

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1175/2013

In the matter between:-

RHYS JUSTIN JONES

Applicant

and

PHILLIPUS ARNOLDUS VAN DER WALT
NKETOANA MUNICIPALITY

First Respondent
Second Respondent

JUDGMENT BY:

RAMPAI, AJP

HEARD ON:

15 AUGUST 2013

DELIVERED ON:

21 NOVEMBER 2013

- [1] These are motion proceedings. The applicant applied for an eviction order against the first respondent. The first respondent was in occupation of five farms in terms of the lease agreement he had concluded with the applicant. The applicant alleged that the first respondent had breached the terms and conditions of the lease agreement. He added that due to such breach he had cancelled the lease agreement and reclaimed possession of the farms. Notwithstanding the alleged lawful cancellation of the lease agreement, the first respondent refused to vacate the farms.
- [2] The first respondent opposed the application. The crux of his defence was that the applicant had prematurely purported to

cancel the lease agreement since the applicant had not properly cancelled the lease agreement. He maintained that he was legally still entitled to occupy the five farms in terms of the lease agreement. He denied that he had breached the terms and conditions of the lease agreement, as alleged. The second respondent did not enter the fray.

[3] In his founding affidavit the applicant alleged that he was the owner of the following landed properties:

- 3.1 Portion 1 Rugby Farm 642 district Reitz Free State Province;
- 3.2 Portion 2 Rugby Farm 642 district Reitz Free State Province;
- 3.3 Remainder of Rugby Farm 642 district Reitz Free State Province;
- 3.4 Beupark Farm 80 district Reitz Free State Province; and
- 3.5 Portion 1 Beupark Farm 80 district Reitz Free State Province.

[4] The applicant also alleged that he leased the aforesaid farms to the first respondent. The lease agreement was evidenced by a written contract (anx "e") last signed at Reitz on 4 October 2004 by the applicant.

[5] It was the applicant's case that the first respondent had failed to comply with the terms and conditions of the contract. The essence of the complaint was that he had not strictly and fully paid the agreed rental. He was thus in arrears. He alleged that he duly gave the first respondent proper notice in terms of

the contract to remedy the breach. Notwithstanding such notice, he alleged further, the first respondent still refused to comply. Instead the first respondent unambiguously notified him in no uncertain terms that he was not prepared to comply unless the applicant first met certain demands.

- [6] On account of the first respondent's alleged conduct, the applicant revoked the lease agreement on 5 February 2013. Pursuant to such cancellation of the lease agreement, the applicant also called upon the first respondent to vacate the leased farms and to restore possession thereof to him. Such cancellation notwithstanding, the first respondent refused to vacate the farms. He had persisted with such stance for a period of six months immediately preceding the initiation of the current proceedings.
- [7] In his answering affidavit the first respondent raised *in limine* the preliminary points that the applicant had no *locus standi in iudicio* to institute these proceedings. That was the first point he took. He contended that the applicant was not entitled to evict him. The second point taken *in limine* by the first respondent was that there existed a dispute as to whether the applicant's cancellation of the lease agreement was sound in law or not. He contended that, first and foremost, such dispute must be separately arbitrated or adjudicated before this eviction application could be entertained.

- [8] The first respondent put up the defence. He countered that some of the farms were not properly and securely fenced. That was the one dimension of his defence.

The second dimension of his defence was that although the applicant was charging him 14% value-added tax, the applicant was not paying such tax over to the South African Revenue Service.

The applicant, so alleged the first respondent, frustrated his efforts to have those thorny matters candidly discussed and amicably resolved. As a result of the applicant's indifference, he decided to make certain deductions from the agreed rental due by him to the applicant. He maintained that he was entitled to withhold the money in view of those and other contractual wrongs committed by the applicant.

- [9] He denied the applicant's allegations: that he was in breach of the lease agreement; that he was in arrears; that the lease agreement had been lawfully terminated; that he was in unlawful occupation of the farms; and that he, therefore, had to vacate the farms. Therefore, he asserted that he would remain on the farms since his continued occupation of those farms was perfectly lawful.

- [10] In his replying affidavit the applicant replied that the two points raised *in limine* were not genuine. He asserted that it was ridiculous to contend, as the first respondent did, that these proceedings were premature. Since there was no genuine

dispute concerning the cancellation, as the first respondent would have it, there was no need for a separate preliminary inquiry to be held in order to adjudicate any dispute before these proceedings could be entertained. He also dismissed as baseless, the respondent's further preliminary point that the applicant did not have *locus standi* to initiate these eviction proceedings.

[11] As regards the substantive merits, the applicant replied that the first respondent had breached the lease agreement; that the first respondent had, by categorically informing the applicant that he was not prepared to remedy such breach, effectively repudiated the lease agreement; that the applicant was thus entitled to cancel the lease agreement, as he in fact did; that the first respondent was, in the circumstances, legally bound to restore undisturbed possession of the farms to the applicant; that his refusal to do so entitled the applicant to have the first respondent evicted from the leased farms; and that no genuine dispute existed to justify a stay of these proceedings.

