IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

JBarnardt

27 October 2021
SIGNATURE DATE

Case Number:23481/2020

In the matter between:

GRETA ALGONDA BETSY CARLA ROON	Applicant

And

ALL HEARTS FOUNDATION NPO	First Respondent
ALEXANDRA CHRISTINE LENNON	Second Respondent
RONNIE KIM AUSTEN	Third Respondent
UNLAWFUL OCCUPIERS	Fourth Respondent
MADIBENG LOCAL MUNICPALITY	Fifth Respondent

JUDGMENT

BARNARDT (AJ)

1. The applicant, as the registered owner of an immovable property situated at Plot […], De Rust, Hartbeespoortdam, North West Province brought the application based on the cancellation of a lease agreement for the eviction of the first, second, third and fourth respondents ("the respondents") from the property in terms of the common law (first respondent) and provisions of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1988 ("the PIE Act") (second to fourth respondents). The Madibeng Local Municipality ("the Municipality") was cited as the fifth respondent in these proceedings.

BACKGROUND

2**.** The applicant and the first respondent concluded a written lease agreement in terms whereof the property was leased for 24 months. The owner signed the contract on 11 June 2018 and the first respondent on 12 June 2018.

3. Paragraph 46 of the contract listed the special conditions applicable:

> "THE PROPERTY WILL REMAIN IN THE MARKET TO BE SOLD. TENANTS HAVE 1ST OPTION TO BUY. IF ANOTHER OFFER TO PURCHASE IS MADE TO THE OWNER, THE TENANTS WILL HAVE 30 DAYS TO SECURE FINANCE TO BUY THE PROPERTY. THE RENT WILL BE REDUCED BY R3000 FOR APPROVED REPAIRS BY THE TENANTS AND OWNER LISTED TO ANNEXURE A. TENANTS ARE AWARE THAT THEY HAVE TO GET ALL LICENSES AND PERMITS APPLICABLE TO HOUSE WILD ANIMALS ON THE PROPERTY & THEY ALSO HAVE TO GET CONSENT FROM THE NEIGHBOURS. THE TENANTS WOULD LIKE TO SIGN A LONG TERM LEASE (10 YEARS) AS THEY WANT TO MAKE THIS PROPERTY THE

WOLVES PERMANENT HOME. BUT THE CPA STATES THAT THE RESIDENTAL LEASE ARE NOT PERMITTE TO 3XCEED 24 MONTHS AT A TIME. THE TENANTS WILL HAVE THE OPTION TO RENEW THEIR LEASE EVERY 24 MONTHS UNTIL SUCH TIME THAT THEY PURCHASE THE PROPERTY. THE TENANTS WILL ALSO USE THE PROPERTY TO GENERATE AN FIXED INCOME (AS SET OUT IN THE TENANTS BUSINESS PLAN) BY CHARGING DAY VISITORS A FEE TO SEE THE ANIMAL, PROVIDING "SLEEP-IN" FACILITIES FOR GUESTS, ECT. THE TENANTS AGREE TO REPLACE ANY INTEMS (GEYSERS, POOL PUMP, BOREHOLE PUMP, STOVE, GATE MOTOR, GARAGE DOORS & MOTORS, ECT, IF IT WAS DAMAGED BY THEM, LESS FAIR WEAR & TEAR. THE TENANT AGREES THAT MAINTENACE TO THE VALUE OF R36 000 WILL BE DONE IN THE FIRST 12 MONTHS OF THE LEASE. THE RENT WILL INCREASE BY 5% TO R14 805 IN THE SECOND YEAR OF THE LEASE."

4. Annexure A, was also signed respectively on 11 and 12 June 2018, and it reads as follows: (I quote the terms to the best of my ability since the copy provided is not very clear.)

"Annexure A to Plot […] De Rust
RE: maintenance to Be done for Reduced Rent
MAIN HOUSE
Repair waterproofing on roof windows
Repair broke ceiling panels and cracks inside as well as under roofs outside
Stop cracking in walls with Painters Male and paint over with CrackOn
Paint all internal walls and ceilings (inside and outside) with Dulux Super Acrylic
Sand down and varnish Washroom (rear) door, as well as garage door
Set glass front door and roof door
Replace carpet in main bedroom with the same tiles (Leprima or Lupini)- the latter means that the surface layer of the floor must also be removed to make it level with the rest of the house or replace tiles with affordable carpeting
Fit upper bathroom sink to the floor & wall

FLAT

Cut top sliding door frame to give more space between window and concrete slab to ensure easy opening & closing of the sliding door

Service sliding door to open properly again

Repair leakage on water pipe and repairing tiles (Laprima or Lupini) bathroom

GENERAL

Restore the garden & maintain

Monthly inspections with reasonable progress on the basis of photos must be forwarded. If no progress is made the discount will expire and the repair will be the responsibility of the Landlord."

