IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO.: AR86/15

In the matter between:

SUNSHINE FOODS Appellant
(Applicant in the Court a quo)

And

H CHEN Respondent
(Respondent in the Court a quo)

Coram: Koen, Henriques *et* Olsen JJ

Heard: 1 February 2016

Delivered: 18 March 2016

ORDER

On appeal from the High Court of South Africa, KwaZulu-Natal Local Division, Durban (D Pillay J):

1. The appeal is upheld with costs, such costs to include the employment of two counsel where applicable.

2. The order of the court *a quo* granted on the 11 December 2014 under Case No. 4240/2013 (KZD) is hereby set aside and replaced with the following order:
   (a) The Respondent and all and any other persons purporting to hold title to the leased premises, being two shops Unit 1 and Unit 2 known as Johanna Centre, Main Road, Jozini, District Ubombo, KwaZulu-Natal through or under her, be and are hereby directed to vacate the premises within 14 days of the granting of this order;
   (b) Failing due compliance with the order in para (a) above, the Sheriff for the area in which the premises are situate, be and is hereby ordered to eject the Respondent and all or any persons purporting to hold title through her from the premises;
   (c) The Respondent is directed to pay the costs of this application including the costs of two counsel where applicable.

J U D G M E N T

KOEN J (HENRIQUES et OLSEN JJ concurring):

[1] This is an appeal[1] against the refusal by the court *a quo* to grant the following relief sought in motion proceedings:

'1.

That it is declared that the Applicant be and is hereby entitled to sole occupation and possession of the premises which includes 2 (two) shops being Unit 1 and Unit 2 known as:

Johanna Centre
Main Road
Jozini, District Ubombo
KwaZulu-Natal

[1] The parties shall for convenience be referred to as in the court *a quo*, i.e. the Appellant shall be referred to as 'the Applicant' and the Respondent as 'the Respondent'.

[hereinafter 'the premises'].[2]

2.

That the Respondent and all and any other persons holding title to the premises or purporting to hold title to the premises through or under her, be and is hereby ordered forthwith to vacate the premises.

3.

That failing due and immediate compliance with the order in paragraph 2 hereof, the Sheriff for the area in which the premises are situate, be and is hereby ordered to eject the Respondent and all and any persons holding title or purporting to hold title through her from the premises.

4.

Ordering the Respondent to pay the costs of this application.

5.

That the Applicant be granted such other or alternative relief as may be deemed meet.'

[2] The court *a quo* dismissed the application for the aforesaid relief with costs.

[3] The Applicant is the Lessee of respectively units 1 and 2, which constitute the premises, pursuant to two written lease agreements, respectively annexures SF2 and SF1 to the founding affidavit.[3] These two leases are largely in similar terms save for the amount of the rental and the commencement dates of the respective lease periods. The lease in respect of Unit 2[4] commenced on 1 May 2007 and would continue for 5 years. The lease in respect unit 1[5] commenced on 1 November 2005

[2] The same description shall be followed in this judgment in referring to the leased premises.
[3] SF1 was concluded during or about April 2007 and SF2 during or about July 2005.
[4] Annexure SF1.
[5] Annexure SF2.

and similarly would be for 5 years. Each lease afforded the Applicant the right to renew the lease upon the same terms and conditions applicable to the initial period for a further period of 5 years. It is common cause that the lease in respect of unit 1 was timeously renewed to endure until 1 November 2015. At the time judgment was delivered in the court *a quo* on 5 December 2013, this lease was therefore still extant, but when the appeal was argued on 1 February 2016 it had terminated by effluxion of time. The renewal of the lease in respect of unit 2 will be dealt with in more detail later in this judgment. That lease would have to be renewed by notice in writing being given by the Applicant and received by the lessor not later than 30 days[6] prior to the date on which the renewal period was to commence, and would lapse if not so exercised.[7] The initial period of 5 years was due to expire on the 30 April 2012. If properly renewed, that lease would endure for a further period of 5 years until 30 April 2017.

