

FULFILLING CONTRACTUAL OBLIGATIONS TRUMPS “MAKING UP” ATTEMPT

Richard Pollack (N.O) and Others v Peacock Inn (Pty) Ltd (15173/2022) [2023] ZAGPJHC 210 (9 February 2023)

It is not unusual, in property transactions, to learn of purchasers struggling to meet the financial commitments stipulated for in the agreement. In this judgment, the purchaser could not pay the deposit in time and the seller exercised its rights to demand compliance with the agreement's terms, and cancelling the agreement when this was not heeded. The purchaser, in the meantime, made a substantial payment in respect of occupational rental and sought to rely on this attempt at making up, to salvage the agreement. The seller's rights, in the circumstances, trumped and the judgment explains how a court deals with the rights of the parties in such instances.

The Judgment can be viewed [here](#).

FACTS

The liquidators of In-Out Panel Beaters CC (in liquidation) ('the CC') sold a property to Peacock Inn (Pty) Ltd ('Peacock Inn') in November 2021 for R5.6 million. The agreement provided that a non-refundable deposit of R1.4 million was payable of which R1.2 million had to be paid on 28 February 2022. Peacock Inn would take occupation and would be liable for occupational rental calculated as 1% on the balance of the purchase price.

The agreement provided further that in the event of breach of the agreement by Peacock Inn, and after it was called upon in writing to remedy such breach within seven days and failing to do so, the CC would have the right, amongst others, to cancel the agreement forthwith and retake possession of the property with immediate effect. If Peacock Inn, as purchaser, was in occupation of the property at the time, it would also immediately vacate the property.

Peacock Inn breached the agreement by not paying the deposit nor the balance of the purchase price. It also failed to pay the occupational rental. Accordingly, in March 2022, the CC formally noted the failure to pay the amounts agreed to in the sale agreement and demanded rectification. Peacock Inn paid some R150,000 thereafter and this was allocated towards arrear occupational, which at the time reflected as R193,000.

Peacock Inn acknowledged a letter of demand sent by the CC and undertook to pay the amounts required and thus remedy the breaches. Despite this, Peacock Inn failed to remedy the breach. Consequently, the CC cancelled the sale agreement in writing.

The controversy in this matter is whether or not the cancellation was effective and whether the CC was entitled to the eviction of Peacock Inn from the commercial property, especially after making a substantial contribution to the outstanding occupational rent.

HELD

- The legal consequences of an agreement in terms of which a party may take occupation of premises against the payment of occupational rental is well known: Once the occupant's right to occupy the property comes to an end, the other party is entitled to have the occupant evicted. The subsequent payment of an amount towards occupational rental does not negate that right to cancel.
- The principle is that once the other party remains in default after he was notified of the breach and had failed to heed the request to comply with the terms of the agreement, the right to cancel has accrued to that other party and "[h]is accrued right to do so is not defeated by a belated tender of payment of the arrears before he

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exercises his election to cancel.”

- In determining whether or not to grant an eviction order, the court must exercise a discretion based upon what is just and equitable as with regard to the date upon which the property must be vacated.
- In the present matter, there were no factors that required of the court to depart from the well-established principles following on breach: Parties to a contract must be held to their obligations.
- In the instant case, Peacock Inn agreed to meet its obligations by paying as stipulated in the sale agreement. It failed to honour its obligations as agreed and there is no explanation tendered on the reason for its failure.

CONCLUSION

Accordingly, the CC acted within their rights by terminating the sale agreement after the breach and is entitled to eviction of Peacock Inn.