IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A591/01

In the matter between:

NEDCOR BANK LIMITED Appellant

and

WITHINSHAW PROPERTIES (PTY) LTD Respondent

JUDGMENT: 30 MAY 2002

VAN ZYL J:

INTRODUCTION

[1] During or about October 1990 the respondent, as landlord, and Nedperm Bank Limited, as tenant, concluded a written agreement of lease in respect of certain business premises situated in the Wynberg Centre, Main Road, Wynberg, for a period commencing on 1 December 1990 and terminating on 31 October 1999. With the consent of the parties the appellant was subsequently substituted as tenant and remained in occupation of the premises for the duration of the lease. On expiry of the lease, the appellant remained in occupation of the premises with a view to effecting certain restoration procedures required by the respondent. On completion thereof it vacated the premises and handed over the keys thereto on 17 December 1999.

[2] As a result of the appellant's continued occupation of the premises after expiry of the lease, the respondent claimed payment of rent in the amount of R156 468,44 for the months of November and December 1999. It relied in this regard on an implied

agreement of lease to the effect that the appellant would remain in occupation of the premises “while it removed its equipment, assets, records and fittings”, subject to the payment of rent in the amount R78 234,22 per month.

[3] In its reply to a request for further particulars by the appellant, the respondent averred that one Howard Cara and/or authorised representatives had acted on behalf of the appellant and one Kenneth Berezowski on behalf of the respondent in concluding the implied agreement. In this regard the respondent alleged that, prior to the termination of the lease, the representatives of the appellant had been unable, despite requests by the respondent, to advise as to when it intended vacating the premises. By 29 October 1999, however, it became apparent to both parties that the appellant "would need to continue to occupy the premises for an indefinite period in order to remove its property and reinstate the premises". As a consequence of the appellant's inability to advise the respondent when it would be vacating the premises, the respondent had been "unable to advise its agents when the property would once again become lettable".

[4] In the alternative the respondent averred that the appellant was obliged, upon termination of the lease, to restore the premises to the respondent in the same condition as at the commencement of the lease, fair wear and tear excepted. By failing to vacate the premises on 31 October 1999 and restoring it only on 17 December 1999, the appellant had breached this obligation and was liable to pay the respondent rent in the amount of R78 234,22 per month for the months of November and December 1999. Alternatively it

was entitled to payment of R78 234,22 for November and R42 902,52 for December, being the *pro rata* rent payable by the appellant for seventeen days.

[5] In the further alternative the respondent claimed the aforesaid amount of R156 468,44 as damages arising from the appellant's failure, in terms of the written lease, to vacate the leased premises on 31 October 1999. The damages were calculated on the basis of the "market rental value" of the premises during the period of the appellant's "unlawful occupation". To bring its claim within the jurisdiction of the magistrate's court, the respondent abandoned R56 468,44 thereof, thereby reducing the claim to R100 000,00.

[6] In its plea the appellant denied that an implied agreement of lease had been concluded, as alleged by the respondent. It admitted that it had failed to vacate the premises before 17 December 1999, but pleaded that it had been obliged to restore the premises "in the same good order as they were in at commencement of the lease". In this regard it averred that it was an express, alternatively an implied or tacit, term of the lease agreement that such restoration would occur only after the appellant had concluded business on 31 October 1999, being "the final business day of the lease period". The appellant hence denied that the respondent was entitled to rent or damages. In any event it denied that the respondent had suffered any damages.

THE LEASE AGREEMENT

[7] For present purposes the most salient provisions of the agreement of lease

between the parties are contained in section 32 thereof, under the heading "Termination".

It reads thus:

32.1 Upon the termination of this lease, notwithstanding anything to the contrary herein contained, the Landlord may require the Tenant at the Tenant's sole cost and expense to re-instate the premises and remove any alterations, extensions, renovations or the like effected by it so that the premises are restored in the same good order and condition as they were at the commencement hereof, fair wear and tear excepted.

32.2 The Tenant shall on no account be entitled to any compensation in respect of any alterations, extensions, renovations or the like effected by it (with or without the consent of the Landlord) whether or not they are required to be removed from the premises, which alterations, extensions, renovations or the like shall become the property of the Landlord immediately upon the same being effected.

32.3 Notwithstanding anything to the contrary the Tenant shall upon termination of this lease for any reason restore the premises fit for immediate beneficial occupation and in a clean, neat and tidy condition and in the same good order and condition as they were at the commencement hereof, fair wear and tear excepted.

32.4 The Tenant shall forthwith on termination deliver all keys of the premises to the Landlord.

[8] Section 43.1 provides that the lease incorporates the entire agreement between the parties. They "acknowledge that there are no understandings, representations or terms or conditions … other than those set out herein and that no alteration, cancellation and variation of this lease shall be of any force and effect unless it is in writing and signed by both parties".