5. On 14 January 2020 Justproperty, as agents for the applicant, forwarded a letter to the first respondent, demanding payment of R3 358, 00 for outstanding rent plus interest at 15.5% and informing the first respondent that late payments are breach of contract and gives the owner right to cancel the lease.

6. On 6 February 2020 the first respondent filed a complaint with the North West Rental Housing Tribunal against the applicant to be investigated.

7. On 11 February 2020, the applicant's attorneys of record forwarded a letter to the first respondent, with the following relevant paragraphs:

"5. In addition to the aforesaid do we confirm that:

5.1 the tenant failed, alternatively refused to make payment of an amount of R3 358, 00;

5.2 the tenant failed, alternatively refused to make payment of the monthly rent for February 2020 in the amount of R14 805, 00 (including VAT).

6. The agreement specifically provides that:

> "the tenant shall pay the rent and any other charges payable as stipulated in clause in terms of this lease in advance on or before the 1st day of every month, unless otherwise stipulated in the lease."
>
> "monthly rent shall be paid each month without demand, free of any deduction, bank charges or set off into the bank account as stipulated in clause 1.3."
>
> "the tenant shall provide verifiable confirmation of a rental payment or any other payment to the agent (Justproperty) in order to facilitate accurate facilitation of such payment."
>
> "the tenant shall furthermore not withhold, set off or delay payment of any monies owed to the landlord (our client) in terms of this lease for any reason whatsoever:

7. We are therefore instructed to demand from you as the tenant, as we hereby do:

   7.1 Payment of the amount due and payable to our client in the amount of R18 163, 00
   7.2 Proof that the reparations as contained in Annexure "A" was properly done.

8. Should the tenant fail to remedy its breach as specified in paragraphs 6 and 7 above within 20 (twenty) days, from receipt of this letter to cancel the agreement without further notice to you (the tenant) and proceed to institute legal action against you (the tenant) to recover the indebted amount from you (the tenant) as well as to evict you as well as any and-or all other parties occupying the property through you. The cost for such

legal action will be for your account. We specifically refer you to the provisions of clause 33 of the agreement.

9. …

10. We specifically refer you to the provisions of clause 33 of the agreement, which reads as follows:

> "If the tenant does not pay any amount on the due date, or should the tenant breach any condition of this lease, the landlord/agent will give the tenant seven business days written notice to either pay the amount owed or to remedy the breach."
>
> "If the breach is not corrected, the landlord/agent will be entitled to take whatever action is necessary without further notice to the tenant."
>
> "Should the CPA apply to this lease agreement, the Landlord may cancel the lease agreement 20 business days after given written notice to the tenant of a material failure by the tenant to comply with the lease agreement, unless the tenant has rectified the failure within that time limit."

8. On 13 March 2020, the applicant's attorneys of record forwarded a further letter to the first respondent, stating:

> "4. It is our instruction that since receipt of the aforesaid letter, the tenant has failed and/or refused to remedy its breach. As such, our client is entitled, as it hereby does, to formally cancel the lease agreement
>
> 5. We therefore confirm that no agreement, whether a lease agreement of otherwise, exists between the tenant and our client, and that the

agreements which previously governed the relationship between the tenant and our client, has come to an end.

6. the reason for cancellation is *inter alia* as a result of the tenants' failure, alternatively refusal to make payment of rental fee for February 2020; the tenants' failure, alternatively failure to make payment of the amount of R3 580.00 and the tenants' failure to provide proof that the reparations as contained in Annexure "A" was properly done."

9. The first respondent's complaint with the Housing Tribunal was struck from the roll, but on 2 June 2020 the first respondent refiled the complaint and stated that it did not receive notification of the date of hearing of its first complaint. The first respondent's attorneys were informed by email on 4 August 2020 that they will be informed of a date as soon as a date is received from head office.

