IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 2088/2008

In the matter between

THE PALACE SHAREBLOCK LTD **APPLICANT**

and

LAVENDER MOON TRADING 157CC
T/A THE COPPER CHIMNEY **RESPONDENT**

JUDGMENT

MOKGOHLOA J

1. The applicant brought an application to evict the Respondent from the leased restaurant in the Palace Hotel at 21 Marine Parade, Durban.

Background

2. On 9 November 2006 the Respondent and Inner Anchorage Restaurant CC ("Inner Anchorage") concluded a written agreement in the following terms:

(a) Inner Anchorage let and the Respondent hired certain premises consisting of a restaurant, kitchen and food preparation area at the building known as The Palace Hotel situated at 211 Marine Parade, Durban ("the leased premises"). The lease would commence on 15 December 2006 and terminated on 31 July 2012.

(b) The Respondent would pay rental in the amount of R8 028.94 from the commencement date until 31 December 2006. Thereafter rental would be R14 641.00 per month from 1 January 2007 until 31 July 2007. From 1 August 2007 the monthly rental shall escalate at the rate of 10 % per annum. The Respondent was to pay VAT on these amounts.

(c) Rental shall be paid monthly in advance on or before the first day of each month without deduction or demand and free from bank charges to Inner Anchorage c/o Beare Holdings (Pty) Ltd at 4th Floor FNB House, 151 Musgrave Road, Berea Durban or at such place or other person as Inner Anchorage may advise in writing from time to time.

(d) The Respondent agreed to use the leased premises for the purposes of conducting a restaurant business which would cater for the provisions of breakfast (both in the leased premises and on a room service basis) and a general room service (for food and beverage) for the residential occupants of The Palace Hotel.

(e) The Respondent agreed to keep the leased premises in a clean condition and in good order and repair.

(f) The parties agreed that any payment not made on due date, or any other breach of the agreement, would entitle Inner Anchorage to cancel the agreement.

3. On 15 December 2006 the Respondent took occupation of the leased premises and commenced its restaurant business under the name and style of The Copper Chimney.

4. From 1 September 2007 Inner Anchorage ceded, assigned and delegated all of its rights and obligations in terms of the agreement to The Palace Shareblock Limited, the Applicant herein.

5. The Applicant submitted that the Respondent has breached the agreement in that it has:

(a) Failed to pay the rental due for September 2007 at all. In addition the Respondent has failed to make payment of the October 2007 and November 2007 rentals on due date, rental for October 2007 having been made on 8 November 2007 and the November 2007 rental bond made on 7 November 2007.

(b) Failed and/ or refused to provide a breakfast service and has failed to provide general food and beverage room service to the residents of the Palace Hotel.

(c) Failed to maintain the leased premises in a clean condition.

6. The Respondent denied having been informed of the 1 September 2007 cession referred to in paragraph 4 above. The Respondent argued that on 29 August 2007 a document annexed to the Respondent's Opposing Affidavit marked "A" was delivered at the leased premises. According to the Respondent, it appeared from that document that there was a dispute between Inner Anchorage and an entity referred to as Brikord. That the dispute was resolved and a settlement was reached between

the parties, the success of which was, according to the Respondent, depended on the termination of the lease agreement entered into between the Respondent and Inner Anchorage.

7. The Respondent argued further that the September 2007 rental was paid into Inner Anchorage's bank account on 15 September 2007. According to the Respondent annexure "A" created confusion as it was apparent from the said annexure "A" that Inner Anchorage was no longer going to be the Respondent's landlord. The Respondent started making enquires as to where to pay the September 2007 rentals. During the enquiries the Respondent was given a bank account to deposit the rental but it turned out that it was an incorrect account. Ultimately, the rental for October and November 2007 was paid into the Applicant's banking account on 7 and 8 November 2007.

8. Furthermore, the Respondent argued that the Applicant deliberately created this confusing condition which made it impossible for the Respondent to pay the rental on due dates. According to the Respondent, the Applicant created a situation where the Respondent would be forced to breach its obligations in terms of the lease agreement so that the Applicant would have grounds to evict the Respondent. This, according to the Respondent, is supported by the contents of annexure "A".