[9] Section 50 provides that the tenant shall occupy the premises continuously for purposes of conducting the business of commercial banking, as set forth in section 4 of the schedule to the agreement.

[10] Finally, in section 51.1 provision is made for a right of renewal of the lease subject thereto that, at least six months prior to the termination date, the tenant should give written notice of its intention to exercise such right.

THE EVIDENCE

[11] Only one witness testified at the hearing. He was Mr K S Berezowski, a director of the respondent. Much of his evidence related to his interpretation of the lease agreement and was hence of little relevance in resolving the disputes before the court *a quo*. Of some significance, however, was the fact that the appellant had leased the premises in question over a period of some twenty-three years in terms of three separate lease agreements, the last of which was concluded during October 1990 (par 1 above). Shortly after the appellant took occupation of the premises in terms of the initial lease agreement, it effected a number of major improvements to the premises, including the installation of a vault or strong room as required for its commercial banking business. There is no indication that any improvements of substance were effected during the period of the final, and for present purposes the relevant, lease.

[12] According to Berezowski the appellant did not give notice in terms of section 51.1 (par 10 above) of its intention to renew the lease. On the contrary, during June or July 1999 it put up a notice in the window stating that the branch was to close at the end of October 1999. Despite this notice Berezowski and certain staff members of the appellant discussed the possibility of an extension of the lease to enable the appellant to

maintain its corporate business on the leased premises in the Wynberg Centre, while moving only its personal banking section to Constantia Village. Nothing came of these discussions, however, and no extension was ever requested.

[13] The next step in the process was a discussion during early October 1999 between Berezowski and Cara, the appellant's representative, on the topic of reinstatement of the leased premises. The appellant suggested that the respondent take over the premises as they were, without any of the permanent improvements being removed. The respondent rejected this suggestion and required the premises to be reinstated in the same condition as that in which they had been at the commencement of the initial lease agreement, some twenty-three years previously. What the condition of the premises had been at that stage, however, was not discussed.

[14] The said discussion was followed up by a fax dated 7 October 1999 from Cara to Berezowski, wherein the respondent was requested to notify the appellant of its "reinstatement requirements". This request was repeated in a letter dated 25 or 26 October 1999. In the letter the appellant gave notice that it would vacate the premises on 30 October 1999 and informed the respondent that its "tenant installations department" was awaiting details of the said requirements. In this regard Berezowski testified that he had specifically told Cara that, should the appellant vacate the premises after 31 October 1999, there would be "cost implications". By this he had meant rent and other incidental costs such as electricity and rates. Cara apparently did not respond to this intimation. At

no stage, according to Berezowski, was it envisaged that the appellant would stay on without paying rent.

[15] An on-site meeting was held on the premises on 27 October 1999. Subsequent thereto ten "reinstatement requirements" were set forth in a fax dated 29 October 1999 from the appellant to the respondent. The major requirement was that the walls and doors of the strong room and record room "be removed and made good where necessary". As Berezowski put it, it only later became apparent how extremely difficult it would be to demolish the strong room, which had been constructed with reinforced concrete. The appellant had to make use of a front-end loader, pneumatic drill, jackhammer and even explosives to do so. In any event it was clear to both parties that the reinstatement requirements would be fulfilled only after termination of the lease, during November or even December 1999.

[16] It is common cause that the appellant remained on the premises, for purposes of the required reinstatement, with the leave of the respondent. Berezowski testified in this regard that the appellant had the "benefit of full occupation of the premises" for such purpose. The parties had, he suggested, concluded an implied agreement of lease on the basis that the appellant would continue paying rent while thus remaining in occupation. If it had wished to avoid paying additional rent, it should have commenced restoration procedures six weeks before the termination of the agreement.

[17] It is likewise common cause that the appellant had accepted liability for the costs of electricity utilised during the restoration process, and had in fact made payment thereof.

[18] The appellant closed its case without calling any witnesses. After hearing argument by Mr Steltzner on behalf of the plaintiff and by Mr Coughlan on behalf of the defendant, the court gave judgment in favour of the plaintiff in the amount of R78 234,22, being rent for November 1999, and R44 902,52 as *pro* rata rent for the first seventeen days of December 1999. In addition it awarded interest and costs.

JUDGMENT OF THE COURT *A QUO*

[19] In her judgment the learned magistrate accepted that the appellant had remained in occupation of the leased premises, with the consent of the respondent, from 1 November to 17 December 1999. During this period it had engaged in restoring the premises and not in trading as a commercial banker. By the same token the respondent had been unable to re-let the premises during such period. Potential lessees could view the premises only after it had been restored and vacated by the appellant.

