REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: A5035/2013

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

10/09/14
DATE

SIGNATURE

In the matter between:

HENNOX 349 CC Appellant

and

SA RETAIL PROPERTIES LIMITED Respondent

J U D G M E N T

KAIRINOS AJ:

1. This is an appeal against the judgment of Moshidi J delivered on 31 May 2013.

2. Before dealing with the merits of the appeal it is necessary to set out a brief chronology of the matter which will go a long way to explaining the factual background to the appeal.

3. On 1 November 2000, Consaf (Pty) Limited ("Consaf") and Westwood Supermarket (Pty) Ltd ("Westwood Supermarket") concluded a written agreement of lease ("the lease") in terms of which Consaf, being the erstwhile owner of the Westwood Shopping Centre, leased to Westwood Supermarket the premises situate at No 15 Westwood Village ("the premises") for a period of 13 years with an option to renew for a further five years.

4. In March 2005, Consaf sold the property to the present Respondent, SA Retail Properties Limited, and the Respondent became the lessor in respect of the lease by delegation *ex lege* as a result of *huur gaat voor koop*.

5. On or about 19 of 20 September 2005, the premises were damaged as a result of fire to the extent that the lessee was wholly deprived of the use thereof. That much is common cause. It is important to note at this juncture that the Appellant, who was the plaintiff *a quo*, did not plead in its particulars of claim that the premises were destroyed but only that they were damaged to the extent that the lessee thereof was wholly deprived of the use thereof. The importance of this distinction will become apparent later in this judgment.

6. On 13 June 2006, all rights and obligations in the lease were ceded and assigned from Westwood Supermarket to the present Appellant, Hennox 349 CC, in terms of

a written Deed of Cession and with the consent of the lessor, who was also a signatory to the Deed of Cession. As a result of such cession and assignment, the Appellant became the lessee of the premises. The Appellant undertook as cessionary, to make payment of the rental and related charges from 1 July 2006.

7. On or about 15 December 2006, the property situate at Westwood Village was sold by the Respondent to Soleprops 39 (Pty) Limited ("Soleprops") and the transfer of the property into the name of Soleprops took place on 26 April 2007. It is common cause that as at the date 26 April 2007, all rights and obligations in the lease were delegated *ex lege* from the Respondent to Soleprops by application of the principle *huur gaat voor koop*. Soleprops therefore became the new lessor.

8. Clause 16 of the lease which relates to "damage or destruction" provides as follows:

"16.1 In the event of the premises being completely destroyed or so extensively damaged by fire, storm, tempest or other unavoidable cause as to deprive the LESSEE of the use thereof during the currency of this Lease, either party may elect to terminate the Lease as from the date of such destruction, upon giving the other party notice within 14 (FOURTEEN) days after such destruction or damage, in which event the rental shall terminate and be adjusted as from the date of such destruction or damage.

16.2 In the event of the premises being completely destroyed or damaged as in the abovementioned clause, and neither party giving notice of their intention to terminate the Lease, or in the event of the parties mutually agreeing that the Lessee shall continue, the LESSOR shall rebuild or repair the building within a reasonable time, reserving the right, however, to change or vary from the form or construction of the building but granting to the LESSEE the same accommodation as regards position and space in such altered or varied construction. In such event, the LESSEE shall be entitled to a total rebate of rental for the period during which it may be deprived of whole use of the premises.

16.3 ....

16.4 In any event, the LESSOR shall not be liable to the LESSEE for any loss or damage that may be sustained by the LESSEE as a result of being deprived of partial or total occupation of the premises."

9. It is common cause that neither party gave notice within the fourteen day period contemplated in clause 16.1 that they wished to terminate the lease. The lease therefore continued. In such circumstances the lessor became obliged in terms of the provisions of clause 16.2 to repair or rebuild the premises within a reasonable period of time. The Respondent, who was at the material time the lessor, did not do so.

10. The Appellant, who was the plaintiff *a quo*, pleaded in paragraph 9 of its particulars of claim that it rebuilt and repaired:

10.1 The floors of the supermarket;

10.2 The walls of the supermarket;

10.3 The ceilings of the supermarket;

10.4 The refrigeration, electrical and lighting installations of the supermarket.

11. Presumably it did so as a result of the Respondent's failure to comply with its obligation to do so in clause 16.2 of the lease. This much is clear from the Appellant's reply to the Defendant's request for further particulars wherein the Appellant alleged that the lessee had made demand from the time of the fire until June 2006 and that the repairs and rebuilding to the premises were effected from

March 2006 to June 2006 to restore the premises to the condition they were in prior to the "partial destruction" thereof.

