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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable/Not Reportable

Case no: 22803/24

In the matter between:

OURANON PROPERTIES (PTY) LTD

APPLICANT

and

**JBO WORLDWIDE SUPPLIES (PTY) LTC T/A COCO
SAFAR**

RESPONDENT

Neutral citation: *Ouranon Properties (Pty) Ltd v JBO Worldwide Supplies (Pty) Ltd
t/a Coco Safar* (Case no 22803/24) [2024] ZAWCHC (20 May
2025)

Coram: **SALLER AJ**

Heard: 23 April 2025

Delivered: 20 May 2025

Summary: Contract – strict enforcement of cancellation clause – eviction from commercial property – refusal of application for leave to file a further affidavit – public policy

ORDER

The following order is made:

1. The respondent and all those occupying the premises by, through or under them are directed to vacate Shop 8 (including storeroom 3[...]) and Shop 9, Piazza St John, 3[...] M[...] Road, Sea Point (“the premises”).
2. In the event that the respondent or any person occupying the premises by, through or under it do not vacate the premises within ten (10) days from the date of this order, the sheriff of this court or his or her deputy is directed and authorised to evict the occupiers from the premises.
3. The sheriff or his or her deputy is authorised to approach the South African Police Service for any assistance or support to enforce this order.
4. The respondent is to pay the applicant’s costs on a scale as between attorney and client.

JUDGMENT

Saller AJ:

INTRODUCTION

- [1] This is an application for the eviction of the respondent from commercial property consisting of Shop 9 and Shop 8 (including storeroom 3[...]), Piazza St John, 3[...] M[...] Road, Sea Point (“the premises”). The respondent operates a restaurant, retail space and coffee roastery from the premises.
- [2] The respondent first entered into a lease agreement in respect of Shop 8 with the erstwhile owners of the premises, Nedglen Property Developments (Pty) Ltd (“Nedglen”), on 2 June 2021 (“the Shop 8 lease”). On 18 June 2021 the same parties concluded a further lease agreement, this time in respect of Shop 9 (“the Shop 9 lease”). Finally, on 9 November 2021 the respondent and Nedglen concluded a written addendum to the Shop 8 lease, whereby the respondent leased from Nedglen storeroom 3A (“the addendum”). Collectively, I refer to these agreements as “the lease agreements”.
- [3] The lease agreements are similar, but not identical. They have in common, however, that payment of the agreed rental and ancillary charges are due and payable in advance, on the first day of each month.
- [4] Despite this, Nedglen was prepared to indulge the respondent by allowing it to pay the rental and ancillary charges for in multiple payments over the course of the relevant month.

- [5] On 6 May 2024, Nedglen and the applicant concluded a written sale of letting agreement, which related *inter alia* to the premises. The lease agreements anticipated such a sale in that they provide, in identical terms, for reference to the landlord in the respective lease agreement to include reference to the landlord's successor in title. Transfer and registration of the premises in the applicant's name was effected on 6 August 2024.
- [6] Consequently, the rental for September 2024 was, for the first time, due and payable to the applicant on or before 1 September 2024. This is common cause. It is also not in dispute that the respondent did not pay the due amounts on or before that day.
- [7] Instead, over two days on 2 and 3 September 2024, the respondent made two payments of R 5.000,00 each.
- [8] On 3 September 2024, at 10h39, the applicant's Ms Shireen Coraizin sent an email to the respondent demanding immediate payment of arrears in an amount of R 78.061,89, in order to avoid "*further penalties as well as negatively affecting your credit record*". Ms Coraizin's email was addressed *inter alia* to the email address p[...]. It is common cause that this is the correct email address for the purpose of communication between the parties.
- [9] At 14h45 on the same day, the applicant's Ms Nadia Duvenhage sent a further email, to the same recipients, enclosing a formal letter of demand. In that letter of demand, the applicant demanded payment of the outstanding amount "*within 7 (seven) days from date hereof*" – the seven day period being that stipulated in clause 19 of the Shop 9 lease for remedying any breach. The Shop 8 lease contains no such requirement, nor does the addendum. The applicant further gave notice that, failing such payment, it would be entitled to cancel the respective lease agreements, seek the respondent's eviction from the premises, and hold the respondent liable for all costs incurred on the attorney-client scale.

