REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **2367 /2007**

In the matter between:

TRANSNET LIMITED	Applicant
and	
ERF 154927 CAPE TOWN (PROPRIETARY) LIMITED	1st Respondent
JOHAN LOMBARD	2nd Respondent
CROSS COUNTRY CONTAINERS (PTY) LIMITED	3rd Respondent
VINTAGE AFRICA INVESTMENTS 706 (Pty) LIMITED	4th Respondent
VONPROP ONE (PTY) LIMITED	5th Respondent
SMOKEY MOUNTAIN TRADING 151 (PTY) LIMITED	6th Respondent
SOUTHERN CARGO (PTY) LIMITED	7th Respondent
ROMAN EMPEROR INVESTMENTS SEVEN (PTY) LIMITED	8th Respondent
PEARL ISLE TRADING (PTY) LIMITED	9th Respondent
NICOLHEALTH PROPERTIES (PTY) LIMITED	10th Respondent
LORCOM SIX (PTY) LIMITED	11th Respondent
MALKEN CC	12th Respondent
CMC GRINROD (PTY) LIMITED	13th Respondent
SUCH ADDITIONAL PERSONS AS ARE FOUND TO BE IN OCCUPATION OF THE PROPERTY AT THE TIME OF THE SHERIFF'S SERVICE OF THIS APPLICATION	14th Respondent
SOUTH CAPE CONTAINERS (PTY) LIMITED	15th Respondent

JUDGMENT DELIVERED THIS 17th DAY OF MAY 2010

KOEN AJ.

[1] Transnet Limited ("Transnet") is the applicant in this matter. It seeks an order evicting the first, third, fifth, tenth, eleventh, thirteenth, fourteenth and fifteenth respondents from immovable property ("the property") owned by it at Cape Town. It does so by exercising its vindicatory rights, asserting that it is the owner of the property and that the respondents are in possession thereof. It seeks no relief against the remaining respondents as they are not in possession of the property.

[2] The eleventh respondent ("Lorcom") asserts that it is entitled to occupy the property in question in terms of an oral lease agreement it concluded with Transnet. Lorcom itself occupies a small portion of the property, and contends that it has sublet the remainder to the first respondent, which has in turn sublet portions of the property to the remaining respondents against whom an eviction order is sought.

[3] The oral lease referred to above was concluded, Lorcom contends, by Lombard, one of its directors, and by Messrs Vilikazi and Bhoola, representing Transnet. Vilikazi was at all material times Transnet's executive responsible for the immovable property in question and Bhoola was Transnet's senior property manager in the relevant property division.

[4] Transnet denies the conclusion of the oral lease asserted by Lorcom. However, it was unable to procure affidavits from Vilikazi and Bhoola to controvert what Lombard said. This state of affairs gave rise to an application to strike out from the replying affidavit those parts of it which incorporated hearsay evidence relating to what Vilikazi and Bhoola had said to the deponent to the founding affidavit about the alleged conclusion of the oral lease[1].

[5] The application to strike out paragraph 26.2 of the replying affidavit was not persisted in. For the rest there was no opposition from Transnet to the application to strike out save for the application to strike out the last sentence of paragraph 26.1 of the replying affidavit. This part of the replying affidavit recorded that Bhoola had initially said that he would confirm what the deponent to the relying affidavit had said about his role in the matter. As it happened Bhoola did not confirm what was said about him. It follows in my view that, absent confirmation from Bhoola on affidavit, what the deponent says Bhoola said to him is plainly hearsay. The application to strike out was therefore granted.

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[1] The application to strike out on the grounds of hearsay was directed at the replying affidavit paragraphs 26.1, save for the first sentence; paragraph 26.2; paragraph 26.3; paragraph 26.5; paragraph 50.1; paragraph 55.1; the last sentence of paragraph 61.3.6; paragraph 61.3.9; paragraph 62 save for the first two sentences; paragraph 63.3 and paragraph 64, save for the third sentence.

[6] Notwithstanding that it can adduce no admissible evidence to controvert Lombard's account of the conclusion of an oral lease agreement Transnet contends that the facts put up in support of the alleged lease by Lombard are insufficient for it to be found that such a lease exists. Transnet argued that Lombard's version that a lease was concluded is far-fetched and untenable and should be rejected on the papers. Alternatively, it contends that if a lease did exist then it was for one year only; in the further alternative Transnet argues that it has cancelled any lease which might be found to exist on account of Lorcom's failure to pay rent since the inception of the lease. And finally, in yet another further alternative, Transnet contends that the failure on the part of Lorcom to pay rent since the inception of the lease indicates a repudiation on the part of Lorcom of its obligations under the lease, which repudiation has been accepted by Transnet.

