THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 468/2023

In the matter between:

GLOWING ROOMS (PTY) LTD	**APPELLANT**
and	
ARTHUR LEVIN N O	**FIRST RESPONDENT**
ALAN MARK LOCKETZ N O	**SECOND RESPONDENT**
MICHAEL LARRY NOVOS N O	**THIRD RESPONDENT**
SEYMOUR MICHAEL ABRAHAMS N O	**FOURTH RESPONDENT**

(Respondents cited in their capacities as trustees

for the time being of The Woodlands Trust)

Neutral citation: *Glowing Rooms (Pty) Ltd v Levin N O & Others* (468/2023) [2024] ZASCA 33 (28 March 2024)

Coram: NICHOLLS, MBATHA, MABINDLA-BOQWANA, WEINER and KGOELE JJA

Heard: 20 February 2024

Delivered: 28 March 2024

Summary: Contract law – whether the eviction order was properly granted – whether the respondents had a right to cancel the lease agreement – whether their conduct amounted to repudiation of the agreement – whether court should have developed the common law in accordance with constitutional norms and values to refuse the eviction.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Savage J, sitting as court of first instance):

1 The appeal is dismissed with costs, save for the variation of the date of eviction.

2 The order of the high court is substituted with the following:

'1. The respondent, Glowing Rooms (Pty) Ltd, as well as its employees, agents, assigns and any other person/s that may occupy Unit 16 Gallery, Turf Club Drive, Milnerton, Western Cape ("the premises") are to vacate the premises on or before 30 June 2024.

2. Should the respondent, as well as its employees, agents, assigns and any other person/s that occupy the premises *vis-á-vis* the respondent, fail to vacate the premises voluntarily as set out in paragraph 1 above, the sheriff is authorised to evict the respondent, its employees, agents, assigns and any other person/s that may occupy the premises *vis-á-vis* the respondent on 1 July 2024, or as soon thereafter as possible.

3. The respondent is to pay the costs of this application on the scale as between attorney and client.'

JUDGMENT

Nicholls JA (Mbatha, Mabindla-Boqwana, Weiner & Kgoele JJA concurring):

[1] This is an appeal against a judgment of the Western Cape Division of the High Court, Cape Town (the high court), which granted an eviction order against the appellant from a commercial property, pursuant to a notice of termination in terms of a lease. The central issue in this appeal is whether the eviction order was properly granted or whether the respondents repudiated the lease agreement, and whether on proper interpretation of the agreement as a whole, the respondents had a right to 'unilaterally' cancel the agreement. In addition, whether the court should have developed the common law in accordance with constitutional norms and values, to refuse the eviction.

[2] The appellant is Glowing Rooms (Pty) Ltd (Glowing Rooms). On 2 July 2016, Glowing Rooms entered into a lease agreement with the Woodlands Trust (the Trust) (the first agreement) in terms of which it leased a unit in a retail development, the Gallery, located in an industrial area near the Milnerton Race Course in Cape Town (the premises). The premises were utilised as an indoor 3D mini golf course, which operated only on Saturdays and Sundays. The trustees of the Woodlands Trust are the respondents herein. The first agreement of lease was for a period of three years, commencing on 1 September 2016 and terminating on 31 August 2019. A second lease agreement was entered into on 27 February 2020 for another three years, commencing on 1 September 2019 and terminating on 31 August 2022. In July and August 2022, the parties attempted to negotiate a new lease agreement.

[3] It was disputed between the parties whether pursuant to these negotiations, a new lease came into existence. Glowing Rooms insisted that the parties had entered into a new lease agreement on the same terms as the previous one. That a new lease agreement had been concluded was disputed by the Trust, which alleged that once the second lease agreement was terminated by the effluxion of time, the negotiations for a new lease agreement during July and August 2022 had been unsuccessful.

[4] Because, at least on the Trust's version, no agreement had been reached, it entered into a lease agreement with a third party, Tambudzai Perky Umera, commencing on 1 September 2022. Ms Umera leased not only the premises in question, but also two other units in the Gallery. As a director of a non-profit educational institution, she intended to set up a school. To this end, the Trust agreed to undertake renovations and to give Ms Umera vacant occupation of the premises on 1 January 2023.