[4] The following terms were common to both leases:

(a) All rentals must be paid monthly in arrear on or before the first day of each and every succeeding month for the duration of the lease and any extension thereof;[8]

(b) The Applicant is not allowed to use or permit the premises to be used for any illegal or improper purpose; contravene or permit the contravention of any statutory law or regulation or a requirement of any competent authority or any provision of the title deeds under which the premises are held, or of any servitude or town planning scheme applying to or affecting the premises, or of any measure having the force of law with which the owner of the premises is obliged to comply, and shall at all times comply therewith; do or omit to do or permit any act or omission which may be or become an annoyance, nuisance, disturbance or hazard, or cause damage to the owners and/or occupiers of neighbouring premises or properties or to the public in general;[9]

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[6] That is on or before 1 April 2012.
[7] Clause 3.2.3.
[8] Clause 5.2.
[9] Clauses 7.1 to 7.3.

(c) The Applicant is not entitled, except with the prior written consent of the Lessor, to cede all or any of its rights under the lease or to sublet or give up possession of the premises in whole or part. The Lessor would not, however, unreasonably withhold its consent to a subletting of the whole of the premises to any third party;[10]

(d) Should the Applicant default in any payment due under the lease, the Lessor shall be entitled, without prejudice to any alternative or additional right of action or remedy available to the Lessor, to cancel the lease with immediate effect, be repossessed of the premises, and recover from the Applicant damages for the default or breach and the cancellation of the lease.[11] The aforesaid would not be construed as excluding the ordinary lawful consequences of a breach of the lease by either party (save any such consequences as are expressly excluded by any of the other provisions of the lease) and in particular any rights of cancellation of the lease on the ground of a material breach going to the root of this lease;[12]

(e) The validity of the lease would not in any way be affected by the transfer of the premises from the Lessor pursuant to a sale thereof. It shall accordingly, upon registration of transfer of the premises into the name of purchaser, remain of full force and effect save that the purchaser shall be substituted as Lessor and acquire all the rights and be liable to fulfil all the obligations which the Lessor, as lessor, enjoyed against or was liable to fulfil in favour of the Applicant in terms of the lease.[13]

[5] The two units are adjoining shops in the Johanna Centre, Main Road, Jozini. The wall which previously separated them has since been demolished resulting in the two units now forming a single shop from which the Applicant previously conducted business.

[10] Clause 10.
[11] Clause 12.1.
[12] Clause 12.2.
[13] Clause 17.

[6] The Lessor in the two lease agreements, Vernon Adams, was entitled to occupy the premises in terms of a written Permission to Occupy.[14] That Permission to Occupy dated 28 May 1999 at Ulundi was issued under the signature of the Secretary: Traditional and Environmental Affairs pursuant to the provisions of '…the KwaZulu Land Affairs (Permission to Occupy) Regulations 1994 as amended'.

[7] All the rights, title and interest in and to the premises in terms of that permission to occupy were transferred from Vernon Adams to Quinton Jerome Adams pursuant to a deed of donation, by an endorsement dated the 10 April 2000 at Ulundi and signed by the Head: Traditional & Local Government Affairs.[15]

[8] Towards the end of 2011 a written 'Deed of Sale of Occupational Rights Jozini Trading Site'[16] was concluded between Quinton Adams and the Respondent for a consideration of R1 800 000.00.[17] The Applicant maintains that Quinton Adams has cancelled that sale agreement. The Respondent denies that Quinton Adams has cancelled the sale agreement and moreover that he is entitled to do so. Whether the sale has been validly cancelled is irrelevant. Indeed the Applicant encapsulates its cause of action in the following allegations in the founding affidavit:

> 'The Applicant submits that the Respondent has no right to possession or occupation of the premises arising from the sale agreement and whether the cancellation of the sale agreement was valid or not is irrelevant. What cannot be contradicted is the fact that the leases in favour of the Applicant supercede any sale, and as a matter of law, "Huur gaat voor koop", both leases take precedence over any sale. This is especially so considering clause 17 of both of the lease agreements which provide that the validity of each lease shall not in any way be affected by the transfer of the premises from the Lessor pursuant to any sale thereof'.[18]

The Applicant further states that:

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[14] It is of course not a requirement of our law that the lessor must be the owner of the premises or the right to occupy. The lessor simply warrants undisturbed use and enjoyment of the leased premises to the lessee.

[15] A copy of the endorsement was Annexure HC2 to the answering affidavit.

[16] A copy was annexed as Annexure HC5 to the answering affidavit. Since 5 October 1998 the Ingonyama Trust Board delegated all its functions and duties pertaining to permissions to occupy to the Secretary of the Department of Traditional and Environmental Affairs.

