IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: AR 319/2011

In the matter between:

SOUTH COAST FURNISHERS CC Appellant

and

SECPROP 30 INVESTMENTS (PTY) LTD Respondent

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**JUDGMENT**

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**GORVEN J**

1]The respondent, as owner, launched an application to evict the appellant, as tenant, from business premises which were subject to a lease. I shall refer to the parties as in the court *a quo*. Mnguni J found for the applicant. The matter comes before us with the leave of the Supreme Court of Appeal after leave was refused by the court *a quo.*

2]In an application for eviction, an applicant need only aver that it is the owner of the premises and that the respondent is in occupation. The unlawfulness of the occupation is presumed in the absence of an admitted right to occupy.[1] However, as soon as the applicant claims the termination

1 *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 where Jansen JA said: 'It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the

of a previously admitted right to occupy, on which the respondent relies, an onus rests on the applicant to prove that such right has been terminated.[2]

3]The following brief history of the matter is undisputed. On 22 October 2001, a written lease was concluded between Fedsure Life Assurance Limited, the then owner of the property, and the respondent which would run from 1 December 2001 to 31 January 2005 (the Fedsure lease). No provision was made for a renewal period. The property was sold and transferred to Armrest Investments (Pty) Limited (Armrest) on 13 February 2002. During or about November 2005 the property was sold to Artistic Woodcarvers and Turners (Pty) Limited which in turn sold and transferred the property to the applicant on 21 December 2007. The respondent has remained in occupation throughout and is still in occupation of the premises on the property. No further written lease or written amendment to the Fedsure lease was concluded.

4]It was also common cause that the applicant had inherited a lease from the previous owner and was bound to it on the basis of the principle *huur gaat voor koop*. No breach of the lease has been alleged. The applicant claims that the lease inherited by it could be cancelled on one month's notice. Implicit in that position is the standpoint that the Fedsure lease had run its term prior to the applicant purchasing the property and that no further express lease had been concluded. That being so, the new lease would have come into effect by way of a tacit relocation. Since the rental under the Fedsure lease was paid monthly and it is common cause that rental continued to be payable monthly, the new lease could be cancelled on one month's notice. This is clearly the case relied on by the applicant,

owner'.
2 *Chetty* at 21G-H.

even though no mention is made in the founding affidavit of the Fedsure lease nor is the above position spelled out. The respondent, on the other hand, contends as follows. An express, oral, lease was concluded between it and Armrest in January 2003. This oral lease was to run for nine years and 11 months with the respondent having an option to renew it for a further such period. The first such period elapses in October 2012. The only issue, both in the application and on appeal, is whether the lease under which the respondent occupied the premises when the applicant took transfer was the monthly tenancy contended for by the applicant or the term lease contended for by the respondent. If the applicant's contention as to a monthly tenancy is correct, there is no dispute that the applicant gave timeous notice to the respondent cancelling the lease and requiring the respondent to vacate the premises. If, however, the respondent's contention as to a term lease is correct, the purported cancellation is of no force or effect.

5]As I have indicated above, the applicant approached the court by way of application for final relief. Such proceedings are appropriate for the resolution of legal issues based on common cause facts and are not designed to determine probabilities.[3] The approach to be taken to factual disputes on application papers was set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4] by Corbett JA to the following effect:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial

3 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.
4 1984 (3) SA 623 (A) at 634G-H (references omitted).

by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court…and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks…. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers….

Various judgments have dealt with the test to be applied. In *Zuma*, Harms DP said that where a 'version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or … clearly untenable'[5] the court is justified in rejecting it merely on the papers. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & Another*[6] Shongwe JA said this could be done where 'the version propounded by the respondents was fanciful and wholly untenable.' Stated positively, it has been said that a 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed'.[7]

6]It is so, however, that a 'court must always be cautious about deciding probabilities in the face of conflicts of fact in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open.'[8]

5 Footnote 3, para 26.
6 2011 (1) SA 8 (SCA) para 21.
7 Per Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) para 13.
8 *Buffalo* para 20.

7]Having sketched the background to the dispute and the principles governing such applications, it is appropriate to turn to the specific averments made by the respective parties on the papers.

8]In paragraph 8 of the founding affidavit, the deponent states as follows:

'As at the 21st December 2007 the Respondent occupied a portion of the property in terms of a monthly tenancy with the previous landlord namely Artistic Woodcarvers & Turners (Pty) Ltd. That portion of the property occupied by the respondent bears the address Shop 03, 102 Field Street, Durban….'

The founding affidavit then proceeds to deal with the letter giving notice of cancellation and further correspondence demanding the vacation of the premises.

9]In paragraph 4 of its answering affidavit, the respondent begins by setting out what it regards as the salient features of the history of the rental of the premises. Although this paragraph is lengthy, it will be necessary to set it out almost in full because counsel for the applicant subjected it to close scrutiny before us, submitting that the averments concerning a new oral lease agreement raised in it are so clearly untenable as to have been capable of rejection on the papers by the court *a quo*. The paragraph reads as follows:

'4.

4.1 During or about December 2001 I had leased the premises from INVESTEC PROPERTY GROUP[9] for a period of four years…

4.2 I annex hereto marked "RD 1" a copy of the said lease agreement.

4.3 As can be seen from the said agreement, the terms were rather extensive and owing to the fact that the premises and the surrounding area was rather rundown and bordering on dereliction, the rental was for the premises as a

9 The Fedsure lease was administered on its behalf by Investec Property Group (Pty) Ltd. Although reference is here made to Investec as being the landlord, it is not disputed that Fedsure was the landlord.

whole and was not dependent on a rate per square metre;

4.4 I had, on behalf of the Respondent effected extensive repairs to the premises which included replacing the shopfront glass and security gates at an approximate cost of R7 500.00, rewiring the entire electrical circuitry at a cost of R13 000.00, reconnecting all the internal planning at a cost of R2 000.00, painting the premises at a cost of R4 800.00 and other minor repairs totalling approximately R 6 000.00….

4.5 I had subsequently made the premises fit for the purposes of running a furniture store and had commenced business;

4.6 During or about the 14th February 2002, INVESTEC had given all the tenants notice that the premises was sold to ARMREST INVESTMENTS (PTY) LTD and that such entity would now collect the rentals….

4.7 It goes without saying that the terms of the said lease had extended and had operated in respect of the tenancy with Armrest;

4.8 I, being an existing tenant was offered a lengthy lease by one Ebrahim Simjee, the representative of Armrest, in order to ensure that the building remained tenanted by a reputable businesses and the building did not deteriorate any further;

4.9 During the negotiations with Simjee, I had stressed that owing to the extensive repairs to the premises and the fact that the Respondent was establishing a good name at the premises, in that the building profile had increased and more importantly that the Respondent was on time with its obligations, the Respondent would be seeking a comprehensive and lengthy lease for the premises, failing which the Respondent would rather cut its losses and relocate where more stability could be provided.

4.10 The said Simjee had informed me that Armrest was desirous of entering into a long lease with the Respondent and would honour a lease equivalent to nine (9) years and eleven (11) months on the exact terms as embodied in the existing lease save for the conditions relating to the duration of the lease and the further clause that the lease would be renewed subject to the Respondent giving one calendar months notice to extend the lease for a second period of 9 years 11;

4.11 Based on the aforesaid representations by Simjee and the conclusion of the new oral lease during or about January 2003, the Respondent continued to pay

the rent together with an escalation of ten per cent (10 %), secure in the knowledge that the lease would endure until end October 2012;

4.12 Subsequently, during or about November 2005, Artistic Woodcarvers and Turners (Pty) Ltd purchased the property from Armrest and the lease as existed with Armrest was extended to Artistic;

4.13 I might add that the Respondent has not breached any of the terms of the lease agreement and has paid the rental requested and due on time or as promised;

4.14 I have in my possession all invoices and receipts received from Investec, Armrest, Artistic Woodcarvers, the owners of the property prior to the Applicant and the Applicant itself in respect of the Respondent's indebtedness for rental. Due to the voluminous nature of same I shall only produce same if requested to do so by this Honourable Court or in the event of this matter being referred for the hearing of oral evidence, which I respectfully submit is the only way in which my contentions can be tested or the denials of the Applicant as to the facts stated herein may be contested under pain of cross examination, which I am willing to undergo with pleasure as I verily believe that the Applicant is deliberately attempting to mislead this Honourable Court into granting the relief that it is not entitled to.

4.15 During or about December 2007, the Applicant took ownership of the premises.

4.16 During November 2007 a meeting was held at the premises between one HAFIZ YUSUF BUCCAS, who purported himself to be an advocate of this Honourable Court and the representative of the Applicant;

4.17 The said Buccas intimated that the premises leased was not leased in accordance to square metres and that the floor area was greater than that stipulated in the lease agreement with Investec by approximately fifty (50) sq mtrs. Buccas demanded that the Respondent compensate the Applicant for such space and further advised that the rental for November and each month subsequent thereto shall be R116.00 a sq metre;

4.18 Needless to state, I was perplexed as the lease agreement was always for the premises as it was and was not charged or invoiced as per square metres. Buccas was rather confrontational and rather rude and overbearing in his approach. I advised that I would revert to him simply to get rid of him on that occasion as he demanded the sum of R66 560.22 as a rental to cover the

shortfall alleged to be due.

4.19 During or about the 18th of January 2008 a letter was received from the Applicant which appeared to be a letter of cancellation of a monthly tenancy. I disputed this contention and immediately contacted Buccas on 072 450 3066 and advised him of the true position of the lease, that being that the lease was to endure until October 2012 and further that the Respondent was entitled to renew such lease for a further period of time and therefore the notice was defective as the Respondent had not committed any breach of the tenancy agreement;

4.20 Needless to say, Buccas was furious and advised me that I would live to regret my actions in not vacating the premises;

4.21 I immediately contacted the Respondents attorneys herein which forwarded annexure "D" to the Founding Affidavit hearin, wherein once again, the Applicants notice of cancellation was challenged.

4.22 I therefore deny that the applicant was entitled to cancel the agreement of lease, the terms of which had been passed on from INVESTEC to Armrest, to Artistic and thereafter to the Applicant'…

10]After this paragraph, the respondent deals with the various paragraphs of the founding affidavit. The relevant averments for the purposes of the application and this appeal are contained in consecutive paragraphs, each numbered 7. The first of these begins by admitting 'the allegations contained in paragraph 1, 2, 4, 5, 6, 7 and 8 of the Founding Affidavit'. The second of these admits having received the notice of cancellation but denies that the lease was capable of being cancelled. The lease contended for by the respondent is also mentioned in paragraph 10. Throughout the answering affidavit, and in particular in paragraph 4, the respondent denies being in unlawful occupation of the premises and denies that the applicant was or is entitled to cancel the lease.

11]In the first paragraph 7 the respondent, dealing with a number of

paragraphs in the founding affidavit, includes paragraph 8 of the founding affidavit in a blanket admission. As can be seen from paragraph 8, the first sentence asserts that a monthly lease was in existence when the applicant took transfer. This blanket admission appears to have been the basis upon which Mnguni J decided the matter in favour of the applicant. It is, at the very least, the primary basis upon which it was decided. I say this because, after stating that no affidavit had been placed before him to the effect that the admission was made in error, he found s 15 of the Civil Proceedings Evidence Act 25 of 1965 applicable. This provides that, where an admission is made in civil proceedings, no party is required to prove, nor is any party entitled to disprove, the fact admitted. On appeal before us an application was made on notice to withdraw the admission if it was found that such an admission had been made. Counsel for the respondent submitted that, on analysis, what is said in the first paragraph 7 does not amount to the kind of judicial admission envisaged in s 15. The applicant abided the outcome of the application to withdraw any omission found to have been made and made no submissions on the point. Taken within the context of the answering affidavit as a whole, and coming as it does after paragraph 4 thereof in particular, I am not convinced that the first paragraph 7 amounts to a judicial admission. The whole thrust of the answering affidavit is to assert the oral lease for nine years and 11 months. The inclusion of this part of paragraph 8 in the blanket admission was clearly done in error. The second sentence of paragraph 8, relating to the location of the premises, is clearly admitted. There is therefore no binding admission to withdraw. If, contrary to what I have found, the first paragraph 7 of the answering affidavit does amount to an admission of the first sentence in paragraph 8 of the founding affidavit, the application to withdraw that admission can clearly cause no prejudice whatsoever to the applicant in the light of the thrust of the

entire answering affidavit. Any such admission was clearly made in error and the applicant could have been under no illusion as to the case made out by the respondent. If it did amount to an admission, therefore, I would have been disposed to grant the application to withdraw the admission in question.

12]It remains then to establish whether the averments in the answering affidavit, and in particular those in paragraph 4 thereof, are such that they are clearly untenable and can be rejected outright on the papers or whether they give rise to a genuine factual dispute relating to the coming into effect of the oral lease contended for by the respondent. The respondent submitted that a genuine factual dispute arises on the papers which cannot be resolved in favour of the applicant without oral evidence being led. The applicant submitted otherwise.

13]Counsel for the applicant submitted that there are a number of highly improbable aspects of the version which, taken together, would have justified the court *a quo* to reject it as untenable and which therefore did not raise a genuine factual dispute. He submitted that Mnguni J was correct in finding for the applicant on the papers. Some of the points raised by the applicant were the following. First, when Armrest purchased the property in February 2002, the Fedsure lease had only endured approximately three months and the unexpired portion was some two years and 11 months. In January 2003, when the respondent says a new oral lease came into existence, it had endured for one year and two months and the unexpired portion was some two years. It is therefore improbable that the parties would have concluded a lease at that time with identical terms, other than those relating to the duration of the lease. In addition, since there was certainly no need for haste and plenty of time

while the Fedsure lease was running, it is improbable that, if a lease was concluded at that time, it would not have been reduced to writing. No explanation is given as to why this did not take place in the light of the evidence that both parties wanted to secure their long term positions. In the light of the respondent claiming to be able to produce all the receipts for rental during its occupation, thus demonstrating administrative efficiency and a reliance on paper proof, the contentions as to an oral lease are highly improbable. Further, the claim that the period of the oral lease was nine years and 11 months shows knowledge that a lease of ten years and longer requires registration in order to secure the rights of the lessee against purchasers who do not have knowledge of the lease. Also, no mention of the new oral lease is said to have been made to Buccas at the meeting in November 2007. The deponent to the respondent's affidavit says she told Buccas that she would revert on his demand for what he claimed was arrear rental purely in order to get rid of him. It was submitted that, if there was a binding lease in existence at the time, the probabilities are that she would simply have told him so. Further, because the deponent states that she contacted Buccas after receipt of the letter of cancellation and informed him of the date on which the lease would expire, one would expect the letter written by the respondent’s attorney thereafter to mention either the conversation with Buccas or the contention of the respondent, disclosed in that conversation concerning the duration of the lease or both. Since no such mention was made in that letter or in a later one sent by the respondent’s attorney, the claim to the lease must be rejected.

14]These submissions have some force. However, they cannot be viewed in isolation. There are features of the applicant’s case which must be weighed against the apparent improbabilities on which the applicant

relies. In the first place, the applicant in reply simply disregards the detailed mention of both Simjee and Buccas and all their alleged actions set out in the respondent's answering affidavit. The applicant satisfies itself in reply with arguing the improbabilities of the version of the respondent without dealing at all with these averments. The replying affidavit does not state that these persons were not available to furnish affidavits which could deal with these averments. Nor does it say that any attempt was made to contact either person and, in particular, Buccas, for whom a telephone number is supplied and who is said by the respondent to be the applicant's representative. Nothing at all is even mentioned as to whether or not he was in fact the representative of the applicant at the time. In addition to these lacunae, the version of the respondent, although the abovementioned features may be argued to be improbable, is a full and detailed one. I have referred to the detail with which the applicant failed to deal in reply. By no stretch of the imagination can the answering affidavit be said to amount to a bald denial. It raises facts which, on the face of it, are capable of investigation and mentions people which, on the face of it, can take issue with what is said. This is particularly so of Buccas because he is said to have been the applicant's representative. Finally, the reference to the dispute about the question of square metres arose, on the respondent's uncontested version, from Buccas having confronted the respondent concerning the discrepancy between the actual number of square metres leased and the number referred to in the Fedsure lease. The question arises why the applicant would have been furnished with, or even told about, the Fedsure lease when it had purchased the property well after the Fedsure lease had expired. This is also not dealt with in reply, either by way of a denial of such a conversation or by way of an explanation of how the Fedsure lease came into the possession of the applicant and was used to claim arrear rental almost three years after

it had expired. The failure to contest or explain this evidence is open to the inference that the terms contained in the Fedsure lease had continued at least in part to govern the relationship between the various owners and the respondent, which is consistent with the version of the respondent.

15]I conceive that the test to be applied as to whether a genuine factual dispute has been raised on the papers is similar in nature to that in a trial at the point where the plaintiff's case has been closed and absolution is sought before the defence is embarked upon. Here, the test is whether there is evidence upon which a reasonable presiding officer might or could find for the plaintiff. If there is, absolution should be refused. The court does not enter into an evaluation of the credibility of witnesses unless they have 'palpably broken down, and where it is clear that they have stated what is not true'.[10] Similarly, in motion proceedings, a robust approach can only be taken, and the matter decided on the probabilities, if that clear falsity emerges from the papers. This was clearly stated by Leon J in *Sewmungal & another NNO v Regent Cinema*[11]where he said:

'There are, however, more serious improbabilities to which the learned Judge has referred. But they are not of such a nature as to justify the conclusion that they are so inherently improbable that the respondent's version is incredible.'

In the light of what I have set out above, I do not believe that it can be said that the version of the respondent raises 'bald or uncreditworthy denials…fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'[12] or is 'fanciful and wholly untenable'[13] or so 'inherently improbable that the respondent's version is incredible.'[14] I am satisfied that the respondent 'has in [its] affidavit seriously and unambiguously

10 Per Solomon J in *Siko v Zonsa* 1908 TS 1013 at 1015.
11 1977 (1) SA 814 (N) at 822D-E
12 *Zuma* note 3, para 26.
13 *Buffalo* note 7, para 21.
14 *Sewmungal* at p822E.

addressed the fact said to be disputed'.[15] In the absence of 'direct and obvious contradictions'[16] judgment on the credibility of the deponent to the respondent's answering affidavit must be left open.

16]As a result, I find, with respect, that there was no basis for Mnguni J to have granted the order on the papers before him. He should have found, on the test set out above, that the respondent had raised a genuine factual dispute as to the existence or otherwise of the oral lease contended for by it.

17]The respondent requested that, if this court found that to be the case, the matter should be referred for the hearing of oral evidence in order to determine that factual dispute. This appears to me to be warranted. It is a narrow dispute and readily capable of speedy disposal. I am also aware that, if the court *a quo* had come to this conclusion in April 2010 when judgment was handed down, the oral evidence would probably have been heard by now. In the light of that fact and in the light of the respondent's contention that the lease endures until October 2012, it is my view that preference should be accorded to this matter.

18]The question of costs arises. Although the learned judge *a quo* appears to have determined the matter on the issue of an admission having been made, and despite the application to withdraw the admission having been made some two days prior to the appeal hearing, the applicant did not rely on that admission on appeal, either in argument or in its heads. No indication was given that, if the application had been made earlier, the applicant would have consented to the appeal being allowed and the matter being referred to oral evidence. In addition, as mentioned above, I

15 *Wightman,* note 8, para 13.
16 *Buffalo* para 20.

am unpersuaded that the application was necessary. In all the circumstances, therefore, the costs must follow the result of the appeal. The Supreme Court of Appeal, in granting leave to appeal, ordered that the costs of the applications for leave to appeal in the court a quo and before it would be costs in the cause. It is therefore not necessary to deal with these separately.

In the result, the following order issues:

1. The appeal is allowed with costs.
2. The order of the court a quo is set aside and replaced with the following order:

    a) The application is referred for the hearing of oral evidence on the issue as to whether the oral lease agreement contended for by the respondent in paragraph 4 of its answering affidavit came into effect.
    b) The deponents to affidavits shall be available to be called as witnesses and to be cross-examined if so

required.

c) Further witnesses may be called by either party in the discretion of the court.

d) The provisions of Uniform Rules 21(2), 35 and 37 shall apply to the hearing of oral evidence.

e) The costs of the application to date are reserved for decision by the court hearing oral evidence.

3. The registrar is requested to accord this matter such preference as is possible.

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GORVEN J

I agree:

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VAHED J

I agree:

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STRETCH AJ

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| DATE OF HEARING: | 10 February 2012 |
| DATE OF JUDGMENT: | 28 February 2012 |
| FOR THE APPELLANT: | M Pillemer SC and D Tobias, instructed by SHAUKAT KARIM & COMPANY |
| FOR THE RESPONDENT: | D Gordon SC, instructed by EBI MOOLLA & SINGH ATTORNEYS. |