[7] Transnet's ownership of the immovable property in question is not disputed. What is in issue is Lorcom's right to occupy the immovable property in terms of the alleged oral lease. In this regard a dispute of fact exists. This is so because although Lorcom admits Transnet's ownership of the property and the fact that it is in possession thereof, it alleges other facts which Transnet disputes[2].

[2] See *Room Hire (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163

[8] The approach to disputes of fact in application proceedings is trite. However it is useful to be reminded of the principles. These were restated in the matter of *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). I can do no better than to quote from what was said by Cameron JA, as he then was, at paragraphs 55 and 56 of the judgment in that matter: *"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been the doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."[3]

[9] To this needs only to be added that because these are motion proceedings questions of onus do not arise[4]. The abovementioned principles, so eloquently summarised by the learned Appeal Court judge, must be applied in order to resolve any disputes of fact notwithstanding that Lorcom bears an onus to establish the existence of the oral lease agreement allegedly entitling it to occupy the premises.

[10] The first question which arises for consideration is whether Lombard's account of the conclusion of the oral lease is *"palpably implausible"* or *"so far-fetched or clearly untenable that the Court is justified in rejecting* [it] *merely on the papers"*, to use the expressions employed in *Fakie*.

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[3] See also *NDPP v Zuma* 2009 (2) SA 277 (SCA) at 290 D - G
[4] See *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (AD) at 260 H to 263D; *NDPP v Zuma* 2009 (2) SA 277 (SCA) at 291 A - B

[11] Although it is possible to glean from the papers a detailed history of Transnet's ownership of the property going back more than two decades I shall refrain from doing so as the issue to be decided is a narrow one and the background facts are of little, if any, assistance in deciding it. It is important to note, however, that it is common cause that the right to occupy the property under a 30 year lease which had commenced on 11 December 1987 had vested in a company called MacPhail (Pty) Ltd (MacPhail") and that the first respondent had the right to take transfer of the property, and thus become the owner of the property. Whether or not the first Respondent was by the time of the hearing entitled to exercise the right to take transfer of the property is now, it appears, disputed by Transnet. But nothing turns on this, because as will appear from what follows, it is apparent that the parties approached the matter at the time when the alleged lease is said to have been concluded on the basis that transfer of ownership of the property to the first Respondent was expected to occur in the near future.

[12] To turn now to the facts which are more directly relevant to the question at issue. It is apparent that by late 2000 Transnet and Lombard knew that the MacPhail lease was to be terminated. On 22 August 2000 Lombard sent an email to Bhoola the gist of which was to request Transnet to consent to MacPhail sub-letting the property to Lorcom for the period 1 September 2000 to 28

February 2001. The email was responded to on 28 August 2000 when Bhoola sent an email to Lombard stating that Transnet expected to receive six months' notice of termination of its lease with MacPhail, and stated further that Transnet was *"in principle"* prepared to permit MacPhail to sub-let the property to Lorcom for the six month period.

[13] As it happened MacPhail (Pty) Ltd gave six months notice of the termination of its lease of the property to Transnet on 31 August 2000. MacPhail's tenancy was thus to come to an end on 28 February 2001. Lorcom asserts that it became entitled to occupy the property on 31 August 2000. It contends that it had been given Transnet's consent to sub-let the property from MacPhail and refers to an email dated 1 September 2000 sent by Bhoola to Lombard, the relevant parts of which state that Transnet consented to Lorcom sub-letting from MacPhail for a three month period effective from 31 August 2000. It is apparent from the email that Transnet hoped to conclude a lease agreement directly with Lorcom during the three month period referred to in the email. It must therefore be accepted that it is not disputed that Lorcom was in lawful occupation of the property during the period 31 August 2000 until the end of November 2000.

