IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)
APPEAL TO THE FULL COURT

Case No. A5031/2011
SGHC Case No. 2010/8562

In the matter between:

GALAXIAS PROPERTIES CC Appellant
(Applicant in the Court *a quo*)

And

SAVVAS ANGELO GEORGIOU Respondent
(Respondent in the Court *a quo*)

JUDGMENT

VERMEULEN AJ

[1] The Appellant appeals to this Court with leave from the Supreme Court of Appeal against the judgment of Tsoka, J., dismissing an application by the Appellant as Applicant in the Court *a quo* for the eviction of the Respondent from certain business premises situate in Nigel and described in the notice of motion as Shop 1, Ferryvale shopping centre, 25 Beverley Road, Nigel.

[2] The Appellant sought the eviction of the Respondent as the owner of the shopping centre, having purchased the property on which the shopping centre is

situate from the previous owner who was also the lessor in terms of a written agreement of lease entered into with the Respondent on 24 January 2001.

[3] The Appellant purchased the property during 2005, in terms of an agreement styled *"Sale of Rental Enterprise"* pursuant whereto the property was sold, and the lease of the premises concerned ceded and assigned, to the Appellant. The property was transferred to the Appellant on 31 January 2006.

[4] The lease, by way of clause 5 thereof, provides that the rental is payable monthly in advance on the first day of each month.

[5] The consequences of a material breach of the agreement are provided for in clause 26 of the lease. Where the breach takes the form of a failure to pay the rental on the date when it falls due, as provided for in clause 26.1 of the agreement, the landlord has the right to give the tenant ten days' written notice requiring the tenant to make payment of the rental.

[6] Should the tenant fail to make such payment within the ten day-period, the landlord acquires the right to cancel the lease forthwith and to take possession of the premises and for that purpose to institute whatever action may be necessary for the immediate ejectment of the tenant from the premises without prejudice to his right to claim arrear rent and such other damages as he may have sustained.

[7] In terms of clause 26.2 of the agreement, if during any period of eighteen months the landlord has on two occasions given the tenant notice in terms of paragraph 26.1 of the tenant's failure to pay the rent or any other sum payable by the tenant, the tenant shall not thereafter be entitled to any notice in respect of any other

similar breach during the same eighteen months and the landlord may, immediately without written notice exercise its rights in terms of the agreement.

[8] The lease agreement, furthermore, contains a non-variation clause in the terms provided for in clause 40 of the agreement as follows :-

> *"This agreement of lease constitutes the sole agreement between the parties. No waiver by the landlord of its rights or variation or cancellation hereof shall be binding upon the parties unless such waiver, variation or cancellation shall be reduced to writing and signed by both parties."*

[9] The Applicant alleges that the Respondent breached the agreement of lease by; *inter alia*, failing to pay the agreed monthly rental timeously for the months of April 2009 as well as November 2009. The Respondent admits that he failed to pay the rent on the 1st day of the months as stated above, but alleges that the Applicant condoned these late payments and waived its right to cancel the agreement arising from such late payments. The Respondent, indeed, alleges that he never made timeous payment in terms of the lease, that the Applicant throughout accepted such late payments and, in so doing, the Respondent seeks to set up the waiver as stated above.

[10] The Respondent admits having received the first letter of demand addressed to him on the Appellant's behalf by the latter's attorneys on 16 April 2009. This letter reads as follows :-

> *"We address this letter to you on behalf of our client.*
>
> *You are in breach of the agreement of lease dated 24 January 2001 in that :-*
>
> *1. You are in arrears with payment of rent for April 2009 in the amount of R66,292.45.*
>
> *2. You are in arrears with payment of water consumption in the amount of R342.00.*

> *3. You are in arrears with payment of rates and taxes in the amount of R978.47.*
>
> *Client also instructed us to collect interest in the amount of R5,956.69 in respect of interest charged on late payments.*
>
> *In terms of clause 26 of the agreement of lease you are hereby given notice to rectify the breach aforementioned within 10 [ten] days after receipt of this notice, failing which, we hold instructions to issue summons for payment of the arrear amount, interest and costs without any further notice.*
>
> *Kindly further take notice that you are also held responsible for the legal costs in respect of the drafting of this letter by the Sheriff."*

[11] I have quoted this letter in full in the light of the defence raised by the Respondent and the line of reasoning adopted by the Court *a quo*, to which I return hereunder. For present purposes it suffices to point out that this letter qualifies as a notice within the meaning of clause 26.1 of the agreement of lease. As such, the letter has ramifications in the sense that it triggers the mechanism provided for in clause 26.2, in terms of which the landlord obtains the right to cancel the lease without further written notice if, within eighteen months from the date of the previous breach, the Respondent should fall into arrears again.

