

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **25th May 2023** Signature:

CASE NO: 8494/2023

DATE: 25TH MAY 2023

In the matter between:

THE BANCHAN (PROPRIETARY) LIMITED

Applicant

and

DES NAIDOO & ASSOCIATES

First Respondent

DES NAIDOO

Second Respondent

Neutral Citation: *The Banchan v Des Naidoo & Associates and Another*
(8494/2023) [2023] ZAGPJHC 563 (25 May 2023)

Coram: Adams J

Heard: 22 May 2023 – in a ‘virtual hearing’ as a videoconference on *MS Teams*.

Delivered: 25 May 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 25 May 2023.

Summary: Commercial lease agreement – cancellation due to breach – non-payment of monthly rental – opposed eviction application – cancellation notice, following notice to remedy breach, delivered prematurely – defective and therefore invalid – cancellation of lease agreement unlawful – application for the eviction from commercial premises dismissed.

ORDER

(1) The applicant's application is dismissed with costs.

JUDGMENT

Adams J:

[1]. The first respondent is a law firm, which carries on business as such from commercial premises situated at 108 Victoria Avenue, Parkmore, Sandton ('the leased premises'), which it presently occupies pursuant to and in terms of a written lease agreement. The lease agreement was concluded with the previous owner of the said property on the 13th May 2021 and was to endure for a period of three years from 1 June 2021 to 31 May 2024, apparently with the option to renew, at the sole discretion of the lessor, for a further period of two years. The initial rental payable in terms of the lease, exclusive of municipal services and related charges, was the sum of R12 650 (inclusive of VAT) per month, and the present rental appears to be R13 800 per month. In terms of the lease agreement, rental is payable in advance on or before the first of each and every month.

[2]. The second respondent is the sole proprietor of the first respondent and he signed the lease agreement on its behalf, in addition to binding himself as surety and co-principal debtor to the landlord. There is no dispute that the applicant, as the new owner of the property on which the premises are situated, succeeded the previous owner as the landlord in terms of the said agreement.

[3]. In this opposed application, the applicant applies for an order evicting from the leased premises the first and second respondents, who, so the applicant alleges, is in unlawful occupation of the said premises. The case made out by the applicant in its founding affidavit is that the first respondent was, as and at the date on which this application was issued on or about 3 February 2023, in breach of the provisions of the lease agreement, more particularly in that it had since November 2022 failed to pay any rental or other amounts due in terms of the lease Agreement. Despite due and proper demand to the first and second respondents, so the applicant avers, they (the respondents) failed and/or refused to remedy the alleged breach, thus entitling the applicant to cancel the lease, which was done as per the cancellation notice dated 25 January 2023.

[4]. The breach clauses of the lease agreement provide, in the relevant parts, as follows: -

‘9 **Breach of lease**

9.1 Should the tenant:

9.1.1 fail to pay any amount due by it in terms of this lease on the due date thereof or commit any other breach of any provision of this lease and fail to make such payment or to remedy such breach within a period of 7 (seven) days after the receipt of written notice to that effect by the landlord. Should that breach be one which is not reasonably capable of being remedied within the said period of 7 (seven) days, payment of rental being excluded from such reason for breach, then the tenant may be allowed, at the landlord's sole discretion, an additional period of 7 (seven) days to remedy such breach; or

9.1.2 consistently breach any of the conditions of this lease in such manner as to justify the landlord in holding that the tenant's conduct as inconsistent with the intention or ability of the tenant to carry out the provisions of this lease; or

9.1.3;

Then, and in any of such events, the landlord shall be entitled to cancel this lease without prejudice to any other claim of any nature whatsoever which it may have against the tenant as a result thereof, and without prejudice and in addition to all other rights available to the landlord in law.

9.2’.

[5]. The breach notice dated 17 January 2023, as required by clause 9.1.1 of the lease agreement, was hand delivered on behalf of the applicant by its

attorneys to the first respondent on 18 January 2023. The said notice advised the first respondent that it was in breach of the lease agreement in that it was in arrears with the rental and the ancillary charges payable by it in respect of the months of November and December 2022 and January 2023, and that such arrear rental amounted in total to R53 519.79. The said notice therefore demanded payment of the said sum within seven days, failing which, so the demand read, '[the applicant] [would] cancel the lease agreement'.

