



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

JUDGMENT

Reportable

Case no: A 47/2025

In the matter between:

INFUSION SOCIAL CLUB CAMPS BAY (PTY) LTD APPELLANT

and

CAMPS BAY INVESTMENT TRUST (PTY) LTD RESPONDENT

Coram: FORTUIN, KUSEVITSKY, SLINGERS JJ

Heard: 23 July 2025

Delivered: 13 November 2025

This judgement will be handed down electronically by email circulation to the parties' legal representatives' email addresses.

JUDGMENT

Kusevitsky J (Fortuin et Slingers J concurring):

[1] The appeal in this matter concerns the validity of a cancellation of a lease agreement concluded between the parties and the subsequent order of eviction which followed on 11 July 2024. With leave to appeal having been refused by the Court *a quo*, leave was subsequently granted by the Supreme Court of Appeal on 09 December 2024.

Factual Matrix

[2] It is common cause that the Appellant (“Infusion”) and the Respondent (“CBIT”) concluded a written commercial property lease agreement and an Addendum thereto on 4 March 2024 in terms of which the Respondent let restaurant premises located in the up-market area of Camps Bay, to the Appellant. The Respondent owns the building which houses various tenants therein from doctors, a gym and estate agents. The Appellant through its sole Director, Mr Arthur Calamaras wished to establish a restaurant and put forward a written proposal of its planned style of operation to Mr John van der Vyver acting on behalf of the Respondent.

[3] The relevant material, express terms of the written lease signed on 4 March 2024 *inter alia* are the following:

- 3.1 The Appellant would lease the premises from Respondent for a period of five (5) years, from 1 March 2024 to end February 2029 (clause 5) for a monthly rental of R75 000.00 (clause 6.1). The Appellant would pay a deposit of R150 000.00 to the Respondent (clause 7.1);
- 3.2 The Appellant would conduct a restaurant business from the premises, which includes the cooking and selling of food and serving of drinks, including alcohol (clause 9.1); The premises shall be used for no other purpose whatsoever, without the Respondent's prior written consent which consent shall not withheld (clause 9.1.3).
- 3.3 The Appellant shall be entitled to carry out such alterations or additions including carpeting, curtaining, partitioning to the premises as the Appellant may itself require. Any such work shall be carried out at the expense of the Appellant (clause 9.4); The nature of such alterations, improvements etc. and their form of construction shall first have been approved by the Respondent in writing (clause 9.4.1) and no alterations or additions to the premises shall be affected by the Appellant save and except with the prior written consent of the Respondent ("clause 9.5").

[4] The breach of contract is found in clause 20 and provides as follows:

“20.1 If the Lessee fails to pay any amount due or commits any other breach of any other terms of this lease and fails to remedy such breach within (7) seven days after receipt of the notice delivered by the Lessor, then and in such event the Lessor shall have the right to terminate this lease without further notice and re-take possession of the premises and thereupon this lease shall come to an end...”

20.2 Any written notice sent by the parties by way of prepaid registered post shall be deemed to be received on the fourth day of posting, or if delivered by hand to the leased premises, such notice shall be deemed to be received on the date of delivery, or if sent via email such notice shall be deemed to be received by the Lessee’s email on the same day.”

[5] Clause 22 provides that no variation would be of any effect unless reduced to writing and signed by both parties, and clause 24 provides that the lease constitutes the whole agreement and that no representations not stated in the document are binding on the parties.

[6] The Addendum to the lease agreement related to the terms of the previous tenant, Firefly Cafe (Pty) Ltd (“Firefly”). It is common cause that this restaurant had run into financial difficulties and was indebted to the Respondent in the amount of R 226 836.50 in respect of arrear rental. The parties, after attempts to rescue Firefly had failed, came to an arrangement wherein the Appellant would purchase the equipment of Firefly and pay its arrear rental in the amount of R 226

836.50 to the Respondent. It is not disputed that the Appellant, on the basis that it would be leasing premises from the Respondent, agreed to purchase the shop content of Firefly in the amount of R 1 500 000.00.

[7] The relevant terms of the Addendum are the following:

7.1 It confirmed that the previous tenant's lease, between the Respondent and Firefly had been terminated on 29 February 2024.

7.2 The lease between the Appellant and Respondent would commence on 1 March 2024 and would terminate at the end of February 2029 with an option to renew for a further 5 years under the same terms and conditions subject to the Appellant giving the Respondent three calendar months' notice of its intention to renew this lease. (clause 2).

