IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 43073/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

29 May 2015 **EJ FRANCIS**

In the matter between:

HOLLYBERRY PROPS 4 (PTY) LTD (IN LIQUIDATIO)	Applicant
And	
HISUPER TRADING CC	1st Respondent
AFRICA LAND PROPERTIES (PTY) LTD	2nd Respondent
MOGALE CITY LOCAL MUNICIPALITY	3rd Respondent

JUDGMENT

FRANCIS J

1. This is an application for an order that the first and second respondents and all those who occupy the premises known as Erf 132 Chamdor Krugersdorp, and more commonly known as 38 Van Eck Street, Chamdor (the premises), which are commercial premises, under and by virtue of the first and second respondents' occupancy be evicted from the premises with immediate effect.

2. The application was initially opposed on several grounds. However when the

matter came before me, the challenge was limited only to two grounds. The first is that the applicant is not the registered owner of the property and the second is that the sale agreement was not lawfully terminated in that the applicant had not given notice by registered post of the *mora* and cancellation in terms of clause 11 of the agreement of sale.

3. On 8 March 2013, the applicant and the first respondent entered into a written agreement of lease (the lease agreement) in respect of the premises. The lease agreement provided that the premises was leased by the first respondent from the applicant on terms and conditions set forth in the schedule A to the agreement for the purposes of manufacturing of furniture. The terms of the lease agreement were *inter alia* that the first respondent leased from the applicant the premises. The period of the lease agreement was for a period of 1 year commencing from 1 May 2013 and terminating on 30 April 2014. The monthly rental payable by the first respondent to the applicant for the premises was R130 000.00 excluding VAT per month for the duration of the lease period. The rental would be payable in advance on or before the first day of each and every successive calendar month into the applicant's bank account.

4. The first respondent took occupation of the premises in term of the lease agreement and continued to remain in occupation as at 30 April 2014, at which time the lease agreement lapsed due to the effluxion of time. The first respondent did not attempt to extend the lease agreement for a further period of 1 year. The first respondent had ceased making payments in respect of

rental, electricity, water and sewerage during the currency of the lease for the period July 2013 to April 2014 and is currently indebted to the applicant in the amount of R1 721 573.40.

5. Whilst the first respondent was still in occupation of the premises, and on 14 January 2014 after the applicant had been liquidated, the second respondent also duly represented by JianLiang Li (Li) who is also the director of the second respondent and a member of the first respondent signed an Offer to Purchase the premises (the sale agreement), which offer was accepted by Juanito Martin Damons, Lilly Mampina Malatsi-Teffo, Mthebaleng Christina Morobane and the applicant as the provisional liquidators of the applicant.

6. The material express terms of the sale agreement were *inter alia*, the following:

   6.1 The purchase price of the premises is the sum of R11 000 000.00.

   6.2 A cash deposit of 10%, being R1 100 000.00 was to be paid by the second respondent on the effective date, being 14 January 2014.

   6.3 The full balance of the purchase price was payable against registration of transfer of the premises and was to be secured by bank guarantees acceptable to the applicant, payable at Johannesburg free of exchange upon registration of transfer of the premises and would be delivered to the transferring attorneys or its nominee within 30 days of the effective date.

   6.4 In the event that the second respondent took occupation before

registration of transfer:

6.4.1 The second respondent would pay interest on the full purchase price from date of occupation to date of registration of transfer, calculated at 12% per annum, both days inclusive. The interest would be payable in advance in the sum of R110 000.00 before or on the first of the month following occupation to the transferring attorneys.

6.4.2 From the date of occupation, all benefits and risks in respect of the premises would pass to the second respondent and the second respondent would be liable for any rates and taxes, and water and electricity and any other municipal charges and imposts levied against the premises. The second respondent would also be liable for all insurance premiums and any and all charges and imposts with regards to the premises.

6.5 Should any party fail to comply with any of the terms and conditions of the sale agreement and remain in default for a period of 10 (ten) days after dispatch per registered post of written notice requiring any default to be remedied, the aggrieved party would be entitled, in addition to and without prejudice to any other rights available at law, to cancel the sale agreement forthwith and retain all moneys paid by the second respondent as "Rouwkoop" by way of liquidated damages or enforce performance of the terms of the sale agreement.

