IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2016.12.20 — i Mahanjana

DATE SIGNATURE

20/12/2016

CASE NUMBER: 90024/15

DATE: 20 December 2016

VERONICA NOMLAMALI MAHANJANA — Appellant

V

GEORGE WEBB — First Respondent

TRAFALGAR PROPERTY MANAGEMENT (PTY) LTD — Second Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY — Third Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Third Respondent

JUDGMENT

MABUSE J:

[1] This is an application for eviction of the first respondent and all other persons occupying through him from the property situated at 247 Kent Road, Meyerspark, Pretoria, within 14 days of the granting of the order or within such other period as this Court may determine. This application is opposed only by the first respondent.

[2] The applicant in this matter, Veronica Nomlamali Mahanjana ("Mahanjana"), describes herself as an adult female who resides at 12 Nama Road, Faerie Glen, Pretoria. She is the registered owner of the immovable property known as 247 Kent Road, Pretoria, Gauteng Province ("the property"). She is in that capacity the lessor of the property. This is the property that forms the subject of this application. The first respondent, George Webb ("Webb") is described as an adult businessman, who, together with people unknown to Mahanjana, resides on the property. The second respondent, Trafalgar Property Management (Pty) Ltd ("Trafalgar"), against which no order is sought, is a company duly registered as such in terms of the company laws of this country with its principal place of business located at 829 Church Street, Arcadia, Pretoria, Gauteng Province. The third respondent is the municipality established as such in terms of the Local Government Municipality Structures Act No. 117 of 1998 ("the Act"). It conducts its business at 320 Bosman Street, HB Philips Building, Pretoria, Gauteng Province.

[3] I proceed to set out the salient facts relevant to this application. On or about 26 June 2015 and at Pretoria, Mahanjana, in her capacities as the owner and lessor of the property, entered into a written agreement of a residential lease ("the lease agreement") with Webb, as the lessee or tenant.

Mahanjana let to Webb who hired from Mahanjana the property for residential purposes. At the conclusion of the said lease agreement, Mahanjana was represented by Trafalgar.

[4] The letting and hiring of the property was entered into on the following terms and conditions, among others, set out in the written Agreement of Residential Lease, the General Conditions of Lease and Annexures thereto and the Disclosure Document. There are quite a number of clauses in this lease agreement which appear to be relevant in this application. Therefore I deem it apposite at this stage to quote the clauses in the parties' lease which might have a bearing in the consideration of this application.

4.1 The Lease will be for a period (that is hereinafter called 'the lease period') of 12 months starting on 1 July 2015(that date hereinafter called 'the Commencement Date') and terminating on JUNE 2016 (that date is hereinafter called ('the Termination Date').

4.2 the monthly rental for the property was the amount of R13 500.00;

4.3 the tenant must pay to the landlord monthly rental and all other amounts which are payable by the tenant to the landlord under this lease monthly in advance without any deduction or setoff whatsoever on or before the 7th day of each and every month during the lease period;

4.4 the monthly rental and any other charges payable by the tenant in terms of this lease must be paid into and cleared in the landlord's bank account on or before the 1st day of every month in advance. The tenant is not allowed to pay a lower amount of rent than the monthly rental for any reason whatsoever. If the tenant pays the monthly rental or other amount(s) payable in terms of this lease by any means other than by way of a cheque at the offices of Trafalgar, the tenant must immediately advise Trafalgar of the date, place, amount and method of payment and send proof of that payment to Trafalgar. The tenant acknowledges that unless he or she advises Trafalgar of that payment, it will not be possible for Trafalgar to identify the payment and to credit the tenant's account and the tenant will be liable for any fees raised as a result of that payment being overdue. Furthermore, if the tenant pays the monthly rental by electronic banking or by any other direct deposit, he or she will only be entitled to a receipt in respect of that payment if he or she has properly notified Trafalgar of that electronic or direct payment;

4.5 no alterations in or to the premises or to any fixtures in the premises may be made except with the landlord's prior written consent;

4.6 if any alterations are made to the premises or any of its fixtures during the lease period without the landlord's consent, the landlord may (in addition to its rights to terminate the lease and claim damages from the tenant) require the tenant to restore the premises to its original condition when this lease ends. If the tenant does not so restore the premises to its original condition, the landlord may restore the premises to its original condition, and the tenant must then pay the costs of that restoration to the landlord;