[5] Glowing Rooms refused to vacate the premises and denied that it had any legal obligation to do so. It claimed that a lease agreement had been concluded on 26 August 2022, pursuant to the acceptance of an offer made by the Trust. As a result, on 6 October 2022, the Trust instituted an urgent application to evict Glowing Rooms from the premises on the basis that the second lease agreement had been terminated by the effluxion of time and that Glowing Rooms was accordingly in unlawful occupation of the premises. Glowing Rooms pleaded that a further lease agreement had been entered into on the same terms and conditions as the second lease agreement, which had commenced on 1 September 2019.

[6] On 28 October 2022, the high court (per Kusevitsky J), dismissed the eviction application (the first eviction application). No reasons were provided for the order,

but it is common cause between the parties that the basis for the dismissal of the eviction application was that the high court found that the parties had entered into a new lease agreement pursuant to the negotiations in July and August 2022, despite it not having been reduced to writing.

[7] The trustees, apparently having accepted the court's ruling, as indeed they were obliged to, then proceeded on the basis that there was an extant lease agreement on the same terms and conditions as the second lease agreement, as contended for by Glowing Rooms. Of particular significance is clause 2.1 of the lease agreement, which provides that the duration of the lease will be three years 'subject to the Lessor's right to cancel this agreement on one month's notice'. Clause 2.2 provides that the lessee shall have an option to renew the lease on two months' written notice. It is common cause that Glowing Rooms did not give two months' written notice to renew the second lease agreement.

[8] On the same day, and immediately after Kusevitsky J's ruling in the first eviction application, on 28 October 2022, the Trust sent a notice to Glowing Rooms terminating the lease agreement in terms of clause 2.1, on one month's notice, and requiring Glowing Rooms to vacate by not later than 30 November 2022. The third paragraph of the notice reads as follows:

'Insofar as Glowing Rooms (Pty) Ltd ("Glowing Rooms") allege that the parties have entered into a new lease agreement, on the same terms and conditions as the previous lease agreement dated 27 February 2020, save for the change in Glowing Rooms' rental obligation [the Trust] hereby gives Glowing Rooms notice, in terms of clause 2.1. of the alleged agreement, that it has elected to **CANCEL** the alleged agreement, and this letter serves as notice thereof.' (Emphasis added.)

[9] Again, Glowing Rooms refused to vacate in terms of the notice, which resulted in the Trust instituting the present proceedings, seeking eviction for the second time. In the second eviction application, which is the subject matter of this appeal, the Trust based its case on its contractual right to evict in terms of clause 2.1 of the lease agreement.

[10] The high court, per Savage J, granted the eviction application but determined that the eviction should take place on or before 31 December 2022, instead of 30 November 2022. In the exercise of its discretion to determine a reasonable date for the eviction, the high court took into consideration that Glowing Rooms had been a tenant for many years and would require some time to relocate. The high court refused an application for leave to appeal by Glowing Rooms. Leave to appeal was granted by this Court.

[11] Glowing Rooms' appeal is based on four grounds. In this appeal, as in the high court, Glowing Rooms' primary defence is that public policy considerations mitigate against the enforcement of clause 2.1. Aligned to this, is the duty to negotiate in good faith. The next aspect of Glowing Rooms' argument is that the Trust repudiated the lease agreement and was therefore not in a position to assert a contractual right in terms thereof. The third point related to the validity of the notice to terminate. Finally, Glowing Rooms contended that on a proper interpretation of the lease agreement, clause 2.1 should be seen as part of the whole agreement, which incorporated several other clauses providing for termination on notice, in defined circumstances. By relying on it in isolation, the Trust impermissibly abrogated to itself an unfettered discretion to terminate the lease on one month's notice.

[12] The starting point should be whether the Trust repudiated the lease agreement, as this would be dispositive of its claim for eviction. The basis for Glowing Rooms' argument is that in the first eviction application, the Trust contended that no lease was concluded after the second lease agreement expired, on 31 August 2022, through the effluxion of time. It could not, therefore, rely on a term of an agreement, which it alleged did not exist, to evict Glowing Rooms without expressly disavowing its initial stance. The notice in terms of clause 2.1 also referred to an 'alleged agreement' indicating, according to Glowing Rooms, that the Trust had not accepted that there was an extant lease agreement, thereby repudiating the lease agreement. In fact, argued Glowing Rooms, nothing short of a written acceptance of an extant lease agreement would suffice, absent which this Court should find that the Trust had repudiated the lease agreement.

