NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO. 8684/08

In the matter between :

STAND 2436 PMB (PTY) LTD Applicant

and

ISAAC KWESI TAKOR Respondent

J U D G M E N T

Delivered on 1 June 2009

SISHI, J. :

[1] The Applicant is the owner of an immovable property known as Selgro Shopping Centre, situated at 361 Church Street, Pietermaritzburg (the Selgro Centre). The Respondent is a businessman who operates his businesses from Shop 42, 44 and Shop 5 of Selgro Shopping Centre, Church Street, Pietermaritzburg. At all relevant times Colliers International (Pty) Ltd was acting as an agent and property manager of the Applicant in respect of the Selgro Centre. During February 2003 the Respondent personally and the Applicant duly represented by Mr. William Wayne Barnes in his capacity as a

Director of Colliers International (Pty) Ltd entered into a lease agreement in respect of Shop No. 5, Selgro Centre. In terms of the lease agreement the lease was for a period of five years from 1 February 2003 to 31 January 2008.

[2] The Applicant has approached this Court wherein it seeks an order in the following terms :

(a) That it be declared that the Agreement of Lease entered into by the Applicant and Respondent during or about February 2003 expired on 31 January 2008;

(b) An order evicting Respondent from the premises at Shop 5, Selgro Shopping Centre, 362 Church Street, Pietermaritzburg.

(c) Costs of suit.

[3] This application is opposed by the Respondent. In terms of the order of this court dated 25 March 2009 this matter was referred for the hearing of oral evidence on the question of whether the Respondent gave timeous and proper notice to the Applicant of his intention to renew the lease.

[4] It is undisputed that the parties entered into the lease agreement for a period of five years. The lease provides for an option to extend it for a further

period of five years, the lease would have expired on the 31 January 2008. The option which would have been exercised the 31 July 2007. If the option was exercised the agreement makes provision for a 12% escalation in rental. The lease agreement further provides that that option should be exercised in writing.

[5] It is the Respondent's case that he did indicate in writing to the Applicant's agent that he desired to renew the lease not only of the premises in question, i.e. shop no. 5, but also to the other shops 42 and 44 of which he was also the lessee, and that one single letter was written covering all three shops, shop 5, shop 42 and shop 44. The letter was sent to the physical address of applicant's agent which address was taken off its rental statements. It is the Applicant's case that no such notice was ever received.

[6] It is common cause between the parties that should the court find that the Respondent did not give timeous and proper notice to the Applicant of his intention to renew the lease, the application should succeed and the relief claimed in paragraphs 1, 2 and 3 of the Notice of Motion ought to be granted. On the other hand should the court find that Respondent did indeed give timeous and proper notice to the applicant of his intention to renew the lease, then the application ought to be dismissed.

[7] The Respondent's testimony is that he read and understood the terms of the lease agreement. He specifically referred to Clause 3 of the Lease

Agreement, Annexure “A” to the papers dealing with renewal. His evidence was that he knew when and how to renew the lease agreement. Clause 3.3 of the lease agreement states that the tenant shall give the landlord written notice of his intention to exercise this option of renewal by not later than six calendar months prior to the expiry of the initial period of lease. If the tenant does not give notice by then this option of renewal shall lapse. He testified that in order to exercise his option to renew the lease, he had to write to the landlord a letter of renewal. Since the lease was ending in January 2008 he had to send them a letter before July 2007. As it was his intention to continue trading, he stated that prior to the 31 July 2007 he addressed a letter to the landlord’s agents Collier International in which he confirmed his intention to renew the lease for the further period of five years and requested that such renewal be effected. It was his testimony that he operated three shops in this shopping centre Shop Nos. 5, 42 and 44. Two of the shops are operated as hair salons and one as an internet café. He drafted this letter of renewal in handwriting and gave it to Raymond Manful his internet café manager to type it and send it to the address which was on the rental statement. Raymond Manful was instructed to send this letter to the address 2 Derby Place, Derby Downs Office Park, Westville,3630. Raymond Manful carried out this instruction and he also testified and confirmed that he was given instruction to type such a letter and send it to the address shown in the rental statement.