12. The Appellant then instituted action against the Respondent for payment of damages alternatively useful and necessary expenditure in the amount of R2 242 538.27. The action was premised in essence upon a breach by the Respondent, as erstwhile lessor, to repair the premises within a reasonable period of time as envisaged in clause 16.2. However the Appellant did not seem to claim specific performance of the Respondent's obligation to repair the premises. Of course it could not do so since it had already repaired the premises. Rather it sought to import a tacit term into the lease to the effect that in the event of the lessor failing to make the necessary repairs following a fire the lessee would be entitled to do so and recover the amounts so spent from the lessor ("the tacit term").

13. It is not clear from the particulars of claim whether the Appellant was seeking specific performance of the tacit term it sought to import into the lease i.e. recovery of the amounts spent to restore the premises, or damages as a result of the Respondent's breach of the obligation to restore the premises in terms of clause 16.2. It appears to be the latter since in paragraph 7 of the particulars of claim the Appellants alleges "the plaintiff suffered damages as follows..."

14. The confusion as to the Appellant's precise cause of action is however not material. Ultimately it seems that the Appellant sought compensation from the Respondent for its expenditure in restoring the premises, whether as damages or a claim based on unjust enrichment.

15. The Respondent, who was the defendant *a quo* delivered its plea and therein, in essence, raised the following defences which are material to the adjudication of this appeal:

15.1 The Respondent disputed the tacit term alleged by the Appellant;

15.2 The Respondent pleaded that it had sold the property to Soleprops and transfer had taken place in April 2007 and as a result of *huur gaat voor koop*, it had been divested of any obligations to compensate the Appellant;

15.3 In any event, the lessor was exempted from any liability for such a claim in terms of the provisions of clauses 10.1, 16.4 and 19.

16. The parties then agreed to separate issues in terms of the provisions of Rule 33(4) and such an order was granted at the hearing of the matter by the court *a quo*.

17. The precise terms of the separation order are material to the adjudication of this matter. The terms were set out in the judgment of the court *a quo* as follows:

17.1 Whether the plaintiff can hold the defendant legally liable for any claim arising from an alleged breach of the lease agreement, Annexure "B" to the plaintiff's particulars of claim in circumstances where:

17.1.1 the immovable property, including the premises let in terms thereof, were sold and transferred into the name of a third party

(being Soleprops 39 (Pty) Ltd prior to the date of issue of the summons herein; and

17.1.2 all rights and obligations arising in terms of the lease agreement having passed to the said third party on the date of transfer of the immovable property;

17.2 In the event of the question referred to in [17.1] above decided (sic) in favour of the plaintiff, whether the plaintiff can hold the defendant liable in respect of either of its claims having regard to the provisions of clause 10.1, 16.4 and 19 of the lease agreement, and having regard to the fact that the defendant ceased being the owner of the immovable property, including the premises let in terms of the lease agreement, with effect from 26 April 2007.

18. The above is quoted from the judgment of the court *a quo*. However the court *a quo*, after setting out the issues to be separated and dealt with, then made an order to such effect in terms of the draft marked "X". This Court for some inexplicable reason was not favoured with a copy of the order and it did not form part of the record before us. We were advised by Mr Steyn, who appeared for the Respondent, that in fact the issue as set out in paragraph 17.2 above does not accurately record the contents of the draft order "X", which was made an order of court. Rather he submitted that the correct wording of that paragraph 17.2 above was found in paragraph 2 of the "Defendant's additional pre-trial agenda" dated 15 July 2010. Mr Bollo, for the

Appellant, did not dispute this submission. The wording in paragraph 2 of the additional pre-trial agenda is as follows:

"In the event of the question referred to in 2.5.1 [paragraph 17.1 above] being decided in favour of the Plaintiff, whether the Plaintiff can hold the Defendant liable in respect of its claims having regard to the provisions of clause 16.4 and 19 of the lease agreement, annexure "B" to the particulars of claim."

19. In truth there is no material difference between the two versions, other than that the separated issue no longer refers to the provisions of clause 10.1 and no longer has a reference to fact that the Respondent ceased being the owner of the immovable property, including the premises let in terms of the lease agreement, with effect from 26 April 2007, which in any event related to *huur gaat voor koop* and was included in the issue in paragraph 17.1 above.

20. Having regard to the issues separated, the issue in paragraph 17.1 can be styled the "*huur gaat voor koop* issue" and the second issue "the exemption clauses issue".

21. In essence in relation to the *huur gaat voor koop* issue, the Respondent contended that it was not liable for any damages or compensation for the cost of restoring or repairing the premises since it had delegated *ex lege* all the rights and obligations arising from the lease to the new owner of the property when it sold the property to Soleprops, including any obligation to pay damages or compensate the lessee.

22. In relation to the exemption clauses issue, the Respondent contended that the provisions of clauses 16.4 and 19 of the lease exempted it (or any lessor) from any liability for damages or compensation.

