REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A3061/2018

COURT *A QUO*: MAGISTRATES COURT CASE NO: 23709/2015

(1)	REPORTABLE: YES/NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
28/3/19.		
DATE		SIGNATURE

In the matter between:

ROBIN VELA Appellant

And

MARTA EDUARDO DOS SANTOS Respondent

JUDGMENT

NKOSI- THOMAS, AJ

Introduction

[1] This is an appeal against a portion of the judgment and order dated 31 October 2017 handed down by the Honourable Additional Magistrate N Sewnarain (hereinafter 'the learned Magistrate') in the Randburg Magistrates Court. The appellant also seeks condonation and the reinstatement of the appeal and the cross-appeal. This was not opposed and accordingly condonation is granted.

[2] The grounds upon which the appeal was noted and prosecuted are fully set out in the appellant's notice of appeal dated 28 November 2017.

[3] The facts on which this appeal falls to be determined are largely common cause. They are that:

3.1 The parties entered into a lease agreement in February 2015 in respect of a residential property situated in Bryanston ('the property');

3.2 The lease agreement would endure for a period of 6 months commencing on 1 March 2015 up to and including August 2015;

3.3 Monthly rental in the amount of R150 000 would be payable which would, for the total rental period of six months, amount to R900 000; and

3.4 The aforesaid rental amount of R900 000, together with a deposit of R300 000, would be payable to the appellant in advance of the respondent taking occupation of the premises.

[4] At the time of respondent taking occupation of the premises, two flatlets on the property were occupied by certain employees of Mitsubishi. The parties thus agreed on the insertion of a special condition into the lease agreement which reads as follows:

> *'The tenant agrees a concessionary discount of R60 000 whilst Mitsubishi* [tenants] *are occupying the two flat lets on the property. It is agreed that Mitsubishi will have their lease terminated as of 30 April 2015.'*

[5] In consequence, the rental obligation of the respondent was reduced by an amount of R60 000 to R840 000 plus R300 000 deposit. These amounts were paid by the respondent upfront, and she took occupation of the premises on the

understanding that the appellant would ensure that the Mitsubishi employees would vacate the two flatlets by no later than 30 April 2015.

[6] The appellant, in breach of the express terms of the lease agreement, failed to ensure that the Mitsubishi tenants vacated the flatlets on 30 April 2015, or at all.

[7] As a direct consequence of the above breach, the respondent advised the appellant of the breach and invited him to remedy the same within a period of 7 days, reckoned from 12 June 2015, failing which, the respondent would cancel the lease agreement.

[8] The appellant failed to remedy the breach and the respondent proceeded to cancel the lease agreement on 30 June 2015. The appellant accepted the cancellation. The respondent claimed a refund and/or repayment of a portion of the rental amount paid upfront which the appellant refused to make.

[9] In the result, respondent instituted action in the court *a quo* seeking the following relief:

9.1 Payment of the amount of R300 000, representing the rental paid upfront in respect of the months July and August 2015;

9.2 Payment of the amount of R60 000 as a remission of her rental for the months May and June 2015, that being the period during which she was in occupation but did not enjoy *vacua possessio* of the premises based on the continued occupation of the premises by the Mitsubishi tenants;

9.3 Repayment of the deposit of R300 000; and

9.4 Interest on all the above amounts.

The judgment of the court *a quo*

[10] The court *a quo* characterised the issues before it in the following manner:

10.1 Whether or not the respondent's premature cancellation of the lease agreement was valid, entitling her to a refund of the two-month rental paid;

10.2 Whether the respondent was entitled to a full refund of her deposit; and

10.3 Whether the concessionary discount should apply in respect of the period during which the respondent remained in occupation of the premises.

[11] The appellant's main contention in the court *a quo* was that clause 22 of the lease agreement, properly construed, precluded the cancellation of the agreement by the respondent.

[12] Clause 22 of the lease agreement titled '*Cancellation of this lease by the tenant before expiry of this agreement*' provides as follows: *'Not applicable'.*

[13] The appellant contends that based on the express provisions of clause 22, the respondent was not entitled either *ex contractu* or under the common law to cancel the agreement.

[14] The court *a quo* held, correctly in my view, that the respondent was entitled to cancel the lease agreement pursuant to the appellant's breach of a material term thereof.

[15] The breach relied upon took the form of appellant's failure to provide *vacua possessio* of the premises to the respondent. The appellant simply failed to eject the Mitsubishi tenants from the premises as he was contractually obliged to do.

[16] Faced with the above, the respondent was put to an election of either cancelling the contract or suing for specific performance. She elected the former. There can thus be no sound reason, in fact or in law, to criticise firstly, the election as exercised or secondly, the judgment of the court *a quo* in this regard.