[12] This is precisely what happened, in that, during November of 2009, the Respondent was again in default of paying the rental due for November timeously in accordance with the provisions of the agreement. The Appellant sent a notice to the Respondent calling upon him to remedy the breach in terms similar to those contained in the notice of 16 April 2009. Again, the Appellant's allegations to this effect are undisputed.

[13] During February 2010, the Respondent was yet again in default, in that he failed to timeously pay the rental for this month on the due date. On this occasion the Appellant elected to exercise its rights in terms of clause 26 and, accordingly,

gave notice of its election to cancel the agreement and to demand that the Respondent vacate the premises by no later than 31st March 2010. This it did by way of a letter addressed by its attorneys of record to the Respondent dated 11 February 2010.

[14] The Respondent, whilst admitting its default, sought to contend, in paragraph 8.18 of its answering affidavit, that the late payment in February did not fall within the same eighteen month period as the previous defaults on the basis of the contention that the eighteen month period falls to be reckoned from the inception of the lease and that, if so reckoned the breach did not occur within the same eighteen month period. This defence needs merely to be articulated for its lack of substance to be revealed. Clause 26.2 of the agreement provides that the eighteen month period commences on the date of any breach; it does not commence on the date of the lease agreement itself. The argument based on these contentions was rightly not pressed during the hearing of the appeal before us.

[15] Another contention on the part of the Respondent was that, prior to the Respondent's receipt of the letter dated 11 February 2010 addressed to it by the Appellant's attorneys of record in which the Appellant's election to cancel the agreement is recorded, the Respondent had paid the overdue rental amount and that, accordingly, the Respondent had rectified the breach before notice of cancellation was communicated to it on behalf of the Appellant. In this regard the Appellant replied that the letter of cancellation, annexure "E" to the founding affidavit, was served by the Sheriff at 09h00 on Thursday the 11th of February 2010 and that the deposit slip evidencing the deposit of the overdue rental for February 2010, annexed to the Respondent's answering affidavit is dated the same day, but that Standard

Bank, Nigel, where the money was deposited only opens at 09h00 during weekdays and that the deposit must, accordingly, necessarily have been after receipt by the Respondent of the notice of cancellation. I return to deal with this defence hereinlater.

[16] In terms of what may be regarded as his main defence, the Respondent alleged that the requirement of timeous performance by him of the obligation to pay rental on the first of each month was never enforced by the Applicant. Indeed, in paragraph 5.1 of his Answering Affidavit, the Respondent went further to allege that there was a specific agreement between himself and the landlord that he could pay the rent if and when he had the money available. In my view this latter defence is not entirely harmonious with the defence that the Appellant waived its rights in terms of the agreement to insist upon timeous performance of the obligation to pay the rental. Indeed, the two defences are mutual exclusive in the sense that, if the agreement of lease was amended to provide for the specific agreement referred to by the Respondent to the effect that he could pay as and when he pleased, then the issue of a waiver on the part of the Appellant's rights as a landlord does not arise. On the other hand, if there was a waiver, the presupposition is that the clause giving rise to the right which was waived could not have been amended as alleged. What the defences have in common, however, is that both fall foul of clause 40 of the agreement, which precludes reliance by the lessee on an oral waiver or variation of the lease agreement in the manner alleged by the Respondent.