[20] On the issue whether or not an implied agreement of lease had come into operation pursuant to the discussions between Berezowski and Cara, the learned magistrate held that no *consensus* between the parties could be established in this regard. This did not, however, mean that the appellant was not liable for rent or damages arising

from its continued occupation of the premises from 1 November to 17 December 1999. With reference to the judgments in *Sapro v Schlinkman* 1948 (2) SA 637 (A), *Arnold v Viljoen* 1954 (3) SA 322 (C), *Tooth and Another v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N) and *Bourbon-Leftley v Turner* 1963 (2) SA 104 (C), the learned magistrate held that the appellant was indeed liable for rent, and not damages, for the period from termination of the lease until the premises were actually vacated.

[21] The present appeal is directed only against the finding of the court *a quo* that the appellant was liable for rent as aforesaid. The respondent noted a cross-appeal against the court's finding that there was no tacit relocation or implied lease agreement concluded between the parties, and that there had been no unlawful holding over by the appellant or damages suffered by the respondent.

APPELLANT'S ARGUMENT

[22] Mr Coughlan, for the appellant, devoted much of his argument to the cross-appeal as to whether or not the respondent's main claim, namely the alleged tacit relocation or implied agreement to re-let the leased premises, was justified on the facts. Inasmuch as no *consensus* in this regard could be inferred from the proven facts, he submitted, the court *a quo* had correctly held that no such agreement could be established. On the contrary, the appellant's conduct indicated unequivocally that it had no interest in renewing the agreement. It intended, rather, to comply with the terms, more specifically clause 32.1, of the existing lease agreement. Any contradiction between this clause and

clause 32.3 was more apparent than real. This was supported by the provisions of clause 32.2, namely that "all alterations, extensions, renovations or the like" would, upon being effected, forthwith become the property of the respondent.

[23] It was clear from the facts, Mr Coughlan suggested, that the respondent was acting in terms of the provisions of clause 32.1 when, on 29 October 1999, it informed the appellant of its reinstatement requirements. This clause, he submitted, clearly contemplated that the reinstatement could be effected only after termination of the lease, in which event the appellant would be compelled to remain in occupation of the premises for the duration of the reinstatement procedure. The respondent was fully aware of this, and hence had no difficulty in consenting to the appellant's continued occupation of the premises. Such occupation must, therefore, have been lawful and there could have been no question of unlawful holding over. There was hence, Mr Coughlan argued no merit in the cross-appeal.

[24] In any event, Mr Coughlan submitted, even if there had been an unlawful holding over, the respondent had failed to prove any damages in the form of pecuniary loss. There was no indication that a new tenant had been secured or that the respondent had even attempted to attract potential tenants during the six-month period prior to termination of the lease, as it was fully entitled to do.

[25] Mr Coughlan submitted that the court *a quo* had erred in finding, on the second

alternative claim, that the appellant had failed to vacate the premises on termination of the lease and was hence liable for rent during its continued occupation. He submitted that the cases relied on by the learned magistrate in this regard (par 20 above) were distinguishable from the present. In those cases the tenant had, without the consent of the landlord, remained in occupation of the leased premises after cancellation of the lease agreement in question. In the present case the continued occupation of the leased premises by the tenant (appellant) was with the consent of the landlord (respondent) and with the specific purpose of reinstating the premises in terms of clause 32.1 of the lease agreement. It was implicit in such clause, Mr Coughlan argued, that the appellant would have a reasonable time within which to complete the reinstatement. At no stage did the respondent dispute this, nor did it suggest that the approximately six-week period required for such reinstatement had been unreasonable.

RESPONDENT'S ARGUMENT

[26] Mr Steltzner, on behalf of the respondent, submitted that the court *a quo* had properly relied on the aforesaid authorities. The legal principle emanating therefrom was that, even if a lease agreement should be cancelled by consent, the tenant would, in the absence of a contrary indication, remain liable to pay rent at the agreed rate for the actual period of occupation. The *Tooth* case (par 20 above) was indeed a case of cancellation by mutual agreement and hence indistinguishable from the present case. Similarly the *Sapro* case (par 20 above) expressed the principle that a lessee who enjoys the full use and enjoyment of the premises must pay the full rent.

[27] The fact that the appellant's continued occupation was solely for purposes of reinstating the premises was, according to Mr Steltzner, of no consequence. It had the obligation to vacate the premises on termination of the lease and in fact utilised its continued occupation for purposes of fulfilling its contractual obligations. The court *a quo* hence correctly held that it was liable to pay full rent for November and a proportionate rental for December 1999.

