IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NO: 12237/2012

In the matter between:

ACTEBIS 319 CC **Applicant**

and

BAMBOO ROCK 1115 CC **Respondent**

Order:

The application is dismissed with costs.

JUDGMENT
DATE:28 August 2013

PLOOS VAN AMSTEL J

[1] This is an application for the ejectment of a business which trades as Westville Tyre Services. When the application was launched Mr Frank Goedeke was cited as the respondent, on the assumption that he was the sole proprietor of the business. He said in his answering affidavit that it was Bamboo Rock 1115 CC, of which he is the sole member, which traded as Westville Tyre Services. As a result

the close corporation was by agreement substituted for Mr Goedeke as the respondent and the applicant was ordered to pay MrGoedeke's costs. The application then proceeded on the basis that Bamboo Rock 1115 CC was the respondent and the lessee who was sought to be evicted.

[2] The premises occupied by the respondent form part of premises leased by the applicant from a petrol company, on which it operates a service station. Thesub - lease is in writing, commenced on 1 September 2011 and is for a three(3) year period with an option to renew for a further two (2) years. Clause 5 provides as follows:

> 'The basic monthly rent to be paid without any deductions of whatever nature by the tenant to the landlord from the commencement date under and in terms of the lease, shall be the amount of R13 000.00 plus VAT such sum to be paid by the 5th day of each and every month with an escalation of 10% p.a. compounded on the 1st September of each and every year of the lease then in existence.'

[3] The applicant seeks an ejectment order on the basis that it cancelled the lease agreement on 7 September 2012. It is common cause that the respondent withheld a sum of R4000 from the August rental and did not pay the rental which was due on 5 September. These amounts were tendered to the applicant after the purported cancellation.

[4] There is no *lexcommissoria* in the agreement. Nor was there a notice to the respondent to put it on terms to rectify the breach. This gave rise to a debate as to whether the applicant was obliged to place the respondent *in mora* before it cancelled the agreement, and, in any event, whether it was in law entitled to cancel the agreement.

[5] Before I consider the submissions regarding *mora* and cancellation I must first deal with another issue, which arises from the fact that the respondent almost always paid its rental late. A schedule of its rental payments shows that in respect of the six months before the lease was cancelled the rental was paid on 8 March, 10 April, 23 May, 21 June, 16 July and 13 August. It will be recalled that the rental was payable

on the 5th of each month.The applicant accepted these late payments without complaint.

[6] In *Garlick Ltd v Phillips*[1]Watermeyer CJ said at 131 that there is no doubt that modification by conduct of the obligations under an executory contract can occur. He referred to *Williston on Contracts,*where he said the principle was stated with great clarity:

> "Continued acceptance of a series of defective performances especially if they are all defective in the same respect may justify belief, not only that performance of that character has been satisfactory to the promiser in the past, but that it will be satisfactory as a performance of future conditions. Thus continued acceptance of late performance without objection may operate as a permission to make similarly late performance in the future even where the exact time of performance is made of the essence of the contract between the parties."

At 132 Watermeyer CJ said the following:

> 'In the present case there was a very long continued failure by the lessee both under the lease of 26th September, 1946, and under previous leases to pay his rent on due date and no objection was taken thereto, consequently an application of the above principle leads to the conclusion that appellant by its conduct either gave a revocable permission to respondent to pay his rent late or led respondent to believe that such permission had been given and in consequence thereof respondent continued to pay his rent late.
>
> If the first be the true legal position the tenant's obligation to pay rent in advance was temporarily modified or suspended by the permission to pay late given by appellant.
>
> If the second be the true legal position then something in the nature of an estoppel arises which precludes appellant from denying that he had given such permission.'

[1]1949 (1) SA 121 (AD).

He continued that so long as the lessor's attitude remained one of indifference towards late payments of rent there was no necessity to speak, but when its state of mind changed from one of indifference to one of a desire or intention to take advantage of late payments of rent in order to obtain ejectment, then a duty arose to make that changed attitude known to the tenant. He concluded that a duty rested on the appellant if it intended to treat late payments of rent in the future as breaches of contract and to take advantage of them, to inform the respondent of that change of mind.

[7] In the present case the September rental was overdue by two days when the applicant cancelled the lease agreement. In the light of the history of late payment of rental there was a duty on the applicant to notify the respondent that it would no longer tolerate late payment of rental and that in future a late payment would be regarded as a breach of the lease agreement. It was common cause before me that no such notice was given expressly. Counsel for the applicant however argued that such notification occurred by necessary implication. He referred to a letter which the respondent's attorney addressed to the applicant on 24 August 2012. The attorney recorded that the respondent had ascertained that the owners of the centre were intending to renovate the entire building, including the premises occupied by the applicant and the respondent. He said it appeared that the proposed renovations envisaged that the respondent's premises would be converted to a shopping area for use by the Total franchisee. He recorded that the respondent intended holding the applicant strictly to the terms of the sub-lease and should it in anyway be terminated before it had run its course such termination would be vigorously opposed and if necessary an appropriate claim for damages made against the applicant. Counsel submitted that when the respondent said it intended to hold the applicant strictly to the terms of the sub-lease it must have realised that the applicant would in turn hold it strictly to the terms thereof and that consequently it should have realised that late payment of rental would in future be regarded as a breach of the agreement. There is no merit in this submission. The statement that the respondent intended to hold the applicant strictly to the terms of the sub-lease must be seen in the context of the letter, which dealt with an apprehension on the part of the respondent that the proposed renovations would result in it losing the use of the leased premises. The

applicant did not respond to the letter. If it intended to regard future late payments of rental as breaches of the agreement it should in my view have notified the respondent of this in a clear and unequivocal manner.It follows that the applicant was not entitled on 7 September to cancel the lease agreement on the basis of the failure by the respondent to pay the September rental on the due date.

