

[2] The facts relevant to the determination of this application are largely uncontroversial. The applicant is the owner of the property. On 1 December 2017, the applicant and the respondent concluded an oral commercial lease agreement in terms whereof the applicant let the property to the respondent to be utilised by it as a private school for girls (the agreement). The lease of the property would commence on 1 December 2017 and would continue indefinitely, subject to either party's right to terminate the agreement on 30 days' written notice to the other. In terms of the agreement, the respondent would be responsible for the payment of rental, electricity, effluent and water charges. Monthly rental in the amount of R27 000.00 would be paid by the respondent on the first day of each month without deduction or set off.

[3] Pursuant to the conclusion of the agreement, the respondent took occupation of the property. The applicant invoiced the respondent as follows during the period October 2019 until August 2020:

| Month | Rent | Water | Electricity | Effluent | Refuge |
|----------------|------------|------------|-------------|-----------|---------|
| October 2019: | R27 000.00 | R41 954.57 | R3 982.58 | R2 834.51 | R731.64 |
| November 2019: | R27 000.00 | R 3 719.00 | R6 504.16 | R2 591.43 | R731.64 |
| December 2019: | R27 000.00 | R19 647.00 | R6 504.16 | R2 591.43 | R731.64 |
| January 2020: | R27 000.00 | R19 647.00 | R6 504.16 | R2 591.43 | R731.64 |
| February 2020: | R27 000.00 | R19 647.00 | R6 504.16 | R2 591.42 | R731.64 |
| March 2020: | R27 000.00 | R19 647.00 | R6 504.16 | R2 591.42 | R731.64 |
| April 2020: | R27 000.00 | R28 956.00 | R7 802.73 | R9 441.20 | - |
| May 2020: | R27 000.00 | R27 338.10 | R6 999.35 | R8 294.29 | - |
| June 2020: | R27 000.00 | R18 612.53 | R2 332.74 | R1 819.96 | - |
| July 2020: | R27 000.00 | R18 068.14 | R8 664.23 | R1 412.92 | - |
| August 2020: | R27 000.00 | R22 522.15 | R5 693.10 | R4 742.62 | - |

[4] The payments made by the respondent to the applicant during the period October 2019 until August 2020, were the following:

| | |
|----------------|------------|
| October 2019: | R13 500.00 |
| November 2019: | R37 000.00 |
| December 2019: | nil |
| January 2020: | nil |
| February 2020: | R15 000.00 |
| March 2020: | R15 000.00 |
| April 2020: | nil |
| May 2020: | nil |
| June 2020: | nil |
| July 2020: | nil |

August 2020: nil

The applicant avers that the respondent is indebted to it in the amount of R570 146.77 as at 1 August 2020.

[5] By letter dated 13 February 2020 addressed to the respondent, the applicant's attorneys advised the respondent *inter alia* that it was in breach of the agreement as at 1 February 2020 in the amount of R446 210.22 in respect of outstanding rental and municipal consumption charges. The respondent was notified that unless such amount was received by the applicant within seven business days, the applicant shall cancel the agreement and proceed with an application for the respondent's eviction from the premises (the letter of demand). On 20 February 2020, the letter of demand was served by the sheriff at the property. Despite the letter of demand, the respondent failed to remedy its breach. On 29 July 2020 and on 3 August 2020, the applicant's sent a letter to the respondent via email and by registered post. The respondent was notified that as a result of its failure to remedy its breach of agreement, the agreement is cancelled forthwith. It was also demanded from the respondent to vacate the property by 12 noon on 5 August 2020 (the notice of cancellation).

[6] The respondent opposes the relief claimed by the applicant on the following grounds: First, *in limine* it contends that the applicant's founding affidavit was not signed in accordance with the Regulations Governing the Administering of an Oath or Affirmation made by the State President in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act) and published under GN R1258 in GG 3619 of 21 July 1972, as amended from time to time (the Regulations), and is therefore invalid. Second, that the applicant's cancellation of the agreement in terms of its notice of cancellation on 29 July 2020 is unlawful, invalid, and therefore null and void, since the agreement was cancelled while the country was still under a state of disaster as a result of the Covid 19 pandemic. Third, the respondent avers that the applicant has overcharged it for its consumption of water and electricity and effluent charges, and the applicant's cancellation of the agreement was therefore invalid since it was based on incorrect figures. Fourth, the respondent avers that the Applicant claims to have cancelled the lease agreement in a letter dated 29 July 2020, which was allegedly sent

to the Respondent by registered mail, which letter never came to the attention of the Respondent'. Fifth, the respondent 'will suffer severe prejudice, if it would be ordered to vacate, because it will be required to apply in writing six months in advance in order to change the school's address'.

