IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL LOCAL DIVISION, DURBAN

CASE NO. 9837/2014

In the matter between:

LOBELIA INVESTMENTS (PTY) LTD **PLAINTIFF**

And

RTT GROUP (PTY) LTD **DEFENDANT**

J U D G M E N T

STEYN J

[1] The plaintiff, a private company, seeks damages from the defendant pursuant to, what it alleges to be a breach of the lease agreement between the parties. The plaintiff is the landlord and the defendant the tenant.

[2] The plaintiff claimed the following relief:

2.1 Judgment against the defendant for payment of arrear rental of R356 090.40;

2.2 Interest on the aforegoing amount at the prescribed rate of 15,5% per annum *a tempora morae*, until date of payment.

2.3 Judgment against the defendant for damages in the sum of R127 005,57.

2.4 Interest thereon at the prescribed rate *a tempora morae* until date of payment.

2.5 Costs of suit on a scale as between attorney and client.

[3] It has been averred that on or about 20 December 2013, the plaintiff entered into a contract of lease with the defendant, which was partly oral and partly in writing. The plaintiff was represented, at all material times, by Mr Benjamin Van Luyk in his capacity as an estate agent and the defendant was represented by Mr Jason Niemann, the general manager of the defendant for the region of KZN.

3.1 In terms of the agreement, the plaintiff leased to the defendant the premises which formed a subdivided portion of Unit E2, in extent approximately 1370m², at the rate of R38/m² excluding VAT. The unit was a sectionalised portion of the first floor of a warehouse at Old Mutual Centre, Outer Circuit Road, Prospecton Industrial, Durban.

3.2 The material terms of the oral part of the lease were to the effect that:

3.2.1 the defendant agreed to extend the occupation date from 1 January 2014 to 1 February 2014.

3.2.2 the defendant agreed to commence paying rental on 1 February 2014.

3.2.3 the defendant agreed that the escalation rate for January 2015, February 2015 and March 2015 would be 7% per annum. The plaintiff tendered unconditional occupation of the premises on 1 February 2014.

[4] The defendant has defended the action and alleged in its plea that it cancelled the agreement because the property was not ready for occupation. Most importantly the defendant placed reliance on clause 27 of the lease agreement that reads:

> '27.1 The landlord agrees to section the warehouse accordingly with cladding at his own costs.
> 27.2 The landlord agrees to secure the windows with cladding at his own costs.
> 27.3 The landlord to install a new pedestrian door at his own cost.
> 27.4 The landlord to install electricity and water meters at his own cost.
> 27.5 The landlord is willing to grant the Tenant access to the unit for the month of December 2013 rental for which will be calculated on a pro-rata basis.'

The lease agreement attached to the particulars of claim contains a breach clause (clause 10) and a non-variation clause (clause 14). The defendant has pleaded that the escalation reflected in the schedule to the agreement was never signed by the defendant and as a consequence it only amounted to a proposal which was never accepted.

[5] The trial commenced on 7 August 2015. On behalf of the plaintiff Messrs Van Luyk, Mohammed and Moosa testified. On behalf of the defendant Mr Niemann and Ms Moopanar testified.

[6] The following issues were raised and need to be determined:

6.1 Did the parties conclude a valid agreement of lease;

6.2 If so, was the agreement validly cancelled on 3 February 2014.

6.3 Was the defendant's purported cancellation of the lease agreement a repudiation of the lease agreement, and if so, was the plaintiff entitled to claim specific performance and thereafter change its mind and cancel the agreement.

6.4 Was the plaintiff's letter dated 18 August 2014 a valid cancellation of the lease agreement, and

6.5 Is the plaintiff entitled to damages given the circumstances.

The Evidence

[7] Mr Van Luyk's evidence on behalf of the defendant, in my view, is central to the plaintiff's claim since he was the *de facto* negotiator on behalf of the plaintiff and acted as mediator between the parties. What is clear from his evidence is that the plaintiff undertook to make certain changes to the rental property, such changes are stipulated in clause 27 of the agreement. From 23 December 2013 until 13 January 2014 the work that had to be done had been listed in far greater detail. Mr Van Luyk wrote to the plaintiff and informed him as follows:

> 'We suggest that we amend the Lease Agreement to show the updated date of occupation and also the work needed.
> Please note that RTT need the following work still to be done.
>
> - Exclusive entrance via roller shutter into the warehouse.
> - Toilets on the left to be opened up top make way for the roller shutter door.
> - Secure the louver (sic) windows in the ceiling.
> - Water meter
> - Electricity meter
> - Secure the pedestrian doors.
>
> We look forward to your comments and instructions.'[1]

