

SOUTH AFRICA / JUDGMENT

Highflyer Properties (PTY) td v Franchkings (PTY) Ltd (40462/2019) [2022] ZAGPJHC 612 (29 August 2022) [2022] ZAGPJHC 612

COURT

South Gauteng High Court, Johannesburg

BEFORE

E F Dippenaar

CASE / FILE NUMBER

40462/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: 40462/2019

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

NO

In

the matter between:

HIGHFLYER

PROPERTIES (PTY) LTD

Plaintiff

And

FRANCHKINGS

(PTY) LTD

Defendant

JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time

for hand-down is deemed to be 10h00 on the 29th of August 2022.

DIPPENAAR J:

- [1] This action concerns a claim launched by the plaintiff, as lessor, pursuant to a commercial lease agreement concluded between it and the defendant on 24 June 2019 in respect of office premises situate at 51 West Street, Houghton. The conclusion of the lease agreement and its terms are common cause, save for an implied term contended for by the defendant pertaining to the condition of the premises.
- [2] The disputes between the parties centre around which of the parties repudiated the agreement and whether the plaintiff suffered damages. The respective parties each contends that the other repudiated the agreement. Each sought to cancel the agreement consequent upon the repudiation thereof by the other.
- [3] The plaintiff claimed contractual damages suffered as a result of the defendant's repudiation of the agreement. The defendant in turn raised a counter claim for damages, being the R50 000 it paid to the plaintiff towards the deposit. The defendant did not persist with its alternative claim seeking an order directing the plaintiff to take all necessary steps to remedy the latent defects to the ceilings, the walls, the flooring and the air conditioning in the premises.
- [4] At the commencement of the trial the issue of liability[1] was separated from the quantum. This judgment pertains to the liability issue.
- [5] Nine witnesses testified at the trial. The plaintiff called Mr Dennis Gamsy, a trustee of the Gamsy Family Trust, the main shareholder of the plaintiff and Mrs Gillian Gamsy, the director of the plaintiff. The Gamsy's are both actively involved in the business activities of the plaintiff. Mrs Gamsy is also the group CEO of Gilian Gamsy International Communications ("GGI"), another tenant of the plaintiff which occupied the premises here in issue. Ms Gaynor Foxon, who dealt with the administration of the plaintiff's business including issues surrounding tenants and repairs also testified. Its last witness was Ms Wheeler, an employee of the plaintiff's new tenant, etfSA Portfolio Management Company (Pty) Ltd ("ETF"), which concluded a lease agreement pertaining to the premises on 6 August 2020.
- [6] The defendant's main witness was Mr Faadil Tayob, ("Mr Tayob") the primary representative of the defendant in relation to the agreement. It also called Mr Aadil Tayob, a director of the Defendant, their business associate, Mr Hussein Dawood, Ms Daniella Gossayn-Brady of Tru Interiors and an expert, Mr Saul Gumede, a property management practitioner.

- [7] The background facts are not contentious. Mr Tayob had responded to an advertisement advertising vacant premises in the plaintiff's building and was shown the premises by Mr Gamsy. Mr Tayob noticed the premises occupied by GGI in the building and preferred it to the vacant premises advertised. Mr Tayob insisted in taking occupation of the GGI premises and conducted various inspections of the premises. Pursuant thereto, negotiations ensued for GGI to relocate so that the defendant could rent the premises occupied by GGI. The lease agreement pertains to those premises.
- [8] It is common cause that the lease agreement was concluded on 24 June 2019 and that the defendant would be given beneficial occupation by 1 August 2019. The lease would commence on 1 September 2019 and endure for a period of three years. The lease would thus terminate on 31 August 2022. The defendant never took beneficial occupation of the premises.
- [9] On 19 July 2019, the defendant's attorney of record, Mr Koor, sent a letter to the plaintiff, addressed to Mrs Gamsy, the relevant portions of which stated:

"3 Our instructions reveal that on 10 July 2019 our client, duly represented by Mr Faadil Tayob and his interior decorator, Ms Daniella Brady, attended at the (sic) your premises in order to assess the scope of work required for the adequate fit out of the premises for the purpose of our client obtaining occupation to commence his business.

4 Our instructions further reveal that the following items were recorded as needing immediate attention and which the landlord is expected to attend to before beneficial occupation could be passed to our client: The current open area ceiling tiles have holes and water marks, they are old and the T-bars that hold them up are warped and dropping down, they would need to be removed and completely replaced; the wall air conditioners in the offices are old you could not even try to service them, They don't provide sufficient cool air for the office space and a few of them don't even work; the central air conditioner cassettes available in between don't cover all areas for proper ventilation; the carpets in the front open areas are stained and damaged and not in a state to be re-used at all, they deteriorated; the flush plaster ceiling has dropped ceilings so if you take all out to make it a white box you need to redo those ceilings as current ones are all at different levels.

5 Our client on 10 July 2019 addressed the above concerns with you personally at the premises and in the presence of his Interior decorator Daniella Brady, and we regret that your attitude to our client was basically to take the premises as is or to leave and find alternative premises. Your derogatory tone and condescending attitude towards our client is truly unacceptable and our client demands and (sic) apology forthwith.

6 We confirm your instruction to my client, which has been confirmed by his interior decorator, not to expect any improvements from yourself to the premises but to instead take his "money" and leave.

7 We do advise that the premises is in such a poor state that the cost to repair is an amount of R634 965.08, please see attached quotation marked “A”.

8 Our client accordingly accepts your termination of the lease and we advise that our client has found alternative business premises from which to operate.

9 We demand that the rental deposit of R50 000 be refunded into our trust account within 3(three) days of receipt hereof”.

[10] The plaintiff’s attorneys responded on 24 July 2019. The relevant portion of that letter stated:

“2 Our client is in receipt of your letter dated 19 July 2019 presumably addressed to Mrs Gillian Gamsy, purporting to accept an ostensible offer of cancellation of the lease agreement concluded between our respective clients.

3 At the outset, we record that any failure on our part to deal with any of the allegations contained in your letter under reply ought not to be construed as an acceptance of the correctness of any of those allegations...

...

4.4 the lease agreement made specific provision for an amount of R100 000, 00, which was an agreed amount allocated by our client to fit out and modify the premises to make it more suitable for your client’s specific needs, which modifications were to be carried out by your client;

4.5 in addition thereto our client agreed to allow your client 1 month’s beneficial occupation towards achieving tenant installation;

4.6 All other salient issues relating to the terms and conditions were agreed upon whereupon the lease agreement was signed off and became binding on the parties from date of signature thereof. Furthermore your client paid a portion of the deposit amount as further confirmation of the lease agreement.

5 Subsequent to the conclusion of the lease agreement, our client began preparations towards relocating of the GGI Communications business to its new office space. It was during this time that your client began making unreasonable demands on our client insofar as remedial work to the premises that needed to be carried out, despite the same having been factored into the amount allocated for tenant installation.

6 Our client gained the distinct impression that your client was looking for every excuse to repudiate the lease agreement and made unreasonable demands upon our client to achieve this end. Consequently, the contents of your letter under reply do not come as much of a surprise to our client and the reference by your client to an exasperated outburst on the part of Mrs Gamy as an intention to terminate the lease is most opportunistic.

7 As you will no doubt appreciate, and we trust that you will advise your client that the lease agreement is quite specific insofar as termination thereof is concerned and the lessor's rights to enforce performance of the lessee's obligations even in the event of cancellation of the lease.

8 Our instructions are that our client hereby tenders performance of its obligations in terms of the lease and holds your client to the lease agreement concluded with it. Furthermore, our client most certainly does not accept your client's purported cancellation of the lease agreement and it is our client's intention to ensure that your client adheres to its obligations arising from the lease agreement.

9 Your client is consequently called upon to confirm by no later than close of business on Thursday, 25 July 2019, whether it persists with its repudiation of the lease agreement as GGI Communications will be moving out of its current premises over the weekend as the designated premises to which it is relocating has already been revamped to their requirements.

10 You will appreciate that in the event of your client persisting with its purported cancellation of the lease agreement our client will have no alternative but to claim all amounts due to it in terms of the lease agreement, including such consequential damages as it may have suffered on account of your client's repudiation of the lease agreement."

[11] The defendant maintained its stance in a letter dated 25 July 2019, wherein it was recorded that "our client only made requests to your client for remedial work relating to the latent defects in the premises".

[12] Following further communications between the parties' respective attorneys on 20 September the plaintiff notified the defendant:

"Please be advised that we have since been instructed to accept your client's repudiation of the lease agreement and a summons for our client (sic) damages will be served shortly."

[13] Against this background, two primary issues require determination. The first, which of the parties repudiated the agreement. The correspondence between the respective parties' attorneys sets out the outlines of their respective cases. Considering their respective pleadings, both the plaintiff and the defendant in certain respects failed to prove certain of the facts averred.

[14] The success of the defendant's first counterclaim for damages is dependent on whether the plaintiff repudiated the agreement.

[15] The second issue is whether the plaintiff suffered any loss or damages as contractually pleaded.

[16] Regarding the latter, the plaintiff contended that it had established the damages claimed. The defendant's case was that as GGI remained in the premises to which the lease agreement relates, the plaintiff did not suffer any damages. It also argued that the plaintiff on its pleadings did not establish any claim for GGI's relocation costs.

Was the lease agreement repudiated and if so, by whom?

[17] The defendant's case for repudiation is squarely based on an altercation which occurred on 10 July 2019 in the boardroom of GGI between Mrs Gamsy and various of the defendant's representatives and Mrs Gamsy's conduct and utterances on that

occasion. In its heads of argument the defendant contended that the plaintiff, as represented by Mrs Gamsy, repudiated the agreement by advising its representatives that "she did not have time to deal with the defects pointed out in the premises and that if they did not like the premises as is, they must take their things and go".[2]

[18] It was common cause that Mr Tayob had requested a site visit on 10 July 2019 to consider certain drawings and the like pertaining to the defendant's office get up and that the GGI boardroom had been made available for this purpose. Mr Tayob indicated that if Mrs Gamsy was free, they could discuss certain boardroom furniture which GGI wanted to sell.

[19] Mrs Gamsy's version of the events which occurred in the boardroom on that date was not challenged in cross examination. It was not expressly put to Mrs Gamsy in cross examination that she repudiated the lease agreement by her words or conduct.

[20] According to Mrs Gamsy, she was on her way out to a lunch meeting when she was asked to meet the defendant's representatives in the boardroom. She thought it was to discuss the boardroom furniture. On arrival, five representatives of the defendant were in attendance. She testified that she was bombarded with complaints and concerns and gained the impression that the representatives were trying to renegotiate the terms of the lease. According to Mrs Gamsy she felt overwhelmed and attacked and said words to the effect of: "I can't take this anymore, we have an agreement" before storming off. She conceded that her conduct was rude.

[21] The defendant's evidence later established that Mr Tayob and Mr Dawood started pointing out defects and were raising their

concerns when Mrs Gamsy stormed out of the meeting. Their evidence did not provide a clear and composite list of exactly what those

defects were and defects were only referred to in general terms. The defendant's witnesses were further not consistent on exactly what words were used by Mrs Gamsy and reliance was placed on the tenor of her statements rather than the words themselves.

[22] According to Mr Tayob, Mrs Gamsy used the words: "If you don't like the premises, take your things and leave", which he said he understood to constitute a termination of the agreement.

- [23] Mr Dawood did not clearly remember the events of the day. His impression was that Mrs Gamsy's rude conduct should discourage the defendant from entering into the lease. His discussions with Mr Tayob centered around his concerns of how their business relationship would be with the plaintiff, given how Mrs Gamsy had conducted herself at the meeting. Mr Dawood testified that he was not aware at the time that a lease agreement had already been concluded between the parties.
- [24] Ms Gossayn-Brady could not remember the exact words used by Mrs Gamsy but remembered her saying something to the effect that she was not going to negotiate and discuss, and that if they were not happy, they should go. According to her, Mrs Gamsy was in a rush or under pressure and did not have time to deal with Mr Tayob and Mr Dawood. Under cross-examination she conceded that Mrs Gamsy may have said the words: "I can't take this anymore, we have an agreement".
- [25] None of the defendant's witnesses testified that Mrs Gamsy said that "the defendant should recover the deposit and find alternative premises" as contended in its plea.
- [26] The high water mark of the evidence is thus that there was an altercation in the boardroom when Messrs Tayob and Dawood tried to raise their concerns with Mrs Gamsy and point out certain defects. In my view, the plaintiff's alleged repudiation must be viewed in context of the circumstances as they prevailed at the time.
- [27] By 10 July 2019, the lease agreement had already been concluded. At least Mr Tayob was well aware of its terms as he had negotiated them with the plaintiff and signed the lease agreement on the defendant's behalf. In terms of the lease agreement[3], the defendant had agreed that it would take occupation of the premises even if they were in a state of disrepair. It further did

not place any obligation on the plaintiff to take any remedial action prior to receipt of the notice. It was also undisputed that in terms of clause 15 of annexure A of the lease agreement provided that the defendant was obliged to:

"15.1 Notify the lessor in writing within 21(twenty one) days after the commencement date or occupation date (whichever is later) of the lease of any defects in the leased premises.

- [28] It was common cause that the defendant had not by that time given any written notice of defects to the plaintiff, nor did it do so thereafter.
- [29] The lease agreement in its terms required the premises to be provided in good order and condition. This connotes the common law standards[4] and not a higher standard. Put differently, the leased property must be in a condition that renders it reasonably fit for the purpose for which it was let[5].
- [30] The evidence did not in my view establish that the premises were not in good order and condition, as contended by the defendant, but rather established that they were reasonably fit for use as offices.

- [31] Considering the evidence of Mrs Gamsy, Ms Foxon, Ms Wheeler and a concession by Mr Faadil Tayob under cross examination, they all testified that the premises were in an inhabitable condition and could reasonably be used as offices. GGI used them as offices as did ETF. Such evidence is corroborated by Mr Tayob's own evidence that he was intent on obtaining the GGI premises after seeing them, rather than the advertised vacant premises.
- [32] Ms Brady's evidence requiring so called white box standards was gainsaid by the evidence of Mr Gumede, who confirmed that such standards would only be applicable to new office space which had not been used before.
- [33] The fact that there were certain defects does not detract from the fact that the premises were fit to be used as offices. Whilst the plaintiff's witnesses readily conceded that there were indeed certain defects, being the damaged ceiling tiles, worn carpeting and one air conditioner that was not operational, their evidence further established that such defects could easily be remedied if required.
- [34] It is clear that whilst disputes arose between the parties regarding what exactly the defects were and whether the tenant installation could be used to repair the defective items, the defendant did not act in terms of the agreement by providing a written notice and the plaintiff did not respond thereto by refusing to effect the necessary repairs.
- [35] The defects were only raised in writing in Mr Koor's letter of 19 July 2019 and the disputes which arose in relation thereto were only raised in the correspondence between the parties' respective legal representatives.
- [36] This in my view takes the issue of whether Mrs Gamsy repudiated the lease agreement on 10 July 2019 no further. First, because the defendant relied squarely on Mrs Gamsy's words and conduct on 10 July 2019 for the plaintiff's repudiation of the agreement. Second, because when the disputes were raised in the correspondence, the defendant had already purported to cancel the agreement.
- [37] The various disputes surrounding the nature and extent of the defects featured in the parties' respective pleadings and much of the trial was devoted to evidence on those issues. It is not in my view necessary to make determinations on all those issues.
- [38] It is apposite to set out the principles applicable to repudiation. Repudiation occurs when a party to a contract indicates to the other party, in words or by conduct, a deliberate and unequivocal intention no longer to be bound by the contract, without any legal basis to do so. [6] The test is objective and is not dependent on the intentions of the party but rather what the perception of a reasonable person in the position of the aggrieved party would be.[7]
- [39] The test is whether a notional reasonable person in the position of the innocent party would conclude that proper performance in accordance with the agreement will not be forthcoming.

[40] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[8] (“Datacolor”), the Supreme Court of Appeal held:

“The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is a “serious matter”, requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed.”

[41] I turn to apply the relevant principles to the facts. The defendant argued that Mrs Gamsey’s conduct constituted a deliberate and unequivocal intention by the plaintiff to no longer be bound by the lease. The plaintiff argued the opposite.

[42] Whilst the understanding and reaction of the defendant’s representatives is not irrelevant, it is not conclusive of whether

the conduct and words constituted an act of repudiation[9]. The issue is whether their understanding or interpretation is objectively viewed reasonable.

[43] Mr Tayob’s evidence that his understanding of the words used by Mrs Gamsy was that she was terminating the agreement is clearly subjective and aimed at a deliberate interpretation which would assist the defendant in avoiding the lease agreement. The evidence established that the defendant was mindful of Mr Dawood’s misgivings about concluding a lease agreement with the plaintiff by questioning how smooth the business relationship between the parties was going to be if that was how Mrs Gamsy would react, which constituted a point of debate during the deliberations of the defendant’s representatives and business associates.

[44] Whilst it clear that Mrs Gamsy was rude during the altercation of 10 July 2019 and it was reasonable for the defendant’s representatives to have been offended thereby, her conduct and words are open to various feasible interpretations other than a repudiation.

[45] By way of example, the words “if you don’t like the premises take your things and leave” reasonably refers to a demand by Mrs Gamsy that the defendant’s representatives leave the boardroom and the GGI premises. Given that the defendant had not yet taken occupation of the premises, an interpretation these words indicated that the plaintiff no longer intended to be bound by the lease agreement is strained.

[46] Similarly, it is a feasible interpretation of the fact that Mrs Gamsy stormed out of the meeting, that she was exasperated (as contended in plaintiff’s attorney’s letter of 24 July 2019), rather than that the plaintiff refused to remedy any defects raised by the defendant.

[47] Objectively speaking, given the terms of the lease agreement, it is further tenuous for the defendant to suggest that Mrs Gamsy repudiated the lease agreement by refusing to consider the oral complaints and defects raised at the 10 July 2019 meeting.

- [48] Considering all the facts and the prevailing circumstances at the time, the conduct of Ms Gamsy was not a clear cut and unequivocal manifestation of the plaintiff evidencing an intention no longer to be bound by the lease agreement. Nor did her conduct evidence an unequivocal and clear cut intention on the part of the plaintiff not to perform any remedial work and repair the defects. It is reasonable to interpret her conduct and utterances as frustration and an emotional response to the confrontation and complaints raised by the defendant's representatives in the meeting and the criticisms levied at the GGI offices of which she was very proud.
- [49] It is also by no means clear that Mrs Gamsy, although a director of the plaintiff, was acting in that capacity in the meeting, given that it was the GGI boardroom what had been made available to the defendant's representatives for their meeting and the discussions which Mrs Gamsy anticipated would occur pertaining to the boardroom furniture would be between the defendant and GGI. It should also be borne in mind that it was Ms Foxon, rather than Mrs Gamsy, who dealt with the administrative issues relating to tenants, repairs and the like on behalf of the plaintiff.
- [50] I conclude that Mr Tayob's understanding of the words used by Mrs Gamsy is not the perception of a reasonable person in the position of the aggrieved party. In light of the evidence of Mr Dawood on the issue and his concerns regarding how difficult the relationship between the parties may be considering Mrs Gamsy's rudeness even before the defendant took occupation, it is probable that those concerns, rather than Mrs Gamsy's words informed the defendant's decision to seek alternative premises.
- [51] Considered in context, Mrs Gamsey's outburst speaks to a frustrated and emotional response to the conduct and alleged defects pointed out by Messrs Tayob and Dawood, rather than to any repudiation of the agreement.
- [52] I am fortified in this view by how the parties conducted themselves immediately after the events of 10 July
2019. Various emails were exchanged between the parties which corroborates that both the plaintiff and the defendant acted as if there was still a lease agreement in place. The plaintiff called for copies of the defendant's floorplans for signature and the parties continued to discuss the purchase of GGI's boardroom furniture. As late as 17 July 2019, Mr Tayob addressed an email to Ms Foxon advising that the defendant's drawings were ready and they were meeting Ms Brady on site the following day. Consent was requested to use GGI's boardroom for the meeting and reference was again made to the purchase of the boardroom furniture. The request was granted.

- [53] This conduct on the part of all the parties is not consistent with either the plaintiff intending to terminate the lease agreement or the defendant considering the outburst on 10 July 2019 as a repudiation of the lease agreement. Mr Tayob's explanation that before a decision could be taken it was necessary to consult with all his business partners in the defendant does not support his alleged perception that Mrs Gamsy had repudiated the agreement.
- [54] Having concluded that the plaintiff did not repudiate the lease agreement, the defendant's letter of 19 July 2019 does in my view constitute a repudiation of the lease agreement. In the letter from their attorney, Mr Koor, the defendant expressed an unequivocal intention to no longer to be bound by the lease agreement is evidenced. It was also stated that the defendant had obtained alternative premises.
- [55] I conclude that the plaintiff did not repudiate the lease agreement and that it was the defendant which did so. It is undisputed that the plaintiff accepted the repudiation and cancelled the agreement by way of letter dated 20 September 2019.
- [56] I turn to consider the respondent's first counterclaim, which is predicated on the plaintiff's repudiation of the lease agreement. It is pleaded:

"In breach of its obligations in terms of the agreement, the Plaintiff indicated in clear terms that it would not make any improvements to the premises and displayed a deliberate and unequivocal intention not to be bound by the terms of the agreement. Despite demand, the plaintiff has failed and/or refused to undertake remedial work relating to the latent defects in the premises"[10].

- [57] Clause 4.3 of annexure A to the lease agreement provides:

"The lessee shall deposit with the lessor an amount equal to two months of the total monthly rental as set out in clause 4.1 of the lease agreement, one month payable on signing of this lease agreement followed by 50% of the balance in 30 days and the remainder by 60 days. This amount shall be retained by the lessor until the expiration or earlier termination of this lease. ...The lessor shall be entitled to deduct therefrom (from the deposit) any amounts owing by the lessee to the lessor, arising from any cause whatsoever, and the balance of such deposit, if any, shall then be refunded to the lessee".

- [58] Having concluded that it was the defendant who repudiated the lease agreement, the plaintiff would be entitled to retain the deposit. It follows that the defendant's first counter claim must fail.

Did the plaintiff suffer damages?

- [59] As the issue of quantum was separated to be determined by another court in due course, no opinion will be expressed on that issue. For present purposes it is necessary to determine whether the defendant's conduct in repudiating the lease agreement resulted in the plaintiff suffering damages.

- [60] The plaintiff sought damages for the loss of income it would have received in terms of the lease agreement relocation costs, interest and costs on an attorney and client scale, provided for in the lease agreement.
- [61] On the first day of trial, the plaintiff sought an amendment which it later withdrew in terms whereof it sought to claim rental for the alternative premises in the building which had remained vacant.
- [62] The case pleaded was that the plaintiff relocated its then tenant, GGI, from the leased premises upon conclusion of the lease with the defendant in order to make way for it to take beneficial occupation of the premises by 1 August 2019. It was further pleaded that as a result of the defendant's repudiation of the agreement, the premises remained unoccupied until 23 October 2020 at which point ETF took occupation in accordance with a lease concluded between it and the plaintiff.
- [63] The defendant raised two issues. The first, that the plaintiff suffered no loss as the premises remained occupied, first by GGI and thereafter by ETF and were never vacant. The second, that the plaintiff's claim for the relocation costs of GGI lacked merit.
- [64] During the evidence of Mr Gamsy, he readily conceded that the pleaded version regarding GGI's relocation was not factually accurate. GGI remained in occupation of the leased premises until ETF took occupation of the premises some fourteen months later pursuant to the conclusion of the ETF lease agreement. The evidence of Mr Gamsy, corroborated by Ms Foxon, Mrs Gamsy and Ms Wheeler, established that GGI only moved from the premises pursuant to the ETF lease agreement being concluded on 6 August 2020 and to enable ETF to take occupation thereof.
- [65] I do not agree with the defendant's argument that the mere fact that another tenant occupied the premises and it was not vacant means that the plaintiff has no claim. As held by the Supreme Court of Appeal in *Monyetla Property Holdings (Pty) Ltd v Imm Graduate School of Marketing (Pty) Ltd and Another*:^[11]
- "In the context of a lease cancelled by the lessor due to a breach by the lessee, the prima facie measure of damages is the rental that would have been paid for the premises over the remaining period of the lease less any amounts received which would not have accrued had the lease not been cancelled — and of course a lessor who cancels is obliged to take reasonable steps, such as re-letting the premises, in order to mitigate its loss."*
- [66] No evidence was presented regarding the rental which the plaintiff was receiving from GGI. There is thus no evidence to establish that the plaintiff suffered a loss during the period GGI remained in the premises.

[67] The plaintiff's evidence that the commercial rental market had changed significantly between 2019 and 2020 as in 2020 the market was favourable to tenants whereas in 2019 it was more favourable to lessors, was not challenged. The evidence further established that the lease agreement with ETF commenced on 1 November 2020 at a base rental of R48 750.00, together with an annual escalation of 7%. The lease concluded with the plaintiff, provided for a higher rental of R59 091.50 per month, subject to an annual escalation of 8%.

[68] It having been established that the rental received by the plaintiff from ETF was lower than what the defendant would have paid,

I am persuaded that the plaintiff has established that it has suffered a loss, causally connected to the repudiation by the defendant of the lease agreement.

[69] Whether the plaintiff will ultimately be successful to provide damages in the total amount claimed, is not an issue which must presently be determined.

[70] There is in my view merit in the defendant's challenge to the claim for the relocation costs of GGI. It was common cause that no agreement was concluded between the defendant and GGI and that the lease agreement did not provide for the defendant being liable for any relocation costs of GGI.

[71] It is trite that a person claiming contractual damages must prove the existence of the damages actually suffered[12], the rationale being that a sufferer be placed in the position it ought to have been in if the contract was properly performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party[13].

[72] The defendant argued that the claim for CGI's relocation on account of ETF's occupation of the leased premises is too remote to be claimed from the defendant. I agree.

[73] I am not persuaded that the plaintiff has established the necessary factual causation, given that GGI relocated to accommodate ETF and not to accommodate the defendant. I further agree with the defendant that the plaintiff's claim for the relocation costs of GGI is too remote having regard to the test of causation in a claim for damages for breach of contract.

[74] A defaulting party's liability is limited to damages flowing naturally from the breach of the contract in question and to damages which, although caused by the breach, are ordinarily regarded as too remote to be recoverable, unless the parties specifically

contemplated that they would probably result from a breach[14]. The plaintiff did not plead, nor at trial establish a case for special damages.

[75] I have already concluded that the plaintiff has established a loss. It follows that the plaintiff has established the liability of the defendant.

[76] There is no reason to deviate from the normal principle that costs follow the result. In terms of the lease agreement, the plaintiff is entitled to costs on the scale as between attorney and client.

[77] I grant the following order:

- [1] The defendant is declared liable to the plaintiff for such damages as the plaintiff may prove in due course or as may be agreed between the parties in respect of the repudiation of the lease agreement concluded between the parties on 24 June 2019.
- [2] The defendant is directed to pay the costs on the scale as between attorney and client.
- [3] The defendant's first counterclaim is dismissed with costs.

EF DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING

: 09 to 13 & 30 May 2022

DATE OF JUDGMENT

: 29 August 2022

PLAINTIFF'S COUNSEL

: Adv O. Ben-Zeev

PLAINTIFF'S ATTORNEYS

: Dev Maharaj and Associates Inc.

DEFENDANT'S COUNSEL

: Adv. B.A. Morris

DEFENDANT'S ATTORNEYS

: Rafique Baba Attorneys

- [1] Styled "merits" in the consent order provided by the parties.
- [2] Defendant's heads of argument para 1
- [3] Annexure A to the lease agreement, clauses 3.1, 3.1(d)
- [4] Poynton v Cran 1910 AD 205 at 221-222, wherein it was held: "Now, the Roman-Dutch law (differing in this respect from the law of England) imposes upon every lessor the duty of placing and

maintaining the leased premises in a condition reasonably fit for the purpose for which they are let. The principle is that the tenant is entitled to the due use of the thing which he has leased, and he cannot enjoy that use unless the property is delivered and maintained in a state of repair which is reasonable under the circumstances.”

[4] Poynton v Cran 1910 AD 205 at 221-222, wherein it was held:

“Now, the Roman-Dutch law (differing in this respect from the law of England) imposes upon every lessor the duty of placing and

maintaining the leased premises in a condition reasonably fit for the purpose for which they are let. The principle is that the tenant is entitled to the due use of the thing which he has leased, and he cannot enjoy that use unless the property is delivered and maintained in a state of repair which is reasonable under the circumstances.”

[5] Pete’s Warehousing and Sales CC v Bowsink Investments CC

[2000] 2 All SA 266 (EC)

[6] Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A) at 22D-E.

[7] Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd [2000] ZASCA 82; 2001 (2) SA 284 (SCA) at para [16]

[8] SA (SCA)

[9] Datacolor at paragraph 19.

[10] Counterclaim paras 9-10

[11] 2017 (2) SA 42 (SCA) at para [16].

[12] Dominium Earthworks (Pty) Ltd v MJ Greed Electrical Contractors 1970

(1) SA 228 A, [1070] 1 All SA 369 (A) at 375; Thompson v Scholts

[1998] ZASCA 87; 1999 (1) SA 232 (SCA); Combined Business Solutions Cc v Courier & Freight Group (Pty) Ltd [2011] 1 SA 10 (SCA)

[13] Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) at 687D-F; Van Immerzeel v Samancor Ltd 2001 (2) SA 90 (SCA); [2001] JOL 7800 (A) para [49]

[14] Thoroughbred Breeders’ Association of South Africa v Price Waterhouse [2001] 4 All SA 161 (SCA) at para [46]-[47]; Shaltz Investments (Pty) Ltd v Kalovymas 1976 (2) SA 545 (A) at 550

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