[8] According to the evidence of Mr. Manful he did type the letter and saved it on the hard drive. He did not retain a copy of the letter nor did he

give it to the Respondent. Mr. Manful used one of the six computers in the internet café to type the said letter, however, when he was asked to retrieve the said letter by the Respondent, he could not find it on the hard drive of the computer. The explanation therefor was that the computers are also used in the internet café by the members of the public and when the hard drive is full the information thereon is erased and if they want to get rid of the virus they have to empty the hard drive of the computer. You format the whole thing to start afresh. By this one destroys all the documents that have been previously saved on the hard drive.

[9] Wayne William Barnes the director of Colliers Property and Facilities Management (Pty) Ltd testified on behalf of the Applicant. He confirmed the current address wherein they operate in Durban as 2 Derby Place, Derby Downs Office Park, Westville. The Applicant in this matter is the landlord and they manage the property on behalf of the client. The Applicant is the owner of the property Selgro Centre. He confirmed that there was a lease agreement concluded between the Applicant and the Respondent in respect of Shop no. 5 in Selgro Centre which was concluded in 2003. He is also aware that there is an option built into the agreement in terms of which the Respondent could exercise the option for renewal for another five years.

[10] He did not receive any notification of an intention to exercise the option of renewal of the lease. The option should have been exercised before 31 July 2007. He explained that the 2003 lease refers to 7 Derby Place and the

present address is no. 2 Derby Place. The reason therefor was that they relocated from 7 Derby Place to 2 Derby Place on the 1 September 2006. His evidence was that if that letter was received it would have come to his attention. He testified that he did a thorough search after receiving the Answering Affidavit of the Respondent and again went through the records to see whether any such letter came. Such letter could not be traced. He receives mail delivered to physical address as well as the postal address.

[11] He testified that the negotiation meetings which were held after the 31 July 2007 were held because Mr. Takor the Respondent was complaining about the trading hours within the centre more especially Shop no. 5. He could not get access out of the trading hours and he wanted the landlord to extend the centre trading hours accordingly. That was discussed and he was informed it was not possible to extend the trading hours for one specific tenant. It came about after numerous discussions after July 2007 that they would not renew that lease agreement due to the required trading hours within the centre. The landlord after discussion declined to keep the centre open specifically for one tenant. When he was asked if that was the reason for the non-renewal of the lease, he stated that there was no option they did not receive a written option or written intention that the tenant would like to exercise the option to renew the lease. The tenant at no stage prior to the 31 July 2007 gave an indication that he wanted to renew the lease. At no stage prior to 31 July 2008 did Applicant indicate to the Respondent that they were not going to renew the lease because of this issue regarding trading hours.

There were more then one meetings of such nature and that at such meetings the Respondent at no stage indicated that he wanted to exercise his option, the option to renew the lease. He was advised verbally that the lease would not be renewed. When he was advised that the lease would not be renewed they suggested that he actually look for alternative premises. They actually offered him alternative premises within the centre in Pietermaritz Street, in order for him to trade longer hours but he declined. This offer was made to the Respondent during the latter part of 2007. He requested longer hours only in respect of shop no. 5.

[12] He then identified two documents in Bundle "B" referring to shops 42 and 44 and stated that these documents are offers to lease which are presented to respective tenants when they sign these offers then they are presented to the landlord and should the terms and conditions be acceptable then they would actually be instructed by the landlord to send acceptance letters. Once one gets an acceptance then they have got a binding agreement. Thereafter the lease agreements will be sent to the respective tenants. As the lease agreements for shops no. 42 and shop no. 44 expired in January 2008 these were basically documents for the new terms and conditions of the proposed lease agreements in order to present to the landlords for acceptance.

[13] He disputed the Respondent's evidence that he exercised the option and as a consequence of exercising the option these documents were sent to

him. If he had received a document to exercise an option they would basically forward a document thereafter and if the Respondent had exercised the option within the duration of six months as the lease provided, these documents would not have been sent to him. This was only sent to him on the 25 January 2008 whereby the lease expired at the end of January 2008. If the respondent had exercised his option timeously they would send him a letter advising him that he had exercised his option and all the terms and conditions are within the lease agreement. The landlord advised them to give them a three years lease in terms of the documents referred to above. If the two documents referring to shop nos. 42 and 44 were sent to the respondent as a consequence of him exercising his option as he testified, those documents would not have referred to a lease period of three years instead it would have been a five year period because of the option period of five years in the original lease.

[14] The Respondent's testimony was that he was very surprised when he received these documents in respect of shops nos. 42 and 44 and not in respect of shop no. 5. He testified that at their meetings during the latter part of 2007 they advised the respondent that the lease agreement in respect of shop no. 5 would not be renewed. They actually sent him a letter advising him that only the other shops would be renewed and not shop no. 5. That is the reason why he did not receive any document in respect of shop no. 5.

[15] He then referred to the letter in Bundle "B" dated 15 October 2007 which reads as follows :

> **"LEASE AGREEMENT - SHOP 5, SELGRO CENTRE**
>
> **We refer to our previous discussions and hereby confirm that we will not be renewing the lease agreement for the abovementioned premises, which expires on 31 January 2008.**
>
> **Please note that the Landlords are prepared to renew the lease agreements for shop numbers 42 and 44, subject to upgrading your stores."**

He then referred to a letter dated 17 October 2007 from the Respondent's attorneys wherein they require to be furnished with reasons for not renewing the lease agreement.

He then testified that this letter was responded to by a letter dated 29 October 2007 from Colliers International addressed to the Respondent's attorneys and this letter reads as follows :

> **"SHOP NO. 5 SELGRO CENTRE : I.K. TAKOR**
>
> **Your fax dated 17 October 2007 refers.**

> **We have had numerous meetings with Mr. Takor and have advised him of the reasons why the Landlords will not renew the lease agreement.**
>
> **To reiterate, the rationale behind the decision was due to Mr. Takor's requests for the Centre to alter the trading hours. The Landlords were not prepared to entertain such requests and decided not to renew the lease."**

He then testified that the respondent actually ignored their letter and made no attempt to vacate the premises. They then extended the notice by two calendar months to the 31 March 2008 failing which they would have to apply to a High Court for an eviction order.

[16] He then referred to one of the documents dated 2 June 2008 which is similar to the two documents relating to shop nos 42 and 44 but the terms thereof are different to those relating to shop number 42 and 44 and this document relates to shop number 5. According to Mr. Barnes this was a new lease agreement because there was no option to renew. This document was sent to the Respondent as he approached him and stated that he wanted to resolve all the matters and he was prepared to adhere to the management's rules of the shopping centre and to try and resolve matters as opposed to going to the High Court for eviction. The new lease agreement was subject to certain terms and conditions which are outlined on page 3 of the same document. Amongst these were the payment by tenant of the high court costs

of litigation expended thus far. At that stage fresh instructions were given to attorneys to proceed with the eviction.

[17] The Respondent's evidence regarding the new lease for shop no. 5 was that the landlord had taken the 9cm out of the shop for another tenant. After that he was asking for R23 000.00 instead of R15 000.00 rental. He told him that that was too much. It was almost 100% increment on rental. He told him that the rent was R13 605.00 in respect of the old lease. It was now R23000.00 almost twice the normal rent he was paying. The normal escalation in terms of the previous lease was 12%. The Respondent was not happy with the lease. He testified that all of a sudden they raised the issue of not receiving a letter of renewal of lease whilst they did not tell his attorney about this issue.

[18] Mr. Barnes testified that at that stage instructions were given to their attorneys to proceed with the eviction. Mr. Barnes then testified that the documents in respect of shop no 5, the new lease agreement, and those in respect of shop nos 44 and 42 were never returned to him. The present position as far as occupation of the two shops, shops 42 and 44 is that his rental is up to date and the terms of his occupation and that he is on a month to month tenancy. There is no written agreement in respect of both shops nos 42 and 44. There is also no agreement at all in respect of shop no. 5 that is why they have applied for eviction. He then testified that in respect of shop no. 5 there is a substantial amount of arrears to the tune of R160 000.00.

However in his affidavit deposed to on the 18 June 2008 he alleged that there is currently an amount of R6 673.16 in rentals due to the Applicant in respect of shop number 5 which the respondent refuses to pay and he has annexed a statement marked “D” in support thereof. The Respondent’s evidence on the other hand is that even though the applicant stopped sending him statements in respect of shop no. 5 he continued paying rental using the old statements.

[19] Mr. Pretorius for the Applicant submitted that it is trite law that in respect of the issues before Court, the Respondent carries the onus and he referred to the following cases :

Pillay v Krishna & Another 1946 AD 946**; Rhoodie v Curitz** 1983(2) 431 CPD at 435 G; and **Cash-In CC v OK Bazaars (1929) LTD** 1991(3) SA 353 at 362 A.

He submitted that in **Rhoodie v Curitz**, *supra*, the Court stated the following :

> “**The onus of establishing that notice of renewal was communicated by the Respondent, to the Applicant, or that the Respondent exercised his option to renew, effectively rests on him the respondent”.**

He then referred to the case of **Cash CC v OK Bazaars (1929) Ltd** *supra* at 362 A – B wherein SCOTT J. held that his construction of clause 3, the Defendant was obliged in order to be entitled to renew the lease, to establish:

"(i) that notice had been given in terms of clause 3.2; and

(ii) that it was not in default of any of the provisions of the lease upon its expiry; and

(iii) that it had complied with all the terms and conditions of the lease …"

He then referred to the book by Cooper : Landlord and Tenant 2nd Edition at page 347 where he says :

> **"A Lessee who wishes to exercise his option to renew must communicate to the Lessor his acceptance of the latter's offer".**

He submits that it is also clear from Cooper's work that if he does not do so or if he does not exercise or communicate within the period open for such then it lapses.

Mr. Pretorius submits that the Respondent has not satisfied this onus.

[20] Mr. Blomkamp for the Respondent submitted that he is not so sure that the onus is on the Respondent in this case. He submitted that the Applicant did not simply say in his application "I am the owner of the premises, the Respondent is in occupation unlawfully and I want him ejected". He submits that in that situation, the onus would have been on the Respondent to establish that he had some basis for occupation, some lawful basis for occupation and it is not what occurred in this case. The Applicant goes considerably further and states that he had a lease. If he wanted to renew the lease he had to exercise his option to renew the lease in writing. He did not do so. The Respondent on the other hand says that he exercised the option to renew the lease by writing a letter which the Applicant must have received. The Applicant on the other hand says that he did not receive this letter. In that situation Mr. Blomkamp submits that the onus is on the Applicant and if at the end of the day, the Court finds that it is not possible to say that the Applicant's version is true and that of the Respondent is false, the onus has not been discharged and the application must be dismissed.

The case in point on this issue is **Chetty v Naidoo**1974(3) SA AD 21 AT 20 A – E.

This case mainly dealt with the incidence of proof in ejectment proceedings. The court found that where in ejectment proceedings the owner admits that the defendant was a monthly tenant but averring that tenancy terminated the onus in such circumstances is on the defendant to establish the right of

occupation. (See also **de Villiers v Potgieter and Others NNO** 2007(2) SA 311 at 316 para 12)**.**

[21] The authorities referred to above by Mr. Pretorius on the issue of onus are clear on this point. Cooper in his work referred to above also refers to the cases of **Rhoodie v Curitz** *supra* and **Cash-In CC v OK Bazaars** in support of the principle that the onus is on the Lessee who claims he duly exercised his option to renew the lease. In the light of these authorities the submission by Mr. Blomkamp that the Applicant bears the onus of proof in this matter cannot be correct. I therefore find that the Respondent bears the onus to prove on a balance of probabilities that he duly exercised his options to renew the lease and that it was communicated to the Applicant.

[22] It is clear from the Respondent's evidence that he knew that he had to exercise his right, the option to renew the lease prior to 31 July 2007. It is clear that he understood the terms of the lease. He read it, he knew exactly what he had to do and what his rights and obligations were. His evidence was that he had sent such a notice by ordinary mail prior to 31 July 2007. He did not keep a copy of this letter. The notice of renewal was in respect of all three shops and this was only saved on the hard drive of the computer. One of the computers used by the members of the public to write letters in the internet café. He also did not make a follow up if this notice was communicated to the applicant. He and his witness Mr. Manful could not remember when this notice was sent to the applicant. One would expect a

prudent businessman to keep a copy of such a letter and even to make a follow up to ensure that the notice was communicated to the Applicant. The Respondent had a responsibility to ensure that the notice of renewal was communicated to the Lessor. The Respondent failed in this regard.

[23] Mr. Pretorius submitted that if one looks at the explanation tendered by the Respondent as to why he says that notification must have been received by the Applicant he says that he received the documents on pages 15 – 20 of Bundle "B". Those documents are an offer by the Respondent to the Applicant indicating that he would like to rent the two shops 42 and 44. The offer was open for a period of six days until 31 January 2008 and then the landlord had to accept that and then further paperwork would be put in place. The Respondent says that he received those documents and those documents must have been sent by the Applicant as a consequence of him having exercised his option i.e. some six months later. He was not concerned about the fact that he did not hear anything from then until less than a week before the leases would have expired and then he got those documents. He did not get such documents in respect of shop no. 5, this shop was important, his evidence was that it was his main shop because it was the biggest of the three shops. He says that he was surprised but he did not do anything about it. Mr. Pretorius then referred to **Cooper : Landlord and Tenant** where it is stated that an option that has been given and that has been exercised the terms should be the same as the main lease unless specific terms are specified for the main lease. In the instant case the lease says it shall be on

the same terms and conditions except for the escalation which has also been provided for and it shall be for 5 years. In these documents there is an offer to lease for three years. Mr. Pretorius submitted correctly in my view that it can clearly not be the same document. It is therefore clear that the Respondent's evidence that these documents were sent to him as a consequence of his election to exercise the option, should be rejected as false outright.

[24] There is a further letter by the Applicant sent in October 2007 saying:

> **"The Landlord is willing to give you a lease in respect of shop number 42 and 44 but not 5 because of the trading hours."**

Mr. Pretorius submits that as far as the Applicant is concerned everything that Mr. Barnes said tallies up with the correspondence placed before Court and what the Respondent says is simply improbable and all that he has is his word and that there is nothing more to substantiate what the Respondent says. He then referred to the evidence of the Respondent's second witness Mr. Manful and stated that in his evidence in chief he was asked to read the address appearing on the rental statement and he read it twice as 9 Derby Place. It was only when it was pointed out to him by the Respondent's counsel that it is indeed no. 2 Derby Place and not 9 did he correct himself. He also submits that Mr. Manful indeed typed the letter and indeed mailed the letter which appears to be improbable then the possibility exists that he would

have either typed the address incorrectly or could have written an incorrect address on the envelope. There was no return address on the envelope. Mr. Pretorius submits that even if the Court finds that such a letter was prepared and was mailed which he submits on the evidence the Court should not then there is always a possibility that an error could have occurred when the witness Manful had to write the address on the envelope.

[25] He then submitted, correctly in my view, that Mr. Barnes for the Applicant was a good witness, he was straightforward; he answered questions directly, and he made concession when he had to make concessions e.g. when it was suggested to him that there may sometimes, or where the tenant did not exercise his lease he may follow up with him in order to secure himself, he said Yes and that does happen but the distinction is very important that if that happens a new lease is entered into so it does not have an effect.

[26] On the other hand Mr.Tako was an evasive witness. He on many occasions under cross-examination did not answer questions. It was even put to him that it was going to be argued at the end that he was evasive and that he tried to avoid giving a direct answer. His evidence simply does not add up.

[27] A lot was said to Mr. Barnes under cross-examination as “Why did you Give them a reason when they asked for a reason in the letter. Why didn’t

you simply say we are not talking to you. We are not entitled to be in occupation or your leases expired". He said they asked him for an answer and he gave them an answer. There was nothing untoward that it is proper business ethics.

[28] Mr. Pretorius finally submitted that the version by the Respondent is improbable and the Court can safely reject it and the Respondent carries the onus. The evidence presented on behalf of the Applicant was probable. It was good in all material respects and the Court can safely accept that evidence. The Court should not have any difficulty to find that the option was not exercised timeously in terms of the agreement and there was no notice and in any event it was never communicated to the Applicant and therefore the Applicant should succeed and an order should be granted in terms of the Notice of Motion.

[29] Mr. Blomkamp on the other hand said the version of the Respondent in this matter is not improbable. The fact that he did not diarise the date of the renewal of a lease as a businessman who rented the premises knew that his lease should be renewed six months prior to the expiry of the lease. He wrote a letter asking Mr. Raymond Manful to type this letter and he submits that there is nothing improbable about that. In the case of a lease that expires five years later it is not improbable at all that the lessee would make a mental note. He submits that it is presumably implicit in the inference because they did not find such a letter that it could not have been written. If one looks at

the probabilities hereto it is not unknown that an organisation, correspondence goes missing or is misfiled and cannot later be found. He submits that at macroscopic level the probabilities are equally balanced in this case. He submits that one then has to look at the credibility and refers to paragraph 154 of the Applicant's heads which reads as follows :

> **"It is improbable that the Respondent would recall the time at which the option ought to be exercised, and this places a serious question mark over the credibility when he states, allege, that two years later that he cannot recall when he actually gave the notice".**

Mr. Blomkamp submits that first of all there is nothing improbable about the fact that he would remember when he had to give the notice. The date when the letter is written that is something that he is not likely to be able to recall.

[30] He submits that if the Respondent and his witness wanted to lie it would have been the simplest thing in the world for them to type out a letter, give it a date either in July of the year when it was supposed to have been sent, print out and say this is the letter which was sent.

[31] Mr. Blomkamp submits that the argument by Mr. Pretorius that in terms of the lease it had to be sent by registered mail is not correct. He submits that in the clause requiring notice to be sent by registered mail or hand delivered to the premises is the clause of the lease that deals with the situation where one party is in breach and the other party puts him on terms

to remedy the breach. He submits that in those circumstances the notice has to be sent by registered mail. He submits that when it comes to the renewal of the lease that is dealt with in clause 3 of the lease and clause 3.3 of the lease provides as follows :

> **"The tenant shall give the Landlord written notice of its intention to exercise this option of renewal by not later than six calendar months prior to the expiry of the initial period of this lease. If the tenant does not give notice by then this option of renewal shall lapse."**

Mr. Blomkamp submits that the clause does not say that the notice has to be sent by registered mail. It does not say that the notice has to be sent in accordance with the terms set out in clause 45 and dealing with notices and domicilia.. Clause 45 provides as follows :

> **"45. NOTICES AND DOMICILIA**
>
> **45.1 All notices hereunder by : -**
>
> **45.1.1 …**
>
> **45.1.2 the tenant to the landlord shall be considered to be duly served when sent by prepaid registered letter post to the landlord or delivered by hand to the current place of payment of rental, which address the landlord**

nominates and chooses as its domicilium citandi et executandi,"

Clause 45.1 states that all notices hereunder …. 45.1.2 the tenant to the landlord …. There is nothing which stipulates that this clause of the lease deals with the situation where one party is in breach and the other party puts him on terms to remedy the breach. The way in which the section and sub-sections are worded should include all notices in terms of the lease which in my view includes all sections dealing with notices in terms of the lease.

Mr. Blomkamp's submission in this regard cannot be correct.

In any event what the Respondent was required to do in terms of the lease was to communicate in writing his intention to exercise the option to renew the lease.

The main issue in this matter was whether he did so or not.

[32] Mr. Blomkamp also submitted that it was not necessary for the Respondent to have printed and kept a copy of the letter of renewal of the lease if it was saved on the computer. Because when it becomes necessary to refer to this document they will be able to print it out from the hard drive of the computer and the document will be made available. This argument goes against the evidence tendered on behalf of both the respondents that if there is a virus on the computer all the information on the hard drive is erased.

That is the reason why they should have kept a printed copy of this document so as to avoid the situations where when the information on the hard drive is erased. They were also well aware that this computer is normally used by members of the public. The information on the hard drive could be interfered with.

[33] Mr. Blomkamp also submits that nothing is to be made of the fact that when the witness Manful was asked the address at which he sent the document he stated that it was 9 Derby Place when the exact address was 2 Derby Place. That it was accurate that the letter was sent to the wrong address. He submits that even if that was the case there is one Collier International in the area of Westville. It was addressed to 9 Derby Place instead of 2 Derby Place it would nevertheless have reached its destination.

Mr. Blomkamp conceded that if it is accepted that the Respondent did indeed write and send this letter by ordinary mail and it was waylaid in transit that is not the landlord's concern. In my view by sending this letter by ordinary mail without a return address the Respondent was running the very same risk contemplated herein.

[34] I have already indicted above that the Respondent bears the onus to establish his right to be in occupation of the property in question. In dealing with two mutually destructive versions, the correct approach for deciding whether the Plaintiff has discharged his onus is stated in the often quoted

dictum of WESSELS J.A. in **National Employers Mutual General Insurance Assocation v Gani** 1931 AD 187 at 199 :

> **"Where there are two stories mutually destructive before, the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false".**

This was cited with approval in **Machewana v Road Accident Fund** 2005(6) SA 72 at 76 A – F. In the present matter one has to determine which of the two versions is more probable than the other.

[35] There are a number of facts which indicate some improbabilities in the version of the Respondent. There is no explanation from the Respondent as to why the letter wherein he communication his intention to exercise his option of renewal of the lease was not sent by registered mail or hand delivered to the Respondent. There is also no reason why prior to the expiration of the lease or on the date the lease expired he could have enquired from the Applicant whether the said letter was received.

The Respondent's evidence that the documents which were described as an offer to the landlord to enter into a new lease for a period of three years in respect of shop no. 42 and 44 these documents could be construed as renewal documents as a consequence of his election to exercise the option to renew the lease. A similar document was also sent to him in respect of shop

no. 5 and all these documents referred to a lease for a period of three years and not a lease period of five years as it is stipulated in the original lease agreement. The Respondent's evidence is that he read and understood the terms of the lease.

Respondent's evidence was that he was surprised when he did not receive a renewal document in respect of shop no 5 at the time he received the document in respect of shop no. 42 and 44. It is however surprising that he did not do anything thereafter.

[36] Mr. Barnes who gave evidence on behalf of the Applicant was a good witness. He was clear and straightforward and answered questions directly and did not contradict himself. He was a reliable, good witness. The Respondent on the other hand was evasive. In some instances questions had to be repeated to him. He did not give direct answers to questions put to him. The same could be said of his witness Manful. Mr. Barnes' testimony was clear and straightforward. His evidence was that no notice was received by the company. He stated that a search was conducted by two staff members of all the files. He himself was also involved in the search through the three files and the said letter could not be found.

The Respondent's version in this case is beset with inherent improbabilities as referred to earlier on in this judgment. The version of the Applicant is far more probable than the version of the Respondent.

In **National Employers General Assurance Company Ltd v Jaggers** 1984(4) SA 437 E at 444 it was held :

> **"Where therefore the probabilities are evenly balanced and where there can be no findings on the relative credibility of the witnesses it seems to me that the only conclusion to which the Court could have come was that the Respondent (Plaintiff) had failed to discharge the onus which rested on him)."**

I have already determined in this case that the probabilities are certainly not evenly balanced.

I am satisfied that the version of the Applicant is supported by the credible evidence of Mr. Barnes and documentary evidence. I have no reason to doubt the reliability of his evidence. The version of the Respondent is inherently improbable and therefore false.

[37] Even if I am wrong in this regard if the probabilities are evenly balanced and the Court is unable to say which one is more probable than the other the onus bearing party must fail as Mr. Blomkamp submitted. It means that the onus bearing party has not discharged the onus. In the present case I have already determined that the Respondent bears the onus of proof that he has a right to be on the property. He has certainly not discharged this onus.

[38] In the circumstances the Court accepts the evidence given by Mr. Barnes and rejects the evidence given by the Respondent and Mr. Manful. I am satisfied on the totality of the evidence that the Respondent did not give timeous and proper notice to the Applicant of his intention to renew the lease.

[39] In the circumstances the Applicant as the registered owner of the property in question and having established that the Respondent's lease terminated, that he failed to give timeous and proper notice to the Applicant of his intention to renew the lease and that he was in unlawful occupation of the said property is entitled to the eviction order and the other orders referred to in the Notice of Motion against the Respondent who has not established a right to be on the property.

There is no reason why the costs should not follow the result in this matter.

In the result I make the following order :

1. It is declared that the agreement of lease entered into by the Applicant and the Respondent during or about February 2003 expired on the 31 January 2008;

2. An order is granted evicting the Respondent from the premises at shop no. 5, Selgro Shopping Centre, 361 Church Street, Pietermaritzburg, KwaZulu-Natal.

3. Respondent is ordered to pay the costs of the application.

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SISHI J.

Judge of the High Court
KwaZulu-Natal, Pietermaritzburg

Date of hearing	:	5 and 11 May 2009
Date of Judgment	:	1 June 2009
Applicant's attorneys	:	Mason Incorporated 251 Church Street Pietermaritzburg
Applicant's Counsel	:	Advocate C.J. Pretorius
Respondent's Attorneys	:	Nasen Naicker Attorneys
Respondent's Counsel	:	Advocate P.J. Blomkamp