[8] Mr Van Luyk however received correspondence from Mr Niemann on 16 January 2014 that stipulated that the defendant was not prepared to wait until the

[1] See page 35 of Bundle.

end of January to occupy the premises and accordingly would no longer lease the property. It is clear from Mr Van Luyk's evidence that he was astounded since the defendant was informed on 8 January 2014 of the date of occupation, i.e. 1 February 2014 and had agreed to the date. He forwarded the cancellation letter of the defendant to the plaintiff, who demanded that the defendant perform and comply with its obligations. What is evident is that Mr Niemann and other individuals came to inspect the premises on 21 January 2014. Without any further arrangements being made he received a call from the defendant's representative on 1 February 2014 who wanted the keys to the property and access. He requested Mr Niemann to directly liaise with the landlord since no arrangements were made with him.

[9] Mr Ebrahim Mohammed is employed by Mr Moosa. He was tasked with the alterations at the premises. He considers himself as an all-rounder handyman/builder with 45 years' experience. He is however not a qualified electrician. He conceded that he was not given a copy of the agreement. In fact he had acted on instructions that were given to him.

[10] Mr Shokat Allie Moosa is a director of Lobelia Investments (Pty) Ltd and handles the letting and administration of the company. He stated that he received a duly signed written agreement from Mr van Luyk and had noticed that the lease made provision for a further three months, albeit without a concomitant provision for an escalation of the rental. Mr Moosa effected handwritten changes to the document (exhibit "A", page 3) and accordingly signed it and returned the document to Mr van Luyk. According to him the defendant kept shifting the goal posts.

[11] It is common cause that van Luyk forwarded the lease agreement to the defendant whereupon the defendant responded per the written email of Ms Moopanar dated 24 December 2013, the important part reads:

> 'I asked if the initial period could be extended and you did not at the time advice of the escalation in the rental. This has not been agreed by the business and unfortunately we cannot accept the escalation being added after signature by us.

> Most of the directors are on leave and I will only be in a position to raise this with them in the new year.'[2]

[12] Mr van Luyk responded and informed the defendant that no agreement had been concluded until the plaintiff had signed the defendant's proposed lease agreement. Once more Ms Moopanar responded and stated:

> 'We only signed once the terms were agreed between both Parties. With respect we did not unilaterally extend the term but requested if the added period was in order before signing. As the Landlord's gent (sic), you had agreed to it prior to signature. It is not okay for the Landlord to unilaterally add a material term to the Agreement after the terms were agreed.
> I cannot guarantee that the Directors would agree to the escalation nor that they would countersign the changes made. I can only give you clarity in the second week of January 2014 when they are all back.
> Be that as it may, we do not wish this to become a matter of contention going forward. In the event that the business does agree to an escalation (and this can only be confirmed in January), and from what we generally agree to in respect of our other lease agreements, it would be more likely that they would agree to 7% rather than 8%.
> I will advise as soon as the directors are back and have made a decision in this regard.'[3]

[13] Mr Niemann on 27 December 2013 responded in an email to Mr van Luyk and stated:

> 'The initial lease has been signed, it is just the extension that needs to be approved. Please check with landlord in the interim if he will agree to 7% escalation so that it aligns with my current escalation.
> Please ensure that the premises is ready for move-in as discussed for the 04th Jan '14 latest.'[4]

[14] As much as it was common cause that the lease provided for occupation on 1 January 2014 it also provided for the specific alterations, stipulated in clause 27.[5] It is common cause that the premises were not ready for occupation on 1 January 2014. Important to the issues is the fact that the roller shutter door was a major requirement for the defendant and it was not installed by January 2014. This door

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[2] See page 25 of exhibit "A".
[3] See page 27 of exhibit "A".
[4] See page 29 of exhibit "A".
[5] See para 4 *supra* for the specific alterations.

was however not specified amongst the specified alterations listed in terms of the lease agreement. Mr Niemann identified the door as per exhibit "B", page 15.