[17] R300 000.00 was payable in cash on 24 October 2011 and the balance when requested by the seller, with all the costs of the transfer being payable by the Respondent.

[18] Paragraph 16.

> 'It is on this basis that there is no genuine dispute of fact envisaged, hence the Applicant's proceeding by way of motion and not action'.[19]

[9] The Respondent concedes that throughout the negotiations regarding the sale to her she was aware that the Applicant was in occupation of the premises and conducted its business from there. She and her husband had however not been given copies of the lease agreements and were not informed of the contents of the lease agreements. Nevertheless, they were happy to honour the lease agreements for their duration.[20] At best then for the Respondent she stepped into the shoes of the Lessor[21] and would be bound by the lease unless the leases had terminated.

[10] The Respondent alleges that everything changed towards the end of 2011. The Applicant had remained in occupation of the premises up and until approximately the end of November 2011 to mid-December 2011. Thereafter its store which conducted business from the premises closed and there was no activity for some time. At the beginning of January 2012[22] she and her husband noticed that there were new occupants in the premises, being people of Chinese origin, who not only started trading from the premises but also lived, bathed, cooked and washed in the premises. These new occupants advised her that they had bought the business from the Applicant and asked to enter into a long term lease with her as the 'owner' of the premises. The Respondent informed them that she would not be willing to enter into a long term lease agreement with them.

[11] On 19 January 2012 the Respondent and her husband were approached by Mr Henderson of the Applicant who wanted to extend the Applicant's later lease (that is annexure SF1 which would lapse by 30 April 2012 but could be renewed for a further period of 5 years by notice in writing given to the Lessor and received not

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[19] Paragraph 17 of the founding affidavit.
[20] In the absence of any formal assent from the Applicant amounting to a variation of the terms of the lease agreements, which did not occur, the sale of the occupational right to the premises in terms of the deed of sale concluded between Quinton Adams and the Respondent could not afford any better rights to occupation of that site to the Respondent than that held by the Applicant in terms of the two lease agreements.
[21] On that however see paragraphs [17] to [19] below.
[22] Paragraph 19 of the answering affidavit wrongly refers to 'January 2013'.

later than 30 days prior to the date on which the renewal period was to commence).[23]

[12] On 20 January 2012 the Applicant addressed a letter to the Respondent's husband enclosing a copy of the lease agreement as per their discussion.

[13] On 23 January 2012, the Respondent's attorneys replied to this letter advising that the Respondent's husband[24] had purchased the premises subject to the lease agreement from Mr Vernon Adams (the Lessor in the agreement) and expressing her belief that the Applicant was in the process of selling its business in Jozini. Certain terms of the lease were referred to, particularly clause 10.1 which was quoted only in part, the part quoted being restricted to the prohibition against any cession or assignment of the lease except with the prior written consent of the Lessor, without any reference being made to such consent not being capable of being withheld unreasonably. The Respondent's attorney recorded that the Applicant could not cede its rights to renew the lease to any third party. The letter concluded with the confirmation that:

> '… our client shall honour the existing lease with Sunshine Foods until its expiry on 30 April 2012, or any earlier date if agreed upon by both parties. Our client shall not enter into a lease agreement with any third party.'

The letter did not seek to invoke any legal remedy on behalf of the Respondent.

[14] In reply to the Respondent's attorney's letter of 23 January 2012, the Applicant on the same day addressed a letter to the Respondent's attorneys stating:

> 'We wish to confirm that we have cancelled the sale of our business in Jozini and that we will resume trading from the premises shortly. We accordingly also give notice of our intention to exercise our right of renewal of the lease in terms of clause 3.2 of the lease agreement noting that the lease will expire on 31 April 2017.'

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[23] The earlier lease had been renewed and would endure until 31 November 2015.

[24] This appears to be simply an inaccurate recordal of the *de jure* position. The Respondent was probably represented by her husband in providing instructions to her attorney from time to time, but it was common cause that she was indeed the purchaser of the trading rights to the premises. The letter should therefore be construed as referring to her as the purchaser.

[15] This letter resulted in a reply from the Respondent's attorneys dated 26 January 2012 recording their instructions in the following terms:

'1. At the beginning of January 2012, Sunshine Foods CC handed possession of the premises over to the prospective purchaser of their business, without the Lessee having complied with Section 10.1 of the Lease Agreement. The Lessee thereby ceded its rights under the lease to a third party, thereby materially breaching the agreement.

