IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 05621/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED ✓

29/05/2013
DATE

SIGNATURE

In the matter between: -

AIRA INVESTMENTS Applicant

and

STEPHEN MANGOLELA First Respondent

MATIMBA HOUSE (PTY) LIMITED Second Respondent

J U D G M E N T

BECKER, AJ: -

[1] The Applicant seeks the eviction of the First and Second Respondents from its premises, being Pats Spar, 656 Hira Street, Actonville, Benoni. The First Respondent is a director of the Second Respondent.

[2] On 20 March 2013 the Second Respondent was placed into liquidation and joint provisional liquidators were appointed on 25 April 2013 who allegedly, without success, attempted to take control of the assets of the First Respondent's business conducted from the premises.

[3] Demand was accordingly made for immediate access to the premises and the taking into possession of all the assets belonging to the Second Respondent. As this process has not been finalized yet, the Applicant requests that the relief against the Second Respondent be postponed until the liquidators are substituted.

THE LEASE AGREEMENT

[4] On 30 September 2011 and at Johannesburg the Applicant and the Respondents concluded a lease agreement in terms whereof the premises in the building, Pats Spar, was leased for 5 years from 1 October 2011 to 30 September 2016. The monthly rental payable was the sum of R55,000.00 together with VAT, which rental escalated annually. The business to be conducted from the premises was a Spar Supermarket.

[5] In terms of the lease agreement: -

[5.1] all rentals would be paid monthly in advance without any deduction or demand and free of exchange on the first day of each and every month;

[5.2] the Respondents would pay for all the electricity, gas and water used by it or on the premises as recorded by means of separate metres, together with metre reading charges for electricity and water used in the building in respect of such electricity and water used by the Respondents in or on the premises;

[5.3] the Respondents agreed to pay the Applicant's expenses, costs and charges which it incurred arising out of the breach by the Respondents of the lease and legal costs on an attorney and client scale.

[6] Clause 12 of the lease agreement contains the following provisions: -

"12.1 Should: -

12.1.1 the Monthly Rental, or any other amount in terms hereof, not be paid on due date, and remain unpaid for 3 (three) days after due notice requiring such payment has been given to the lessees ...

12.2 Notwithstanding the aforegoing, if, within any one period of 12 (twelve) months, the lessor shall have duly given the lessees notice in terms of 12.1.1 in respect of two failures to make payment, the lessee shall not thereafter be entitled to any notice in respect of any further failure to make payment on due date, and the lessor's rights of cancellation, and other relief in terms of this clause, shall arise forthwith upon any further failure to pay."

BREACH OF LEASE AGREEMENT

[7] On 28 May 2012 the Applicant's attorney of record (Kim Meikle) addressed a letter of demand (*"the first letter"*) to the Respondents wherein it was, *inter alia*, recorded that the April 2012 rental was short-paid in the sum of R172.08 and the May 2012 rental by the sum of R139.37 (the latter rental also not having been paid on the first of the month, but only on the 25th of May 2012).

[8] The aforesaid short-payments were rectified by the Respondents and paid on 12 June 2012.

[9] On 8 June 2012 Meikle again addressed a letter of demand (*"the second letter"*) to the Respondents, recording the failure to pay rental and other charges in the sum of R72,446.83 having been due on 1 June 2012 and affording the Respondents a period of three days within which to comply with the demand in accordance with the provisions of clause 12.1.1 of the lease agreement, failing which the Applicant informed the Respondents that the lease agreement would be cancelled and all monies due in terms of it claimed in addition to evicting the Respondents from the premises.

[10] The June 2012 rental was paid on 11 June 2012 and, as stated, the shortfalls for April, May and June 2012 were only paid on 12 June 2012.

[11] On 20 September 2012 a further letter (*"the third letter"*) was delivered to

the Respondents in terms of which Meikle recorded that in view of the fact that the Respondents had failed to make payment of the September 2012 rentals by 1 September 2012, the Applicant was exercising its right in terms of clause 2.2 of the lease agreement in that two previous notices of breach had been furnished to the Respondents in the last 12 months and that accordingly, the agreement of lease was cancelled without further notice. The Respondents were requested to vacate the premises by no later than close of business on 25 September 2012.

