IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE 24/3/16 SIGNATURE

CASE NO: A154/2014
(*A quo* Case no: 2006/15860)

DATE: 30/3/2016

IN THE MATTER BETWEEN

IMPERIAL BANK — APPELLANT
(Respondent in court *a quo*)

AND

LANSERIA INTERNATIONAL AIRPORT (PTY) LTD — RESPONDENT
(Applicant in court *a quo*)

JUDGMENT

PRINSLOO, J

[1] This appeal came before us, sitting as a Full Court of this Division, with the leave of the learned Judge *a quo*, Pretorius J.

[2] In very broad terms, it can be said that it is the case of the respondent that it was at all relevant times the sub-lessor, and the appellant its sub-lessee, of a portion of the total property comprising the Lanseria International Airport. According to the respondent, the appellant failed to make timeous payment of the lease instalments, prompting the respondent to cancel the lease and to seek the eviction of the respondent.

The appellant, on the other hand, denies that there was any privity of contract between it and the respondent, so that the latter did not have the required *locus standi* to purport to cancel the lease agreement, let alone to evict the appellant.

Brief notes about the history of the case

[3] The history of this case, spanning more than twenty years, features a remarkable (and, at times, almost overwhelming) variety of property sale transactions, leases, notarial leases, head-leases and cessions.

[4] Lanseria Airport is situated on a property comprising about twenty smaller properties under various title deeds and the whole airport property is described as the remaining extent of Portion 12 (a Portion of Portion 9) of the farm Zwartkop/Rooiwal 530, Registration Division JQ, Gauteng ("the property").

[5] The leased premises ("the premises"), to which I have referred, and which form the subject of this dispute, form part of the property, and are described as Lease Area no 11 (also known as Hangar Site no 4 or Erf 57), situated on the remaining extent of Portion 12 (a Portion of Portion 9) of the farm Zwartkop or Rooiwal 530, Registration Division JQ, Gauteng.

[6] The premises are also mentioned in the notice of motion. It is convenient to quote the first two paragraphs of the notice of motion:

> "1. An order confirming the cancellation of notarial deed of lease registered by the Registrar of Deeds, Pretoria under reference number K6754/94L;
>
> 2. An order directing the respondent to vacate the premises forming the subject-matter of the aforesaid lease, being Lease Area no 11 (also known as Hangar Site no 4 or Erf 57) ..."

The "respondent" referred to is, of course, the respondent *a quo* or the present appellant.

[7] The name of the airport was originally Lanseria Airport (Pty) Ltd and it was changed to Lanseria International Airport (Pty) Ltd on 17 December 2002. This is the respondent in the present appeal, and will be referred to as such.

[8] A property holding company of the airport/respondent, Lanseria Airport Properties (Pty) Ltd ("LAP") originally bought the property from the Transvaal Provincial Administration and the Krugersdorp and Roodepoort municipalities.

[9] During June 1993 LAP sold the property to the Southern Life Association Ltd ("Southern") for some R30 million.

[10] Under the heading "sub-leases", the first portion of clause 14 of the deed of sale between LAP and Southern reads as follows:

> "14.1 It is recorded that the tenants listed in annexure 'D' annexed to the lease agreement, (marked '6' annexed hereto), presently lease various premises comprising part of the property.
>
> 14.2 The seller (this is obviously LAP) hereby, to the extent that this does not apply by operation of law, cedes to the purchaser, (obviously Southern) effective as at the transfer date, all of such leases listed on annexure 'D'.
>
> 14.3 Simultaneously with the abovementioned cession, the purchaser, as lessor, will cede to Lanseria Airport (Pty) Ltd, as lessee, effective as at the transfer date, the leases listed in such annexure 'D', which will then become sub-leases of the lessee of the respective premises."

[11] It is common cause that the transfer date from LAP to Southern was 9 December 1993.

[12] There was, consequently, an agreement between LAP, Southern and the respondent that:

- With effect from the transfer date LAP would cede the leases referred to to Southern.

It is convenient to record, at this stage, that the reason why it is stipulated in clause 14.2 that this cession would take place "to the extent that this does not apply by operation of law" emanates from the trite legal position that, with

effect from the transfer date, Southern would, in any event, step into the shoes of LAP as the lessor. This is common cause between the parties – see *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 2 SA 926 (A) at 939A-C.

- Simultaneously Southern, as lessor, will cede the leases to the respondent who will become the sub-lessor of the tenants of the airport.

[13] Pursuant to the aforesaid transaction, a lease agreement (referred to throughout as "the head-lease") was entered into between Southern as lessor and the respondent as lessee. It was signed on 30 September 1993 on behalf of the respondent and 12 October 1993 on behalf of Southern.

Clauses 13.1 and 13.2 of the head-lease provide:

"13.1 This lease is subject to the cession of all sub-leases listed on annexure 'D' together with any further sub-leases entered into after the compilation of annexure 'D', from Lanseria Airport Properties (Pty) Ltd to the lessor (obviously, Southern) and a copy of such written cession furnished to the lessor prior to the effective date, failing which cession this agreement will be void.

13.2 The lessee shall be entitled to sub-let portions of the property but shall not be entitled to cede or assign such sub-leases to persons other than the lessor without the prior written consent of the lessor first had and obtained."

[14] Annexure "D" referred to in clause 14 of the sale agreement between LAP and Southern, is the same as annexure "D" referred to in clause 13 of the head-lease. The head-lease is referred to in clause 5.1.1 of the sale agreement between LAP and Southern.

[15] In the head-lease, a "sub-lessee" is defined as meaning:

> "A sub-lessee of a defined portion of the property in terms of a sub-lease between the sub-lessee and the lessee".

The reference to "the lessee" is obviously a reference to the respondent. One would also assume that "sub-lease" would have a corresponding meaning to "sub-lessee".

[16] Clause 13, *supra*, goes under the sub-heading, in the head-lease, of "sub-letting of premises". It is clearly aimed at regulating the arrangement whereby the respondent, as sub-lessee of the lessor (Southern) can sub-let portions of the property. The effective date of the head-lease is also stipulated to be the date of transfer of the property from LAP to Southern.