[14] What happened at the end of November 2000 does not appear from the papers. It is clear, however, that Lorcom remained in

occupation of the property without Transnet's objection. Certainly there is no evidence in the papers that Transnet registered any form of objection to Lorcom's occupancy of the property at that stage. On 26 February 2001, just two days before the end of the MacPhail lease, Lombard wrote to Bhoola. In his letter he stated that he wished to negotiate an interim lease with Transnet, as transfer of the property to the first Respondent had not yet taken place. It is clear from the letter, in my view, that Lombard believed that with effect from 1 March 2001 Lorcom's right to occupy the property would come to an end. Lombard proposed the continuation of the lease for a further three month period at a rental of R 70 000 per month, and stated that if required further arrangements could be made at the expiry of this period. It seems clear from these exchanges, as I read them, that both Transnet and Lorcom were under the impression that transfer of ownership of the property to the first Respondent was soon to take place.

[15] On 2 March 2001 Lombard and Bhoola met. The meeting was followed by an email sent by Bhoola to Lombard from which it is apparent that Lombard had attempted to persuade Bhoola that his proposal in regard to an interim lease ought to be accepted. Bhoola undertook to forward the proposal to Vilikazi and to revert to Lombard urgently.

[16] On 12 March 2001 Lombard had a discussion with Vilikazi. He followed the discussion up with a letter in which he referred to a proposal made by Vilikazi to enter into a longer lease while the issue of transfer of ownership of the property to the first respondent was being attended to. About five months later Vilikazi wrote a letter to Lombard referring to *"recent discussions"* during which it had been agreed that Transnet would lease the property to Lorcom for a period of twelve months commencing on 1 September 2001 and ending on 31 August 2002. The letter makes it clear that Vilikazi thought that transfer of ownership of the property from Transnet to the first respondent was expected to occur, and that if this happened then the 12 month lease would terminate. The letter ended off by stating that *"any further terms and conditions relating to* [the lease] *will be discussed between us"*.

[17] In response to this letter, on 10 September 2001, Lombard sent an email to Vilikazi proposing what amounts to a rental amount of R50 000 per month, which is less than what had previously been discussed, and reiterated that if transfer of ownership of the property to the first Respondent occurred than the lease would end. This email was responded to by Vilikazi in a letter dated 12 September 2001. In it Vilikazi stated that Lorcom was *"permitted to sub-lease the property in question for the period of the lease (namely 12 months)"* and the rental would shortly be confirmed.

[18] During September 2001 Lombard had a further discussion with Vilikazi during which, he says, it was agreed that the rentals for the interim lease would be as he had proposed in the 10 September 2001 email. On 19 October 2001 Lombard states that he sent an email to Vilikazi requesting that the interim lease agreement be between Transnet and the first Respondent (as opposed to Lorcom) and asking where payment of the rental should be made. Lombard says the email was not responded to and that he assumed that his suggestion to amend the terms of the interim lease had not been agreed to and that the interim lease remained with Lorcom.

[19] After 19 October 2001 Lombard had several discussions with Bhoola and Vilikazi about the transfer and during these he mentioned that Lorcom had fallen in arrears in payment of the rental. Lombard says he asked for a schedule of arrear rentals to be drafted by Transnet.

[20] Lombard goes on to say that on or about 28 March 2002 he discussed the arrangements in regard to rental with Bhoola. Bhoola stated that a rental amount of R50 000 per month was acceptable provided that there was an annual increase in rental of between 8 and 10 percent. Lombard says he agreed to the

change, and that he and Bhoola *"accepted that the lease would endure until transfer of the property was effected"*.

[21] On 5 April 2002 Lombard sent an email to Vilikazi referring to various discussions and recording, among other things, that *"The interim rental agreement must hold good until the subdivision is finalised but for planning purposes we request that a minimum period of twelve months be agreed. The rental is R 50 000 per month and Mr Vilikazi held open the option to increase this after some period. This can tie in with the annual increase of 8 – 10% which* [Vilikazi] *mentioned."* The email concluded with a request that an agreement be drafted by Transnet. It should be added that at that time it appears that the transfer was being delayed by difficulties about a subdivision, hence the reference to a subdivision in the email.

[22] For over two years nothing further transpired. Lorcom and the Respondents who occupied the property under it remained in occupation. Then, on 27 September 2004, Bhoola sent an email to Lombard asking for a meeting to discuss the sale and lease of the property which he said was a long outstanding matter. Lombard did not reply to the email and again nothing happened until August 2006 when an attorney engaged by Transnet attended at the property in order to ascertain who occupied it. Pursuant to his enquiries and on 25 August 2006 letters were

addressed on behalf of Transnet to the entities which appeared to occupy the property, including Lorcom and first Respondent. The letters simply asserted a right of ownership of the property on behalf of Transnet and required the occupiers to vacate the property within 10 days, failing which proceedings for eviction would ensue. The letter makes it quite apparent that Transnet had decided to avail itself of its vindicatory rights in regard to the property. It is also the first indication that Transnet objected to Lorcom's occupancy of almost six years.

