Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CIV APP RC 03/2022

In the matter between: -

H & F ASSOCIATES CC T/A
BUILD–IT POTCHEFSTROOM Appellant

and

MOHBRO PROPERTIES CC Respondent

CORAM: HENDRICKS JP & SCHOLTZ AJ

DATE OF HEARING : 01 MARCH 2024
DATE OF JUDGMENT : 21 JUNE 2024

FOR THE APPELLANT : ADV. GRUNDLINGH
FOR THE RESPONDENT : ADV. PRETORIUS

JUDGMENT

ORDER

Resultantly the following order is made

1. The appeal is upheld.

2. Claim 2 is dismissed.

3. The order granted by the court a quo in respect of Claim 3, is set aside and is substituted with the following:

   "Absolution is granted".

4. The Respondent is ordered to pay the costs of the appeal.

APPEAL JUDGMENT

SCHOLTZ AJ

[1] This is an appeal against a judgment by the **REGIONAL COURT, POTCHEFSTROOM**, which came before Regional President **NONCEMBU** by way of an action. The aforesaid Regional Magistrate handed down a written judgment on **26 NOVEMBER 2021**, in terms whereof the following orders were made:

"Claim 1: The claim is dismissed.

Claim 2: (a) The Plaintiff is awarded damages in the amount of R1 529 51,52 plus interest at the FNB prime rate a tempore morae.

(b) The Plaintiff is awarded costs which shall include costs of Counsel.

Claim 3: *(a) The Plaintiff is awarded damages in the amount of R72 452,58 plus interest at the FNB prime rate a tempore morae.*

(b) The Plaintiff is awarded costs which shall include costs of Counsel."

[2] The action, which is now the subject of this appeal, contained three (3) claims, as set out in the particulars of claim, which accompanied the summons. These claims will comprehensively be dealt with later in this judgment. For now, it suffice to state that the first claim failed, whilst claims two and three in essence succeeded (although on lesser amounts, as claimed in the summons), as is evident from the Regional Magistrate's order referred to in paragraph [1] above.

[3] The salient facts pertaining to the matter will briefly be set out. It is not the intention of this Court to repeat the totality of the evidence, as the transcribed record consist of more than 730 pages. This Court will, although conversant with all the evidence led, restrict itself to the evidence which are relevant in respect of the grounds of appeal, as raised by the Appellant, in it's notice of appeal.

RELEVANT FACTS RELATING TO THE GROUNDS OF APPEAL

[4] The Appellant and the Respondent, both being legal entities, and

more specifically, Close Corporations, entered into a written lease agreement on **30 MAY 2007**, regarding a certain commercial building located at **ERF NUMBER 39, POTCHEFSTROOM**. The Appellant was represented by **MR HERMAN STEYN** (as lessee), and **MR IQBAL HAMID** represented the Respondent (as lessor). The material terms of the written lease agreement were *inter alia:*

(a) The lease commenced on **1 JUNE 2007**, and was for an initial period of **7 years**. The Appellant had the option to renew the lease for a further period of **5 years** by written notice, which was to be given not less than **6 months** prior to the termination date.

(b) The rent payable was **R40 000 (Forty Thousand Rand)** per month (VAT excluded), and the aforesaid rent amount was subject to an increase of **9 %** annually.

(c) The property was to be used exclusively for the purpose of conducting a general hardware and retail business by the Appellant.

(d) That the Appellant would be entitled to erect fixtures and fittings to the building, as may be required for the carrying on of the Appellants business, although all such fixtures and fittings were to be removed by the Appellant upon expiration of the lease agreement.