4.7 if any alterations or additions are made to the premises or its fixtures, whether with the landlord's consent or without it, the tenant will not be compensated for those alterations;

4.8 no alterations or fixtures may be removed unless the landlord requires the tenant to do so;

4.9 the landlord and Trafalgar shall be entitled to access the premises at all reasonable times in order to inspect the premises; or to enable prospective tenants or purchasers of the premises to view the premises or to make any repairs or alterations to the premises that the landlord or Trafalgar of this lease if the tenant does not pay the monthly rental to the landlord monthly in advance on the first day of any month during the lease period; or the tenant does not pay to the landlord monthly in advance on the first day of any month during the lease period any other amount which the tenant must pay to the landlord on that day in terms of this lease or the tenant has committed any other material breach of this lease or material failure to comply with this lease;

4.11 If a breach (as described in clause 19.1) happens and :

4.11.1 the Landlord has given the Tenant a written notice calling upon the Tenant to pay that Monthly Rental, to pay that other amount, to remedy that material breach or to rectify that material failure, as the case may be, within 20(twenty) business days after the date on which the Landlord gave that written notice to the Tenant; and

4.11.2 the Tenant has not within that 20 (twenty) business day period paid that Monthly Rental, paid that other amount, remedied that material breach or rectified that material failure, as the case may be, then the Landlord may either cancel this Lease or require that the Tenant makes that payment, remedies that material breach or rectifies that material failure.

4.12 no change to this lease, other than changes to any charges payable by the tenant in terms of this lease and the other changes contemplated by this lease shall be of any force or effect unless that change is made in writing and is signed by the parties;

4.13 this lease as read with the RHA and the CPA contains all the terms and conditions of the lease between the parties. The parties acknowledge that there are, subject to applicable law, no understandings, representations, or terms between the landlord and the tenant in regard to the letting of the premises other than those set out in this lease.

[5] On 26 June 2015 a further agreement was reached between Mahanjana and Webb by way of an addendum. The relevant clause of the addendum reads as follows:

"The first respondent agrees to maintain the following at his own costs and that no refund from the owner will be expected:

(a) swimming pool;

(b) fix small items inside the house (once-off)

(c) cleaning of carports (once-off)

(d) maintain the garden."

Webb admitted the terms of the written lease agreement of the addendum.

[6] On or about 2 July 2015 the Webb conducted an inspection of the property with one Isaac Mindo, an assessor in the employ of Trafalgar. This inspection was the one contemplated in clause 5(3)(c) of the Rental Housing Act 50 of 1999. During this inspection all the defects that were actually evidend on the premises were identified and an Assessment Report was completed and signed both by Mindo and Webb. A copy of the Assessment Report, consisting of 18 pages, was attached to the founding affidavit as annexure VNM6. The first page of it was signed on 2 July 2015 at 1:00 by Mindo, the inspector and Webb.

[7] Webb does not deny that he and Mindo inspected the property in terms of the provisions of clause 5(3)(c) of the Rental Housing Act. He denies, however, that the report contained all the defects in the

property which was to be occupied. He contends that he discovered within the first week of his occupation of the property many more defects, such as locks in various doors that did not have keys, electrical repairs, pool motor repair and the re-marbilite of the pool, a gate motor and various other repairs which the applicant authorised him to do.

[8] Mahanjana denies that she had authorised Webb to make any repairs. In support of her denial she referred to the fact that Trafalgar had been authorised to act for her and that in such circumstances she could not have had any discussions with Webb. Secondly, she referred to the correspondence exchanged between Trafalgar and Webb. Webb has not produced any letters exchanged between him and Mahanjana. He does not refer to any form of communication he has had with Mahanjana. In the circumstances it is highly unlikely that he communicated with Mahanjana and that Mahanjana authorised him to make any repairs.

[9] Ever since he took occupation of the property Webb breached the material terms of the lease agreement as follows:

9.1 he made alterations to the premises without Mahanjana's prior written consent, in breach of clauses 9.1 and 9.2 of the General Conditions of the Lease;

9.2 he failed to pay monthly rental and all other amounts payable for municipal services in breach of clause 3 in the Schedule to the lease agreement and clause 6.1 of the General Conditions; and

9.3 he set-off, and undertook to set-off, amounts from the monthly rental payable in breach of clause 3 of the schedule.