[23] In response to the letters the first respondent's attorney wrote on 28 August 2006 to say that it was *"entitled to remain on the property"* and so too were the other entities to which the letter written on behalf of Transnet had been addressed. Certain of the other entities had written to Transnet's attorney to say that they occupied the property under a lease from the first Respondent, and requested Transnet to direct its enquiries to it.

[24] Save for the further fact that since 1 March 2001, when the MacPhail lease terminated, there has been no payment of rental in respect of the property what has been summarised above are the relevant facts, extracted for the most part from Lombard's version of events.

[25] It was submitted on behalf of Transnet that on Lombard's own version no case has been made out for a lease of indefinite duration pending transfer of the property to the first Respondent. As mentioned above neither Vilikazi nor Bhoola have deposed to affidavits in the matter, and Transnet did not adduce admissible evidence to controvert what Lombard says. This notwithstanding, Transnet's counsel urged me to find that Lombard's account of events does not bear scrutiny and that it was so far-fetched as to warrant rejection on the papers.

[26] A thorough analysis of Lombard's version undertaken by counsel for Transnet highlighted several features of his evidence which, it was argued, gave the lie to Lombard's version. In no particular order of importance these were that Lombard's excuse for Lorcom not having paid rent, namely that no VAT invoices had been supplied, was incredible; that Vilikazi's agreement to accept less rental than had initially been offered was absurd; that Lombard's account of a lease which would endure until transfer of the property to first Respondent was effected was unsubstantiated and should not be believed; that Lombard's request to Transnet to draft an agreement indicated that none had been concluded; the fact that the conclusion of an oral lease was contrary to Transnet's internal policies; and the fact that a lease had not been referred to in the attorneys' letters written

during August 2006 indicating that Lombard's version was a recent fabrication.

[27] What makes matters difficult for Transnet is that what Lombard says is not controverted, and the truthfulness of his evidence can be measured only against inherent contradictions therein and against the established facts. The scope for an analysis of probabilities in motion proceedings, if it exists at all, is extremely limited[5]. Motion proceedings are not intended to enable a Court to weigh probabilities to determine where the balance lies in order to decide who is probably telling the truth.

[28] I do not consider that there are inherent contradictions in Lombard's version, or that his evidence conflicts to any material degree with the established common cause facts. There is nothing about Lombard's version which strikes me as being far-fetched, palpably implausible or clearly untenable. To make this finding I am required to brand Lombard as a liar, in spite of the fact that neither Vilikazi nor Bhoola's response to his allegations is before me. I have not been persuaded that this is justified.

[29] Having concluded that Lombard's version cannot be rejected out of hand it is necessary now to deal with the second leg of the argument put up by counsel for Transnet. This was that the

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[5] See *NDPP v Zuma* 2009 (2) SA 277 (SCA) at 290 F-G

asserted lease was at best for Lorcom a lease for one year only, because an annual escalation of between 8 and 10 percent was envisaged, and the rental payable in the second year was therefore indeterminable, rendering the agreement from the second year onwards void for vagueness.

[30] I think that it is important, firstly, to have regard to precisely what was transpired about the escalation of rental. The 5 April 2002 email referred to in paragraph 22, which is the only piece of objective evidence concerning the terms of the escalation which I can find in the papers above holds the key. It records that "*Mr Vilikazi held open the option to increase this after some period. This can tie in with the annual increase of 8 – 10% which* [Vilikazi] *mentioned.*" As I understand Lombard, what he agreed with Bhoola was that Transnet would have the right to determine an escalation rate of between 8 and 10 percent. In effect, he gave Transnet the right to decide on the amount of an escalation, if any, provided that it fell within the parameters agreed upon.

[31] Counsel for Transnet urged me to find that the term asserted by Lombard rendered the agreement invalid. At best, he submitted, Lombard had proved a lease agreement of one year duration, because after that the rental payable was uncertain.