[13] What this contention overlooks is that the Trust's first application for eviction had been dismissed by Kusevitsky J, on the basis that there was an extant lease agreement. That these were the grounds for the high court's dismissal of the eviction application, was emphasised repeatedly by Glowing Rooms. Once the trustees accepted the decision of the high court, as they were compelled to do, their denial of the existence of the lease in the first eviction application could have no bearing on their subsequent conduct in utilising the terms of the lease to procure an eviction in this application. After the decision of the high court apparently based on an extant lease agreement, the only avenue open to the Trust, in order to evict Glowing Rooms, was to do so in terms of the lease agreement. There is, therefore, nothing to prevent the Trust from relying on a contractual right to cancel the lease agreement.

[14] This Court, in *Datacolour International (Pty) Ltd v Intamarket*,[1] held that repudiatory conduct must be objective. The proper test is whether a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The conduct must be clear cut and unequivocal, as repudiation is not lightly presumed. The Court further held that repudiation occurs 'where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract.'[2] Repudiation is not a matter of intention, but rather of perception and the perception being that of the reasonable person.

[15] The use of the words 'insofar as Glowing Rooms allege that the parties have entered in to a new lease agreement . . .' cannot amount to an unequivocal intention not to be bound by the lease agreement, particularly once a court had for all intents and purposes held that there was an existing lease agreement, to which the Trust was bound. While the Trust might have initially denied the existence of the agreement, the very fact that it brought its second eviction application in terms of the lease agreement after the first eviction application was dismissed, points to conduct which is the exact opposite of a party refusing to perform in terms of a contract. As such, the defence of repudiation is unsustainable.

[16] The next question is whether the notice of termination was valid. Glowing Rooms' contention, in this regard, is that the notice, by the use of the words 'insofar as' and the reference to an 'alleged' agreement being concluded, implied that it did

[1] *Datacolour International (Pty) Ltd v Intamarket* 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A) paras 16, 17 and 18.
[2] Ibid para 16, quoting Corbett JA in *Nash v Golden Dumps* 1985 (3) SA 1 (A) at 22 D-F.

not consider itself to be bound by the agreement. It was submitted that where there is no clear and unequivocal intention to be bound by the agreement, a notice of termination is invalid. For this contention, reliance was placed on *Kragga Kamma Estates CC and Another v Flanagan* (*Kragga Kamma*)[3] and *Sweet v Ragerguhara NO and Others* (*Sweet*),[4] both dealing with the sale of immovable property. In *Kragga Kamma*, the plaintiff claimed that non-payment of a portion of the purchase price constituted a repudiation of the sale agreement, which repudiation the seller accepted. This Court held that the notice of demand was a conditional demand and was incapable of placing the defendant *in mora* as it was subject to some uncertain future event. But even if it were, the plaintiff had, for other reasons, not validly cancelled the sale. The notice was framed in the alternative. It was not clear and unambiguous. In the present matter, the written notice is clear and unambiguous, it is not conditional or contradictory.

[17] Similarly, the facts in *Sweet* are distinguishable. There, the applicant sought an order that an agreement of sale had been lawfully cancelled on the basis that the respondent had not given vacant possession of the property in question. A notice was sent to remedy the defective performance by giving vacant possession. The court found that the defaulting party was entitled to know how to respond to the notice, but in that instance, it was equivocal and inconsistent. Here, there is no demand that Glowing Rooms remedy its breach, as clause 2.1 is not dependent upon a breach of the agreement.

[3] *Kragga Kamma Estates CC and Another v Flanagan* 1995 (2) SA 367 (A); [1995] 1 All SA 486 (A) at 374 H-J – 375 A-E.
[4] *Sweet v Ragerguhara NO and Others* 1978 (1) SA 131 (D) at 139 E-G.

[18] There can be no suggestion that the notice sent to Glowing Rooms is in any manner contradictory or confusing. The notice clearly and unambiguously states that the Trust is exercising a contractual right in terms of clause 2.1 to terminate the lease agreement on one month's notice. The reference to an 'alleged' agreement does not detract from that.