[10] It is not in dispute that Webb has, without any regard to the terms and conditions of the Agreement of Lease, deducted and set-off certain amounts payable for rent to Mahanjana and that still he claimed compensation notwithstanding. It was argued by counsel for Mahanjana, and in my view quite correctly so, that Webb has shown total disregard not only for the terms of the parties' agreement but also for Mahanjana's rights of ownership and has acted with impunity towards Mahanjana. A court should under no circumstances accommodate such a conduct from a litigant. Clause 3 of the Agreement of Residence of Lease as set out above states as follows:

"The tenant must pay to the landlord the monthly rental and all other amounts which are payable by the tenant to the landlord under this lease monthly in advance (without any deduction or a set-off whatsoever) on or before the 7th day of each and every month during the lease period."

In his heads of argument counsel for Mahanjana pointed that in an email dated 23 September 2015 and which was attached by Webb as annexures 'GW21' and 'GW22' to his answering affidavit, Webb stated in not less than six occasions that he had deducted several amounts from the rental, by way of set-off, in respect of repairs which he alleges needed to be made on the property. An example of such statements is as follows:

"As I am sending this mail to you now I confirm that I will ensure that a geyser is installed, whether it is done by me or by any contractor, billed to your client for payment. If payment does not take place I will again take it from the rental that is due."

Furthermore he stated the following:

"The water pipe has been repaired over the past weekend and I have worked on it for 5 hours (double rate since it was in the midnight hours). And I attach my invoice hereto for settlement failure whereof I will deduct from the rental."

[11] Webb could not deduct or set-off any amounts from the rental amount payable. This was contrary to the clause 3 of the agreement of rental lease which prohibited him from withholding or from setting off any amounts. Mahanjana regarded Webb's conduct as a material breach of the agreement which entitled her to cancel the agreement. Mahanjana then proceeded to terminate the lease agreement.

[12] In terms of the agreement, in particular, clause 9 of the General Conditions of Lease, the parties had agreed that no alterations in or to the premises or to any fixtures in the premises may be made except with the landlord's prior written consent. Webb simply ignored the general terms of this clause. He proceeded to breach the lease agreement by continuing to make alterations and improvements on the premises without Mahanjana's written consent. Having made those alterations without the requisite consent Webb set-off amounts from the rental amount payable despite being notified to cease his conduct and to make payment of the arrear rental. Mahanjana has on the basis of the breach cancelled the lease agreement between the parties and as a result that made Webb and all those who

occupy through her unlawful occupiers. He has not provided a valid reason which entitles him to continue to occupy the property.

[13] Webb has raised a number of defences including two points *in limine* against the application. The first of such points *in limine* relates to the applicant's *locus standi*. He contends in his answering affidavit in this respect that Mahanjana makes an application in terms of s 4 of the Illegal Occupation of Land Act 19 of 1998 ("Pie") in her capacity as the owner of the property in question. He continues to state that although in her founding affidavit Mahanjana has stated that proof of her ownership was a deed search here attached as annexure 'VNM', she has failed to attach the relevant deed search. Instead she had attached the registration documents and her power of attorney. It is contended by Webb that on that basis Mahanjana has failed to prove that she was the owner of the property in question.

[14] This point *in limine* is, in my view, ill-advised and badly raised. In her founding affidavit Mahanjana had attached a copy of the title deed to prove that she was the owner of the property. The document attached was proof enough that she was the owner of the property. Secondly, Mahanjana had attached a deed search marked 'R1' to her replying affidavit to support her claim of ownership of the property in question. The deed search showed convincingly that Mahanjana was indeed the owner of the property in question. Thirdly, and lastly, Mahanjana made the necessary allegation in paragraph 4 of her founding affidavit. Webb has not denied this allegation. Accordingly, what is not denied is deemed to be admitted. The point *in limine* has no merit and is accordingly dismissed.