23. In relation to the *huur gaat voor koop* issue, the court *a quo* held in its judgment that *huur gaat voor koop* applied and that in terms thereof the Respondent was "relieved of all rights and obligations flowing from the lease which are transferred to the buyer on transfer, and that the lessor/seller falls out of the picture." The court *a quo* then dealt with the submission of the Appellant that this did not relate to collateral rights and obligations unconnected to the lease were unaffected and would remain vested with the original lessor since the Appellant had submitted that the lessor's obligation was a collateral obligation unconnected to the lease and not subject to the delegation *ex lege*. Moshidi J did not however make a finding in this regard. Presumably he did not do so since he then went on to make a finding in regard to the exemption clauses issue in favour of the Respondent, making it unnecessary to determine the rather vexed issues arising in the *huur gaat voor koop* issue. These vexed issues were whether the delegation operates only prospectively from the date of the transfer of the property to the new owner/lessor or whether such new owner/lessor also becomes liable for previous and unfulfilled obligations and what precisely is meant by collateral obligations unconnected to the lease.

24. In light of the view we have taken relating to the second issue, namely the exemption clauses issue, it is best suited to deal with that issue before dealing with the *huur gaat voor koop* issue.

25. In order to rely on the exemption clauses, it was incumbent upon the Respondent to prove that the exemption clauses applied. To do so it is necessary to place a proper grammatical construction on the wording of clauses 16.4 and 19 in their context in the lease.

26. Assuming that *prima facie* the exemption clauses exempted the Respondent from any liability for the damages or compensation claimed by the Appellant, it was then incumbent upon the Appellant to advance reasons why the exemption clauses were not of application. This bearing in mind that the Appellant did not deliver a replication to the Respondent's plea relying on the exemption clauses.

27. One, for example, would have thought that, if the Appellant was going to rely on the contention that the conduct of the lessor had amounted to an intentional breach or intentional non-performance, it would have raised this issue in a replication. It did not do so.

28. In the appeal hearing it was argued by Mr Bollo, on behalf of the Appellant, that it was not necessary for the court *a quo* or this appeal court to make any determination in regard to the tacit term alleged in paragraph 4.3 of the particulars of claim, wherein the Appellant sought to import a tacit term into the lease that "in the event that the lessor failed to make the necessary repairs following a fire, the lessee would be entitled to do so and recover the amounts so spent from the lessor."

29. I have already indicated above that the reliance on this alleged tacit term made it difficult to discern precisely what the Appellant's cause of action was, i.e. was it a

claim for specific performance of the tacit term and claiming "the amounts so spent" from the lessor, or was it rather a damages claim due to the Respondent's failure to restore the premises pursuant to its obligations in clause 16.2. The particulars of claim reveal muddled thinking in this regard since they appear to claim damages arising from the lessor's failure to restore the premises. What then are we to make of the tacit term relied on? Mr Bollo contended that the issue of whether the tacit term is to be imported into the lease was not one of the issues separated for determination and that the issues regarding the tacit term were for the second stage of the trial. However this submission cannot be correct since, if one considers the formulation of the exemption clauses issue, it reveals that the issue was simply whether the Respondent could rely on the provisions of clauses 16.4 and 19 to escape liability for the Appellant's claims. A reliance on the tacit term would have been an obvious answer to such reliance since if the tacit term were proved, the Respondent would not be able to rely on the exemption clauses since the tacit term would provide for the Appellant's right to recover the amounts spent in restoring the premises from the lessor. The need to prove the tacit term was therefore very much an issue that had to be determined in order to make a finding on whether the Respondent could escape liability by relying on clauses 16.4 and 19.

30. However it appears that the formulation of the exemption clauses issue may have been either misunderstood by the Appellant or it deliberately chose not to lead evidence of the circumstances that gave rise to the lease and why a tacit term was necessary. It may have chosen to do so since the circumstances upon which it relied upon were clear from the wording of the lease and the common cause facts. It is difficult to conceive of what other facts or circumstances it would rely upon in due

course to support the importation of the tacit term. Certainly nothing further was pleaded. I do not suggest that it is incumbent upon the Appellant to have pleaded the facts and circumstances it relied upon, but it would nonetheless have had to establish the facts and circumstances it relied upon to persuade the court to import a tacit term into the lease. Furthermore one must be alive to the onus in proving a tacit term. Corbett AJA pointed out in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* **1974 (3) SA 506 (A) 532H - 533A** that:

> "The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term."