It is therefore clear, from a general reading of the deed of sale between LAP and Southern as well as the head-lease, that it was always in the contemplation of the parties that, on the effective date, the respondent would become the sub-lessor.

Moreover, it seems to me that the purported suspensive condition contained in clause 13.1 of the head-lease, to the effect that LAP has to cede the sub-leases to Southern before the effective date, must be seen to be superfluous and without binding effect,

because, by operation of law, Southern in any event became the lessor on the effective date – *Genna-Wae, supra.*

[17] On 1 October 1993, LAP, while it was still the owner of the property, as the effective date of 9 December 1993 had not yet arrived, although the sale to Southern had already taken place, let the premises to Avfin Marketing (Pty) Ltd ("Avfin").

[18] In this written agreement of lease, the premises is correctly described as "Lease Area 11, measuring 2596m² situated on the remaining extent of Portion 12 (a Portion of Portion 9) of the farm Zwartkop or Rooiwal 530, Registration Division JQ, Transvaal, ... also known as site no 4, Lanseria Airport, with which the lessee is acquainted". I will refer to the lease agreement as "the Avfin lease".

[19] The Avfin lease is not listed in annexure "D" to the head-lease neither can it, in my view, be described as a "sub-lease" because it is a straight lease between the owner (LAP) and the lessee. It is, consequently, not one of the leases contemplated in clause 13.1 of the head-lease, which purportedly had to be ceded in writing by LAP to Southern before the effective date.

[20] Nevertheless, and significantly, the fact that LAP had sold the property to Southern before entering into the Avfin lease, as well as the agreement between the parties that the respondent was to become the sub-lessor, is recognised in clause 18 of the Avfin lease in the following terms:

> "18. **Sale of properties.**
>
> It is hereby recorded that –

(a) the lessor (landlord) has sold the properties on which the premises are situated to a new owner ('new owner') in terms of a written agreement of sale ('sale agreement') and the new owner has leased the properties to Lanseria Airport (Pty) Ltd ('Airport') in terms of a written agreement of lease ('head-lease') all with effect from the date upon which the properties are registered in the name of the new owner ('effective date');

(b) in terms of the sale agreement and the head-lease, the lessor (landlord), Airport (obviously this is the respondent) and the new owner (obviously Southern) have agreed that, with effect from the effective date, this lease will be ceded by the lessor (landlord) to the new owner and thereafter be ceded by the new owner to Airport."

[21] These provisions are, of course, in harmony with what was stipulated in clause 14 of the deed of sale between LAP and Southern with clause 14.2, in any event, recognising that the cession of the annexure "D" leases (not including the Avfin lease) by LAP to Southern, was not necessary because it happened by operation of law.

[22] From a general reading of clause 18, as well as the other documents referred to, it is, in my view, clear that all the parties, including Avfin, agreed that, from the effective date, the position would be as follows:

- Southern would be the owner of the property;

- Southern would lease the property to the respondent (head-lease, and clause 18(a) of the Avfin lease); and
- the respondent, as sub-lessor, would lease to Avfin as sub-lessee.

[23] Because the Avfin lease is the one forming the subject of this dispute, it is convenient to record, at this stage, that all the parties, in fact, acted on the basis contemplated above, because the respondent invoiced Avfin on a monthly basis for the rental of the premises and was duly paid by Avfin. Independently from this, the respondent paid rent to Southern in a lump sum, and in respect of all the sub-leases, in terms of the provisions of the head-lease.

[24] This situation, with Avfin recognising the respondent as its sub-lessor, and paying the rent to the respondent, prevailed for a period of more than four years from the effective date in December 1993 until the Avfin lease was notarialy ceded to a company called Transafrican Aviation (Pty) Ltd in February 1998.

[25] In August 1994, more than a year after the Avfin lease commenced in June 1993, it was converted into a notarial deed of lease and registered, as such, in the Deeds office on 24 November 1994.

This notarial lease consists of a first part (a relatively concise affair) and a "Part B" which is incorporated into the notarial lease by reference in the first part, which I will refer to as "Part A" although it does not carry that description.

Clause 6 of Part A stipulates -

"The contents of this notarial deed of lease shall be read in conjunction with Part B annexed hereto, the provisions of which shall be an integral part of this notarial deed of lease and any signed annexure attached hereto."

[26] In Part A, Southern, duly represented by Mr John Martin Rippon who also testified before the court *a quo* in support of the respondent, then the applicant *a quo*, is cited as the lessor. Avfin is cited as the lessee.

Where no formal recognition is given to the respondent as the sub-lessor, counsel for the appellant, Mr Luderitz SC with Mr Botha, strongly argued that this introduction of Southern as the lessor, defeats any notion of a sub-lessor/sub-lessee relationship between the respondent and the appellant and, consequently, supports the appellant's argument that there was no privity of contract between the respondent and the appellant, so that the former did not have the necessary *locus standi* to cancel the Avfin lease, let alone evict the appellant from the premises.

[27] On this subject Mr John Martin Rippon ("Rippon") who was the group property investment manager of Southern from 1993 to 1998 and who, *inter alia*, signed the head-lease on behalf of Southern and whose name also appears on the notarial deed of lease, now under discussion, as the representative of Southern authorising the conversion of the Avfin lease between LAP and Avfin into a notarial deed of lease between Southern and Avfin, said the following in a supporting affidavit to the replying affidavit of the applicant *a quo* (now the respondent):

"With regard to the notarial deed of lease ... I am able to state that I was authorised by Southern Life to attend to the notarial execution and registration

of the said lease. I am informed that the respondent in the present application (of course now the appellant) contends that the lease which was notarially executed and registered was a different lease from the lease appearing on pp142-160 of the papers (this is the Avfin lease) and that the notarial deed of lease was a new lease concluded directly between Avfin and Southern Life after Southern Life became the owner of the property. This contention is incorrect. The correct position is that the previously existing lease between Lanseria Airport Properties (Pty) Ltd and Avfin (appearing on pp142 and further) was subsequently notarially executed and registered after the initial lessor, being Lanseria Airport Properties (Pty) Ltd, was replaced as lessor by Southern Life as the new owner of the property."