[15] Mr Niemann testified and stated that when the property was inspected the plaintiff did not affix cladding over the windows, save for the louvre windows and had failed to install an electricity meter for the defendant at Unit E2. Plaintiff had failed to comply with clauses 27.2 and 27.4. It is this failure to perform that resulted in the defendant cancelling the lease in the following terms:

> 'We refer to the above matter and the discussions between yourself and the writer and confirm that the above premises is not ready for occupation.
> Unfortunately, RTT cannot wait until the end of January 2014 in order to relocate its customer's goods to the premises. The delay will have a negative impact on our business operations and on our customer.
> In the circumstances, RTT will not be leasing the above premises.
> We trust that you find the above in order.'[6]

[16] The defendant's legal advisor, Ms Reshma Moopanar, testified that she placed in perspective the amendments to the lease and whether the defendant agreed to the escalation in rent. Importantly she explained why she was not prepared to give an undertaking to the plaintiff when it was sought from the defendant.

[17] In my view it is unnecessary to resolve this matter by making credibility findings.

[18] The consequences of a material breach of the agreement was provided for in terms of clause 10, importantly clause 10.5 which reads:

> 'The provisions of this clause 10 shall apply *mutatis mutandis* to the LANDLORD in the event of a breach by the LANDLORD of any of its obligations in terms of this lease or otherwise provided for in clause 10.'

[6] See page 37 of exhibit "A".

Clause 10.3.1 provides for notice in terms of any breach. It reads:

> 'Within fourteen (14) days after written notice has been given by the LANDLORD to the TENANT to remedy such breach where it is one which is capable of being remedied within such period.'

[19] Repudiation

In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[7] Nienaber JA succinctly defined repudiation as follows:

> 'Repudiation has sometimes been said to consist of two parts; the act of repudiation by the guilty party evincing a deliver a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, 'accepting' and thus completing the breach. So for example Winn LJ remarked in *Denmark Productions v Boscobel Productions Ltd* [1969] 1 QB 699 at 731F-732A:
>
> Where A and B are parties to an executor contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is in effect making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed according to the language of many decided cases, to 'accept the repudiation and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further.' (At 287G-I.)
>
> [28] The innocent party to a breach of contract justifying cancellation exercises his right to cancel it a} by words or conduct manifesting a clear election to do so b} which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time (cf *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other related cases* 1985 (4) SA 809 (A) at 832C-D).'

In *Erasmus v Pienaar* 1984 (4) SA 9 (T) the court held:

> 'The test as to whether conduct amounts to such a repudiation is whether, fairly interpreted, it exhibits a deliberate and unequivocal intention no longer to be bound."

[7] 2001 (2) SA 284 (SCA).

Die toets is 'n objektiewe een. Nienaber *Anticipatory Repudiations in English and South African Law of Contract, A Comparative Study* ('n ongepubliseerde proefskrif, Desember 1961) konstateer op 267 die volgende:
'… it would seem as if the test applied in South Africa in order to determine whether certain conduct constitutes a repudiation, is the same as that applied in England, viz culpable conduct of such a nature as to lead a reasonable person to believe that an actual breach would be committed.'

[20] As much as the plaintiff has argued that a repudiation has been established, I am of the view that the conduct of the defendant, fairly interpreted, shows that the defendant still considered itself bound to the agreement. The defendant, represented by Mr Niemann and two directors, conducted an inspection of the unit on 21 January 2014. It is irrelevant whether Mr Moosa was aware of the inspection since Mr Van Luyk who acted as his agent was aware of the meeting and present. What is far more problematic is whether the defendant validly cancelled the lease. I shall now deal with all the issues raised during argument.

[21] <u>Issues raised</u>

21.1 Did the parties conclude a valid agreement of lease?

When all the evidence and facts are considered then it is clear that the parties undoubtedly concluded a valid lease agreement. Both parties elected to amend the written agreement, partly oral and partly in writing. Mr Niemann added a specific requirement, i.e. the roller shutter door and Mr Moosa effected changes to the lease without it being countersigned by the defendant. The conduct of both parties show that they were in agreement of the terms during January 2014. The defendant in its pleadings admitted that annexure "A", annexed to the particulars of claim constitutes the sole and entire agreement concluded between the parties.

21.2 Having found that the lease was valid, the question remains whether the defendant could validly cancel the lease on 3 February 2014. The defendant placed reliance on the plaintiff's breach to fulfil the terms as per clause 27 of the agreement. More specifically the defendant relied on a letter dated 3 February 2014 that was sent to the plaintiff, it reads:

> 'We confirm that the landlord has not completed the renovations as listed in the abovementioned clause.
>
> The premises was due to be available for occupation on 1 January 2014. RTT agreed to an extension on the occupation date and same was moved to 1 February 2014. <u>The premises was, again, not ready for occupation on 1 February 2014 and the renovations not completed as agreed.</u>'

(My emphasis.)