[17] The Court *a quo* held that it was common cause that, during the period 2000 to 2008, the Respondent on eleven occasions failed to pay the rental on due date and that the Applicant, instead of demanding payment of rental, failing which

cancellation of the agreement and ejectment of the Respondent from the premises [was demanded], the Applicant contented itself with the demand that the Respondent bring its account up to date. I take this to mean that the Appellant did not notify the Respondent that it would insist on due and punctual compliance with the terms of the agreement and that it would cancel the agreement if the Respondent were to persist in paying the rental after the due date.

[18] The Court *a quo* referred to *Garlick Ltd v Phillips* 1949 (1) SA 121 AD, on the basis that the facts in that case were similar to the present matter and referred to the Court's finding in that case that the landlord's long continued acquiescence, without protest, in the late payment of rental was tantamount to a tacit permission given to the lessee to pay his rent late until further notice. Reference was also made to *Myerson v Osmond Ltd* 1950 (1) SA 714 AD, where the Appellate Division referred to the same principle as articulated in the *Garlick*-case, but distinguished the matter on the facts. On the basis of these decisions the Court *a quo* concluded that it seems settled that the Respondent in the present matter cannot be ejected from the premises for non-payment of rental on 1 February 2010.

[19] The Court *a quo*, nevertheless, referred to clause 40 of the lease agreement and acknowledged that the approach of the Appellate Division in *S.A. Sentrale Ko-öp Graan Maatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) in relation to a non-variation clause similar in its terms to those contained in clause 40 of the present agreement, would preclude reliance by the Respondent upon the alleged oral waiver or variation of the agreement in the manner contended for by it.

[20] The Court *a quo*, however, held that the position adopted in the *Shifren*-case in 1964 has changed since 1994, with the advent of the constitutional disposition.

The Court *a quo* further held that, since any conduct or law which is inconsistent with the constitution is unlawful, the question that arises in a constitutional context is : *"*[d]*oes public policy permit a landlord, such as the applicant* [the present Appellant], *who frequently from inception of the agreement in 2001 until February 2010, acquiesced, without protest, in the late payment of rent, suddenly and without warning to the lessee such as the Respondent to cancel the lease and demand ejectment of the Respondent from the premises?"* The Court *a quo* held that this question must be answered on the basis of principles as interpreted and developed having regard to the values espoused in the Constitution.

[21] The Court *a quo* referred to the decision of the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), where Ngcobo J., writing for the majority, stated at paragraph 73 of the judgment:

> *Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled, 'is the general sense of justice of the community, the* boni mores*, manifested in public opinion.'"*

[22] The Court *a quo* also referred to a full bench decision of the Eastern Cape High Court in *Nyandeni Local Municipality v MEC for Local Government and Others* 2010 (4) SA 261 (ECM). The citation to which the Court *a quo* referred appears at para.126 of the judgment, where Alkema J. stated:

> *In balancing the* pacta sunt servanda *principle as expressed in* Shifren *against the right to engage in the due process of law under s 34, and to be protected against an abuse thereof, I have no hesitation in coming to the conclusion, on the facts of this case, that public policy in this particular case favours the rule of law as a foundational cornerstone of our Constitution. I therefor believe that the facts and circumstances of this case justify a departure from the Shifren principle."* (Own emphasis).

[23] As pointed out already, the Court *a quo* found that the Appellant ought to have warned the Respondent that it intended to cancel the agreement if the Respondent persisted in paying the rentals after the due date in terms of the agreement. The Court *a quo* considered it significant that the Appellant suffered two instances of a default on the part of the Respondent between April and November 2009, when the Respondent failed to pay on time, without cancelling the agreement. When the Respondent again failed to pay timeously in February 2010, the Appellant summarily cancelled the agreement, without having warned the Respondent of its intention to do so. This, so the Court *a quo* held, would be regarded in terms of public policy as unfair, unjust and unreasonable and the Appellant cannot *"seek shelter in the Shifren-clause"* in these circumstances.