[28] In the same affidavit, Rippon also says the following:

"It should be pointed out that during the period between the conclusion of the initial lease appearing on pp142-160 of the papers (in October 1993) and the notarial execution and registration of the deed of lease appearing on pp172-188 on 24 November 1994 (this is the notarial lease) Southern Life had become the registered owner of the property in question and concluded the head-lease with the applicant (the present respondent) and had by its conduct ceded its rights in terms of the lease (pp142-160) to the applicant."

[29] Of course, this evidence is in perfect harmony with what is stipulated in clause 18 **of Part B of the notarial lease** which is identical to what is stipulated in the corresponding clause of the Avfin lease. It is convenient to quote the contents again:

"18. **Sale of properties**

It is hereby recorded that –

(a) the LESSOR (landlord) has sold the properties on which the premises are situated to a new owner ('new owner') in terms of a written agreement of sale ('sale agreement') and the new owner has leased the properties to Lanseria Airport (Pty) Ltd ('Airport') in terms of a written agreement of lease ('head-lease'), all with effect from the date upon which the properties are registered in the name of the new owner ('effective date');

(b) in terms of the sale agreement and the head-lease, the LESSOR (landlord), Airport and the new owner have agreed that, with effect from the effective date, this lease will be ceded by the LESSOR (landlord) to the new owner and thereafter be ceded by the new owner to Airport;

(c) in terms of the sale agreement and the head-lease further, it was agreed that, upon the cancellation of the head-lease (for whatsoever cause or reason), the new owner shall immediately become the LESSOR (landlord) to the LESSEE (tenant) in terms of this lease and be entitled to all the benefits, and be obliged to perform all obligations, hereunder; and

(d) the LESSEE (tenant) has agreed to be bound by the provisions of clause (c) above."

I add that counsel for the respondent, Mr Vorster SC and Mr Heystek, argued that clause (c) never came into operation because the head-lease was never cancelled, for present purposes. If I understood counsel for the appellant correctly, they advanced a different view. On my reading of the papers, the argument offered on behalf of the respondent is the preferred one.

[30] In my view, the fact that the respondent ("Airport") is recognised in the notarial lease as the sub-lessor, as it was in the Avfin lease, clearly lends support to the evidence of Rippon that the *status quo* flowing from the Avfin lease and the head-lease, with reference to the respondent's position as sub-lessor, did not change at all as a result of the registration of the notarial lease, with Southern as the lessor and Avfin as the lessee.

It should be borne in mind that this recognition of the respondent as the sub-lessor came not only from Southern, but also from Avfin as lessee in terms of the notarial lease. I mention this because Avfin is a predecessor in title of the appellant as lessee in terms of the Avfin and the notarial leases. I will revert to this subject.

[31] Moreover, I am of the view that compelling support for this approach flows from the fact that, from the outset, all parties acted on the basis that the respondent is the sub-lessor of Avfin, with the latter being invoiced on a monthly basis by the respondent and paying the rental to the respondent. As I pointed out earlier in this judgment, the situation with Avfin recognising the respondent as its sub-lessor, and paying the rent to the respondent, prevailed for a period of more than four years from the effective date in December 1993 until the Avfin lease was notarially ceded to

Transafrican Aviation (Pty) Ltd in February 1998, more than three years after the notarial lease was registered.

[32] I add that when Rippon testified in support of the respondent's case before the court *a quo*, he stated that according to Southern's business plan it had no interest whatsoever in becoming directly involved with the tenants occupying the premises at the airport. This would have included Avfin. Southern had no meaningful contact with the lessees on the premises. Southern had nothing to do with the underlying leases or the issuing of rental statements, rental raising or rental collection. Southern was only interested in receiving one rental cheque per month from the respondent.

[33] In cross-examination before the court *a quo*, Rippon was asked about clause 18 of the notarial lease, which I quoted, and testified that there was tacit acceptance that where there was a new owner coming in they entered into the head-lease with the respondent and the latter then had the whole bank and underlying sub-leases.

[34] Despite lengthy and intensive cross-examination, Rippon, on my reading of his evidence, was in no way discredited. He insisted that the position did not change when the notarial lease was registered. He said, had that been the case, Southern would have started charging rental which they did not do.

As to the need to have a notarial bond registered at all, Rippon testified that it was his understanding that it had to do with the registration of a mortgage bond "and as the owner of the airport they would have required our consent for that lease to be notarially registered".

[35] It should be added that the evidence of Rippon, who was intimately involved in all these developments as the representative of Southern, was undisputed for all practical purposes.

The only witness called by the appellant, before the court *a quo*, was one Vincent Crous, who only got involved in June 2005, well after the relevant events took place.

[36] After this brief interlude involving arguments and counter-arguments about the effect, or lack thereof, of the registration of the notarial lease, I revert to describe more of the history of the case.

[37] In February 1998, as I have already briefly mentioned in this judgment, and about three and a half years after the registration of the notarial lease, Avfin in terms of a written instrument registered on 18 March 1998, ceded the notarial lease to a company called Transafrican Aviation (Pty) Ltd.

[38] It is common cause that after this cession took place and Transafrican took occupation of the premises, it was again "business as usual" in the sense that Transafrican was invoiced for the rent on a monthly basis by the respondent and paid the rent to the latter with the respondent paying a lump sum in respect of all the rental of the various sub-leases to Southern on a regular basis.

[39] During April 1998 Southern sold the property to a company Lanseria Airport 1993 (Pty) Ltd ("Airport 1993") with the latter taking transfer of the property on 17 August 1998.

[40] At this stage, as explained with reference to *Genna-Wae*, Airport 1993 became the landlord (lessor) in terms of the head-lease and the respondent remained the sub-lessor of Transafrican.

[41] After this, it was again "business as usual" with all parties recognising that Transafrican had to pay monthly rental to the respondent who then made lump sum payments to Airport 1993.

[42] This state of affairs endured for more than five years until Transafrican was liquidated in October 2003.