9. I believe it is necessary at this stage to refer to the contents of Annexure "A". There are two letters attached to annexure "A". The first is dated 28 August 2007 from Horny, Smyly, Glavovic Inc (the Applicant's attorneys herein) addressed to First Resort (Pty) Ltd for attention Herdley Adams.

The second letter is dated 24 August 2007 from JH Nicolson Stiller & Geshen Attorneys addressed to the Applicant's attorneys. Both letters refer to a Revised Settlement agreement between the Applicant and Brikord.

10. The first letter reads as follows:

> *"Please find enclosed the following:*
>
> 1. *a copy of a letter from Brikord's attorney dated 24 August 2007, setting out the terms of the revised settlement agreement;*
>
> 2. *the original agreement of sub-lease.*
>
> *Please note the following:*
>
> (a) *I am expecting Stuart to sign the letter to confirm The Palace Shareblock Limited's acceptance of the terms of the settlement when he is back in office next Tuesday.*
>
> (b) *You will note that in terms of paragraph 2 of this letter, the sum of R470 000-00 must be paid into our Trust account and will be invested in an interest bearing Trust account pending the eviction of the tenant.*
>
> (c) *Brikord will be invoicing the tenant for July and August's rental.*
>
> (d) *The Palace will be entitled to begin invoicing for rental with effect from 1 September 2007.*
>
> (e) *Apparently, the arrangements with Brikord have been that the tenant pays rental in response to a tax invoice.*
>
> (f) *We will be instituting action against the tenant for its eviction based on various breaches of the sub-lease agreements…."*

11. The contents of the second letter relevant to this application are from paragraphs 4 to 11:

> *"4. The effective date of the Revised Settlement will be 1st September 2007.*
>
> *5. Our clients will:-*
>
> *5.1 pay all rentals due, owing and payable in terms of the Pavement Lease in respect of the period up to 1st September 2007;*
>
> *5.2 claim all rentals due, owing and payable by the Tenants in respect of the Restaurant Lease and the Conference Lease in respect of the period up to 1st September 2007.*
>
> *6. If the rental due, owing and payable by the Tenants in respect of the Restaurant Lease and the Conference Lease for July and August 2007 has not been paid to our client(s) by 31 August 2007, our client(s) will cede their right, title and interest in and to their claims to such rental to your client to enable your client to include, as a ground for the cancellation of the Restaurant Lease referred to in paragraph 7.1 of this letter, the failure by such Tenant to pay such rental on the basis that if such Tenant, your client will, on receipt thereof, pay the proceeds to our client.*
>
> *7. As soon as possible after 1st September 2007, your client will take whatever steps are available to it, as Landlord in respect of the Restaurant Lease:-*
>
> *to cancel such Lease by virtue of one or more breaches thereof committed by the Tenant (Lavender Moon Trading 157 CC); and*
>
> *to institute action in the appropriate Court of jurisdiction against such Tenant claiming:-*
>
> *confirmation of the cancellation of the Restaurant Lease;*
>
> *payment of arrear rentals and damages; the eviction of such Tenant from the premises occupied by it; and*

to make such other arrangements by agreement with the Tenant to your client's satisfaction regarding the Tenant's use and occupation of the premises occupied by it.

8. *The aforesaid litigation proceedings and all matters incidental thereto will be at your client's sole risk and expense.*

9. *The Revised Settlement will be subject to the resolutive condition that in the event that:-*

the Tenant is not lawfully evicted from the premises occupied by it by Court Order; or

the Tenant does not voluntarily vacate such premises; or

your client does not make any other arrangement by agreement with the Tenant concerning its use and occupation of the premises occupied by it which is acceptable to your client;

within a reasonable period after 1st September 2007, having regard to time periods associated with Court processes, the Revised Settlement will be deemed to have failed and will be of no further force or effect.

