REPUBLIC OF SOUTH AFRICA

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

CASE NO: 43745/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED YES

26 April 2022
Date **Signature**

In the matter between:

VLP PROPERTY CC **Applicant**
(REGISTRATION NUMBER 2007/250462/23

and

MARTJOHN TRADING CC **Respondent**
(REGISTRATION NUMBER 2009/097424/23)

Heard: 25 January 2022
Judgment: 26 April 2022

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This is an application for the eviction of the respondent. Given that this is a commercial eviction, no issues pertaining to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 and Extension of Security of Tenure Act, 1997 arise. The respondent has counter-applied for a stay of the eviction application pending the final resolution of an action launched by it under case number 55641/2020 ("**the action**") and an interdict against eviction in the interim.

2. The dispute centres on whether the respondent still retains any legal right to remain in occupation of shops 20, 21 and 23 at the Elsburg Shopping Centre ("**the premises**"). The premises presently house a Spar and a Spar Tops. According to the applicant, any right of occupation terminated on the date that the lease agreements and addenda concluded between the applicant and the respondent terminated on 30 June 2019. The respondent on the other hand, avers that a new lease agreement in respect of the premises was concluded between it and the applicant on or about 17 January 2020, with a lease term of five years.

3. It is a settled principle of law that an eviction application at the instance of a landlord cannot succeed if the respondent can establish a right of occupation. In evaluating the evidence in this matter, being an application for final relief, I am also bound to apply the well-known *Plascon Evans* principle and its progeny. The upshot of that principle is that an application for final relief is adjudicated on the basis of the respondent's factual version, together with such facts set forth in the applicant's papers as the respondent does not substantively deny, unless there are exceptional circumstances where the Court can reject the respondent's version as far-fetched,

clearly untenable or palpably implausible simply on the papers.[1] The circumstances in which a Court will look behind a respondent's factual version will be rare.[2]

4. The *Plascon Evans* principle does not, however, apply to disputes of a legal character, or disputes about legal conclusions or inferences to be drawn from common cause facts. The province of the principle are genuine disputes in relation to material facts.

5. The above principles form the backdrop to the analysis below. But first the key factual background.

The facts

6. It is common ground that the respondent has occupied the premises since 1 July 2009. Until 30 June 2019, it did so in terms of five-year fixed term lease agreements, renewed for a further five-year period (collectively, "**the original lease agreements**"). What, if anything, governs the period subsequent to 30 June 2019 is the subject matter of the dispute in these proceedings.

7. On 3 April 2019, the respondent indicated that it would prepare a new lease agreement for consideration of the applicant. 30 June 2019 came and went without any further progress being made on a replacement lease. It appears that negotiations took place between the parties in the second half of 2019 to try to reach agreement on a new lease. In the meantime, the respondent remained in occupation of the premises on a month-to-month lease basis. In the latter half of 2019, the applicant also attempted to sell the premises, but that sale fell through by November 2019. It is

[1] *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), 634 0 5; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para [26].

[2] *National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA), paras [21] and [22].

unclear from the record with what frequency or intensity the applicant and the respondent were engaging on the terms of any new lease.

8. On 17 December 2019, the applicant's attorneys wrote to the respondent's attorneys indicating that the applicant was no longer willing to negotiate the terms for the renewal of the lease in respect of the premises and the draft new agreement of lease circulated earlier by the applicant ("**the draft new lease**") had to be signed by 20 December 2019, failing which the lease would continue on a month-to-month basis on the same terms and conditions as in the original lease agreements.

9. The respondent's attorneys only responded on 23 January 2020. They attached the draft new lease, signed by the respondent on 17 January 2020 ("**the amended lease**"), but with numerous amendments being effected to the terms of the draft new lease. The amendments were described by the respondent as "minor". The letter of 23 January 2020 requested the applicant to peruse and consider the update draft and, "*if fully acceptable*" to sign it.