[43] The liquidator, Ms Gail Warricker, elected to keep the notarial lease intact, and made a few payments in respect of rental to the respondent.

[44] Thereafter, the liquidator sold all the right, title and interest in and to and arising from the notarial deed of lease by public auction on 9 March 2004. The appellant, who, as a creditor, had an interest in the matter, took part in the bidding process and turned out to be the successful buyer, thereby acquiring all the aforesaid rights in and to the notarial deed of lease and, in law, becoming the lessee of the premises, subject to the conditions contained in the original Avfin lease, later echoed in the notarial lease, as explained.

[45] On 21 April 2004 the liquidator advised the respondent that the appellant had acquired the rights flowing from the notarial deed of lease from Transafrican. The respondent was advised that, with effect from 1 May 2004, the appellant would be responsible for the payment of the monthly rental and all other relevant charges. The rent until the end of April was properly paid by the liquidator.

[46] From then on, it was again "business as usual", with the appellant being invoiced for the monthly rental and the latter making payments to the respondent as sub-lessor.

[47] From a general reading of the papers, it is clear that the appellant was not a model lessee and the payments were invariably late.

[48] It is nevertheless clear, from the conduct of the appellant and the respondent, that they acknowledged the existence of a binding agreement of lease between them.

[49] It emerges from the evidence that, not only were the rental payments erratic, but, at times, no payments were made at all. For example, at one stage the rental in respect of the leased premises for the months July, August, September and October 2004 remained unpaid.

Correspondence and demands were exchanged.

Towards late 2005, the respondent's attorney, Mr Le Roux, also took the matter up with the appellant's representative, Mr Crous (also, in some of the papers, referred to

as Mr Kraus, but I will persist with the name Crous which appears to represent the correct spelling).

[50] When payments remained outstanding, the respondent, represented by Mr Opperman, instructed Mr Le Roux to cancel the lease on behalf of the respondent.

[51] On 3 October 2005, Attorney Le Roux wrote the following letter to the appellant, for the attention of Mr Crous:

> "**Lease agreement – Yourself/Lanseria International Airport (Pty) Ltd Hanger Site 4 Lanseria International Airport**
>
> We act for Lanseria International Airport (Pty) Ltd, your landlord in respect of Hanger Site 4, Lanseria International Airport.
>
> It is our instructions that you are presently in arrears with your monthly rentals and other charges in respect of your lease agreement for the months of July 2005, August 2005 and September 2005 in the amount of R28 553,07.
>
> As a result of your breach to pay your monthly rentals on due date you are hereby notified that your lease agreement is cancelled forthwith and you must accordingly vacate the leased premises immediately and arrange for all improvements to be removed in terms of the provisions of your lease.
>
> Yours faithfully"

[52] It is common cause that this letter ("the cancellation letter") was hand-delivered as well as delivered by telefax to the appellant, represented by Mr Crous, on the same date, 3 October 2005.

[53] This is the cancellation which forms the subject of the present dispute, and which is referred to in the notice of motion.

[54] The relevant portions of clause 11 of the Avfin lease as well as clause 11 of Part B of the notarial lease (which subject I have dealt with) reads as follows:

> "11. **BREACH**
>
> In the event of:
>
> (a) the rental or any other amounts due in terms hereof not being paid on due date; **OR**
>
> (b) the lessee failing to remedy any breach or any other conditions of this agreement within 7 (seven) days after written registered notice or within 7 (seven) days after receipt of a hand-delivered notice will have been given by the LESSOR to the LESSEE to remedy such breach; or
>
> (c) ...; or
>
> (d) ...; or
>
> (e) ...;
>
> then the LESSOR shall be entitled but not obliged, notwithstanding any previous waiver or anything to the contrary herein contained, to cancel this lease forthwith, without prejudice, and retake possession of the Premises, without prejudice to its claim, or any arrear rental and/or

other sums payable hereunder and/or for any damages which it may suffer by reason of such breach and/or cancellation, or to any other remedy which it may have against the LESSEE arising out of this lease or in law."

[55] From the aforegoing, it is clear that, in terms of the lease, the lessor was entitled to cancel forthwith in the event of non-payment of the rental, and not, for example, obliged first to give a seven day notice to the lessee to remedy the breach.

This much was common cause before us.

[56] After this cancellation, the appellant, initially, raised defences to the effect that, through its conduct, the respondent had waived the right to cancel the lease ("the waiver defence") and was, consequently, estopped from doing so ("the estoppel defence").

[57] The remaining, and third, defence was that the respondent did not have the necessary *locus standi* to cancel the lease and seek the appellant's eviction from the premises (the so-called "*locus standi* issue"). This was based on the argument that there was no privity of contract between the parties.

[58] Throughout the long, and somewhat tortuous, journey which this case travelled through the courts, the appellant persisted with these three defences.

[59] However, in heads of argument filed for purposes of the appeal which came before us, counsel for the appellant stated that their client was not persisting with the estoppel or waiver defences.

What remains for decision, therefore, is the "*locus standi* defence".

[60] So much for the background and history of the case.

The journey through the courts

[61] The respondent (as applicant *a quo*) launched the application for confirmation of the cancellation of the lease and eviction of the appellant (as respondent *a quo*) in September 2006.

[62] In March 2007, the matter came before Ebersohn, AJ, who, on 13 April 2007, upheld the application with regard to the *locus standi* issue and referred the waiver and estoppel defences to oral evidence. He did so in the following terms:

> "1. It is declared that the applicant has the necessary *locus standi* to seek the relief set out in the notice of motion.
>
> 2. All the defences raised by the respondent in this application, save for the defences referred to in prayer 3 below, are dismissed.
>
> 3. The application is referred for the hearing of oral evidence, on a date to be arranged with the Registrar, on the following issues:
>
> 3.1 whether the applicant has waived its right to rely on the notice of cancellation dated 3 October 2005 ...;

3.2 whether the applicant is estopped from cancelling the deed of lease, annexure FA10 to the founding affidavit (my note: this is the notarial lease) ..."