7.3 The Appellant would pay an amount of R226 836.50 to the Respondent on behalf of Firefly to settle Firefly's indebtedness to the Respondent (clause 3);

7.4 The Appellant would be granted free, beneficial occupation of the premises for the month of March 2024, in order to afford the Appellant an opportunity to rebrand the premises (clause 4);

7.5 *Due to the special nature of the business pertaining to the Appellant, special regard shall be paid by the Appellant to Clause 12 of the Lease, with reference to not committing or allowing to be committed any act calculated to be a nuisance or to disturb the peace and enjoyment of the general public (clause 5) (“own emphasis”);*

[8] Clause 7 of the addendum provides that:

“The consent of the Lessor for both the sale of Firefly Café (Pty) Ltd agreement and acceptance as a Lessee, is dependent on the nature of the business as specified. We require a best in class, well run café, restaurant and bar that has occasional DJs and quiz evenings from time to time, promotes the building, and has a symbiont relationship with the other tenants and stakeholders.”

[9] As alluded to above, the Respondent, following a purported cancellation of the lease agreement, applied for and was granted an order of eviction in the Court *a quo*.

[10] A great amount of evidence was placed before the Court *a quo* as to whether or not the Appellant’s business would operate as a ‘normal’ restaurant,

or whether it would be a restaurant where, *inter alia*, food infused with cannabis products would be served. I will return to this aspect in due course, although it is interesting to note the special and very specific reference made in clause 5 of the Addendum to the lease agreement recording “*the special nature of the business pertaining to the Appellant...*”. This clause, on the face of it, seem to indicate an appreciation by the parties that they were not dealing with a ‘normal’ restaurant. In any event, I do not make any definitive finding in this regard.

[11] The Appellant contends that the Respondent set out to terminate the lease agreement a mere nine days after the lease agreement was signed. Firstly, the Appellant argues that the Court *a quo* erred in finding that there was evidence to support the Respondent’s purported cancellation. They argue that the Court relied upon inadmissible opinion and hearsay evidence put up in the Respondent’s supporting affidavits and furthermore, that the Respondent’s evidence was directly contradicted by the unimpeachable and admissible evidence of the Appellant. Thus based on this dispute of facts, so the argument goes, the matter could only have been resolved in accordance with the *Plascon Evans*¹ rule in favour of the Appellant. This is denied by the Respondent arguing, *inter alia*, that the parties are bound by the appeal record and in *casu*, the Appellant now seeks to raise a new defence on appeal which is impermissible.

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-634I

[12] Central to the determination of this matter is whether, pursuant to the signing of the lease agreements and the subsequent interactions between the parties, the conduct by the Appellant through its Director, Mr Arthur Calamaras, amounted to a cancellation of the lease agreement either through a settlement agreement, alternatively whether there was a cancellation of the lease agreement due to a material misrepresentation by omission by the Appellant.

[13] In the founding affidavit, which was deposed to by Mr John Van der Vyver, the Director of CBIT, he advised that soon after the lease agreement was signed, that he had received reports about the Appellant's 'undisclosed business'² from the building's tenants. Concerned, on 11 March 2024, a meeting was held at the premises where he met with Mr Arthur Calamaras and confronted him regarding Infusion's intention to sell cannabis from the premises and raised the other tenants' concerns. According to Mr Van der Vyver, Mr Arthur Calamaras admitted to him that: Infusion would be selling cannabis to the public from the premises but explained that he had a legal opinion confirming that in the context of a 'social club', that this was legal; He also admitted that food offered in the restaurant would be infused with cannabis products, including tetrahydrocannabinol ("THC"); and that the Business proposal put forward by the Infusion Group had not mentioned either of the aforementioned activities. Mr

² The operation of a social club where cannabis would be sold; offering food in the restaurant which would be infused with cannabis products including THC were referred to in the founding affidavit as the 'Undisclosed Business'.

Van der Vyver contends that Mr Arthur Calamaras explained that it would not be feasible to exclude the undisclosed business from Infusion's business model and Mr Van der Vyver advised that he considered the manner in which this was not disclosed as a serious problem, and that he would have to consult the board of directors and relevant stakeholders and revert to him.