10. Despite the fact that he first respondent's answering affidavit was only commissioned on 8 February 2021, no further enquiries or correspondence with or from the Housing Tribunal was referred to or attached.

REFERRAL TO HOUSING TRIBUNAL

11. On behalf of the respondents it was alleged and argued, that this application should be postponed since the first respondent's complaint with the Housing Tribunal is still pending.

12. Section 13(7) of Rental Housing Act 50 of 1999 reads as follows:

"(7) As from the date of any complaint having been lodged with the Tribunal, until the Tribunal has made a ruling on the matter or a period of three months has elapsed, whichever is the earlier-

(a) the landlord may not evict any tenant, subject to paragraph (b);

(b) the tenant must continue to pay the rental payable in respect of that dwelling as applicable prior to the complaint, or, if there has been an escalation prior to such complaint, the amount payable immediately prior to such escalation; and

(c) the landlord must effect the necessary maintenance."

13. Considering that the 'revived' complaint has not been allocated or dealt with since August 2020 and no further enquiries were made on behalf of the respondents, I accept that the complaint is abandoned, and I am not prepared to postpone this application pending a final determination, if ever, by the Housing Tribunal.

CANCELLATION OF THE CONTRACT

14. According to the cancellation letter, dated 13 March 2020, the contract was cancelled, because the first respondent failed to pay February's rent (being R14 805, 00), the amount of R3 580, 00 and to provide proof that the reparations as contained in Annexure "A" was properly done.

15. It is evident form the summary of payments listed in the applicant's replying affidavit, that the first respondent paid a total amount of R27 670.20 during February 2020 (being R12 790, 20 on 13 February 2020 and R14 880, 00 on 27 February 2020) which contradicts the allegations regarding payment in the attorneys' letter dated 13 March 2020.

16. Granted, the payment of February's lease was not paid in advance on or before the 1st of February as stipulated in the contract, or within 7 days of the letter of demand, but it was paid within 20 days as required in paragraph 8 of the letter dated 11February 2020, with reference to the applicant's right to cancel the agreement.

17. The remaining breach, according to the cancellation letter, was the first respondent's failure to provide proof that the reparation as contained in Annexure "A" was properly done.

18. According to the applicant, Annexure A was an addendum to the agreement and in the letter dated 11 February 2020, referred to above, the applicant's attorney of record, mistakenly stated that the contract was entered into on or about 28 May 2018 and that Annexure A, as an addendum, was signed on 12 June 2018.

19. The applicant, in her founding affidavit confirmed that the agreement as well as Annexure A was entered into/ signed on 12 June 2018, although she also referred to Annexure A as "the Addendum".

20. The first respondent denies that Annexure A was an addendum entered into at a later stage and the deponent specifically stated that Annexure A was part and partial of the initial contract, as indicated in its heading and especially since reference was made to "Annexure A" in Clause 46 of the contract.

21. According to the applicant, the first respondent had to attend to all the repairs listed in Annexure A within the first 12 months of the rental agreement to justify the reduced rent.

22. The first respondent alleged that the parties agreed that the rent would be reduced with R3 000, 00 per month to enable the first respondent to attend to the repairs as set out in Annexure A and that maintenance to the value of R36 000, 00 would be done within the first 12 months of the lease, as recorded in Clause 46 of the agreement.

23. On behalf of the applicant, it was argued, that the first respondent was, in terms of clause 17 in any event responsible for the maintenance of the property and that the reduced rent to attend to the repairs listed in Annexure "the Addendum" was merely a kind gesture to the first respondent.

24. On scrutiny of clauses 16 and 17 of the contract, it is however evident that although the first respondent as tenant was responsible for maintenance, the defects listed in Annexure A were not regarded as maintenance.

25. Clause 16.3 reads as follows:

> "The premises is let and rented in the condition in which it is at the beginning of the lease. No obligation shall rest on the landlord/agent to repair or improve any of the defects listed in Annexure A, unless specifically specified as a special condition of the lease and signed by both parties.

26. Clause 17.1, which deals with the tenant's obligations regarding maintenance, specifically states that

> "The tenant shall at his own cost during the lease period, keep the inside of the premises as well as all fixtures and fittings in a good state of repair. At the end of the lease the tenant shall return the premises to the landlord/agent in the same condition as it was at the beginning of the lease, less fair wear and tear."

27. It is therefore clear, that the defects listed in Annexure A was part of the "condition of the premises" when the leased started and these defects were not part of maintenance.

