

“IF YOU DON’T LIKE IT, LEAVE!”: IS THIS REPUDIATION OF THE LEASE BY THE LANDLORD?

Highflyer Properties (Pty) Ltd v Franchkings (Pty) Ltd (40462/2019) [2022] ZAGPJHC 612 (29 August 2022)

The answer is yes and no, it depends. The court here had to determine which of the landlord or tenant repudiated the lease. This after a heated altercation during which the tenant complained about defects and the landlord said words to the effect that the tenant must move in or find another place to rent. The tenant later alleged that the landlord had, by that conduct, repudiated the lease. The landlord disagreed and stated that it was an unfortunate argument about defects. The Court explained here that repudiation can occur by conduct, but the measure is not necessarily what the other party subjectively perceived, but what a reasonable man would have deducted. Considering the facts of this matter, a reasonable man would not have thought that the landlord had repudiated. The tenant was accordingly held liable for the landlord’s damages. The judgment is a great illustration of how these principles apply practically.

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

FACTS

Highflyer Properties (Pty) Ltd (‘HP’), as landlord, and Franchkings (Pty) Ltd (‘FK’), as tenant, entered into a commercial lease agreement in June 2019. This came about as a result of HP’s advertisement of vacant office premises. When FK inspected the premises, it noticed other premises occupied by another tenant, GGI, in the same building. As it preferred these to the vacant premises, it negotiated with HP that the latter would relocate GGI so that FK could move into the GGI premises.

The agreement provided that FK would be given beneficial occupation by 1 August 2019, that the lease would commence on 1 September 2019 and endure for a period of three years. In terms of the lease, FK would take occupation of the premises even if they were in a state of disrepair. The agreement provided further that FK was obliged to notify HP within 21 days after the commencement date or occupation date of any defects in the leased premises. FK never gave notice in this regard nor did it take beneficial occupation of the premises.

This is because, during a discussion on 10 July at the GGI premises (‘the 10 July meeting’), FK raised various complaints about defects in the premises. This resulted in a heated debate, during which HP admitted its representative became rude, and HP walked out of the meeting with words to the effect that FK had to take the premises as is or take their money and leave, and find alternative premises. (Witnesses at the trial conceded that there was uncertainty what exactly the words were.)

When things cooled down after this, the parties again communicated about administrative matters and arrangements for FK’s move to the property and improvements thereon.

Then, towards the end of July 2019, FK’s attorneys wrote to HP and advised that its conduct in refusing to deal with the defects in the property and the rude behaviour at the 10 July meeting, signified an intention to repudiate the agreement, which FK accepted. It sought the return of the R 50,000 deposit it had paid.

HP denied that it had repudiated and stated that the agreement was intact and that they will hold FK to the terms thereof. After further to-ing and fro-ing, HP advised FK that they will now (September 2019) accept the repudiation and will issue summons in respect of the damages they suffered. FK maintained that it had not repudiated the agreement and that it had only made requests to HP for remedial work relating to the latent defects in the premises.

The disputes between the parties centre around which of them repudiated the agreement and whether HP suffered damages. HP and FK each argued that it was the other that had repudiated. Each sought to cancel the agreement consequent upon the repudiation thereof by the other. HP claimed, in addition, contractual damages suffered as a result of FK's repudiation of the agreement. FK, in turn, raised a counter claim for damages, being the R50,000 it paid to HP as the deposit.

Against this background, two primary issues require determination. The first was which of the two parties repudiated the agreement. The second issue was whether HP suffered damages. It appeared that as a result of the breakdown in the relationship between HP and FK, GGI remained in the premises for a while and then it was leased to a new tenant. Therefore, FK argued, there was no loss.

HELD

Was the lease agreement repudiated and if so, by whom?

