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

JUDGMENT

Not Reportable
Case no: 7742/2021

In the matter between:

WEBRAM FOUR (PTY) LTD	**PLAINTIFF**
and	
TRANSFORMATION CAPITAL GROUP (PTY) LTD	**FIRST DEFENDANT**
MICHAEL ESLICK	**SECOND DEFENDANT**
REGINALD BATH	**THIRD DEFENDANT**

Coram: **AG CHRISTIANS AJ**
Heard: 25, 26 and 27 November 2025
Written Submissions: 5 December 2025

Delivered: 4 June 2026

JUDGMENT

Christians AJ

Introduction

1. The Plaintiff claims from the Defendants, jointly and severally, payment of arrear rental and damages in the amount of R918 550.35 arising from a commercial lease agreement between the Plaintiff and the First Defendant. The Second and Third Defendants stood surety for the First Defendant's obligations under the lease.

2. The First Defendant counterclaims for payment in the amount of R1 006 221.44, comprising the deposit it paid pursuant to the lease agreement and the value of certain alterations and additions effected to premises.

3. At the commencement of the hearing, counsel for the Plaintiff indicated that the Second Defendant's estate had been placed under a final order of sequestration and, as a consequence, the Plaintiff's claim, as against the Second Defendant, was withdrawn. In what follows, therefore, any reference in this judgment to "the Defendants" shall mean the First and Third Defendants.

The pleadings

4. The relevant parts of the Plaintiff's particulars of claim may be summarised as follows:

4.1. The Plaintiff is the registered owner of certain immovable commercial property in Cape Town, in respect of which it concluded a lease agreement with the First Defendant on or about 29 November 2019. The lease was intended to endure for a period of five years and six months, commencing on 1 February 2020 and terminating on 31 July 2025. The monthly amounts payable in terms of the lease agreement included rent and contributions towards a generator levy, utility charges, municipal rates, the CID levy and an amortised contribution towards tenant installations.

4.2. In terms of the lease agreement, the First Defendant paid a deposit in the amount of R411 995.25 and the Plaintiff, in its discretion, was entitled to apply the deposit toward the payment of rent or any other obligation for which the First Defendant is liable.

4.3. The Second and Third Defendants bound themselves to the Plaintiff as sureties *in solidum* and as co-principal debtor for the due and punctual payment and performance of the First Defendant's debts and obligations arising from the lease agreement.

4.4. As at the date of summons, being 6 May 2021, the First Defendant was in arrears in the amount of R920 500.62. Pursuant to certain calculation discrepancies which emerged during the evidence, this figure was ultimately adjusted to R918 550.35 (i.e. having deducted the amount of R1 950.28 from the initial claim amount).

4.5. Plaintiff claimed payment of the arrears plus interest at the prescribed rate and costs on the scale as between attorney and client, the scale of costs being provided for in the lease agreement.

5. Save to deny that the First Defendant owed the Plaintiff the amount claimed, or any amount at all, the Defendants did not dispute the allegations summarised above.

6. Instead, the Defendants alleged that the Plaintiff repudiated the lease agreement in June 2021 and that the repudiation was accepted by First Defendant, which acceptances was communicated to the Plaintiff on 23 June 2021. As a result, so the contention went, the enforcement of the Plaintiff's claims would be "*unfair, unreasonable, unjust and/or against ubuntu, and accordingly against public policy*".

7. Flowing from these broad public policy considerations, and the allegation that the Plaintiff was unjustly enriched as a result of its repudiation of the agreement in June 2021, being one and a half years into a five and a half year lease, the First Defendant claimed

payment in the amount of R1 217 352.74, comprising of the following:

(a) R411 995.25, being the deposit;

(b) R 61 044.59, being the difference between what the it paid for additions/alterations to the interior of the leased premises and the amount the Plaintiff reimbursed it for the additions/alterations;

(c) R211 131.30, being amounts paid from January 2020 to October 2020 as amortised tenant installation costs in respect of the additions/alterations referred to above;

(d) R533 181.60, being the value of the benefit it is alleged to have forfeited in respect of the additions/alterations for the remainder of the lease period; and

(e) R101 490.50, being amounts it paid for certain fixtures/fittings/equipment to the leases premises.