28. This was confirmed by Justpoperty in the letter, dated 29 November 2018, addressed to the first respondent where it was specifically recorded that if the first respondent does not at least take care of one of the items on the list per month,

> "the owners will revert back to the original agreement of R14 100, 00 rent per month and see to the maintenance themselves."

And the comment by the applicant in her replying affidavit that

> "Annexure A specified that if no progress were made, the discount (rebate) would have expired, and the repairs would have been my responsibility".

29. According to the applicant, in her replying affidavit, Clause 46 and Annexure A were amendments to the lease agreement which complies with the provisions of clause 42 (the non-variation clause).

> "This variation was clearly for the benefit of the 1st respondent because it limited the extend of, and its liability to do maintenance and effect repairs to an amount of R36 000, 00. It further made provision for a reduction in rent to amortise the amount of R36 000, 00 over a period of 12 months. These were concessions to which the 1st respondent was not contractually entitled." (my underlining.)

30. If cognisance is taken of the fact that applicant in Annexure A acknowledged that the repair of the defects was her responsibility

> "Monthly inspections with reasonable progress on the basis of photos must be forwarded, if no progress is made the discount will expire and the repair will be the responsibility of the Landlord." (my underling)

The reduction in rent in exchange for the repair of defects on Annexure A was as much to her benefit as to the benefit of the first respondent.

31. Since the agreement, including Clause 46 and annexure A was signed on 11 and 12 June 2018 and annexure A is referred to in Clause 16.3 and Clause 46, I find that it was part of the initial agreement and should be read with Clause 46 and the limitation of maintenance to the value of R36 000, 00 to be done within the first 12 months.

32. The first respondent stated that it attended to several repairs to the value of more than R36 000, 00 within the first 12 month of the lease agreement.

> "For the sake of clarity and transparency, the first Respondent records that prior to the expiry of the first year period agreed upon, the items listed on "AHF3" hereto were completed prior to 1 July 2019 all at a cost in excess of the R36 000, 00 agreed upon. The Annexure "AHF3" is a statement by RH Structural Projects, the contractor utilised to attend to the repairs."

33. The applicant, in her replying affidavit, mistakenly stated that the 'deponent alleged that the first respondent completed all the items listed in annexure A prior to 1 July 2019', but she did not dispute that the items, listed on "AHF3" were attend to. She merely reiterated that the first respondent did not attend to all the maintenance listed in annexure A and therefore the R36 000, 00 rebate was reversed and debited to the first respondent's account on 1 July 2019.

34. It is undisputed that the first respondent spent more than R36 000, 00 in the first 12 months of the lease agreement which is, according to my ruling above, in accordance with Clause 46 and the lease agreement and therefore, the applicant was not entitled to reverse the R36 000, 00 rebate to the first respondent's account on 1 July 2019.

35. It was furthermore not a term of the agreement that the first respondent had to provide proof that all the reparations as contained in annexure "A" was properly done.

36. Annexure A only provided:

> "Monthly inspection with reasonable progress on the basis of photos must be forwarded. If no progress is made the discount will expire and the repair will be the responsibility of the Landlord"

37. Although the letter dated 11 February 2020 referred to the first respondent's obligation to allow monthly inspections,

> "The tenant thus had an obligation to allow for inspections by our client allowing her to inspect the progress in respect of the reparations to the property, alternatively to provide photos as proof of such progress on a monthly basis. The tenant failed to comply with these provisions of the agreement and are currently in breach thereof.

Its failure to do so was not referred to in paragraphs 6 or 7 of the letter as breaches of the agreement to be remedied.

38 In ***Kingbiel v Olwage***[1] Keightley discussed the requirements to place a debtor in mora and quoted an extract of Malt v Meyerthal 1920 TPD 338:

> "[31] Our common law requires that in order to place a debtor in mora, the creditor must give him or her an unequivocal and unconditional demand for performance within the specified time. The intention to cancel in the event of non-performance must also be made clear. While a debtor is assumed to know the origin of the debt in respect of which performance is demanded, the creditor may be under an obligation to make this clear in the letter of demand. It has been held in this regard that:
>
> > "A debtor ought to know what is due by him to his creditor, but according to our law it is the duty of the creditor to go to the debtor and demand from his debtor what is due to him, and when making that demand the debtor is entitled to know upon what score the creditor claims the money. It is not sufficient for the creditor to go to the debtor and say: 'You owe me £20, and if you do not pay me the £20 I will sue you.' <u>He must state on what score that £20 is due</u>."