10. *In the event of :-*

the successful eviction, by Court Order, of the Tenant in respect of the Restaurant Lease from the premises occupied by it; or

such Tenant voluntary vacate such premises; or

your client making any other arrangement by agreement with the Tenant concerning its use ad occupation of the premises occupied by it which is acceptable to your client;

within the reasonable period referred to in paragraph 9 of this letter, the amount being held by you in trust in terms of paragraph 2 of this letter, and the amount being held by us in trust in terms of paragraph 3 of this letter, together with all interest earned thereon, will be paid to our client.

11. In the event of a failure of the Revised Settlement in any of the events referred to in paragraph 9 of this letter:-

the parties will take the necessary steps to restore the status quo ante as far as is reasonably possible;

the amount being held by you in trust referred to in paragraph 2 of this letter, together with all interest earned thereon, shall be refunded to your client, save that if any rentals collected by your client from the Tenants in respect of the Restaurant Lease and the Conference Lease during the period from 1st September 2007 to the date of failure of the Revised Settlement have not been paid to our client pursuant to the restoration of the status quo ante, an amount equivalent to the total of such rentals will be deducted from the trust funds and will be paid to our client;

the amount being held by us in trust referred to in paragraph 3 of this letter, together will all interest earned thereon, will be refunded to our clients;

both parties reserve their respective rights and contentions in respect of the Arbitration proceedings and in respect of the terms and conditions of the settlement of such Arbitration proceedings reached on or about 1st June 2007."

12.1 It is clear from the contents of both letters that there was an agreement entered between the Applicant and Brikord relating to a leased restaurant. These letters were not addressed to the Respondent. How these letters created confusion to the Respondent and subsequently caused the Respondent to pay the rentals late, is not apparent from the papers.

12.2 The Respondent in its papers submitted that it was never informed of the 1 September 2007 rental cession between Inner Anchorage and the Applicant. The Respondent contended that is why the September 2007 rental was paid to Inner Anchorage late. The Respondent did not advance any further explanations or reasons for the late payment. This payment, according to the Respondent, was made on 15 September 2007, after receipt of annexure "A". If the tenant referred to in paragraphs 2 (c), (e) and (f) of the first letter referred to the Respondent, then the Respondent was supposed to continue to pay the rentals to Inner Anchorage until advised in writing of any changes. This is in terms of Clause 5 of the Lease Agreement. How and where the Respondent obtained the banking details of Local Finance is not clear and is not substantiated by any affidavits.

13. The Respondent argued that the Applicant is fabricating breach on the part of the Respondent in order to create a basis to evict the Respondent so as to give effect to a settlement agreement referred to in annexure "A" (the letters). The Respondent and Inner Anchorage have entered into a valid lease agreement the terms of which are clear and unambiguous. The Respondent complied with those terms for eight (8) months. The Applicant never advised the Respondent of any changes as per Clause 5 of the Lease Agreement. I am not able to find any untoward conduct on the part of the Applicant that misled the Respondent into the commission any breach.

14. The next issue is whether the Respondent failed to provide breakfast and general food and beverages room service to the residents of The Palace Hotel. The Respondent denied this and attached to its opposing affidavit receipt and bills that, according to the Respondent, reflect that such services were provided. The Applicant argued that these receipts or bills are fabricated as they do not follow logical

sequence. For example, there are no bills for February 2007 and in other months service was rendered for four or five days only. I cannot, however, find that the Respondent failed to provide the service required. Much of this will depend on whether there were guests in a hotel or not. I have not been addressed on this point.

15. Another issue is whether the Respondent failed to maintain the leased premises in a clean condition. The Respondent argued that the premises are kept clean and that the Municipality Health Inspectors visit and inspect the property monthly and bi-monthly and they have given the Respondent a clean bill of health. Though the Respondent did not put up copies of any inspection reports, I find that the Applicant did not make a case on this issue.