[14] On 12 March 2024, Mr Van der Vyver addressed an email to Mr Arthur Calamaras referring to their meeting of the previous day with feedback from their stakeholders. He attached the Infusion presentation that formed the basis of their proposal and advised that the presentation had not mentioned the sale of cannabis and the CBD with a THC component being used. He asked Mr Calamaras to *"clarify the component of [I]nfusion with THC as well as legal opinion that supports this"* as the stakeholders were not comfortable with, and would not permit the sale of cannabis on site. He concluded that both their legal teams would need to be happy with that and that *"before we can proceed with the project, we would need this detail and the other stakeholders will need to understand this and be comfortable accordingly with this."*

[15] On the following day, 13 March 2024, Mr Van der Vyver sent a further email to Mr Calamaras, saying that things had progressed further. He referred in this regard to the fact that two further tenants had requested meetings and had

indicated that they would leave if the Respondent continued with the restaurant. He referred also to ostensibly many sectors of the Camps Bay community that had voiced their disapproval. He said that there had been a material non-disclosure. He concluded by stating that as a result, they '*therefore intend to cancel the lease*' and put forward a proposal in the manner in which this could be achieved.

[16] Shortly after on the same day, Mr Arthur Calamaras replied advising that he would reply soon. A telephonic conversation between the two ensued. Mr Van der Vyver then emailed Mr Arthur Calamaras confirming their telephonic discussion wherein they ostensibly agreed in principle to the termination of the lease agreement in the terms stated. The email reads as follows:

"Hi Arthur

Thank you for your call.

The key principles of the agreement that hopefully can be distilled by Lawrence and Shayne as a one pager are:

1. Lease between CBIT (Pty) Ltd and Infusion CB, is cancelled forthwith.
2. CBIT refund monies paid being arrears and deposit (R 150k + R 223k)
3. All keys returned.
4. An AOD is drafted between CBIT and Luzanne for arrears net of deposit, R 223k less R 62k approx.
5. ...

6. Can we endeavour to draft, agree, sign, by Friday 15/3/24. We shall give notice for funds on call today.

Regards

John”

[17] On 15 March 2024, Mr Arthur Calamaras responded per return email. He lamented the concerns raised by the tenants as skewed or ill-informed prejudice, and maintained that Infusion’s business model prides itself on being a professional business committed to upholding the highest standards of professionalism, responsibility and compliance, having established Infusion Social Clubs in both Sea Point and Durbanville and other areas of Cape Town. He further addressed two financial aspects which hinged upon the cancellation of the lease.

[18] It is common cause that the Appellant failed to sign the draft agreement presented to Mr Arthur Calamaras on 18 March 2024 and on 25 March 2025 through their erstwhile legal representatives, informed the Respondent that they denied that the lease agreement was *void ab initio*, but to the extent that they wished to cancel, that they would consider the cancellation of the lease agreement by mutual agreement upon further proposed terms.³

³ “11.1 CBIT to pay Infusion R 150 000.00 plus R 226, 850.00 on or before the close of business, 31 March 2024;

11.2 CBIT to pay Infusion R 1 500 000.00 on or before close of business, 31 March 2024 *in lieu* of the restaurant equipment and furnishing purchased by Infusion from Firefly Café (Pty) Ltd.”

Court a quo

[19] The Court *a quo* in its reasoning found that:

- (a) Infusion (and the Infusion Group) had materially misrepresented the true nature of its business to CBIT by failing to disclose its cannabis business;
- (b) Infusion then belatedly undertook not to trade cannabis on the premises, but this undertaking came after the material misrepresentation of its business and after a number of breaches of the lease by Infusion;
- (c) The parties had settled the matter and Infusion had agreed to terminate the Lease; and
- (d) Even after termination, certain other breaches manifested in the form of disturbances emanating from the premises, including cannabis being smoked, complaints from tenants, breach of the law by allowing smoking inside the premises, and the fact that Infusion embarked on branding and alterations of the premises without CBIT's consent.

Was the Respondent's termination of the lease valid?

[20] To evaluate the Appellant's first defence as to whether or not the cancellation was invalid firstly necessitates an evaluation as to whether or not the defence of *Lex commissoria* is available to the Appellant.

[21] The Respondent argues that this is an impermissible ground of appeal because this was not raised in the Appellant's answering affidavit. During argument, counsel for the Appellant conceded that this was a new defence.

[22] According to the Respondent, whether or not there has been compliance with an agreed method of cancellation is a *factual* question. It must therefore be raised in evidence. They say had it been raised by Infusion in its answering affidavit, CBIT would have had an opportunity to address this defence. They argue that it would be prejudicial to CBIT to allow the defence to be raised now, without its having had an opportunity to address the contention on a factual level.