10. The applicant's attorneys responded on 6 February 2020 ("**the 6 February 2020 letter**"), stating that the applicant had identified a new tenant and that if the respondent wanted to remain in occupation of the premises, it was required to match the terms agreed with the new tenant ("**the new tenant's lease**"). On 10 February 2020, the respondent requested from the applicant a copy of the new tenant's lease as this was not attached to the letter of 6 February 2020. There seemed to be some confusion in the correspondence about whether the new tenant's lease was sent to the respondent prior to Monday, 10 February 2020. The applicant's letting agent was under the impression that it had been. In this context, the letting agent stated in an email to the respondent later on 10 February 2020 that "*I spoke to Rowan Terry [the applicant's*

attorney] on Friday [7 February 2020] and he confirmed, that everything was in order please check with your attorneys as well" ("**the 10 February 2020 email**").

11. This statement was made in the context of (and as part of an email chain relating to) the respondent's request for a copy of the new tenant's lease. The 10 February 2020 email was plainly simply a recordal that, as intimated earlier in the chain, the lease was already circulated between the attorneys and "*everything was in order*" in that regard. The deponent to the answering papers suggests that the respondent understood the above email (which incidentally did not even contain any salutations or closing and could not have been framed more informally) to mean that the amended lease had been accepted. This alleged understanding is based simply on the wording of the email. It is not alleged that any such meaning was communicated in another way to the respondent. In this regard, there is no factual dispute, but simply a matter of interpretation of the email, which is a question of law for the court.[3]

12. There is no basis for the respondent's self-serving characterisation of the 10 February 2020 email. It was patently not an acceptance of the amended lease by the applicant. The email chain did not relate to the amended lease. Not only does the 10 February 2020 email not convey what the respondent contends, but the email was sent in the context of a discussion on procedural issues regarding receipt of the new tenant's lease, which the applicant already said the respondent was required to match if it wanted to remain in occupation of the premises. This is also borne out by an email from the letting agent to Mr Terry on 7 February 2020 (annexed to the replying affidavit) – which is prefaced in the 10 February 2020 email – which clearly addresses the issue of the new tenant's lease and its alleged non-transmission to the respondent,

[3] *KPMG Chartered Accountants (SA) v Securefin Limited* 2009 (4) SA 399 (SCA), para [39]

and the subsequent email also on 7 February 2020 from Mr Terry to Mr Leisher, the respondent's attorney, attaching the new tenant's lease.

13. Moreover, to the extent that the amended lease required acceptance as a counter-offer (a topic to which I return below), it has already been formally rejected in the 6 February 2020 letter from the applicant's attorneys, so there is no basis on which it could or would have been accepted in the 10 February 2020 email.

14. Finally, it is pertinent that the 10 February 2020 email emanated from the letting agent, not the applicant's attorneys. But by that stage, the applicant's attorneys had taken over the substantive communication on behalf of the applicant and any formal and weighty subject such as acceptance of a legal agreement would be expected to emanate from the attorneys.

15. On 11 February 2020, the respondent's attorneys addressed a further letter to the applicant's attorneys headed "*without prejudice*", stating that the original lease agreements were in fact renewed in January 2019 ("**the alleged 2019 renewal**"). Confusingly, they then also stated that the amended lease was an acceptance of the draft new lease (which was on different terms to the original lease agreements which would have formed the basis of the alleged 2019 renewal) and an agreement thus arose as a result. Finally, to add to the lack of clarity, and despite the above two separate and mutually exclusive bases for lawful occupation, the respondent's attorneys also "*urge[d] [the applicant's attorneys to impress on [the applicant] to continue to negotiate with [the respondent] in good faith and to finalise this matter on a fair and reasonable basis whereafter [the respondent] will then sign another Agreement of Lease with [the applicant].*"

16. Another six months passed with no significant development except the continued occupation of the premises by the respondent, before the applicant's attorneys responded to the 11 February 2020 letter. In the letter of 31 August 2020, the applicant denied the alleged renewal and the alleged acceptance of the draft new lease and sought to terminate the month-to-month lease agreement on three calendar months' notice.

17. On or about 22 October 2020, the respondent launched the action claiming declaratory relief to the effect that the period of the original lease agreements was extended by virtue of the alleged extension. No allegation was made in those pleadings about the amended lease being an acceptance of the draft new lease. That allegation and relief were only added later, after an amendment to the pleadings in the action following the delivery of the applicant's replying affidavit, *jurat* 8 March 2021.