31. The test for a tacit term is the well known officious bystander test (see *Wilkins NO v Voges* **1994 (3) SA 130 (A) 136I – 137D** for a full explanation of the test for tacit terms and the difference between actual and imputed tacit terms). Therefore since clause 16.2 was silent on what the parties were entitled to do if the lessor did not restore within a reasonable period of time, the Appellant would have had to prove that had an officious bystander been present when the parties signed the written lease and he/she had asked what would happen in such event, both parties would have answered that in such circumstances, the lessee would be entitled to repair or restore and recover the amounts spent from the lessor. In other words the tacit term would effectively allow the lessee to perform on behalf of the lessor and recover the cost of doing so from the lessor. However a tacit term cannot be imported if it would be contrary to an express term of the lease (see *SA Mutual Aid Society v Cape Town Chamber of Commerce* **1962 (1) SA 598 (A) 615D**; *Denel (Edms) Bpk v Vorster*

2004 (4) SA 481 (SCA) 487J-488A; *Transnet Ltd v Rubenstein* **2006 (1) SA 591 (SCA) [18]**). The question therefore is whether there are express terms of the lease which militate against importing a tacit term.

32. In this regard, there appear to be numerous indications in the lease that militate against the importation of the tacit term alleged by the Appellant. In clause 10.2 of the lease, it states that should the lessee wish to undertake the lessor's duty of maintaining or installing supplementary locks, it is entitled to do so "without payment of any compensation". In clause 11.1 relating to "Lessee's Maintenance", it provides that the lessee shall maintain as set out in the sub-paragraphs, "at the LESSEES' own cost". Importantly, in paragraph 14.1 relating to "structural alterations", it provides that should the lessee make any structural or other alterations, additions or improvements to the interior or exterior of the premises with or without the prior written consent of the lessor, such alterations, additions or improvements shall be made at the cost of the lessee. Clause 14.2 provides that the lessee shall be obliged to make additions, alterations or improvements required by any law, ordinance, by-law, regulation or licensing or health or other competent authority appertaining or in connection with the lessee's business in the premises, at its own expense. Clause 16.4 provides that in the event of partial or total destruction, the lessor shall not be liable for any loss or damage that may be sustained by the lessee as a result of being deprived of partial or total occupation of the premises. Clause 19.1 provides that subject to the provisions of clause 9.1, the lessee shall not have any claim of any nature whatsoever, whether for damages or otherwise against the lessor.

33. All of the aforesaid clauses appear to display an intention by the lessor not to be liable for compensation or damages or loss to the lessee in the event of any of the occurrences mentioned in the respective clauses. This intention militates against the importation of a tacit term that despite not intending to be liable for any loss or damages or compensation, the lessor would however agree to compensate the lessee should the lessee restore the premises in the event that the lessor failed to do so in terms of clause 16.2.

34. When it was put to the Appellant's legal representative that clause 14.1 seemed to absolve the lessor for any liability to compensate the lessee for structural or other alterations, additions or improvements to the interior or exterior of the premises, he submitted that clause 14.1 did not deal with partial or total destruction of the premises and related to any alterations, additions or improvements in the normal course of business. It appears to me that clause 14.1 is wide enough to include any alterations, additions or improvements to the interior or exterior of the premises resulting from the lessee improving the premises after partial or total destruction and this would militate against the importation of the tacit term contended for. However, even if a restrictive interpretation is placed on clause 14.1, it is highly improbable that a lessor would expressly agree not to be liable for any compensation for alterations, additions or improvements to the interior or exterior of the premises other than a partial or total destruction of the premises, yet tacitly agree to be liable to compensate the lessee if the alterations, additions or improvements to the interior or exterior of the premises are brought about after a failure to restore the premises pursuant to the obligation on the lessor to do so in clause 16.2. Why would the lessor not agree to compensate the lessee in the first situation, where the cost would in all

probability be a lot less arising from minor alterations or improvements, but yet agree to compensate in the case of restoration by the lessee after total or partial destruction where the cost would probably be a lot more. The answer is that the lessor would not and that is probably what the lessor would have answered the officious bystander had he/she asked that question when the parties were concluding the lease agreement. In the circumstances the tacit term cannot be imported into the lease and the court *a quo* was correct in refusing to do so.

35. It is not sufficient for the Appellant to submit that this was not an issue upon which the court *a quo* was called upon to determine since it was by implication part and parcel of the exemption clause issue as explained above. The time to prove the tacit term was at this stage of the trial and not in the next round. If the Appellant did not do so, it is the author of its own misfortune in this regard.

36. A further problem with the claim for the importation of a tacit term was that the Appellant's formulation of the wording of the tacit term, itself gave rise to various problems. Reading paragraphs 4.2 and 4.3 of the particulars of claim together, it appears that the Appellant pleaded that the lessor would be obliged to restore the premises in a manner suitable and appropriate for use as a SPAR supermarket. However, as pointed out by Mr Steyn, for the Respondent, clause 16.2 merely states that the premises must be restored so as to afford the lessee the same accommodation as regards position and space, not in a manner necessarily suitable and appropriate for use as a SPAR supermarket and that the tacit term as formulated in the pleadings was therefore contrary to the express wording of the lease. A difficulty in formulating the tacit term correctly may also warrant an inference that

the parties did not apply their mind to the tacit term (i.e. it was not an actual tacit term) or would have had difficulty expressing the term to the officious bystander (i.e. it was not a putative tacit term).