7. Prior to the registration of transfer, and on or about 1 May 2014, and after the

expiry of the lease agreement with the first respondent, the second respondent took occupation of the premises. The second respondent as a result of the sale agreement became liable from that date for payment of occupational rent and all rates and taxes, water and electricity and any other municipal charges and imposts levied against the premises. The second respondent also became liable for all insurance premiums with regards to the premises.

8. The applicant through its attorneys addressed a letter to Li on or about 3 September 2014, attaching a schedule setting out the various amounts owed by the first respondent in respect of rental, electricity, water and sewerage under the lease agreement, and which had not been paid during the currency of the lease for the period July 2013 to April 2014 in the sum of R1 721 573.40.

9. On or about 26 September 2014 the applicant through its attorneys addressed a further letter to the first respondent demanding the sum of R1 721 573.40 within seven days, failing which the applicant would proceed to take such steps as may be necessary to protect its rights, the costs of which would be for the first respondent's account. There was no response to the letter and the amount remains outstanding. Similarly in relation to the second respondent, notwithstanding the fact that it took occupation of the premises on or about 1 May 2014, the second respondent has failed to make any payment to the applicant for occupational rental, water, electricity, sewerage, and rates and as at August 2014 was indebted to the applicant in the sum of R572 050.11.

10. The applicant, through its attorneys, addressed a letter to the second respondent, represented by Li on 3 September 2014, attaching a schedule which sets out the various amounts owed by the second respondent for the period May 2014 to August 2014 to the applicant in respect of occupational rental, water and electricity, sewerage, and rates, which were not paid during the currency of sale agreement, prior to its cancellation, the total being R572 050.11.

11. In addition to the above breach of the sale agreement, the second respondent also failed to procure and make available to the applicant the bank guarantees in terms of clause 4.2 of the sale of agreement, which were to be procured within 30 days of the effective date. Although the deposit of R1 100 000.00 was paid by the second respondent, it did not make available the required guarantees for the balance of the purchase price for the premises.

12. On or about 26 September 2014, the applicant through its attorneys addressed a letter to the second respondent wherein the applicant gave notice to the second respondent in terms of clause 11 of the sale agreement that the second respondent was in breach of the sale agreement and that the second respondent was required to remedy its defaults within a period of 10 days of the date of dispatch of the letter in terms of which the second respondent was called upon to make payment to the applicant in the sum of R572 050.11 in respect of occupational rental and various consumables and the second respondent was called upon to provide the applicant with the bank guarantees required to be

obtained by it, to secure the balance of the purchase price in terms of clause 4.2 of the sale agreement.

13. Following the letters of demand dated 3 and 26 September 2014 to the first and second respondents, the applicant and second respondent engaged in without prejudice discussion and no agreement could be reached on the resolution of the issues. These discussions culminated in the second respondent being verbally informed by Len Vorster of the applicant's attorney on 9 October 2014 that the sale agreement was cancelled and that the second respondent had 48 hours to vacate the property.

14. On or about 9 October 2014 the applicant's attorneys addressed a letter to the second respondent stating that the second respondent had failed to meet any of the demands set out in the applicant's letter dated 26 September 2014 within the time period afforded to it therein. The letter further stated that settlement discussions held on that same day between the applicant and the second respondent had been unsuccessful and that accordingly the sale agreement signed on 14 January 2014 was thereby cancelled in accordance with clause 11 of the sale agreement and that the second respondent had 48 hours within which to vacate the premises.

15. On or about 11 October 2014 the applicant's attorney received a letter from the second respondent's than attorney indicating that to meaningfully advise the second respondent, and taking into account the applicant's demand to

vacate the premises in its letter dated 9 October 2014, it requested that the applicant's attorneys furnish it with a copies of the sale agreement and all copies of documents pertaining to the matter which bears any impact in the second respondent. They requested that the demand that the second respondent vacate the property be held over until the attorneys had received the requested documentation and was able to advise its clients of its rights.

16. On or about 13 October 2014 the applicant's attorneys responded to the second respondent's attorneys letter and provided a copy of the sale agreement; the letter of demand dated 26 September 2014 and the letter to vacate the premises dated 9 October 2014. It advised that any further documentation or correspondence would be in the second respondent's possession and that they did not agree to hold over the demand for the second respondent to vacate the premises.