[28] Mr Steltzner sought support for his contentions in the provisions of clause 32.3 of the lease agreement in that the appellant was required, upon termination of the lease, to restore the premises fit for immediate beneficial occupation. Clause 32.1, he submitted, merely empowered the respondent to require the appellant "to do certain things" on termination of the lease and did not provide for "rent free" continued occupation.

[29] Should this court be disposed to uphold any of the appellant's contentions, Mr Steltzner argued, the respondent's cross-appeal should succeed, either on the basis of an implied relocation or new lease, or on the basis of damages for breach of contract. An implied relocation or new lease on the same terms as the previous lease should, he submitted, be inferred from the conduct of the parties. In the present case the relevant conduct was the fact that the respondent had allowed the appellant to remain on the premises for purposes of reinstating it. There was hence a tacit undertaking by the appellant to pay rent for its continued occupation of the premises. In the alternative,

although the continued occupation did not constitute unlawful holding over, the appellant had breached its obligation to restore the premises on termination of the lease and was hence liable in damages.

THE RELEVANT LAW

Implied Agreements

[30] An implied agreement can come into existence only if there has been a tacit acceptance of a tacit offer. The offer and acceptance, indicating unqualified *consensus ad idem* on all essential aspects of the agreement, must clearly and unequivocally be inferred from the conduct of the parties. It must, in accordance with what has been described as the "traditional" approach, in fact be the only reasonable inference that can be drawn from such conduct. See in this regard the *dictum* of Corbett JA in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 SA 276 (A) at 292B:

In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.

[31] Corbett JA adopted a somewhat less stringent approach in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 165B-C:

In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence …

See also *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk* [2000] 4 All SA 412 (C) at 418*j*-419*b*, where Comrie J expressed a preference for "the so-called traditional test, the only reasonable interpretation test, provided that the test is applied in a common-sense and businesslike way". See further the exhaustive discussion in R H Christie *The Law of Contract in South Africa* (4th edition 2001) 92-101.

[32] Whether or not there was an implied agreement to renew an existing lease (a so-called “tacit relocation”), or to conclude a new lease on the same terms as the previous one, is likewise dependant on the facts and circumstances of the case. More specifically it must be unequivocally inferred from the conduct of the parties (lessor and lessee) that a renewed or new lease has come into existence. Under normal circumstances this would be the case when the lessor allows the lessee to remain in occupation of the leased premises after termination of the lease, and the lessee continues to pay rent that the lessor accepts. See in general W E Cooper *Landlord and Tenant* (2nd edition 1994) 350 352; W A Joubert (editor) *The Law of South Africa* (first reissue 1999) volume 14 (hereinafter referred to as *LAWSA* 14) par 217.

[33] This appears to have been the approach adopted in Roman and Roman-European law. Thus in *Digest* 19.2.14, the Roman jurist Ulpian tells us that the lessor is regarded, in such a case, as having leased the premises anew (*ex integro locare*). An agreement then comes into existence without the parties requiring words or writing, but purely on

the basis of *consensus* (*et huiusmodi contractus neque verba neque scriptura utique desiderant, sed nudo consensu convalescunt*). In his *Inleidinge tot de hollandsche rechts-geleerdheid* (2nd edition by Dovring, Fischer and Meijers, Leiden 1965) 3.19.2, Grotius (De Groot) explains that agreements of lease may be concluded not only by express words, but also tacitly. This happens when the lessee of a house, after termination of the lease, continues to use the house, in which event the rental is regarded as being extended for the same time as previously agreed:

Overkominge, de welcke verstaen werd aenghegaen te zijn, niet alleen door uitdruckelicke woorden, maer oock stilzwijghende, indien den huirder nae des huirs uitgang blijft in 't ghebruick van eenig huis, want daer door werd de huis verstaen verlengt te zijn, voor zoo veel tijds als de zelve te vooren was aengegaen.

Reference may also be made to Van Leeuwen *Censura forensis* 1.4.22.15 and *Het roomsch-hollandsch recht* 4.21.6; Voet *Commentarius ad pandectas* 19.2.9; Van der Keessel *Theses selectae juris hollandici et zelandici* 671 (a commentary on Grotius *Inleidinge* 3.19.2) and *Praelectiones juris hodierni* 3.19.2; Pothier *Traité du contrat de louage* 342.

[34] These principles have, in substance, become part and parcel of South African jurisprudence, as appears from *Bowhay v Ward* 1903 TS 772 at 779 (*per* Innes CJ):

[T]acit relocation depends upon this, that both parties adopt and continue the position which the termination of the lease found them in; in other words, that the lessor is content that the lessee should remain, and the lessee is content to remain.