[17] The learned court *a quo* articulated the point in the following terms:

'[9] It is not disputed that the defendant failed to take any steps to evict or remove the Mitsubishi tenants from occupying the two flat-lets on the property. The plaintiff considered this to be a material breach of the agreement.

[10]... It is disingenuous for the defendant to place reliance on a clause in the agreement which does not specifically cater for an early termination of the lease agreement especially when the full rental amount and the deposit was paid upfront to him and when he was expressly notified of the concerns relating to his non-compliance with the special condition. ...'

[18] Furthermore, in my judgment, the court *a quo* correctly held that:

'[9] ... The common law too permits cancellation of an agreement based on a material breach thereof even in the absence of a clause allowing for same. The court cannot conclude on a conspectus of the facts that the plaintiff waived her right to terminate the lease agreement in the event of the defendant's breach during its operation.

Therefore, the defendant's failure to adhere to the special condition must result in the finding that

(i) the breach of the lease agreement complained of was material to the Plaintiff's continued use and enjoyment of the property,

(ii) that the defendant was given reasonable notice to remedy the breach complained of (which he had not done nor had he taken steps towards) and

(iii) further that the cancellation of the lease agreement was valid.'

In this Court

[19] Before us, the appellant persisted in the argument that, absent an express term entitling the respondent to terminate the lease agreement in the face of a clear repudiatory breach, the respondent was left without a legal remedy.

[20] This proposition is unsustainable for a number of reasons. Firstly, as the learned Magistrate found, at common law, a party may cancel an agreement, even in the absence of a cancellation clause, in the event that that other party breaches a material term thereof. The cancellation right arises *ex lege* and as such, accrues to the respondent *in casu.* In *Aucamp v Morton*[1] the Appellate Division found:

'*Various criteria have been suggested in our cases for the purpose of determining whether or not a particular breach of contract by one party entitles the other to treat the contract as terminated by such breach and regard himself as discharged from further performance of his obligations under it, and there is much learning on the subject in text books. It is not possible to find in them a simple general principle which can be applied as a test in all cases. This is not surprising because contracts and breaches of contract take so many forms. We are dealing in this case with a contract involving reciprocal obligations of which several, of varying importance, rest upon the appellant, and it is usually laid down with regard to such cases that a breach by one party of one of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfilment of which is essential to the continuation of the contractual tie. There are two statements of the principle which are frequently quoted, one by FLETCHER MOULTON, L.J., in the case of Wallis v Pratt and Haynes (1910 (2), K.B. 1003 at p. 1012) and one by Lord BLACKBURN in Mersey Steel and Iron Co v Naylor (9 A.C. 434 at p. 443). They are as follows:*

"A party to a contract who has performed, or is ready and willing to perform, his obligations under the contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature, that their non-performance may fairly be considered by the

[1] *Aucamp v Morton* 1949 (3) SA 611 (A) at 619-620.

other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance, and . . . he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract."

"The rule of law, as I always understand it, is that where there is a contract in which there are two parties, each side having to do something . . . if you see that the failure to perform one part of it goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and substantial consideration for my performance is defeated by your misconduct".'

[21] In *Singh v McCarthy Retail Ltd*[2] the SCA stated:

'The crucial question is whether the appellant was entitled to cancel the contract because of such breach, either because the breach was material, or because the parties had tacitly agreed on a lex commissoria entitling the appellant to cancel if the contract is breached as aforesaid.

The right of a party to a contract to cancel it on account of malperformance by the other party, in the absence of a lex commissoria depends on whether or not the breach, objectively evaluated, is so serious as to justify cancellation by the innocent party.'

[22] Secondly, an oppressive term of the sort contained in clause 22 would not withstand constitutional scrutiny. In *Barkhuizen v Napier*[3] the Constitutional Court had the following to say on matters of this sort:

'[27] What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? ....

.....

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[2] *Singh v McCarthy Retail Ltd (t/a McIntosh Motors)* 2000 (4) SA (SCA) 795 paras 11-12.
[3] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 27-30.

[30] In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. ...'

[23] Based on the respondent's common law rights and on the *dictum* of the *Napier* case, I conclude that clause 22 of the lease does not preclude cancellation and is unconstitutional and thus unenforceable.

[24] It is indeed so that the constitutionality of clause 22 was neither pleaded nor argued either before us or the court *a quo.* However, the point is one of law which arises fairly and reasonably from the record, and in respect of which neither party could be prejudiced.[4] Accordingly, this Court, sitting as it does as an appeal court, is quite entitled to consider the point of law reasonably emerging from the papers where it is satisfied that no prejudice would be occasioned to either party. This, in my judgment, is such a case.