[63] The appellant applied for leave to appeal against the judgment in respect of the *locus standi* issue which application was dismissed on 25 August 2008.

[64] The appellant then petitioned the Supreme Court of Appeal, which, on 1 December 2008, granted leave to appeal to the Full Court of this Division.

[65] This appeal lapsed through non-compliance with the rules, but was reinstated and when the appeal came before the Full Court, that court decided to refer the *locus standi* issue to oral evidence as well.

[66] The application, as referred to oral evidence on all three issues, came before Pretorius, J on 26-28 November 2012.

[67] On 9 January 2013, the learned Judge, in a written judgment, found in favour of the respondent (then as applicant *a quo*).

Some of the findings of the learned Judge are:

(i) the notarial lease is the same as the Avfin lease which had subsequently been registered;

(ii) "Mr Henwood's evidence (he was one of the witnesses in the trial) was clear that the tacit cessions took place on 9 December 1993. The evidence confirms

that all the parties from that date onwards conducted themselves in a way which made it abundantly clear that all the facts supported the tacit cession."

And

"Having considered all the evidence, all the affidavits and all the authorities that both counsel for the applicant and the respondent had referred the court to, the court finds unequivocally that on the probabilities, the conduct of the parties and the circumstances which existed that the parties were in agreement and that the applicant has established that there was a tacit cession at all times.";

(iii) the defence of estoppel was dismissed; and

(iv) the waiver defence was dismissed.

[68] The learned Judge made the following order:

"1. An order confirming the cancellation of notarial deed of lease registered by the Registrar of Deeds, Pretoria under reference number K6754/94L;

2. an order directing the respondent to vacate the premises forming subject-matter of the aforesaid lease, being lease area 11 ...;

3. an order directing the respondent to pay the costs of this application on the attorney and client scale including the costs of two counsel."

[69] On 11 February 2014, the learned Judge granted leave to appeal to the Full Court of this Division.

This is the appeal which came before us on 14 October 2015.

Brief overview of the evidence led during the trial

[70] The overview is limited to what I consider to be relevant aspects of the evidence.

(i) **John Martin Rippon**

[71] I have dealt with most of his evidence earlier in this judgment.

[72] He was intimately involved with the whole transaction involving the acquisition of the property by Southern. During 1993 to 1998 he was the Group Property Investment Manager of Southern.

[73] Southern was not interested in the sub-leases. They were only concerned with the head-lease and the collection of their lump sum payment every month.

[74] The Avfin lease is not mentioned in annexure "D", the list of sub-leases, referred to in clause 13.1 of the head-lease, the contents of which has already been quoted but, for the sake of easy reference, it is repeated:

> "13.1 This lease is subject to the cession of all sub-leases listed in annexure 'D' together with any further sub-leases entered into after the compilation of annexure 'D', from Lanseria Airport Properties (Pty) Ltd to the lessor (obviously, Southern) and a copy of such written cession furnished to the lessor prior to the effective date, failing which cession this agreement will be void."

I have already pointed out that, before us, it was common cause that such a cession was, in law, unnecessary because Southern, in any event, stepped into the shoes of LAP as lessor – see *Genna-Wae*, *supra*.

Moreover, the Avfin lease was, in any event, not a "sub-lease" in the true sense of the word: it was a straightforward lease between the then owner, LAP, and Avfin. In respect of this lease, Southern would also, for the reasons mentioned, automatically, in law, step into the shoes of LAP as the lessor in respect of the Avfin lease.

In the result, I have difficulty to accept the argument offered on behalf of the appellant in terms of which strong reliance was placed on the purported suspensive condition, in clause 13.1 of the head-lease, that, in the absence of a written cession of the "sub-leases" by LAP to Southern, and furnished to Southern prior to the effective date, the head-lease would be void. Such a cession was patently not necessary in law. Moreover, the Avfin lease, forming the subject of this case, was not a "sub-lease", neither was it mentioned in annexure "D".

In the cross-examination of Mr Rippon, mention was also made of the provisions of clause 18(b) of the Avfin lease, the contents of which I have quoted. In that clause it is recognised that LAP had sold the property to Southern, and in terms of that sale, and the head-lease, LAP, the respondent and Southern had agreed that with effect from the effective date, the Avfin lease will be ceded by LAP to Southern and thereafter by the latter to the respondent.

It was the unequivocal evidence of all the witnesses on behalf of the respondent that written cessions was not considered to be necessary (in any event clause 18(b) of the Avfin lease does not make any mention of **written** cessions) and that, through their conduct, all parties recognised that inasmuch as cessions may have been necessary, they were tacitly effected. It was argued on behalf of the respondent that objectively, it is clear from the conduct of the parties through the years (I have listed these developments earlier on) that the respondent was recognised as the sub-lessor with the procession of tenants (Avfin, Transafrican and the appellant) as its sub-lessees receiving monthly invoices for the rent from the respondent and making payment. I add that the learned author Christie, *The Law of Contract in South Africa* 6th ed, states on p484 that "In general no formalities are required for a cession, which may validly be made orally or tacitly even if the rights ceded form part of a written contract." - See authorities cited at footnote 237.

For present purposes, this state of affairs endured for at least twelve years, from the December 1993 effective date to October 2005 when the respondent cancelled the lease with the appellant.

It is also worth repeating that in the deed of sale between LAP and Southern (clause 14) it is recorded that LAP -

> "hereby, to the extent that this does not apply by operation of law, cedes to (Southern), effective as at the transfer date, all of such leases listed on such annexure 'D' ... simultaneously with the abovementioned cession, (Southern), as lessor, will cede to Lanseria Airport (Pty) Ltd (the respondent), as lessee,

effective as at the transfer date, the leases listed on such annexure 'D' which will then become sub-leases of the lessee of the respective premises."

This deed of sale was already signed in June 1993, well before the December 1993 effective date. In my view, it is also arguable (although I do not recall such a submission being made) that the written cession in clause 14.2 of the deed of sale under discussion, that LAP "hereby cedes" the leases to Southern, probably amounts to material compliance, inasmuch as it may be necessary, with the provisions of clause 13.1 of the head-lease.