[5] From the contents of the appeal before me, it appears like the Appellant conducted business as a hardware store, and more

specifically a *Build It* franchise. Of importance to mention, is that the Respondent prior to entering into the lease agreement with the Appellant, managed and owned the franchise. The intention of the parties were that the Appellant bought the franchise from the Respondent by *inter alia* entering into the lease agreement. There was also a separate agreement between the parties, referred to as the main agreement. The main agreement is not relevant, except to state that such agreement is described as follows in the lease agreement :

> *"**the main agreement** shall mean the sale of shares to be entered into between **MARAIS** and **STEYN** as purchasers and the shareholders of the Lessee simultaneously."*

[6] A few months before the lease agreement came to an end, the Appellant verbally undertook to renew the lease, on condition that the Respondent, as owner of the building, need to do certain renovations to the building. However, during **MAY 2014** the Appellant decided not to renew the lease, but rather to relocate to different premises. The Respondent alleged that the Appellant did not restore full and undisturbed possession of the premises on **31 MAY 2014** [being the date of the termination of the lease agreement by effluxion of time] to the Respondent. The Respondent further alleges that the Appellant was holding over the premises from **1 JUNE 2014**, to the first week of **AUGUST 2014**. The holding over of the premises was based on the fact that the Appellant did not remove all it's trading stock from the premises, as same was stored behind locked doors in the building on the premises. Lastly, the Respondent allege that the Appellant

failed to removed fixtures and fittings from the building when it relocated. The Appellant also had to remove various movable goods which the Appellant left at the premises. Consequently, the Respondent had to remove the fixtures and fittings, and movable goods from the premises on it's own costs during the first week of **AUGUST 2014**, which removal was only completed towards the end of **SEPTEMBER 2014**. It is from these allegations of breach of contract, that the action emanated in the Court *a quo*.

CLAIMS BEFORE COURT A QUO

[7] Aggrieved by the alleged conduct of the Appellant, the Respondent instituted summons proceedings in the Court *a quo*. The particulars of claim, as mentioned earlier, contained three separate claims, to wit:

(a) Claim 1 refers to a verbal agreement in terms whereof the Appellant seemingly undertook to pay **(3)** three months rental to the Respondent, regarding compensation by it's failure to renew the lease agreement. This claim had been dismissed by the Court *a quo,* and is not appealed against. For purposes of this judgment, this claim is irrelevant.

(b) Claim 2 relates to a claim for damages as the Respondent alleged that the Appellant breached the written lease agreement, as it failed to timeously vacate the premises. The Respondent content that it suffered damages equal to **(4)** four months rental, as the Appellant took until the first week of **AUGUST 2014** to remove it's stock from the premises, and

left rubble behind on the premises. Furthermore, the Appellant left behind structures which it erected and which it failed to remove upon it's departure. For this, the Respondent claimed damages in the amount of **R 305 903.24** in the court *a quo*.

(c) Claim 3 dealt with the costs to remove fixtures and fittings and to repair the property to the state it was, prior to the lease agreement. The Respondent allegedly spent **R 95 271.89** in this regard. It formulated it's claim to be that such amount comprise of the normal, alternatively, generally accepted further alternatively fair and reasonable costs to remove the aforesaid fixtures and fittings, and to repair and restore the premises and building to the same condition as at **1 JUNE 2007**, excluding wear and tear.

FINDING BY COURT A QUO

[8] Regarding claim 2, the court *a quo* found that was common cause that the Appellant did not vacate on **31 MAY 2024** as contractually obliged. The conflicting versions were that the Respondent alleged that the Appellant only vacated the premises during **AUGUST 2021**, whilst the Appellant indicated that it in fact vacated during the first week of **JUNE 2014**, after an extension was granted by the Respondent. The court *a quo* was satisfied that the Appellant was holding over the premises for at least until the end of **JULY 2014**, and that the Respondent was entitled to damages for such holding over period. Consequently, judgment had been granted in favour of the Respondent in the amount of

R152 951.52, plus interest at the **FNB** prime rate *a tempore morae*.

[9] In respect of claim 3, the Appellant contended that the Respondent's claim, though labelled as a damages claim, was actually a claim for the objective value of performances (damages *in lieu* of performance). The Regional Magistrate, to the contrary, found that the claim should succeed, as set out in paragraph 51 of the court *a quo's* judgment. In respect of *quantum* the Regional Magistrate granted judgment in the amount of **R72 452.58,** plus interest at the FNB prime rate *a tempore morae* regarding this claim.