[19] I now deal with Glowing Rooms' argument relating to the interpretation of the lease agreement. It proceeds along the following lines. By relying on clause 2.1, the Trust impermissibly utilised its unfettered discretion to terminate the lease, when clause 2.1 should have been interpreted in light of the contract as a whole. This was in circumstances where there are other clauses in the lease agreement which provide for longer notice periods in different scenarios. For example, in terms of clause 18.1, the Trust can terminate on three months' written notice in the case of the building being sold; clause 18.2 provides for three months' written notice in the case of substantial renovations, reconstruction or redevelopment of the building; clauses 18.3 and 18.4 provide 60 days' written notice, where the lessee is to be moved to alternative premises in consequence of renovations being carried out; and clause 18.7 provides for three months' written notice, if the parties fail to reach agreement within 30 days on an alternative lease providing for relocation of the business of the lessee. Clause 22 affords the Trust the right to terminate in the case of destruction of property or damage which renders it unlettable, upon 60 days' notice.

[20] In its answering affidavit, Glowing Rooms stated that the lease agreement grants the Trust an array of unilateral contractual powers as set out in clauses 18 and 22, without any qualification that they be exercised in accordance with the judgment of a reasonable person. As such, all these clauses were contrary to public policy and invalid, not only clause 2.1. Further, Glowing Rooms contended that this is

disproportionate and does not take into account the rights and interests of both parties.

[21] Significantly, it was not Glowing Rooms' case in the high court that it ought to have been given a longer notice period, in line with the other clauses. Nor did it contend on appeal before this Court, that these other clauses were themselves, contrary to public policy. In this Court, counsel for Glowing Rooms specifically stated that clause 2.1 *per se* is not unlawful and contrary to public policy. Rather, it was the interpretation and implementation thereof that was the fundamental problem, thus linking the interpretation of the contract to whether it was contrary to public policy. Glowing Rooms argued that a contract which provides for a unilateral right to terminate by written notice and 'to implement a contracting party's act of repudiation', amounts to 'abuse of a contractual right'. It was further argued that the Trust's abuse of the contractual right to further an act of repudiation or breach, is contrary to public policy.

[22] This argument is difficult to understand. Our courts have repeatedly confirmed that public policy demands that contracts freely and consciously entered into must be honoured.[5] The principle of *pacta sunt servanda* (agreements must be kept) gives effect to 'central constitutional values of freedom and dignity'. The qualification is that, in our constitutional dispensation, it is not the only principle to be applied. Furthermore, where constitutional rights and values are implicated, there

[5] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC); *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC); *Botha v Rich N.O.* [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC); *AB v Pridwin Preparatory School* [2018] ZASCA 150; 2019 (1) SA 327 (SCA).

must be a careful balancing act.[6] While there is recognition of the role of equity (encompassing the notions of good faith, fairness and reasonableness), as a factor in assessing the terms and enforcement of a contract, it has been emphasised that a court cannot refuse to enforce contractual provisions on the basis that to do so would be unfair, unreasonable or unduly harsh.[7]

[23] In our present contractual regime, the starting point is that a contracting party is entitled to specific performance of any contractual right. Notions of good faith and fairness have not been elevated to substantive rules of contract. While these values play an important role in our law of contract, they do not provide a free-standing basis on which a court may interfere in contractual relationships. It is only where a term is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[8] This Court has held that to coerce a lessor to conclude a lease agreement with a party it no longer wants as a tenant would be contrary to public policy.[9]

[24] Applying the above principles to the facts of this case, Glowing Rooms voluntarily entered into a commercial lease in 2016. It was renewed in 2019 and, as was successfully argued by Glowing Rooms in the first eviction application, it was renewed yet again. Clause 2.1 featured in all the agreements. At no point did Glowing Rooms object to the inclusion of the clause, on the grounds that it was too onerous or in any manner unfair. It accepted all the clauses of the lease agreement

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[6] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (*Beadica*) para 83, quoting *Barkhuhizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 57.
[7] *Beadica* para 80.
[8] *Ibid* para 79 and 80.
[9] *Rozaar CC v Falls Supermarket CC* [2017] ZASCA 166; [2018] 1 All SA 438 (SCA); 2018 (3) SA 76 (SCA) para 24.

without demur. It was not disputed that the case it advanced in the first eviction application was that the lease agreement should be accepted in all its terms. It is not open to Glowing Rooms now to assert that the exercise of the terms of the lease agreement is contrary to public policy and therefore of no force and effect. Despite Glowing Rooms' averment that the eviction constitutes an unlawful infringement of their constitutional right to 'practice [their] trade and occupation as business persons', this is a purely commercial lease. There is no element of contractual oppression or disproportionate bargaining power. There are no grounds for finding that clause 2.1 is contrary to public policy.