[25] The appellant also relied upon a waiver by the respondent of her right of cancellation. It is trite that there is a factual presumption that a party is not likely to be deemed to have waived his or her rights, and that clear and unequivocal evidence of a waiver is required. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty)*,[5] waiver of existing rights was claimed. It was held that such must be as clearly and unambiguously proved as any other waiver or novation. In addition, it must be clearly proved by the defendant that the plaintiff who has waived his rights was fully aware of both the facts and the legal consequences which surrounded such waiver.

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[4] See *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Ltd* 2019 (1) SA 370 (CC) at para 29 where the following was stated: '*The new issue raised is a point of law that turns on the interpretation of the Competition Act. It is central to the primary question on appeal. It can prejudice no-one and no prejudice is claimed. It is accordingly in the interests of justice that this issue be determined on appeal.*'

[5] *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011(1) SA 8 (SCA); see also *Feinstein v Niggli* 1981 (2) SA 684 (A).

[26] In my view, the evidence does not satisfy the requirements of a waiver by the respondent of her constitutional and common law remedies under the contract.

[27] As regards the reasonableness or otherwise of the notice of cancellation, I am satisfied that in the specific circumstances of this case the notice was reasonable. The lease was only for a period of six months; any longer period allowed for the appellant to remedy would be illogical. More noteworthy is the fact that clause 24 of the lease agreement provided that the appellant would be entitled to cancel the lease agreement for a breach by the respondent after giving 7 days' notice to remedy the breach. Thus, he believed that such period was reasonable in the circumstances.

[28] Indeed, the appellant was knowingly in breach of his obligation to ensure that the Mitsubishi tenants vacated the flatlets at the end of April. He was afforded the opportunity of remedying the breach and despite such an 'olive branch' having been extended to him, he adopted the approach that he was contractually insulated from such an obligation.

[29] The respondent referred this Court to the Rental Housing Act 50 of 1999 (The Act) and the Unfair Practices Regulations, 2001 promulgated thereunder.[6] In terms of the Regulations:

> '*3.(3)(c) A lease agreement must exclude any provision which -*
>
> ...
>
> *(b) excludes liability of either party for failing to comply with a duty under the lease, these regulations, the Act or any other law;*
>
> *(c) limits or prevents either party from using the normal rights of recourse against the other because of the other's failure to comply with any duty under the lease...*'[7]

[6] 'Rental Housing Act, 1999 (Act No. 50 of 1999): Unfair Practices Regulations, 2001' Provincial Gazette No. 124 Notice No. 4004 of 2001 (4 July 2001).
[7] Regulation 3(3)(b) and (c).

[30] In terms of this regulation, a clause which excludes the tenant's right of cancellation and effectively allows the landlord to disregard his obligations, leaving the tenant without a remedy, as in the present case, is not permissible.

[31] For all the reasons that have been stated above, the appellant's reliance on clause 22 of the lease agreement must be disregarded. The respondent lawfully exercised her right to cancel the lease agreement.

[32] The appellant also contended that the court *a quo* erred in finding that a proper inspection of the property had taken place once the respondent had vacated the premises. It contends that as, the landlord, it had not undertaken an inspection of the property to determine the extent of any damage thereto, for purposes of setting-off any damage against the deposit. The court *a quo* accepted that the inspection which had taken place by the respondent's representative and an employee of the appellant (even though the employee did not have the requisite authorisation) was a proper inspection for purposes of the lease agreement. The appellant submits that the lease agreement provides that an inspection could only be done by the Landlord or his agent. Therefore, the court a quo should not have accepted that the so-called informal inspection was proper for the appellant to quantify the damages suffered by him.

[33] The inspection that took place was conducted by Mr Mapengu (on behalf of the respondent) and Ms Coyne, the appellant's housekeeper. They inspected the premises, and recorded the damages on a handwritten note which was signed by both of them.

[34] In relation to inspections, clause 13 titled '*Inspection of the Premises*' provides as follows:

'....

13.4 Within 3 (Three) days prior to the Termination Date, either the Landlord or the Agent (as the case may be) and the Tenant will inspect the premises together to determine if any damage was caused to the Premises or the furniture (in the event that the Premises contains the Landlord's furniture during the subsistence of this Lease (including any renewal periods). If the Tenant fails to attend the inspection, the Landlord shall be entitled to inspect the Premises at any time

within 7 (Seven) days of the Termination Date, without the Tenant, in order to determine whether any damage was caused to the Premises during the subsistence of the Lease.

13.5 The Landlord shall be entitled to:

15.5.1 deduct money from the Deposit to repair any damage cause to the Premises; and

15.5.2 charge the Tenant for any amount over and above the value of the Deposit, if the cost of repairing the damage amounts to more than the total sum of the Deposit.'