GROUNDS OF APPEAL

[10] Unsatisfied with the judgment by the court *a quo,* the Appellant appealed to this Court, and raised the following grounds of appeal as contained in the Notice of Appeal.

> *"1. The court a quo erred in finding that the Appellant was in occupation or held over the premises for at least until the end of **JULY 2014**, and that the Respondent is entitled to damages for holding over the said premises for an amount equivalent to **2 (two)** month's rental in respect of the Respondent's second claim. The court a quo should have found that the Respondent failed to prove on a balance of probabilities that the Appellant was in occupation of alternatively, held over the premises beyond **31 MAY 2014** alternatively, beyond the first week of **JUNE 2014**, and that it is not entitled to any damages for*

*holding alternatively, for damages for more than the first week of **JUNE 2014**.*

2. *The court a quo erred in finding that the Respondent's third claim is a claim based on damages, and that the facts are distinguishable to those in **ISEP STRUCTURAL ENGINEERING AND PLATING (PTY) LTD v INLAND EXPLORATION CO (PTY) LTD 1981 (4) SA1 (A)**. The court a quo should have found that the Respondent's third claim is a claim for the objective value of performance (damages in lieu of performance), which claim is not competent in South Africa Law in the case of reinstatement under a lease. The court a quo accordingly should have dismissed the Respondent's third claim with costs alternatively, should have granted absolution from the instance with costs in respect of the Respondent's third claim.*

3. *In the alternative, the court a quo erred in finding that the Respondent had proven its damages in the amount of **R72 452.58** in respect of the claims for the removal of the concrete bins, the paving, the electrical work, the fest fire, removal of steel hanger, wooden office, steel structure, wall and gate, cleaning materials, water pipe, the yard and the supervisor. The Court a quo should have found that the Respondent has failed to prove any damages in its third claim, and should have dismissed the Respondent's third claim with costs alternatively, should have granted absolution from the instance with costs in respect of the Respondent's third claim.*

4. *The court a quo erred in finding that the Respondent has been substantially successful with its claim, and by awarding costs including the costs of Counsel to the Respondent in respect of its second and third claims. The Court a quo should have found that the Respondent has not been substantially successful with its claim, having regard to the fact that the Respondent was only*

*successful with **36%** of its original total claim amount and that costs should have been awarded to amount and that costs should have been awarded to the Appellant in the action as the substantially successful party alternatively in respect of the Respondent's First Claim further alternatively each party should have been ordered to pay its own costs further alternatively the Appellant should only have been ordered to pay a percentage of the Respondent's costs commensurate to its overall degree of success in the action.*

GIST OF DISPUTE

[11] The following, in my view, are the main issues in the appeal namely:

(a) Whether the court *a quo* erred in finding that the Appellant held over the premises for at least until the end of **JULY 2014**, and if so, whether damages equivalent to **(2)** two months rental was justified in the circumstances.

(b) Whether the court *a quo* erred in finding that the Respondent's third claim is based on damages, instead of a claim for the objective value of performance, which is according to the Appellant, not competent in law. The Appellant also contend that the Respondent failed to prove damages in the amount of **R72 452.58**, for the works as set out in paragraph 3 of the notice of appeal, and that the court *a quo* ought to have granted absolution from the instance.

Did the Respondent proof that the Appellant hold over the premises, and if so, for which period?

[12] In my opinion, a factual finding should be made on the evidence which served before the court *a quo,* relating to the issue of holding over. This can only be done if the relevant evidence of the Appellant, and those of the Respondent are compared, and evaluated. The relevant evidence as led in the court *a quo,* is quoted verbatim:

"**On behalf of the Appellant**

(a) **MR HAMID JNR** *inter alia* testified:

*"He, he was supposed to have vacated at the end of **MAY**, **31 MAY 2014**. There were still in the premises right through if my memory is right. I know it was maybe the first week of **AUGUST** that all the stock was removed."*

*"The premi, the keys was always in, in, by **MR HERMAN** and them they possessed the keys to the premises."*

"They still had cement, some pipes, ceiling boards, they had racking, all the racks were still in place."