2. The prospective purchaser occupied the premises until 25 January 2012. They traded for approximately three weeks from the premises, where after they stopped trading for approximately a week, while remaining in occupation of the premises.

3. They also physically resided in the shop, meaning that they slept, cooked and ate there. This constitutes a breach of Section 7 of the lease agreement ("Use of Premises").

4. Our client regards the above breaches of the lease agreement as material breaches, going to the root of the lease, whereby the Lessee repudiated the contract.

5. Mr Chang offered to reinstate the lease, on condition that it expires on 30 April 2012.

6. In your letter dated 23/01/2012, Mr Chang's offer was rejected. The Lessee tendered to remedy his breach, by resuming occupation of the premises.

Mr Chang[25] hereby gives notice:

1. That he does not accept your tender of performance;
2. That he deems the lease agreement to be cancelled with immediate effect.'

[16] The purchasers of the Applicant's business vacated the leased premises on or about 25 January 2012.[26] Thereafter the Respondent or her husband apparently padlocked the door to the premises and subsequently took occupation of the premises and commenced trading from the premises.[27]

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[25] Again, the reference should be to the Respondent and not her husband.

[26] Paragraph 25 of the answering affidavit, which was not disputed in reply, incorrectly refers to it as '25 January 2013'. That is clearly a typographical error.

[27] Spoliation proceedings were instituted by the Applicant against the Respondent but remain unfinalised due to a dispute of fact regarding whether the Applicant had undisturbed possession of the premises.

[17] In the application which came before the court a quo the Respondent in addition to her contentions in the aforesaid correspondence also alleges that the Applicant had not tendered payment of the rental of the property to her since she had 'taken over the ownership, despite the Applicant being aware of that fact …'. In response to that contention the Applicant however replied that the Respondent has to date not become the owner of the rights to the premises and therefore is not the Lessor, and that the Applicant has tendered payment of all the rentals to the de jure Lessor i.e. Quinton Adams. The Applicant asserted in its founding affidavit that the lease evidenced by Annexure SF1 with an initial period to 30 April 2012 and a renewal period to 30 April 2017 was indeed renewed with Quinton Adams, and this was confirmed by the confirmatory affidavits of Vernon and Quinton Adams.

[18] Unless the Respondent could show that she had indeed become the owner of the right to occupy with a title superior to that of Quinton Adams which would have entitled her to have stepped into the shoes of the Lessor:

(a) any renewal of that lease for a further period of five years would have been required to have been concluded with Adams, and rentals pursuant thereto, or in respect of the unexpired balance of the initial period of the lease, be paid to Adams;

(b) She would not have acquired any rights to cancel the lease agreements.[28]

[19] The mere conclusion of the sale by Quinton Adams to the Respondent did not per se confer any rights in terms of the lease agreements upon the Respondent. Clause 17 of the leases is very specific; it was only upon registration of transfer that 'the purchaser shall be substituted as Lessor and acquire all rights and be liable to fulfil all the obligations which the Lessor, as Lessor, enjoyed against or was liable to fulfil in favour of the Lessee in terms of the lease.' This contractual provision prevails, but in any event simply seems to echo what would be the common law position in accordance with the principle of 'huur gaat voor koop', which although referring to 'koop' only comes into operation upon transfer when the purchaser becomes the owner of the leased premises.[29]

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[28] Leaving aside the issue whether she did in fact legally cancel the lease agreements.

[29] See *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) at 928I-J where Corbet CJ held: 'Whilst it is clear that, assuming there to be an election vested in the tenant,

[20] The question which then arises, and particularly arose in the appeal, was whether and when the Respondent became the owner or lawful holder of the rights to occupy the leased premises, because failing that and her stepping into the shoes of the Lessor the issue whether the Applicant's rights to occupy the premises were validly cancelled, would be premature.

[21] The Respondent in her answering affidavit simply asserted that she had become the owner and had been recognised as such, at least impliedly by being approached by the Chinese occupiers who asked her for a long term lease of the premises and by the Applicant when it approached her/her husband regarding the renewal of the more recent of the two leases. Her assertion of ownership of those rights is, however, a conclusion of law and not conclusive. Such facts as she advanced, of her own volition but which she in any event would be required to advance to persuade the court that she had indeed become the owner of the rights of occupation in law, need to be examined more closely.