17. The parties failed to reach an agreement on the resolution of the issues. The first and second respondents have failed to vacate the premises or to make payment to the applicant of any amounts which are currently due and owing to it.

18. The application was opposed by the first and second respondents and Li stated that he is the owner of both respondents. He manages a furniture manufacturing company, producing lounge suites for a number of South African furniture retail companies. He is presently employing a number of 50

employees earning between R400 and R1 000.00 per week, which averages at least R700 per week. Most of the employees working for him have commenced employment in 2006 and are depended on their jobs to sustain a reasonable livelihood. He took possession of the premises initially in a rental arrangement in July 2013, but later opted to enter into a sales agreement. Li entered on 8 March 2013 into a rental/lease agreement with the applicant. The lease agreement was to commence on 1 May 2013 and was to operate for a period of one year and was to terminate on 30 April 2014. He took possession of the premises in June 2013 and in terms of the agreement was to effect rental in the amount of R130 000 per month excluding VAT. When he took occupation of the premises there were already concerns related to electricity supply, water leaks, broken windows and a leaking proof. These were to have been attended to by the lessor but he attended to fixing the water leaks, the plumbing and some of the broken windows. He affected a deposit in the sum of R148 200.00 and one month's rental in the sum of R130 000.00 and the total paid is R278 200.00. He has complied with his obligations in terms of the lease agreement. He did not make any further payments after one of the directors of the applicant's, Jeffrey Mark Wiggil had passed away.

19. In August 2013 Li was approached and told that the premises was available for sale. He was interested in purchasing it and in terms of the sale agreement he was to purchase the property for R11 million and had to effect a deposit of R1.1 million as a deposit. That payment was effected in October 2013. In September 2013 he approached Michael Pillay from Business Partners who

advised him that they were desirous to fund the balance of the purchase price and take up equity within the second respondent. The only requirement for the finalisation of financing raised by Business Partners was the fact that the electrical supply from the adjacent building was not acceptable. After he had given them an explanation Business Partners required a new electrical supply point be installed before it could continue with the financing. He met with the seller who he believed was KPMG at their offices on 25 August 2014 but had subsequently discovered that the building is owned by Investec Bank, the original bond holder. The meeting was attended by various people and the issue regarding the electrical repairs was central to the discussion. It was decided that an investigation would be undertaken to gauge the extent of the electrical problems. It was decided that Mr Weber would undertake an investigation for purposes of preparing a quotation to effect a single supply electrical point. The lease agreement fell away upon conclusion of the sale agreement.

20. In October 2014 Li attended a meeting at KPMG and was informed that it would cost R2.8 million to install a single supply electrical point and attend the relay of the electrical supply throughout the premises. The negotiations broke down when he requested whether the amount for the repairs of the electrical issues could be offset from the remainder of the purchase price. The prospective financing of the remainder of the outstanding purchase price was discussed. He had expressly advised that the duty of the restoration of a single electrical supply point was the duty of the seller and not the purchaser and that

the extent of the problem was never disclosed to him. Had he known about the extent of the cost involved, he would not have agreed to accepting the responsibility for the electrical repairs. The agreement in that regard was unreasonable and unconstitutional as it unfairly and unreasonably favours one party only namely the applicant. He has attempted to draw to the attention to the seller the urgency of the electrical problems but same fell on deaf ears. He has been informed that the purchaser of a property generally is not required to attend to the electrical repairs, but that there is a duty on the seller to ensure that the premises are fit for usage and that the requisite electrical compliance certificates are prepared.

21. It was contended by the applicant that the first and second respondents who remain in unlawful occupation have no basis in law upon which they are entitled to occupy the premises at all and are unlawful occupiers. The lease period under the lease agreement has come to its end and the sale agreement has been cancelled and a notice to vacate was premises delivered to the second respondent, which notice was acknowledged by the second respondent's attorneys. In terms of the notice to vacate, the second respondent was informed that the premises must be vacated by 11 October 2014. The first and second respondents are both represented by Li who received the notice to vacate the premises, and they were both aware that they were required to vacate the premises on that specified date which they had refused to do.