[12] The crucial question in the application was whether the lease agreement was properly or validly cancelled prior to the institution of the current application or not.

[13] Mr Snellenburg, counsel for the applicant, argued that the answer to the question has to be positive. He contended that there was no genuine dispute about the cancellation of the lease agreement. He submitted that the applicant had validly

cancelled the lease agreement as a result of the first respondent's breach of his contractual obligations coupled with his expressly firm determination not to remedy such breach. He contended that there was no substance in the first respondent's contention that this eviction application was prematurely launched. Accordingly counsel urged me to grant the final relief sought by the applicant.

[14] Mr Knoetze, counsel for first respondent, differed. He argued that the question had to be negatively answered in favour of the first respondent. He contended that a genuine dispute existed concerning the alleged cancellation of the lease agreement. He submitted that the applicant did not properly cancel the lease agreement. In developing that argument further, he pointed out that in his notice of motion, the applicant did not seek confirmation of the alleged cancellation by the court. He submitted, therefore, that the applicant's eviction application was prematurely moved. Accordingly counsel urged me to dismiss the application with costs.

[15] The test for the grant of final relief on motion is trite. All the same it will do nobody any harm to recite it here as was recently done in **Wightman t/a J W Construction v Headfour (Pty) Ltd & Another** 2008 (3) SA 371 (SCA) para [12]:

“Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are,

in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton* NO 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)”

- [16] About the real dispute which may, in certain circumstances, move the court to form an opinion favourable to the respondent and decline to grant a final relief on motion, the court went on to comment further in **Wightman** *supra* [13]:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or

understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

- [17] In **Gemeenskapsontwikkelingsraad v Williams (2)** 1977 (3) SA 955 (W) at 957E the court held:

“The respondents admitted that Eldorado Park Extension 3 is a Coloured group area, but said that they had no knowledge of the other allegations and put the applicant to proof thereof. These are affidavits and not pleadings. A statement of lack of knowledge coupled with a challenge to the applicant to prove part of its case does not amount to a denial of the averments by the applicant. The Court having ruled, however, that the applicant's averment that it is the registered owner of the property is inadmissible, that part must be taken as pro non scripto.”

See also **Room Hire 6 (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1163E.

- [18] The non-variation clause in a written contract prohibits oral amendment of such a contract. The effect of such a clause is that no amendment of a written contract shall have any legal force and effect unless it is reduced to writing and signed by

both parties. The Shifren principle was laid down in **SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren & Andere** 1964 (4) SA 760 (A) and re-affirmed in **Afrox Healthcare Bpk v Strydom** 2002 (6) SA 21 (SCA) as well as **Brisley v Drotsky** 2002 (4) SA 1 (SCA).

- [19] Where a guilty party repudiates a contract and the innocent party accepts such repudiation and as a result of such a state of affairs cancels the contract, the guilty party is precluded from relying any more on the terms and conditions of a contract that he has chosen to repudiate.
- [20] Where the written contract with a non-variation clause, specifically determines that no representations, warranties or undertakings other than those expressly spelt out in the contract were given, evidence concerning representations, warranties or undertakings which is in conflict with the provisions of the contract between the parties constitutes no real, genuine or *bona fide* dispute. Such evidence becomes inadmissible **Balar v Afrikaanse Nasionale Afslaers & Agentskap Maatskappy (Edms) Bpk** 1951 (3) SA 371 (A), **Trollip v Jordaan** 1961 (1) SA 238 (A).
- [21] In **Chetty v Naidoo** 1974 (3) SA 13 (A) at 20B the court held that once the lessee's right to occupy the leased property expires the lessor is entitled to have the lessee evicted from the occupied property. **South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd** 2012 (3) SA 431 (KZP) 432 [2].

- [22] The payment of rental by first respondent to the applicant is covered in clause 2 of the lease agreement.

2.3 anx “e” reads:

“Hurgeldebetalings geskied vry van bankkommissie en sonder aftrekkings of skuldvergelyking aan die VERHUURDER, welke hurgeld in sy bankrekening inbetaal sal word met die volgende besonderhede:

RJ Jones

Standard Bank

Rekeningnommer: 042 091 330

Takkode: 055333”

2.4 anx “e” reads:

“Die hurgeld sal eskaleer met 5% (VYF PERSENT) per jaar, welke eskalasie bereken sal word op die hurgeld wat die voorafgaande jaar betaal is.

- [23] The grievance procedure was provided for. Clause 3, anx “e” reads:

“VERBETERINGS

- 3.1.1 Die HUURDER hou alle verbeterings en toerusting op die EIENDOM op die HUURDER se eie koste in ‘n behoorlike toestand van herstel en versorging, slegs slytasie weens normale gebruik en skade deur oormag uitgesluit, en sien in die besonder toe dat enige windpompe gereeld ge-olie word en die draadheinings in stand gehou word.