[23] In support of this contention, they argue that the Constitutional Court has held that it would not be in the interests of justice "*for an appeal court to overturn the judgment of a lower court on the basis of an issue that Court was never asked to decide*".⁴ Whereas some leeway may be granted where a new point of *law* is raised for the first time on appeal, there is no such leeway where a new *factual* issue is raised.⁵ Thus, in order to permit a new legal argument to be made, the court of appeal "*must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no*

⁴ *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and another* 2016 (1) SA 621 (CC) para 62.

⁵ *Provincial Commissioner, Gauteng South African Police Services and another v Mnguni* [2013] 2 All SA 362 (SCA) para 27; *Mighty Solutions supra* para 63; *Moroka v Premier of the Free State Province and others* [2022] ZASCA 34 para 36.

*prejudice will be occasioned to the other parties by permitting the point to be raised and argued.*⁶

[24] During argument, counsel for the Appellant argued that the question of the lawfulness of a cancellation is a question of law. They argue that as a fact, no notice to remedy a breach was given. It is apparent from *inter alia* the correspondence of the Respondent's legal representative dated 25 March 2024 that reference was made to all of the specific clauses in the lease agreement that the Appellant had ostensibly breached. Notably absent given these ostensible breaches and reliance on these clauses was the Respondent's notice to remedy the said breaches. It is also clear from this correspondence that the Respondent accepted that no settlement had occurred, stating that "[s]hould your client no longer wish to settle this matter, all of our client's rights are reserved...". On the 13th May 2024, the first indication of a letter headlined "*Notice of Breach*" was sent to the Appellant. The letter referenced various ostensible breaches and concluded in paragraph 14 thereof that it reaffirmed the cancellation email sent on 13 March 2024, but nevertheless afforded the Appellant a further 7 days from receipt of the latter to make representations regarding the aforementioned breaches. On 20 May 2024, the Appellant through its legal representatives replied, referring to the "*Notice of Breach*" dated 13 March 2024 and denied that

⁶ *Minister of Justice and Constitutional Development and others v Southern African Litigation Centre and others* 2016 (3) SA 317 (SCA) para 24 (emphasis added).

it had materially breached the lease agreement and that a right to cancel the lease agreement had accrued to the Respondent to warrant the “cancellation email” transmitted on 13 March 2024.

[25] From the above correspondence at the very least, it is clear that the validity of the cancellation of the lease agreement was at issue and raised and dealt with by both parties on the papers. It is also important to remember that the issue of the purported settlement does not yet arise here, as that the legal personality of an entity remain sacrosanct. In the founding affidavit, the Respondent averred that Infusion was advised that it was required to vacate the premises and that they had failed to remedy its material breaches of the lease agreement and the Addendum.⁷ This was again reiterated in paragraph 80 of the founding affidavit where the Respondent *inter alia* listed the breaches complained of and declared in paragraph 82 of the founding affidavit that Infusion had failed to remedy the breaches. Tellingly, perhaps having appreciated that no valid notice to remedy those breaches were sent, it contended that “*even if the Lease agreement had not already been validity cancelled by way of the First Cancellation email and the Notice of Breach...CBIT hereby cancels the Lease Agreement if found to be still valid.*”

⁷ Paragraph 70 of the founding affidavit

[26] In the answering affidavit, the Appellant denied that it materially breached the lease agreement and that the Respondent had a right to cancel the lease agreement and demand its ejection.

[27] Based on the aforementioned evidence, I am satisfied that the defence of the *Lex Commissoria* is available to the Appellant. In fact, this clause forms the very basis in any contract in order to compel or demand specific performance by one party from the other contracting party. To say otherwise would be absurd. Furthermore, such clauses are valid and enforceable according to their terms and the court has no equitable jurisdiction to relieve a debtor from the automatic forfeiture resulting from such a clause.⁸ In sum therefore, a court cannot assess the validity of a termination without evaluating compliance of the very enabling provision or clause rendering the termination or cancellation valid.

[28] I am also of the view that, bar the purported settlement, which I will deal with in due course, that the Court *a quo* erred in not assessing these allegations in accordance with the *Plascon-Evans* rule and in my view, it seems as though the issue of the deponent to the answering affidavit, which seemed to occupy the court's attention, was a conflation of the issues. I am therefore in agreement with

⁸ Christie GB Bradfield Christie's Law of Contract in South Africa (7th ed) at 599

the Appellant's submission that the Court *a quo* failed to deal at all with the Respondent's version and simply accepted the Respondent's version *in toto*.