[15] The second point *in limine* relates to the non-compliance by Mahanjana with the provisions of s 4(2) of Pie. It is contended by Webb that Mahanjana has failed to give him and the municipality notice of the evictions proceedings, at least fourteen days before the hearing. According to Webb's testimony, the notice of motion in the matter was dated 6 November 2015 and was served on him by the sheriff on 10 November 2015. The said notice sought eviction within fourteen days. He filed a notice to oppose the application on 12 November 2015. The matter was earmarked for hearing on 18 December 2015. Webb claimed that Mahanjana could not attempt to comply with s 4(2) at that stage.

[16] The order authorising the service of the notice in terms of s 4(2) of Pie was obtained on 18 December 2015. In terms of clause 2 of the said notice the application for eviction would be heard on 4 February 2016 at 10h00. More than 14 days from the date which the order was granted. Copies of the application were served on Webb on 10 November 2015. In the sheriff return of service he was notified that the application for leave to serve the section 4(2) notice would be heard on 18 December 2015. It is also clear from the report that Webb refused to sign receipt of the papers as requested by the sheriff. Section 4(2) requires the notice of the proceedings in section 4(1) to be served 14 days before the hearing of such proceedings. It does not require the notice to be issued first and thereafter the proceedings. It is enough if 14 days before the hearing of the application for eviction as set in s 4(1) the notice in s 4(2) is served. The fact that the Webb first received the eviction proceedings before the s 4(2) notice is not fatal and did not prejudice him in any way. The question is whether he received the said notice in terms of s 4(2) 14 days before the hearing of the eviction proceedings. If the answer is yes, caedit quaestio. Accordingly no merits exist in this point in limine and it is accordingly dismissed.

[17] Webb denies that he and those who claim through him are in unlawful occupation of the property. The bases of his denial are firstly that he effected certain repairs to the premises and that such repairs were authorised by Mahanjana. Secondly, he contends that there is a dispute of fact with relation to the authorisation to make improvements and repairs to the property and an arrangement for the cost of such improvements to be set off from the rental of the property. Thirdly, he disputes the validity of the cancellation of the agreement on the basis of the contention that Mahanjana had defaulted with her obligations in respect of the further agreement concluded, with reference to the expenses incurred in respect of the necessary repairs to the properly. Fourthly, and lastly, he contends that he is legally entitled to retain possession of the property until such time as he has been compensated for such expenses.

[18] The starting point by Webb was to deny that the Assessment Report contained all the defects in the property that was to be occupied and the contention that he discovered further defects within the first week of his occupation of the property. The problem with this denial and contention is that Webb does not deny, firstly, that a thorough inspection of the property was conducted on or about 2 July

2015 and that he was not only present at such inspection but also took part in the inspection. He does not explain why he and Isaac Mindo were, during the said inspection, unable to discover the defects that he subsequently discovered during the first week of his occupation of the property. Judging from the extent of the report compiled by Isaac Mindo and Webb I find it very hard to believe that there could have been any further unnoticed defects in the property after the said inspection.

[19] Webb then contends that he engaged Mahanjana who authorised him to effect the repairs. He states furthermore that he and Mahanjana had agreed to overlook Trafalgar. Based on their oral agreement he made several repairs and sent invoices thereof to Mahanjana. After he testified that he and Mahanjana had agreed behind the back of Trafalgar orally, he turns around and testifies that Trafalgar, acting on behalf of Mahanjana, confirmed the oral agreement that he would be allowed to effect the necessary repairs. His evidence, in my view, is inconsistent.

[20] Mahanjana denied that she had any contact with Webb and that she had authorised Webb orally or otherwise to make any repairs to the property. The duty is accordingly on Webb to prove that he has had contact with Mahanjana and that orally Mahanjana had given him permission to make these repairs. In the following circumstances, it is highly unlikely that Mahanjana and Webb communicated with each other behind the back of Trafalgar. Firstly, Mahanjana and Webb had to communicate with each other through Trafalgar. Trafalgar acted at the time as Mahanjana's agent. Webb was aware of it and was aware furthermore that he had to communicate with Mahanjana through Trafalgar. It was not Webb's case that they communicated with Mahanjana through the second respondent. He does not indicate who of the two of them started, contrary to the agreement, to communicate with the other of them and why they ignored Trafalgar. It is highly unlikely that they communicated with each other as claimed by Webb.