- 3.1.2 Indien enige verbeterings of toerusting gedurende die huurtermyn beskadig mag word as van slytasie weens normale gebruik of deur oormag, sal die VERHUURDER op sy koste enige onderdele, goedere of material wat vir die herstel daarvan nodig mag wees, in 'n redelike tyd verskaf en die HUURDER sal op sy koste die nodige herstelwerk laat doen met sy eie arbeid en toesig hou oor die herstelwerk.
- 3.2 Die HUURDER stel die VERHUURDER binne 14 (VEERTIEN) dae na die AANVANGSDATUM skriftelik in kennis van enige verbeterings en toerusting wat nie in 'n goeie toestand van herstel is nie en vermeld daarin alle gebreke daaraan en indien geen sodanige kennisgewing aan die VERHUURDER gegee word nie, aanvaar die partye dat die HUURDER die verbeterings en toerusting op die EIENDOM in 'n goeie toestand van herstel en in werkende orde ontvang het.
- 3.3 Die HUURDER mag slegs met die VERHUURDER se skriftelike toestemming verbeterings, byvoegings, aanhegtings of veranderings op die EIENDOM aanbring en indien die HUURDER wel enige veranderings verbeterings of byvoegings aanbring –
 - 3.3.1 geskied dit op die HUURDER se eie koste;
 - 3.3.2 is die HUURDER geregtig om dit binne 'n redelike tyd na die VERSTRYKINGSDATUM of die vroeë beëindiging van die ooreenkoms, na gelang van die geval, te verwyder indien die VERHUURDER skriftelik magtiging daartoe verleen;
 - 3.3.3 is die HUURDER verplig om dit binne 'n redelike tyd na die VERSTRYKINGSDATUM of die vroeë beëindiging van die ooreenkoms, na gelang van die geval, te verwyder indien die VERHUURDER aldus gelas;
 - 3.3.4 mag die EIENDOM by die verwydering daarvan soos hierin bedoel, nie beskadig word nie en moet die

HUURDER die EIENDOM indien dit wel beskadig word,
tot bevrediging van die VERHUURDER herstel;

3.3.5 sal die VERHUURDER nie verplig wees om enige
vergoeding daarvoor te betaal nie.”

[24] The applicant's right in the case of the first respondent's breach of the lease agreement is to terminate the lease agreement; to repossess the leased farms and to demand immediate payment of all the amounts of money due by the first respondent to the applicant. Clause 8, annex “h” reads:

“KONTRAKBREUK

Indien die HUURDER –

8.1 versuim om enige bedrag wat die HUURDER aan die
VERHUURDER mag skuld op die betrokke vervaldag daarvan
te betaal; of

8.2 ten opsigte van enige ander bepaling of voorwaarde van
hierdie ooreenkoms kontrakbreuk pleeg en sou versuim om
sodanige kontrakbreuk te herstel binne 14 (VEERTIEN) dae
nadat die VERHUURDER aan hom kennis gegee het om
bedoelde kontrakbreuk te herstel,

dan in enige van sodanige gevalle is die VERHUURDER geregtig
om, sonder benadeling van enige ander regte wat die
VERHUURDER as gevolg daarvan mag hê –

8.2.1 hier huurkontrak op te sê en besit van die EIENDOM te
neem; en/of

8.2.2 onmiddellik betaling van alle bedrae wat deur die
HUURDER aan die VERHUURDER geskuld mag word,
te vorder, ongeag daarvan of die vervaldag vir die
betaling van sodanige bedrag aangebreek het, al dan
nie.”

[25] The lease agreement contains a non-variation clause which limits the scope of the representations, warranties, provisions, terms and conditions agreed upon prior to and upon conclusion of the lease agreement. Clause 12 anx “e” is relevant to quote. It reads:

“ALGEMENE BEPALINGS:

12.1 Hierdie huurkontrak behels die hele ooreenkoms aangeaan tussen die partye.

12.2 Daar bestaan geen ander bepalinge, voorwaardes en waarborge of voortellings van welke aard ookal, wat deur die VERHUURDER ooreengekom of gemaak is nie, behalwe die wat in hierdie ooreenkoms opgeneem is.

12.3 Geen wysiging of ooreengekome kansellasië van die huurkontrak is van krag tensy dit op skrif gestel word en deur die partye geteken word nie.”

[26] I now proceed to deal with the merits. I shall revert to the preliminary points later. The current application was precipitated by the first respondent’s withholding of the rental. According to clause 2.3 anx “e” the respondent was contractually obliged to pay rental without any deduction whatsoever. He was obliged to do so at all relevant times and irrespective of any dispute. He was required to make such payment directly into the applicant’s chosen bank account. It was an express term of the lease agreement that the rental would escalate at the rate of 5% p.a. – vide clause 2.4 anx “e”.

[27] The undisputed facts or facts which the first respondent cannot dispute clearly show that the first respondent wrongfully

withheld the rental (clause 2.3 anx “e”). By so doing he materially breached the contract (clause 8.1 anx “e”). Although he was called upon in terms of clause 8.2 anx “e” to rectify his default, he failed to remedy the breach. On the strength of such material breach, the applicant was entitled in terms of clause 8.2 anx “e” to cancel the lease agreement and to reclaim possession of the leased farms. It seemed to me, in the light of all these circumstances, that the lease agreement was validly cancelled. I could find nothing irregular about it. In the result I find that the applicant was entitled to have the first respondent evicted from the farms.