[22] It is in this respect that much controversy and opposition were encountered.

[23] Mr Kemp SC, with him Mr Crots, for the Applicant argued with reference to the provisions of the KwaZulu Land Affairs Act No. 11 of 1992 and the regulations thereto issued in terms of KwaZulu Government Notice No. 32 of 1994, that the requirements relating to registration of transfer of the right to occupy the premises, specifically the requirement that the Minister's prior approval (given after consultation with the tribal authority to any transfer of right to occupy), had on the Respondent's version not been satisfied. Accordingly, that meant that the Respondent could not have acquired any rights of ownership in terms of that legislation. Reference was also made to the provisions of the KwaZulu-Natal Ingonyama Trust Act No. 3 KZ of 1994 not being satisfied. It was argued that such documentation as was presented by the Respondent as annexures to her answering affidavit, notably annexure HC3 (a traditional council consent), HC4 (the Ingonyama Trust 10 year option application

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the effect of the tenant electing to remain in occupation is that from the date of transfer of the property to the new owner the lease binds the new owner as landlord'. See also *Metcash Seven Eleven (Pty) Ltd v Pollev Property Holding and Investment CC* 2013 (4) SA 506 (GSJ) and *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA).

form) and a handwritten endorsement signed before a commissioner of oaths and seemingly bearing a stamp of the traditional council (although it was not clear), fell short of the statutory requirements and hence that any alleged 'transfer' of any rights to occupy to the Respondent was a nullity and/or of no legal force or effect. Strict compliance with statutory requirements are generally required failing which no rights accrue.[30] In summary, it was argued that there had been non-compliance with *inter-alia:*

(a) The provisions of s 25(4) of the KwaZulu-Natal Land Affairs Act of 1992;

(b) The provisions of regulation 6(1) and 7(1) of the regulations thereto;

(c) The relevant provisions of the Ingonyama Trust read with the resolution of the Ingonyama Trust Board dated 5 October 1998 delegating the trust functions and duties pertaining to permissions to occupy to the Secretary to the Department of Traditional and Environmental Affairs.

[24] Mr Combrink, with him Mr Hattingh, for the Respondent objected to these arguments being advanced, contending that the issue of the legality or otherwise of the transfer of rights to the Respondent had not been raised squarely on the papers for proper adjudication.[31]

[25] The specific legislation which should find application and the import thereof, particularly whether a transfer of rights equating to ownership held in terms of a permission to occupy premises can only be effected in accordance with the provisions of the legislation by endorsement, or also underhand, are complex issues which might necessitate evidence being led. They would certainly require full investigation and detailed argument. On what has been presented on the papers

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[30] Red Dunes of Africa v Masingita Property Investment Holdings (159/2014) [2015] ZASCA 99 (1 June 2015).

[31] A court will not allow the introduction of new matter in reply if the new matter amounts to the abandonment of the existing claim and the substitution therefor of a fresh or completely different claim based on a different cause of action. Nor will a court permit an Applicant to make out a case in reply when no case was made out in the original application – *Triomf Kunsmis (Edms) Bpk v AE&CI Bpk en Andere* 1984 (2) SA 261 (W) at 270H; *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (D) 316A. A party who relies on illegality is duty bound to plead such reliance with reference to the number of the section and the statute he relies on – *Yannakou v Apollo Club* 1974 (1) SA 614 (A) 623G.

before the court *a quo* and this court, I am unable to express any definitive and considered view.

[26] What is however significant is that the defence which the Respondent advanced was that the Applicant had no right to claim her ejectment from the leased premises, because the leases the Applicant held entitling it to occupation had been validly cancelled by her. Any right that might have accrued to her to cancel the leases, could however only have arisen upon her legally stepping into the shoes of the Lessor, because short of that eventuality, the Respondent would be a party extraneous to the legal relationship created by the two lease agreements with no right to cancel the lease agreements. It was therefore incumbent on the Respondent to establish the legal basis which would have entitled her to step into the shoes of the Lessor and which would then have entitled her to cancel the lease agreements. This she failed to do. The mere statement of a legal conclusion that she had become the 'owner' is woefully insufficient. The documents she had provided as annexures to her answering affidavit *prima facie* do not seem to support that conclusion either. Her complaint that this issue was not raised squarely by the Applicant therefore rings hollow. She was required to have dealt with this issue. But in any event, although perhaps not pertinently brought to her attention in express terms by the Applicant, the replying affidavit did suggest, albeit with reference to hearsay evidence regarding an alleged communication from the Ingonyama Trust Board to the Applicant's attorney,that the Applicant would contend that the transfer of the rights had not been registered.