18. The current liquidation application was instituted on or about 14 December 2020.

Analysis

19. The respondent contends that there are material disputes of fact in this application which cannot be resolved on the papers and that the application should in any event be pended (in terms of the *lis pendens* principle) until the finalisation of the action.

20. I do not agree. As is plain from the above, no material facts are actually in dispute: what is disputed are the legal conclusions and inferences to be drawn from those facts. There is thus no contested evidence which a trial court need elicit or conflict of versions which it need resolve. But even if I were wrong, and the respondent's inferences in respect of the 10 February 2020 email may be classed as "*facts*", I have indicated above why I consider the respondent's version pertaining to that email

clearly untenable, palpably implausible and far-fetched. This is one of the instances in which a robust, common-sense approach is indeed warranted.[4]

21. In my view, the *lis pendens* point also does not arise. Given that the cause of action pertaining to the amended lease only arose in the action in March 2021, the relevant dispute in the action only arose at that time, which was several months after the time that the current application was launched. Conversely, the cause of action based on the alleged renewal is not advanced as a basis to resist the eviction sought in this application. As such, the dispute relevant to the current application was not "*started to be mooted before another judge between the same persons, about the same matter and on the same cause*" as at 14 December 2020.[5] As the application was first in time in that sense, *lis pendens* can only apply as a defence in the (later) action, but not in the (earlier) application.

22. Moreover, *lis pendens* is not an automatic defence. The Court retains a discretion to refuse the plea even where the requisites are met. It is plain that in a case such as the present, the discretion should be exercised in favour of the application proceeding. There are no material disputes of fact that cannot be resolved on the papers; the action is thus unnecessary and will cause an unwarranted delay (even if this was not the intention of the respondent); and the subject-matter of the application is an eviction – a dispute which should, if possible, be disposed of relatively expeditiously. This is particularly so when the alleged new lease only has under three years to run and the eviction application was launched over a year ago. Deferring a decision to the action

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[4] *Soffiantini v Mould* 1956 (4) SA 150 (E), 154.

[5] *Caesarstone Sdot - Yam Ltd v The World of Marble and Granite* 2013 (6) SA 499 (SCA), para [3].

would be kicking this dispute into the long grass and possibly thwarting the grant of an effective remedy to the applicant.

23. As such, the *lis pendens* plea must fail.

24. What remains to be considered are the merits of the respondent's defence in the application. I have already found above that the 10 February 2020 email does not constitute a basis on which a new lease agreement may be founded. The only material question at this point is whether the amended lease constituted an acceptance of the draft new lease.

25. In this regard, I have doubts as to whether the draft new lease constituted an offer capable of acceptance by its mere signature by the respondent. The draft new lease remained unsigned by the applicant as landlord. The landlord's signature appears to be a prerequisite for the coming into force of the lease. Clause 51.3 of the new draft lease expressly stated that the lease only becomes binding on the applicant when it executes (including signs) that document. No case had been brought on the basis of fictional fulfilment of any condition of signature.[6]

26. But even if the draft new lease constituted an offer, it is clear that the offer was not accepted by the respondent.

27. The respondent avers that its amendments, as set forth in the amended lease, were minor and did not render the amended lease a counter-offer. I disagree. Acceptance of an offer must be clear and unequivocal, and must correspond to the offer.[7] The respondent effected more than a dozen material changes to the draft new lease. In this regard, I note that I consider all of the changes below to be objectively material,

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[6] *Du Plessis NO v Goldco Motor and Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA).

[7] *Boerne v Harris* 1949 (1) SA 793 (A), 799-800.

but I also do not think that it lies in the mouth of the respondent as a contractual counter-party to parse through a draft agreement provided by the applicant to pick out what the respondent considers material. Clearly, all the terms sent to the respondent must, as a starting point, be considered to be material to its author, being the applicant, unless they are plainly inapplicable. Provisions which may be irrelevant to the respondent could be of importance to the applicant. The deletion of any of them will generally require the assent of the applicant; otherwise, there is no consensus, which is the bedrock of every contract.