8. At the trial, counsel for the Defendants indicated that the First Defendant no longer persisted with the claims referred to in paragraphs (c) and (e) above. In any event, as I calculated it, the last-mentioned was not included in the total R1 217 352.74 initially claimed. The counterclaim was thus reduced to R1 006 221.44.

9. Counsel for the Defendants further submitted that, if the Court finds that there was no repudiation, then the counterclaim would, likewise, fall away. In that event, however, it was contended that the deposit

should nevertheless be set off against any claim granted in favour of the Plaintiff.

10. From the above submission, it follows that the primary dispute in respect of the Plaintiff's claim is also whether it repudiated the lease agreement and, if it did, whether it is entitled to claim the arrear amounts. If either of these questions are answered in the Plaintiff's favour, it will be necessary to determine the amount the Defendants are liable to pay to the Plaintiff.

11. In the circumstances, I consider the alleged repudiation first.

Did the Plaintiff repudiate the lease agreement

12. As indicated above, the Plaintiff instituted its action in May 2021 for amounts that were then calculated to be in arrears. At that time, the lease agreement had not been cancelled, nor did the Plaintiff give notice to the First Defendant of an intention to cancel the lease agreement.

13. The high water mark of the Defendants' claim that the Plaintiff repudiated the lease agreement is the following:

    13.1. whilst the lease agreement remained extant, the Plaintiff advertised the leased premises as available to lease;

13.2. by letter dated 17 June 2021 the Plaintiff's attorney indicated that the Plaintiff had received an offer from a third party to rent the leased premises at a substantially reduced rental;

13.3. the Defendants viewed the aforesaid communication as confirmation that the Plaintiff did not wish to comply with the remaining aspects of the lease and thus a repudiation of the lease agreement;

13.4. the Defendant accepted the repudiation and undertook to vacate the leased premises by 15 July 2021.

14. These letters, however, cannot be viewed in isolation but must be considered within the context within which they were exchanged. The evidence demonstrated the following:

14.1. The last payment made by the First Defendant was in January 2021 and even that was to discharge arrear amounts that were due and payable in December 2020.

14.2. As early as 22 January 2021 the Second Defendant, Mr Mike Eslick (Eslick), informed the Plaintiff's Mr Clifford Toerien (Toerien) that the Defendants had appointed a third party, Betapoint, to asssit them "*with the possibilities around our lease, sub lease, cost savings and alternatives that ultimately will bring about a win win for all parties*". On 8 February 2021 Eslick again indicated that they are working

with Betapoint to assist them "*with various scenarios – sub tenant and other etc*".

14.3. Over the ensuing period, the discussions included settlement of the arrears and potential payment plans. Despite these discussions, the First Defendant did not honour any of its payment obligations under the lease agreement. It is apparent from the contemporaneous correspondence and Eslick's evidence that the source of the First Defendant's inability to honour its financial obligations under the lease agreement related to the withdrawal of its sub-tenants.

14.4. On 10 February 2021 Betapoint's Mr Grant Steppe (Steppe) confirmed its appointment by the First Defendant. He also referred to a conversation between him and Toerien the previous day and, *inter alia*, sought to confirm that the two had discussed "*lease restructuring*" options. Toerien responded on the same day and denied that they had discussed restructuring. Toerien, in turn, stated that the discussion had included possible assistance with sub-let / re-let efforts. Toerien's evidence was that, during that discussion, he explained to Steppe that, with a sub-let, the First Defendant would remain the main tenant; and under a re-let, a new lease would be concluded with a different tenant.

14.5. On 11 February 2021 Steppe thanked Toerien for the assistance with the sub-let / re-let efforts and requested Toerien to send him a re-let mandate for the First Defendant to sign.

14.6. In an email dated 16 February 2021 Toerien informed Steppe that the Plaintiff had taken steps to source clients to "sub-let" and requested the First Defendant's cooperation in giving it a re-let mandate. The email expressly stated that Plaintiff would assist with marketing the proposed sublease portion or the full premises and would add the leased premises to its vacancy schedule upon signature of the re-let mandate. It is apparent from Toerien's email and the content of the re-let mandate that it entailed various costs and potential financial risk to the First Defendant, as the existing tenant.