[35] Clause 2.1.23 of the lease agreement defines 'Termination Date' as '*the date of termination of this lease for any reason whatsoever.*'

[36] The respondent states that if it is found that no joint inspection as envisaged by the lease agreement took place, she relies on s 5(3)(*j*) of the Act which states that

'*A lease will be deemed to include terms, enforceable in a competent court, to the effect that—*

...

(j) failure by the landlord to inspect the dwelling in the presence of the tenant as contemplated in paragraphs (e) or (f) is deemed to be an acknowledgement by the landlord that the dwelling is in a good and proper state of repair, and the landlord will have no further claim against the tenant who must then be refunded, in terms of this subsection, the full deposit plus interest by the landlord;

...'

[37] The provisions set out in section 5(3) of the Act are standard provisions which are deemed to form part of a lease. They cannot be waived by either the landlord or tenant.[8] The appellant, by his own admission, states that no joint inspection of the premises took place. Given that the lease agreement does not explicitly provide for

[8] Section 5(4) of the Rental Housing Act provides '*The standard provisions referred to in subsection (3) may not be waived by the tenant or the landlord.*'

instances where the parties failed to undertake a joint inspection, the provision as set out in section 5(3)(*j*) of the Act is applicable. Accordingly, the appellant has no claim against the respondent in respect of the damages to the premises.

[38] The appellant also argued that the court *a quo* had erred in disregarding the 2% interest charged by the appellant on overdue amounts in terms of the lease agreement. This contention is challenged by the respondent, who submits that the charge of 2% interest only applied in respect of arrear rentals. The respondent states that the full rental was paid upfront, and the appellant was therefore not entitled to claim interest. Furthermore, the appellant was entitled to charge a 10% surcharge on other outstanding amounts, which was done. The appellant is not be entitled to claim both interest and a surcharge.

[39] Thus, this ground of appeal must also fail.

The cross-appeal

[40] The respondent, in a cross-appeal, claimed an entitlement to a remission of monthly rental for the months of May and June 2015, due to the fact that the Mitsubishi tenants continued to occupy the premises over that period. The court *a quo* dismissed this claim on the basis that the lease agreement did not expressly oblige the appellant to offer any further discount after the two month initial period. The respondent contends that a right to claim remission of rental arises in terms of the common law, and need not be expressly provided for in the lease agreement.

[41] The respondent relies on two cases in this regard. In *Thompson v Scholtz*,[9] it was stated that—

'*...To award the landlord the full rental when he failed to give his tenant full occupation is to offend against the first proposition in BK Tooling; and to deny the tenant a reduction of rental pro rata to his diminished enjoyment of the merx is to offend against all authority sanctioning a remissio mercedis when the landlord is in breach of the lease....*'[10]

[9] *Thompson v Scholtz* 1999 (1) SA 232 (SCA).
[10] Ibid at 246G.

'...Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him pro rata to his own reduced enjoyment of the merx. ...'[11]

[42] The second case relied upon by the respondent is that of *Mpange v Sithole*,[12] where the High Court stated as follows in calculating the reduction in rental:

'The measure against which this proportionate abatement is to be calculated is the "tenant's reduced enjoyment or utilisation of the leased property". The test is a subjective one and "(s)ubjective factors which are peculiar to the tenant ... must be incorporated into the equation". The amount of remission is to be calculated without any reference to any claim for damages but by reference to what is fair in all the circumstances.'[13]

[43] The respondent submits that an amount of R30 000 reduction in rental for each of the months of May and June 2015, totalling R60 000, is fair in the circumstances. This amount is equal to the concessionary discount afforded to the respondent for the two months (March and April 2015) that Mitsubishi occupied the premises with the respondent's consent. It therefore speaks to what the parties considered to be fair compensation for the respondent's diminished use and enjoyment of the property for the first two months of the lease.

[44] The cross -appeal must therefore succeed.

Accordingly, the following order is granted:

(a) The application for reinstatement of the appeal and the cross-appeal is granted.

(b) The appeal is dismissed.

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[11] Ibid at 247J-A. This method of calculation was cited with approval by Satchwell J in *Mpange v Sithole* 2007 (6) SA 578 (W) para 83-84.
[12] *Mpange v Sithole* 2007 (6) SA 578 (W).
[13] Ibid para 85, quoting from *Thompson v Scholtz* (note 9 above) at 247F.

(c) The cross-appeal is upheld. The appellant is to pay the sum of R60 000, with interest at the rate of 9% per annum from 12 June 2015.

(d) The appellant is ordered to pay the costs.

L G NKOSI-THOMAS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	12 March 2019
Date of judgment:	28 March 2019

Appearances:

Counsel for the Appellant:	Mr K P Maponya
Instructing Attorneys:	Maponya Incorporated
Counsel for the Respondent:	Adv. A C McKenzie
Instructing Attorneys:	Peter Sapire Attorney