[27] The Respondent's failure to raise and deal with this issue squarely, is fatal to her defence. However, even if I was wrong in that regard, I am not persuaded assuming that the Respondent had lawfully acquired the right to terminate the lease agreements, that she validly cancelled the lease agreements.

[28] In the correspondence resulting in the application before the court *a quo*, she purported to cancel the lease agreements on the basis of the Applicant's alleged repudiation of the agreements. Specifically her contentions were that:

(a) the Applicant had at the beginning of January 2012 handed possession of the premises over to the prospective purchasers of the business without any prior agreement from the Lessor;
(b) that the Applicant allowed the premises to be occupied by the prospective purchasers;
(c) that these purchasers physically resided in the shop in breach of clause 7 of the lease agreement;

and that she,

> 'regards the above breaches of the lease agreement as material breaches, going to the root of the lease, whereby the Lessee repudiated the contract'.[32]

In argument Mr Combrink also relied on the failure of the Applicant to pay any rental to the Respondent (which I have also alluded to briefly earlier in this judgment), as a ground for cancellation. I shall deal with this aspect first before dealing with cancellation on the grounds of the alleged acts of repudiation.

[29] As regards the failure to pay rental argument as a ground for cancellation, the Respondent failed to prove that she had become lawfully entitled to the rental, which is fatal to her contention in this regard. However, even leaving aside the issue whether the Respondent had shown that she was legally entitled to any rental from the Applicant, the alleged non-payment of the rent was never advanced as a ground for cancellation in the Respondent's attorney's letter of 26 January 2012. The answering affidavit is devoid of allegations as to when any rentals would allegedly have become legally payable to her. The onus establishing when she would have become entitled to any rental and the amount thereof would be on the Respondent.[33] Cancellation on that ground accordingly need not be considered any further. The acts of repudiation, relied upon by the Respondent to cancel the leases, did not include the failure to pay rental, and that cannot be relied upon later to justify a

[32] As per the Respondent's attorney's letter of 26 January 2012.
[33] At best, the Respondent would only have become entitled to the rentals from the date she acquired ownership of the rights to occupy. As alluded to earlier, this legal issue was never pertinently raised and cannot be decided on what was placed before the court *a quo*. The failure to do so must be placed before the door of the Respondent. Her failure to do so means that she has not discharged the onus of proving the non-payment of any rent legally due to her.

cancellation if the original basis for claiming cancellation cannot be sustained.[34] The issue of non-payment of the rental appears to be an afterthought.

[30] The Respondent was also not entitled to cancel the lease agreements on the basis of an alleged repudiation. For this part of the judgment I shall assume in favour of the Respondent, but without making any finding to that effect, that she had acquired some rights which would have resulted in her legally stepping into the shoes of the Lessor and which would entitle her to have cancelled the leases if valid grounds for such cancellation existed in law.

[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*[35] the test to be applied was explained as follows:

> '[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:

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[34] Mr Kemp argued that where reliance is placed on a repudiation its consequences cannot be avoided by the later invocation of another "valid" ground for cancellation. In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (5) SA 266 (SCA) it was held:
'[166] In any event Telkom's argument is unsound in law. Telkom prayed in aid the *falsa causa non nocet* principle laid down in cases such as *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) ([2001] 1 All SA 581). Those cases hold that:
"Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given."
But this principle has no application in a case such as the present, where it is the other party who has cancelled the contract. In such a case, the party who repudiated cannot put the clock back and undo the valid cancellation by relying on a ground that he legitimately could have, but did not, advance, in substitution for the ground that he did advance and which resulted in the cancellation of the contract. Once cancelled, the contract is irrevocably at an end. The rule exists for the protection of an innocent party and does not enure to the benefit of a party guilty of a breach of contract: it does not entitle the latter to claim that, since it could have done something similar without breaching the contract, its breach had no adverse legal consequences.' (footnotes removed)
Effectively, the repudiation precludes a party which persists in it, from invoking the contract in his favour – *Comwezi Security Services v Cape Empowerment Trust* [2014] ZASCA 22.
In the light of the conclusion I have reached it is unnecessary to consider this argument further.