[24] The Court *a quo* sought support for this approach in the *Garlick* decision at pp. 132-133 of the report, where the following is stated:

> *But I am inclined to think that, if a breach of a duty be necessary, there was a duty resting on appellant which was not performed. So long as its attitude remained one of indifference towards late payments of rent, there was of course no necessity to speak, but when appellant's 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 I think the duty arose to make that changed attitude known to the respondent. A responsible man in the appellant's position would have known that a long continued receipt by him of late payments of rent without protest such as occurred in this case, would lead the Respondent into the belief that he had no objection to late payments and did not treat them as breaches of contract and would not, without notice, do so in the future. A duty therefore rested on 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 respondent of that change of mind."*

[25] The Court *a quo* was alive to the fact that the agreement in the present matter does not impose a duty on the Applicant to inform the Respondent if the Applicant wishes to take advantage of the Respondent's late payment of rental and obtain

ejectment of the Respondent from the premises. The learned Judge *a quo* reasoned, however, that the duty referred to in the *Garlick*-decision is "*the brainchild of public policy"* which, in turn, is the embodiment of the *"general sense of justice of the community"*, the *boni mores*, manifested in public opinion, which demands of the Applicant to act fairly, reasonably and justly towards the Respondent. Therefore it was held that the Respondent, in the circumstances, is entitled to know that his late payments of rental would not be tolerated and that the Applicant intends to enforce the terms of the agreement and demand prompt payment of rental.

[26] I regret that I am unable to agree with this line of reasoning. There are at least two fundamental differences between the facts of this matter and those which formed the subject matter of the decision in the *Garlick*-case. First: there was no non-variation clause included in the agreement of lease which featured in the *Garlick*-decision. Second: the conduct of the lessor in the present case cannot be equated to the attitude of indifference towards late payments of rent which characterised the conduct of the lessor in the *Garlick*-decision. These distinguishing factors place the current matter in a completely different purview to that which obtained in the *Garlick*-decision. The decision in that case turned on the fact that the attitude of indifference espoused by the lessor towards the late payments of rental by the lessee indicated either that there was a tacit amendment of the agreement by the conduct of the lessor, or that the conduct of the lessor gave rise to an estoppel, in that the aforesaid conduct constituted a representation to the lessee that the lessor would not, without more, use the late payments as a ground for the cancellation of the agreement. The duty imposed upon the lessor in the *Garlick*-decision arose from the aforesaid considerations, to which regard could be had since the parties did not covenant to the contrary; it was not imposed *ex cathedra* simply on account of a

perceived duty on the part of the lessor to act fairly, reasonably and justly towards the lessee; notwithstanding the parties' covenant that regard may not be had to those very considerations. A general duty by one contracting party to act fairly, reasonably or justly towards his counterpart, in the absence of a specific provision in the agreement to this effect, or where such a term is implied, has for good reason never been acknowledged in our law, for according to whose lights must its alleged breach be determined? See in this regard the pithy observations of Harms DP in *Bredenkamp and Others v Standard Bank* 2010 (4) SA 468 SCA at paragraphs 27 and 28 of the judgment.

[27] The SCA, in *Brisley v Drotsky*, *supra*, emphasised the dangers inherent in permitting the sanctity of contracts to hang by the thread of the idiosyncrasies of individual contracting parties or the perception of the prevailing equities by individual judges.

[28] This was also one of the issues which both the minority as well as the majority grappled with in the decision of the Constitutional Court in *Barkhuizen v Napier*, *supra*. The judgment by the majority, spoken for by Ngcobo J., is pertinent in this regard. The decision was concerned with the enforceability of a time-bar clause in an insurance contract; it addressed this issue by posing the question whether the relevant clause offends against public policy which, in the post-constitutional era, is evidenced by the values which underpin the Constitution, being, *inter alia*, the values of human dignity, equality, the advancement of human rights and freedoms and the rule of law. Ngcobo, J. pointed out (at paragraph 30 of his judgment), that this approach leaves space for the principle of *pacta sunt servanda* to operate, but

allows courts to decline to enforce contractual terms that are in conflict with constitutional values, even though the parties may have consented to them.