See also *Gau v Stokes* 1903 TH 158; *Maister & Shagam v Bernstein* 1915 CPD 373 at 377; *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325; *Van der Merwe v Erasmus* *and Another* 1945 TPD 97 at 102; *Parkleigh Court (Pty) Ltd v V M F Dairies (Pty) Ltd* 1946 WLD 349 at 350.

[35] The effect of a tacit relocation is, in general, that a new lease is concluded on the same basis as the original lease (Pothier *op cit* 363; *Licences and General Insurance Co v Bassano* 1936 CPD 179 at 185-186; *R v Cumming* 1956 (4) SA 143 (E) at 145C-148A). In *Doll House Refreshments (Pty) Ltd v O'Shea and Others* 1957 (1) SA 345 (T) at 348G-H, however, Ramsbottom J qualified this principle by stating that only essential provisions of the original lease, and those "incident to the relation of landlord and tenant", are presumed to be renewed. Collateral provisions, which are "independent of and not incident to that relation", are not presumed to be similarly incorporated in the new lease. See also *Fiat S A v Kolbe Motors* 1975 (2) SA 129 (O) at 139D-G; *Shell South Africa (Pty) Ltd v Bezuidenhout and Others* 1978 (3) SA 981 (N) at 984B-E.

[36] The mere fact that a lessee remains in occupation of the leased premises after the expiration of the term of the lease does not, of course, mean that there is a tacit renewal of the lease. Similarly the belief, or impression, of one of the parties to the lease that there has been a tacit relocation, is not sufficient to bring a new lease into existence. There must be compliance with the requirements for an implied or tacit agreement. See *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk* [2000] 4 All SA 412 (C) at 417*g-j*.

[37] A lessee is obliged to restore the leased premises to the lessor in a good condition,

or at least in substantially the same condition as they were in at the time he took occupation thereof, fair wear and tear excepted. On this obligation see Grotius *Inleidinge* 3.19.11-12; Voet *Commentarius ad pandectas* 19.2.32; Van der Keessel *Pralectiones* 3.9.11; Van der Linden *Koopmans handboek* 1.15.12; Pothier *Traité du contrat de louage* 197; *Bartman v Leonard and Others* 1952 (2) SA 582 (C) at 596G; *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C); *Sandown Park v Hunter Your Wine & Spirit Merchant* 1985 (1) SA 248 (W); W E Cooper *Landlord and Tenant* (2nd edition 1994) 217-218; *LAWSA* 14 par 189.

[38] Should a lessee be in breach of this obligation, he is regarded as unlawfully "holding over". The lessor may then have him ejected by legal process, or claim damages for breach of contract. See *Matz v Simmonds' Assignees* 1915 CPD 34; *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C); *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another* 1985 (1) SA 248 (W).

[39] There has been some debate regarding whether or not the lessor may claim rental for the period during which the lessee remains in occupation of the leased premises after termination of the lease. In the early case of *Cohen's Trustee v Rifkind and Cumes* 1914 WLD 79 at 84, Mason J held that a lessor was entitled to rent for the actual period of occupation by the lessee after cancellation of the lease agreement between the parties. A similar approach was adopted in two Cape cases, namely *Arenson v Bishop* 1926 CPD 73 at 74-75 and *Parry, Leon and Hayhoe Ltd v Yorkshire Insurance Co Ltd* 1940 CPD 397

at 402.

[40] This approach was confirmed by the Appellate Division in *Sapro v Schlinkman* 1948 (2) SA 637 (A). In that matter the plaintiff sought ejectment and damages from the defendants (it would appear that there was more than one) on termination of the lease agreement between them. The matter was settled on the basis that the parties conclude a new lease for fifteen months on certain conditions, one of which was that a written lease agreement would be drawn up by the plaintiff's attorney, one G Brown, "to incorporate the usual terms". Their consent paper was made an order of court. A draft agreement prepared by Brown was rejected by the defendants on the ground that it did not "incorporate the usual terms". They were nevertheless prepared to pay rent at a significantly lower rate than that agreed upon in terms of the consent paper. When a further draft was likewise rejected, the plaintiff sued them for the difference between what they had paid and what they should have paid in terms of the consent paper. Their claim was successful and the defendants appealed.

[41] On appeal Davis AJA identified the salient issue as follows (at 643):

The main point to be considered is whether the plaintiff who, assuming that he has broken the contract in that Brown has not to this day tendered to the defendants a draft lease containing "the usual terms", is able to sue on the contract for "rent" as fixed therein, or whether he is not confined to claiming a reasonable compensation for the defendant's use and occupation of the premises.