[35] 2000 (4) SA 795 (SCA).

> "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 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?'

[33] Repudiation is a disavowal of the existence of an agreement or its material terms. As was remarked in *Du Preez v Tornel Props (Pty) Limited*:[36]

> '[17] …The test for repudiation is objective and not subjective. The test as to whether conduct amounts to repudiation of a contract is whether fairly interpreted, it

[36] [2015] ZASCA 134.

exhibits a deliberate and unequivocal intention no longer to be bound by the terms of the contract…

[18] … In *Datacolor International v Intamarket (Pty) Ltd* 2001 (2) SA 284 para 1, Nienaber JA, observed that:

> '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'.

In addition as pointed out at 294E-H:

> "The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."'

[34] The Respondent placed particular reliance for its argument of materiality on the statement by Potgieter JA in *Otarian Property (Pty) Ltd v Maroun*[37] where it was held:

> 'It is important to bear in mind that the contract under consideration is one of letting and hiring and according to the common law the use in which the lease premises is to be put is of real and substantial importance.'

[35] Pothier in his *Treatise on the Contract of Lease* also states:

> '22 It is of the essence of the contract of lease that there be a certain enjoinment or a certain use of the thing which the Lessor undertakes to cause the Lessee to have during the period agreed upon. And it is actually that which constitutes the subject and substance of the contract. The kind of enjoyment which is conferred by the lease either is or is not stated therein. When it is

[37] 1973 (3) SA 779 (AD) at 785G – H.

> stated, the Lessee may not put the thing to a use other than that stated in the lease.'

[36] In communicating her acceptance of the alleged acts of repudiation in the letter of 26 January 2012 the Respondent stated that she regarded 'the above breaches of the lease agreement as material breaches, going to the root of the lease, whereby the Lessee repudiated the contract.' That statement however conflated breach with repudiation. What the Respondent's case indeed was, as recorded in paragraph 6 of her answering affidavit was that 'it has always been the contention of both my husband and I that the Applicant repudiated the lease agreements, which I accepted …'

[37] However, objectively viewed the Applicant had not repudiated the lease agreements.

[38] By the 23 of January 2012 the Respondent knew of the occupation of the premises by the proposed purchasers of the Applicant's business. There was no indication in the Respondent's attorney's letter of the 23 January 2012 that the occupation and manner in which the proposed purchasers occupied the premises contrary to the terms of the leases by living and washing there, or that they were occupying as a sub-lessee without the required prior consent, were viewed as a repudiation of the Applicant's obligations in terms of the leases. Indeed, there was not even a complaint by the Respondent that it amounted to a breach, which clearly it might be. On the contrary, the Respondent in her attorney's letter expressed her intention to 'honour the existing lease with Sunshine Foods CC until the expiry on 30 April 2012 …'

[39] In the Applicant's letter of the 23 January 2012 which followed on the aforesaid letter, the Applicant advised that it had cancelled the sale of its business and that it would resume trading from the leased premises shortly. The occupation by the proposed purchaser and the unauthorised use to which that purchaser had put the lease premises were thereby, at least impliedly recognised by the Applicant, even in the absence of any demand for remedying any such breach, as conduct which would be rectified. There is nothing to suggest that it was not rectified, at least

before the Respondent sought to cancel on the basis of any alleged repudiation. That letter from the Applicant indeed went further and also gave notice of renewal of the lease to expire then on '31 (sic) April 2017', conduct inconsistent with an intention to repudiate the terms of the leases.

[40] It was only thereafter on the 26 January 2012 that the non-compliance with clause 10.1 of the lease agreements and the unauthorised use to which the premises had been put were sought to be relied upon as 'material breaches, going to the root of the lease, whereby the Lessee repudiated the contract'.

[41] It might very well be, as the Applicant contended, that faced with the Applicant's undeniable right to claim a renewal of the second lease that the Respondent now sought to 'craft' a repudiation to escape the renewal period. But even leaving the motive of the Respondent aside, the conduct sought to be invoked as indicative of a repudiation is on probability more consistent with the Applicant wishing to uphold the leases. The validity of a main lease is precisely what a Lessee who requests a Lessor's consent to a subletting would rely upon to secure such consent. It is the very kind of conduct contemplated by the provisions of the lease.

