THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 20023/2014

In the matter between:

MONYETLA PROPERTY HOLDINGS (PTY) LIMITED **APPELLANT**

and

IMM GRADUATE SCHOOL OF MARKETING (PTY) LIMITED **FIRST RESPONDENT**

NIGEL COLIN TATERSALL **SECOND RESPONDENT**

Neutral citation: *Monyetla Property Holdings v IMM Graduate School of Marketing* (20023/2014) [2015] ZASCA 32 (25 March 2015)

Coram: Ponnan, Shongwe and Leach JJA and Dambuza and Mayat AJJA

Heard: 26 February 2015

Delivered: 25 March 2015

Summary: Lease – cancellation by lessor due to lessee's breach – lessor's claim for damages arising on cancellation – prescription running from cancellation despite lessor remaining in occupation of the leased premises and continuing to pay rental under a clause in the lease that obliged it to do so if cancellation disputed – lessor's claim prescribed.

ORDER

On appeal from: Gauteng Division, Johannesburg (Wepener J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Ponnan and Shongwe JJA and Dambuza and Mayat AJJA concurring)

[1] An agreement of lease and its cancellation has proved to be fertile ground for litigation between the parties to this appeal. In the present matter, the appellant instituted action against the two respondents, claiming payment of an amount it alleged it had suffered as damages due to the first respondent having breached the lease which had led to its cancellation. The claim against the second respondent was based on his being bound as surety and co-principal debtor for the damages claimed. In response, the respondents raised two 'special pleas': first, that the claim had prescribed and, second, relying on the so-called 'once and for all' principle,[1] that the appellant was precluded from recovering its alleged damages as such loss ought to have been claimed in previous proceedings between the parties.

[1] As to which see eg *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E and *Janse van Rensburg &others NNO v Steenkamp and another;Janse van Rensburg &others NNO v Myburgh & others* 2010 (1) SA 649 (SCA) paras 27-30.

[2] When the matter came to trial in the Gauteng Division, Johannesburg the court, acting under the provisions of Uniform rule 33(4), ordered that the two special pleas be decided at the outset as separate issues. Thereafter, having received certain documents and heard counsel for both sides, it upheld both special pleas and dismissed the appellant's claim. A subsequent application for leave to appeal was also dismissed. The appeal to this court lies with its leave.

[3] It is unnecessary to spell out the precise details of the lease that lies at the heart of the dispute. Suffice it to say that it relates to certain immovable property in Richmond known as Richmond Forum; that as at 31 July 2007 the appellant became the registered owner of the property; that the appellant leased office space and parking bays situated on the property to the first respondent under a written agreement of lease and an addendum thereto that was due to expire on 30 September 2010; and that the second respondent had bound himself as surety and co-principal debtor for the obligations of the first respondent arising from the lease.

[4] Clause 26.1 of the lease provided that in the event of the first respondent having failed to pay any amount due in terms of the lease within seven days of being obliged to do so, the appellant would be entitled to cancel the lease on written notice and to claim immediate repossession of the leased premises. Clauses 26.2 and 26.3 further provided as follows:

'26.2 While the Lessee remains in occupation of the Premises and irrespective of any dispute between the parties, including, but not being restricted to a dispute as to the Lessor's right to terminate this lease the —

26.2.1 Lessee shall continue to pay all amounts due to the Lessor in terms of this lease on the due dates;

26.2.2 Lessor shall be entitled to recover and accept such payments;

26.2.3 Acceptance by the Lessor of such payments shall be without prejudice to and shall not in any manner whatsoever affect the Lessor's right to terminate this lease or to claim any damages whatsoever.

26.3 Should the dispute between the Lessor and the Lessee be determined in favour of the Lessor the payments made to the Lessor in terms of this clause 26 shall be regarded as amounts paid by the Lessee in respect of any loss and/or damages sustained by the Lessor as a result of the breach.'

[5] Although the first respondent complied with its obligations under the lease until 31 October 2007, it thereafter proceeded to fall into arrears and by 1 March 2009 had become indebted to the appellant in a sum in excess of R2 million in respect of unpaid rental and other charges. Consequently, on 6 March 2009 the appellant exercised its right under clause 26.1 to cancel the lease. The first respondent, however, disputed the validity of the cancellation and refused to vacate the leased premises.

[6] As a result of the first respondent's attitude, the appellant instituted motion proceedings in the high court on 6 October 2009, seeking the eviction of the first respondent from the leased premises. In addition it sought payment by both respondents not only of the sum of R2 058 260,60 due at date of cancellation of the lease but of a further amount of R750 298,04 due under the provisions of clause 26.2 of the lease in respect of the first respondent's occupation of the leased premises from April 2009 to September 2009. For convenience these proceedings will be referred to as 'the first application'.