[8] That brings me to the August rental, which was not paid in full. The respondent withheld a sum of R4000 because Mr Goedeke's sunglasses had been broken by one of the applicant's employees when he cleaned his car. This portion of the August rental was still unpaid when the applicant cancelled the lease agreement on 7 September. I do not consider that the principle in*Garlick Ltd*[2] finds application in this instance. The acceptance of late payments in the past caused the respondent to believe that the applicant would not cancel the agreement on the basis of a late payment without prior warning. The portion of the August rental did not remain unpaid as a result of unpunctuality, as was the case with the September rental. It was withheld intentionally because Mr Goedeke felt he was entitled to be compensated for the damage to his sunglasses. That was a breach of the lease agreement in respect of which it is not open to the respondent to say that the past acceptance by the applicant of late rental payments led it to believe that the applicant would not exercise its right to cancel.

[9] This brings me to the question of *mora*. Counsel for the respondent submitted that as there was no *lexcommissoria*the applicant was not entitled to cancel the lease agreement without first placing the respondent*in mora.* One must be careful here to distinguish between *mora* and a notice of rescission.

[10] In *Christie's The Law of Contract in South Africa,*6th Edition, the learned authors say at page 519:

> 'When the contract fixes the time for performance *mora*is said to arise from the contract itself (*mora ex re*) and no demand (*interpellatio*) is necessary to place the debtor *inmora*because*,* figuratively, the fixed time makes the demand that would

[2]Supra.

otherwise have to be made by the creditor (*dies interpellat pro homine*). In *Laws vsRutherfurd* 1924 AD 261 [at] 262 Innes CJreferred to this as the

> "principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand: *dies interpellat pro homine*, and the debtor is *inmora* if he fails to pay on the appointed day".'

[11] The lease agreement stipulates that the rent was payable on the 5th day of each month. When the respondent failed to do so it was*in mora* withoutthe need for any notice to it.The *mora* arose from the contract itself. It does not follow however that the applicant was entitled to cancel the agreement.[3]

[12] The lease agreement specifies a time for payment of the rental but does not contain a *lexcommissoria*or any other provision which regulates the position in the case of a breach. The question then arises whether the withholding of portion of the August rental was so material a breach as to entitle the applicant to cancel the lease agreement.[4]

[13] In *Spies v Lombard*[5] Van den Heever JA said the tolerant treatment in Roman law of a contract of letting and hiring has been received in our law and in the absence of *a lexcommissoria* neither party is bound to suffer cancellation merely because he has been to some extent unpunctual or remiss in his performance. He said it is trite law that non-payment of rent is not per se good cause for cancellation.

[14] Where time is not of the essence a failure to make a payment when it is due does not entitle the other contracting party to cancel the agreement. He can however make time of the essence by giving a notice of rescission.[6] The notice must specify a reasonable time within which the outstanding amount must be paid,and the consequences of a failure to do so timeously. If it is not paid within the period specified in the notice the creditorwill be entitled to cancel the agreement.[7] These

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[3]*Ponisammy andAnother v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (AD) at 387H.
[4]*Spies v Lombard*1950 (3) SA 469 (AD) at 485B.
[5]Ibid, at 487.
[6]*Ponisammy and Another v Versailles Estates (Pty) Ltd* (supra) at 385G.
[7]*Microutsicos and Another v Swart* 1949 (3) SA 715 (AD) at 730; *Nel v Cloete*1972 (2) SA 150 (A) at 162-3.

principles also apply to lease agreements.[8]In the absence of a notice of rescission the applicant was therefore not entitled to cancel the lease agreement on the basis of the respondent's failure to pay the August rental in full.

[15] Counsel for the applicant had one final arrow in his quiver. He submitted that as a portion of the August rental was withheld deliberately this constituted a repudiation of the respondent's obligations in terms of the lease agreement, which entitled the applicant to cancel it. In particular circumstances conduct of a contracting party can constitute both a breach of contract in the form of malperformance and a repudiation.[9]In *Ankon CC v Tadcor Properties (Pty) Ltd*[10]Van Deventer AJ (with Howie J concurring) said in the absence of a *lexcommissoria* the repudiation by a party of only some of his contractual obligations may in certain circumstances entitle the innocent party to accept the repudiation as a breach of contract and to summarily and unilaterally resile from the contract. He can only do so however where the obligation repudiated constitutes a vital or material term of the contract.[11] The learned authors of *Die Suid-AfrikaanseKontraktereg en Handelsreg*[12] say in order to determine whether the repudiated obligation is sufficiently material to justify cancellation one applies the same principles as are used to determine whether a breach of the agreement justifies cancellation. Also see *Christie's Law of Contract in South Africa.*[13]

[16] The failure to pay the August rental in full did not justify cancellation of the agreement in the absence of a notice of rescission, and a repudiation of that obligation did not do so either.In those circumstances the application for ejectment cannot succeed. It is dismissed with costs.

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Ploos van Amstel J

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[8]*BuytendagBoerderyBeleggings (Edms) Bpk v Goldberg*1979 (2) SA 172 (TPD) at 176H, 177A.Confirmed on appeal - 1980 (4) SA 775 (AD).
[9]*South African Forestry CO Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para [38].
[10]1991 (3) SA 119 (CPD) at 121.
[11]At 122C-D.
[12]De Wet and Van Wyk, 5th edition, volume 1, page171.
[13]Supra, page 539.

Appearances:

For the Applicant	**:**	Adv M Collins
Instructed by	**:**	V. ChettyInc Durban
For the Respondent	**:**	AdvH A De Beer SC
Instructed by	**:**	Patrick Lander Attorney Durban
Date of Hearing	**:**	13 August 2013
Date of Judgment	**:**	28 August 2013