28. The changes included the following:

28.1 the respondent deleted the requirement of two months' deposit by it;

28.2 the respondent changed the rate of escalation of the rental after termination of the draft new lease from 20% to 8%;

28.3 the respondent deleted certain provisions concerning its liability for electricity charges;

28.4 the respondent excised any provision for a deposit in respect of electricity charges;

28.5 the respondent deleted the clause dealing with the splitting of charges pertaining to security and other services;

28.6 the respondent deleted the provision which required it to seek approval from the applicant of any contractors or subcontractors who would be doing work on the premises;

28.7 provisions which dealt with insurance of the premises were changed;

28.8 the respondent deleted the provision allowing the applicant to extend or change the premises without the respondent's consent;

28.9 the respondent excised the provision dealing with replacement costs of bins or containers;

28.10 the respondent excluded a clause which would render it liable for air-conditioning maintenance;

28.11 the respondent excised the provision encapsulating the parties' consent to High Court proceedings being instituted by the applicant in certain circumstances;

28.12 provisions concerning a suretyship were also deleted;

28.13 the provisions relating to the manner in which the draft new lease may come into force were deleted; and

28.14 the respondent deleted the applicant's right of cancellation of the draft new lease and removal of goods from the premises upon breach by the respondent.

29. In the above circumstances, I think it is plain that the amended lease was, at best, a counter-offer. That counter-offer was rejected in the 6 February 2020 letter and was at no point accepted. In any event, the respondent does not rely on any acceptance of amended lease by the respondent after its signature on 17 January 2020, other than, possibly, the reference to the 10 February 2020 email, which I have already found takes the matter no further.

30. The respondent thus has no defence to the eviction and an order for eviction falls to be granted. The respondent took no issue with the reasonableness of the period afforded to it to vacate: three calendar months. That period is now long passed, and

eviction must come into force without any undue delay. While I appreciate that a hasty termination now could cause dislocation for the respondent, this position is of its own making. I shall, however, afford the respondent one calendar month to vacate, such that the eviction will become effective on 31 May 2022. The date of vacation does not in any way affect any claims for holding over and the like which the applicant may wish to pursue against the respondent.

31. In light of the above conclusions, there is no room for any interdictory relief sought by the respondent in the counter-application.

32. The order must be tailored and narrowed to refer specifically to eviction of the respondent and persons who occupy the premises *through or under the respondent* and not simply any occupants of the premises, given that these proceedings only concerned occupation by the respondent. I, of course, make no finding as to whether any occupants of the premises other than those who occupy the premises through or under the respondent in fact exist.

Costs

33. I do not see any reason why costs should not follow the result in both the application and the counter-application. While the applicant prayed for a punitive costs order, I do not think there is a basis on the facts for such an order. While the respondent's opposition was in several respects misguided, I cannot find that the respondent's position is *mala fide* or vexatious.

Order

34. I thus make the following order:

34.1 the counter-application is dismissed with costs;

34.2 the respondent and all those who occupy Shops 20, 21 and 23, Elsburg Shopping Centre, 6 Voortrekker Street, Elsburg, Johannesburg ("**the entire premises**") through or under the respondent (collectively, "**the respondent and occupants**") are:

34.2.1 ejected from the entire premises;

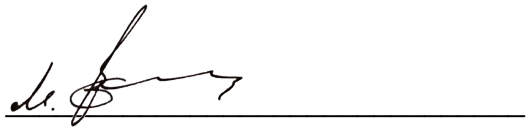
34.2.2 ordered to vacate the entire premises by no later than 31 May 2022;

34.3 the sheriff or his deputy is ordered and authorised to take all steps necessary to eject the respondent and occupants from the entire premises to the extent that the respondent and occupants have not vacated same by 31 May 2022;

34.4 the respondent shall pay the costs of the application.

Hand-down and date of judgment

35. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 01:15 on 26 April 2022.



VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel:	BH Steyn
Applicants' Attorneys:	SSLR Attorneys
Respondents' Counsel:	Leander VR Van Tonder
Respondents' Attorneys:	Paul T Leisher & Associates
Date of Hearing:	25 January 2022
Date of Judgment:	26 April 2022