[29] A classic *lex commissoria* clause affords an innocent party the right to cancel in the event of a default on the part of the defaulting party after the latter had given written notice to remedy the breach, *in casu*, within 7 days. If there is no compliance, that should be the end of the matter. A *lex commissoria* is peremptory and non-compliance would prevent a party from relying on any of the breaches on which it purports to rely to cancel an agreement.⁹

[30] What then of the other purported breaches such as the noise nuisance and the apparent building without permission? Whilst no more weight was placed on these purported breaches, supporting affidavits were obtained by tenants to support these alleged breaches. In the Court *a quo*'s reasoning, certain additional breaches of the lease manifested in the form of disturbances emanating from the premises; complaints from other tenants impacting their business; allowing smoke inside their premises and embarking on alterations and branding without prior approval from the Respondent.¹⁰ Again, in accordance with clause 20.1 of the lease agreement, the Respondent had to afford the Appellant 7 days within which to *remedy* the breach. The Respondent failed to do this. Instead, it sent out

⁹ See *Hano Trading CC v JR Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) at paras 33 to 34

¹⁰ Paragraph 24 of the Judgement

a ‘notice of breach’ stating that ‘by virtue of the cancellation email, reinforced by the fresh termination notice contained in this letter, ICB is afforded 7 days from receipt of this letter to make representations regarding the aforementioned breaches, failing which to vacate the premises...’. (“my emphasis”)

[31] What is apparent from the letter is the following: The Appellant was not afforded time to *remedy* these purported breaches in accordance with clause 20.1 of the lease agreement; the notice referred to a previous notice of cancellation; and the present notice invited the Appellant to ‘*make representations*’ about the alleged breaches. In my view, this does not meet the threshold of a notice to remedy a breach nor does it comply with clause 20.1 in that the Appellant is not granted an opportunity within the stipulated timeframe to remedy the supposed breach. This was also the case in *Hano Trading* where the Court, on a closer analysis of the notice itself, held that it entirely failed to indicate and call on the respondent to remedy any particular breach complained of and accordingly failed to comply with the *lex commissoria*.

[32] I am in agreement with the Appellant’s contention that where an agreement lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.¹¹ It is clear from the evidence that the

¹¹ See *Bekker v Schmidt Bou-Ontwikkelings CC and Others* 2007 (1) SA 600 (C) at 605; *Standard Bank of SA Ltd v Koekemoer* 2012 JDR 2223 (GNP) (70014/2011) [2012] ZAGPPHC 300 (20 November 2012) at para 15

Respondent failed to comply with this provision and as a consequence, the Respondent's purported cancellation is invalid.

Misrepresentation

[33] What then remains to be determined is whether or not the Respondent was entitled to cancel the lease agreement on account of misrepresentation. As already stated, at the meeting of 11 March 2024, a discussion was had between Mr Van der Vyver and Mr Arthur Calamaras about the purported undisclosed business. The founding affidavit records that the meeting of the 11th March 2024 was for the purpose of discussing Infusion's proposed branding, which in terms of clauses 9.4.1 and 9.5 of the lease agreement, had to be approved by the Respondent. The email recordal of their meeting stated that the material non-disclosure would need to be resolved "before we can proceed with the project".

[34] A reading of the 12 March 2024 email indicates that the Respondent sought clarification that the business model of Infusion was indeed lawful; required their legal opinion relied upon and re-iterated that they would require this information so that their stakeholders would understand and be comfortable with that.

[35] The email of 13 March 2024 indicated further unhappiness from neighbouring tenants about the proposed restaurant as well as "...many sectors of

the Camps Bay community, our long standing customers, including the CID, of which we are a founding member, have clearly voiced their disapproval and along with ourselves do not find this acceptable.” The letter stated that they therefore “intend to cancel the lease”. It is trite that contracts that are *void ab initio* are invalid from inception and are of no legal effect. Where contracts are *void ab initio*, the doctrine of election finds no application.¹² Here, it is evident that the Respondent made an election based on his conduct and the correspondence that followed. I am therefore in agreement with the contention that to the extent that the lease agreement was voidable, that the Respondent elected at this point to seek further clarification in the manner stated and elected to keep the contract alive at that point.

[36] On 19 March 2024, a draft agreement dated 18 March 2024 was sent. It is not necessary for me to quote the letter in full since it is neither an agreement, nor a notice of termination. At best for the Respondent’s it was a proposal to navigate a proposed election to terminate the lease agreement. On 25 March 2024, the Appellant directed a letter *via* their erstwhile legal representatives denying that there was a breach of clause 7 of the Addendum to the lease agreement. Importantly, the following was recorded:

¹² See Christie at 349.

