

# SUMMARY OF THE JUDGMENT

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&gt;&gt; PROPERTY LAW UPDATE

## LEASE NON-COMPLIANCE: TENANT CANNOT DEMAND LANDLORD TO CANCEL RATHER THAN CLAIM COMPLIANCE

**Clemlen Investments No. 10 (Pty) Ltd v Recycle Yourself (Pty) Ltd (1328/2017) [2017] ZACPEHC 32 (13 June 2017)**

*In this matter the tenant had a recycling business which meant that it received deliveries of material in large containers. The lease agreement provided that containers may be on the premises only whilst loading was in progress. The tenant contravened and, at times, left the containers on the premises even when no loading was taking place. One of the issues raised by the tenant, when faced with a claim from the landlord for an order that the recycling business comply with the lease agreement, was that the landlord should rather exercise its right to cancel the agreement. What does the law say?*

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

### FACTS

Clemlen Investments No. 10 (Pty) Ltd (Clemlen) was the owner of an immovable property in Port Elizabeth, consisting of a warehouse and an office. Certain portions of the premises were rented out to a number of tenants for business purposes, including to Recycle Yourself (Pty) Ltd (Recycle).

The lease agreement between Clemlen and Recycle provided, amongst other things, that Recycle leased the premises for recycling of cardboard and paper products. The following conditions were included in clause 29 of the agreement:

*"The front yard area of the warehouse may be utilised for staff and visitor parking and loading and off-loading of trucks only;*

*All stock in trade to be worked with and stored internally. The external yard area is to remain clean and tidy at all times.*

*No Purchase of cardboard or paper products shall be allowed from people ... off the street at the premises at all times."*

Clemlen alleged that Recycle was in breach of the provisions of clause 29 as it had on several occasions stored large metal bins, shipping containers, bales of recyclable material and baling machines in the yard area in front of the premises. This was substantiated by photographs. Clemlen alleged that it had suffered financial losses because it could not secure further leases as a result and that Recycle's conduct was hazardous. Clemlen then brought an application for an interdict ordering Recycle to

comply with its contractual obligations in terms of the lease agreement. (To be successful in a provisional interdict, it must be shown that there is a *prima facie* right (i.e a right “on the face of it”), a reasonable apprehension of irreparable harm if the interim interdict is not granted; there is no alternative satisfactory remedy available to the applicant; and the balance of convenience is in favour of granting the interim relief.)

Recycle defended the matter. They argued that:

- (i) They were not in breach as they never stored recyclable material externally in breach of the lease agreement. They contended that, having regard to the nature of the business, the recyclable material was transported in bins or shipping containers which were off-loaded from trucks and loaded onto trucks, which had to occur outside and that this was reasonably incidental to the agreed loading and off-loading process. It also argued that the large metal bins and shipping containers were placed in the yard area at the back of the building and not in front.
- (ii) If they were in breach, as Clemlen alleged, Clemlen should have brought an action to cancel the lease, which it did not do. There was thus a suitable alternative remedy for Clemlen.

**HELD:**

- On any reading of clause 29, the front yard area of the warehouse was reserved only for visitors and staff parking, and for loading and off-loading of trucks. In addition, all stock in trade had to be worked with and stored internally. The external yard area had to remain clean and tidy at all times.
- Although Recycle disputed that its conduct offended the provisions of clause 29, the photographs (which were taken over a period of time and on different days) supported Clemlen’s case. It was evident from these that shipping containers, recyclable materials and bales were stored in front and outside the warehouse. This included huge shipping containers. There was no evidence, when the photographs were taken, that the containers were there for purposes of loading. Therefore, Recycle’s contention that it had not conducted its business in contravention of the lease agreement was not supported by the evidence.
- The argument that there was a suitable alternative remedy could not prevail. Clemlen, as applicant, was entitled to enforce its bargain, i.e. to obtain the lessee’s promised rental while preventing the latter from conducting itself in a manner that involves breaking the provisions of their agreement. The latter remedy is provided

with an interdict: cancellation will be quite the opposite of that to which Clemlen is entitled. As such, even if provision for cancellation is available in the lease agreement, a claimant is not barred from binding the other party who is conducting itself in breach of the lease agreement, to the terms of the agreement.

As a result, Clemlen's application succeeded.

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