16. The above having been stated, the next question is whether the Respondent's failure to pay its rental on due dates constituted a breach that entitled the Applicant to cancel the agreement. Clause 5 of the Lease Agreement states precisely the amount, the time and place for the payment of rental. Clause 16.1 of the agreement provides as follows:

> *"16.1 If the TENANT fails to pay <u>any rental or other amount due in</u> <u>terms of this sub lease on the due date thereof</u>, or commits a breach of any other provision of this sub lease, the LANDLORD shall be entitled to cancel this sublease, forthwith and to claim all damages which it may suffer arising from such breach."* (My own underlining)

17. The Respondent admitted having committed a breach of the lease agreement by failing to pay rental on due dates. However, the

Respondent argues that the breach was occasioned by the Applicant 's conduct of causing confusion in the mind of the Respondent as to who should receive rental for September 2007 if Inner Anchorage was no longer going to be the landlord. The Respondent argued further that an entity entitled to receive the rental could have demanded same from the Respondent and thereby mitigated any prejudice that the Applicant would suffer. I was referred to a case of ***Die Afrikaanse Pers Bpk v Perestrello and Another 1949 (2) SA 346 (WLD),*** where **Murray J** stated at **p 348** that:

> *"…It can be accepted that a landlord's conduct may in certain circumstances amount to a waiver in advance of his rights to claim forfeiture where subsequent breach occurs, and further that if the landlord has actually misled the tenant into the commission of the breach the landlord will be estopped from claiming forfeiture."*

18. In **Die Afrikaanse** case, the lessees were obliged to pay the rent in advance on the first day of the month, and failure to pay the rent within seven (7) days thereafter entitled the lessor to terminate the lease and eject the lessees. The lessees handed over a cheque for the July rental to the lessor on 1 July. The lessor deposited this cheque into his bank account on 2 July. On 7 July the lessor was advised that the cheque has been dishonoured by non-payment. On 8 July, the lessor, without notifying the lessees of the dishonour, cancelled the lease. The lessees resisted the lessor's application for ejectment on the ground that the lessor failed to notify them that the cheque had been dishonoured and thereby misled the lessees into the commission of the breach. The Court held that, before the lessor could be held to have lost his right to claim forfeiture and to eject, it was necessary to show that he had contributed directly to the mistaken view of the tenant and that the failure to make due payment was attributed to some positive

and active step by the lessor in misleading the lessee. The court found that the lease had been properly cancelled.

19. In **Venter v Venter 1948 (1) SA 1291 (C),** the lessor leased a portion of his farm to the lessee at an annual rental of 150 pounds payable in advance on 31 March each year. The lease provided that, if the rental is not paid on due date, the lessor has a right to cancel the lease and take possession of the land. On 28 March the lessor received a telegram from the lessee advising him that an amount of 150 pounds has been deposited into the lessor's Standard Bank account, Cape Town . This amount represented rental for ending 31 March. On 29 March the lessor's wife, acting on instruction of the lessor, went to Standard Bank three times and again three times on 31 March and, on each occasion, was informed that no money had been deposited to the lessor's credit. On 1 April, the lessor still having not received the rental due, sent a telegram to the lessee advising him that the rent remained unpaid and that he therefore was cancelling the lease. On 10 April the bank informed the lessor that the money was available but it had, in error, been placed to the credit of another customer. On appeal the court held that it was clear from the telegram that the money was deposited but it was not available on 31 March. There being no variation or novation of the time of payment, the rent had not been paid on due date. It was held further that the lessor's failure to advise the lessee that the money was not available did not estop him from relying on default, there being no duty on the lessor to speak.

20. Similarly *in casu*, there was no obligation on the Applicant to demand from the Respondent any payment due. The Respondent's own submission is that it was not advised of the cession between Inner Anchorage and the Applicant. That being the case, it was expected of the Respondent to continue to make its monthly payments to Inner Anchorage as per clause 5 of the lease agreement. Therefore the Respondent's failure to do so constituted a material breach, and the

Applicant was entitled to cancel the lease in terms of clause 16.1 of the lease agreement, which it duly did.

As a result I make the following order:

Application is granted with costs on attorney and client scale

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JUDGE MOKGOHLOA

COUNSEL

Counsel for the Applicant	:	R.A.K. Vahed SC
Instructing Attorneys	:	Horny Smyly Glavovic Inc
		C/o Thorpe & Hands Inc
Counsel for the Respondent	:	N.G. Winfred
Instructing Attorneys	:	D.K. Singh, Vahed & Partners
Date of hearing	:	10 February 2009
Date of Judgment	:	2 September 2009