- [10] In argument, the parties referred to this as the “*breach notice*” and I adopt this terminology to distinguish the letter of demand of 3 September 2024 from Ms Coraizin’s email of the same day.
- [11] The respondent’s Mr Liebenberg replied to the email of Ms Coraizin on 4 September 2024. He acknowledged being in arrears, referred to what he said was an agreement with Nayglen to make daily payments over the course of the month, and promised that with such daily payments “*the arrears will be covered in the next 14 days and then we will start to build up a credit.*”
- [12] He did not address the applicant’s demand, in the breach notice, that full payment of arrears be made within seven days of the letter of demand, failing which the applicant would be entitled to cancel the lease agreements.
- [13] The respondent made a further two payments of R 5 000 each on 9 and 11 September 2025.
- [14] On 12 September 2024 the applicant cancelled the lease agreements for non-payment, and demanded that the respondent vacate the premises the following day, failing which an application for the respondent’s eviction would be launched. The respondent did not vacate the premises.
- [15] On 21 October 2025 the applicant launched the present application. It is common cause that the respondent remains in occupation of the premises and continues to pay the rental and ancillary charges due to the respondent, albeit not always on the first of each month.

STRICT ENFORCEMENT OF CONTRACTUAL REMEDIES

- [16] In the answering affidavit, despite putting up its case in somewhat cryptic terms, it appears the respondent's defence is, in effect, three-fold: [1] that the applicant was entitled to carry on making payments in accordance with the payment terms agreed between it and Nedglen; [2] that the applicant was not entitled to cancel the lease because at the time of the cancellation, the respondent was "*actively remedying the breach*", had promised to make good the outstanding payments within 14 days, and in fact did so one day after the self-imposed deadline of 14 days; and [3] that this application was launched "*prematurely*" because the breach had been remedied by the time the application was launched and there had been no further breaches since then.
- [17] None of these defences can succeed.
- [18] As to the payment arrangement between the respondent and Nedglen, for this arrangement to be binding, it had to have been recorded in writing. This is because the respective clauses 24 of the lease agreements stipulate that such agreements constitute the whole agreement between the parties, and variation thereof had to be in writing and signed by the parties.
- [19] Consequently, the payment arrangement between the respondent and Nedglen amounted to no more than an indulgence which does not bind the applicant – notably, on the wording of clause it also would not have bound Nedglen. The respondent does not say that it was unaware of the change of ownership of the premises. It says, instead, that it was under the impression that the indulgence granted by Nedglen would continue but does say on what legal basis. There is none.
- [20] As to the defendant's undertaking in the email of 4 September 2024 to remedy the breach within 14 days, in the absence of the applicant's acceptance of the proposal it amounted to a unilateral variation of the lease agreements which, too, does not meet the requirements of a formal variation of the lease agreements. The

Shop 9 lease required the respondent to remedy a breach within 7, not 14 days. The Shop 8 agreement and the addendum afforded the respondent no additional time at all. On the terms of the respective lease agreements, the applicant was entitled to cancel the respective leases when it did.

[21] In any event, on the facts, the respondent remained in arrears on the 14th day and even, on its own version, on 1 October 2024 when an outstanding amount of R 1 938 was carried over in the October invoice.

[22] As to the respondent's suggestion that eviction proceedings could not be launched because, by that time, it was no longer in arrears, there is no legal basis for this surprising proposition, and Ms Meiring who appeared for the respondent advanced none. Valid cancellation of a contract is not undone by a subsequent remedy of the breach which provided the grounds for the cancellation.

[23] In argument, Ms Meiring who appeared for the applicant did not seriously pursue the argument that there had been a variation of the lease agreements either flowing from the indulgences granted by Nedglen to the respondent, nor from the respondent's unilateral undertaking to remedy the breach within 14 days. She rightly accepted that the respondent had in fact breached the terms of the written lease agreements, and that such contractual terms were also not contrary to public policy.

[24] Instead, Ms Meiring urged the court to find that the facts referred to above at para [16] should move the court to find that a strict application of the lease agreements' terms as they related to non-payment and cancellation would be contrary to public policy, and that, consequently, the court should refuse to enforce the agreements' terms.

[25] For a number of years following the Constitutional Court's decision in *Botha v Rich N.O.* 2014 (4) SA 124 (CC), the role played by considerations of good faith

and fairness in contract law, as well as the application of public policy considerations in cases where a party seeks to rely strictly on contractual provisions, was the subject of considerable jurisprudential uncertainty. Such uncertainty was fortunately resolved in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC).