[7] The respondent contends that the commissioner of oaths, Mr Tshepo GL Mohapi, 'appended his signature on the founding affidavit before it could be signed by the deponent' and 'that the founding affidavit is invalid and therefore it should be declared null and void'. Regulation 4 of the Regulations provide as follows:

'(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The commissioner of oaths shall-

(a) sign the declaration and print his full name and business address below his signature; and

(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.'

[8] The deponent to the applicant's founding affidavit explains that he signed the founding affidavit before the commissioner of oaths on 14 September 2020. He, however, made a *bona fide* error when he signed the affidavit in the space provided for the commissioner of oaths to sign. He also attaches to his replying affidavit an identical founding affidavit where he signed at the place provided for the signature of the deponent, which affidavit was commissioned by a different commissioner of oaths. The applicant's founding affidavit was commissioned as follows (my use of italics indicates where it was completed in manuscript):

DEPONENT

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO BEFORE ME AT NORWOOD ON THIS THE 14 DAY OF Sept 2020. THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO R1258 OF 21 JULY 1972, AS AMENDED AND GOVERNMENT NOTICE NO R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.

Deponent's signature
COMMISSIONER OF OATHS

Signature of Commissioner of oaths
Tshepo GL Mohapi
EX OFFICIO
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
1 THE AVENUE, NORWOOD 2192, JOHANNESBURG
Printed full names and surname of commissioner of oaths'

[9] It is settled law that the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the Regulations depending upon whether there has been substantial compliance with the Regulations. In, for example, *Lohman v Vaal Ontwikkeling* 1979 (3) SA 391 (T) at 398G-399A, Nestadt J said the following:

'It is now settled (at least in the Transvaal) that the requirements as contained in regs 1,2,3 and 4 are not peremptory but merely directory; the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (*S v Msibi* 1974 (4) SA 821 (T)). In *Ladybrand Hotels v Stellenbosch Farmers' Winery (supra)* [1974 (1) SA 490 (O)] a similar conclusion was arrived at. In that case the admissibility of an affidavit was attacked on the basis that the certification did not state that the deponents had signed it in the presence of the commissioner of oaths. It was held that the maxim *omnia praesumuntur rite esse acta* applied, that there was an *onus* on the person who disputes the validity of the affidavit to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken failed. In any event, it was held that if the affidavit was defective it should be condoned.

It is of course a question of fact in each case whether there has been substantial compliance or not.'

[10] *In casu* I am similarly of the view that substantial compliance with the Regulations has been proved and the defect (the deponent signing at the wrong place when the founding affidavit was commissioned before the commissioner of oaths) should be condoned.

[11] There is, in my view, also no merit in the respondent's attack on the validity of the applicant's cancellation of the agreement on 29 July 2020, because it was cancelled at a time when our country was under lockdown as a result of the Covid 19 pandemic. Regulations in terms of the Disaster Management Act 57 of 2002 (the DMA Act) were published to regulate the different levels of the national lockdown. The DMA regulations find no application *in casu* in so far as the lease is a commercial lease. The applicant's cancellation of the agreement is not invalid merely because it was cancelled during the National State of Disaster.

[12] The respondent's contention that the applicant's cancellation of the agreement was invalid, because it was based on incorrect figures as result of the respondent being overcharged for its consumption of water and electricity, and effluent charges, is, in my view, also unmeritorious. The respondent did not take issue with its liability vis-à-vis the applicant for payment of monthly rentals of R27 000 on the first day of each month during the currency of the lease, and that it only made payment of the total amount of R65 500 to the applicant in respect of rent, water and electricity consumption, effluent and refuse charges, during the five month period October 2019 until February 2020 when the letter of demand was served by the sheriff at the property on 20 February 2020. The total monthly rental that it was obliged to pay to the applicant during that period amounted to R135 000, leaving an arrear balance in respect of only its monthly rental payment obligation in the amount of R69 500.00. Since then until the time when the notice of cancellation was sent to the respondent via email and by registered post on 29 July 2020 and on 3 August 2020 respectively, it made only one further payment in the amount of R15 000 during March 2020 to the applicant. By then, the total monthly rental that the respondent was obliged to have paid to the applicant for the ten month period October 2019 until July 2020 amounted to R270 000, whilst it had only paid the total amount of R80 500 to the applicant, leaving an arrear balance in respect of only the monthly rental owed by it in the amount of R189 500.