[6]. That is exactly what the applicant purported to do by its letter dated 25 January 2023, which was hand delivered to the first respondent on the same day. The said letter referred to the applicant's breach notice dated 17 January 2023 and stated that, the first respondent having failed to remedy its breaches of the lease agreement 'in that [it] [had] failed and/or neglected to make payment of the sum of R53 519.79 or any amount whatsoever', the applicant was thereby cancelling the lease agreement. I interpose here to mention that the first respondent remedied the aforesaid alleged breach by making payment to the applicant's attorneys of an amount of R54 322.16 on 4 February 2023.

[7]. The difficulty with the applicant's case is, as contended by the respondents, that by all accounts the cancellation notice dated 25 January 2023 was premature and accordingly invalid. If regard is had to the provisions of the lease agreement, then it has to be accepted that the breach notice was given to the first respondent at the earliest on 19 January 2023. In that regard, clauses 10.3.1 and 10.3.2 reads as follows: -

'10.3.1 All notices delivered by hand to a domicilium address shall be deemed to be received on the day after delivery;

'10.3.2 All notices delivered via electronic mail (email) to the numbers set out in the schedule during normal office hours shall be deemed as received on the day following such transmission;'

[8]. The foregoing translates into the fact that the breach notice from the applicant was received by the first respondent on 19 January 2023, which, in turn, means that the first respondent would have had seven days until 26 January 2023 within which to remedy its breach by paying the arrear rental. This is however one day after the day on which the applicant, through its

attorneys, sent out the cancellation notice. Therefore, the lease was purportedly cancelled before the expiration of the 'notice to remedy the breach' period.

[9]. In my view, the agreement had not been lawfully cancelled. The first respondent has quite clearly not been given a proper opportunity to remedy the breach. The cancellation notice was given prior to the expiration of the period within which the first respondent was obliged to remedy the breach. Therefore, the lease agreement was not lawfully cancelled and the applicant's application falls to be dismissed. The point is simply that the applicant's cancellation notice was defective and thus invalid, because it was given before the expiry of the period during which the first respondent was required to remedy its breach. They had until 26 January 2023 and the cancellation notice was given on 25 January 2023, which was one day short of the seven days within which they were entitled to remedy the breach. Therefore, a right to cancel the lease agreement had not accrued to the applicant.

[10]. Accordingly, in my view, the lease was not validly cancelled by the applicant. This, in turn, means that the applicant is not entitled to an eviction order against the first respondent.

[11]. During the 'virtual hearing' of this opposed application on 22 May 2023, Mr Nowitz, Counsel for the applicant, argued that, even if the notice of cancellation of the lease agreement was defective for non-compliance with clause 9.1.1 of the lease, the applicant is still entitled to cancel the said agreement in term of clause 9.1.2 (supra) on the basis that the first respondent had consistently breached some of the conditions of the lease. There is no merit in this contention for the simple reason that such a case is not pleaded by the applicant. Moreover, the evidence does not even begin to support an averment (which is, in any event, not made by the applicant) that the first respondent's alleged consistent breaches of the lease agreement is such as to justify the applicant concluding that the first respondent did not have the intention or the ability to comply with its obligations in terms of the lease agreement.

[12]. Accordingly, the relief sought by the applicant should be refused.

Costs

[13]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

[14]. I can think of no reason why I should deviate from this general rule.

[15]. I therefore intend awarding costs against the applicant in favour of the respondent.

Order

[16]. Accordingly, I make the following order: -

(1) The applicant's application is dismissed, with costs.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

HEARD ON: 22nd May 2023 – in a ‘virtual hearing’ on *Microsoft Teams*

JUDGMENT DATE: 25th May 2023 – judgment handed down electronically.

FOR THE APPLICANT: Advocate Mark Nowitz

INSTRUCTED BY: Hirschowitz Flionis Attorneys,
Rosebank, Johannesburg

FOR THE FIRST AND
SECOND RESPONDENTS: Advocate Adriaan Venter

INSTRUCTED BY: Des Naidoo & Associates,
Parkmore, Sandton