[12] As at the date of the application the Respondents had failed to effect payment for the months of November and December 2012 and January to April 2013. Further correspondence ensued between the parties' respective attorneys of record which is not relevant for the present purposes.

[13] On 18 January 2013 Meikle again addressed a further letter to the Respondents confirming the earlier cancellation of the lease agreement and claiming all outstanding rental together with electricity charges totalling the sum of R594,293.74. To the extent necessary, Meikle again cancels the lease agreement.

CANCELLATION OF LEASE AGREEMENT

[14] The first issue for adjudication is the dispute between the parties as to whether the lease agreement had been properly cancelled. Mr Joseph, on

behalf of the Respondents, referred to the shortcomings of the first of the two letters relied upon by the Applicant, in justification for the cancellation by the Applicant in its third letter. The Applicant relies for its cancellation on clause 12.2 which was colloquially referred to at the hearing as the *"two strikes and you're out"* rule. Mr Joseph argued that the first *"strike"* did not qualify as a proper *interpellatio* as no reference is to be found to the period of three days within which the Respondents were to be afforded the opportunity to rectify/remedy their breach of the lease agreement. The letter reads as follows: -

> *"2. Our client, Mr Abbas Petkar wishes to advise that it is totally unacceptable to have the monthly rentals paid whenever it suits yourselves. After several telephone calls the May rental was only paid on the 25th of May. The rentals should be paid by no later than the **5th** of every month.*
>
> *3. The April invoice was short-paid in the sum of R172.08 and the May invoice the sum of R139.37 which amounts need to be settled forthwith as a matter of urgency, to update our records."*

[15] Mr Joseph argued that the clause required a demand by the lessor, being the Applicant. He argued that the demand (to the extent that it constitutes one) was not forthcoming from the Applicant as Meikle's client is identified as one Mr Abbas Petkar. This approach appears to be overly formalistic as both objectively and subjectively there can be no doubt that Meikle's letter

constituted a demand relating to the lease agreement in question. A mere perusal of the other physical features of the letter reveals as much. The designation of the representative of the Applicant as the client, instead of the Applicant itself, is accordingly of no consequence.

[16] A more attractive argument is that Meikle's letter was not intended to constitute a demand in terms of clause 12.1, but from the tenor and content of the letter refers to the Respondents' breach in an incidental manner. It is as if, so goes the argument, the Applicant intended complaining about late payment of the monthly rental and added merely as an afterthought *"By the way, you short-paid for the months of April and May"*. The Respondents, instead of paying the rental for April of R72,172.08 and May for R72,139.37, on both occasions paid a round sum of R72,000.00 per month. Moreover, as the short-payments were therefore negligible it could hardly have been considered as material breaches of the lease agreement.

[17] In addition, and having regard to the formulation of the second letter (strike two), Mr Joseph argued that the difference in wording and tenor was significant. In the second letter, the Respondents are told in no uncertain terms to remedy their non-payment of the monthly rental within three days, failing which the lease agreement would be cancelled. These facts therefore culminated in Mr Joseph's submission that clause 12.2 was not available as the *modus* of cancellation of the lease agreement as the prerequisites for its operation had not been met.

[18] The issue therefore is whether the first letter constituted a *"strike"* or proper *interpellatio* in terms of the lease agreement. In this regard, I was referred to various authorities by Mrs Ternent, on behalf of the Applicant.

[19] The state of mind or motive of an author or party purporting to issue a demand or *interpellatio* cannot be relevant in considering the question as to whether a proper demand was furnished. This was effectively echoed in **Rautenbach v Fenner 1928 TPD 26 at 30**. The correct principle was stated as being *"to ascertain in every case whether all the conditions on which the right is dependent had been fulfilled. If they have been fulfilled, then the right comes into existence, whether it be a right of forfeiture or of any other kind. And in construing the words setting out the conditions, the object of the conditions will have to be considered in order to assist in the question of construction"*. Such an exercise does not permit of a subjective analysis, but only whether the written demand qualifies as such for purposes of the breach clause in the lease agreement.