[7] The respondents opposed the first application, contending that the lease had been unlawfully cancelled. However the court concluded otherwise. On 24 March 2010, it rejected the respondents' defence and granted the appellant the relief it sought. Despite this setback, the respondents remained obdurate; they sought leave to appeal and the first respondent stubbornly continued to remain

in occupation of the leased premises until their application for leave to appeal was dismissed on 29 April 2010.

[8] Faced with the inevitable, the first respondent eventually vacated the premises a few days later. But despite this, the respondents brought further applications for leave to appeal, firstly, to this court and, thereafter, to the Constitutional Court. Their view of the strength of their case proved to be misplaced as both applications were dismissed, on 24 June 2010 and 16 August 2010, respectively.

[9] In the meantime, the appellant had on 20 April 2010 instituted further motion proceedings in the high court ('the second application') in which it once more sought an order against the respondents for payment under clause 26.2 of the lease. On this occasion its claim related to the period October 2009 to April 2010 (ie from immediately after the period that was the subject of the claim in the first application up to the date the first respondent vacated the premises.)

[10] Although the respondents initially opposed the proceedings, they subsequently conceded liability. Accordingly, on 29 September 2010, the parties entered into a written settlement of their dispute that was made an order of court on 12 October 2010. In terms of this agreement, the respondents undertook to pay the appellant R1 741 302 together with interest by way of agreed instalments.

[11] This still did not bring an end to litigation between the parties. On 16 March 2012, the appellant issued summons in the present case in which it claimed damages from the respondents in the sum of R1 192 493,81 allegedly suffered due to the first respondent's breach of the lease and its resultant cancellation. In its particulars of claim the appellant alleged that after the lease

had been cancelled the first respondent had remained in unlawful occupation of the leased premises until the end of April 2010; that the first respondent had made payments of all amounts owing by it in terms of the lease until 15 April 2010, and that:

'As a result of the (first respondent's) breach of the lease agreement and the resultant cancellation thereof, the (appellant) has suffered damages in the amount of R1 192 493,81 which damages represent the rental, operating costs, rates, open parking, basement parking, parking (additional premises), water, refuse, sewerage and electricity which the (appellant) would have received in respect of the period 16 April 2010 to 30 September 2010 but for the (first respondent's) breach of the lease agreement.'

[12] It was in pleading to this claim that the respondents raised the two special pleas mentioned at the outset of this judgment that were upheld by the court a quo. But despite this success, the respondents have since lost confidence in their second special plea and, in this court, abandoned any reliance on it. In doing so they conceded that the first and second applications had not involved claims for damages but the enforcement of the provisions of clause 26 of the lease, and that the 'once and for all' rule relating to claims for damages had therefore been of no application. Accordingly the appeal turns solely on whether the plea of prescription was correctly upheld in the court a quo.

[13] Turning to the issue of prescription, the respondents admitted in their plea that the lease had been cancelled on 6 March 2009 due to the first respondent's breach, that the first respondent had remained in unlawful occupation until the end of April 2010, and that the first respondent had made payment for all amounts owing under the lease agreement until 15 April 2010 (those payments of course having included the payments made under clause 26.2 pursuant to its enforcement by way of the first and second applications). However the respondents pleaded that the appellant's claim had arisen on the

date of cancellation of the agreement on 6 March 2009, that the summons had been served more than three years later on 19 March 2012, and that the claim for damages flowing from that breach had therefore prescribed under s 11 of the Prescription Act 68 of 1969.

[14] It is common cause that the prescriptive period applicable to the appellant's claim is three years. But the appellant, in seeking to avoid the contention that its claim had prescribed as more than three years had elapsed after the lease was cancelled before action was instituted, argued both in this court and in the court below that although the debt sued upon may have arisen on date of cancellation;

(a) the amounts that became payable from the date of cancellation while the first respondent was in occupation of the leased premises were due under the provisions of clause 26.2.1 of the lease;

(b) the damages claimed in the present action relate to the period after the appellant had vacated the premises;

(c) at the earliest those damages only became 'due' as contemplated in s 12 of the Prescription Act on 30 April 2010 when the first respondent vacated the premises as, until then, the first respondent was bound to pay for its occupation under clause 26.2 of the lease;

(d) consequently all the *facta probanda* necessary for a complete cause of action were not present until the property had been vacated;

(e) no damages for breach of the lease were therefore due before 30 April 2010, and as action had been instituted within three years of that date, the claim had not prescribed.

