**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 31693/19**

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

24.03.2020
DATE

SIGNATURE

In the matter between:

**THE RECLAMATION GROUP (PTY) LTD** Applicant

and

**RUSTENBURG CHEMICALS (PTY) LTD** Respondent

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**JUDGMENT**

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**EICHNER-VISSER AJ**

[1] On 19 April 2016 the Applicant, as sub-lessor, and the Respondent, as sub-lessee, concluded a sub-lease agreement ("the original sub-lease agreement").

[2] The material terms of the original sub-lease agreement were, *inter alia* that:

2.1 The Applicant leases the back portion and extent of Erf 2701, Rustenburg Township Extension 4, North West Province ("the premises") from Ringgold Investment 438 (Pty) Ltd ("the Lessor") in terms of a Notarial Deed of Lease executed between the Lessor and the Applicant on the 23rd of January 2013 ("the Principal Lease").

2.2 The Applicant ~~is~~ was agreeable to sub-let the premises to the Respondent.

2.3 The original sub-lease would commence on a commencement date (defined as the first business day after the "closing date", as defined in the sale of shares agreement entered into between the parties) and would, subject to any other provisions relating to termination and/or cancellation contained or contemplated therein, or in the Principle Lease, continue for a definite period of three years from the commencement date ("the initial period").

2.4 The Respondent would have an option to renew the sub-lease for a further period of two years from termination of the initial period.

2.5 The Respondent would exercise the option, by written notice to the Applicant, not less than three calendar months prior to the termination of the initial period, failing which the option would lapse.

[3] On the same day, being the 19th of April 2016, and at Johannesburg, the Applicant and the Respondent concluded a written sale of shares agreement ("the Sale of Shares Agreement"). The material terms of the Sale of Shares Agreement which are relevant, are, *inter alia*, as follows:

3.1 It was recorded that the lease agreement in respect of a portion of the premises from which the Respondent operates its business, is leased by the Landlord to the Applicant.

3.2 The Applicant wished to sell "the transaction shares" comprising 78 shares in the issued capital of the Respondent to Mr David Jacobus du Toit ("Du Toit") who wished to purchase same.

3.3 The purchase price of the transaction shares was ~~is~~ the sum of R3 000 000.00 less the sum of R500 000.00 owed by the Applicant to Du Toit. The aggregate purchase price of R2 500 000.00 for the transaction shares would be payable into the nominated bank account of Applicant in cash via electronic bank transfer as follows:

3.3.1 R1 500 000.00 within 14 (fourteen) calendar days of the signature date of the sale of shares agreement;

3.3.2 R500 000.00 on or before the 25th of May 2016;

3.3.3 R250 000.00 on or before the 25th of June 2016; and

3.3.4 R250 000.00 on or before the 25th of July 2016.

3.4 The "Closing date" was ~~is~~ defined as a date not later than one business day working from the date that the purchaser (Du Toit) would ~~shall~~ have effected payment of the full purchase price to the seller, the Applicant, as contemplated in clause 8.2 of the said agreement.

[4] The "Commencement date" in terms of the sub-lease agreement was ~~is~~ defined as "the 1st (first) business day after the closing date" as defined in the sale of shares agreement.

[5] If the definition of the "commencement date" in the sub-lease agreement is read with the definition of the "closing date" of the sale of shares agreement, with the Respondent having effected actual payment of the full aggregate purchase price in the sum of R2.5 million for the transaction shares in the Sale of Shares Agreement to the Applicant on 21 April 2016, from a simple determination, the sub-lease commenced on the 22nd of April 2016, being the first business day after the closing date, as defined in the Sale of Shares Agreement.

[6] From the above, one can only conclude that the original lease agreement came to an end three years later and on the 21st of April 2019.

[7] Mr Ferreira, who acted on behalf of the Respondent, argued that when regard is had to clause 8 of the Sale of Shares Agreement, the last date upon which the final payment was to be made by Du Toit, was the 25th of July 2016 and therefore the commencement date of the sub-lease was the 26th of July 2016, therefore concluding that the initial period terminated on the 25th of July 2019.