This letter was sent by Ms Meyer from the defendant's legal department. It appears that the defendant was of the view that it was placing the plaintiff *in mora* because the premises were not ready for occupation on that date.

21.3 In my view the written lease agreement provided for a breach and stipulated what ought to be done. Clause 10 of the agreement ought to have been enforced. The defendant through its own witnesses never placed any evidence before this court that it had performed in terms of clause 10. In my view clause 20.3 under the heading of Miscellaneous should not be read in isolation but considered in the context of the entire agreement. Mr Saks, on behalf of the defendant, argued clause 20.3 afforded the defendant a specific remedy in the event that the premises were not ready for occupation. As much as clause 20.3 does not refer to a notice period, clause 10 does and accordingly it should have been adhered to. Regrettably I am unable to agree with Mr Saks' line of reasoning.

[22] For ease of reference I consider it necessary to quote clause 20.3, it reads:

’20.3 Should the LEASE PREMISES not be ready for occupation by the TENANT upon the commencement date by reason of building operations not having been completed; or

20.3.1 their being in a state of disrepair; or

20.3.2 the failure of the previous tenant to vacate; or

20.3.3 any other cause whatsoever;

Then the TENANT shall have a claim for cancellation of this lease and for damages or other right of action against the LANDLORD. Should the TENANT agree and undertake to take occupation of the LEASED PREMISES upon a later date, the LANDLORD shall ensure that the LEASED PREMISES will be available for occupation by the TENANT on such later date and the lease shall commence on such date as agreed between the parties and shall, *mutatis mutandi* continue thereafter for the period set out in clause 4 of the SCHEDULE with the date of termination being extended accordingly.’

[23] I agree with Mr Omar, appearing on behalf of the plaintiff, that the lease agreement relied upon contains a *lex commissori*a and accordingly the provisions embodied in clause 10 are enforceable. The defendant failed to prove that the contractual obligations of the *lex commissoria* have been complied with. The cancellation of the lease was invalid and accordingly the defendant is liable for the arrear rental of R356 090.40 for the period February 2014 to July 2014 since the lease remained valid until terminated with effect on 31 July 2014.

[24] Is the plaintiff entitled to damages?

The evidence before court showed that the plaintiff on 18 August 2014 had cancelled the lease and informed the defendant that a new tenant would lease the property from 1 July 2014 until 31 January 2015. The plaintiff based its claim of damages on the fact that the defendant would be liable for damages for the months February and March 2015. In deciding upon the issue of damages, it is necessary to consider the content of a letter that was addressed to the defendant on 18 August 2014 by the plaintiff’s legal representative. I shall quote only from the relevant paragraphs of the letter:

‘3. Our client hereby cancels the lease entered into with you, such cancellation to take effect from the 31st July 2014.

4. You are accordingly liable for arrear rental for the months of February 2014 to July 2014 (inclusive) in the total sum of R356 090.40 (inclusive of VAT).

5. Please ensure that the arrear rental is paid into our trust account by no later than close of business, Thursday, 21st August 2014, failing which, our instructions are to institute proceedings in the High Court for recovery of same, together with other appropriate relief, including interest and a punitive order of costs.

6. Please note that the RTT Group is also liable for damages in an amount equivalent to the rent for the outstanding period of the lease, namely February and March 2015, in the total sum of R127 005.57. This amount must also be paid forthwith.'[8]

(My emphasis.)

[25] The plaintiff, given the facts, is entitled to the damages suffered for the months February and March when no rental was paid by the defendant. It is not necessary to decide on quantum since it was never disputed.

[26] Costs should follow the result, however the plaintiff has sought costs on an attorney and client scale. Costs remains discretionary and the lease agreement, by way of clause 5.20, does not provide for costs on attorney and client scale, nor am I convinced that costs on an attorney and client scale should be awarded.

[27] Accordingly the following order is granted:

1. Judgment against the defendant for payment of arrear rental of R356 090.40;

2 Interest on the aforegoing amount at the prescribed rate of 15,5% per annum *a tempora morae*, until date of payment.

3. Judgment against the defendant for damages in the sum of R127 005,57.

[8] Pages 56 and 57 of exhibit "A".

4. Interest thereon at the prescribed rate *a tempora morae* until date of payment.

5. Costs of suit.

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STEYN J

Trial completed on :	25 November 2015
Counsel for the plaintiff :	Mr MS Omar
Instructed by :	MS Omar & Associates
Counsel for the defendant :	Mr DJ Saks
Instructed by :	Woodhead Bigby Inc
Judgment handed down on :	23 May 2016