[29] The weight to be attached in this assessment to the fact that a particular obligation was freely and voluntarily undertaken comes to the fore in Ngcobo. J.'s description of this consideration as *"a vital factor"* which will determine the weight to be attached to the values of freedom and dignity (*vide* paragraph 57 of the judgment). He emphasised that public policy requires that contractual obligations freely and voluntarily undertaken should be honoured, precisely because this requirement gives effect to the central constitutional values of freedom and dignity. This emphasis is entirely harmonious with the approach by the SCA to the same question in, *inter alia*, *Brisley v Drotsky, supra; Afrox Health Care Ltd v Strydom* 2002 (6) SA 21 (SCA), *South African Forestry Co. Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA), *Bredenkamp v Standard Bank*, 2010 (4) SA 468 (SCA), *Law Society of the Northern Provinces v Mahon* 2011 (2) SA 441 (SCA) and *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA).

[30] In having thus focused on what admittedly constitutes a selection of *dicta* from Ngcobo, J.'s judgment, I am not suggesting that his judgment as a whole is to be understood as an uncritical endorsement of the maxim *pacta sunt servanda* at all costs. But neither can the judgments of the SCA, referred to in the paragraph above, be seen in such a light. In the context of the broader judicial debate on the present topic, the judgments by Wallis AJ (as he then was), in *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D), on the one hand, and Davis J., in *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn and Another* 2008 (2) SA 375 (C) and *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C),

on the other, at first may appear to represent nothing less than the thesis and antithesis underpinning two opposing philosophies; but closer analysis of each position, in the broader context of the present debate, suggests rather that their respective approaches approximate the contrapuntal voices in an intricate fugue, with each voice contributing vitally to the harmonic whole.

[31] The citation from Ngcobo, J.'s judgment in the *Barkhuizen*-decision, quoted in paragraph 24 above, was relied upon by the Court *a quo* in arriving at its conclusion that the lease agreement should not be enforced, because a reliance by the lessor on the non-variation clause therein would be unfair and unjust and thus offend against public policy. This conclusion was reached without having identified any specific constitutional value which was allegedly breached by the lessor's reliance upon the non-variation clause. In other words, the abstract concepts of fairness and justice were regarded by the Court *a quo* as independent grounds upon which to interfere with a private contractual relationship. This approach is not sanctioned by the majority judgment in *Barkhuizen v Napier*, *supra*. The majority in *Barkhuizen* considered whether the time-bar clause in that case offends against the constitutional right enshrined in s. 34 of the Constitution, being the right to fair access to the Courts to have disputes judicially determined. The majority came to the conclusion that the disputed clause is neither unjust nor unfair, because s 34 contains no absolute bar against time-limitation clauses and, in the result, that there is no reason why public policy would not tolerate such a clause if it affords the claimant a fair and reasonable opportunity to seek judicial redress. See paragraphs 44 - 52 of the judgment. The majority in the *Barkhuizen*-decision, in other words, did not use fairness and justice as independent grounds on the basis whereof the terms in a contract fall to be assessed.

[32] The decision by the full bench of the Eastern Cape High Court in *Nyandeni Local Municipality v The MEC for Local Government & Others*, *supra*, to which the Court *a quo* referred, also formed the mainstay of the argument advanced to this Court on appeal on behalf of the Respondent. This decision, however, also affords no support for the line of reasoning adopted by the Court *a quo*. In the *Nyandeni Local Municipality*-decision, Alkema, J. was at pains to acknowledge the full ambit of the *Shifren*-decision and the decision by the SCA in *Brisley v Drotsky*, *supra*. The learned Judge's carefully reasoned assessment of the *Shifren*-principle in paragraphs 41 to 63 of the judgment in the *Nyandeni Local Municipality*-decision clearly evidences such an acknowledgement. The balancing process between the *pacta sunt servanda*-principle against the right to engage the due process of law under s. 34 of the Constitution and to be protected against an abuse thereof, was undertaken by Alkema, J. in the light of his previous finding that, on the facts of that case, the resort to the non-variation clause in the agreement which featured there, resulted in an abuse of process which entailed that the Appellant's rights to due process of law would have been breached. This being the case, the Court held that the implementation of the non-variation clause in that case would be so unreasonable as to offend public policy and on that basis the Court held that the clause was unenforceable. The position in this case is materially different: As pointed out already, there is no claim in this case that any identified constitutional right was breached in consequence of the enforcement of the non-variation clause. The argument is simply that, because of the perceived unfairness which would result from its implementation, the non-variation clause ought to be regarded as *pro non-scripto*. Alkema, J. expressly disavowed such an approach. See paragraph 90 of the decision.