[13] It is trite that a notice of cancellation will be effective even though it gives a wrong reason for cancelling the agreement. In this regard it was said by Jansen JA in *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) 943 (A) at 953F, that '[i]t has also been long

recognised in our practice that a party purporting to terminate for a wrong reason may later justify the termination on a different and valid ground existing at the time of the termination'. (See also *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other Related Cases* 1985 (4) SA 809 (A) at 832C-D); *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 699C-E.). *In casu*, the applicant is entitled to rely at least on the non-payment of the monthly rentals by the respondent as justification for its cancellation of the agreement, which is not a different reason but only part of the reason stated in its letter of demand and notice of cancellation.

[14] In its founding affidavit the applicant makes the following averment:

'On 29 July 2020 and on the 3rd of August 2020 the Applicant's attorneys of record sent a letter to the Respondent via email and registered post. The letter, a copy of which is annexed hereto marked "SG5", advised the Respondent of cancellation of the lease and demanded that the Respondent vacate the premises by 5 August 2020.'

In its answering affidavit the respondent replies to this averment as follows:

'The Applicant claims to have cancelled the lease agreement in a letter, dated 29 July 2020, which was allegedly sent to the Respondent by registered mail, which letter never came to the attention of the Respondent.'

[15] But, the applicant clearly states that the notice of cancellation was sent to the respondent by registered mail and via email. The respondent did not reply to the averment that the notice of cancellation was sent to it by email nor whether the one that was sent by email came to its attention. Nevertheless, cancellation of an agreement takes effect from the time it is communicated to the other party. (See *Swart v Vosloo* 1965 (1) SA 100 (A) at 105G; *Phone-a-copy Worldwide (Pty) Ltd v Orkin* 1986 (1) SA 729 (A) at 751A-C.) If it has not previously been communicated it takes effect from service of summons or notice of motion (*Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk* 1987 (2) SA 244 (T) at 249A-G), unless a contract prescribes a particular procedure (*Swart v Vosloo* at 112F), which is not the case in this instance.

[16] The prejudice which the respondent will suffer if it is ordered to vacate the property, because it will be required to apply to the Gauteng Province Department of Education in writing six months in advance in order to change the school's address, is of

its own making. It has been aware of the applicant's cancellation of the agreement and its demand that it vacates the property since 29 July 2020, when the applicant's attorneys of record sent the notice of cancellation of the lease via email to it, or at least since this application, which was issued on 1 September 2020, was served upon it. Apart from two payments of R25 000 and of R50 000, which it made to the applicant on 24 September 2020 and on 22 December 2020 respectively after the agreement had already been cancelled by the applicant, it has not made any payment of the monthly rentals and other charges since April 2020. The applicant remains liable for the payment of all municipal rates and taxes and service/consumption charges in respect of the property, it is not able to let the property due to the respondent's failure to vacate the property and it continues to suffer damages. It should also be borne in mind that the respondent in any event agreed to let the property indefinitely, subject to either party's right to terminate the agreement on 30 days' written notice to the other.

[17] The applicant, as it was entitled to do, cancelled the agreement and the respondent's right to occupy the property, therefore, terminated.

[18] In the result, the following order is made:

- (a) The respondent and all those who occupy Erf 7, Doornfontein situate at 178 Helen Joseph Street, Doornfontein, Johannesburg (the property) by virtue of the respondent's occupancy thereof, are hereby ejected from the property.
- (b) The respondent and all those who occupy the property by virtue of the respondent's occupancy thereof, shall vacate the property within 30 days of service of this order on the respondent, failing which the sheriff of this court is hereby authorised to forthwith enter upon the property and eject the respondent and all those who occupy the property by virtue of the respondent's occupancy thereof.
- (c) The respondent is to pay the costs of the application.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment: 20 July 2021
Heard: 29 April 2021
Applicant's Counsel: Adv V Vergano
Instructed by: Joshua Apfel Attorneys, Norwood, Johannesburg
Respondent's Counsel: Mr TML Mashitoa
Instructed by: TML Mashitoa Inc., Benoni
C/o Mokhabukhi Attorneys, Johannesburg