GAUTENG DIVISION, PRETORIA

CASE NO: A382/2013

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

5 May 2016
DATE

.....
SIGNATURE
(for the Court)

In the matter between:-

CENTPRET PROPERTIES (PTY) LTD	Appellant
and	
GERHARDUS D VAN LOGGERENBERG & ASSOCIATES CC	First Respondent
GERHARDUS DANIëL VAN LOGGERENBERG	Second Respondent
SAREL JACOBUS VAN LOGGERENBERG	Third Respondent
DANIE VAN LOGGERENBERG	Fourth Respondent
GERHARDUS DANIëL VAN LOGGERENBERG	Fifth Respondent

JUDGMENT

SPILG J

THE ISSUES ON APPEAL

1. The appellant sued the first respondent in the Magistrates' Court for;

    a. "*confirmation of the cancellation of the agreement*" of lease;

    b. eviction;

    c. payment of arrear rentals until 1 December 2007 of R22 077.47;

    d. payment of damages from 1 January 2008 until the date when a new tenant could be procured, or occupies the premises and becomes liable for rent at a daily rate of;

        i. R92.12 from that date until 31 August 2008 (calculated on the monthly rental, operating costs and rates and taxes ("*rent and other charges)* of R2 802.08 per month of which rental under the agreement is R1 449.14 per month;

        ii. R101.10 from 1 September 2008 until 31 August 2009 (calculated on the escalated monthly rental and other charges) of R3 075.41 per month of which rental under the agreement is R3 075.41 per month.

Costs were sought against all the respondents on the attorney and client scale by reason of the terms of the lease agreement.

2. The other four respondents were sued as sureties and co-principal debtors. The appeal only concerns the first respondent.

   A reference in this judgment to the respondent will therefore be to the first respondent only unless the context otherwise requires

3. The respondent raised a number of special pleas, pleaded over on the merits denying that the appellant was entitled to cancel and counterclaimed firstly for restoration of possession to the premises as a consequence of being unlawfully spoliated and secondly for both ordinary and special damages, arising from unlawfully preventing the respondent access to the premises (through the act of spoliation) which constituted a breach of contract in a total amount of R1 126 761.10.

4. The appellant filed a special plea to the counterclaim relying on certain exemption clauses in the lease agreement.

THE ISSUES

5. The appellant withdrew its claim for arrear rental and it was unnecessary for the respondent to pursue the first counterclaim since it had since been restored to possession of the premises.

6. The case therefore went to trial on the second counterclaim only, based on damages for breach of contract arising from the appellant's unlawful spoliation. The parties also separated the issue of liability from quantum, the latter to be decided at a subsequent hearing if needs be.

7. There is a dispute between the parties as to the actual issues before the learned magistrate.

   The appellant submits that the issues argued before the trial court concerned the identity of the landlord, whether the type of damages were in the contemplation of the parties and whether the counterclaim was excluded by virtue of the exemption clauses relied upon in the special plea to the counterclaim.

   The respondent however contends that there remained the question of costs of the first counterclaim, (ie; the spoliation) but aside from this accepts that the issue for determination was whether the special plea regarding the exemption clauses ought to have been dismissed.

8. For sake of clarity it should be made clear that the trial court identified the issues and resolved them as follows;

   a. The costs in relation to the first counterclaim.

      The court found that the appellant must have had knowledge of, or consented to, the spoliation of the respondent from the premises. It would follow that the respondent was entitled to its costs. The findings and conclusion have not been challenged on appeal;

   b. Whether the appellant was a party to the written lease and the correct party against whom the counterclaims were instituted.

      The court found that it was. The appellant has not challenged these findings;

   c. Whether the written lease required the appellant to place the respondent in mora. This was to be dealt with as a legal point.

      The court found that clause 18 of the agreement required the appellant to put the respondent on terms to remedy a failure to pay rent on time and it was common cause that there had been no prior notice. This has not been challenged on appeal;

d. Whether the respondent has a claim for special damages for loss of business or business opportunity. The court found that the appellant would have known that the premises were used for business purposes. This finding has not been challenged on appeal;

e. Whether the exemption clauses relied on by the appellant precluded the damages claims. The court found that in the circumstances the appellant could not rely on these clauses to avoid liability.

This is the only issue on appeal.

THE EXEMPTION CLAUSES

9. The starting point must be the grounds upon which the respondent claimed both general and special damages. It contended that the appellant had deliberately locked it out of the premises alternatively had failed to place it in mora before cancelling the lease.

10. In my view there is no causal connection between the failure to place the respondent in mora and any damages suffered. The respondent did not vacate the premises when the appellant purported to cancel. Nor could the appellant rely on a cancellation to spoliate.