[1] Saflii (23891/2015) [2016] ZAGPJHC 145 (16 March 2016)

39. As indicated above, the first respondent's failure to allow inspections or provide monthly photos of the progress was not specifically raised as a ground for cancellation of the agreement.

40. These allegations by the applicant were in any event denied by the first respondent in its answering affidavit,

> "The First Respondent had always complied with clause 20 of the Lease Agreement and allowed reasonable inspection of the property on the terms agreed upon.
>
> On 6 June the Second Respondent obtained an interim protection order against the Applicant arising from an altercation that took place on the property. The Applicant had repeatedly breached clause 20 of the Lease Agreement, which specified the terms agreed upon for reasonable inspections, and would with no prior notice simply arrive at the property and let herself and her extended family onto the property. There was no warning and no agreed 24-hours' notice having been provided to the First Respondent and the Applicant would come and go as she pleased utilising her own remote control."

and this denial was not challenged by the applicant in her replying affidavit.

41 With due consideration of all aspects discussed, I find that the first respondent made the payment of the R18 163, 00 within 20 days of the letter of the demand and that it was not a term lease agreement that the tenant had to proof that it attended to all the defects on Annexure A within the first 12 months of the lease agreement.

42. However, it remains common cause that the first respondent failed to pay its monthly rental timeously and remains, since 1 March 2020 in arrears with its rent. Even if it is given the benefit of the R36 000,00 rebate, the arrears on 1 March 2020 were R5 598,80.

43. This amount escalated and on 30 November 2020, when this application was served on the respondents, the first respondent was in arrears with at least R61 722, 00 and this was never rectified by the first respondent.

44. The deponent on behalf of the first respondent, in its answering affidavit, acknowledged that the first respondent was in arrears with the rent.

> "Despite the financial hardship the first Respondent continues to pay occupational rental to the applicant and is currently addressing the arrears that have accrued as a result of the harsh lock down period which still endures." (my underlining)

45. The answering affidavit was filed on 11 February 2021 and at that stage the first respondent was already in arrears with R91 287, 00.

46 As quoted above, paragraph 6 of the letter addressed to the first respondent on 8 February 2020 *inter alia* referred to the tenant's obligation to pay the rent timeously.

> "the tenant shall pay the rent and any other charges payable as stipulated in clause in terms of this lease in advance on or before the 1st day of every month, unless otherwise stipulated in the lease."

47. Paragraph 8 furthermore stated that "if the tenant should fail to remedy its breach as specified in paragraphs 6 and 7 above within 20 (twenty) days, from receipt of this letter" that the agreement would be cancelled without further notice.

48. In ***Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd***[2] the Supreme Court of Appeals held as follows:

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[2] 2001 (2) SA 284 (SCA)

> "[28] The innocent party to a breach of contract justifying cancellation exercises his right to cancel it a) by words or conduct manifesting a clear election to do so b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time (cf Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other related cases 1985 (4) SA 809 (A) at 832C-D)."

49. It is since the first letter by the agent, addressed to the first respondent, clear that the applicant wanted to cancel the lease agreement and could have done so based on the first respondent's failure to pay its monthly rent timeously.

50. The first respondent's rent was in arrears on 1 March 2020 and as is quoted above, the deponent on behalf of the first respondent conceded in the answering affidavit that it 'was trying to address the arrears that accrued'.

51. In ***Sunshine Foods v H Chen***[3] Koen J discussed a party's right to cancel an agreement in the absence of a *lex commissoria* as follows:

> "[31] 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.

[32] In ***Singh v McCarthy Retail Limited t/a McIntosh Motors***[4] the test to be applied was explained as follows:

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[3] (AR86/15) [2016] ZAKZPHC 29 (18 March 2016)

'[13] When is a breach, in the form of malperformance, so serious that it justifies cancellation by the innocent party? Van der Merwe *et al Contract, General Principles* 1st ed (1993) at 255 summarises the position as follows, with reference to decided cases and various writers:

> "The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance."