[25] On the aspect of good faith, Glowing Rooms contends that where a lease agreement provides that the lessor has the unilateral right to terminate the lease, this should give rise to a duty to negotiate in good faith. Such a duty, as a bare minimum, should preclude a party from purporting to unilaterally cancel without first presenting a formal written lease agreement for acceptance. Glowing Rooms calls on this Court to develop the common law in this regard.

[26] This, too, is premised on a misconception of the Court's right to develop the common law. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (*Everfresh*),[10] the applicant sought to develop the law of contract in light of s 39(2) of the Constitution, so that the common law would require parties who undertake to negotiate a new rental for a renewed term of the lease to do so in good faith. The majority refused the invitation. It held that only where the common law is deficient are the courts under a general obligation to develop it. The first inquiry is whether the common law viewed in the light of s 39(2) requires development, and if so, the

[10] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

second inquiry is how.[11] Litigants who seek to invoke provisions of s 39(2) must plead their case in the court of first instance. The applicant in *Everfresh* did not plead dire consequences, commercial or otherwise, that might ensue if the lease were not renewed. Nor did it suggest that it had lacked proper legal representation or that it was poorly advised or indeed suffered from any form of vulnerability springing from unequal bargaining power. The Constitutional Court, while acknowledging that where there is a contractual obligation to negotiate, it would be unimaginable that constitutional values would not require that the negotiations be in good faith, drew a distinction where the dispute was of a purely commercial nature. This is to be distinguished from *Carmichele v Minister of Safety and Security* (*Carmichele*),[12] where fundamental rights were at stake.

[27] So, too, this matter, is purely a commercial dispute about commercial premises. No fundamental rights are implicated. Glowing Rooms makes no case that if it loses these premises, it will be unable to find any other, or that these premises are of any special value or importance. Quite the contrary, during negotiations in July 2022, Glowing Rooms' director wrote to the Trust saying: '[w]e are [al]ready in negotiations with various agents/landlords and there is a lot of free space available for a much lower rate at very good locations.'[13] Furthermore, because Glowing Rooms was obliged to 'redo/freshen-up' the mini golf course, 'a move to another premises would solve that problem as well.' This suggests a willingness to relocate. Nothing on the facts of this matter indicates that there is a need to develop the common law. There is no contractual duty to negotiate and any reliance on a general duty to negotiate in good faith is misplaced.

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[11] Ibid para 30 quoting *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*) paras 39-40.
[12] *Carmichele*.
[13] See respondent's heads of argument para 11.

[28] For the above reasons, the appeal must fail. All that remains is whether this Court should use its discretion to extend the date of eviction to enable Glowing Rooms to relocate to new premises. Counsel for the trustees, without conceding, accepted that it would not be unreasonable to grant Glowing Rooms a three months' notice of eviction. Insofar as costs are concerned, the scale of costs in the high court was on the attorney and client scale as governed by the lease agreement. There is no reason to grant attorney and client costs in this appeal.

[29] In the result, the following order is made:

1 The appeal is dismissed with costs, save for the variation of the date of eviction.

2 The order of the high court is substituted with the following:

'1. The respondent, Glowing Rooms (Pty) Ltd, as well as its employees, agents, assigns and any other person/s that may occupy Unit 16 Gallery, Turf Club Drive, Milnerton, Western Cape ("the premises") are to vacate the premises on or before 30 June 2024.

2. Should the respondent, as well as its employees, agents, assigns and any other person/s that occupy the premises vis-á-vis the respondent, fail to vacate the premises voluntarily as set out in paragraph 1 above, the sheriff is authorised to evict the respondent, its employees, agents, assigns and any other person/s that may occupy the premises vis-á-vis the respondent, on 1 July 2024, or as soon thereafter as possible.

3. The respondent is to pay the costs of this application on the scale as between attorney and client.'

C E HEATON NICHOLLS

JUDGE OF APPEAL

Appearances

For the appellant:	H J O (Wallis) Roux
Instructed by:	Brits & Matthee Attorneys, Somerset West
	Brits & Matthee Inc, Bloemfontein
For the respondent:	F S G Sievers SC
Instructed by:	Smith Tabata Buchanan Boyes, Cape Town
	Webber Attorneys Inc, Bloemfontein.