11. The respondent had been deprived of access to the property by taking the law into its own hands through its act of spoliation. The question is whether any of the three exclusion clauses relied upon by the appellant relieve it from liability for the damages allegedly sustained.

12. The clauses are 14.1, 14.3 and 15.1 which read:

> "*14. LIMITATION OF LANDLORD'S LIABILITY*
>
> *14.1 The TENANT waives any claims of whatsoever nature which it might now or hereafter have against the LANDLORD and indemnifies the LANDLORD and holds it harmless from and against any claims of whatsoever nature which the TENANT'S employees, invitees or licensees might now or hereafter have against the LANDLORD arising from or out of any loss or damage or injury or loss of life which may be caused to any of the assets of the TENANT including but not limited to, stock in trade, fixtures, fittings, books and papers in/or on the leased premises or to the TENANT or its employees, invitees or licensees in consequence of the overflow of water supply or any leakage or any fault in the plumbing works or any electrical fault or any theft or burglary, with or without forcible entry or any of the elements of the weather or any riot, strike or state enemy, or failure on*

the part of the LANDLORD or its agents or employees to carry out any work required of any of them in a proper manner or any latent or patent to defect in the leased premises or any of the equipment of the LANDLORD or any other cause whatsoever. (emphasis added)

14.3 *The nature of the services in the leased premises by the employees' agents of the LANDLORD shall be at the sole discretion of the LANDLORD. Neither the LANDLORD or his agents or employee shall be liable for the receipt or non-receipt or the delivery or non-delivery of goods, postal matter or correspondence, nor shall they be liable for anything which the TENANT, or any employee, or any client, licensee, visitor or in invitee of the TENANT may have deposited or left in the leased premises or in any part of the building. All goods brought by the TENANT onto the leased premises shall be placed there at the sole risk and no responsibility whatsoever therefor is undertaken by the LANDLORD or its agents or employees. The TENANT acknowledges that neither the LANDLORD nor his agents or employees shall be in any way responsible for any loss, theft or damage of any kind to any of the TENANT'S property whilst contained in the leased premises.*

15. *EXCLUSION OF CLAIMS AND RIGHTS TO WITHHOLD RENTAL*

15.1 *The TENANT shall under no circumstances be entitled to cancel this lease or have any claim or right of action whatsoever against the LANDLORD for any damages, loss, or otherwise or to withhold or defer payment of rental, or to a remission of rental, by reason of the leased premises or any appliances, air-conditioning or other installations, fittings, fixtures and appurtenances in the leased premises or the building being in a defective condition or falling into despair or any particular repairs not been affected by the LANDLORD or for any other reason whatsoever. The TENANT shall not have any right of cancellation or claim for damages, abatement of rental or otherwise against the LANDLORD by reason of the escalators or lifts, air conditioning, installation or other amenities it is in or on the leased premises being out of used or out of order for any reason whatsoever for any period whatsoever. The LANDLORD shall not be responsible for any damage or inconvenience which the TENANT may suffer owing to any difficulties experienced from time to time in the supply of electric current, water, gas, air conditioning, installation or other amenities or the complete cessation of such amenities.*

The TENANT shall also not be entitled to cancel this lease or to an abatement of rental in respect of any such occurrence.

CLAUSE 14.1

13. It is immediately apparent that the exclusion of liability under clause 14.1 is limited to loss, damage, injury or loss of life arising from the events mentioned after the highlighted words "*in consequence of*". These events do not include loss or damage arising from an unlawful act of spoliation.

CLAUSE 14.3

14. The clause is concerned with the property of the tenant while on the premises or in the building and the nature or competency of services provided by the landlord which may result in loss or damage (eg if the services or skill levels are insufficient or inadequate).

15. The clause in its terms is limited to goods and other property while on the premises or in the building of which the leased premises forms a part.

16. The only property of the respondent that was allegedly on the premises at the time and in respect of which damages is claimed consists of office furniture and equipment valued at R13 000.

17. Two questions immediately arise.

The first is whether the clause covers loss as a consequence of the unlawful or deliberate acts of the appellant.

The other is whether the clause was intended to cover the situation where the tenant has been precluded by the landlord or its agents from exercising rights of occupation and thereby effective control over its property other than as a consequence of any voluntary act on its part.