[8] This argument cannot hold water as it is common cause that Du Toit could have paid for the shares on or before (*my emphasis*) the date stipulated in the Sale of Shares Agreement, which, in fact, was the case. The trigger date is the date of actual payment of the purchase price and not the date on which the Respondent could have paid the final payment of the purchase price.

[9] It is therefore clear that the commencement date was the 22nd of April 2016 and the initial period of the sub-lease terminated on the 21st of April 2019.

[10] If the Respondent wished to exercise the option to renew the sub-lease as referred to in clause 3.5 of the original sub-lease agreement, it would have had, in terms of clause 3.6 thereof, to exercise such option in writing 3 (three) calendar months prior to the termination of the initial period, failing which the option would lapse.

[11] Given my determination that the termination date of the sub-lease agreement was the 21st April 2019, by simple calculation, the Respondent would have had to exercise its option to renew the sub-lease agreement before the 1st January 2019, being 3 (three) calendar months prior to the termination date of the sub-lease agreement.

[12] It is pertinent to note that the Respondent, in its email to the Applicant on the 15th October 2018, by its own admission, was also of the view that the date to exercise the option was "around January 2019".

[13] Argument for the Respondent was that should the option be exercised, same would have had to be done by 1st of April 2019. Given my aforementioned determination, this version is not accepted by the Court.

[14] The argument on behalf of the Respondent was that the option was first exercised in an e-mail dated 15 October 2018. Then, again, in a letter dated 28 January 2019 and once again, in a letter dated 24 April 2019.

[15] When one considers that the last day upon which the option could have been exercised was on or before the 1st of January 2019, the only possible notice was the e-mail dated the 15th of October 2018. The correspondence on the 28th of January 2019

and the letter dated the 24th of April 2019 will therefore, for the purpose of this analysis, not be dealt with.

[16] Reference is made to clause 3.7 of the sub-lease agreement which states that "the option period shall, subject to clause 5 (*dealing with the monthly rental payable by the Respondent*), be on the same terms as set out in this lease (*the original sub-lease agreement*), save that there shall be no further option to renew" (*my emphasis*). My interpretation of this clause is that, save for the determination of the rent in terms of clause 5 for the renewal period, all other terms of the sub-lease agreement, inclusive of the renewal period (being two years in terms clause 3.5), would have had to be the same.

[17] When one analyses the e-mail of 18 October 2018, it is clear that that the Respondent, by seeking to enter into a new lease agreement for a further period of six years, is introducing a new term to the lease and is not exercising the option referred to in the sub-lease agreement.

[18] The Court does not find that this e-mail amounts to the exercise of the option. As such, the sub-lease ended on the 21st of April 2019.

[19] Reference was made to *Kahn v Raatz* 1976 (4) SA 543 (A) at 547 B – H which stated:

> *"When the lessee elects to exercise his option, his intention to do so must be timeously expressed and conveyed to the lessor clearly and unequivocally, i.e. positively and unambiguously, since the exercise of the option is tantamount of the acceptance of the lessee of the lessor's standing offer to renew the lease.*
>
> *Where the alleged exercise of the option of renewal is wholly or exclusively contained in a unilateral writing* (as in the present case) *the actual but uncommunicated intention of the lease is irrelevant. It is the intention as expressed in the written notification that must be regarded. Hence its language must be construed in conjunction with the lease itself, in order to determine how a reasonable person in the position of a lessor to whom it is addressed and by whom it is received would understand it and so construed, it conveyed clearly,*

*unequivocally, and unambiguously that the lessee thereby intends to and does exercise the option ..."*

[20] Clearly, in this case, the exercise of the option was not done timeously, and certainly the e-mail of 18 October 2018, refers to a new lease with different terms. As such, the Court does not accept this e-mail as an exercise of the option.

[21] The Respondent raises several other defences. The Respondent alleges that in the event that it is found that the exercise of the option was not done timeously then a tacit month to month lease came into effect by virtue of the Applicant having issued invoices for the months of August and September 2019 and accepted monthly payments in respect thereof.

