REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **2012/44123**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
SIGNATURE

9/06/2014
.....
DATE

In the matter between:

JUANNE PROPERTIES (PTY) LTD Plaintiff

and

CONN-WELD AFRICA (PTY) LTD Defendant

J U D G M E N T

KATHREE-SETILOANE J:

[1] The plaintiff, Juanna Properties (Pty) Ltd (Juanna) seeks payment of arrear rental and damages from the defendant, Conn-Weld Africa (Pty) Ltd ("Conn-Weld) arising from Conn-Weld's alleged breach of a fixed term written lease agreement which it concluded with Juanna for the rental of a section of Portion 5 of Erf 4450, 22 Van Dyk Road, Extension 12, Benoni ("the premises"). The alleged breach is premised upon Conn-Weld's alleged failure to pay rental for the period 1 May 2012 to 30 November 2012. Juanna accordingly claims rental in the amount of R67 032.00 for the period 1 May 2012 to 30 November 2012, and damages in respect of the period of the balance of the contract from 1 December 2012 to 31 August 2016.

[2] Juanna is the owner of the property. The property is divided into office space, factory space and storage space. A number of directors and shareholders are also directors and shareholders of a company called Pak Engineering (Pty) Ltd trading as Central Welding Works trading as Pak Engineering. Central Welding Works occupies office space on the property.

[3] Juanna had rented more than one section of the property to Conn-Weld. Conn-Weld is in the business of selling, manufacturing, maintaining and repairing mining equipment. Conn-Weld does business with a company called Barcandyle Engineering ("Barcandyle"). Conn-Weld is the sales and marketing arm of the business, and Barcandyle is its maintenance and manufacturing arm. Barcandyle had first rented office space at the property from Juanna in 2008. That space is indicated as area 11 on the floor plan of the property. Soon thereafter Barcandyle rented additional space at the property indicated as area 12 on the floor plan of the property. Conn-Weld then started doing business with Barcandyle, and further space was needed to accommodate Conn-Weld. Factory space indicated as area 7A on the floor plan, which was occupied by Central Welding Works, was identified for occupation by Barcandyle. Central Welding Works sub-let area 7A to Barcandyle. Then in 2010, Conn-Weld rented storage space at the property, which is indicated as area 10 on the floor plan of the property. The lease agreements between Juanna/Central Welding Works and Conn-

Weld/Barcandyle in relation to the rental of areas 7A, 10, 11, and 12, respectively were oral agreements.

[4] Conn-Weld subsequently rented further factory space from Juanna, which is indicated as area 9 on the floor plan of the property. It is this area that is the subject matter of the dispute between Juanna and Conn-Weld. Conn-Weld and Juanna entered into a five year fixed term written lease agreement in relation to the rental of area 9 on 16 September 2011. Area 9 was refurbished by Juanna to meet the requirements of Conn-Weld, as it intended to use this factory space for purposes of repairing a new range of mining equipment called Exciter Mechanisms. Area 9 was 154 square metres. The total area rented by Conn-Weld and Barcandyle from Juanna was 2000 square metres.

REPUDIATION

[5] It is common cause that the lease agreement was cancelled by Juanna on 7 November 2012 as a result of Conn-Weld's failure to pay rent for the period 1 May 2012 to 30 November 2012. Conn-Weld admits that the rental in the amount of R67 032.00 for the period 1 May 2012 to 30 November 2012 has not been paid, but it denies breaching the lease agreement and raises the defence of repudiation, which is pleaded as follows in its plea:

> "4.3.1 On or about November 2011 Plaintiff repudiated the lease agreement between Plaintiff and Defendant by notifying Defendant that he no longer intended proceeding with the lease agreement and notifying Defendant to vacate the premises by 31 January 2012;
>
> 4.3.2 Plaintiff delivered a written notice dated 30 November 2011 to this effect to Defendant, a copy of which is attached hereto as Annexure "X";
>
> 4.3.3 Defendant accepted Plaintiff's repudiation of the agreement and vacated the premises."

The onus to prove repudiation is on Conn-Weld. Conn-Weld accepts that this issue is pivotal to the matter, and if its defence of repudiation is not upheld, then plaintiff must succeed with its claim for arrear rental and damages, subject of course to proving its damages.