18. In *Durban Water Wonder World (Pty) Ltd v Botha* 1999(1) SA 982 (A) at 989H-I the court confirmed that the ordinary rules of interpretation of contracts applies when construing an exemption clause. Accordingly;

> *If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. (See Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be 'fanciful' or 'remote' (cf Canada Steamship Lines Ltd v Regem [1952] 1 All ER 305 (PC) at 310C--D).*

19. However as was pointed out in cases such as *Essa v Divaris* 1947 (1) SA 753 (A) at 766 a party wishing to contract for such a clause must do so in clear terms. On that page Tindall JA cited the following extract from *Alderslade v Hendon Laundry, Ltd.* 114 L.J. K.B. 196 at 197:

> *'Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence, and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason for that is that, if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.*

20.. In case of ambiguity the *contra proferentem* rule will come to the aid of a person who was required to sign an agreement which was drawn up by the other contracting party. See *Government of the Republic of South Africa v Fibre Spinners and Weavers* 1978 (2) SA 794 (A) at 804C and 805G - 806H and *Durban Water Wonder World (Pty) Ltd v Botha* 1999(1) SA 982 (A) at 989H.

21. In addition the exemption may be against public policy (or *contra bonos mores*) either *per se* or in its application to the particular facts: And that may be informed by the Constitution or the constitutionally protected rights alone may suffice to limit an exemption clause. See *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras 8 and 17.

22. In the leading case of *Sasfin (Pty) Ltd v Beukes*1989 (1) SA 1 (A) at 7H- 8D the court explained that;

    a. Our common law does not recognise agreements that are contrary to public policy or which are *contra bonos mores*:

    b. Agreements which are contrary to public policy are those:

        '... which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience ... ";

    c. Illegal or unenforceable contracts are generally classified into those which are *contra bonos mores* and those which are contrary to public policy. There is also a classification of those which are contrary to the common law. However the classifications are interchangeable: "*These classifications may not be of importance in principle, for where a court*

refuses to enforce a contract it ultimately so decides on the basis of public policy"

d. It is up to the courts to determine whether a contract is contrary to public policy. However while a court should not;

> "*shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power."*

e. It appears that;

> *'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'*

and that

> *'it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom."*

23. These principles apply not only with reference to the words used but in their application to the circumstances in which they are sought to be invoked.

24. A spoliation order is granted precisely because the courts frown upon extra-judicial self-help. The reason a spoliation order is granted is precisely because the court will not allow a party to take the law into its own hands, even where in cases of ownership, the occupier has no lawful right to be on the premises.

See *Yeko v Qana* 1973 (4) SA 735 (A) at 739G ;

> *'Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as Voet, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands.'*

25. Case law prior to the legislative protection afforded by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is replete with the grant of spoliation orders in favour of illegal occupiers. The cases also confirm that where property is removed by the spoliator then it must be restored and if it has been destroyed other remedies will be provided.

26. Although the case of *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) has been disapproved of for extending the *mandament van spolie* , which is strictly a possessory remedy, to the replacement of property that was destroyed during the spoliation, the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at para 23 to 28 recognised that a Constitutional right might be infringed which would provide an appropriate remedy.

27. In the earlier case of *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W), which questioned the appropriateness of extending a possessory remedy to one providing for reparation and which declined to follow *Fredericks*, Nugent J added at 535B-C:

> *'I do not suggest that the law countenances wanton destruction, nor that it does not afford a remedy. Remedies to discourage such conduct exist in both the civil and the criminal law. My conclusion is only that the mandament van spolie is not that remedy.'*

28. In *Nienaber v Stuckey* 1946 AD1049 at 1055 the court cited the statement in *Nino Bonino v de Lange* 1906 TS 120 at 122 that "*spoliation is any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right*".

It is therefore an unlawful act. (eg; *Erasmus v Dorsyd Farms (Pty) Ltd* 1982 (2) SA 107 (T); *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education & Culture Services* 1996 (4) SA 231 (C).

29. Despite declining to extend the *mandament van spolie* to provide for reparations, the decisions are all agreed that the right to reparation where the spoliation has resulted in the loss or destruction of property is intrinsically linked to the underlying unlawful act of taking the law into one's own hands without a court order. In *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) Froneman J said at para 34:

> *'The high court orders were challenged in this court on the basis that they disregarded the infringement of the applicants' rights not to be evicted without a court order and, in effect, condoned a profoundly illegal act. They did not provide the applicants with any effective relief. I think that there is merit in the argument that the relief granted falls short of what is required ....'*

30. The common peg relied on in providing an effective remedy in addition to spoliation orders so as to restore the *status quo ante* in both *Tswelopele* and *Schubart Park* was section 26(3) of the Constitution. This is the right not to be evicted from ones house without a court order (as part of the socio-economic rights to adequate housing). However in *Tswelopele* Cameron JA (at the time)

also considered that the spoliation of the appellants violated their constitutional rights to personal security under section 12(1) (bearing in mind the implicit menace with which the evictions were carried out), to privacy under section 14(1)(a) to (c)[1] and not to be deprived of property save in terms of a law of general application as provided for in terms of section 25(1).