All this, in my view, bears testimony to the fact that all concerned (including the appellant until after the lease was cancelled!) considered that the necessary cessions had taken place and that there was a relationship of sub-lessor-sub-lessee between the respondent and the appellant.

Mr Rippon, testifying in November 2012, some nineteen years after the event, put it like this:

"--- We never concluded a written cession.

Right, why was that not done because it has an effect on the validity of the head-lease? --- Today when we buy properties we never formally cede the leases to the new owners and we never have. The effective transaction came into being on 9 December 1993 when the property was transferred. It was on that date that the head-lease came into being with ourselves. So we never formally ceded the underlying sub-leases to the sub-lessees at the Airport.

> And was the reason for that because you became the owner of the property in any event? --- We were the owners of the property yes."

[75] I add that, in the deed of sale entered into between Southern and Lanseria Airport 1993 (Pty) Ltd ("Airport 1993") Southern, as seller, also "assigned" all the leases to Airport 1993 in the following terms:

> "The parties record that there are leases effective in respect of the property, and registered against the title deeds thereof (my note: this would probably include the notarial lease which is the subject of this case). The seller hereby assigns to the purchaser, effective as at the transfer date, all leases in respect of the property to which the seller is a party."

I have mentioned that this transfer, leading to Airport 1993 becoming the owner of the property, took place on 17 August 1998, almost six years before the appellant became the lessee in terms of the notarial lease when the auction took place on 9 March 2004.

[76] On this whole issue of the leases being "formally" ceded, Rippon said:

> "I might rephrase [indistinct] wrong but it was tacit acceptance that there is a new owner coming in we entered into head-lease with Lanseria Airport (Pty) Ltd and they then had the whole bank and underlying sub-leases."

I have mentioned this, but the repetition is for easy reference.

[77] In cross-examination, Rippon was also quizzed about certain documents reflecting, *inter alia*, that as the owner of the property at the time, Southern agreed to the cession, already mentioned, of the notarial lease from Avfin to Transafrican Aviation (Pty) Ltd.

There was also a "deed, cession and assignment of lease" dated May 1994 (after the December 1993 effective date) in terms of which LAP, as cedent, ceded the Avfin lease to Southern in terms of clause 18 of the Avfin lease. I already mentioned that this was not necessary in law. In my view nothing turns on this, and I do not recall that any particular emphasis was placed on this document during argument before us.

[78] Rippon was not, as I read his evidence, in any way discredited despite lengthy cross-examination. As I have mentioned, his evidence, on the relevant aspects of the case, was uncontested.

(ii) **Douglas William Henwood**

[79] His supporting affidavits form part of the founding and replying papers, and he confirmed the correctness thereof.

[80] When he testified, he had been a director of the respondent as well as LAP since 1991.

[81] He testified about the decision to expand the Airport and to structure the Southern deal as a "typical sale and lease pack".

[82] There was no question of Southern having any direct dealings with the tenants on the properties comprising the Airport.

[83] About the cessions, he said the following:

> "So did you go from the understanding that well if you say you are going to cede it, it is the same as ceded, we accept that it is ceded. We all assume it is ceded and we carry on as though that has happened? --- Absolutely yes.
>
> And was that the common understanding of the parties at that time? --- Yes, and I think it is very common in the classical sale and lease back agreement that that happens."

Mr Henwood was clearly an impressive and credible witness, and not in any way discredited.

(iii) **Daniel Arnoldus Christoffel Jacobs Opperman**

[84] He was the assistant airport manager, a post he had held since 1991 by the time he testified in 2012, some 21 years later.

[85] He confirmed the evidence he offered in the founding affidavit, *inter alia*, his statement that until Avfin ceded the lease in question to Transafrican Aviation (Pty) Ltd during 1998, all parties acted on the basis that Southern was the lessor and the respondent the lessee of the leased premises in terms of the head-lease, and Avfin was the sub-lessee in accordance with the conditions contained in the Avfin lease.

[86] He also confirmed his evidence in the founding affidavit that it is the respondent's case that in view of the conduct of the parties as evidenced by the documentation (this would include, *inter alia*, monthly invoices for rental and so on) Southern tacitly

ceded the Avfin lease to the respondent. He pointed out that Henwood, in his supporting affidavit, supported this evidence.

[87] The bulk of Opperman's evidence, particularly in cross-examination, deals with the issues involving the waiver defence and the estoppel defence. These defences were strongly pursued by the appellant in cross-examination of the witnesses, but, as I have indicated, abandoned before the matter came before us.

[88] These were the witnesses called by the respondent.

[89] Their evidence was impressive and uncontested.

(iv) **Vincent Crous (also spelt differently at times, eg Kraus, as I have mentioned)**

[90] He was employed by the appellant in the Legal division as a consultant. His main area of focus was to address accounts that had gone into default and the recovery process thereof. Everything regarding the "Aviation Portfolio" was only put under his control during June 2005.

Until then, he was not involved in making the rental payments to the respondent.

[91] He had no personal knowledge about the important aspects, such as the sale transactions, the cessions and so on.

[92] The bulk of his evidence had to do with the cancellation of the lease and aspects involving the waiver and estoppel defences. With these having been abandoned, his evidence, in my view, did nothing to contribute to the adjudication of this case.

[93] The appellant did not call any other witnesses.

[94] So much for the brief overview of the evidence.

The lease has expired

[95] In their heads of argument, counsel for the appellant, reminded us that "the initial period of the notarial deed of lease" expired on 31 May 2013.

[96] It is stipulated in the 1993 Avfin lease that the date of commencement thereof would be 1 June 1993 and the expiry date, twenty years later, 31 May 2013.

[97] We were informed by counsel that it is common cause that the appellant vacated the premises at the termination of "the initial period of the notarial deed of lease".

[98] Without in any way attributing any form of concession on the part of counsel for the appellant, it does appear that this development lends support to the finding of the learned Judge *a quo* that the notarial lease is the same as the Avfin lease which had subsequently been registered. This is also in line with the evidence offered on behalf of the respondent and something which I attempted to articulate earlier on in this judgment.