- FK's case for repudiation is based on the altercation during the 10 July 2019 meeting, alleging that HP's representative uttered words to the effect that it did not have time to deal with the defects pointed out in the premises and that if FK did not like the premises as is, they must take their things and go.
- This was the high water mark of their evidence. However, this must be seen in the context of the circumstances as they prevailed at the time. The lease agreement in its terms required the premises to be provided in good order and condition. This connotes the common law standards and not a higher standard. Put differently, the leased property must be in a condition that renders it reasonably fit for the purpose for which it was let.
- The evidence further did not establish that the premises were not in good order and condition, as contended by FK, but rather established that they were reasonably fit for use as offices. The witnesses conceded that the premises were in an inhabitable condition and could reasonably be used as offices. GGI used them as offices as did the tenant that moved in after GGI. This was corroborated by FK's own evidence that it was intent on obtaining the GGI premises after seeing them, rather than the advertised vacant premises.
- The fact that there were certain defects did not detract from the reality that the premises were fit to be used as offices and the defects could easily be remedied if required. It is clear that whilst disputes arose between the parties regarding what exactly the defects were, FK did not act in terms of the agreement by providing a written notice of the defects. HP thus could not be said to have responded to such notice and refused to effect the necessary repairs.
- The principles applicable to repudiation hold that repudiation occurs when a party to a contract indicates to the other party, in words or by conduct, a deliberate and unequivocal intention no longer to be bound by the contract, without any legal basis to do so. The test is objective and is not dependent on the intentions of the party but rather what the perception of a reasonable person in the position of the aggrieved party would be.
- On the facts, HP's conduct did not constitute a deliberate and unequivocal intention to no longer be bound by the lease. Whilst the understanding and reaction of FK was not irrelevant, it was not conclusive of whether HP's conduct and words constituted an act of repudiation. ***The issue is whether FK's understanding or interpretation was, objectively viewed, reasonable.***
- FK's evidence that its understanding of the words used by HP was clearly subjective and aimed at a deliberate interpretation which would assist FK in avoiding the lease agreement. Whilst it is clear that HP was rude during the altercation of 10 July 2019 and it was reasonable for FK to have been offended thereby, the

conduct and words uttered did not reasonably infer an intention to repudiate. FK's understanding of the words used by HP was not the perception of a reasonable person in the position of the aggrieved party, in this context.

- HP's outburst speaks to a frustrated and emotional response to the conduct and alleged defects pointed out by FK rather than to any repudiation of the agreement.
- This is fortified by how the parties conducted themselves immediately after the events of 10 July 2019. Various emails were exchanged between the parties which corroborates that both HP and FK acted as if there was still a lease agreement in place. HP asked for copies of FK's floorplans for signature and the parties continued to discuss the purchase of GGI's boardroom furniture.
- HP accordingly did not repudiate the lease agreement; it was FK that did so. HP accepted the repudiation and cancelled the agreement by way of a letter dated 20 September 2019.

Retaining the deposit

- Clause 4.3 of annexure A to the lease agreement provided:

"The lessee shall deposit ... an amount equal to two months of the total monthly rental ... This amount shall be retained by the lessor until the expiration or earlier termination of this lease ..."

- Having concluded that it was FK who repudiated the lease agreement, HP was entitled to retain the deposit.

Did HP suffer damages?

- HP sought damages for the loss of income it would have received in terms of the lease agreement with FK. In this regard, it was shown that HP retained GGI as tenants in the premises and then leased to a new tenant, and accordingly, so argued FK, there were no damages.
- In the context of "a lease cancelled by the lessor due to a breach by the lessee, the *prima facie* measure of damages is the rental that would have been paid for the premises over the remaining period of the lease less any amounts received which would not have accrued had the lease not been cancelled — and of course a lessor who cancels is obliged to take reasonable steps, such as re-letting the premises, in order to mitigate its loss."
- HP's evidence that the commercial rental market had changed significantly between 2019 and 2020 as in 2020 the market was favourable to tenants whereas in 2019 it was more favourable to lessors, was not challenged. The evidence further established that the lease agreement with the subsequent tenants (after GGI left) commenced on 1 November 2020 at a base rental of R48,750.00, together with an annual escalation of 7%. The lease concluded between HP and FT provided for a higher rental of R59,091.50 per month, subject to an annual escalation of 8%.
- Thus, as the rental received by HP from the new tenant was lower than what it would have received from FK, HP has shown that it had suffered a loss, causally connected to the repudiation by FK.

CONCLUSION

Accordingly, FK was liable to HP for the damages the latter had suffered as a result of FK's repudiation.