[28] It was an undisputed fact that the first respondent withheld the rental primarily because he reckoned that the applicant had breached the lease agreement. The applicant denied the allegation. He maintained that he had fully complied with all of his contractual obligations. He contended that all the farms were properly fenced and secured in accordance with the lease agreement. Obviously there was a factual dispute.

[29] Such factual dispute, however real, genuine and *bona fide* it might have been, did not assist the first respondent at all. The first respondent was not remediless if the fencing, farming equipment or any improvement was in a state of disrepair. His contractual rights as regards defects in respect of the leased farms were contained in clause 3 anx “e”. The crux of the matter is that the first respondent never gave the applicant the requisite notice in terms of this clause. End of the argument. Even if the applicant was in breach as the first respondent

contended, the first respondent would not have been entitled to make any deductions from the rental, let alone to withhold it in *toto*, by virtue of such breach. He had to pay first and complain later.

[30] The first respondent's breach prompted the applicant to consult his attorneys. On 1 October 2012 Blignaut & Wessels, on behalf of the applicant, sent a letter to Mr P A van der Walt, seemingly the first respondent's attorney. They demanded payment of R13 865,25 being the shortfall in rental instalment which became due and payable for the next period of six months. It was made clear in the letter that unless the first respondent complied, the applicant would proceed to cancel the lease agreement and to repossess the farms.

[31] Notwithstanding the foregoing demand, the first respondent did not rectify the breach. Instead he, through his attorney, made it very clear that the first respondent would not pay the arrears. His attorney went a step further. He forewarned the applicant that the first respondent would withhold the full rental which would become due and payable on 1 March 2013 until such time as the applicant would have addressed his grievances. The letter from Richter van der Watt to Blignaut & Wessels was dated 13 November 2012 and labelled anx "h". In the letter the first respondent complained about various matters such as defective fence, defective windmill, water deficiency, unfulfilled undertaking to build a reservoir and illegal animal grazing on the leased farms.

[32] It was apparent from anx “h” that the first respondent was determined to withhold rental. He alleged that the applicant was indebted to him R32 997,30 as a result of the illegal grazing of his livestock on the leased farms. Therefore, he reckoned that he was entitled to set off the applicant’s rental claim against his own grazing claim. That he could not do. He was contractually obliged to pay the full rental without any deduction or set-off.

[33] Moreover, it was also abundantly clear from anx “h” that he did not consider the terms of the lease agreement concerning the payment of rental binding on him anymore. Now bearing in mind his unambiguous notice to abide no more with such material terms of the lease agreement, as well as his firm determination to continue unrepentantly with the contractual breach, coupled with his equally serious forewarning that he intended stepping up acts of default in time to come, there can be no doubt that the first respondent thereby repudiated the lease agreement. In my view the lease agreement was lawfully cancelled on the grounds of the first respondent’s continued breach.

[34] On 5 February 2013 the applicant’s attorney wrote at para [7] anx “j”:

“Dit is ons instruksies om u hiermee in kennis te stel dat ons kliënt die huurkontrak hiermee en by wyse van hierdie skrywe kanselleer, hetsy op grond van u kliënt versuim om die kontrakbreuk aan te suiwer niteenstaande kennisgewing om dit aan te suiwer, hetsy op

grond van aanvaarding van u kliënt se repudiasie van die huurkontrak.”

A guilty party who has repudiated a contract cannot turn around and seek to enforce a clause in a contract so repudiated. It is trite.

[35] The first respondent’s attorney responded on 8 February 2013. He wrote:

“I/S: SKIKKINGSVOORSTELLE HUUROOREENKOMS: RJ JONES / PA VAN DER WALT

Ons verwys na die bostaande aangeleentheid sowel as u skrywe gedateer 5 Februarie 2013 en berig as volg.

Skrywer se kliënt het nie klousule 2.3 van die koopkontrak deeglik gelees nie en het dit dan inderdaad ook nou eers onder skrywer se aandag gekom, waarvoor ons dan ons verskoning aanbied en is die bedrag uitstaande ten opsigte van die eskalاسie vanoggend in u kliënt se rekening inbetaal. Sien hierby aangeheg die bewys van betaling.

Verdermeer is dit duidelik dat hier ‘n aantal dispute tussen die partye is en het dit ontstaan waar die Suid-Afrikaanse Inkomste Diens skrywer se kliënt gekontak het vir BTW wat hy verkeerdelik eis op grondhuur waarvan die eienaar, u kliënt se broer nie vir BTW geregistreer is nie. Na verskeie pogings om met u kliënt kontak te maak het ons kliënt bloot die eskalاسie bedrag teruggehou sodat u kliënt sy kant van die ooreenkoms kan honoreer.

Skrywer het sy kliënt geadviseer dat in terme van klousule 2.3 hy nie geregtig daarop was nie.

Hoe dit ookal sy is dit vir skrywer se kliënt menslik onmoontlik en onredelik om u kliënt se plaas te ontruim voor of op 8 Februarie 2013 aangesien daar 120 hektaar mielies op is, sowel as 267 beeste met kalwers waardaar geen ander heenkome is nie.