[20] In construing the relevant clause in order to ascertain the intention of the parties, there appears to be a distinct (however subtle), difference between a clause requiring a party to rectify its breach within a specified time and a clause requiring proper notice initiating a period after which the innocent party could cancel. This was recognised in **Chatrooghoon v Desai and Others 1951(4) SA 122 (N) at 126A - C** where Broome JP stated: -

"We are not here dealing with an instrument which requires

the party desiring to cancel to give the other party notice to pay within a prescribed period. In such a case the notice must do what the instrument requires, that is to say it must require payment within the prescribed period. If it requires payment within a different period it will no doubt be invalid."

[21] The distinction also found favour in **SA Wimpy (Pty) Ltd v Tzouras 1977(4) SA 244 (W) at 248H – 249D**. With reference to **Tangney and Others v Ziv's Trustees 1961(1) SA 449 (W)** and **Fourie v Olivier en 'n Ander 1971(3) SA 274 (T)**, Nestadt J concluded: -

"Clause 19.1 does not require that the notice to be given to the tenant must specify the time within which the breach complained of must be remedied. It simply requires the tenant not to remain in breach for (more than) four days after the giving of the notice. It was therefore unnecessary for the letter of 17 June 1977 to refer to any time period within which the rent had to be paid."

[22] Recently the Full Bench of this division in **Lench and Another v Cohen and Another 2006(2) SA 99 (W) at 105C - D** (in overturning this decision [2007(6) SA 132 (SCA)] the SCA did not deal with this issue) appeared to have embraced the above approach with the following *dictum*: -

"The fact that the respondents were given until 15 January 2004 to comply with the obligations is also of little consequence. The mention of an inadequate or wrong period in which to remedy the default does not invalidate the modus.

It was not a requirement of clause 8 that a date for compliance be fixed. All that was required was that the respondents be given notice of their breach. The mistaken signification of the period in such circumstances does not invalidate the act placing the respondents in mora."

[23] It should be apparent that the matter *in casu* resonates with this approach. Clause 12.1.1 does not require the Applicant to notify the Respondents that unless they remedy the breach on a fixed date or within three days, the Applicant would be entitled to cancel the lease agreement. The clause requires no more than a *"due notice"* of payment to the Respondents and what follows is merely the consequence of their failure to remedy the breach. One has to assume that the parties had a specific result in mind in formulating and agreeing to the wording of this clause.

[24] Commercial leases have in the past often adopted the body of authority emanating from Courts which would otherwise have visited the parties with consequences which they had not intended when concluding their agreement. It is no different in this case. The parties specifically refrained from burdening the Applicant with any obligation to afford the Respondents a period of time (or a specified date) within which to remedy their breach prior to visiting it with cancellation. Once *"due notice"* requesting payment was furnished, the lapse of the period of three days, initiates the Applicant's right to cancel. It follows that the Respondents had been afforded *"two strikes"* on 28 May 2012 and 8 June 2012, entitling the Applicant to, without

more, cancel the agreement on 20 September 2012.

CLAIM FOR RENTAL

[25] The remainder of the Respondents' defences relate to the Applicant's claim for arrear rental, electricity and other charges. Mr Joseph conceded that the Respondents' version has simply not passed muster in relation to these defences. The answering affidavit is essentially a bare denial of the Applicant's allegations without any evidence in support of the positive averment that the rental, electricity and other charges are not in arrears and have been paid. A Court's approach in such circumstances is trite. No *bona fide* factual dispute has been created by the answering affidavit on this score.

[26] Even in applying the test in **Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)**, I find the Respondents' version to be unsustainable. On the evidence before me, the Applicant has made out a proper case that rental in the sum of R317,460.89 from November 2012 until February 2013 is due and payable.

ELECTRICITY CHARGES

[27] Another issue raised by the Respondents is that the claim for electricity charges in the sum of R504,637.64 cannot be claimed in this application as a result of the clear provisions of the lease agreement.