22. It was further contended by the applicant that by virtue of the termination of

the lease agreement and the cancellation of the sale agreement, the unlawful occupiers' and/or tenants' continued occupation and possession of the property is unlawful. Their unlawful occupation of the premises is not subject to the provisions of the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997 or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 in that they are not occupiers as defined in section 1 of the aforesaid pieces of legislation and they are conducting manufacturing business on the premises and do not occupy it for residential purposes since it is situated in an industrial area. The applicant is entitled to claim for immediate ejectment of the unlawful occupiers from the premises and the unlawful occupiers has no defence in law to this claim by the applicant.

23. Li denied that the first and second respondents are in unlawful or illegal occupation of the premises since his conduct demonstrates a willingness to finalise the conclusion of the sale agreement, which has been and continues to be delayed by the conduct of the seller. It was contended that a party cannot frustrate the process and claim relief for non-compliance where that party itself was the cause of the non-compliance. The electrical report is in the process of being finalised and same will be made available to the court and the premises are safe. For the aforesaid reasons there is neither unlawful nor illegal occupation of the premises.

24. Li has admitted having received the various letters but denied the accuracy of

the contents of the letter namely the one of 26 September 2014. He denied that he was indebted to the applicant. The one letter deals with clause 11 of the agreement and he admitted having received that. He further admitted having received the letter dated 9 October 2014 that states that he has failed to meet the demands contained in the letter dated 26 September 2014 within the period mentioned in it and that it was cancelled. However it was contended that the applicant cannot cancel the agreement verbally and that no notice of cancellation has been filed and it cannot vary the terms of the agreement unilaterally. The first and second respondents' admitted that it received notice to vacate the property by 11 October 2014 but denied the notice constitutes a valid notice in terms in the PIE Act.

25. PIE finds no application in this matter since these are commercial premises situated in an industrial area. This defence was for obvious reasons not persisted with.

26. I have earlier indicated that the first and second respondents are persisting only with two defences. The first was the non-joinder of the bondholder on the property, Investec Bank who it was contended was the owner of the property and not Hollyberry Props 4 (Pty) Ltd. The second ground is that there was no compliance with clause 11 of the sale agreement in that the said notices were not sent by registered post. This court was referred to various judgments by the first and second respondents in an attempt to bolster their defence.

27. I now propose to deal with the first issue whether the applicant could seek the relief that they are seeking and whether Investec Bank should have been joined as a party to the application. Investec Bank as the bondholder is not the owner of the business premises by virtue of the bond. It has no interest other than that it is a secured creditor. In this regard see *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 SCA. There is there no merit in the above defence.

28. This brings me to the second defence raised by the first and second respondent around the issue of non compliance with clause 11 of the sale agreement. Section 11 of the sale agreement deals with breach and provides as follows:

"Should any party fail to comply with any of the terms and conditions of this agreement and remain in default for a period of 10 (TEN) days after dispatch per registered post of written notice requiring any default to be remedied, the aggrieved party shall be entitled, in addition to and without prejudice to any other rights available at law, to cancel this agreement forthwith and retain all monies paid by the purchaser as 'ROUWKOOP" by way of liquidated damages or enforce performance of the terms of this agreement."

29. Before I refer to the judgements that the first and second respondents counsel had referred me to, Li who is the owner of the first and second respondent's had admitted that he had received the letters that had placed him in *mora* and the cancellation letter but had disputed the contents of the letters. Whilst it is so that there is no proof that the letters were sent by registered post, it appears that the letters were hand delivered. The first letter dated 26 September 2014 marked for the attention of Li appears to have been hand delivered and sent by registered mail and was received by one Malcolm Pillay on 26 September 2014. The letter at page 3 deals with the breach and informs Li that in terms

of clause 11 he is in breach and is given 10 days to remedy his breach failing which further steps would be taken. Li admitted having received the said letter.

30. The next letter of import is the letter dated 9 October 2014 which was hand delivered on the same day which was also acknowledged to have been received by Li informs him that as a result of their breach the sale agreement has been cancelled.