- “6. It is of significance that the “Infusion-brand” is an established business with Infusion Social Clubs in both Sea Point and Durbanville and other areas of Cape, and having brand exposure, *inter alia*, on social media and the internet (website). Prior to the conclusion of the Lease, the representative of CBIT was invited to view and inspect the existing Infusion Social Clubs.
7. In consideration of the conduct of CBIT, it is significant to take cognizance of the fact that CBIT voluntarily and by agreement concluded the Lease -as such, our client denies that the Lease is *void ab initio*.
8. To such extent that the lease may have been voidable (which our client denies), and to such extent that CBIT may have had the choice to elect whether to keep the contract alive or to cancel it, CBIT forfeited the right to rescind or cancel the lease when it affirmed the contract by accepting payment of the requisite deposit on 4 March 2024, and then by having approved the shop front branding on 11 March 2024.” (“own emphasis”)

[37] The letter further indicated that Infusion was a party to a binding lease agreement in terms whereof the Appellant had the right to run a café, restaurant and bar and any attempt by the Respondent to prohibit them from doing so would be a breach of the lease agreement.¹³

¹³ Clause 10 of the letter dated 25 March 2025

[38] The Respondent in the founding affidavit reiterated its contention that Infusion materially misrepresented the business conducted by them and the business intended to be conducted. They averred that CBIT entered into the lease agreement on the basis that the business was as disclosed to it as in the business proposal; that the Camps Bay subsidiary would conduct the same business as the rest of the Infusion Group conducted had not been disclosed, and had it been done, then they would not have entered into the lease agreement had it known the true nature of the Infusion Group's business, even if the Infusion Group had given an undertaking not to conduct certain elements of that business from the premises. It concluded that this misrepresentation was material and the misrepresentation itself founded a right on the part of CBIT to terminate, which it exercised.¹⁴

The purported tacit oral settlement

[39] What then does one make of the purported oral agreement to cancel the lease? The Court *a quo* found that a settlement had been reached by which Infusion agreed to terminate the lease and vacate the premises. However, this purported settlement would not have been binding on the parties since, although the proposal was reduced to writing, the agreement itself was not signed by the parties as envisaged in clause 22 of the lease agreement. Reliance could therefore

¹⁴ Paras 77 to 79 of the founding affidavit.

not have been placed on this purported oral agreement to terminate. The Court *a quo* therefore erred in the acceptance of this purported settlement agreement.

[40] Furthermore, the reliance by the Respondent on the uncontroverted facts of the founding affidavit¹⁵ – given that the answering affidavit was not signed by Mr Arthur Calamaras who had negotiated and signed the lease agreement and was party to the meeting with Mr van der Vyver - but instead deposed to by his son Mr Duan Dongas-Calamaras, does not assist the Respondent. This is because whilst it may be that the evidence of Mr Van der Vyver stands uncontroverted *vis-a vis* the purported settlement, again, there was no compliance with clause 22 of the lease agreement.

[41] Ponan JA in *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa)*¹⁶ recognized that agreements can be concluded tacitly to replace previous agreements, but held that a contracting party, when faced with a breach of the contract by the other party, must elect whether to terminate or to enforce the contract. Once an election is made, the party's bound by it. Whether such an election has been made is a factual question. Two questions flow from this finding. In the first instance, the Respondent relies

¹⁵ According to the founding affidavit, Mr Arthur Calamaras admitted to Mr Van der Vyfer that Infusion would be selling food infused with cannabis products including THC. See also para 24 of the Court *a quo* judgment.

¹⁶ (288/2017) [2018] ZASCA 9; 2018 (3) SA 404 (SCA) (1 March 2018)

on this *dictum* to support its argument that there was a tacit agreement to cancel the lease, and as a result, the *lex commissaria* is not applicable.

[42] If one assumes that an election was made to cancel, a letter giving notice of a breach or termination would not have been required. The facts, however, indicate that based on the email correspondence, Mr. Arthur Calamaras did not agree or confirm the oral tacit agreement to cancel the lease. It is therefore evident that Mr. Arthur Calamaras elected not to cancel the agreement. Ponan JA in *Ocean Echo* held that the tacit agreement pleaded by *Ocean Echo* would have the effect of terminating the operation of the contract *in futurum* only, in other words, obligations already accrued remain enforceable, but the operation of the contract ceases as far as future obligations are concerned.¹⁷ That case centred around an exception to plea where the court *a quo* upheld an exception and dismissed the action. Central was whether an informal agreement without written prior consent is not a cancellation of the agreement, but a variation of the prohibition because no prior written consent had been given.