[4] The proper approach to be adopted in determining whether there has been repudiation is set out in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) where the court observed:

"[1] Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, 'accepting' and thus completing the breach. So, for example, Winn LJ remarked in *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 (CA) at 731F - 732A:

> 'Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to "accept the repudiation" and is thereupon entitled *(a)* to sue for damages in respect of any earlier breach committed by A *and* for damages in respect of the repudiation, *(b)* to refrain from himself performing the contract any further.'

The Supreme Court of Appeal in *Datacolor* went on (at para 16) to state that:

"Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . .' (per Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D - F). This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission, with its emphasis on the guilty party's intention and the innocent party's

acceptance. At the same time this Court has repeatedly stated that the test for repudiation is not subjective but objective .... Thus it has recently been said in *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 684I - 685B:

'It is probably correct to say that respondent was *bona fide* in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however *bona fide* it might have been in its belief that it was not.'

[17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

[18] **The conduct from which the inference of impending non or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is 'a serious matter'** (cf Ross *T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 (HL) at 72B; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals* Ltd (supra at 685B - C), **requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.**

[19] Since the test is objective and the matter is to be approached from the vantage point of the innocent party (in this case the defendant) it follows that evidence of Hill, the author of the letters RW8 and RW9, as to what the plaintiff had in mind when he drafted them would have been irrelevant. By the same token the evidence of the defendant's witnesses, Wachsberger and Mayer, as to what they understood by, and how they reacted to, the letters was not irrelevant. But such evidence, although relevant, would not be conclusive, **since the approach is that a court, faced with the enquiry of whether a party's conduct amounted to a**

repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.

[20] Consistent with that approach it further follows that a court in making its assessment must take into account all the background material and circumstances that should have weighed with the innocent party." (own emphasis)

[7] Turning to the current matter, the defendant's witness Mr Mark Goately ("Goatley") testified that at a 'verbal meeting' held in the meeting room of Cental Welding Works, sometime during October 2011, Mr Mathew Pavkovitch ("Pavkovitch"), a director of both Cental Welding Works and Juanna "*instructed us that he would like us to vacate the premises*" by Easter 2012 as Central Welding Works needed the space. Conn-Weld and Barcandyle were represented by Goatley (Director) and Clive Rabie (Director), and Juanna and Central Welding Works were represented by Pavkovitch (Director of both Juanna and Central Welding Works) and Mr Des Waller (Manager of Central Welding Works). Goatley stated that although Pavkovitch did not identify the area which had to be vacated, the party that had to vacate, and the lease agreement which was being repudiated, he understood his instruction to mean that Conn-Weld and Barcandyle were required to vacate the property. He said that they were not happy with moving, but respected the decision of Pavkovitch and agreed to move because they (Conn-Weld and Barcandyle) had a good business relationship with Pavkovitch over the years of occupying space at the property.

[8] To my mind, without any identification of which party, area or lease agreement was being referred to, Pavkovitch's instruction to vacate could never be construed as a clear-cut and unequivocal repudiation by Juanna of the lease agreement with Conn-Weld in regard to area 9 of the property. As contended for by counsel for Juanna, Goatley's assumption that the discussion constituted a repudiation of the lease agreement is just that; a mere assumption. Conn-Weld must have realised that it was not permissible for Juanna to arbitrarily and informally terminate the lease agreement, and violate the provisions of the agreement. Moreover, to my mind, a reasonable

person in the position of Goatley would not have construed the meeting as a repudiation of the agreement barely two months after being entered into, particularly where Juanna incurred a substantial capital expenditure in refurbishing the rented premises to meet Conn-Weld's requirements. A reasonable person in the position of Goatley would furthermore have sought clarity from Pavkovitch as to the specific areas that Conn-weld and/or Barkandale were required to be vacate.