37. Another problem with importing the tacit term is that it was not necessary to give business efficacy to the lease. In *Wilkins NO v Voges* **1994 (3) SA 130 (A) 137B-D**, Nienaber JA held as follows in this regard:

> "Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional. The above propositions, all in point, are established by or follow from numerous decisions of our Courts (see, for instance Rapp and Maister v Aronovsky 1943 WLD 68 at 75; Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A); Delfs v Kuehne & Nagel (Pty) Ltd 1990 (1) SA 822 (A))"

38. The lessee had a remedy should the lessor not restore within the reasonable period of time, being a claim for specific performance, even one brought on an urgent basis if necessary. It seems unlikely that the lessor would have had any defence to such a claim for specific performance. But to suggest that if the lessor failed to perform, the lessee could perform for the lessor, is stretching the contractual remedies too far. This would by implication import a new type of contractual remedy in addition to the remedies of cancellation and/or damages, interdict and specific performance, namely substituted specific performance by the aggrieved party. I know of no such remedy in common law. It seems unlikely that the parties would have tacitly created such a remedy contractually.

39. Furthermore the express provisions of clause 16.2 entitle the lessor to restore the premises but reserving the right to change or vary from the form or construction of the building. If the tacit term contended for by the Appellant was imported, what would happen to the lessor's right to change or vary from the form or construction? How could this right be retained in such circumstances, where the lessee performs on behalf of the lessor? This too militates against the importation of the tacit term since it is contrary to the express provisions of clause 16.2.

40. In any event, the Appellant did not succeed in proving the importation of the tacit term since it was contrary to the express terms of the lease and improbable for the reasons set out above. The Appellant did not therefore discharge the onus of proving the tacit term.

41. That being so and since the Appellant's first claim was predicated upon a breach of the tacit term alleged, it follows that the Respondent could and did not breach a non-existent tacit term. However the Appellant's particulars of claim do not allege a breach of the tacit term, i.e. they do not allege a breach of the obligation to repay the Appellant the cost of restoring the premises. Rather they allege a breach of clause 16.2, being the obligation to restore the premises within a reasonable period of time. The Appellant then pleads that this breach caused the Appellant to suffer damages, being the cost of the repairs. However the contentions are circular. The Appellant could only suffer the damages if it had the right to restore the premises itself. This can only arise from the tacit term alleged. If the tacit term cannot be imported for the reasons set out above, on what basis was the Appellant entitled to incur the cost of restoring the premises itself, rather than approach a court for specific performance

by the lessor of its obligation to restore the premises? The answer submitted by the Appellant was that it had to do so in order to mitigate its continuing damages being its loss of profits whilst it could not trade as a Spar supermarket having lost beneficial occupation in terms of the lease. This was not the case pleaded in the particulars of claim i.e. the Appellant did not plead that it suffered loss arising from its duty to mitigate its damages. In any event it seems that in reality what the Appellant did, in the absence of a tacit term entitling it to do so, was perform on the lessor's behalf and then claim compensation for doing so. Such a claim is founded rather in an enrichment claim and not a contractual damages claim.

42. The enrichment claim is pleaded in the alternative and at first blush is the more appropriate claim. After all, there can be no doubt that the lessor was enriched by the restoration of its premises after the partial destruction thereof. At this juncture I pause to reiterate that the Appellant did not claim total destruction of the premises but rather only partial destruction thereof. The conduct of the lessee in restoring the premises may amount to structural or other improvements to the interior or exterior of the premises as envisaged in clause 14.1. If so, the Appellant would not have a claim for such improvements since such would be at the lessee's cost as set out in clause 14.1. If the restoration of the premises pursuant to clause 16.2 is not the same type of improvement contemplated in clause 14.1, as submitted by the Appellant, the question then becomes whether the provisions of clause 16.4 or clause 19 exempt the lessor from any liability for such improvements, in other words whether those clauses exempt the lessor from an enrichment claim for necessary and useful improvements (which the restoration surely is). To answer this question, one must interpret the provisions of clause 16.4 and clause 19.