[22] I respectfully disagree with this contention. The tacit month to month sub-lease came into existence by virtue of the Respondent's continued occupation of the premises after the original sub-lease expired [i.e. 21st April 2019] and the Applicant allowing the Respondent to so occupy the premises. However, the Applicant's letter to the Respondent dated 21st May 2019 sets out the terms and conditions upon which it would agree to a new sub-lease with the Respondent failing which the Respondent would be was required to vacate the premises on or before the 31st July 2019. In effect, the Applicant gave the Respondent reasonable notice in terms of the tacit month to month sub-lease to vacate the premises by the 31st July 2019 if the terms of the new sub-lease as contained in its letter to the Respondent dated 21st May 2019 were not acceptable to it.

[23] The Applicant, in error, subsequently issued invoices for the months of August and September 2019 in terms of which the Respondent was requested to pay the rental in accordance with the expired original sub-lease agreement. With full knowledge of the terms upon which the Applicant was prepared to contract with them, the Respondent

nevertheless paid the invoiced amounts and remained in unlawful occupation subsequent to the 31st July 2019. The Applicant, having realised its mistake, addressed correspondence to the Respondent on the 13th September 2019 and 10th October 2019 advising the Respondent of the error in their accounts department and that there was no new sub-lease agreement in existence. The Applicant tendered refund of the amounts so paid by the Respondent. It is noteworthy that the Respondent fails to mention these two letters in its Answering affidavit, notwithstanding that these letters were sent before the answering affidavit was deposed to on the 29th of October 2019.

[24] The Respondent, by receiving the Applicant's invoices subsequent to the 31st July 2019, was possibly under the mistaken belief that the tacit month-to-month sub-lease that was created subsequent to the 21st April 2019 remained in existence after the 31st July 2019.

[25] It is a basic principle of contractual law that there has to be consensus between the parties to an agreement it. Often, one or more of the parties think that they are in agreement and have reached consensus, but in fact are mistaken. Mistakes can be classified into two categories, namely those that are material and those that are non-material. A material mistake is one which goes to the heart of the contract and completely negates consensus. Consequently, no contract can be said to have existed. It will be impossible to try and uphold the terms of an agreement which is rendered of no force or effect due to a material mistake.

[26] Applying this principle to the case *in situ*, there is no doubt in the Court's mind that there was no consensus between the Applicant and the Respondent and that no new sub-lease came into existence subsequent to the 31st July 2019.

[27] The next defence by the Respondent was that a month to month lease cannot be terminated in the absence of a breach by the Respondent. This defence is unmeritorious, because written notice of termination of the month to month lease was given. It is trite that in regard to a monthly lease, a notice of termination of a minimum of one month needs to be given (which is what occurred *in casu*).

[28] The fifth defence raised by the Respondent, is that the Applicant cannot evict the Respondent, because the Respondent is currently exercising an enrichment lien over the property. This defence is, likewise, unmeritorious, because the Respondent fails to make out a case in support of his contention that it has an enrichment lien over the property. In particular, the Respondent has failed to make any averments in regard to any enhancement in the value of the property, useful expenses and enrichment.

[29] The Court is in agreement with the conclusion reached by the Applicant that the defences raised by the Respondent are "so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers

[30] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) it was stated in paragraph 12 as follows:

> *"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."*

[31] In *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the following was held:

> *"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous*

*respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."*

[32] The defences raised by the Respondent are unmeritorious and clearly fabricated. They are so far-fetched that Respondent's version cannot be believed and the Applicant's version has to prevail.

[33] By reason of the aforementioned, I grant the following order:

1. The Respondent, and all those persons who occupy by through or under the Respondent or with its authority, must vacate the premises situated at Erf 2701, Rustenburg Township, Extension 4, North West Province, situate at 92 Heever Street, Industria Suites, Rustenburg, on or before the 30th day of June 2020.

2. In the event that the Respondent and all those persons who occupy by through or under the Respondent or with its authority, fail to vacate the aforesaid premises by 30 June 2020, the Sheriff of the above Honourable Court is authorised to carry out the eviction order and evict the Respondent and all such persons on or after the 1st day of July 2020.

3. The Respondent is to pay the costs of this application.

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**T EICHNER-VISSER**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| INSTRUCTED BY: | IAN LEVITT ATTORNEYS |
| COUNSEL FOR THE RESPONDENT: | ADV. E. FERREIRA |
| INSTRUCTED BY: | BOUWER CARDONA INC. |
| DATE OF HEARING: | 4 MARCH 2020 |
| DATE OF JUDGMENT: | |