[43] He further held that the tacit agreement, *if proved*, would have extinguished the contract as a source of future obligations whilst keeping alive already accrued obligations by virtue of its operation in the past. This would not, the court held,

¹⁷ *Ocean Echo supra* at para 13

in any way, involve a variation of the terms of the original lease agreement. He however emphasized, that these were not firm findings and much depended on the evidence to be led in the main trial. In other words, the court's findings were based on the *prima facie* evidence presented by a party, in exception proceedings. The Court stressed that these were *not firm findings*. Much will depend on the acceptability and the admissibility of the evidence. But that will only be known once the appellants have been the given the opportunity to adduce evidence. In my view therefore, *Ocean Echo* is distinguishable from the present in so far as the proceedings in that court were interlocutory in nature whereas the proceedings in *casu* in the Court *a quo* were proceedings of final relief sought and the application of the *Plascon-Evans* rule ought to have found application.

[44] It is therefore clear that based on the evidence provided, the Respondent's contention that Mr Arthur Calamaras agreed to terminate the lease agreement is not supported by the further evidence on record in the form of the correspondence. In *Ferreira & Another v SAPDC (Trading) Ltd*,¹⁸ Botha JA, opined, extracting the following principle from *Neethling's* case as follows: that while an oral agreement varying (at least materially) the terms of a contract of the kind in question is not permissible, there is no objection to allowing proof of an oral agreement relating to the cancellation of the contract by which its terms are

¹⁸ [1983] 3 All SA 346 (A) at 346, see also *Ocean Echo* at para 11

not placed in issue. In *casu*, substantial evidence was placed on record placing in issue the various terms, not only of the lease agreement, but also the good faith negotiations of the terms of the purported settlement, which ultimately was rejected. On this basis alone, a reliance on any purported settlement was a misdirection.

[45] In any event, *Ocean Echo* ultimately found that in that case that a tacit agreement as pleaded, would have had the effect of only terminating the operation of the contract *in futurum*, so as to leave intact the remaining obligations that arose from the past operation of the contract with all of its terms.¹⁹ In other words, whilst a provisional finding of the facts as presented, the court did not find that a tacit agreement nullified the contract as being *void ab initio*.

[46] In its heads of argument, the Respondent contends that the Appellant, ‘impermissibly’, sought to add new grounds to its original defence, such as contending that the doctrine of election precluded CBIT from alleging that it was entitled to terminate the lease and that the lease may also be void/voidable due to misrepresentation. It then relied upon the Court *a quo*’s reasoning to support the finding that the Respondent’s termination of the contract was valid and entitled it to evict the Appellant.

¹⁹ *Ocean Echo* at para 15

[47] The Appellant argued that the Respondent in fact clearly elected to accept the contract and that this is incompatible with an election that renders it void based on any misrepresentation. The doctrine of election proceeds from the point that an injured party in a contract, owing to his or her contracting party's failure to perform, has options²⁰. They can elect to treat the contract as binding or cancel the contract. Once an election has been made, it is binding. The rationale for the binding nature of the election stems from the principle that no one can take up two positions which are inconsistent with each other²¹. I am in agreement with the Appellant's argument that had the misrepresentation been important enough to have resulted in a voidable contract, then the election must have been made to rely on voidability.

[48] In *casu*, the evidence indicates that the decision to terminate by the Respondent was more informed by the threats of the tenants to terminate their lease agreements and the perceived perception of Infusion's business model. Had the Respondent done its due diligence, as it was invited to do by the Appellant prior to entering into the lease agreement, then it would have realised that the restaurant might not have been a good 'symbiotic' fit to the rest of the premises. It failed to do this. Instead various correspondence ensued about ostensible breaches; that the trust relationship had broken down; that the business was not

²⁰ *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* 2018 (3) SA 65 (SCA) paragraph 20.

²¹ *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ) at pages 511 - 512

‘symbiotic’; and that there had been a settlement agreement. I am in agreement that one cannot cure *ex post facto* a misrepresentation. Furthermore, this cannot be done where reliance is placed on the existence of the contract and its terms. This is so because the Respondent invited the Appellant in the letter of 12 March 2024 to find solutions going forward. The Appellant gave their undertaking that they would undertake the business of a café and restaurant in accordance with clause 7 of the Addendum.