[14] As long ago as 1949 it was said by this Court in *Aucamp v Morton* 1949 (3) SA 611 (A) at 619 with regard to the relevant question that it was not possible to find a simple general principle which can be applied as a test in all cases because contracts and breaches of contract take so many forms. In deciding, in that case, whether the respondent was entitled to cancel the contract, the Court said (at 620)

> ". . . nor were the obligations which were broken so vital or material to the performance of the whole contract that respondent could say that the foundation of the contract was destroyed".

[15] I perceive the correct approach to be as follows: The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails

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[4] 2000 (4) SA 795 (SCA)

> a value judgment by the Court. It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?'

52. I accept that the lease agreement in case has a *lex commissoria* but regard the abovementioned principles applicable due to the applicant failure to specifically rely on the first respondent's failure to pay it rent timeously as a reason for the cancellation of the agreement.

53. With due consideration of the circumstances of this matter and the fact that the first respondent has been arrears with its rent since March 2020, I find that the lease agreement was lawfully cancelled and that the first respondent should return the property to the applicant.

OPTION TO BUY THE PROPERTY

54. It is true that in terms of clause 46 of the contract the tenant, (being the first respondent) would have had the first option to purchase the property if another offer to purchase were made and I need to consider the effect of this 'option' on the cancellation of the agreement.

55. On behalf of the applicant it was argued, correctly so, that the use of the word 'option' is a misnomer and that it should have been called 'a right of pre-emption'. In ***Soteriou v RetcoPoyntons (Pty) Ltd***[5] the distinction between a right of pre-emption and an option was clearly explained as follows:

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[5] 1985(2) SA 922 (A) at 932 B-E

> "A right of first refusal is well known in our law. In the context of sale it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing, and consequently he is prevented from selling to a third person without giving the first refusal …So, a right of pre-emption involves a negative contract not to sell the property to a third person without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies. In the case of an option, the grantor has made an offer which the grantee can accept without more, upon which a contract of sale is complete. In the case of a right of pre-emption, there is no offer at the time of the grant, and the grantor is not obliged to make an offer unless and until he wishes to sell the property".

56. In *casu* the applicant did not receive an offer to purchase the property but cancelled the agreement due to the first respondent's failure to pay the rent and therefore the status of the first respondent's right of pre-emption, should be considered.

57. In ***Mokone v Tassos Properties CC and Another*** [6] the Constitutional Court unanimously held that when a lease is simply extended without more, 'all the terms of the lease, including terms that are "collateral, and not incident, to" a lease, are being extended', including, obviously a right of pre-emption.

58. However, this matter is distinguishable, since the contract in *casu* was not extended, but was cancelled due to the first respondent's breach of its contractual obligations and therefore, the whole contract, including the right of pre-emption was terminated.

59. In the light of the cancellation of the lease agreement, the position of the second and third respondents, and the application for their eviction, should be

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[6] 2017(5) SA 456 (CC)

considered. At the hearing of this application, the applicant indicated that she is no longer perusing the eviction of the fourth respondent.

PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION ACT, 19 OF 1988 (the PIE Act)

60. It is common cause that the applicant is the owner of the property and that the lease agreement with the first respondent was legally terminated, rendering the first and second respondents as unlawful occupiers of the property.

61. Section 4 of the PIE Act contains both procedural and substantive provisions. On 13 November 2020 this court authorised written and effective notice pursuant to the provisions of section 4(2) of the PIE Act, ordering the costs to be costs in the main application.

62. The fifth respondent, being the Madibeng Local Municipality, who was duly served with the application in terms of the PIE Act, filed a report, dated 22 July 202, stating that the municipality does not have any alternative land available.

63. I am therefore satisfied that the procedural provisions in ss 4(2), (3), (4) and (5) of the PIE Act have been complied with.

64. The requirements as set out in sub-sections 4(6), (7), (8) and (9) of the PIE Act are more substantive:

> "(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other Organ of State or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) If the court is satisfied that all the requirements of this section had been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in sub-section (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or his family have resided on the land question."

65. In determining whether to grant an eviction order, I must exercise a discretion based on what is just and equitable, which means that I have to have regard to all relevant circumstances, including the availability of land for relocation of the occupiers and the rights and needs of the elderly, children and disabled persons.

66. In *casu* the first respondent operates an NPO, Wildlife and Animal Sanctuary on the property which houses several animals, including wolves and feral cats and

although the PIE Act is not applicable to the first respondent, I am of the view that these factors should also be considered, at least regarding a reasonable period within which to terminate a periodic tenancy.