"Any equipment? The, yes the equipment that was still there was there was a, a solid steel table and a concrete mixer. That was actually later on we came to find out it actually belonged to one of the contracts and only once we took occupation of the building did the contractor contact us and said look his, his, his, his machinery is laying there".

*"The front store still had plen, plenty of these Eureka products, when I say **EUREKA** products, nails, screws, all plumbing material."*

*Then the new premises we asked them please to give us the keys because we never saw any activity after the first week of **AUGUST** at the store".*

"We had a look in to the store it looked like there was, there was still some racking but not stock to the front sections that we could see. So we had the locks cut and we entered the premises".

(b) **MR MOHAMMED HAMID SENIOR**

*"Please Sir we only change those locks at round about the end of **SEPTEMBER** or **AUGUST** or **SEPTEMBER** somewhere there because when we saw there is nothing going on, on the premises and we checked up on the gates we said look there do not seem to anymore stock left here so we want to go in and my son went to them and said please give us he keys. They would not give us the keys. So we said you know we cannot wait here for another **(6) six months** until they decide to give us the keys. I said no we got to move and start fixing the premises."*

(c) **MR MOHAMMED YAMELE HAMID**

"So you just sit back and let your damages run up? No, no he was already like I said the products were virtually out of the store towards the second week of August he was, we took possession of the premises. I do not think we acted unreasonably. "

On behalf of the Appellant:

MR STEYN

*"So you moved on the which days? ---We started packing on the **WEDNESDAY** evening and we moved, we started moving early on the **THURSDAY**. So, we moved the **THURSDAY** we moved on the **FRIDAY**, we moved on the **SATURDAY** and we*

*moved on the **SUNDAY**. On the **MONDAY** morning we opened for trade in the new building. I know it is testified that it was impossible to do that, but I must state that we planned it very well. Our stock were not taken off the shelves and put in boxes and sealed. We took the shelves as they were, and we rapped it all with glad wrap around. So, we kept everything on the shelves and all we did is we took the shelves out, put is on trucks that we hired, and we moved it over to the new store.*
As far as I know, there was not trading stock left. All the trading stock that we need to trade and sell to customers to make a profit, to keep the business running was out. It was in the store, my store. There were a few other things such as heavy stands, steel construction stands. That we could not move during that initial period that remained behind. Some boxes but no trading stock.

*The evidence of **MR HAMID** was that the premises were only empty at the beginning of **AUGUST 2014**. In order words, during **JUNE, JULY** and the first part of **AUGUST** the Defendant still had some of his stuff inside the premises. That is **(2)** two months and one week after the expiry of the lease agreement. What do you say to that? ---*

Let me begin by saying remember we bought a fully functional hardware store. So, when we took over the hardware store it was fully functional. There was stand, there were old stock, there were old bricks, there were old pieces of steel. There were old stands, they were bent stands, there was old equipment of the Plaintiff in that store. We took it over as it.

Or can I leave behind stuff that I do no need, that was there before I purchased the store. When we moved, we took first our trading stock. And then in the week after that we took out everything else that we could. I had two trucks that helped us. ….. Saying that I was there three months later, is not true. There

might have been one or two pieces of metal or maybe a box or two, or maybe signage.