[33] What is more, the Appellant in the present case manifestly did not acquiesce in the late payment of rentals by the Respondent; of that the notices by the Appellant's attorneys consequent upon the Respondent's breaches in April and November 2009 bear incontrovertible testimony.

[34] The Court *a quo*'s line of reasoning has the effect of rendering the non-variation clause nugatory under circumstances where the decision by the SCA in *Brisley v Drotsky*, *supra*, which was binding on the Court *a quo*, militated against such a decision. The Court *a quo* was accordingly not justified in these circumstances from departing from the principles laid down in the *Shifren*-decision.

[35] I, in any event, do not agree with the sentiment that the Respondent has any basis for complaint if his repeated breaches of the agreement led to the cancellation of the agreement without further notice to him. The terms of the rental agreement in general, and clause 26 in particular are not unduly onerous. The lessor has to suffer two breaches of the lease in an eighteen month period before the right to cancel without notice in terms of the *lex commissoria* accrues. A late payment as such does not give rise to a right to cancel on the part of the lessor, who is obliged in terms of clause 26.1 to afford the lessee ten days grace within which to remedy the default. These provisions do not evidence an unequal bargaining position between the parties to the agreement, nor was any other evidence tendered to suggest that such a relationship existed. From the very attitude adopted by the Respondent, to the effect that he paid late throughout the duration of this lease, one gets the impression rather that it was the Appellant who was the long suffering party. This is, furthermore, not a standard term contract. In the absence of a defined constitutional right in favour of the tenant which is impacted upon by the landlord's invocation of the non-variation

clause, no constitutional issue arose and the resort to fairness and justice was unwarranted.

[36] There is, furthermore, no significance in the fact that the Appellant, on the occasion of the breaches in April and November 2009, merely notified the Respondent to correct the breaches without cancelling the agreement, as the Court *a quo* found. The right to cancel the agreement had not accrued to the Appellant in April or November 2009, by reason of the provisions of clause 26, which I have already adverted to above. That right only accrued in February 2010 when the Respondent again defaulted, having received two notices in terms of clause 26 in the eighteen month period preceding the final default. If the Respondent really did not know what the consequences of his continued breaches might be and he wanted to inform himself in this regard, he needed merely to have read the lease agreement of which he presumably had a copy. If he did not have a copy, the Appellant would presumably have been more than willing to provide him with one.

[37] In the result, I hold that the Court *a quo* erred in its finding that the Respondent was at liberty to advance the defences of an oral variation of the agreement or an oral waiver of the Appellant's rights to cancel the agreement under the circumstances of the matter.

[38] The Court *a quo* did not deal with the further defence that the breach was remedied before notice of the cancellation was imparted to the Respondent. In my view, this defence also lacks substance, for the following reasons :-

> [38.1] The Appellant alleged that, as a result of the Respondent's breach of the agreement in February 2010, which breach occurred within eighteen months of the Respondent's breach during April 2009, there having been a

second breach in November 2009, elected to cancel the agreement with the Respondent.

[38.2] This allegation is plainly correct, if regard is had to the provisions of clause 26.2 of the lease agreement, which is in the nature of a *lex commissoria*. The effect of this forfeiture clause is simply that the Appellant obtains a right to cancel the agreement without notice to the Respondent, should the Respondent breach the agreement for a third time within an eighteen month period, reckoned from the first breach, provided that the Appellant gave notice to the Respondent to remedy the breach on the first and second occasions.

[38.3] The Respondent relied upon the decision in *Swart v Vosloo* 1965 (1) SA 100 (AD) at 105G where Holmes, JA. said :-

> *"... It must be taken as settled that, in the absence of agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party; and cancellation does not take place until that happens."*

[38.4] The Respondent also referred to the decision in *Segal v Nazzur* 1920 CPD 634 at 644 – 645 and *Culverwell & Another v Brown* 1990 (1) SA 7 (A).