[9] Any uncertainty which may have prevailed in the mind of Conn-Weld (Goatley) at this meeting and subsequently thereto, regarding the alleged repudiation was undoubtedly cleared up in terms of the letter addressed by Central Welding Works to Barcandyle on 30 November 2012 (Annexure "X"). Since Conn-Weld relies in its plea on this letter to prove Juanna's repudiation of the lease agreement, I quote it in full:

"

Park Engineering (Pty) Ltd
Reg No. 6808842/07

Trading cc

22 Van Dyk Street
Benoni 1501
P O Box 937
Benoni 1500

CENTRAL WELDING WORKS

Tel: 011 914 1826 e-Mail: cww@iafrica.com Fax: 011 914 1571

30 November 2011

Barcandyle Engineering Solutions
P O Box 1837
Allensnek
1737

Attention: Mark Goatley

Dear Sirs,

NOTICE TO VACATE WORKSHOP PREMESIS

22 VAN DYK ROAD BENONI

Further to previous verbal notification, you are now formally advised to vacate the workshop premises that you are presently hiring from us by 31 January 2012.

We take this opportunity to thank you for the good relationship built up over the past few years and look forward to doing business with you in the future.

Yours faithfully,
For PAK Engineering t/a Central Welding Works

D K WALLER
General Manager "

[10] As alluded to above, Juanna had let area 7 to Central Welding Works. When Barcandyle required additional space, Central Welding Works sub-let a portion of its premises to Barcandyle in 2009, which is indicated as area 7A on the floor plan of the property. It is thus clear from a perusal of this letter that Central Welding Works was giving Barcandyle notice to vacate the factory/workshop space indicated as area 7A on the floor plan of the property, which it had sub-let to Barcandyle, by 31 January 2012. Significantly, however, Goatley admitted under cross examination that he 'willingly chose to turn a blind eye to this, in an attempt to allow Conn-Weld to also vacate the premises – and in so doing, to avoid Conn-weld's obligations in terms of the lease agreement' – despite his acknowledged uncertainty regarding the accuracy of the contents thereof.

[11] During argument, counsel for Conn-Weld submitted that Annexure "X" has become irrelevant, and is not a factor that the court should have regard to in evaluating the circumstances that led Goatley to conclude that Juanna had repudiated the lease agreement, as Juanna had already verbally repudiated the lease agreement at the meeting that took place during October 2011, and that Goatley had accepted the repudiation and vacated the premises. In addition, Conn-weld contends that by virtue of Juanna's failure to call either Pavkovitch or Waller to refute the evidence of Goatley in respect of what

transpired at the meeting held in October 2011, Goatley's testimony remains unchallenged.

[11] I am unable to agree with these contentions because from an objective point of view Pavkovitch's instruction to vacate the premises, as articulated at the October 2011 meeting, cannot construed as a clear cut, unequivocal repudiation of the lease agreement in relation to area 9. Conn-Weld's case as pleaded is that (a) on or about November 2011, Juanna Properties repudiated the lease agreement between the parties by notifying Conn-Weld that he no longer intended proceeding with the lease agreement and notifying Conn-Weld to vacate the property by 31 January 2012; (b) Juanna Properties delivered a written notice dated 30 November 2011 to this effect to Defendant, a copy of which is attached hereto as Annexure "X"; and (c) Conn-Weld accepted Juanna Properties repudiation of the agreement and vacated the property.

[12] Goatley's evidence is, however, inconsistent with the case pleaded by Conn-Weld. Importantly in this regard Goatley's evidence was not that Pavkovitch had notified Conn-Weld at the October 2011 meeting that he no longer intended proceeding with the lease agreement, and that Conn-Weld must vacate area 9 by 31 January 2012, but rather that Pavkovitch instructed them to vacate the premises by Easter 2012, and that no distinction was made as to which party should vacate the premises, and which portions of the premises exactly, but that he assumed this to mean that Conn-Weld and Barcandyle must vacate the property. Furthermore, Annexure "X", which Conn-Weld relies upon, in its pleadings, to prove Juanna's Properties' repudiation of the lease agreement in relation to area 9, simply has no application to that lease agreement at all, as Annexure "X" constitutes a notice from Central Welding Works to Barcandyle to vacate workshop premises (area 7A on the floor plan of the property) by 31 January 2012. As much was conceded by Goatley under cross examination. It is precisely for this reason that Conn-Weld belatedly, during argument, disavowed its reliance on Annexure "X", which it relied upon in its plea to prove repudiation. In the

absence, however, on an application to amend its plea, Conn-Weld is bound by the case which it pleaded.