43. Clause 16.4 provides that the lessor shall not be liable to the lessee for any loss or damage that may be sustained by the lessee as a result of being deprived of partial or total occupation of the premises. On a proper interpretation of this clause, it signifies an intention not to be liable to the lessee for damages or loss suffered as a result of being deprived of beneficial occupation. An example of such damages is the loss of trading profits whilst being deprived of beneficial occupation. This is however not what the Appellant's damages or enrichment claims are based on. Clause 16.4 does not therefore assist to the Respondent in staving off a claim for the damages or compensation for enrichment claimed by the Appellant *in casu.*

44. Clause 19 is a different kettle of fish. It is not by any stretch of the imagination elegantly drafted. It appears (and the parties are common cause) that clause 19.1 is intended to be the main clause and that clauses 19.2, 19.3 and 19.4 were intended to be sub-clauses of clause 19.1. Its heading is "NO CLAIMS AGAINST THE LESSOR". On a proper interpretation of the provisions of clause 19, the heading sums up the intention of the parties. On an ordinary grammatical construction of clause 19, it is clear that the lessor and lessee agreed that, subject to clause 9.1, the lessee would not have any claims of any nature whatsoever, whether for damages or otherwise, against the lessor. Clause 9.1 is not applicable *in casu.* In particular the lessee would not have any claim of any nature whatsoever, arising from loss or damage sustained by the lessee by reason of any act, omission or neglect whatsoever on the part of the lessor, his agents, servants or contractors and by reason of the premises or any part thereof being in a defective condition or a state of disrepair "or by reason of any particular repair not being carried out by the lessor timeously".

45. The last sentence above seems to have been tailored-made to suit the facts of this case. The lessor failed to repair the premises. As I pointed out above, the Appellant relied on partial destruction and its rebuilding and repairing those parts of the premises. The provisions of clause 19.2 and in particular the failure to repair the premises would, in my view, include the failure to repair the premises partially destroyed. In any event it is clear from the provisions of clause 19.1 that the lessor was intending not to be liable for any claim of any nature whatsoever. This would include any improvements claim. As I have set out above, it is highly improbable that the lessor would not agree to compensation for improvements in clause 14.1 but agree to compensate the lessee for improvements if the premises were partially destroyed. Clause 19.1 must therefore be interpreted in the context of the lease as a whole, including the intention expressed in clause 14.1. In those circumstances clause 19 exempts the lessor from any claims of any nature, including a damages claim or an enrichment claim.

46. The Appellant submitted that clause 19 could not be so widely construed since this would mean that claims of any nature would include a claim for specific performance, which would effectively leave the lessee remediless upon a breach by the lessor. However clause 19 cannot be interpreted to include claims for specific performance. Having regard to its provisions and applying the *noscitur a sociis* rule of interpretation, that the meaning of the general words being known from the company they keep (see Christie *Law of Contract in South Africa* 6th Edition page 230), it is clear that clause 19 is exempting the lessor from monetary claims for loss or damage or compensation and not from claims for specific performance. A contractual provision which allowed one contracting party no contractual remedies

whatsoever, not even a claim for specific performance of the very obligations which it undertook to fulfil, would not only be contrary to the very nature of a contract, which is to create enforceable rights and obligations, but would in my view also be *contra bones mores* and unenforceable. Even in the absence of being able to claim contractual damages arising from a breach, a party must always be entitled to claim specific performance where such is appropriate.

47. The only other submission by the Appellant was that the exemption clauses could never exempt the lessor from intentional breach. This contention does not appear to have been advanced before the court *a quo* and it did not address this issue in its judgment. It was raised pertinently for the first time in the Appellant's heads of argument and then dealt with in more detail in supplementary heads of argument delivered the day prior to the hearing of the appeal. It appears to be an afterthought. However, afterthought or not, if the submission is good in law, it must be considered.

48. Before dealing with intentional breach of an agreement, it must be made clear that this does not relate to fundamental breach and I did not understand the Appellant to rely on the doctrine of fundamental breach. In terms of this doctrine, which applies in English law, a party may not exempt itself from the consequences of its own fundamental breach of contract. In *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* **1993 3 SA 424 (A) 492F–G**, the doctrine was described as:

"the outmoded English doctrine of fundamental breach which, in the matter of interpreting exemption clauses, has never been part of our law. According to the

doctrine, if I understand it correctly, the position in English law was at one stage thought to be that an exemption clause, no matter how widely expressed, availed the party seeking to invoke it when he performed his contract in essential respects. It did not avail him when he was guilty of a breach going to the root of the contract."

49. However at 430I–J of the *Elgin Brown* judgment, Hoexter JA dealt the doctrine its final nail in the coffin in our law by stating as follows:

"The extent of a breach and the question whether it is fundamental or goes to the root of the contract are matters relevant in determining whether there is a right of rescission. But the fact of fundamental breach is irrelevant and alien to the construction of an exemption clause and cannot govern its compass."

