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

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

SIGNATURE DATE: **7 October 2021**

Case No: 26568 / 2018

In the matter between:

ALLAN DAVID PELLOW NO	Plaintiff
and	
IMPROVON PROPERTY FUND 2 (PTY) LTD	First Defendant
ACUCAP INVESTMENTS (PTY) LTD	Second Defendant
CAPITAL PROPFUND (PTY) LTD	Third Defendant

JUDGMENT

WILSON AJ:

1 The plaintiff ("Mr. Pellow") is the liquidator of Angel Lifestyle (Pty) Ltd ("Angel"), a company in liquidation. The defendants are Angel's erstwhile landlords. They leased to Angel the business premises at ERF 1944 Kosmosdal Extension 7 ("the property"). The first defendant ("Improvon") entered into the

lease with Angel on its own behalf, and as the agent of the second and third defendants.

2 Clause 8.3 of the lease required that Angel pay Improvon rent and other charges due under the lease monthly in advance on the first day of every calendar month. As security for the performance of its obligations under the lease, and for any damage beyond fair wear and tear that might be done to the property during Angel's occupation, Angel provided to Improvon a bank guarantee to the value of R1 516 860-00 ("the bank guarantee"). The guarantee was held at Standard Bank and could, in terms of clause 6.2 of the lease, be drawn upon to defray unpaid rent or other charges due under the lease; any "reinstatement works" necessary as a result of Angel's occupation; and, importantly for this case, "any other liability" for which Angel was responsible under the lease.

3 The lease commenced on 1 September 2012. On 8 April 2015, Angel went into liquidation, having neglected to pay the amounts due on 1 April 2015. The amount due on 1 April 2015 was R225 906-49. On 2 April 2015, Improvon cancelled the lease and drew down the full amount of the bank guarantee.

4 The question in the main claim, brought by Mr. Pellow, is whether Improvon was entitled to do this, or whether it was limited to drawing down only the amounts that were left unpaid by Angel on 1 April 2015. If Improvon was entitled to draw down the full amount of the guarantee, the main claim fails. If Improvon was only entitled to draw down the amount Angel was actually in default of its obligations, then the difference between this amount and the full value of the bank guarantee – R1 290 953-51 – ought to have fallen into the

insolvent estate, and is due to Mr. Pellow in his capacity as liquidator of that estate. The main claim is for payment of that amount.

5 After Angel went into liquidation, Mr. Pellow entered into a new lease agreement with Improvon, which was backdated to commence on 3 April 2015. The purpose of the agreement was to preserve and store various assets of Angel which remained at the property. The agreement was partly written and partly oral. Improvon contends that the agreement was that Mr. Pellow would pay rent in the sum of R200 000 per month plus VAT. Mr. Pellow states that the agreement was, in fact, that Improvon would be paid R200 000 per month including VAT. Improvon counterclaims for the amount due in terms of the new lease agreement it contends for.

6 Although evidence was led, and witnesses for both parties were cross-examined, the facts are really common cause. Cross-examination consisted, in the main, of each party putting their legal position to the other. This was unfortunate. Cross-examination is about facts, not legal conclusions. The point is to test a witness' account of the facts in light of the circumstances of the case as a whole, and the factual version advanced by the cross-examining party. Since the parties' contentions in this case are all about the interpretation of the two lease agreements in light of the applicable law, they would have been better advised to proceed by way of a stated case, or on motion. Had that been done, the essential disputes between the parties would have emerged sooner, and the matter could have been disposed of in less than one court day, instead of the three days that it eventually took up.

7 I say this to emphasise the need for more effective trial preparation and case management. I suspect that the parties were keen to play their cards so close to their chests that the real issues emerged only at the last possible moment – to the detriment of the court, and ultimately to no real advantage to either party. Legal representatives who are responsible for preparing a matter for trial ought to recognise that there is a balance to be struck between whatever tactical considerations that may weigh on them, and the need to identify the true ambit of the dispute between the parties as early as possible. In this case, it seems to me that balance could have been better struck than it was.

The main claim

8 The bank guarantee was for the payment of a deposit. It is in the nature of a deposit that the deposit amount is not due to the landlord unless and until the right to draw on it is triggered by some event defined in the lease itself. This is usually, but need not be, the failure of the tenant to meet their payment obligations under the lease.

9 The question in this case is whether, when and to what extent Improvon's right to draw down the lease was triggered. There is no genuine dispute that Improvon was entitled to draw down at least the amounts on which Angel had defaulted on 1 April 2015.