[13] Conn-Weld bears the onus to prove the repudiation. However, in view of Conn-Weld's failure to make out a prima facie case that Juanna had repudiated the lease agreement in relation to area 9, there is no duty on Juanna to lead evidence in rebuttal. In the circumstances, I am satisfied that Conn-weld has failed to prove on a balance of probabilities that Juanna had repudiated the lease agreement. Accordingly, I find on a balance of probabilities that Conn-Weld has breached the lease agreement by failing to pay the required rent for the period 1 May 2012 to 30 November 2012 , and that Juanna must succeed with its claim for arrear rental in the amount of R67 032.00 and damages subject, however, to proof thereof.

DAMAGES

[14] Where a lessee breaches a lease agreement, and a lessor cancels the agreement, the lessor is entitled to claim damages in addition to cancellation. Hence, a lessor may claim as damages an amount equivalent to the rent for the time during which the property remains un-let, provided that that time would have been within the period of operation of the lease which has been cancelled, and that mitigation of loss has not been possible (Kerr AJ, *The Law of Sale and Lease*, 3rd ed, LexisNexis Butterworths, p 362)

[15] Conn-weld, however, contends that Juanna is required to prove that it is entitled to an amount equal to the lost future rent without any 'deduction'. Not only is this a disguised contention in regard to the purported failure of Juanna to mitigate its damages, the onus of which rests on Conn-Weld (the defendant) to prove, but it also loses sight of the fact that clause 4.3.3 of the lease agreement places the obligation on Conn-Weld to 'care for and maintain the installations' (ie. the premises). In so far as mitigation of damages is concerned, the onus rests squarely on the defendant (Conn-weld) to allege and prove that the plaintiff (Juanna) neglected to do what a reasonable person would have done to mitigate its damages. It follows that Juanna is only required to prove its loss on the basis of the normal measure of damages and

show what the proper measure is. Juanna has done this through the undisputed evidence of Ms Kerryn Lawson who testified that pursuant to Conn-Weld vacating the premises, they have remained unoccupied. Since Juanna has discharged this onus, Conn-weld must prove that in the special circumstances of the case Juanna could reasonably have resorted to some type of conduct which would reduce its damages to an amount below that produced by the normal measure which was shown by Juanna to be prima facie applicable. (Harms, *Amler's Precedents of Pleadings*, LexisNexis, 7th ed, p 120; *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) 290; *Soar h/a Rebuilds for Africa v JC Motors* 1992 (4) SA 127 (A) 135).

[16] Conn-Weld has, however, produced no evidence to show that Juanna has failed to mitigate its damages. I accordingly find that Conn-Weld has failed to discharge the onus to prove that Juanna has failed to mitigate its damages and as such, Juanna must succeed in its claim for damages which is an amount equivalent to the rent for the time that the premises remained un-let. The monthly rent payable under the lease agreement is R8400, 00 per month and the time during which the property remained un-let is 18 months. Juanna is accordingly entitled to damages in the amount of R151 200.00 subject to an annual escalation as provided for in clause 2.2.2 of the agreement, which is its lost rent for the period 1 December 2012 until 31 May 2014.

[17] In the result, I make the following order:

1. The defendant is ordered to pay the plaintiff's arrear rental in the sum of R67 032.00 together with interest at a rate of 10.5% per annum calculated from 1 December 2012 until date of payment.

2. The defendant is ordered to pay the plaintiff's damages in the amount of R151 200.00 subject to an annual escalation as provided for in clause 2.2.2 of the lease agreement together with interest at the rate of 15.5%

calculated from date of demand being 7 November 2012 until date of payment.

3. The plaintiff's claim for damages in respect of the lost rent for the period 1 June 2014 to 31 August 2016 is postponed sine die.

4. The defendant is ordered to pay the costs of the action on the scale as between attorney and client.

F KATHREE-SETILOANE J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff:	HP West
Instructed by:	AG Smuts &Partners
Counsel for the Defendant:	J Möller
Instructed by:	Möller & Pienaar Incorporated
Date of Hearing:	23 May 2014
Date of Judgment:	9 June 2014