(see also *Goodman Bros (Pty) Ltd v Rennies Group Ltd* **1997 (4) SA 91 (W) 103H-105H**)

50. However what Hoexter JA did not deal with, was whether an exemption clause may exempt a party from the consequences of non-performance as opposed to malperformance. The learned author, Christie, *supra* at 194 states as follows:

"What has to be decided is whether, in the absence of a doctrine of fundamental breach as a rule of law, our law places any restriction on the freedom of parties to a contract to exempt each other from the consequences of breach of contract. As remarked above, both Galloon v Modern Burglar Alarms (Pty) Ltd 1973 3 SA 647 (C) 640H and Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd 1977 2 SA 709 (W) 713C are authority for the proposition that the breach may be wilful, and this proposition may be accepted, but the present inquiry is concerned with the seriousness of the breach rather than with the mental element which accompanies it, although the two cannot be entirely separated. Bearing this in mind, the answer seems to be that the breach may be so fundamental as to amount to complete non-performance, provided it is not intentional."

51. Both the decisions in *Galloon* and *Micor Shipping* referred to in the extract above, decided that a party can exempt itself from the consequences of intentional malperformance. This position is also supported by the following extract from *Wells v SA Alumenite* **Co 1927 AD 69 73** where Innes CJ said:

"No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands."

52. More difficult is the position in respect of intentional non-performance. The Appellant, relying on extracts from Christie *supra* at 194-195 submits in its supplementary heads of argument that a party cannot exempt itself from the consequences of intentional non-performance. However the Appellant then relies on English case law and the decision in *Hall-Thermotank Natal (Pty) Ltd v Hardman* **1968 (4) SA 818 (D)**. The reliance on these decisions is misplaced insofar as such decisions were primarily based on the application of the doctrine of fundamental breach, which as set out above is not part of our law. The Appellant appears to conflate the principles relating to intentional non-performance and fundamental breach. Fundamental breach, i.e. a breach going to the root of the contract is irrelevant in determining whether a party may rely on an exemption clause. The issue is rather whether a party may rely on intentional non-performance to avoid the exemption clauses, irrespective of whether such is a fundamental breach or a minor breach. Furthermore the *Hall-Thermotank* decision was overruled in this regard by the Appellate Division in the *Elgin Brown & Hamer* decision *supra*.

53. As regards intentional non-performance, Christie *supra* 195 states that "[O]ur law therefore appears to be that an exemption clause may validly exempt from liability for unintentional but not intentional non-performance." However there does not appear to be any conclusive case law in this regard. It does seem inimical to a contract that a party should be allowed to escape the consequences of an intentional refusal to perform. On the other hand why should such party not be entitled to

contract out of the consequences of intentional non-performance, but when it can contract out of intentional mal-performance? The distinction seems artificial.

54. A further problem relates to what precisely is non-performance as opposed to malperformance. Malperformance is when the party does perform but does not perform in accordance with the contract i.e. has performed in the wrong manner (see *Ally v Courtesy Wholesalers (Pty) Ltd* **1996 3 SA 134 (N) 149F–150H**). Non-performance on the other hand is when the party does not perform at all. In my view it should not make a difference whether a party intentionally does not perform properly or whether a party intentionally does not perform at all. The consequences are similar. The party ultimately has not performed in accordance with the contract. The element of intention may in fact lead to the consequence that the party has repudiated the agreement by refusing to perform or to perform in accordance with the agreement. Why then should a party be entitled to exempt itself from the one but not the other, when the common element in both is intention? It is not clear from the extracts from Christie *supra* relied upon by the Appellant, that a party may not exempt itself from the consequences of intentional non-performance as opposed to intentional malperformance. The only thing that is clear is that a party may not exempt itself from the consequences of fraud or dishonesty.

55. A further issue is that it is not clear what conduct *per se* would amount to non-performance as opposed to malperformance. An example from the facts of this matter suffices to illustrate the problem. Assuming for a moment that the Appellant had proved that the Respondent had intentionally refused to restore the premises as pleaded, does this amount to malpeformance or non-performance? After all it is not

as if the lessor had not performed in terms of the lease at all. It had given occupation and complied with all its other obligations in terms of the lease. It was only the obligation to restore the premises it did not comply with. Is this failure to comply with a single obligation sufficient to constitute non-performance of the agreement? Or does it rather constitute malperformance of the agreement, in that there is flawed performance of its obligations in the lease?