On the assumption that the breach was serious enough to warrant cancellation of the agreement, the learned judge was satisfied that the plaintiff, notwithstanding his breach, was entitled to sue for the rent due during the full period that the defendants had enjoyed undisturbed occupation of the leased premises. With reference to a number of Roman and Roman-European sources, he concluded (at 646):

To sum up: the authorities all show that the date that matters in regard to the termination of the lessee's ability to pay rent in terms of the lease is not the date of the breach, or the date on which the lessee purported to cancel the lease, but the date on which he actually quitted the premises.

The appeal was accordingly dismissed.

[42] In *Arnold v Viljoen* 1954 (3) SA 322 (C) the applicant sought to recover certain monies, including rent for one month and twenty-two days, owing to him in terms of an agreement of lease. The respondent refused to pay on the basis that the leased premises were in such a bad state of disrepair that they were rendered substantially unfit for the purpose for which they had been leased. He thereupon purported to cancel the lease and vacate the premises. Van Winsen J, relying on *Sapro v Schlinkman* (par 40 above), held (at 330B):

I think the test for the tenant's liability for rent is whether he was in occupation or in possession of the leased premises and not whether such occupation or possession was beneficial or not.

[43] In the case of *Tooth and Another v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N) the parties to a lease agreement terminated the lease by mutual agreement. After the date of termination, however, the lessee remained in occupation of the leased premises in that certain goods belonging to its customers remained stored on the premises

for some twenty-four days. During that period the lessee retained the keys to the premises. When the lessor claimed rent for such period, the lessee refused to pay on the basis that the lease had already terminated. The court of first instance gave judgment in favour of the lessee. On appeal, however, Henochsberg J, also relying on the *Sapro* case (par 40 above), held (at 130E) that a person cannot be regarded as having vacated premises if he has deliberately stored goods thereon, after removing his own property. In this regard the learned judge averred (at 131E-F):

It seems to me that, in arriving at his conclusions, what the magistrate has failed to appreciate is that it is a principle of our law that, if a lease is cancelled by mutual agreement of the parties, the lessee in the absence of expression to the contrary remains liable to pay rent at the agreed rate for the actual period of occupation.

And at 132H:

Even if a lessee has just cause for quitting premises hired, he is liable to pay rent in so far as he has made use of the property hired.

The fact that the lessee had stored the goods of clients on the premises and had charged them storage fees for such service constituted, in the opinion of the learned judge (at 134A), "actual occupation" of the premises.

[44] The *Sapro* case (par 40 above) was also followed in *Bourbon-Leftley v Turner* 1963 (2) SA 104 (C) at 106E-F. In that case the lessee cancelled the lease because the lessor had not complied with certain obligations in terms thereof. He thereupon tendered

the keys of the leased premises, maintaining that all goods on the premises had been removed. It would appear, however, that an Aga stove remained on the premises after the lessee had vacated it. This prompted Banks J to hold (at 107C) that the lessee could not be said to have vacated the premises in that the stove, which was large and heavy, was "likely to interfere materially with the enjoyment of occupation by some other person". The lessee was hence liable to pay rent during the period of his actual occupation of the premises.

[45] These authorities have not enjoyed general acceptance. The fundamental criticism has been that, if a lease agreement has been terminated by cancellation or otherwise, the rights and obligations attaching thereto are terminated. The lessor cannot then claim arrear rent from the lessee should he remain in occupation of the premises after such termination. This would, it is suggested by A J Kerr "Incompatible Remedies for Breach of Contract: Is Lease a Special Case?" in 90 *SALJ* (1973) 228-233 at 229, constitute "a radical departure from the general rule that an aggrieved party cannot both cancel a contract and sue for specific performance". See in this regard *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 469G-H. His remedy would under normal circumstances, Kerr opines, be directed at damages for breach of contract.

[46] This appears to have been the approach in *Easton Investment Co (Pvt) Ltd v Edwards* 1967 (2) SA 83 (R) at 87B-C, where Davies J said:

In principle rent is a payment for the right to use and occupy the leased premises. Where such right is denied the tenant, for whatever reason, it is contrary to principle to enforce the obligation to pay rent. On this basis, therefore, I am of the opinion that the petitioner has no right to claim any amount as rent in respect of the period subsequent to his cancellation of the agreement, but is restricted to a claim for damages.

See also *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T) at 164E-165A; *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (TkSC) at 64G-65J; *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 244I-247C; A J Kerr "Difficulties in Sapro v Schlinkman" in 92 *SALJ* (1975) 250-252; W E Cooper *Landlord and Tenant* (2nd edition 1994) 163-167; A J Kerr *The Law of Sale and Lease* (2nd edition 1996) 377-381; *LAWSA* 14 par 189-190.