[38.5] As is plain from the citation from *Swart v Vosloo* in paragraph 31.3 above, the general rule stated therein is subject to modification by the parties in their agreement. The decision in *Culverwell & Another v Brown, supra*, deals with an innocent party's right to decide whether or not to accept a repudiation by his counterpart. The point was made in this decision that, should the innocent party elect not to accept the repudiation, the contract

remains of full effect. This does not assist the Respondent's argument at all, because he is not the innocent party. He was in breach of the agreement as from 2 February 2010. No further notice to him was required, because on this third breach within an eighteen month period, the effect of the *lex commissoria* was that *dies interpellat pro homine*. See in this regard Voet 18.3.2 where the principles of a *lex commissoria* are explained.

[38.6] In 18.3.4, Voet addresses the issue of *mora debitoris* as follows :-

> *"This* lex commissoria *takes effect as a general rule by simple effluxion of the stated time, nor is a demand necessary on the part of the vendor in order to constitute the purchaser in default, since it is pre-eminently a case in which* dies interpellat pro homine*."*

[38.7] In the cited texts, Voet deals with a *lex commissoria* in an agreement of sale, but the principles are of course equally applicable to other agreements including a lease agreement.

[38.8] In *Schuurman v Davey* 1908 TS 664, the right to cancel accrued on the 2nd of April and it was exercised on the 17th. Innes, CJ. dealt with this factor as follows (at p. 671 of the decision) :-

> *"Now I am not prepared to say that a delay of fifteen days is such an interval as would be sufficient, in itself, to deprive the seller of his right to cancel. Certainly the court would not be justified in inferring waiver on his part merely because he delayed the fifteen days, and there is nothing to show that the buyer in this case was in any way prejudiced by the delay."*

[38.9] An application of these principles to the facts of the present matter is dispositive of the Respondent's defence. In the case of a forfeiture clause, the right to cancel accrues upon the happening of the event upon which the

forfeiture clause is predicated. The party in whose favour the right has accrued cannot be deprived of it merely because the other party, who is in *mora*, tenders to, or in fact pays on that day. In *Schuurman v Davey*, *supra* , Innes CJ stated that nothing but waiver, undue lapse of time or some default on the part of the party in whose favour the right accrued can deprive him of this right. This decision by Innes CJ. has consistently been followed since its delivery. See *Boland Bank Ltd v Pienaar & Another* 1988 (3) SA 618 (A) at 622C. In the present case, given the provisions of clause 40, only a waiver in writing by the Appellant would have sufficed to deprive it of the accrued right to cancel. There is no suggestion that there was an undue lapse of time or any default on the part of the Appellant in this regard. There is accordingly no substance to this defence.

[39] I would accordingly uphold the appeal. The Appellant is entitled to the costs of the application before the Court *a quo* on the scale between attorney and client, because the lease agreement, by way of clause 34 thereof, entitled the Appellant to such costs

[40] I would accordingly make the following order:-

A. The appeal succeeds with costs including the costs occasioned by the employment of senior counsel.

B. The Court *a quo*'s order is set aside and substituted with the following order :-

1. The Respondent and all persons occupying through or under him is ordered to vacate Shop 1, Ferryvale shopping centre, 25 Beverley

Road, Nigel within ten calendar days from the date of service of this order upon the Respondent.

2. The Sheriff or his deputy for the district of Nigel is authorised to place the Applicant in possession of Shop 1, Ferryvale shopping centre, 25 Beverley Road, Nigel should the Respondent fail to comply with paragraph 1 of the order.

3. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

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VERMEULEN AJ

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MOSHIDI J
(I concur. It is so ordered.)

_____
KGOMO J
(I concur.)

Appearances:

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Hearing Date: 20 March 2012

Judgment Date: 29 November 2013

S U M M A R Y

Eviction proceedings from business premises based on breach of written lease agreement – the lessee regularly defaulted by not paying monthly rental in time – the lessor adopting laissez – faire attitude towards such default prior to finally cancelling lease agreement – the lessee raising several defences, including oral variation of non-variation clause in lease agreement and waiver by the lessor and estoppel – whether lessor's right to enforce the agreement and the non-variation clause would offend public policy considerations of fairness, justice and reasonableness – in all circumstances of the case lessor entitled to cancel the lease agreement and an order to eject.