Ter skikking stel skrywer die volgende voor:

1. Die eskalاسie bedrag uitstaande is so pas inbetaal.
2. Die onderlinge dispute word verwys vir arbitrasie soos per klousule 10 van die kontrak vir spoedige moontlike beregting en eerstens op 'n informele wyse voor of op 1 Maart 2013, alvorens die volgende betaling betaalbaar sal wees.
3. **Sou u kliënt steeds die kontrak wil kanselleer, is skrywer se kliënt bereid om voor of op 31 Augustus 2013 die plaas te ontruim**, aangesien die mielieoes gestroop sal wees en sy jaarlikse produksie veiling ook in Augustus afgehandel sal wees waar hy dan die beeste kan verkoop.

Ons hoop en vertrou u vind dit so in order, en verneem ons graag so spoedig moontlik van u hierin.”

- [36] The first respondent frankly admitted, after the applicant had duly cancelled the lease agreement, that he had acted contrary to the obligatory terms of the lease agreement by withholding the rental. He, even apologized for the breach of clause 2.3 anx “e”. The full arrears were then immediately but belatedly paid. The horse had already bolted. The payment could not have revived the dead contract. That much the first respondent appreciated. It follows, therefore, that the first respondent’s belated and abortive attempts, in his answering affidavit, to deny the cancellation or to attack the validity thereof is untenable and far-fetched – **Wightman** *supra*.

[37] Upon the aforesaid cancellation of the lease agreement, the applicant became entitled to the restoration of possession of the farms. Such was the legal effect of the cancellation. This much the first respondent realised and correctly accepted as far back as 8 February 2013. Before these proceedings were initiated, the parties were *ad idem* with one thing at least: which was that the cancellation of the lease agreement was an accomplished fact. It follows from this reasoning that the subsequent refusal by the first respondent to vacate the farms and to restore vacant possession thereof to the applicant constituted an unlawful act. The law does not countenance such conduct.

[38] The first respondent's refusal to vacate the farms is based on certain representations the applicant is alleged to have made. The representations include, among others, the allegations that the applicant represented to the first respondent that there was ample water in the camps on the farms; that the windmill was in functionally good conditions; that the farms were properly fenced and that the applicant would erect a reservoir. All of those alleged undertakings and representations appear nowhere in the written contract, annex "e". They all have their origins outside the written contract. The contract itself expressly states that the only binding representations, warranties and undertakings given are those exclusively worded in the written contract.

[39] In the light of the foregoing the first respondent's attempts to rely on external representations, warranties and undertakings

were, for obvious reasons, were clearly untenable and far-fetched. No written document signed by the parties, as clause 12.3 anx “e” requires, was attached to the answering affidavit. His version concerning such representations, warranties and undertakings boiled down to inadmissible evidence. It is in direct conflict with the specifically prohibitive clauses of the lease agreement between the parties. The principle of the **Shifren** decision *supra* strongly militates against the first respondent’s case. His defence constitutes no genuine, real and *bona fide* dispute – **Trollip** *supra*.

- [40] According to clause 12 anx “e”, the original lease agreement constitutes the entire agreement between the parties. There were no other representations, provisions, conditions or warranties given save for those specifically spelt out in the written contract. The parties agreed that no amendment, agreement or cancellation of the lease agreement would be of any binding force and effect unless it was written down and signed by the parties. The first respondent failed to show that the original lease agreement was subsequently ever amend.

Clause 12.3 anx “e” is a pure Shifren-clause. It prohibits oral agreements and variations of the written main agreement. Accordingly the first respondent cannot rely on any other subsequent oral agreement outside the ambit of the written agreement. Any evidence in conflict with the express intention of the parties as evidenced by the written contract is inadmissible – **Afrox Healthcare** *supra*.

- [41] I have found that the first respondent's version is so farfetched that I am entitled to reject it merely on the papers and that the applicant cannot be expected to accept the version set up by the first respondent merely because he seeks final relief on motion. This is so because I am not satisfied that the first respondent as a party who purports to raise the dispute has seriously and unambiguously addressed, in his answering affidavit, the various external representations now said to be in dispute. Even if his version concerning such representations is found to be reasonably plausible, upon in-depth scrutiny and consideration it would still not benefit the first respondent. The gist of the matter is that the lease agreement was lawfully cancelled. He never gave the applicant proper notice in terms of the lease agreement to enable the applicant to have such dispute properly adjudicated, say by arbitration.
- [42] The cancellation brought the right of the first respondent to occupy the farms to an end. The applicant was no longer interested to revive the business relationship he once had with the first respondent. Seeing that his right to occupy the farms has lapsed, the applicant is entitled to evict him – **South Coast Furnishers**, *supra*. His belated payment of the arrears did not cure the fatal repudiation of the lease agreement by first respondent and its subsequent cancellation by the applicant.
- [43] The first respondent withheld the rental on the ground that the applicant failed to provide him with value-added tax invoices.