*And then that truck ran to the dumping grounds. In **PRIMOSA**. Where we dumped the rubbish that we did not need. And we did that for four days. Even I know, I instructed them to go in and clean the floor of the building inside. And I said, and that was one of my instructions we must empty that building as fast as possible. And give it, give access to the Plaintiff. They did that, and I know on **THURSDAY**, my Manager at that stage came back and there is a problem…….He wanted to fetch some of his personal stuff that was inside. And he said that we have got a problem we cannot get access because the locks have been changed.*

*I was not in possession of the keys at stage, me personally. It was **MR KALLIE JANSE VAN VUUREN** who as in possessions of it as I testified earlier……And then upon their return on the day when they said the locks were changed when **MR JANSE VAN VUUREN** said we have a problem, we do not have access to the premises anymore because the locks have changed we knew the keys were useless. Then we could not use the keys anymore. Ja, I personally did not take it further."*

[13] Regarding the issue of holding over, there are **(2)** two mutually destructive and conflicting versions. The question arises as to whether the Respondent indeed discharged the onus vested upon it, on a balance of probabilities.

[14] In **SELAMOLELE v MAKHADO** 1988 (2) SA 372 (v), the following *dictum* finds relevance:

"Ultimately, the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of (2) versions is the more probable."

"It would therefore be correct for me to say that in order to give judgment for Plaintiff, I must be satisfied on adequate grounds that sufficient reliance can be placed on the story of the Plaintiff and his witnesses, showing that their version is more probable than that of the Defendant. But one still has to go through the process of considering the credibility of the witnesses and of assessing their weight or cogency and after these processes have been completed."

[15] Having applied the test referred to in paragraph [14] above, I fully agree with the Appellant that it is improbable that the Respondent:

(a) Would have not taken steps to evict the Appellant over a period of more than **2 (two)** months.

(b) Has not called or e-mailed the Appellant over a period of more than **2 (two)** months regarding the holding over.

(c) Failed to instruct its attorney to demand removal of the stock over a period of more than **2 (two)** months.

(d) Took various photos of the premises, but yet took no photos of the stock stored on the premises after **31 MAY 2024**.

[16] I therefore find that it is indeed more probable that the Appellant was spoliated from the premises during the first week of **JUNE 2017** by the Respondent.

[17] The appeal regarding claim 2 must therefore succeed, as the Respondent failed to prove it's case on a balance of probabilities, regarding the issue of holding over.

CLAIM 3 IN THE *COURT A QUO*

[18] The third claim as mentioned, was based on the failure of the Appellant to return the building to the Respondent in the condition as it was received when the lease commenced in **JUNE 2007**. This claim should be read with clauses 1.11, 8.8.5, 8.9, 8.17 and 13.2. of the lease agreement, which reads as follows:

> *"1.11 the expiration or termination of this agreement shall not affect such of the provisions of this agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this."*

"8.8.5. all such signboards, sins or neon signs, shall if so required by the Lessor be removed by the Lessee upon the expiration or earlier termination of this lease and any damage caused to the premises or the building as a result of such removal shall be made good by the Lessee at his expense."

"8.9. be entitled from time to time to erect in the premises such fixtures and fittings as may be required or necessary for the carrying on of the lessee's business therein, provided that –

8.9.1. such fixtures and fittings shall be in keeping with the general finish of the building;

8.9.2. all such fixtures and fittings shall be removed by the Lessee upon the expiration or earlier termination of this lease.

8.9.3. any damage caused to the premises as a result of such removal shall be made good by the Lessee at his expense."

"8.17. save for the addition, removal and/or adjustment of racking, not make any non-structural alterations or additions to the interior of the premises without the Lessor's prior written consent, which consent shall not be unreasonably withheld or delayed, provided that if such consent is given then upon the expiration or earlier termination of this lease –

8.17.1. if the Lessee is required so to do by the Lessor in writing within thirty days after the expiration or termination, the Lessee shall at his cost, remove that non-structural alteration or addition and reinstate the premises or part thereof in question to its same condition, fair wear and tear excepted prior to the carrying out of that alteration or addition.

8.17.2. it the Lessor does not exercise its rights in terms of 8.17.1. above that addition or alternation shall not be removed by the

Lessee but shall become the Lessor's property and no compensation therefore shall be payable by the Lessor."