14.7. On 17 February 2021 Steppe confirmed receipt of the 're-let mandate' and undertook to return a signed copy, together with a floor plan indicating the sub-let portion.

14.8. Then, in an email dated 24 February 2021, Steppe informed Toerien that "*we have been through the re-let mandate and have a few questions we would like to ask*".

14.9. It is common cause that the re-let mandate was never signed on behalf of the First Defendant.

14.10. By letter dated 10 June 2021, which was after these proceedings were launched, the Plaintiff's then attorneys wrote to the Defendants' attorneys and, after referring to earlier settlement proposals, recorded the following:

"*In terms of the lease agreement, there remains a period of over 4 years still remaining, for which your clients are exposed. There is a significant value attributable to the remaining term of the lease… for which our client's rights remain reserved to the extent that it is unable to mitigate its damages insofar as sourcing a replacement tenant…*"

14.11. On 17 June 2021 the Defendants' attorney made a further settlement proposal, the details of which were redacted.

14.12. The Plaintiff's then attorney responded on 22 June 2021 and, in relevant part, recorded the following (here again, the details of the settlement proposals were redacted):

"*In the interim, our client has received an offer to rent for the entire leased premises… which our client is in the process of considering in an attempt to mitigate its damages as a result of your client's repeated and unsubstantiated breaches of the lease agreement.*

…

We will revert further in respect of the aforesaid offer to lease, and the ramifications thereof."

14.13. It was this last-mentioned letter that the Defendants apparently regarded as a repudiation by the Plaintiff.

14.14. Notably, the vacancy schedule for June 2021 reflected the leased premises as being available subject to one month's notice.

15. Against that backdrop, the Defendants' claim that the Plaintiff repudiated the agreement largely turned on three principle contentions:

15.1. First, that First Defendant did not sign the re-let mandate and, therefore, the Plaintiff was not entitled to re-let the leased premises;

15.2. Second, because the lease agreement did not expressly provide for re-letting by the Plaintiff in the event of a breach by the First Defendant, Plaintiff was not entitled to re-let the leased premises without first cancelling the agreement;

15.3. Third, and flowing from the above, the Plaintiff's conduct in advertising the leased premises for re-let, and its consideration of offers before the lease agreement was properly cancelled, constituted a repudiation of the lease agreement.

16. For the reasons I explain below, none of these contentions have merit.

17. On the re-let mandate, Eslick sought to suggest in his evidence that he did not sign the mandate because the Defendants never contemplated a re-let. According to him, the Defendants were only ever considering a sub-let arrangement because they wished to remain in occupation for the duration of the lease agreement. I found Eslick's evidence to be very unconvincing.

17.1. Firstly, his evidence demonstrated a singular lack of appreciation for the seriousness of the First Defendant's failure to meet any of its financial obligations under the lease agreement since January 2021. He seemed to expect the Plaintiff to wait indefinitely for payment simply because the Defendants *wished* to stay in the leased premises for the full five and a half year period. This despite the First Defendant making no payments at all towards rent and other costs due to the Plaintiff. The most incredible part of his evidence was that, not only did he attempt to suggest that the Defendants should be absolved from paying the arrears, but also that the First Defendant should be compensated for improvements to the leased premises that were actually paid for by the Plaintiff. Here again, the justification was that the Defendants had always intended to benefit from those improvements and, so the contention went, they were denied such benefit because of the Plaintiff's alleged repudiation.

Whether these ideas were influenced by legal advice, or as a result of Eslick's own ingenuity, the general tenor of his evidence made him a poor witness.

17.2. The fact of the matter is that the Plaintiff went to great lengths to accommodate the First Defendant's financial difficulties, including offering to find an alternative tenant when it became abundantly clear that the First Defendant could not afford the costs associated with the lease agreement.

17.3. That the Defendants did not want the lease to come to an end is irrelevant. I am, in any event, not convinced by Eslick's suggestion that this was the reason the re-let mandate was not signed. In all probability, the failure to sign the re-let mandate was because it would result in yet further financial risk to the First Defendant. In my view, that was the primary purpose of the re-let mandate: *viz* to give the Plaintiff a right to recoup the costs and losses that might be occasioned by a re-let. Save for this, the Plaintiff did not require the First Defendant's agreement to advertise its own property as available to be let. Notably, the Plaintiffs have not sought to recover any amounts pursuant to the unsigned re-let mandate.