[21] Secondly, in the papers before Court there is no proof that Mahanjana communicated directly with Webb. No written confirmation could be found in all the correspondence before this Court which proves that there was any form of communication between them. The duty is on Webb to prove it. He has failed to discharge this duty.

[22] Thirdly, if anything, and contrary to his evidence, there is sufficient evidence prove to demonstrate that Webb communicated with Mahanjana through the Trafalgar. For instance, his email dated 7 July 2014 which was sent to Chandre Barnard at 09h29 am and which was copied to Isaac Mindo states as follows:

"I refer to our discussion with regards to repairs at the property.

Please could you advise what to do with regards to the expenses we have incurred since we moved into this property. are we subtracting these on the month-end statement when we pay the first rental due? Do we subtract it from the rental due or do we give you the invoices and wait for payment.

Also please remember to send the statement and invoice before the last day of the month so that we can effect payment on the 7th of each month as agreed.

Regards

George Webb

Managing Director – Tronbuild Group

Cell: 082 844 1495."

It is as clear as crystal from the said email that within the first week of taking occupation he had already incurred certain expenses in making alterations or improvements to the property and that already he was asking, contrary to the terms of the agreement, whether he should subtract the amount in respect of the expenses from the rental. What is even clearer is that nowhere in this said email did he refer to any communication he might have had prior to incurring such expenses with Mahanjana. In the premises the conclusion is inevitable that when he sent that relevant email he had already made certain repairs without first having spoken to Mahanjana and without having sought and obtained her consent. All these were done contrary to the terms of the agreement and that constituted a material breach of the terms of the agreement.

[23] His email dated 7 July 2015 sent at 12:36 PM, demonstrates that he had done certain repairs. It states as follows:

"Hallo Isaac

Thanks for the report. Please be advised that we have done certain necessary repairs which we need to invoice for. What is the process and what will be done about the oven that is not mentioned on this report.

I await your urgent reply in this matter.

Regards

George Webb

Managing Director – Tronbuild Group

Cell: 082 844 1495."

Nowhere in the aforegoing email did Webb confirm that he had been authorised to make such repairs. Nowhere in the said email did he seek permission to make repairs. Nowhere did he confirm that he had sought and obtained permission prior to making such repairs. Again this email proves that communication between him and Mahanjana was conducted through Trafalgar. This, in my view, confirms that his evidence that he spoke to Mahanjana who authorised him to make the repairs that he claims he has done, before he did so, is not true. If this evidence is not true it follows that he was not authorised verbally by Mahanjana to make such repairs.

[24] On 9 July 2015 Trafalgar sent an email to Webb. The said email read as follows:

"Morning George

I see Isaac did email you yesterday regarding the maintenance.

Please be advised that all discussions between you and the owner needs to be in writing, we must be notified because it seems that certain items were discussed that we are not aware of. Actually I suggest that you work through our office because we cannot be held responsible for issues not being resolved between you and the owner.

If you did not fix the items you mentioned below, send the quote as she requested for approval. If you did fix the items I need proof like photos and the invoice, I will then discuss with her.

Thank you

Kind regards / vriendelike groete

Natasha Herbst

Presidential Portfolio Manager Pretoria Branch

Trafalgar Property Management."

[25] The contents of the aforegoing email prove that Webb had not obtained prior authorisation to effect any repairs on the property.

UNAUTHORISED IMPROVEMENTS AND THE CONSEQUENCES THEREOF

[26] On his own version, Webb admitted that he had effected some improvements on the property. Such improvements constituted alterations which could, in terms of the agreement of lease, only be done with the consent of Mahanjana obtained in advance. The making of such improvements without the consent of Mahanjana, as agreed in clause 9.1 of the General Conditions of Lease, constituted a material breach of the parties' agreement which entitled her to cancel the agreement. But more importantly, the agreement of lease contained an express clause which permitted the cancellation of the agreement following the specific breach. Clause 19.2 of the General Conditions of Lease states that:

"If any alterations are made to the Premises or any of its fixtures during the Lease Period without the Landlord's consent, the Landlord may (in addition to its right to terminate the Lease and claim damages from the tenant) require the Tenant to restore the Premises to its original condition when the Lease ends. If the Tenant does not so restore the Premises to its original condition, the landlord may restore the Premises to its original condition, and the Tenant must then pay the cost of that restoration to the Landlord."