- [26] In *Beadica*, Justice Theron discussed and affirmed several principles of relevance to the present matter. These include that “... *a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements.*” (para 80).
- [27] Justice Theron further affirmed the continuing authority of *Barkhuizen v Napier* 2007 (5) SA 323 (CC), which in turn had confirmed the centrality of the long-standing contractual principle of *pacta sunt servanda* in the new constitutional order. The starting point, Justice Theron explained at para 83, was that “*in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken*”, thus giving effect to the constitutional values of dignity and freedom (para 92).
- [28] Nevertheless, courts retained the power to invalidate, or refuse to enforce, contractual terms in “*worthy cases*” (para 89), where this was demanded by public policy “*infused with constitutional values*”, giving “*proper weight to the overarching mandate of the Constitution.*” (para 90). What is required is a careful balancing of constitutional imperatives.
- [29] Turning to the facts of the present matter, it is hard not to feel some sympathy for the respondent. But the question whether a constitutionally infused public policy demands that the respondent be shielded from the consequences of its failure to pay rental in advance on 1 September 2024, and to settle the arrears within the

contractually stipulated seven-day period from the applicant's demand, must be answered in the negative. There is nothing on the papers to elevate personal hardship to the level of public policy: no constitutional rights are implicated, nor is the respondent in an exceptionally vulnerable or inequitable position. There is also no suggestion of bad faith or improper conduct on the part of the applicant who stands in a purely commercial relationship to the respondent.

- [30] In those circumstances, there are no grounds for this court to decline to enforce the contractual terms, harsh as their consequences may be.

THE BREACH NOTICE

- [31] Ms Meiring's argument stood on a second pillar – one which was not foreshadowed in the respondent's answering affidavit but which its factual averments were capable of sustaining. She submitted that the breach notice failed to comply with the requirements of the lease agreements in that it was not addressed to the respondent's chosen *domicilium*, being its business premises or the cell phone number stipulated in the lease agreements – the latter presumably by text message.

- [32] In this regard, Ms Meiring relied to the matter of *Fedgas (Pty) Ltd v Rack-Rite Bop (Ltd)* [1997] 3 All SA 68 (B) where, she submitted, the court held that service of a contractual notice on an address other than the lessor's chosen *domicilium* invalidated the notice.

- [33] *Fedgas*, however, is distinguishable. There, the lease agreement in peremptory terms required service on the chosen *domicilium*, whereas in the present matter service on the *domicilium* merely gives rise to a presumption of service within a stipulated period in favour of the serving party. Such a presumption will be unnecessary if service is proven on the papers (I return to this below).

[34] In the present matter, the applicant says that the breach notice was electronically transmitted by Ms Duvenhage on behalf of the applicant to the respondent, using the email address commonly used for correspondence with the respondent. A confirmatory affidavit of Ms Duvenhage forms part of the applicant's papers. In it, Ms Duvenhage identifies the email with reference to an annexure attached to the founding affidavit. The email of Ms Coraizin of the same day is addressed to the same email address, and the respondent replied to it. None of this is denied in the answering affidavit.

[35] In those circumstances, transmission of the breach notice by email instead of personal service at the premises, or notification to the chosen cell phone number is of no consequence.

REASONS FOR MY RULING DISALLOWING THE FILING OF A FURTHER AFFIDAVIT

[36] Mere days before the hearing, and after the applicant had already filed its heads of argument, the respondent applied to admit a further affidavit, wherein it addressed three issues: first, it sought to introduce a denial that it had received the breach notice sent by Ms Duvenhage by email; second, it advanced the *domicilium* argument dealt with above; and, third, it sought to place on record facts relating to the economic impact on the respondent's employees in the event that the court granted the eviction order sought.

[37] Ms Graham on behalf of the applicant opposed the introduction of the further affidavit, and indicated that the applicant would require time to reply to the new averments if the further affidavit were allowed.

[38] Rule 6(5)(e) of this court's rules makes clear that motion proceedings are ordinarily determined on the basis of three sets of affidavits, and that the filing of further affidavits is only permitted with the indulgence of the court. Where a party seeks to file a further affidavit, it must show that there is a good reason for doing so. That party must provide an explanation of why the affidavit is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. These principles are so well established as to be trite, see for example *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons*, NO 1963 (4) SA 656 (A) at 660D-H, and, more recently, *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 SCA para 11.

[39] After hearing argument, I refused the respondent application for leave to file the further affidavit. My reasons were as follows.