APPLICATION OF THE RELEVANT LAW IN THE PRESENT MATTER

[47] It is abundantly clear that, after termination of the lease on 31 October 1999, the appellant remained lawfully in occupation of the leased premises until 17 December 1999 with a view to complying with what it believed its obligations were in terms of section 32 of the lease agreement between the parties (par 7 above). It was in fact doing so at the request, and with the unqualified consent, of the respondent. The sole object of its continued occupation of the premises was to restore the premises to their pristine condition and not to conduct the business of commercial banking, as required by section 50 of the agreement (par 9 above). There was hence no question of an unlawful holding over or of any other form of breach of contract that might justify cancellation of the agreement and substantiate an action for damages (par 37-38 above).

[48] There was likewise no indication of any tacit or implied agreement of relocation, in that none of the legal requirements for an agreement of this nature was present at the relevant time (par 30-35 above). On the contrary, the appellant made it eminently clear that it had no intention of renewing the lease, in that it did not give notice of such intention, as required by section 51.1 of the agreement (par 10 above). In addition, on Berezowski's own evidence (par 12 above), the appellant put up a notice in the window informing customers and clients that the branch was to close at the end of October 1999. The only unequivocal inference (par 32 above) that can be drawn from this conduct is that the appellant had decided not to renew the lease. Berezowski's belief that he and Cara had in fact concluded an implied agreement of lease (par 16 above) cannot substantiate a tacit or an implied relocation (par 36 above). This belief was probably prompted by wishful thinking and by the hope that so valuable a tenant as the appellant might reconsider at least a partial relocation of the premises.

[49] It follows that I am in respectful agreement with the learned magistrate’s finding (par 19 above) that the appellant’s continued occupation of the leased premises was with consent and hence could not constitute unlawful holding over. I likewise respectfully agree with her finding that the respondent was unable to prove that an implied agreement of lease had been concluded (par 20 above). I have some difficulty, however, with the finding, based on the *Sapro*, *Arnold*, *Tooth* and *Bourbon-Leftley* judgments (par 40-44 above), that the appellant was liable for rent for the period during which it remained in occupation of the leased premises.

[50] The said judgments do not, with respect, justify such a finding. They are all, in my view, distinguishable from the present matter in that the continued occupation of the defendant in each case was without the consent of the plaintiff, after the lease had already been terminated, be it by way of cancellation (as in *Sapro*, *Arnold* and *Bourbon-Leftley*) or mutual agreement (as in *Tooth*). For present purposes it is not necessary to consider the criticism directed at these judgments (par 45-46 above), although it would, in my respectful view, be more correct to allow a claim in damages than one directed at the recovery of arrear rental. The *quantum* of a claim for damages for wrongful holding over, constituting a breach of contract and justifying cancellation of the agreement, would in all probability not differ substantially, if at all, from a claim for specific performance directed at the recovery of rent due in terms of such agreement. Once a party to the lease agreement has, however, elected to cancel it, or the parties have mutually agreed to terminate it, the rights and obligations relating to the payment of rent must be regarded as having likewise terminated. Should the lessee then fail to restore the leased premises to the lessor, he would be liable to him in damages. It may well be appropriate, I respectfully suggest, for the Supreme Court of Appeal to reconsider the *ratio* underlying the *Sapro* judgment, should the opportunity arise.

[51] The appellant avers that it remained in lawful occupation of the premises in order to comply with its obligation to restore the premises "in the same good order as they were in at commencement of the lease" (par 6 above). It could be argued that it was complying

with its obligations in terms of section 32.3 of the agreement (par 7 above). That section provides, however, that the tenant must *restore the premises* to the landlord "upon termination of this lease for any reason". The premises must then be "fit for immediate beneficial occupation and in a clean, neat and tidy condition and in the same good order and condition as they were in at the commencement hereof, fair wear and tear excepted". This accords with the common law obligation of the lessee to return the premises to the lessor, in good order, immediately on termination of the lease (par 37 above).

[52] It would appear, however, that the appellant was not simply complying with the provisions of section 32.3, but was intent, rather, on carrying out its perceived obligation in terms of section 32.1 (par 7 above). Such obligation was to *reinstate the premises* by removing "any alterations, extensions, renovations or the like effected by it". After completing such reinstatement, the lessee would return the premises to the landlord "in the same good order and condition as they were in at the commencement hereof, fair wear and tear excepted".