[42] To the extent that there were possible action able breaches on the part of the Applicant, I am not persuaded that these breaches were necessarily material. They were in any event also not preceded by any demand calling for their rectification. Even if a demand was unnecessary, the conduct possibly constituting breaches were recognised by the Applicant with a tender to remedy them by resuming occupation of the premises before there had been any intimation that the lease agreements might be cancelled, or any election to cancel the leases having been communicated to the Applicant. In those circumstances Respondent's and her husband's response could not be that they did not '…accept your (Applicant's) tender of performance', as stated in the concluding paragraph of the Respondent's attorneys letter of 26 January 2012. Such breaches as there were, were not material and certainly not consistent only with an unequivocal intention no longer to be bound by the terms of the lease agreements. Indeed, the contrary was the case. The Respondent could therefore not have cancelled the leases validly.

[43] The Applicant has asked in the event of the appeal being decided in its favour that an order be granted in the following terms:

> ‘1. The appeal is upheld with costs, such costs to include the employment of two counsel.
>
> 2. The order of the court *a quo* granted on 11 December 2014 under Case No. 4240/2013 (KZD) is hereby set aside and replaced with the following order:
>
> “1. It is declared that the Applicant be and is hereby entitled to the sole occupation and possession of the premises which includes two shops being Unit 1 and Unit 2 known as Johanna Centre, Main Road, Jozini, District Ubombo, KwaZulu-Natal (hereinafterreferred to as “the premises”).
>
> 2. The Respondent and all and any other persons holding title to the premises or purporting to hold title to the premises through or under her, be and is hereby ordered forthwith to vacate the premises.
>
> 3. Failing due and immediate compliance with the order in para 2 hereof, the Sheriff for the area in which the parties are situate be and is hereby order to eject the Respondent and all and any persons holding title or purporting to hold title through her from the premises.
>
> 4. Ordering the Respondent to pay the costs of this application.”’

[44] Although Messrs Vernon and Quinton Adams supplied confirmatory affidavits, in the absence of their formal joinder as interested parties, I am not prepared to grant declaratory relief that the Applicant is entitled to sole occupation and possession of the premises, even if such declaration was confined to the position as at 11 December 2014. Furthermore, since then the agreement, Annexure SF2, has lapsed by effluxion of time and the declaratory relief would to that extent in any event be partly academic. Implicit in any order directing the Respondent to vacate the premises is in any event a finding that the Respondent has not demonstrated a better right to occupation of the premises than the Applicant. In the exercise of my discretion regarding the claim for any declaratory relief I am not disposed to granting the relief proposed in paragraph 1 of the Draft Order.

[45] It further also seems to me, the leased premises being occupied and used for a business, that reasonableness dictates that the order directing the Respondent to vacate should allow her 14 days to do so.

[46] Regarding the costs of the appeal specifically the costs of two counsel, both parties employed two counsel. The matter was not unduly complex but it is a matter of importance to the parties. I consider it appropriate that the costs award should provide for the costs of two counsel, where applicable.

[47] The order shall therefore be as follows:

1. The appeal is upheld with costs, such costs to include the employment of two counsel where applicable.
2. The order of the court *a quo* granted on the 11 December 2014 under Case No. 4240/2013 (KZD) is hereby set aside and replaced with the following order:
    (a) The Respondent and all and any other persons purporting to hold title to the leased premises, being two shops Unit 1 and Unit 2 known as Johanna Centre, Main Road, Jozini, District Ubombo, KwaZulu-Natal through or under her, be and are hereby directed to vacate the premises within 14 days of the granting of this order;
    (b) Failing due compliance with the order in para (a) above, the Sheriff for the area in which the premises are situate, be and is hereby ordered to eject the Respondent and all or any persons purporting to hold title through her from the premises;
    (c) The Respondent is directed to pay the costs of this application including the costs of two counsel where applicable.

_____

KOEN J

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HENRIQUES J

_____

OLSEN J

DATE OF HEARING: MONDAY, 1 FEBRUARY 2016.

DATE OF DELIVERY: FRIDAY 18 MARCH 2016.

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