[27] Finally, a lessee is only entitled to compensation for the improvements he made to the property of another if such improvements were made with the consent of the lessor. Accordingly, Webb is only entitled to such improvements as he made with the consent of Mahanjana. It is of crucial importance in this case to point out that Webb had not obtained the consent of Mahanjana to make any repairs to

the property. Thus Mahanjana's consent was required before any improvements could be made. This was the requirements set out in clause 9.1 of the General Conditions of Lease. Webb should have been aware of it. Secondly, which is equally of crucial importance, is that Webb has waived any right he had to compensation for whatever improvements he would have effected on the property. Webb is bound by the terms of clause 9.3 of the General Conditions of Lease. Finally, Webb may not rely on any oral agreement as the parties did not agree to be bound by any such agreement. In terms of clause 26.3 of the general conditions of lease:

"No change to this lease, other than changes to only charges payable by the tenant in terms of the lease and other charges contemplated by this lease shall be of any force or effect unless that change is made in writing and is signed by the parties."

Furthermore in terms of clause 26.4 of the general conditions of lease:

"The lease as read with the RHA and the CPA contains all the terms and conditions of the lease between the parties. The parties acknowledge that there are, subject to the applicable law, no understandings, representations or terms between the landlord and the tenant in regard to the letting of the premises other than those set out in this lease."

FAILURE TO PAY RENT AND ITS CONSEQUENCES

[28] The duty to pay rent was one of Webb's most important obligations. The Agreement of Residential Lease stipulated when such payment should take place. Webb's failure to pay monthly rental and to in fact deduct and set off from the monthly rental constitutes a material breach of the lease agreement. Mahanjana explicitly reserved herself the right to cancel the lease on breach of material condition. Once there is such a breach the applicant is entitled to cancel the agreement in accordance with clause 19 of the General Conditions of Lease. In **Oatorian Properties (Pty) Ltd v Maroun 1973(3) S A 779 [A.D] at 785A-B**, the court quoted with approval the following passage from North Vaal Mineral Co. Ltd v Lovasz, 1961 (3) S A 604 (T) at p. 606:

".... A lex commissoria (in the wide sense of a stipulation conferring a right to cancel upon breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz. to cancel) upon the fulfilment of a condition. The investigation whether right to cancel came into

existence is purely an investigation whether then condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled. (Rautenbach v Venner 1928 T P D at p. 26)". By clause 19 of the General Conditions of Lease, Mahanjana *"reserved to herself the right to cancel the lease on breach of a material condition of the lease. Once there is such a breach, the materiality of the breach is irrelevant and the Court will not enquire into the conscionableness or unconscionableness thereof." See Oatorian Properties (Pty) Ltd v Maroun supra at p. 785B-C*

[29] Webb did not dispute the fact that clause 3 of the Agreement Of Residential Lease as set out in paragraph 4.3 *supra* was a material condition of the lease. He also did not contend that clause 3 was not a material condition of the Lease. In my view, the strongest indications that the said clause was a material condition of the lease agreement are firstly the language of the clause itself; usage of the word *"must'* in the said clause; secondly that Webb was not entitled to make any incomplete payments and thirdly that in the event of Webb failing to make any payment or making incomplete payment Mahanjana was entitled to cancel the agreement. Breach of clause 3 was a condition on the basis of which Mahanjana was entitled to cancel the lease agreement.

[30] Furthermore Webb denied that he and those who occupy the property through him are in lawful occupation of the property and that the lease agreement has been terminated lawfully. He bases this denial by stating the following, that he conducted the repairs on the premises with the authorisation of Mahanjana and that he has engaged with Mahanjana to authorise the work, secondly, that there is a dispute of fact in respect of authorisation to conduct the improvements on the property and the arrangement for the costs of such improvements to be set-off from the rental of the property. No merit exists in this contention. This Court has already made a finding that there was no communication between Webb and Mahanjana and therefore that the improvements that he made on the property were not authorised by Mahanjana anyway. In his emails to Trafalgar, Webb has failed to satisfy the Court that he had obtained any prior authorisation to effect any alterations to the property. In any event clause 9.3 of the material Conditions of the Lease states as follows:

"If any alterations or additions are made to the premises or its features, whether with the landlord's consent or without it, the tenant will not be compensated for those alterations."