18. As to the second contention, the Plaintiffs were not obliged to cancel the lease agreement without first ensuring that it could mitigate its loss by securing a new tenant. Importantly, Plaintiffs did not

conclude a new lease agreement while the agreement with the First Defendant was still in force. At most, the Plaintiff advertised the leased premises to invite offers from potential tenants. To that end, the vacancy schedule clearly stipulated that the leased premises was available subject to one month's notice. This demonstrates the Plaintiff's intention to comply with the terms of the agreement – albeit to exercise its right to cancel the agreement as a consequence of the First Defendant's persistent breach of its obligation to pay the amounts due to it.

19. In the circumstances, I conclude that the Plaintiff was entitled to advertise the leased premises in the manner that it did, notwithstanding that the First Defendant did not sign the re-let mandate or the absence of any express provision to do so in the lease agreement.

20. That, then, brings me to the third issue. Did the advertisement and consideration of an offer constitute a repudiation of the lease agreement?

21. Counsel for the Defendant correctly submitted that repudiation is to be determined by applying an objective test and asking whether the words or conduct of the Plaintiff would lead a reasonable person in the position of the First Defendant to conclude that the Plaintiff did not intend to carry out its part of the contract properly or at all. In this regard, the test has been described as follows:

"*Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract…*"[1]

(Emphasis added)

22. No doubt the Defendants seek to rely only on the Plaintiff's obligation to give them occupation of the leased premises as the basis for the contention that any indication that it intended not to do so would amount to a repudiation. But the obligation to give occupation of the leased premises is not absolute. The lease agreement provides that, in the event of a failure to pay any amount due within a week of the due date, the Plaintiff would have the right to, *inter alia*, terminate the lease agreement on one month's notice.

23. The Plaintiff elected not to do so immediately but, instead, and expressly to mitigate its losses, it advertised the leased premises for possible re-let.

24. I have already found that, in the context of the First Defendant's persistent default, and the discussions between the parties since January 2021, the Plaintiff was entitled to advertise the leased premises to invite offers from potential new tenants. In the context of this case, the Plaintiff had lawful grounds to do so – especially so because the leased premises was advertised as being available on one month's notice.

25. Moreover, on 22 June 2021, the Plaintiff indicated no more than an intention to consider an offer made to it and to revert to the Defendants at a later date. At best for the Defendants, the letter signalled an intention to cancel the lease agreement in the near future, which the Plaintiff would have been perfectly entitled to.

26. Thus, no reasonable tenant in the position of the First Defendant, who had not paid any rent or related costs for five months, could conclude that the *Plaintiff* no longer intended to perform in terms of the lease agreement. Indeed, nothing in the 22 June 2021 letter suggested that the Plaintiff would not continue to honour the lease agreement if the Plaintiff paid the arrears. Thus, a reasonable tenant in the position of the First Defendant, if it seriously wished to avoid cancellation, would have remedied its breach.

27. Instead, the Defendants sought to snatch at a bargain by calling the letter a repudiation, in the hope that they might avoid their own obligations arising from the lease agreement and suretyship.

28. In the circumstances, I find that the Plaintiff did not repudiate the lease agreement.

29. As indicated above, counsel for the Defendants submitted that, if I find there was not repudiation, the the counterclaim must likewise fall away. I agree with the submission. Although I do not need to deal with the merits of the counterclaim, it is worth mentioning that it was hopelessly misconceived. The First Defendant sought to rely on principles of justice, public policy and ubuntu[2] to justify a claim

for compensation relating to benefits that had largely been paid for by the Plaintiff pursuant to a lease agreement in respect of which the First Defendant failed to honour its own obligations. It would offend those very principles of justice, public policy and ubuntu to reward a recalcitrant tenant, and penalise a landlord, in these circumstances.

30. I turn now to address the Plaintiff's claim.

Plaintiff's claim for arrears

31. As I indicated above, pursuant to certain calculation discrepancies which emerged during the trial, the Plaintiff's claim for payment was reduced to R918 550.35, being the total arrears owed by the First Defendant to the Plaintiff as at the date of the summons. The correctness of this figure was not challenged.