[32] Discredited as it undoubtedly now is, it is a principle of our law that a term of an agreement of lease leaving the power to determine the rental entirely to the discretion of one of the parties renders the agreement invalid. (see *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (AD) at 186 D - E). It is evident from a reading of *Benlou* that the principle was reluctantly accepted in that case because the Court considered itself to be bound by it notwithstanding that it is illogical, and that it does not accord with the position in other legal systems[6]. I respectfully agree with the criticism of the principle, which seems to me to be illogical and contrary to common sense.

[33] The principle was again trenchantly criticised in *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 933H). But *One Berg River* had to do with the variation of interest rates under mortgage loans and what the Court had to say about rentals under lease agreements is *obiter* and not binding. Indeed, Van Heerden DCJ stated that *"...the common law rule governing sales and leases was not in issue in this Court and the question whether the rule should be jettisoned was not argued before us. Hence it is unnecessary, and indeed undesirable, to decide that question"* (at 938 C – D).

[6] See page 185 F – H of the judgment

[34] Notwithstanding the reluctance with which the principle confirmed in *Benlou* appears to have been accepted, and the criticism which has been directed at it, it is our law as expressed by the Supreme Court of Appeal and I am bound by it. However, for the reasons which follow I do not think that an invocation of the principle assists Transnet.

[35] Firstly, a rental had been agreed and an escalation is not an essential term of an agreement of lease. Transnet had the right to invoke the escalation, not the obligation to do so. Furthermore, it is common cause that Transnet never invoked a right to increase the rental. The rental therefore remained R50 000 per month and there could be no uncertainty about it.

[36] Secondly, and even if I am wrong about the fact that no escalation was ever applied and that the rental thus remained certain, I do not think that what was agreed left it entirely to Transnet to determine the rental payable from the second year onwards, in the sense this word is used in *Benlou*. Transnet could only increase the rental within agreed and defined narrow parameters. Transnet's power to invoke an increase was considered by Lombard to be reasonable and he had agreed to it on behalf of Lorcom. Any increase had to be between 8 and 10 percent. Transnet's power to determine the rental payable by Lorcom was thus not entirely unfettered.

[37] Having concluded that the agreement alleged by Lombard is not invalid what remains for consideration are the questions whether Lorcom's failure to pay rental constitutes a repudiation of the agreement, and the question whether the agreement was validly cancelled by Transnet in its replying affidavit on account of Lorcom's failure to pay rent.

[38] In *Ankon CC v Tadcor Properties (Pty) Ltd* 1991 (3) SA 119 (CPD) it was held that the failure by a party to perform an obligation can amount to a repudiation only if there is also *"an unequivocal refusal to be bound by the relevant term or terms of the contract"* (at 121 H). *Ankon* also made it clear that in regard to contracts of lease of property our law *"is governed by equitable principles and what has been referred to in our Courts as a 'tolerant', an 'equitable' or a 'flexible' approach"* (at 122 J to 123 B).

[39] Save for Lorcom's admitted failure to pay rent the repudiation argument rests upon no facts which might suggest a refusal on the part of Lorcom to pay rent. Counsel for Transnet was unable to refer me to any authority to the effect that a mere failure (as opposed to a positive refusal) to pay rent under a lease agreement was held to amount to a repudiation by the lessee of

its obligations under the agreement. The argument, in my judgment, must therefore be rejected.

[40] It was contended by counsel for Transnet that in the event that a lease was found to exist, and in the further event that Lorcom's failure to pay rent was held not to be a repudiation of the agreement, then the cancellation of the agreement contained in Transnet's replying affidavit was a valid cancellation of the agreement, thereby bringing to an end Lorcom's right to occupy the property.

[41] The purported cancellation of the lease alleged by Lombard contained in Transnet's replying affidavit is summary, and no demand or notice to make payment preceded it. In the absence of a term of the agreement permitting a summary cancellation the summary cancellation of a lease agreement by a lessor on account of the non payment of rental is not, as I understand our law, normally countenanced. Reasonable notice must be given to the lessee by the landlord to make payment before a cancellation can ensue[7]. No notice of the cancellation was given by Transnet to Lorcom, let alone reasonable notice, and nothing in the agreement entitled it to act in this manner. For this reason the cancellation argument must also be rejected.

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[7] *Goldberg v Buytendag Boerdery Beleggings* 1980 (4) SA 775 (AD) at 793; HA Kerr *The Law of Sale and Lease*, 3rd Ed (2004) at 362-363

[42] This leaves for consideration the submission made on behalf of Transnet by its counsel that if a dispute of fact is found to exist then the matter ought to be referred to oral evidence with a reservation of costs. Rule 6 (5) (g) gives a Court the discretion to dismiss the application, or to make such order as seems meet with a view to ensuring a just and expeditious decision in the matter.