[49] On 13 May 2024, the Respondent’s legal representative sent an email that dealt with, *inter alia*, the reconsideration of a branding proposal that omitted any reference to ‘infusion’, ‘social club’ and derivatives and imagery that might be reasonably associated with Infusion or with cannabis. Notwithstanding the above proposal, the Respondent proceeded to reiterate the first cancellation email of 13 March 2024 based upon purported breaches and incorporated a ‘fresh’ termination notice to ‘make representations regarding the aforementioned breaches’ within 7 days, failing which, to vacate the premises. I have already expressed my finding on this purported ‘notice’.

[50] In my view, the undertaking to comply with clause 7 of the Addendum was akin to a tender to perform. In *NKP Kunsmisverspreiders (EDMS) Bpk v Sentrale Kunsmis Korporasie (EDMS) Bpk en ‘n Ander* 1973 (2) SA 680 (T) at p685, Nicholas J said the following:

‘The purpose of a tender of performance is to enable the other party to take the necessary steps to perform his part of the contract. But if the latter expressly declares that he is under no circumstances prepared to perform, the whole purpose of a tender falls away. In my view, the first defendant by its continuing repudiation of the contract waived its right to a tender of performance by the plaintiff (cf. Van Zijl Steyn, *Mora Debitoris* volgens die Hedendaagse Romeins-Hollandse Reg. pp. 80 - 82).’

[51] The Respondent, having given the Appellant an opportunity to make representations, is bound by his election to keep the contract alive. The undertaking by the Appellant to not conduct the business complained of, in my view, amounted to a tender by the Appellant to continue with his reciprocal obligations under the agreement. If the Respondent on the other hand, made it clear that even that undertaking or tender would not be accepted, it then waived the formalities of that tender. The resultant consequence of that would be that the Appellant would be protected against costs or a claim for damages by the Respondent *in futurum*.²²

[52] The order of the Court *a quo* held that “*the valid cancellation of the lease agreement ... is confirmed*”. The necessary implication is that the Court considered that a valid lease came into being so that it was capable of being cancelled. The corollary of this is that there was no basis for asserting that the lease was void *ab initio* based on the alleged misrepresentations. The Court *a*

²² See in general *Sandown Travel supra* at 518-520

quo confirmed in paragraph 8²³ of the judgment that a commercial lease agreement came into being.

[53] Then, with a valid lease in place, with there being no question of the lease being void *ab initio*, the crux of the Respondent's claim is that at least one of the several attempts made by it to cancel had been successful. In its judgment, the Court *a quo* referred, at paragraph 16²⁴, to the Respondent having "*terminated the lease agreement because of*" the "*impasse concerning the appellant's trading activities*". It followed "*because of the alleged non-disclosure*", because the business model "*was not a symbiotic fit*", because settlement discussions led to the appellant agreeing "*that the lease agreement had been validly terminated*". Paragraph 18 of the judgment, however, concludes that the Appellant made a material misrepresentation about the true nature of its business and that: "*The lease agreement was conditional on a complete and accurate disclosure*". The Appellant argued, correctly so, that if this were correct, no lease contract was concluded because the condition had not been fulfilled.

[54] The Appellant further argued that paragraph 23 of the judgment compounded this error when it reasoned that "*the applicant would not have entered into the lease agreement had it known the true nature of the respondent's*

²³ Record Judgment p 58

²⁴ Record Judgment p 60

business”. I am in agreement that the Court *a quo* erred in finding that the lease was conditional, especially as it had already held that the contract had come into being. These are mutually destructive conclusions. A finding that the lease had come into being necessarily means that there were no antecedent misrepresentations justifying it being declared void. Furthermore, no party relied on the non-fulfilment of any conditions as a ground for escaping the terms of the contract. In fact, the Respondent confirmed that the conditions, such as they were, had been fulfilled and that the contract was concluded.

[55] For all the reasons stated above, I am of the view that the appeal must be upheld.

ORDER

1. The Appeal is upheld.
2. The order of the court *a quo* is set aside and substituted with the following:
“The application is dismissed with costs, including the costs of two counsel where so employed on scale B.”
3. The Respondent is to pay the costs of the application for leave to appeal and the costs of the appeal on scale B.



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DS KUSEVITSKY

JUDGE OF THE HIGH COURT

Fortuin J (concurring)

I agree. It is so ordered.



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C FORTUIN

JUDGE OF THE HIGH COURT

I agree.



Handwritten signature of H Slingers, with a black rectangular redaction box covering the middle portion of the signature.

H SLINGERS

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:

Adv M Seale SC

Adv L Zazeraj

Instructed by LDS Attorneys & Assoc

For the Respondent:

Adv E Fagan SC

Adv C Fehr

Instructed by Werksmans Attorneys