[53] Although the qualification relating to "the same good order and condition" accords with that used in section 32.3, the nature of the obligation contained in section 32.3 differs *toto caelo* from that envisaged by section 32.1. Section 32.3, couched in peremptory terms, requires that, on termination of the lease for whatever reason, the tenant *shall* forthwith restore the premises to the landlord in the said "good order and condition", so that it may immediately be available for beneficial occupation by another

tenant. Section 32.1, however, accords the landlord a right, which he *may*, in his discretion, exercise should he so wish, to require the tenant to re-instate the premises to their original state. Should the landlord choose not to exercise this right, the tenant would obviously still have to comply with his obligation in terms of section 32.3.

[54] Inasmuch as section 32.3 requires the tenant to render the premises "fit for immediate beneficial occupation", he must, prior to the termination of the lease, ensure that it is clean, neat and tidy and in "the same good order and condition" as at the commencement of the lease. This would enable him to return the premises to the landlord immediately "upon the termination of the lease". In the case of section 32.1, however, the tenant is largely in the hands of the landlord, who is entitled to wait until the lease expires before exercising his right to reinstatement of the premises. If he should wait until then, it is abundantly clear that the tenant would require time to comply with his request and would of necessity have to remain in occupation of the premises until completion of the reinstatement. It may be accepted that, in such an event, it would be an implied term that the reinstatement should be completed within a reasonable time.

[55] It is significant that, in the present case, the respondent did not exercise its right in terms of section 32.1 before being requested by the appellant, in the fax from Cara to Berezowski dated 7 October 1999, to notify the appellant of its "reinstatement requirements" (par 14 above). After receiving no response, this request was repeated in a letter dated 25 or 26 October 1999. This gave rise to an on-site meeting on 27 October

1999 (par 15 above), which was followed up by a fax containing a list of ten "reinstatement requirements". This fax was received on 29 October 1999, just two days before the lease was due to expire. Even the most superficial perusal of the fax would make it clear that the reinstatement sought by the respondent would require a considerable time to be completed. This was quite properly conceded by Berezowski, when he testified that the demolition of the strong room could not be effected without the use of heavy machinery and even explosives.

[56] It would appear that both parties understood that the reinstatement obligation arising from section 32.1 of the agreement was that the premises were to be restored to their original condition, that is to say the condition they were in at the time the first of three leases between the parties was concluded, some twenty-three years previously. Why this was their understanding is not clear from the papers or the evidence. For purposes of interpreting the lease in question, namely the third and final lease concluded during October 1990, the first two leases were irrelevant and the condition of the premises at the commencement of such prior leases was likewise irrelevant.

[57] The condition of the premises, for purposes of interpreting section 32.3 of the relevant lease, was that which they were in at the commencement of such lease during October 1990. Inasmuch as the major improvements effected by the appellant dated back to the period of the first lease, such improvements, including the vault or strong room, were clearly already part of the leased premises, and hence the property of the

respondent, on the date the relevant lease was concluded. In terms of section 32.1 thereof, the respondent could require the appellant to remove only those "alterations, extensions, renovations or the like" which were effected during the period of such lease. It hence had no right to require the appellant to remove the strong room or any other improvement or fixture dating back to the period of the first or second leases.

[58] It would appear, therefore, that the appellant, at some considerable expense to itself, effected certain reinstatements it was not required to do in terms of section 32.1 of the agreement. It is of concern, and indeed most unfortunate, that the misinterpretation of this section, apparently by both parties, has resulted in what would appear to be unnecessarily incurred costs of restoration and, for that matter, of subsequent litigation.

[59] It follows from the above that it could clearly not have been the intention of the parties that the appellant should pay rent for the period during which it was compelled to remain in occupation of the leased premises while complying with the respondent's request for reinstatement thereof. Both parties must have contemplated that, should the respondent exercise its discretionary right to require reinstatement of the premises, this would take place only after termination of the lease. It could never have been their intention that the reinstatement should be effected before termination of the lease. That this would have been a physical impossibility is confirmed by the fact that the respondent presented the appellant with its list of requirements only two days before the termination of the lease.

[60] It was at no time suggested that the period of seventeen days utilised by the appellant to effect the reinstatement was unreasonable, bearing in mind the nature and extent of the requirements put to it. There can hence be no basis for any claim, in contract or delict, that the appellant had delayed the reinstatement to the respondent's detriment and caused it damages.

CONCLUSION

[61] It follows that the appeal must succeed and the order of the court *a quo* set aside. In the event I would make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and substituted by the following:

   "The Plaintiff's claim is dismissed with costs".

D H VAN ZYL

Judge of the High Court of South Africa

I agree.

Y S MEER

Acting Judge of the High Court of South Africa

It is so ordered.

D H VAN ZYL

Judge of the High Court of South Africa