Accordingly, Webb has waived his right to get compensation for any improvements that he claims he has made to and on the property. If the parties had agreed that Webb should be compensated for the improvements he made they would at the same time have altered this clause. The fact that they have not done so is a clear indication that their intention was that they should be bound by it.

WEBB'S SUPPLEMENTARY AFFIDAVIT

[31] On 3 June 2016 Webb delivered his supplementary affidavit. He alleges that the said affidavit was filed in order to place certain facts before the Court which transpired subsequently to the issuing of the eviction application and the deposition of the opposing affidavit. He approached his current attorneys who advised him that summons should be issued for alleged damages he has suffered as a result of the applicant's conduct.

[32] It is a well-known rule that three sets of affidavits, founding or supporting affidavit, answering affidavit and replying affidavits are allowed. In terms of Rule 6(5)(e) of the Uniform Rules of Court a Court may in its discretion permit the filing of further affidavits. Leave of the Court to file further affidavits must be sought and obtained. Such leave may be granted only in the special circumstances or where the respondent wishes to answer a new matter contained in the replying affidavits. The respondent may not be allowed to make its case in any other affidavit including supplementary affidavit other than in his answering affidavit. Firstly, there is before Court no application by Webb for leave to file further affidavits including the supplementary affidavits. See **Hano Trading CC v JR209 Investments Pty Ltd and Another 2013 (1) SA 161 SCA at paragraph 11("Hano Trading CC").**

"Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will exercise its discretion in this regard where there is good cause."

Secondly, an application for leave to file further affidavits should set out reasons why the information sought to be put or introduced in the supplementary affidavit or further affidavit was not included in

the answering affidavit. In the Hano Trading CC case the court cited with approval the following passage from James Brown & Hammer Ltd (previously Gilbert Hammer & Co Ltd) v Simmons 1963 4 656 (A), 660D-H:

"It is in the in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied; some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it seeking, not a right, but an indulgence from the court: he must both advance his explanation of why the affidavit is out of time and satisfy the court that, although the affidavit is late, it should, having regard to all the circumstances of the case, be nevertheless received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in Zarug v Parvathie, 1962 (3) SA 872(N). it is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry." The Court will lean towards granting leave to file further affidavits to a litigant where such litigant did not possess the information he seeks to introduce by way of a further affidavit at the time he delivered his answering affidavit.

[33] These are the problems which beset the supplementary affidavit in question. Webb or his attorneys have not sought leave of this Court to file the said supplementary affidavit; secondly, the information which Webb wishes to introduce in the supplementary affidavit is not an attempt by him to address an issue that arose from the replying affidavit. Thirdly, there is no explanation by Webb or his attorneys why the information he wishes to introduce through the supplementary affidavit was not set forth in his answering affidavit. Fourthly, he has not told this Court that he did not have, at the time he delivered his answering affidavit, the information that he now seeks to introduce in his supplementary

affidavit. He was at all material times represented by his attorneys. Accordingly, the introduction of the supplementary affidavit is inadmissible.

[34] In the circumstances the Court is satisfied that the applicant has made out a good case for the eviction of Webb and for all those who occupy Mahanjana's property through him.

[35] The application is accordingly granted and the following order is made:

1. The first respondent and all other persons occupying the property through him or with his authority be and are hereby directed to vacate the property situated at 247 Kent Road, Meyerspark, Pretoria, Gauteng Province within 30 days of the granting of this order.
2. In the event of the first respondent and all those who claim through him or anyone of them failing to comply with the order in (1) above, the sheriff of this Court or its deputy is hereby authorised and directed forthwith to evict the first respondent and all other persons occupying the premises through him from the said premises.
3. The first respondent is hereby ordered to pay the costs of this application.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. B Manentsa*
Instructed by:	*Tshisevhe Gwina Ratshimbilani Inc.*
Counsel for the first respondent:	*Adv. U Lottering*

Instructed by:	*Mianda Smitopolos Attorneys*
Date Heard:	*9 June 2016*
Date of Judgment:	*20 December 2016*