"13.2. Should either party breach any provision of this lease and the aggrieved party request the other to remedy the breach and the other fails to do so, and the aggrieved party thereafter makes use of the services of an attorney to demand and/or enforce compliance by the other party with that provision (whether or not any legal procedures is instituted) the other party will be liable for the payment of the costs of the said attorney on the attorney and own client scale, collection of commission, tracing agents fees and/all other legal costs incurred."

[19] The Appellant contend that the principle as laid down by the Supreme Court in Appeal in ***ISEP STRUCTURAL ENGINEERING AND PLATING (PTY) LTD v INLAND EXPLANATION CO (PTY) LTD***,[1] applies to claim three. This principle can be summarised as follows, namely:

a claim for objective value of performance (damages in lieu of performance) is not competent in South African law.

[20] At this juncture, it is important to note as to how the Respondent has structured its claim in the *Court a quo*. The relevant paragraph of the particulars of claim reads as follows:

[1] 1981 (4) SA (A)

*"The said damages comprise the normal, alternatively the general accepted, further alternatively the fair and reasonable costs to remove the fixtures and fittings and repair and restore the premises and building into the same condition as on **1 JUNE 2007**, excluding fair wear and tear."*

[21] Of importance is to revisit the evidence of **MR STEYN** on behalf of the Appellant, who testified as follows:

"Can I then ask you, during the 10 years of the Defendant in the building, was the building left in the same condition as you have received it? Or what happenend? --- No, not at all, not at all. When we, Your Worship when we received his store, it was a fully functional Built It. It had Built It branding everywhere. Outside of the Built It, as required by Built It head office. And inside the building also as required by Built It.

Inside the building all around there was parapets, yes parapets with Built It branding. There were signage on the walls. Little flags, anything with Built It. A while after I received the store, Built It started with a drive, what they do every year. And the currently Built It which they call re-branding of refresh. Where they refresh the signage. Of the, of the stores.

And I think at that stage they said it was bolder and better, or whatsoever. And we had to change the signage in the store, we had to put up new branding. But we put it over the older branding, inside the store, which was just stickers. That we stuck onto the parapets.

Would you have been able to also effect the repairs that they say they did effect? --- Yes, but just in a quicker time.

How long would it taken you to do so? --- Anything between a week and 10 days. A week. If I put in the right people there it is quickly.

And what do you say about his version that it would have taken between four and six weeks? --- Well, it is possible, but then they took their time and it is unnecessary time wasted there. It could be done very quickly. And if they asked me I would have done that in a very quick time.
I was a tenant no.

All right. Let us look at 24.2 then. "Defendant had failed to remove fixtures and fittings installed by the Defendant to wit bins, concrete floor, counter, wooden office and steel hanger, and failed to make good the damage caused as a result of such removal."

Do you want to say anything about that? You did not remove them --- I did not … The bins I did not remove. I was not asked to remove it. I was not given notice to remove it. The concrete floor, that is part of the bins. I built it with the knowledge the Plaintiff. I was never asked to remove it. I did not get notice to remove it, nor any legal letters to remove it."

[22] From the aforesaid evidence, it is clear that the Respondent never placed the Appellant in *mora* in terms of clauses 1.11, 8.8.5, 8.9, 8.17 and 13.2 of the lease agreement, but rather elected to do what the Respondent deemed necessary without drawing the attention of the Appellant to it's breach, and without affording the Appellant an opportunity to comply.