31. The respondents counsel referred me to the following cases in support of his contentions. The first was that of *Minister of Land Affairs and Agricultural and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 SCA. This case is simply not relevant to the issues that I am required to determine. It deals with that it was not proper for a party in application proceedings to base an argument on passages in documents where these have been annexed to the papers where the conclusions sought to be drawn from such passages had not been canvassed in the affidavits. In motion proceedings the affidavits contain both the pleadings and the evidence and the issues and averments should appeal clearly therefrom. A party could not be expected to trawl through lengthy annexures to their opponents' affidavits and to speculate on the possible relevance of the facts therein contained. Trial by ambush should not be permitted. The reliance on the matter of *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others; First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another* 1998 (4) SA 565 (NC) is

simply misplaced. That case dealt with the issue of knowledge of the summons that was issued but was not a served. The matter of *Kragga Kamma Estates and Another v Flanagan* 1995 (2) SA 367 (A). This deals with the requirements of placing a party in mora and cancellation. The reliance of *Sandton Square Finance (Pty) Ltd and Others v Biagi, Bertola and Vasco and Another* 1997 (1) SA 258 (W) is misplaced since this matter dealt with the question where service took place at another address other than a *domicilium citandi et executandi* it was held that service at another address would be sound. The last case that reliance was placed on is that of *SA Wimpy (Pty) Ltd v Tzouras* 1977 (4) SA 244 (W) which also dealt with the issue whether a notice was validly given. As long as there is prove that the notice was received, it matters not how the notice was given.

32. Save for what I have referred to above, I am satisfied that the first and second respondents are in breach of the sale agreement. In a letter dated 26 September 2014 which as stated earlier Li admitted to having received it, they were informed about the nature of the breach and given ten days to remedy the breach. After they failed to do so, they were given another letter dated 9 October 2014 that they had failed to remedy the breach and that the applicant was now cancelling the sale agreement. There was therefore compliance with clause 11 of the sale agreement. It was mindboggling that despite these admissions that counsel for the first and second respondents had persisted with the defence which was stillbirth. This is a defence that was manufactured in chambers and was simply an afterthought.

33. Following the second respondent's failure to meet the terms of the sale agreement, notwithstanding notice to remedy its defaults and the subsequent settlement discussions between the applicant and the second respondent, the latter failed to remedy its defaults and the applicant accordingly, cancelled the sale agreement, which it is entitled to do. The first and second respondents do not have any defence to this application. They have clearly breached the sale agreement and are in unlawful occupation of the premises. The application stands to be granted.

34. This brings me to the question of costs. The applicant had in its notice of motion indicated that it was seeking costs on an attorney and client scale. It had brought an urgent application which was heard on 9 December 2014. The matter was struck from the urgent roll to allow the first and second respondents' to file an answering affidavit and costs were reserved. The court found that the matter was not urgent and this appears to have been the reason why it was struck of the roll. The applicant clearly did not make out a case for urgency. The applicant should bear the costs of the striking off of the urgent application on a party and party scale. The costs of this application should be borne by the first and second respondents. Their opposition to this application was frivolous and was doomed to fail from the onset. Such costs will have to be on an attorney and client scale.

35. In the circumstances I make the following order:

35.1 The first and second respondents and all those who occupy the premises known as, Erf 132 Chamdor, Krugersdorp and more commonly known as 38 Van Eck Street, Chamdor (the premises), under and by virtue of the first and second respondents' occupancy of the premises, be and are hereby evicted from the premises by not later than 14h00 on 5 June 2015.

35.2 In the event of the first and second respondents and all those who occupy the premises under and by virtue of the first and second respondents' occupancy of the premises, failing and/or refusing to vacate the premises by not later than 14h00 on 5 June 2015, that the sheriff of this Court be and is hereby authorised to forthwith enter upon the premises and evict the first and second respondents and all those who occupy the premises under and by virtue of the first and second respondents' occupancy of the premises, with the assistance of the South African Police.

35.3 The first and second respondents are to jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the scale of attorney and own client, excluding the costs reserved by the court of the hearing on 9 December 2014, which are to be paid by the applicant to the first and second respondents on a party and party scale.

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FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPLICANT	:	D J JOUBERT INSTRUCTED BY EDWARD NATHAN SONNENBERGS INC
FOR RESPONDENTS	:	C E THOMPSON INSTRUCTED BY DAVID KOTZEN ATTORNEYS
DATE OF HEARING	:	12 & 14 MAY 2015
DATE OF JUDGMENT	:	29 MAY 2015