67. In ***AJP Properties CC v Sello***[7] Spilg J discussed the common law position and the Court's discretion regarding evictions, excluding eviction in terms of the PIE Act.

> **"**32. In the present case the three legal strands I have discussed can be integrated. The considerations of public policy, when applying the interests of justice test in contractual relationships take into account commercial reality and in turn reinforce the common law procedure our courts, rightly or wrongly, have applied since the 1920s and which is now reinforced in the high court by rule 45A.
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> 33. The caution expressed by Centlivres JA (at the time) in *Potgieter* restricts the words "*as the court deems meet*" in rule 45A by requiring a court to exercise its discretion judicially.[8] In any event this would have been inferred by s 173 of the Constitution which requires the court to take into account "*the interests of justice"* when either exercising its inherent power to protect and regulate its own process or when it develops the common law.[9] Similarly rule 45A has been applied in cases where "*real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done".*[10]
>
> 34. The exercise of the power, whether under common law or rule 45A, must be rational as does the determination of the period to be allowed before the eviction order can be enforced. Again legal pragmatism plays a role if

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[7] (39302/10) [2017] ZAGPJHC 255; 2018 (1) SA 535 (GJ) (8 September 2017)
[8] *Potgieter v Van der Merwe* 1949(1) SA 361 (A) at 373-4
[9] Section 173, Constitution of South Africa
[10] Per Tebbutt J in Strime v Strime 1983 (4) SA 850 (C) at 852A – B. See also Erasmus Superior Court Practice (2nd) at D1-603 and the cases mentioned at ftn 4 which including *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd* 1981(2) SA 407 (W) at 411E-F (per Nestadt J (at the time).

only because a failure to comply with an eviction order may give rise to contempt proceedings.

35. The first consideration is whether there ought to be a distinction between the ability of a court to delay an ejectment order from a residential property as opposed to a commercial property. While different considerations may apply as to whether to exercise the power in a given case, the case law cited earlier demonstrates that no such distinction exists. Furthermore the old authorities referred to previously had no difficulty in accepting that a reasonable period within which to terminate a periodic tenancy was informed by the nature of the commercial activity undertaken (all be it limited to farming) and the period of time required for the tenant to relocate his activity."

68. The second respondent in her answering affidavit conceded that she and the third respondents are neither elderly or disabled and her main concern, since the eviction of the fourth respondent is no longer prayed for, is for the safety and well-being of the animals.

69. On behalf of the respondents it was argued that if the eviction order is granted, that they should be granted 7 – 8 months to vacate the property to enable them to properly provide for the animals. This was unacceptable for the applicant who argued that this court does not have a discretion in this regard.

70. As indicated above, this Court has a discretion to be exercised in this regard and I am of the view that the termination of the first respondent's tenancy should coincide with the eviction of the second and third respondents.

71. In ***Dwele v Phalatse and Others*** (11112/15) [2017] ZAGPJHC 146 (7 June 2017) Willis AJ granted the respondents, three months to vacate the property and remarked as follows:

> "27 The final enquiry is into what justice and equity demand in relation to the date of implementation of an eviction order and what if any conditions must be attached to an order. The impact of an eviction order on occupiers is almost always severe and there is a possibility that the occupiers in *casu* may be rendered homeless, even if only for a very short while, if not given adequate time to organise their relocation."

72. With due consideration of all the circumstances of this matter, I regard a period of six months for the termination of the first respondent's tenancy and the eviction of the second and third respondents as just and equitable.

I therefore order as follows:

1. The lease agreement between the applicant and first respondent was lawfully cancelled by the applicant.

2. The first respondent is ordered to vacate the property, plot […], De Rust, Hartbeespoortdam, North West on or before 30 April 2022.

3. The second and third respondents are herewith ordered to vacate the property, Plot […], De Rust, Hartbeespoortdam, North West on or before 30 April 2022.

4. It is further ordered that in the event that the first and/or the second and third respondents do not vacate the property on or before 30 April 2022, the sheriff <u>alternatively</u> his duly appointed deputy together with such assistance as he deems appropriate is authorised and directed to evict the first, second and fourth respondents from the property.

5. The first, second and third respondents are ordered to pay the costs of this application including the costs of the application in terms of s 4(2) of the PIE Act.

JBarnardt

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ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 October 2021.

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Date heard:	4 October 2021
Date of judgment:	27 October 2021