31. In my view the exclusion clause relied on by the appellant would immunise a landlord who effects a spoliation from loss or damage sustained to the property of the occupier as a consequence and thereby;

    a. undermines the rationale for precluding a person from taking the law into its own hands, which itself is an unlawful act;

    b. amounts to a limitation of the enforcement of the rights protected under sections 12(1), 14(1)(c) and 25(1) whether read individually or holistically;

32. In addition it would preclude the availability of a suitable remedy where there has been a violation of the broader right to due process under the civil law which is implicit in section 34[2]; and which is an integral part of the spectrum of protective rights against unlawful action, whether in relation to administrative acts or

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[1] Section 14 (1) (c) provides that the right to privacy includes the right not to have one's possessions seized

[2] Section 34: *Access to courts*

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

criminal law processes[3] . The section 36 limitations would not apply as the clause is not a law of general application.

33. In my view it would also be against public policy to allow the avoidance of "*any responsibility ... of any kind*" to extend to the deliberate and unlawful act of spoliation by a landlord or its agent.

34. It also appears that the clause seeks to indemnify the landlord from any liability in respect of an event that is not causally linked to an act or omission on its part but caused by others. If the appellant intended this part of the clause to refer to its own conduct then one would expect it to be qualified by the words" *from any cause whatsoever".* It did not, and the words actually used therefore cannot be extended to cover, at any rate, loss or damage occasioned by an intentional act on its part which is unlawful.

35. Finally, clause 14.3 in its terms contemplates loss occasioned to the tenant. In my view the term *'tenant'* must be restrictively interpreted to the respondent provided it does not lose the attributes of a tenant as a result of which it had no element of physical control over, or access to, its goods or property on the premises. The attributes of a *'tenant'* in terms of clause 8.7.1 which falls under the main heading "*Tenant's rights and obligations*" includes:

[3] See respectively sections 33 and 35

"The TENANT shall have access to the leased premises and any other common facilities on the ground floor of the building during normal business hours."

It is clear from a reading of the contract as a whole that this clause was limited to cases where the respondent was able to exercise its rights of access to the premises without unlawful interference on the part of the landlord.

It could not have been in the contemplation of the parties to tacitly extend the clause to the situation where the tenant had been deprived of the basic rights of access and occupation which flow from the terms of the agreement as read with the common law. See *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 35 (second and third sentences). See also the application of the principle in *Nederduitse Gereformeerde Kerk In Afrika (Ovs) en 'n Ander v Verenigende Gereformeerde Kerk In Suider-Afrika* 1999 (2) SA 156 (SCA) at 171B-G and *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* 2011 (6) SA 343 (D&CLD) at para 75 and 77[4].

36. For all these reasons I am satisfied that clause 14.3 cannot be invoked to provide an exemption in the present circumstances.

[4] See also the application of the principle in *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* 2011 (6) SA 343 (D&CLD) at para 75 and 77

CLAUSE 15

37. The concluding phrase *"or for any other reason whatsoever"* at the end of the first sentence should be read within the context of the words which precede it. Two aids to interpretation are invoked; namely *eiusdem generis* and *noscitur a sociis*. See *Ovenstone v Secretary for Inland Revenue* 1980 (2) SA 721 (A) at 735D-736H.

In *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 44 Mokgoro J said in respect of the two maxims: "*It is an accepted canon of statutory interpretation that terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected*".

38. In my view the words should be restricted to the subject matter; namely rights that might accrue to the respondent and afford it a cause of action (such as a right to cancel, claim damages or withhold rent) as a result of the leased premises or any equipment, fixture or fitting in it " *being in a defective condition or falling into disrepair or any particular repair not being effected by the landlord ...* ".

Accordingly "*or any other reason*" refers to a reason as to why the premises or any part of it may be defective or in a state of disrepair.

39. Furthermore the same considerations as would preclude the appellant from relying on clause 14.3 apply.

ORDER

40. Accordingly the learned magistrate correctly dismissed the special plea.

The appeal is therefore dismissed with costs.

SPILG, J

I agree

JANSEN, J

LEGAL RERESENTATIVES:

FOR APPELLANT: Adv FJ Erasmus

Van Der Merwe Du Toit Inc

FOR RESPONDENT:	Adv M Bouwer
	Opperman Attorneys
DATE OF JUDGMENT:	5 May 2016

5/5/2016.

GAUTENG DIVISION, PRETORIA

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GERHARDUS DANIëL VAN LOGGERENBERG	Fifth Respondent

ORDER

SPILG and JANSEN JJ

Having heard counsel and read the papers filed of record

IT IS ORDERED THAT:

The appeal is dismissed with costs

BY ORDER

REGISTRAR