[40] The respondent only put up any explanation at all in respect of the first aspect of the further affidavit – the denial of having received the breach notice. The respondent's director Mr Liebenberg refers to the fact that in the respondent's answering affidavit it merely noted the applicant's averment that the breach notice was electronically transmitted by Ms Duvenage on 3 September 2024 to the email address p[...]. He says this is because the respondent was “*unsure*” whether the email had been received. That averment stretches credulity. If the respondent was unsure at the time, given the serious consequences for the respondent flowing from the breach notice, it is hardly believable that the respondent would not have investigated this aspect prior to the answering affidavit being filed.

[41] Mr Liebenberg implies that the failure to do so is because the email was not attached to the founding papers. But that is not correct. The email forms part of annexure FA 7 to the founding affidavit, and this is explicitly mentioned by Ms Duvenhage in her confirmatory affidavit that also forms part of the founding papers. Mr Liebenberg provides no explanation for the respondent having

overlooked the annexure, and the content of Ms Duvenhage's confirmatory affidavit, and failing to engage with that evidence in the answering affidavit.

[42] In any event, it was not necessary for the respondent to have seen the actual email before it could investigate whether or not the breach notice had been received. The founding affidavit at para 26 not only traverses its content in detail but also states the time and date of the email's transmission, to which email addresses it was sent, and who sent it. The respondent was undoubtedly aware at least of this part of the founding affidavit – the answering affidavit responds to this paragraph in *seriatim* fashion in the answering affidavit at para 45, albeit without engaging with the contents thereof.

[43] Mr Liebenberg goes on to say that it has “*subsequently*” come to the respondent's attention, after a thorough search of the inbox of the email address p[...], that the email was not received. To repeat - this is the email address that indisputably received Ms Coraizin's email only hours earlier on 3 September 2024, and which the respondent accepts “*is the communication channel historically used in general interactions between the parties.*”

[44] Mr Liebenberg does not engage with the question which urgently presents itself as to why the email from Ms Duvenage would not have been received, when that of Ms Coraizin indisputably was. He also does not traverse alternative explanations as to why on an unspecified date several months after filing the answering affidavit, the email might no longer be found in the inbox – who monitors the inbox, might other persons have inadvertently deleted it, could it have been caught in the spam filter? None of these questions are addressed. Mr Liebenberg quite simply provides no facts that might support his denial, which amounts to nothing more than a bare denial of the facts put up by the applicant.

[45] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13 the Supreme Court of Appeal elaborated on the application of

the Plascon-Evans rule for proof of fact in motion proceedings in such circumstances as follows:

“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 ... 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.”

- [46] Having regard to the above, Mr Liebenberg’s bare denial takes the respondent’s case no further because it does nothing to dislodge the applicant’s evidence in its founding papers.
- [47] Further, as already mentioned, Mr Liebenberg provides no explanation at all as to why, in its answering papers the respondent did not already rely on the *domicilium* argument – after all, the email address to which the breach notice was transmitted did not constitute the chosen *domicilium* of the respondent.
- [48] He also makes no attempt to explain why the answering affidavit failed to put up any evidence of what he says are the harsh socio-economic impacts of eviction on the respondent’s employees, if he regarded such evidence to be material.
- [49] In any event, as unfortunate as that impact will undoubtedly be on the respondent’s employees, there is nothing in the further affidavit to suggest that it is extraordinary when measured against other persons in a similar position, much less that this constitutes the kind of injustice that renders enforcement of the contractual terms in this case contrary to public policy in our constitutional dispensation.

[50] In these circumstances, it cannot be said that the respondent has provided an explanation, much less a compelling explanation, for why the further affidavit was not produced timeously, nor that the evidence which the respondent sought to introduce at the last minute was material. Those factors outweighed any consideration which might speak in favour of admitting the further affidavit, such as the healing balm of a costs order (which Ms Meiring in any event opposed) or the balance of prejudice which tilts mildly in the respondent's favour.

[51] Consequently, I refused the respondent's application for leave to file the further affidavit.

COSTS

[52] Lastly, on the issue of costs: the applicant succeeds with the application, and there is no reason to deviate from the rule that costs follow the result.

[53] The lease agreements between the parties provide for costs on an attorney and client scale. No reason was advanced as to why the court should not give effect to this contractual term, as well.

K S SALLER
ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant:

Instructed by:

For the respondent: