



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

REPUBLIC OF SOUTH AFRICA

CASE NO: 15173/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 09 FEBRUARY 2023
SIGNATURE: ***ML SENYATSI***

In the matter between:

RICHARD POLLACK (N.O)

First Applicant

NURJEHAN ABDOOL GAFAAR OMAR (N.O)

Second

Applicant

ELRICH RUWAYNE SMITH (N.O)

Third

Applicant

(In their capacity as the joint liquidators
of IN-OUT PANELBEATERS CC (in liquidation))

and

PEACOCK INN (PTY) LTD

Respondent

REG: 2020/039892/07

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 09 February 2023.

JUDGMENT

SENYATSI J:

- [1] This is an opposed application for cancellation of the sale agreement of an immovable property and the eviction of the respondent therefrom. The property concerned is commercial and used for business purposes.
- [2] The property was sold by the liquidators of In-Out Panel beaters CC (in liquidation) to the respondent on 30 November 2021 for R5.6 million. A non-refundable deposit of R1.4 million was payable of which R1.2 million part payment had to be made on 28 February 2022. The balance was payable by means of cash or guarantee within 30 days after 28 February 2022. An occupational rental of 1% on the balance of the purchase price.
- [3] In the event of breach of the agreement by the respondent and it was called upon in writing to remedy such breach within 7 (seven) days and failed to do so, the applicants have the right, amongst others, to cancel the agreement forthwith and retake possession of the property with immediate effect.

- [4] In the event of the applicants cancelling the agreement, the respondent being in occupation of the property, would immediately vacate the property.
- [5] The respondent breached the agreement by not paying the amount of R1.2 million and R3 million respectively. It also failed to pay 1% occupational rent. On 24 March 2022 the applicants recorded the applicant's failure to pay the payments referred to above by a way of a letter of demand to the respondents. There was a payment of R150 000.00 by the respondent which was allocated to the balance of occupational rental which at the time reflected a balance of R193 000.00 with the result that after the payment the balance was R43 200.00 for occupational rent.
- [6] The respondent acknowledged a letter of demand on 1 April 2022 to pay the balance and thus remedy the breaches. Despite the demand letter, the respondents failed to remedy the breach. Consequently, a cancellation of the sale agreement was effected in writing by the applicants on 19 April 2022.
- [7] The controversy in this matter is whether or not the cancellation is effective and whether the applicants are entitled to the eviction of the applicant from the commercial property.
- [8] The legal consequences of an agreement through which the occupant took possession and as a consequence, paid occupation rental is trite. In *Chetty v Naidoo*¹, it was held that once the lessee's right to occupy the leased property comes to an end, the lessor is entitled to have the lessee evicted from the occupied property.

¹ 1974 (3) SA 13 (A)

[9] In determining whether or not to grant an eviction order, the court has a discretion to exercise based upon what is just and equitable as regard the date upon which the property must be vacated.²

[10] Regarding payment of occupational rental on a property with defects, the court in *Arnold v Viljoen*³ held as follows:

“In terms of that line of authority, a lessee who takes occupation of premises which are deficient in any respect is obliged, while it remains in occupation, to pay the full rental stipulated in terms of the lease. Its remedy is to claim compensation by way of abatement of rental and/or damages. A lessee who, having taken occupation, fails to pay the full rental is exposed to the cancellation of the lease for non-payment.”

[11] As regards to failure to remedy a breach when called upon to do so, it is trite in our law that a debtor who fails to comply with the time period contained in the *lex commissoria*, the creditor has the right to cancel the contract upon the expiry of that period.⁴ In restating this principle Nestadt JA⁵ stated as follows:

“The principle underlying the argument whether the creditor has the right to cancel the contract on expiry of the period is a well-established one. It has been applied to the case of a creditor seeking to cancel a contract of sale on the basis of a *lex commissoria*. His accrued right to do so is not defeated by a belated tender of payment of the arrears before he exercises his election to cancel. This was decided in *Shuurman v Davey* 1908 TS 664.”

² See *Media Workers Association of South Africa & Other v Press Corporation of South Africa Ltd* ('Perskor') [1992] ZASCA 149; 1992 (4) SA 791 (A) 800; *Knox D' Arcy Ltd and Others v Jamison and Other* [1996] ZASCA 58; 1996 (4) SA 348 (A) 360 G -362 G

³ 1954 (3) SA 322 (C)

⁴ See *Boland Bank Ltd v Piennar* 1988 (3) SA 618 (A)

⁵ *Supra* 621 G - H

[12] In *Galaxias Properties CC v Georgiou*⁶, the owner of the shopping centre sought the eviction of a tenant. The landlord alleged that the tenant breached the agreement of lease by failing to pay the agreed monthly rental timeously for the months of April 2009 as well as November 2009. The tenant admitted that he had failed to pay the rent on the first day of the months referred to, but alleged that the applicant had condoned the late payments and waived its rights to cancel the agreement arising from such late payment. It was held on appeal that the public policy requires that contractual obligations freely and voluntarily undertaken should be honoured, precisely because this requirement gives effect to the central constitutional values of freedom and dignity.

[13] In its defence, the respondent in this case admits that it is in breach of the contract as alleged. It contends through Mr Cohen, who is its director, that it could not secure a loan on time for the balance because of the building plans which were required by his bank. Mr Cohen conceded that he received the cancellation letter from the applicant, dated 19 April 2022.

[14] The question is whether the court will be correct to depart from the well-established principle regarding cancellation of the contract and the belated attempt by the respondent in this case to ask for extension thereof. It is impermissible for the court to depart from the principle and also a well-established law that parties to a contract must be held to their obligations.

[15] In the instant case, the respondent agreed to meet its obligations by paying as stipulated in the sale agreement. It failed to honour its obligations as agreed and there is no explanation tendered on the reason for its failure.

⁶ 2013 ZAGPJHC 399

[16] Accordingly, it is my view that the applicants acted within their rights by terminating the sale agreement owing to the breach thereof by the respondent and that they are entitled to the relief sought. Accordingly, the notice of termination dated 19 April 2022 constitutes a valid cancellation.

ORDER

[17] The following order is granted:

71.1. Cancellation of the offer to purchase agreement, marked as Annexure **FA4** is hereby confirmed;

17.2. The Respondent and all persons holding occupation through the Respondent at the premises are ordered to vacate the premises, situated at erven 47 and 49 of Erf 30, Halfway House, Midrand known as the Boulders Lodge, 128 and 130 Tonnetti Street, Halfway House, Midrand, Johannesburg (T82708/2013) and to return the vacant premises to the Applicants, within **30 (thirty) calendar days** from the date of service of this judgment on the Respondent;

17.3. The Sheriff or his lawful deputy are directed and authorized to take such steps as are necessary to evict the Respondent and all persons holding occupation through the Respondent holding occupation under it and further remove all equipment and furniture of the Respondent situated in the premises, from the premises, in

the event that the Respondent or any others do not do so, within **30 (thirty) calendar days** from the date of service of this judgment on the Respondent.

17.4. The Sheriff or his lawful deputy is authorized to approach the South African Police Service for assistance and support in performing his duties in relation to paragraphs 17.2 and 17.3 above.

17.5. The Respondent is ordered to pay the costs of this application on the attorney and client scale, including the costs of the Sheriff and storage.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 07 February 2023

DATE JUDGMENT DELIVERED: 09 February 2023

APPEARANCES

Counsel for the Applicant: Adv M Ritcher

Instructed by: JP Barnard Attorneys

Counsel for the Respondents: In Person