56. However it is not necessary for this Court to make a decision whether a party may exempt itself from the consequences of intentional non-performance and whether the lessor's conduct constituted non-performance or malperformance. This is so because, even assuming that the conduct would constitute non-performance, there was no evidence that the breach by the Respondent was intentional. It is true that the Appellant did plead a failure alternatively "refusal" to restore the premises. Even assuming that this form of pleading (which appears to be nothing other than the standard form of pleading in such cases) was sufficient to constitute an allegation of intentional non-performance, the Appellant failed to lead any evidence whatsoever to prove that the refusal was in fact intentional. The Appellant submitted that this issue too was not separated and was for the second round of the trial. Similarly to the submission that the tacit term was for the second round, this submission too cannot hold water for the same reasons set out above why the submission in regard to the tacit term could not hold water. As set out above, to rebut the application of the exemption clause, it was necessary for the Appellant (if it relied on intentional non-performance) to lead evidence that the non-performance was in fact intentional in order to prevent the Respondent from being entitled to rely on the exemption clauses (assuming that its submission that a party cannot exempt itself from the

consequences of intentional non-performance). It was incumbent upon the Appellant to do so at this stage of the trial since it was an issue relating to whether the Respondent could escape liability by relying on the exemption clauses. The Appellant did not do so.

57. The Appellant delivered approximately 100 pages of further submissions (including both parties' heads of argument *a quo*) on 18 August 2014, being four days after the hearing of the appeal. The general thrust of the further submissions was that it was always understood and the matter proceeded on the basis that no evidence would be required. Whilst that may have been the parties' understanding, it cannot change the fact that, having regard to the formulation of the separated issues and particularly the exemption issue, it was incumbent upon the Appellant to have led evidence of an intentional non-performance by the Respondent to counter the Respondent's reliance on the exemption clauses. As I have stated above, it appears that the formulation of the separated issue and the consequences of the formulation, were not carefully considered when the separation draft order was agreed to and when the parties requested by consent that such order be made an order of court. The failure to have carefully considered whether evidence was indeed necessary cannot now avail the Appellant. For the reasons set out above, evidence of an intentional non-performance was necessary if the Appellant relied on intentional non-performance to answer the question of whether the Respondent could escape liability by relying on the exemption clauses. This evidence was not led. It is not hard to imagine why the parties did not consider it necessary to lead evidence of intentional non-performance. It appears simply that a reliance on intentional non-performance was not uppermost in the parties' minds at the time. It had not been pertinently pleaded other than a

throwaway reference to "alternatively refused" in the particulars of claim. In fact a perusal of the Appellant's heads of argument *a quo* reveals no reference to intentional breach or intentional non-performance at all. In paragraph 3.4 of those heads of argument, the Plaintiff in setting out the background to the claim as that "the plaintiff alleges that despite demand the defendant **failed** to repair or rebuild the premises" (my emphasis). There is no reference to a **refusal** repair or rebuild the premises. Furthermore there is no reference whatsoever in the heads of argument *a quo* to a reliance on intentional non-performance as an answer to the Respondent's reliance on the exemption clauses. This is indicative of the fact that the Appellant's reliance on intentional non-performance in the appeal is an afterthought when the shoe pinches on the interpretation of the exemption clauses. This then is the real reason that no evidence was led of intentional non-performance before the court *a quo*.

58. In the absence of any such evidence this Court cannot find that the Appellant proved an intentional non-performance (or even intentional malpeformance) and in the circumstances, the question whether the Appellant can hold the Respondent liable in respect of either its claims having regard to the provisions of clause 16.4 and 19 of the lease, must be answered in the negative. The court *a quo* was therefore correct, albeit for slightly different reasons, in finding in the negative on this question.

59. In the light of the aforesaid finding, it is not necessary for this Court to grapple with the vexed question of whether the *huur gaat voor koop* rule means that the new lessor took over outstanding obligations of the old lessor from prior to the date of transfer of the property and we do not express a view since any such view would in

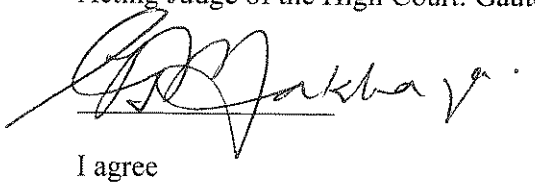
any event merely be an *obiter dictum*. Ultimately the court *a quo*'s view in this regard was similarly merely an *obiter dictum*. The *huur gaat voor koop* issue as separated does not therefore call for determination in this matter.

60. Lastly I might mention that whilst this Court has the greatest sympathy for the plight of the Appellant, who did nothing untoward, other than improve the lessor's property, the fact remains that, in the light of the exemption clauses, it did so at its own risk and it would have been well advised to have rather sought specific performance by the lessor.

61. In the result the following order is made: The appeal is dismissed with costs.

G Kairinos

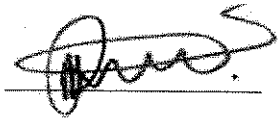
Acting Judge of the High Court: Gauteng Local Division



I agree

GM Makhanya

Judge of the High Court: Gauteng Local Division



I agree

V Ratshibvumo

Acting Judge of the High Court: Gauteng Local Division

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For the Respondent:

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Dates of Hearing: 13 August 2014

Date of Judgment: 11 September 2014