32. However, the Defendants contend that the deposit of R411 995.25 should be set off against the arrears as at the date of the summons. On the Defendants' approach, any amounts accrued after the date of the summons should have been claimed – either through an amendment to the particulars of claim or in separate proceedings. As the Plaintiff did not do so, the Defendants contend that any such claims have prescribed.

33. The Plaintiff, on the other hand, contends that it was entitled to set off the deposit against any further amounts for which the First Defendant became liable after the date of the summons.

34. In relevant part, the lease agreement provided that "*[t]he landlord shall have the right of applying the whole or portion of… the deposit towards payment of the rent or the amount of any other obligation of whatsoever nature for which the tenant is responsible…*"

35. The evidence demonstrated the following:

35.1. First Defendant remained in occupation of the leased premises in May, June and for part of July 2021. The First Defendant, accordingly, remained liable for all amounts due under the lease agreement for these months.

35.2. The statement of account indicated that the Plaintiff appropriated the deposit on 26 July 2021, leaving a balance of R890 018.96.

35.3. Various additional amounts were allocated thereafter, including amounts allocated in August and September 2021 for utilities consumed in June and July (the meter reading dates being 05/07/21 and 04/08/21, respectively).

36. In my view, and having already instituted legal proceedings to recover the arrears up to 1 May 2021, the Plaintiff was entitled in terms of the lease agreement to set off the deposit against amounts that accrued and were not paid after that date.

37. However, given the Plaintiff's election to appropriate the deposit on 26 July 2021, it must be taken to have set off the appropriated

amount against what was due as at that date. Having done so, the outstanding balance was R890 018.96. Applying the adjustment necessitated by the error in calculation mentioned above (in the amount of R1 950.28), the true balance would have been R888 068.68.

38. In the result, the deposit more than covered the amounts accrued after the date of the summons. That being the case, it must also be accepted that some inroads were also made into the claim amount – that is, the balance owing as at 1 May 2021.

39. For these reasons, I conclude that the Plaintiff is entitled to payment of the amounts calculated to be due immediately after it appropriated the deposit on 26 July 2021.

40. Payment of any amounts which accrued after that date should have been claimed separately.

Miscellaneous

41. After the hearing, both counsel submitted written submissions dealing with the costs of an application brought by the Defendants in terms of Uniform Rule 35(7) on 10 November 2025 – i.e. two weeks before the trial. By the time the trial commenced, the Plaintiff had complied with the Defendants' request for further discovery. Thus, although there was some debate about whether the late discovery warranted a postponement of the trial, the Rule 35(7) application did not serve before me. In the circumstances, I do not intend to deal

with the merits or otherwise thereof in order to determine who should bear the costs occasioned by that application. What is relevant is that the request for further discovery was made a month before the trial was set to run. I am willing to accept that the late request is an ordinary consequence of preparation on the proverbial eve of the trial. However, that being the case, the Plaintiff can hardly bear the full blame for not responding to the request immediately. Viewed through this lens, and although the Plaintiff ultimately responded to the application, evidently to the Defendants' satisfaction, I see no reason why the costs should not be costs in the cause.

Conclusion

42. In the result, I make the following order:

(a) Judgment is granted against the First Defendant and the Third Defendant, jointly and severally, the one paying the other to be absolved, for payment of:

i. R888 068.68;

ii. interest on the aforesaid amount at the prescribed rate *a tempora morae*, calculated from the date of service of the summons; and

iii. the Plaintiff's costs of suit on the scale as between attorney and client.

(b) The First Defendant's counterclaim is dismissed with costs on the scale as between attorney and client.

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AG CHRISTIANS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: G Quixley

Instructed by: Rebello Karsten Inc.

For defendant: GV Meijers

Instructed by: Alhadeff Attorneys

[1] Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at 294

[2] Relying on Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC), per majority judgment, at paragraph 71-90; Dikoko v Mokhatla 2006 (6) SA 235 (CC), per Justice Sachs in a concurring supplementary judgment, at paragraph 113; S v Makwanyane and Another 1995 (3) SA 391 (CC) at 481A/B-E and 501C/D-G; Tshwane City v Afriforum and Another 2016 (6) SA 279 (CC) paragraph 10-11.