At para [29] of the answering affidavit he explained his complaint as follows:

“Omdat ek nie ‘n BTW faktuur vir die voormelde betaling van Jones ontvang het nie, kon ek tot op hede nog nie die BTW insetbelasting wat as deel van daardie betaling aan Jones gemaak is, naamlik R34 055,00 terugeis nie. Dit beteken dat Jones se versuim om sy wetlike plig na te kom, om aan my ‘n BTW faktuur te verskaf, die gevolg het dat my kontantvloei reeds vir meer as ‘n jaar met daardie bedrag negatief beïnvloed is.”

[44] The applicant pointed out that there was, nothing new in the first respondent's complaint about VAT invoicing. The first respondent had, in the past, raised the same query in respect of the previous agreement. Nothing ever came out of that previous complaint. The previous agreements came to an end without any further complaint concerning the invoicing. Subsequently to the termination of the previous agreement(s) the parties entered into fresh negotiations. They decided to renew their business relationship.

[45] They renegotiated and concluded the current written agreement(s). However, no specific representation about this particular complainant was included in the current lease agreement. Such a glaring omission struck me as odd. Bearing in mind the first respondent's alleged unhappy experiences occasioned by the applicant's countless failures to furnish him with tax invoices, one would have expected to find a clause in the new agreement(s) specifically dealing with the rendering of tax invoices. Seemingly the first respondent did

not really insist on the inclusion of such a clause. Perhaps he did but the applicant disagreed. It may well be that the matter hardly featured during the fresh business negotiations leading up to the signing of the new lease agreement.

[46] None of those three possible omission scenarios outlined above can positively take the first respondent's defence any further. If the invoicing topic hardly featured as an item on the agenda of the fresh negotiations, then it can only mean that it was of no significance to both parties then. Today it cannot be treated otherwise. If the first respondent did not then vigorously insist on the inclusion of such a specific clause concerning the invoicing, now it is too late. It would mean that he did not consider it to be a vital element of his contractual protection. If the first respondent insisted but the applicant resisted and prevailed, then it can only mean the applicant was able to persuade the first respondent to see things the way he saw them. About that a court can do nothing. It is the power of negotiations. To do otherwise would undermine the principle of freedom to contract.

[47] The applicant replied that he had always sent the tax invoices to the first respondent's chosen postal address at Montapark. He stated that at the first respondent's request he provided copies of such invoices.

[48] I have adequately expressed my views about oral and external representations, guarantees and undertakings in connection with various other disputes relating to the reservoir, camp

water, fencing and windmill. Precisely the same consideration which applied them and there – apply equally well here and now to the alleged contractual neglect of the applicant to furnish the first respondent with tax invoices. In a nutshell, I could find no real, genuine and *bona fide* dispute to disqualify the applicant from receiving the final relief sought.

- [49] Mr Snellenburg argued that the version of the first respondent in connection with the rendering of tax invoices demonstrated that the first respondent was literally clutching on the straws in a desperate but futile attempt to stay alive in order to wreck the applicant's strong boat. At para [36] in applicant's heads of argument counsel said:

“Oorweging van die Eerste Respondent se weergawe in daardie verband toon egter dat die Eerste Respondent spreekwoordelik na grashalms gryp ten einde te poog om die verrigtinge die hoof te bied.”

The critique was fair.

- [50] At para [37] Mr Snellenburg said the following about the irony inherent in the first respondent's version:

“Wat die Eerste Respondent aan die Hof voorhou is dat presies dieselfde problem hulself voorgedoen het tydens 'n vorige huurkontrak; dat hy daarna voortgaan om die huurooreenkoms te onderteken sonder om enigsins die voorstellings waarop hy hom beroep of dan nou die problem met die BTW fakture aan te spreek

in die kontrak. Dit is opsigtelik en duidelik onuithoudbaar en 'n vergesogte weergawe.”

[51] To round off the debate concerning the tax invoicing I pause to make a final comment. Attached to the answering affidavit was a sworn statement by the first respondent's accountant. He stated that the first respondent was a registered vendor; that he was legally entitled to levy value-added tax; that he was legally obliged to pay value-added tax over to SARS; that he was also legally entitled to recoup such tax payments from the SARS and that there were no pending tax queries or investigations by SARS against the first respondent.

[52] It can, therefore, be readily appreciated that the first respondent had a clean tax slate. The aforesaid undisputed facts substantially watered down any argument that there is a real, genuine, or *bona fide* factual dispute about the rendering of tax invoices. In the circumstances I am entitled to reject the first respondent's version as a whole merely on the papers before me.

[53] I now turn to the first respondent's preliminary argument. In the first place the first respondent's contended that the applicant had no *locus standi in iudicio* to move this eviction application. The contention was grounded on the fact that the farms were registered in the name of the applicant's brother.

[54] The undisputed facts showed that the parties were not strangers to each other. They were acquaintances. Prior to

their current business dealings, they have had previous business dealings. Their current commercial relationship was preceded by pretty much the same commercial relationship like the current mutual relationship. The previous relationship was also anchored in lease agreements.