[23] The following *dictums* in the matter of ***BASSON v HANNA***[2] must be referred to:

> *"[22] CHRISTIE'S LAW OF CONTRACT IN SOUTH AFRICA 7 ed at 616 states:*
>
> *"The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the Plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the Plaintiff must not claim inconsistent remedies and must not be overcompensated."*
>
> *"[30] The three main judgments that were delivered were those of JANSEN JA, VAN WINSEN AJA and HOEXTER AJA. KOTZE JA concurred in the judgment of VAN WINSEN AJA and VILJOEN JA concurred in the judgment of HOEXTER AJA. HOEXTER AJA agreed with JANSEN JA'S conclusion that our law does not recognise a claim for the objective value of the performance as an alternative remedy to specific performance."*
>
> *"[31] JANSEN JA states at 6G-H*
>
> *"That a Plaintiff may claim either specific performance or damages for the breach (in the sense of id quod interest, ascertained in the ordinary way) is, on the authorities cited, beyond question. And it would seem that fundamentally these are the only alternatives recognized in our practice*

[2] 2016 ZASCA 198

(leaving aside the possibility of a combination of the two), particularly in respect of an obligation ad factum praestandum. Certainly no cogent authority has been cited to us to show that there is any other. However, it has been suggested that there is the possibility of a Plaintiff claiming "damages" in the sense of the objective value of the performance in lieu of the performance itself. This would not be damages in the ordinary sense at all, but amount to specific performance in another form."

"[32] He went on to say at 7E:

"A case which seems more in point is NATIONAL BUTCHERY CO v AFRICAN MERCHANTS LTD 1907 EDC 57 where damages were granted "in lieu of specific performance", but this seems but slender authority for this Court, in effect, to recognize a remedy akin to specific performance in the shape of a claim for the objective value of the performance.

It may be pointed out, if there were justification for recognizing such a remedy, it would entail the introduction of a number of ancillary rules. Has the Plaintiff an election of claiming either performance or its objective value? If he claims the latter, may the debtor tender actual performance? (Cf D JOUBERT "Skadevergoeding as Surrogaat van Prestasie" 1975 DE JURE 32; "Some Alternative Remedies in Contract" 1973 SALJ 37 at 44 - 47). If specific performance were to be refused because it would operate "unreasonably hardly" on the Defendant, would the Plaintiff still be entitled to the objective value of the performance itself? It would seem not -otherwise the very hardship leading to refusal of the specific performance could still be inflicted upon the debtor by granting the objective value of the

performance, as would be illustrated by the case of an obligation to reinstate in respect of a building destined for immediate demolition. In a case such as the present, the award of the objective value (reasonable costs of reinstatement) would be as unreasonable as an order for specific performance."

"[37] The question is whether this is an appropriate matter in which to reconsider the correctness of the majority decision in ISEP. In my view, this is not. ISEP is distinguishable from the facts of the present matter. There, the Court dealt with a lease and the case concerned the obligation of reinstatement under a lease. What was said there is no more than a ratio in regard to the limited class of contract of reinstatement under the lease and does not constitute a ratio of general application in the law of contract."

[24] Although this Court is mindful of the criticism against *ISEP*, as expressed in *inter alia* ***MOSTERT N.O v OLD MUTUAL LIFE ASSURANCE CO (SA) LTD***[3], and ***BASSON AND OTHERS v HANNA*** referred to *supra*, the reality is that the *ISEP* principle had not yet been reconsidered by either the Supreme Court of Appeal, or the Constitutional Court, and this Court is consequently bound by the *ISEP* principle.

[25] This Court finds that claim 3 indeed falls within the ambit of the *ISEP* principle, being that our law does not recognise a claim for the objective value of performance as an alternative remedy to specific performance. The Respondent should have either

[3] (2001) ZASCA 104

claimed specific performance against the Appellant or contractual damages. Claim 3 is not crafted to accommodate any of these options which were readily available to the Respondent.

[26] The Court *a quo* should have granted absolution of the instance regarding this claim based on the *ISEP* principle. The appeal regarding this claim must succeed.

Order

[27] In the premises, the following order is made:

1. The appeal is upheld.

2. Claim 2 is dismissed.

3. The order granted by the court a quo in respect of Claim 3, is set aside and is substituted with the following:

   "Absolution is granted".

4. The Respondent is ordered to pay the costs of the appeal.

_____

H J SCHOLTZ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree

_____

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG