THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 553/09

In the matter between:

TRANSNET LIMITED Appellant

and

NEWLYN INVESTMENTS (PTY) LIMITED Respondent

Neutral citation: *Transnet Ltd v Newlyn Investments (Pty) Ltd* (553/09) [2011] ZASCA 44 (29 March 2011).

Coram: MPATI P, CLOETE, HEHER and SHONGWE JJA and PETSE AJA

Heard: **14 March 2011**

Delivered: **29 March 2011**

Summary: Evidence:
(1) Technical objections to the admissibility of documentary evidence not taken in the court below and which might have been met by the calling of further evidence, should not be entertained on appeal;
(2) Where the nature of the proceedings is such as to inform the opposite party, by necessary implication, that production of a document in its possession will be required, secondary evidence of the document is admissible;
(3) There are no degrees of secondary evidence and although production of a photocopy would be more reliable than oral evidence, and failure to produce a photocopy may be cause for comment, this goes to weight and not admissibility;
(4) Putting argument to a witness in cross-examination can be improper.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Koen J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

CLOETE JA (MPATI P, HEHER, SHONGWE JJA and PETSE AJA concurring):

Introduction

[1] The appellant instituted action in the KwaZulu-Natal High Court, Pietermaritzburg, against the respondent for the respondent's eviction from immovable property commonly referred to as 'the Pinetown PX' situated at Kirk Road, Pinetown. The cause of action pleaded by the appellant was the rei vindicatio. The respondent admitted that the appellant owned the property in question but pleaded that it had a contractual right to occupy part of the property in terms of an addendum to a written lease, and the remainder of the property in terms of an oral agreement which gave it the right to occupy for so long as the written lease continued in force. The oral agreement was not in contention. The existence of the addendum was the crux of the dispute.

[2] The court a quo (Koen J) found the addendum relied upon by the respondent to have been proved and dismissed the appellant's claim. The appeal is with the leave of that court.

[3] It is common cause that the Pinetown PX was initially leased by the appellant to Kirk Road Properties, Pinetown CC in terms of a written agreement dated 12 November 1996. The lease was due to expire on 31

December 2001 but by written agreement it was extended to 31 December 2005. In terms of a further written agreement dated 15 September 1998 to which the appellant was a party, the lessee ceded its rights and assigned its obligations in terms of the lease to the respondent. The lease agreement did not provide for any right to extend or renew the lease beyond 31 December 2005 and contained a non-variation clause reading as follows:

'8.1 This Lease incorporates the entire agreement between the LESSOR and the LESSEE and no addition, amendment, cancellation or variation hereof shall be of any force or effect unless it is in writing and signed by both the LESSOR and the LESSEE, who hereby acknowledge that no representations or warranties have been made by either the LESSOR or the LESSEE nor are there any understandings or Terms of the Lease other than those set out herein.'

[4] In its initial plea, the respondent averred only that it had concluded a written addendum to the lease agreement (annexed to its plea) which afforded to it the right to renew the lease for two successive periods of nine years and eleven months each, and that it had renewed the lease for the first period. It subsequently transpired that the document annexed was a forgery. The plea was amended to allege that in the event of the court finding that the document already annexed 'is not an agreement for any reason whatever' then a written addendum to the lease in the same terms as the document already annexed was concluded between the parties. The respondent pleaded that a copy of the (genuine) addendum was not in its possession and was last in the possession of the appellant.

[5] To prove its case, the respondent relied on contemporaneous documents and the oral evidence of four witnesses, who testified that an addendum to the lease had been concluded and gave evidence as to its terms. The witnesses were:

(a) Mr Sipho Mashinini, the former CEO of Propnet (a division of the appellant), who said that he had signed the addendum on behalf of the appellant;

(b) Mr Beston Silungwe, a former Propnet manager for the KwaZulu-Natal region, who was intimately involved with negotiations relating to the

addendum and who said that he had witnessed the signature of the respondent's managing director on the original;

(c) Mr Surendra Garach, an attorney in the employ of the respondent, who said that he had prepared the addendum on the instructions of the respondent's managing director; and

(d) Mr Rajendra Balmakhun, the managing director of the respondent, who said that he had signed the addendum on behalf of the respondent.

Documents

[6] I shall start with an analysis of the documents. On 11 July 2000, the respondent wrote to Mr Beni, the Regional Manager of Propnet, stating:

'We refer to our meeting of 10 July 2000 when we advised you of our intention to carry out extensive renovations to the shed which will enhance the value of the property.

The renovations to be undertaken and the cost estimates are attached per schedule A in detail. The total cost is R2 997 060-00 and we envisage completion of the project in three months.

In lieu of [sic, sc: in view of] the above representation we request your kind consideration to the following:

(1) . . .

(2) Extension of the lease agreement for a further period (to be negotiated) in order for us to justify amortisation of the investment.'

[7] On 3 October 2000 the appellant replied to the respondent's letter, stating:

'Item 2 regarding the extension of the lease to justify amortisation of the investment[:] Propnet is not in a position to extend the lease as the land is required for future development.'

The appellant, however changed its mind.

[8] According to the minutes of the Propnet Project Adjudication Committee ('PPAC', a committee of Propnet) held on 26 February 2001 (attended by Mashinini and Silungwe):

'PINETOWN PX SHED: APPROVAL TO APPROACH THE MANAGING DIRECTOR TO APPOINT CONSULTANTS AND APPROVAL TO REPLACE ROOF SHEETING.

Mr Beni tabled a proposal received from the KwaZulu-Natal Region, Propnet Property Management, for the appointment of DE Consultants to implement the replacement of the roof sheeting and necessary structural repairs to the value not exceeding R1,5 mil (excl. VAT) and including professional fees.'

The proposal of Mr Beni reads as follows:

'PRESENTATION TO PROPNET PROJECT ADJUDICATION COMMITTEE

. . .

MOTIVATION

Propnet is under extreme pressure from the Tenant [the respondent] to replace the roof as it is badly corroded and leaks terribly. The Tenant is presently withholding rental due to the unavailability of the premises. Propnet has an existing Lease Agreement with the Tenant for a 9 year period of which 5 years are remaining. The Tenant will exercise his option to renew his Lease for a further 10 year period and spend ± R2 000 000 (two million rand) on additional alterations required.

RECOMMENDATION

In view of Propnet's lease obligations, it is recommended that approval be granted to appoint a consultant and replace the roofing on the shed, thereby guaranteeing an income of no less than R67 000.00 per month for the next 15 years . . . .

. . .

ESTIMATED TIME

Should the Committee approve the project and should the budget be approved, tenders would be called for in the month of April 2001 . . . .

FINANCIAL

. . .

An extension of Lease for a period of 10 years with an option of 10 years, will be concluded prior to any expenditure.

. . .

CONCLUSION

. . .

Propnet cannot afford to lose this tenant and/or the income therefore it is of the utmost importance to replace the roof as soon as possible.

RECOMMENDATION

It is recommended that approval be granted for the appointment of a consultant to oversee the project, an approval for the replacement of the ex PX shed in Pinetown to the value of approximately R1 500 000,00 excl. VAT.'

The PPAC adopted the following resolution at the meeting:

'RESOLUTION

The Committee resolved that the project be approved subject to the following conditions:

(a) The source of funding (capital or maintenance) to be verified by the finance department;

(b) The 2001/02 budget being approved;

(c) The professional fees not to exceed R60 000.00.'

[9] An internal memorandum headed 'APPOINTMENT OF CONSULTANTS FOR DESIGN AND PROJECT MANAGEMENT OF PX SHED ROOF REPLACEMENT (PINETOWN)' addressed on 14 June 2001 by Mashinini to Dr Jardine (the Executive Director, Technology and Property of the appellant) records under a section entitled 'Motivation':

'Propnet has an existing Lease Agreement with the Tenant for a 9 year period of which 5 years are remaining. If repaired the Tenant will exercise his option to renew his Lease for a further 10 year period and spend ± R2 000 000.00 (two million) on additional alterations required.'

[10] Extensive improvements were thereafter effected to the property by both parties although no written agreement between them had been concluded prior to the expenditure being incurred. On 1 October 2002 Silungwe wrote from the appellant's regional office to Balmakhun:

'This serves to confirm that the Propnet warehouse commonly known as "Pinetown PX Shed" has been fully renovated.

We are pleased to grant you occupation of the premises as from 1 November 2002 and rental payment thereof is to commence on the same date.

You will recall that the approval conditions for Propnet to carry major renovations [sic] rested upon you to accept [sic] an extended Lease Agreement period of 10 years with an option to renew for another 10 years. A supplementary agreement is in the process of preparation in this regard and will be forwarded to you shortly.

. . .

The billing for November will be as follows:

R87 812.97 (incl VAT) which is broken as

R75 528.92 rent for the main warehouse

R1500 rent for the additional ablution block and offices, VAT @ 14%

R10 784.05.'

[11] The forged document is dated 14 November 2002. It purports to reflect the signature of Balmakhun on behalf of the respondent on that day and the signature of Mashinini representing the respondent on 4 November 2002.

[12] A year later, on 10 October 2003, Ms Hassan, then the managing director of the respondent, wrote to Beni of the plaintiff recording:

'"URGENT" "URGENT"

Dear Sir

RE: KIRK ROAD, PINETOWN

We refer to your letter dated 1st October 2002 and hereby exercise our option to extend the lease agreement for a further period of ten years commencing 1st January 2006.

Kindly confirm receipt hereof.'

No acknowledgement of receipt or reply was produced in evidence.

[13] On 18 December 2003 Ms Hassan on behalf of the defendant again wrote to Mr Beni of the plaintiff:

'"URGENT"

Dear Sir

RE: LEASE AGREEMENT – NEWLYN INVESTMENTS (PTY) LTD / PROPNET KIRK ROAD, PINETOWN

The above matter refers.

In a letter dated 1st October 2002, Mr Silungwe confirmed our option on the property for a further period of 10 years.

Kindly, advise in writing as to when our offices can expect an agreement for signature.

We attach hereto a copy of the letter that was forwarded to our offices.

We look for (sic) to your reply at your early convenience.'

[14] On 13 August 2004 Garach signed a letter to the appellant which he said demonstrated that agreement had already been reached in regard to the lease of PX. I shall deal with the letter when discussing his evidence.

[15] On 22 September 2004 Garach wrote a letter on behalf of the respondent querying certain rental charges. The reply thereto dated 5 October 2004 (it incorrectly refers to '5 October 2005') includes the following:

'The cession of lease between Newlyn Investments (Pty) Ltd and Transnet Limited is still valid and enforceable up to December 2005.'

[16] On 12 October 2005 Mr Ken Buller of the appellant wrote to the respondent, for the attention Balmakhun, recording the following:

'Notwithstanding numerous meetings and phone calls the following issues have been outstanding for a long period of time and need to be afforded urgent attention.

1) Bayhead: Bank 11 the lease has since expired on 31 May 2005.

. . .

4) Pinetown: Lease expires 31 December 2005 need to negotiate lease.

. . .'

To this letter Balmakhun replied on 2 November 2005 as follows:

'We acknowledge receipt of your letter dated 12th October 2005, which was however faxed to us on 27th October 2005 and record our surprise with regard to items 1 and 4. We have always advised you that the agreements in question were extended beyond the expiry date.

With regard to the Pinetown lease, we refer to your letter dated 2nd October 2002, the terms whereof it was a condition that we extend the lease prior to Propnet replacing the roof. We accordingly signed the agreement to extend the lease and enclose herewith a copy for ease of reference.

We further enclose a copy of the agreement for the extension of Bank 11 as requested in your previous correspondence.

Please advise of your availability to address the various outstanding issues.'

Annexed were two memoranda of agreement in respect of the property described as Bank 11 and in respect of the Pinetown PX. Both were in precisely the same form. Both were forgeries.

Admissibility of oral evidence

[17] Before dealing with the evidence of the witnesses called on behalf of the respondent to prove the existence and terms of the addendum, it would be convenient to deal with the argument, raised for the first time on appeal, that such evidence was inadmissible in as much as the respondent failed to

demonstrate that after a proper search, the lost addendum could not be found. It was submitted, relying on *S v Tshabalala*[1] and *Singh v Govender Brothers Construction*,[2] that such a search would have to be thorough and it would not suffice merely to say, as the respondent's witnesses had done, that the document was lost. It was further submitted that the learned judge a quo had completely overlooked the requirement of a thorough search for the lost document before allowing secondary evidence.

[18] The reason why the learned judge a quo did not consider the admissibility of the evidence, is because the point was never raised in any shape or form before him. So far as this court is concerned, it is a salutary principle that an appeal court will not entertain technical objections to documentary evidence which were not taken in the court below and which might have been met by the calling of further evidence. In *Bradshaw v Widdrington*[3] Collins MR said:

'If the question of admissibility had been seriously argued in the Court below on the ground which Mr Terrell [counsel for the appellant] has urged before us, and if the learned judge had been disposed to adopt his view, it would have been competent to Mr Astbury [counsel for the respondents] there and then to call Mr W Bradshaw, the person who knows most about the matter, but who, I have no doubt for very good reasons, thought it desirable not to go into the box. We could not now replace Mr Astbury's clients in the position in which they stood at the trial, and therefore, Mr Terrell is not now entitled to rely on the technical objections which he has urged as to the admissibility of these documents, though I must say that, after hearing his arguments, I am not disposed to attach very great weight to them. But I think the question is not now open to us, any more than it was open to the learned judge before whom it was not raised, and the advantage of whose opinion upon it we have therefore not got.'

Bradshaw's case was followed in *R v Press*[4] to overrule what the court termed 'a technical objection'. I agree with this approach. It would be unfortunate in cases such as the present if a party could claim a forfeit on appeal.

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1 *S v Tshabalala* 1980 (3) SA 99 (A) at 102H and 104D-F.
2 *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J-617E.
3 *Bradshaw v Widdrington* [1902] 2 Ch 430 (CA) at 449.
4 *R v Press* 1923 CPD 310 at 311.

[19] Furthermore, there was only one original addendum. The evidence (to which I shall refer presently) was that it was never in the possession of the respondent after it had been signed on behalf of the appellant. If it had ever existed, the original remained in the possession of the appellant. That being so, two rules of evidence came into play:

(a) It is well established that a party may adduce secondary evidence of a document in the possession of the opposite party if the latter has failed to produce it after having been given written notice to do so.[5] But notice is not required where the nature of the proceedings is such as to inform the opposite party, by necessary implication, that production of the document will be required: *S v Miles*.[6] If ever there was such a case, this is it. If it be accepted that the original had been lost by the appellant, then the second rule of evidence, which I shall now deal with, becomes applicable anyway.

(b) Once secondary evidence is admissible, there are no degrees of secondary evidence ie the common law no longer requires that the best secondary evidence has to be produced.[7] Phipson[8] states the position as follows:

'The general rule is that there are no degrees in secondary evidence; and that a party is at liberty (subject to comment if more satisfactory proof is withheld) to adduce any admissible description he may choose. The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value, but the very existence of which he may have no means of ascertaining.'

The respondent was therefore entitled to give whatever evidence it could in respect of the contents of the missing addendum. It was not obliged to satisfy the court that its copy was missing and could not be found despite a diligent search. Of course, production of a photocopy would be more reliable than oral evidence as to the contents of a document, but that goes to weight, not admissibility: *R v Green*.[9]

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5 *R v Radziwill* (1902) 19 SC 195; *Dalgleish v J & H Israel* 1909 TH 229; *S v Shepard* 1966 (4) SA 530 (W) at 531E-F; *S v Miles* 1978 (3) SA 407 (N) at 410-411; *Singh v Govender Brothers Construction*, above n 2 at 617G-618B.

6 Above n 5 at 412.

7 *R v Green* 1911 CPD 823 at 825; *R v Press* above, n 4 at 311-2.

8 Hodge M Malek QC (ed) *Phipson on Evidence* 16 ed (2005) para 41-26.

9 Above n 7 at p 825.

Mashinini

[20] I turn to analyse the evidence of the witnesses who testified on behalf of the respondent. The first was Mashinini. As I have said, he was the chief executive officer of Propnet. He was also the general manager of properties of the appellant. He developed a strategy whereby tenants of Transnet would be granted long leases (ranging from 10 to 50 years) in exchange for revamping the properties at their own expense. He himself visited the Pinetown PX on several occasions. At first, the property management division of Propnet wanted to have the property redeveloped but there was no market response. He met Balmakhun who indicated that the respondent wished to take a long term lease of the property and would contribute to its renovation. A series of internal discussions followed at regional and national level to ensure that Propnet would be in a position to grant a long term lease to guarantee an income on the property but, what was more important, according to Mashinini, was that he wanted to ensure what he called a 'catalyst development' to upgrade the area as a whole. Mashinini emphasised that the extension of the respondent's lease was 'extremely important' to both Propnet and to him as the CEO ─ to Propnet, as the value of its asset base would increase, so enabling Transnet to borrow money on the strength of this; and to him as CEO, because he needed a long term annuity income in order to run a profitable business.

[21] Mashinini explained the role of the Propnet Property Approval Committee (to which I have already referred when dealing with the documentation) which he established: All major projects which required capital, long term leases or had long term implications, went first to the region and then to this committee; and its mandate was to approve projects and to look at payback periods. But, stressed Mashinini, he did not require the approval of the committee to enter into a lease such as the addendum for which the respondent contends; he himself had such authority and he used the committee, as he put it, as a 'springboard' to debate issues. Ultimately, he had to make the decision himself.

[22] Mashinini was present at the meeting of the PPAC of 26 February 2001 (referred to in para 8 above) and he confirmed that Beni made the presentation in the document (also referred to in para 8 above) which was approved, as the minutes record.

[23] The crux of Mashinini's evidence was that he himself had seen a document like the forgery. It had been signed by the respondent before it reached his office for final signature. (As he had not yet signed it, this document could not have been the forgery.) He signed it 'around November' 2002. In cross-examination he said that he had done so in his office and that there were already three signatures on the document, one being that of Balmakhun and one, that of Silungwe. When it was pointed out to him in his evidence in chief that the negotiations with the respondent were for an extension of the lease and thereafter, a renewal at the respondent's option, both for 10 years, whereas the forged document provided for two successive options, each for a period of nine years and 11 months, he said that he had not read the document in detail. I am unimpressed with the criticisms advanced by the appellant that he was unable to recall the length of the document, the number of clauses it contained or the clauses that were amended, whereas he said that the document was one with which he was 'extremely familiar because the key issue was the PX shed and the roof'. I am equally unimpressed with the criticism that he described the document as 'a lease agreement' whereas it was an addendum to the lease. He gave evidence in 2009. The addendum about which he testified was signed in 2002. Many such documents would have crossed his desk. Nor could he be expected to speak with the precision of a lawyer.

[24] When Mashinini was asked, again in chief, how he could remember signing the document some seven years before he gave evidence, he replied, testily, that 'I have, I think, three times repeated the significance of the lease to ourselves in terms of its importance . . .'.

[25] Mashinini explained that once he had signed a lease such as the one in contention, either the original would be kept at head office and a copy sent

to the regional office in Durban, or a copy would be kept at head office and the original sent to Durban ─ he was not sure of the general practice; and the lessee would be sent a copy. He agreed with the proposition put in cross-examination that there was 'something wrong' and that it was 'too much of a coincidence' that all three were missing. But there is no evidence that a stamped or unstamped copy of the addendum was ever retained by or sent to the appellant's head office in Johannesburg. So as far as the original is concerned, the learned trial judge said:

'In the ordinary course it is expected that if the addendum had been received back in Durban, it would, according to the undisputed evidence of Mr Silungwe, have been put in an asset management file bearing a prefix "AR". The plaintiff could only produce the development file with the prefix "KN" in respect of the property and not the asset management file. Mr Beni's file was also produced. It was formally placed on record by the parties that his file had an index of dividers and that the divider for contract documents was completely empty, ie not only the missing addendum was not there, but no other contractual documents with respect to Pinetown PX. Mr Beni, who was the regional manager at the time, did not testify. There is no evidence as to why all the contract documents in his file were missing. It suggests that all the lease documents contained therein were removed or lost.'

[26] Mashinini was challenged in cross-examination on the contents of the statement he had given to the police on 3 March 2006. He told the police with reference to two leases, one being the addendum at issue in this matter:

'According to my knowledge of lease agreements marked annexure "A & B" I cannot without the following documents: ─

(i) The minutes of the PPAC meeting where the lease was approved

(ii) The PPAC approval document

conclusively confirm or deny having signed the said lease agreements due to the fact of the time that has elapsed, and the large number of documents I have signed at Propnet on various occasions during the time of my employment.'

His explanation was that he was busy and wanted to get rid of the police as they were unprepared, they had booked only 30 minutes of his time which was not sufficient and he had back to back meetings. That is not the co-operation which a civic minded person could and should give, but the explanation is not inherently improbable. I disagree with the hyperbole in the

appellant's heads of argument that:

'His statement to the police was extraordinary and nonsensical and his determination to avoid the police's questioning is highly suspect. His explanation as to why he gave such a statement to the police is incredible.'

[27] No motive was put to Mashinini as to why he would lie about the existence, and his execution, of the addendum and none suggests itself from the record. Nor is there any warrant for describing him, as the appellant's heads of argument do, as 'an ally of Mr Balmakhun'.

Silungwe

[28] The second witness was Silungwe. At the relevant time he was employed by the development division of Propnet as the manager in charge of the whole of the KwaZulu-Natal region. The work involved looking at converting underutilised Transnet properties into development opportunities. He confirmed Mashinini's evidence that the Pinetown PX was considered for development as it was in a bad state of repair, but despite adverts placed in newspapers, no credible proposal for the development of the site was received; and that the property division accordingly changed its mind in respect of the strategy for the property. Some time after the respondent had taken over the lease of the Pinetown PX, the respondent approached Propnet and indicated that the premises were not in a good state of repair, in consequence of which its sub-tenants had moved out, and that the respondent was accordingly going to suspend the payment of rentals until the premises had been renovated. Silungwe and others in the KwaZulu-Natal regional office of the appellant accordingly started the process of obtaining the approvals necessary for the property to be renovated. According to him, the outcome of the negotiations between the appellant and the respondent was that the appellant would spend money on the roof and the respondent had to spend money to provide the cladding for the warehouse and provide the surrounding paving for the premises. After that was done, the appellant was supposed to enter into an extension of the lease with the respondent in order to recoup whatever money the appellant had put in.

[29] Silungwe oversaw the preparation of the document (referred to in para 8 above) presented by Beni to the meeting of the PPAC on 26 February 2001, which meeting (as I have said) the witness attended. He, too, confirmed the correctness of the minutes.

[30] Silungwe said that he was part of the team which negotiated the terms of the addendum with the respondent. He said in cross-examination that he was present when the proverbial handshake took place at the conclusion of this process.

[31] The crux of Silungwe's evidence was that Balmakhun handed an addendum to the lease to him personally at the respondent's offices, possibly in about November or December 2002. The document had already been signed by Balmakhun and another person as a witness and he then also witnessed Balmakhun's signature. He couriered the document to Johannesburg for signature by Mashinini. His evidence reads:

'Was [the addendum] signed or unsigned when it was sent through for signature by the CEO? Or was it signed or unsigned by Newlyn when it was sent through for signature by the CEO? .--- It was signed by the tenant first.

Did you see it in that form? --- Yes.

Are you speaking from your own knowledge? --- Yes.

Can you remember how you came to see it? --- Well, all leases that were supposed to be signed by tenants came through me as I was the person in charge in terms of the leases, so I particularly remember that one.'

[32] Silungwe said that after signature by Mashinini, the original would be couriered from head office in Johannesburg to the regional office in Durban for stamping and it would then ultimately go back to Johannesburg for safekeeping, with a copy being kept on file; although a copy would be sent to the tenant before stamping where (as here) the rental exceeded R15 000 per month. In the present case the witness did not stamp the document and he did not intend to do so until 2005 because that was when the document took effect. When he last saw it (he left the appellant's employ in September 2005), it was attached to a file for which he was responsible.

[33] Silungwe admitted that a note would in the ordinary course have been made on the appellant's PROMIS computer system of the fact that such an agreement existed, and the appellant called Mrs Davids to say that there was no such record. However, the possibility exists, as Silungwe said in cross-examination, that although he gave an instruction for the relevant entry to be made, it was not ─ and according to Mrs Davids, such an omission would not have been picked up.

[34] Silungwe was challenged in cross-examination to explain, in view of his letter of 1 October 2002 to the respondent stating that a supplementary agreement was in the process of preparation, how it came about that the document was prepared by the respondent. His answer amounted to this: Buller produced drafts which contained nonsensical mistakes which he rejected and the respondent then presented an agreement drafted and signed by it. When asked what the urgency was, he replied that the respondent had spent R2 million on the property and it 'had to be concerned about that'. He also pointed to the fact that he had asked the respondent to recommence paying rental in November 2002. Silungwe's evidence was that the appellant did sign leases prepared by tenants depending on how fast he wanted the lease done 'and how fast the other one volunteered to do it'. Buller was not called to deal with his alleged incompetence and Silungwe's evidence is not in the least improbable, particularly in view of several draft documents discovered by the appellant relating to the PX property which would fit Silungwe's description as containing nonsensical mistakes.

[35] I do not understand the criticism advanced in the appellant's heads of argument that Silungwe 'could not give satisfactory answers as to why the responsible person, Buller, could not produce an acceptable document'. If the suggestion is that he had not asked Buller to do so, that should have been put to Silungwe and Buller called to say so. And if Buller had drafted an acceptable document, it is surprising that such a document was not discovered by the appellant and there is no reason why, if it had been drafted, Silungwe would not have sent it to the respondent.

[36] Silungwe, too, confirmed that the document he saw should have referred to an extension for ten years and an option to extend for a further ten years. The submission on behalf of the appellant was that:

'According to Silungwe, the parties had agreed that the lease would be extended for a further period of ten years, with an option to renew for another period of ten years after the expiry of the extended ten year period. He clearly understood the distinction between an extension of the lease on the one hand and an option to renew on the other hand. Therefore, if the missing addendum ever existed and if its terms were similar to those of the forged document, then clearly the parties did not reach consensus on its terms.'

The argument has no merit. As the learned judge a quo succinctly put it:

'Technically it is argued that what was negotiated and agreed during negotiations (an extension of the lease by 10 years with an option for a further 10 years) and what was contained in the missing addendum (2 options of 10 years each [sic; in fact, two options of nine years and eleven months each]) meant that there was not *consensus*. I do not believe that argument to be correct as the ultimate agreement was to be found in the terms of the addendum, Mr Mashinini having the authority to consent to the terms agreed upon.'

[37] It was submitted that Silungwe's evidence, to the effect that Balmakhun presented him with a signed addendum out of the blue, is at variance with Balmakhun's own evidence. But it appears from the cross-examination of Silungwe that he was not at all sure whether or not the addendum was preceded by discussions between him and Balmakhun. And in any event, one would expect Balmakhun to have a clearer memory of what had transpired as he continued to be involved in the matter after the forgery came to light whereas Silungwe had left the appellant's employ and had no particular reason to think back on the details of what had happened.

[38] The appellant's counsel submitted that there was a contradiction between the evidence of Silungwe and Mashinini in that Silungwe said that a signed and completed document had been sent to Johannesburg, whereas Mashinini said that he had seen drafts. Silungwe's explanation, when the contradiction was put to him in cross-examination, was that Mashinini could have seen drafts from sources other than himself. However that may be, the

trial judge considered that there had been a contradiction but took it into account in his judgment.

[39] Finally, criticism was levelled at Silungwe based on the statement he made to the police. It was submitted that Silungwe could give no satisfactory explanation as to why the statement did not mention that the document was in fact a forgery, or at the very least, why the statement did not mention that he entertain suspicions about it possibly being a forgery. He was also criticised for not saying that he had signed a similar document, if the one subject to investigation was a forgery. I am not impressed by these criticisms. On the respondent's case, the terms of the forgery and the genuine addendum were identical; and Silungwe did not know at the time he gave the statement that the genuine addendum to which he testified, had gone missing from the file which was in his custody whilst he was employed by the appellant.

Impartiality of Mashinini and Silungwe

[40] Before dealing with the other evidence, I wish to emphasise that Mashinini and Silungwe were independent and impartial. Mashinini left the employ of the appellant and joined Absa at the end of March 2004, more than five years before he gave evidence. Balmakhun was no longer a client of his. When asked separately whether he felt loyalty to Transnet, and to Balmakhun, his answer was the same: 'Not really'. Silungwe left the appellant's employ in September 2005 because he received a better offer from Tongaat Hulett Developments. The high water mark of the challenge to his impartiality was the suggestion that he had been to the wedding of Balmakhun's daughter ─ which he flatly denied.

Garach

[41] Garach originally practised as an advocate and then as an attorney. He became, as he put it, a consultant for the respondent in January 2002 and subsequently occupied this position full time from August of that year. He saw the letter from Silungwe dated 1 October 2002 (see para 10 above) almost immediately after the respondent received it. He said that Balmakhun brought it to his attention and requested him to prepare an addendum along the lines of addenda drafted by attorneys Cox Yeats which had previously been accepted by Transnet. According to Garach, Balmakhun indicated to him that if the respondent had to wait for the appellant to prepare the agreement it would take some time and it would be quicker if the respondent did so. Garach accordingly prepared a contract using the precedents which provided for two successive renewal periods of nine years and eleven months each.

[42] The evidence of Garach as to how he drafted the addendum explains why the parties had agreed that the lease would be extended for ten years with an option to renew for a further ten years, whereas the addendum for which the respondent contends provides for two successive options each for nine years and eleven months: the Cox Yeats precedents which he followed contain two successive options for those latter periods.

[43] Garach said that he had had reason to look at the Pinetown PX file kept by the respondent in January or February 2003. He saw a document duly signed which was the document he had drafted: 'It was the addendum relating to the Pinetown property'. It was submitted in argument that the document Garach saw may have been the forged document because it is not known when the forgery was produced. But the evidence quoted was not directly challenged in cross-examination — Garach was not asked whether the document he saw may have been the forgery. But the possibility exists, as the respondent's counsel fairly conceded, that it may have been — although no convincing reason was advanced why a forged document would have been necessary at that stage and in addition, the genuine document, on the respondent's evidence, would have been in existence and had already been forwarded to the respondent by the time Garach saw the document which he

did.

[44] Garach (jointly with another employee of the defendant) prepared a letter dated 13 August 2004 which he signed and sent to the appellant. The heading of the letter is 'OUTSTANDING AGREEMENTS OF LEASE – NEWLYN GROUP OF COMPANIES'. The four leases referred to do not include the PX. The reason, said Garach, is because the PX lease was not outstanding.

[45] Garach had no knowledge of the letters sent by Ms Hassen referred to in paras 12 and 13 above. She had been dismissed by the respondent because, according to Balmakhun, she had diverted corporate opportunities from the appellant, which should have gone to the respondent, to a company in which her husband had an interest. It is evident from the record that the appellant's counsel had consulted with her, but she was not called to give evidence to explain the letters she had written. In the circumstances, the respondent cannot be faulted for not having called her either.

Balmakhun

[46] Balmakhun said that prior to Beni's proposal to the PPAC he had agreed with Mashinini that the appellant would replace the roof of the structure at the PX property, the respondent would effect other improvements pertaining to the cladding, the yard and refurbishment of the floor of the warehouse, and that the lease would be extended by a period of ten years with an option for a further ten years. Escalation for the renewal period was agreed at 11 per cent. He was told that the PPAC had approved the project in March 2001.

[47] On 6 September 2002 Balmakhun attended a meeting at Propnet with Beni, Silungwe and Buller. The Propnet minute of the meeting, which Balmakhun confirmed, reads:

'**5.0 Pinetown**

5.1 Billing will resume once the electricity and lights are sorted out.

5.2 Raj [a reference to Balmakhun] requires a 30-day notice to resume paying

rent.

5.3 Amendment to extend lease to be expedited.'

The minute reflects that Propnet was to attend to these matters. As of 1 October 2002, when Silungwe sent the letter stating that a supplementary agreement to extend the lease for ten years with an option to renew for the same period was in the process of preparation, no supplementary agreement had been forthcoming. Balmakhun accordingly had a discussion with Silungwe and agreed that the respondent would utilise the precedent of previous agreements with the appellant to draft a contract, and would send it to the appellant. Balmakhun then gave instructions to Garach to do just that. Garach drafted the document and Balmakhun signed it. He was subsequently informed that Mashinini had signed the document.

[48] Balmakhun could not explain how the forgery had come into existence. He said in cross-examination:

'M'Lord, I've – the defendant or I have had no part in this despicable act. M'Lord, I've outlined in my earlier evidence that inasmuch as this particular lease appears to be – is a substantial one, it is – comprises a small percentage of the defendant's group income, and having regard to the long established and trustworthy relationship we endured, it would have been unthinkable for the defendant to have engaged in this. In any event, M'Lord, as I've stated in my evidence earlier, that we were invited to enter into a lease agreement, or negotiate a lease agreement, and if this document – and if this matter had not been finalised at this stage, and respectfully, we should have taken advantage of that invitation. As I've stated earlier, M'Lord, that we're aware of our rights, we could have applied to Court for an appropriate relief, having regard to the circumstances that led to the upgrade of that property.'

Balmakhun suspected that the forgery may have been brought into existence by the respondent's then managing director, Ms Hassan, in order to discredit the respondent in the eyes of the appellant. The implausibility of this theory adversely affects the respondent's case on the probabilities. But I am not prepared to find, as the appellant argued that:

'[Balmakhun's] recital of his suspicions are baseless and are the product of his mendacity.'

It is noteworthy that the appellant also did not put any specific reason for the forgery having taken place at a particular time, to Balmakhun. Two theories

were advanced in argument on appeal. As neither was put to Balmakhun they do not require further comment.

[49] The learned judge, having examined the evidence and the probabilities, concluded that it is difficult to make a finding on probability as to whether Balmakhun was responsible for the creation of the forged document. I agree with this conclusion.

[50] Balmakhun was criticised in argument for relying on the authenticity of the forgery on six occasions prior to the trial. But the criticism is only valid if Balmakhun knew that the document was a forgery when he relied on it. Garach, whose signature appears on the document as a witness, did not believe it was. It was submitted that at least when the summaries of the appellant's experts were filed, Balmakhun knew that the two experts had determined the document to have been forged by a 'cut and paste' method. But Balmakhun was entitled to have his own expert examine the document and he was also entitled to refuse to make the admission that it was a forgery when he gave evidence. That of course was ill-advised and reflects adversely on his reliability as a witness.

Conclusion

[51] The primary criticism of the judgment of the court a quo was that it had misdirected itself in relation to the weight it accorded to the evidence of the respondent's witnesses without properly evaluating the probabilities. There is no merit in this criticism. The learned trial judge carefully analysed the evidence of each of the witnesses called on behalf of the respondent and weighed up all the probabilities both for and against the respondent's case. The judgment was comprehensive and meticulous in its detail. The learned judge came to the conclusion that as a matter of probability, the parties had concluded an addendum during or about November 2002 in terms similar to those contained in the forged addendum. I am not in the least persuaded that he erred.

[52] The learned judge committed no factual or legal misdirection. He was aware that the conclusion of such a document was important to both parties,

and why; and that the terms that the document was to contain, had been agreed. The fact that the oral agreement and the written addendum differed, is of no importance as there was no question of the respondent not exercising at least the first option contained in the addendum. On the other hand, the learned judge was also fully alive to the fact that the only party to benefit from the forged addendum would be the respondent; and that, on the assumption that the respondent was somehow responsible for the forgery, the question arose why such a document would be produced at the instance or request of the respondent if an addendum in similar terms had already been concluded. He did overlook the probability in favour of the respondent that there was no reason disclosed on the evidence why the forged document would have been produced by Balmakhun at the stage when he did so. As he said in the passage I have quoted, he could simply have arranged the conclusion of a genuine document. There was no suggestion whatever that the appellant had changed its mind about leasing the property to the respondent prior to the production of the forgery. The learned trial judge also did not take into account the improbability that Balmakhun would, by making or authorising a forgery and sending it to the appellant, risk losing the respondent's entire business relationship with the appellant, when the income from the sub-lease of the PX represented less than four per cent of the turnover of the respondent.

[53] The learned judge said specifically that the evidence of Balmakhun, and to a lesser extent Garach (by virtue of his association with the respondent), had to be approached with caution. He pointed to the fact that Balmakhun was intimately associated with the forgery because he was the first to produce it and by virtue of the position that he occupied in the respondent. He also found that Balmakhun was not a particularly impressive witness as he was at times evasive, loquacious and uncomfortable. He took into account the fact that neither the original nor a copy of the addendum could be produced. And he reasoned that:

'To conclude that, because the addendum was forged, the only reasonable inference is that no written document had existed prior to that date (otherwise why the forgery?), would necessarily entail disbelieving and rejecting the direct evidence of Mr Mashinini, Mr Silungwe, Mr Garach and Mr Balmakhun . . . .'

[54] I entirely agree with this approach. When all is said and done, Mashinini and Silungwe were impartial. They could not have been mistaken; and there is simply no warrant for finding that they committed perjury. On their evidence, both sides considered it essential that a valid addendum be executed, and it was. The balance of probabilities supports this evidence.

Cross-examination

[55] Before making the order, I wish to comment on the following cross-examination of Balmakhun:

'You see, Mr Balmakhun, I'm trying to be fair to you, because you can rest assured that we will argue to His Lordship that your evidence should be rejected, that you are untruthful, that you are evasive, that you are a person who manufactured this story in the endeavour to hoodwink the Court, that you are not worthy of any credence . . . .

. . .

I want to tell you, that we are going to do our best to condemn you as a irredeemable liar.'

[56] It is obviously necessary to repeat what was said in *Kentz (Pty) Ltd v Power*;[10] although I propose on this occasion quoting more fully from the book *Cross-Examination: A Practical Handbook* by Mr Justice Colman:[11]

'A less serious misuse of cross-examination, but one which should be avoided, is the introduction, under the guise of questions, of what is in truth argument. In some degree, that can hardly be avoided; and, indeed, it is sometimes perfectly proper to give a witness the opportunity of meeting a submission which counsel has it in mind to make about his evidence. Thus:

Unless you tell me from whom you received that piece of news, I shall probably submit to the court, in due course, that you didn't receive it at all. Now, from whom was it?

But it is quite a different thing to address a witness thus:

I put it to you that you are the most unmitigated blackguard who ever entered this courtroom.

That is not a question. Counsel expects no answer from the witness which can be of the slightest help to anyone. Although such assertions are often made to witnesses,

10 *Kentz (Pty) Ltd v Power* [2002] 1 All SA 605 (W) para 50.
11 1970 p 21.

one wonders whether they have any purpose unconnected with the presence of a newspaper reporter in the courtroom, or counsel's delight in the sound of his own voice.'

Although counsel disavowed either of the motives suggested by the learned author, he readily conceded that the cross-examination was rude. It was also unjustifiable and should not have been permitted.

Order

[57] The appeal is dismissed with costs, including the costs of two counsel.

T D CLOETE
JUDGE OF APPEAL

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