- [55] The fact of the matter is that the first respondent was placed in beneficial occupation of the farms by no-one else but the applicant. There is no doubt that the applicant leased the farms to the first respondent; that, by virtue of such lease agreement, the applicant became a substantially interested party in the subject-matter of the lease; that as the lessor, the applicant was legally entitled to cancel the lease agreement and to evict the first respondent, as the lessee, from the leased farms. It is trite that a lesser does not have to hold any title in respect of the property before (s)he can lease such property – **Boompret Investment (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd** 1990 (1) SA 347 (A) at 351H and **Fryer (Pty) Ltd v Ries** 1957 (3) SA 575 (A) at 581E-F.

- [56] It is an undeniable fact that the titleless applicant placed all the five leased farms at the disposal of the first respondent. He gave him free undisturbed possession of the farms. The first respondent beneficially exploited and enjoyed the farms since 1 September 2011, being the effective date of the lease agreement (anx “e”). He was still in beneficial and undisturbed actual possession or occupation of those farms on 22 March 2013, when these proceedings were initiated.

[57] Where a lessor delivers a leased property to a lessee who then uses, exploits and enjoys such property without first ascertaining whether such lessor has a valid title in respect of such property, the law bars such a lessee from questioning such lessor's title later. Such lessor is bound by the law to perform his contractual obligations in terms of such lease agreement. He is precluded from invoking the lessor's lack of title as a valid ticket in order to escape from the binding network of his contractual obligations.

[58] His lack of knowledge concerning the applicant's titlelessness coupled with his invitational challenge that the applicant should prove that he was the lawful holder of a legal title and thus entitled to evict him, did not constitute a denial of the applicant's averment that he was entitled to evict him – **Williams** *supra*.

[59] In **Salisbury GM Co v Kliprivier Berg Estate GM Co** 1893 Hertzog 186 at 190 the court said:

“[A]ny person can let to another something which belongs to a third party, and it is not open to the lessee to raise the defence that he has discovered that ... the property leased belongs to another person, where, for instance, he is, during the currency of lease, sued for payment of his stipulated rent.”

The principle was applied in **Ebrahim v Pretoria Stadsraad** 1980 (4) SA 10 (T) at 14B-C and the authorities there cited. In the ejectment proceedings, as in this instance, the law requires

the lessor to prove possessory right and not proprietary right. In *casu* the first respondent could not deny the averment that he acquired occupational rights from the applicant. See also **Clarke v Nourse Mines Ltd** 1910 TS 512 at 520 – 521.

- [60] The aforesaid contractual principle was authoritatively approved in **Hillock & Another v Hilsage Investments (Pty) Ltd** 1975 (1) SA 508 (A) at 516E:

“It seems to me that the rule [that the lessee cannot dispute the lessor’s title] may be based upon one or other of two very simple grounds. The first is, that the lessor having performed his part of the contract, and having placed the lessee in undisturbed possession of the property is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is, that the lessee having had the undisturbed enjoyment of the premises under the lease, and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property.”

- [61] It should now be clear and obvious that there is virtually no substance in the first respondent’s preliminary point. In my view the point *in limine* was not well taken.
- [62] In the second place the first respondent contended that the current eviction proceedings were prematurely initiated before some existing dispute between him and the applicant had been resolved in accordance with the procedure laid down in the lease agreement.

[63] Mr Knoetze articulated the contention of the first respondent as follows concerning the alleged dispute:

“Van der Walt het as ‘n punt *in limine* aangevoer dat, nog voordat Jones die kontrak na bewering gekanselleer het, en daarom ook nog voordat die aansoek uitgereik is, daar ‘n geskil tussen hom en Jones ontstaan het oor die vraag of hy regtens verplig was om aan Jones BTW te betaal ooreenkomstig klousule 2.1 van die kontrak. Voorts voer Van der Walt aan dat Jones uit hoofde van die bepalings van paragraaf 10.1 van die kontrak verplig was om daardie geskil te laat besleg, òf by wyse van arbitrasie, òf deur ‘n Hof alvorens hy daartoe kon oorgaan om die kontrak te kanselleer en die onderhawige aansoek prematuur is en met koste van die hand gewys behoort te word.”

[64] Counsel for first respondent devoted a great deal of time to the interpretation of the lease agreement – anx “e”. He paid particular attention to clauses 8, 9 and 10 thereof. He laid emphasis on the two words “geskil” and “kansellasië”.

[65] I deem it necessary to quote clause 9 anx “e”:

“Die praktiese effek van di twat die partye met paragraaf 9 van die kontrak bedoel het, is die volgende:

- 8.1 indien Jones die kontrak in terme van paragraaf 8 kanselleer en Van der Walt sy reg om dit te doen betwis, mag Van der Walt in besit van die plaas bly in afwagting van die beslissing van daardie geskil;
- 8.2 indien Van der Walt sy voorneme reg uitoefen, moet hy aanhou om alle betalings ooreenkomstig die kontrak te maak, en is

Jones geregtig om daardie betaling te aanvaar en te verhaal en benadeel sodanige aanvaarding nie Jones se regte nie;

- 8.3 indien die geskil ten gunste van Jones beslis sou word, word die betaling aangemerkt as skade vir die wederregtelike okkupasie van die plaas. Dit impliseer dat indien die geskil ten gunste van Van der Walt beslis word, die betaling as huurgeld aangemerkt sal moet word.”