[15] I accept that there is a difference between the concept of a debt 'arising' and a debt 'becoming due' as envisaged by the Prescription Act, and that a debt

is only due, owing or payable 'when the entire set of facts which the creditor must prove to succeed with his claim against the debtor is in place: when everything has happened which would entitle the creditor to institute action and to obtain judgment'.[2] But the argument that all the *facta probanda* necessary for a complete cause of action were not present until the first respondent had vacated the leased premises cannot be accepted.

[16] The appellant's claim is founded upon a breach of the lease, and the general rule is that where one party commits a breach of a contract the other is entitled to claim damages to place it in the position it would have been in had the contract been properly and timeously performed.[3] 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[4] 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.

[17] It must be remembered that a lease, once cancelled, comes to an end, and there is thereafter nothing preventing the lessor from immediately instituting action to place itself in the position in which it would have been had the lease not been cancelled. After all, the lessor's damages amounts to the diminution of its estate, its so-called interest or *interesse*,[5] caused by the breach and cancellation. Such loss will have been suffered whether the lessor vacates or remains in occupation, and constitutes a debt 'immediately claimable'.[6]

[2]See Laubser *Extinctive Prescription* (1996) at 51-2.
[3]See eg *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* 2001 (4) SA 159 (SCA) at 187.
[4]*Hazis v Transvaal and Deladoa Bay Investment Co Ltd* 1939 AD372 at 387.
[5]Van der Merwe *et al Contract General Principles* 4 ed (2012) para 11.5.2.
[6]*Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H.

Consequently I endorse the observations in *Hyprop*[7] that 'continued occupation of the premises is irrelevant to a claim for damages arising from cancelling a lease due to the tenant's breach'[8] and that the effect of the lessee remaining in occupation after cancellation is to preclude it from alleging that the lessor should have mitigated its loss before it vacated.[9]

[18] I do not see how this position can be said to be altered by the provisions of a clause such as s 26.2 that simply obliges the lessee to pay the amount that would otherwise have been paid as rental should it remain in occupation and dispute the cancellation. If it does so and the cancellation is held to be valid, as was here the case, any amounts so paid under the clause must be taken into account (just as the rental from a replacement tenant would be) to determine the lessor's actual loss. But that does not mean the loss has not been suffered or that the claim to recover that loss has not accrued. In the present case, for example, the fact that the first respondent remained in occupation did not mean that the loss the appellant claims in these proceedings had not been suffered on cancellation, even though it relates to the period after the first respondent eventually vacated. To hold otherwise would confuse the right to claim loss that has been suffered with what is required to prove the amount thereof.

[19] Consequently, on cancellation of the contract due to the respondent's breach, the appellant became entitled to claim damages over the period from the date of that breach to 30 September 2010 when the lease was due to expire through the effluxion of time. The measure of its damages was the sum of the rentals that would have been due during that period, less whatever amounts it received in mitigation of such loss. Those amounts included the sums paid by the respondents under clause 26 (albeit pursuant to the orders made in the first

[7] *Hyprop Investments Ltd v NCS Carriers and Forwarding CC* 2013 (4) SA 607 (GSJ).
[8] Para 36
[9] Pars 38.

and second applications). The damages that are the subject of the present claim were thus due and payable as at the date of cancellation. On that date everything had happened which would have entitled the appellant to institute action and to obtain judgment in respect of the period for which the damages presently being claimed are calculated. The debt sued upon was therefore due.

[20] The appellant's argument that its claim only arose once the first respondent had vacated the leased premises therefore falls to be rejected. So, too, does its further argument arising out of the rental for March 2009 having been included in the amount claimed in the first application. It was submitted on behalf of the appellant that as the rental for that month had been included in the amount in respect of which judgment was given and paid pursuant to the high court's order in the first application, its patrimony had been affected only with effect from 1 April 2009 and that prescription could therefore only run from that date. As that was slightly less than three years before the issue of summons, so it was argued, the claim therefore could not have prescribed.

[21] Again this loses sight of the fact that the claim arose when the contract was cancelled. It was then that the loss was suffered, and while any amount in respect of rentals due thereafter recovered pursuant to the first and second applications are to be taken into account in calculating the actual loss suffered, this does not mean that the claim had not risen or that the loss suffered by the breach could not be claimed on cancellation.

[22] In the result, as action was instituted more than three years after the debt sued upon had become due, the special plea of prescription was correctly upheld in the court a quo. The appeal must therefore fail.

[23] The appeal is dismissed with costs.

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L E Leach
Judge of Appeal

Appearances:

For the Appellant:	J Both SC Instructed by: Kokinis Inc, Blairgowrie, Randburg Phatshoane Henney, Bloemfontein
For the Respondent:	D C Fischer SC Instructed by: Blakes Maphanga Attorneys, Ferndale, Randburg Symington & De Kok, Bloemfontein