[43] In this connection I am compelled to make certain observations. Lorcom has been in occupation of the property since August 2000. It came into possession of the property lawfully, with Transnet's consent, and remained in undisturbed possession with Transnet's consent for more than a year until the lease about which Lombard testified on affidavit was allegedly concluded. The first respondent is, in terms of an order of the High Court, entitled to take transfer of ownership of the property. For years Transnet recognised this and even if Transnet now holds a contrary view about the enforceability of the order it ought reasonably to have expected that there would be a dispute about this. Furthermore, Transnet had been told that Lorcom held the view that it was entitled to occupy the property. That much had been made clear in correspondence, with Lorcom's attorneys having gone so far as to consent to the jurisdiction of the appropriate Court in Johannesburg for the purposes of a Court resolving the dispute about Lorcom's right to occupy the property. The tone of the

correspondence exchanged between the parties after the demand to vacate had been made during 2006 was confrontational, to say the least, reinforcing the conclusion that disputes were bound to arise. The first respondent's tenants at the property had written to Transnet's attorneys stating that they held rights of occupation under leases with the first respondent, thus Transnet knew that the first respondent held itself out to be entitled to occupy the property. And Transnet, or its attorneys, must have known that Lorcom asserted, or would assert, that a lease existed, because Lorcom's failure to pay rental was a topic broached in a discussion between Transnet's attorney and Lorcom's attorney recorded in a letter dated 11 September 2006, some five months before the application was issued.

[44] It follows that Transnet ought reasonably to have known that a dispute about the entitlement of the Respondents to occupy the property would ensue. It might not have known what the scope of the dispute might be, but it is apparent that it made no enquiry about this as I would have expected it to make before instituting proceedings. Yet in the face of these circumstances Transnet chose simply to exercise its vindicatory rights utilising motion proceedings without any form of further enquiry.

[45] I do not discount the fact that Lorcom's attorneys were vague about the basis of Lorcom's right to occupy the premises in their

letter written in response to the demand to vacate the property. Nor have I lost sight of the fact that Transnet might have chosen a different vehicle for the resolution of the dispute had it known what was contained in the answering affidavits. But *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), makes it clear that it is the responsibility of an applicant, and not a respondent, to decide whether or not a *"serious dispute of fact [is] bound to develop"*[8] when choosing whether to proceed by way of motion or by way of action.

[46] I am driven to the conclusion that had any reasonable level of enquiry been made before application proceedings were instituted Transnet would have concluded that a serious dispute of fact was likely to arise. Such enquiry as there was, as far as can be discerned from the papers, was superficial and inadequate. Indeed, the inadequate level of investigation undertaken before the application was launched is underscored by the fact that that an order is not sought against almost half of the fifteen respondents in this matter because Transnet concluded after institution of the application that they were not in possession of the property. Given the long history of the matter, and the extent of the correspondence exchanged between Lombard on the one hand and Vilikazi and Bhoola on the other, I would have expected a more searching enquiry to have been

[8] At page 1162 of the judgment

made as to why it was that the occupants of the property remained there. A telephone call or letter asking this question would have achieved exactly what this application has, namely the identification of a dispute of fact incapable of resolution without oral evidence. Transnet proceeded at its peril in instituting proceedings on motion and took the risk that that a Court might in the exercise of its discretion, dismiss the application.

[47] I have come to the conclusion that by simply relying on its right of ownership and the respondents' possession of the property as the basis for the relief it sought, and by ignoring what it had described as the "long outstanding" questions of the sale and lease, Transnet attempted to short-cut matters. In *Room Hire* the Court said *"It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action."*[9] It is difficult not to conclude that this is precisely what happened in this case. In the circumstances I do not think that it is correct to exercise the discretion to refer the matter to trial or to direct that evidence be heard. In my judgment the application should be dismissed.

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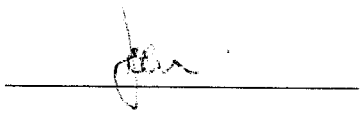
[9] At page 1162 of the judgment

[48] Both parties accepted that any costs order which might be made should include the costs of two counsel.

[49] I therefore make the following order: The application is dismissed with costs, such costs to include the costs of two counsel.



Koen AJ