10 But what, if anything, triggered its right to draw on the bank guarantee beyond that? Ms. Daniels, who appeared for the defendants, submitted that the relevant triggering event was Improvon's cancellation of the lease on 2 April 2015. At that point, Ms. Daniels submitted, Improvon suffered damages at the very least in the amount of rent that would have been due for the remainder

of the lease term. This amount was substantially more than the value of the bank guarantee, and it fell due at the point of cancellation. Given that the lease entitles Improvon to apply the guarantee to "any" liability arising under the lease, Improvon was entitled to the full value of the guarantee at the point that it drew that amount down. Ms. Daniels also drew attention to clause 18.3 of the lease, which allows Improvon to "appropriate any other amounts received from the Lessee towards the payment of any cause debt or amount owing by the Lessee". There was some debate in argument about whether the deposit was truly an "amount received" by Improvon, but that does not seem to me to matter. Whether in terms of clause 6.2 or 18.3, a debt due under the lease is a debt to which the deposit can be applied. The question is really what was due on 2 April 2015.

11 In support of the proposition that it was not only the arrear rentals and other charges, but all of Improvon's contractual damages that fell due on 2 April 2015, Ms. Daniels relied on the decision of the Supreme Court of Appeal in *Monyetla Property Holdings (Pty) Ltd v IMM Graduate School of Marketing (Pty) Ltd* 2017 (2) SA 42 (SCA) ("Monyetla"). There, the Supreme Court of Appeal had to decide when a claim for damages on a lease prescribed. That, in turn, rendered it necessary to decide when those damages had fallen due.

12 Leach JA, writing for a unanimous court, held that the damages due to a landlord on the cancellation of a lease fall due on the date of cancellation. Those damages are generally the amount that would have been collected had the lessee performed their obligations for the remainder of the lease term, less

whatever amounts the landlord receives in mitigation of the loss (see paragraphs 16 to 17 and 19 to 21).

13 It follows from this that, in this case, Improvon sustained its damages – being the amounts payable for the remainder of the lease term – on 2 April 2015. The damages were due and payable on cancellation, and were clearly a "liability" arising under the lease. When it drew down the full amount of the guarantee, Improvon was effectively mitigating its losses, which is the very purpose of a rental deposit and is perfectly consistent with the terms of the lease.

14 Given that there is no meaningful basis on which this case can be distinguished from *Monyetla*, and that the *Moyetla* decision is otherwise binding on me, it follows that the main claim must fail. Improvon was entitled to cancel the lease and draw down the full value of the bank guarantee when it did.

The counterclaim

15 There is no dispute that R200 000 per month in rent is due to Improvon in terms of the agreement it reached with Mr. Pellow. The only dispute is whether the amount due is inclusive or exclusive of Value Added Tax.

16 Improvon's lease with Angel charged rent, services and other amounts due under the lease separately from the Value Added Tax due on them. Both parties, however, accepted that Mr. Pellow's lease with Improvon was separate and distinct from Angel's lease with Improvon. Critically, Mr. Pellow

did not simply step into Angel's shoes and agree to discharge its obligations. An entirely new lease was entered into.

17 Ms. Daniels submitted that there was a tacit term, or at the very least an implied term, in the new lease, to the effect that rent would exclude Value Added Tax. The first problem with this submission is that no tacit term was formulated and pleaded in the counterclaim, and no evidence was led on the nature of the tacit term. There was no exploration, in evidence or argument, of the well-known tests to be applied in ascertaining whether a tacit term exists. Given that the defendants bear the onus to prove the tacit term they contend for (see *Wilkins v Voges NO* 1994 (3) SA 130 (A) at 136H to 137B), I do not think that I can find, in these circumstances, that such a term ever came into existence.

18 The second problem with Ms. Daniels' submission is that the implied term contended for in the alternative conflicts with existing law. As Ms. Kabelo, who appeared for Mr. Pellow, pointed out, section 64 of the Value Added Tax Act 89 of 1991 ("the VAT Act") deems any price charged for a taxable good or service to include the tax, whether or not the vendor explicitly separates out the Value Added Tax portion. The effect of this is that all prices for taxable goods and services include Value Added Tax unless the parties specifically agree to separate out the Value Added Tax portion from the rest of the price.

19 It is in the nature of an implied term that it binds the parties to a contract as a matter of law or public policy. It follows that there can be no term implied in a contract that contradicts existing law. But that is the nature of the term for

which Improvon contends. The implied term advanced assumes that section 64 of the VAT Act says the opposite of what it actually provides.

20 In these circumstances, Improvon's claim for rent exclusive of Value Added Tax must fail. However, its claim for rent *simpliciter* must succeed. It was conceded on Mr. Pellow's behalf that the value of this claim is R715 680-00.

Order

21 The defendants have been substantially successful, both in defending the main claim and in advancing their counterclaim. The defendants are, accordingly, entitled to their costs.

22 For all of these reasons, I make the following order –

1. The plaintiff's claim is dismissed.

2. The defendants' counterclaim succeeds to the extent that the plaintiff is directed to pay the defendants R715 680-00, plus interest at 10% per annum *a tempore morae* to date of final payment.

3. The plaintiff is directed to pay the defendants' costs in the main claim and in the counterclaim.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 7 October 2021.

HEARD ON: 24 and 26 August 2021

DECIDED ON: 7 October 2021

For the Plaintiff:	S Kabelo Instructed by KWA Attorneys
For the Defendants:	N Daniels Instructed by Shaban Clark Coetzee Attorneys