[66] Mr Knoetze’s interpretation of clause 9 and “e” goes like this:

“Klousule 10 van die kontrak skryf die wyse voor waarop daar met enige geskil tussen die partye oor enige aangeleentheid, insluitend die kansellasië van die kontrak, deur Jones gehandel moet word. Paragraaf 10.1 bepaal dat Jones die keuse het of hy sodanige geskil by wyse van arbitrasie of deur ‘n Hof wil laat bereg. Paragrafe 10.2 en 10.3 bepaal hoe die arbitrasie moet geskied.”

[67] The right of the applicant to cancel the lease agreement in the event of the first respondent’s default is circumscribed in clause 8. I have earlier quoted and referred to the clause.

[68] The relevant portion of clause 10 is sub-clause (1) thereof. The rest of the clause deals with arbitration forum. Clause 10(1) stipulates:

“Indien daar enige geskille tussen die partye bestaan oor enige aangeleentheid wat verband hou met hierdie voorwaardes of die kansellasië daarvan kan die VERHUURDER in sy uitsluitlike diskresie besluit om sodanige geskil(le) te laat bereg by wyse van arbitrasie of deur ‘n Hof met toepaslike regsbevoegdheid.”

[69] I have already dealt with the substantive merits of this whole matter. In the course of my consideration of the merits, I found, amongst others, that the first respondent wrongly refused to pay the full amount of the escalated rental as he was obliged to do; that he wrongly applied set-off contrary to the explicit term of the contract and that he wrongly threatened to withhold the next bi-annual rental in full. Those were the material ways in which the first respondent breached the lease agreement – clause 8 an x “e”.

[70] The applicant considered that the contractual wrongs committed by the first respondent were of such a serious magnitude that they constituted a clear repudiation. He appreciated the reality that the lease agreement stood repudiated by the first respondent. He accepted the repudiation and rescinded the contract from which the first respondent had freely resiled for no contractually sound reasons. He then accordingly informed the first respondent.

“Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to “repudiate” the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated ...”

(per Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F).

This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission with its emphasis on the guilty party's intention and the innocent party's acceptance. At the same time this court has repeatedly stated that the test for repudiation is not subjective but objective..."

Datacolor International (Pty) Limited v Intamarket (Pty) Limited 2001 (2) SA 284 (SCA) para [16] per Nienaber JA.

[71] In this instant matter, the first respondent admitted that he intended to resile from the lease agreement; that he repudiated such contract; that the applicant accepted his repudiation and rescinded the lease at the first respondent's special instance and initiative. Moreover, the first respondent even voluntarily tendered to vacate the leased farms on a specific date.

"The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party."

Nienaber JA in **Datacolor** *supra*.

[72] From the outset there was no doubt on the part of the first respondent as regards the lease cancellation or its validity. The first respondent deliberately and unequivocally expressed his intention no longer to be bound by the contract. He subjective intended to walk away from the contract. The

applicant's objective perception was, therefore, fortified by the first respondent's own subjective intention. He previously expressed himself so conclusively and candidly outside court that it makes his current argument about the alleged dispute appear ridiculous. He has repudiated the lease agreement and he can no longer rely on its provisions to say the eviction application was prematurely launched before certain disputes had been procedurally resolved. He is precluded from invoking his procedural rights now.

[73] I hold the view, and it is very firm, that there never was a real, genuine or *bona fide* dispute in the matter concerning the cancellation of the contract or the validity of such cancellation. But even if I am wrong, the outcome would nonetheless still be the same. If there was a genuine dispute between the parties as to the cancellation or otherwise of the contract, the applicant would still have had the absolute discretion to come to this court to have such dispute adjudicated as he in fact did. (clause 10.1 anx "e").

[74] On the facts, the applicant established that the contract was lawfully cancelled following its repudiation by the guilty party, the first respondent. The author, Christie, is of the opinion that it is preferable to ask the court to confirm the cancellation and nothing more. It was not the author's opinion that it was peremptory for the innocent party to expressly seek such confirmation in the notice of motion. The relief sought for the eviction of the first respondent is premised on the assertion that, in fact, the contract no longer exists.

[75] In the light of all the considerations, I have come to the conclusion that there was nothing premature about the eviction application. The second point *in limine* raised by the first respondent also falls to be dismissed.

[76] At all times material to this matter, the first respondent was at liberty to approach this court in order to complain about the applicant's failure to comply with his contractually obligations. He did not. But even if he did, that would not have entitled him to withhold the rental. He would still have been contractual obliged to pay the agreed rental in full without any deduction. He breached the lease agreement. His deliberate and unequivocal refusal to remedy the default entitled the applicant to terminally rescind the contract. Lest it be forgotten, such cancellation process was initially orchestrated by the first respondent. I inserted this final comment *ex abundante cautela*.

[77] These then are the reasons for the order I make *ex tempore* on 15 August 2013.

M. H. RAMPAL, AJP

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Instructed by:

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