[28] Clause 8.5 of the lease agreement provides that the Respondents shall pay for: -

> *"8.5.2 All electricity, gas and water used by the lessees in or on the premises as recorded by means of separate meters, together with the meter reading charges for electricity and water used in the building, in respect of the electricity and water used by the lessees in or on the premises. Upon demand, the lessees shall provide the lessor with proof of payment by them of these charges within twenty four hours of demand..."*

[29] Mrs Ternent submitted that the clause is capable of the meaning that the Applicant is entitled to claim electricity and other charges (normally payable by the Respondents to the relevant Town Council or Municipality) directly. While I am not convinced that this is so, I believe that clause 12.3 resolves the issue. It provides that the Respondents undertake to pay to the Applicant all expenses, costs and charges which it may incur arising out of the breach by the Respondents of the lease agreement. Such expenses (which are not defined) would include any relating to electricity, water and rates (and similar charges) paid for, or incurred by, the Applicant. The Applicant, as owner of the premises, becomes liable for these expenses to the Town Council or Municipality as a result of the Respondents' breach. I am therefore satisfied that the Applicant has made out a proper case for the Respondents being liable for electricity charges in the sum of R504,637.64.

RENTAL AND ANCILLARY CHARGES FROM 1 MARCH 2013

[30] The Applicant also seeks judgment against the Respondents for payment of rental and ancillary charges from 1 March 2013 *"to date of eviction of the First and Second Respondents"*. Two difficulties arise in respect of this relief. Firstly there is no evidence before me regarding the *"ancillary charges"* (presumably electricity, water and the like) pursuant to 1 March 2013 and also, such an order is fraught with difficulty and will in all likelihood lead to further disputes between the parties.

[31] I therefore propose to limit this relief to the payment of rental for the period 1 March 2013 until 1 May 2013 in the monthly amount of R61,600.00 and therefore to the total sum of R184,800.00. The Applicant can always claim for the *"ancillary charges"* in another forum once it is known.

SAPRO v SCHLINKMAN

[32] It should be apparent that pursuant to the Applicant's cancellation of the lease agreement on 20 September 2012 and, as a result of the Respondents' continued occupation of the premises, the Applicant's cause of action (for this period) should be premised on *"holding over"*. In terms of the common law principles of contract, the Applicant's cause of action post cancellation is to be based on an action for damages. Despite a Court's subsequent finding or confirmation of the cancellation and the resultant retrospective nature of such cancellation, no rights accrued to the Applicant

in terms of the agreement of lease consequent upon the date of cancellation (i.e. 20 September 2012).

[33] In **Sapro v Schlinkman 1948(2) SA 637 (A)** the Supreme Court of Appeal found that in such circumstances (and on the assumption that the breach was serious enough to warrant cancellation of the agreement), a Plaintiff, notwithstanding his breach, was entitled to sue for rent due during the full period in which the Defendants had enjoyed undisturbed occupation of the leased premises. With reference to a number of Roman and Roman-European sources, the Court concluded (at 646): -

> *"To sum up: the authorities all show that the date that matters in regard to the termination of the lessee's liability 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."*

[34] I respectfully agree with the Full Bench in **Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd 2002(6) SA 236 (C) at 253B**: -

> *"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."

[35] Others have expressed similar sentiments (see **AJ Kerr: <u>The Law of Sale and Lease</u> (3rd ed) at 421 to 424**).

<u>ORDER</u>

I therefore make the following order: -

[1] The cancellation of the written agreement of lease in respect of the premises situate at Pats Spar, 656 Hira Street, Actonville, Benoni (*"the premises"*) concluded between the Applicant and the First and Second Respondents, dated 30 September 2011, is hereby confirmed;

[2] The First and Second Respondents and all persons and entities claiming occupation of the premises by, through or from the First and Second Respondents, are evicted from the premises, which eviction is to be effective as of 14 June 2013;

[3] Should the First and Second Respondents and/or those who occupy through them fail to vacate the property as provided for in paragraph 2 above, the Sheriff is authorised and directed to evict all such persons from the premises;

[4] Judgment is granted in the Applicant's favour against the First Respondent

in the sums of R317,460.90 together with interest thereon at 15.5 % per annum from 1 March 2013 to date of payment and R504,637.64 together with interest thereon at 15.5 % per annum from 2 April 2013 to date of payment;

[5] Judgment is granted in the Applicant's favour against the First Respondent in the sum of R184,800.00 together with interest thereon at the rate of 15,5 % per annum from 1 June 2013 to date of payment;

[6] Judgment against the Second Respondent is postponed *sine die*;

[7] The First Respondent is ordered to pay the Applicant's costs on the scale as between attorney and client.

Signed,

BECKER, AJ

29/05/2013