[99] It was submitted by counsel for the appellant that the vacating by their client of the premises does not render the appeal moot, because the respondent has instituted an action against the appellant in the Gauteng Local Division based on alleged unlawful holding over of the premises. It was submitted that the issues in that action overlap with those crystalised in this appeal, so that the outcome of the appeal could have an effect on the outcome of the action.

We received no submissions to the contrary from counsel for the respondent.

Brief remarks about the nature of a cession, tacit cessions and the standard of proof required to establish the existence of a tacit cession

[100] In *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) at 331G-H the following was said about a cession:

> "Sessie kan gesien word as 'n oordragshandeling (act of transfer) om die oordrag van 'n vorderingsreg (*translatio juris*) te laat plaasvind. Dit geskied deur middel van 'n oordragsooreenkoms (agreement of transfer) tussen die sedent en die sessionaris uit hoofde van 'n *justa causa* waaruit die bedoeling van die sedent om die vorderingsreg op die sessionaris oor te dra (*animus transferendi*) en die bedoeling van die sessionaris om die reghebbende van die vorderingsreg te word (*animus acquirendi*) blyk of afgelei kan word."

[101] Counsel for the respondent submitted, correctly in my view, that the existence of a cession (transfer agreement) is a matter of fact, which must be proved on a balance of probabilities in the light of all the admissible evidence – see *Samcor Manufacturers v Berger* 2000 3 SA 454 (T) at 461G-I.

[102] Christie, *The Law of Contract in South Africa* 6th edition pp86-89 provides an exposition of the standard of proof required in order to establish a tacit agreement (and, as counsel correctly point out, also a tacit cession). The learned author demonstrates that the standard of proof required is no higher than a preponderance of probabilities. The same was said by the learned Judge in *Samcor Manufacturers* at 461G.

[103] In *Standard Bank of South Africa Ltd and another v Ocean Commodities Incorporated and others* 1983 1 SA 276 (A) it was stated at 292B-C:

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact 'consensus *ad idem*'." – See also *Kropman and others N.N.O. v Nysschen* 1999 2 SA 567 (T) at 575E and 576D.

[104] In my view, the overwhelming weight of the evidence clearly illustrates that, towards the end of 1993, there was a clear "agreement of transfer" in the spirit of what was said in *Johnson, supra*, between the cedent (Southern) and the cessionary (the respondent) that the sub-leases, including the Avfin lease, would be ceded to the respondent because Southern wanted nothing to do with the sub-tenants and was only interested in collecting the lump sum rental payment every month.

The existence of such a cession is supported by the fact that it was also foreshadowed by LAP as clearly stated in clause 18(b) of the Avfin lease and, of course, it was also endorsed by Avfin for the same reason. As I pointed out earlier, clause 18 was adopted, in identical terms, in Part B of the notarial lease with the respondent unequivocally recognised as the sub-lessor.

[105] Moreover, as I have pointed out, the intention to cede is clearly stipulated in paragraph 14 of the deed of sale between LAP and Southern, which precedes the effective date of 9 December 1993.

[106] Quite apart from what is stipulated in all these contracts, the conduct of the parties, in my view, clearly point towards the existence of a cession: for some twelve years, for present purposes, namely from December 1993 until about October 2005 (when the lease agreement was cancelled by the respondent) all concerned, including the procession of lessees in terms of the Avfin lease, recognised the existence of a lease agreement between the respondent and all the sub-tenants, including, in the end, the appellant.

[107] Against this background, and with reference to the standard of proof required to establish a tacit contract, or cession, it is useful to revisit the words of the learned Judge in *Ocean Commodities, supra*:

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged ..."

Conclusionary remarks and brief reference to some arguments advanced on behalf of the appellant

[108] I have already briefly dealt with the argument that the head-lease is void because of non-compliance of the purported suspensive condition contained in clause 13.1.

I have pointed out that such a cession (from LAP to Southern) was not necessary in law (*Genna-Wae* and other authorities).

Moreover, I have expressed the view that the clear cession, contained in clause 14 of the deed of sale between LAP and Southern, of the sub-leases in annexure "D" probably amounts to substantial compliance with this "suspensive condition" such as it may be.

Apart from the aforegoing, the parties to the cession did not seek to enforce or recognise the "suspensive condition" and, for many years, through their conduct, acted as though the cession had taken place.

[109] In any event, the Avfin lease was not a "sub-lease" as intended by the "suspensive condition" neither was it mentioned in annexure "D".

[110] As I understand the argument of the appellant, non-compliance with the "suspensive condition" leading to the invalidity of the head-lease, meant that the relevant parties (presumably including LAP, Southern, the respondent and Avfin) were only under the

mistaken impression that there had been a cession, so that it was not established that a tacit or implied contract (cession) came into existence.

In this regard, counsel for the appellant relied on the case of *Landmark Real Estate (Pty) Ltd v Brand* 1992 3 SA 983 (WLD). The principle, endorsed in this decision (although I could not find clear reference thereto in the text) is summarised as follows in the headnote:

> "Where it is alleged that a tacit contract between two parties came into existence, but it is clear that the parties erroneously assumed that there was a contract between them, that erroneous assumption prevents the court from inferring that a tacit or implied contract came into existence."

In my view, the case in *Landmark* is distinguishable, on the facts, from the present, and, in any event, I find no indication of an "erroneous" assumption of the existence of a cession. All the parties on behalf of the respondent testified that there was such a cession, at least by conduct, and this is supported by a series of contractual provisions that I have mentioned.

The argument that formal (written) cessions were required to establish the existence of a cession, is also, in my view, ill-founded: there is no mention of formal or written cessions in clause 14 of the deed of sale or in clause 18 of the Avfin lease. Clause 13.1 of the head-lease does not have a bearing on the Avfin lease and was in any event unnecessary in law. It cannot be seen to override the trite principle that Southern in any event stepped into the shoes of LAP as lessor.

In my view, the learned Judge *a quo* correctly rejected this argument based on *Landmark* and other authorities. She pointed out that Rippon's evidence was clear that no formal cessions were envisaged at any stage. In any event, the appellant offered no evidence to rebut that of Rippon, Henwood and Opperman for that matter.

[111] There was also an argument, flowing from what was stated in the preceding paragraph, that even if Rippon's evidence was to the effect that formal cessions were not envisaged, it was in breach of the parol evidence rule. It was argued on behalf of the appellant that such evidence of Rippon was inadmissible because it flew in the face of the requirements of clauses 14.2 and 14.3 of the deed of sale, which required "formal" cessions.

There is no reference in clauses 14.2 and 14.3 to "formal" cessions and, in any event, the Avfin lease is not included in annexure "D".

Counsel for the respondent reiterated that the appellant's representative and only witness, Crous, was not involved in the sale transaction and the leases concluded in 1993 (the appellant only got involved with the leases when the execution sale took place in March 2003) so that Crous does not have any personal knowledge regarding the dealings between the relevant parties, the background to the transactions or what their intentions and conduct were.

Interestingly, counsel for the respondent also advanced an argument that it is not for a third party (like the appellant) to seek to bind contracting parties, not involving the appellant, to a term contained in their contract, if they agree on how to apply and

enforce such a term. In *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 4 SA 483 (SCA) at paragraphs [25] and [26], the following was said:

> "[25] Where the parties dispute the meaning of a term then a court must necessarily look to the wording of the provision itself to determine its correct construction. But where they agree on its meaning, even though the provision appears objectively to reflect a different understanding, it would be absurd to insist on binding them to a term upon which neither agrees only because of a third party's insistence on reliance on the apparent meaning of the provision.
>
> [26] Accordingly, in my view, it should not be open to the defendant to contend that, although the parties intended the cession to constitute security only for the overdraft, it covered also all other debts owed or that might in future be owed to the bank. And similarly, where the parties have agreed that the cession will be extinguished when the overdraft ceases to exist, it should not be open to the defendant to argue that the re-cession must be in writing in order for it to take effect ..."

[112] There were other arguments offered as well, which, in my respectful view, have no merit. My failure to deal with those arguments, such as they are, is not out of disrespect for counsel.

[113] Finally, in my view, it should be borne in mind that this is a so-called "facts appeal" or an appeal on fact. For the reasons mentioned, the existence of a cession is a question of fact. The matter was referred to evidence in order to establish the facts and to make a finding thereon. The learned Judge, after considering all the evidence and the

documentation, stated, as I have already mentioned, "the court finds unequivocally that on the probabilities, the conduct of the parties and the circumstances which existed that the parties were in agreement and that the applicant has established that there was a tacit cession at all times".

It is trite that the powers of a court of appeal on fact are limited and that such a court will be slow to interfere with the findings of the court below. The trite principles were laid down in *Rex v Dhlumayo and another* 1948 2 SA 677 (AD) at 705-706, and also apply to civil appeals. In such a civil case, *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 2 SA 450 (AD) the following was said by the learned Judge of Appeal at 452A-B after he referred to *Dhlumayo:*

> "Daar is geen regverdiging vir die tersydestelling van die verhoorhof se beslissing nie. Teenoor die geregverdigde kritiek wat teen sekere aspekte van die uitspraak van die hof *a quo* uitgebring kan word, is daar dus ook gewigtige oorwegings wat op die korrektheid van die kern bevinding dui. By heroorweging van die getuienis op appèl is die vraag, soos hierbo reeds genoem, nie of daar redelike twyfel bestaan oor die juistheid van die konklusie van die Verhoorhof nie, maar wel of die Hof van Appèl om gegronde redes oortuig is dat dit verkeerd is. In die onderhawige geval is dit, ondanks sekere bedenkinge soos genoem, nie moontlik om tot daardie oortuiging te geraak nie."

In *State v Francis* 1991(1) SACR 198 (A), the learned Judge of Appeal, referring to both *Dhlumayo* and *Taljaard*, said the following at 204c-e:

"The court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and another* ...) ... In the absence of any misdirection the trial Court's conclusion, ... is presumed to be correct. In order to succeed on appeal accused no 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence – a reasonable doubt will not suffice to justify interfering with its findings (*Rex v Dhlumayo (supra)*; *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* ...). Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's evaluation of oral testimony ..."

[114] In all the circumstances, and for the reasons mentioned, I have come to the conclusion that the appeal has to fail.

Costs

[115] In the court below, costs were awarded against the unsuccessful respondent (now the appellant) on the scale as between attorney and client.

[116] If I understood counsel for the respondent correctly, this order for costs on a punitive scale was based on the provisions of clause 11 of the Avfin lease, also forming part of Part B of the notarial lease. The relevant portion reads as follows:

"In the event of the LESSOR invoking any of the provisions of this clause and instructing a firm of attorneys for such purpose or for the purpose of collecting from the LESSEE any amount payable by the LESSEE in terms of this lease,

the LESSEE shall, in addition to any other payments which it is liable to make in terms hereof, be obliged to pay all legal costs in connection therewith on the attorney and client scale, including collection commission as well as the costs of any such collection agency as may be incurred."

[117] Clause 11 goes under the heading "BREACH" which is the clause on which the October 2005 cancellation (the subject of this case) was based.

[118] In the result, I see no reason why the same approach, as to costs, should not be adopted in the present matter.

The order

[119] I make the following order:

1. The appeal is dismissed.
2. The ~~respondent~~ appellant is ordered to pay the costs of the ~~appellant~~ respondent, on the scale as between attorney and client, and which costs will include the costs flowing from the employment of two counsel.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A154-2014

I agree

V V ILHAPI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

T VILAKAZI
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 14 OCTOBER 2015
FOR THE APPELLANT: K W LÜDERITZ SC ASSISTED BY A C BOTHA
INSTRUCTED BY: BEZUIDENHOUT VAN ZYL INCORPORATED
FOR THE RESPONDENT: J P VORSTER SC ASSISTED BY A M HEYSTEK
INSTRUCTED BY: LE ROUX VIVIER & ASSOCIATES