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

Case No 14549/11

In the matter between:

MURRAY & ROBERTS LIMITED	First Applicant
MURRAY & ROBERTS STEEL (PTY) LIMITED	Second Applicant
CAPE TOWN IRON AND STEEL WORKS (PTY) LIMITED	Third Applicant

and

NATIONAL SCRAP METAL CAPE TOWN (PTY) LIMITED	First Respondent
MUREC CRUSHING AND MILLING (PTY) LIMITED	Second Respondent

Court:	GRIESEL J
Heard:	26 October 2011
Delivered:	9 November 2011

JUDGMENT

GRIESEL J:

[1] The applicants – all members of the Murray & Roberts Group of companies – have applied as a matter of urgency for the eviction of the respondents from certain industrial premises described as the Remainder of Erf 5926 Kuils River, 20,25 hectares in extent, registered in the name of the first applicant, Murray & Roberts Limited.

[2] It is common cause that portion of the premises was occupied by the first respondent (NSM) in terms of a written lease between it and the third applicant (Cisco), which lease expired on 31 October 2010. The applicants contend that as from 1 November 2010 the leased portion was subject to a tacit monthly lease, terminable on reasonable notice. They contend, further, that this monthly lease arrangement was terminated with effect from 8 August 2011 by notice of termination given by the applicants' attorneys, dated 6 May 2011.

[3] The respondents refuse to vacate any part of the premises which they occupy, relying on an express oral lease – allegedly concluded between representatives of the respective parties at a meeting that took place at Johannesburg Airport sometime between 19 June 2008 and 5 August 2008 – which entitles them to occupy the premises for a period of at least ten years from 1 November 2010.

[4] In reply, the applicants strenuously denied the existence of the purported oral lease on which the respondents rely, stating bluntly that 'there was no such meeting and no such agreement'. Faced with this factual dispute on a material issue counsel for the respondents, not surprisingly, contended that there are 'real and genuine disputes of fact

between the parties as to the first respondent's right of continued occupation of the premises'. They accordingly asked that the application be dismissed with costs.

[5] Faced with a voluminous record and intricate factual detail involved in this matter, the approach suggested by the respondents offers, at first blush, a tempting shortcut to a resolution of the present dispute. Counsel for the applicants, however, in a carefully crafted argument, persuaded me that the easy way out would not do justice to the case brought before court by the applicants. They submitted that close scrutiny of the papers reveals that the respondents' allegations about the purported 2008 oral lease are 'so far-fetched and implausible, and so clearly contrived and fabricated' that they can be dismissed on the papers. Relying on the exceptions to the well-known *Plascon-Evans* rule[1] and also on certain *dicta* in *Fakie NO v CCII Systems (Pty) Ltd*,[2] they urged me to adopt a robust approach in rejecting the respondents' version on the papers. In order to evaluate the cogency of the applicants' argument, it is therefore necessary to follow a slightly longer route and to grapple with the facts in some detail.

Factual background

[6] A written lease agreement in respect of portion of the premises was concluded between Cisco (acting on behalf of the first applicant) and NSM, with an effective date of 1 July 1999. The lease was to be operative for a period of one year, but it continued thereafter on the same terms until an 'amending lease' was eventually signed on 13 March

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635B–D.
[2] 2006 (4) SA 326 (SCA) paras 55–56.

2007. The amending lease provided *inter alia* for an 'expiry date' of 31 October 2010. This coincided with the expiry of a supply agreement between Cisco and NSM, initially concluded in 1999 and amended on 21 May 2001.

[7] A distinction is drawn on the papers between the portion of Erf 5926 that is occupied by Cisco for its own operations (*'the Cisco portion'*); the portion occupied by NSM in terms of the 1999 lease and the 2007 amending lease (*'the leased portion'*); the *'services site'*, a portion used by the second respondent ('Murec') for waste removal and disposal in terms of a written agreement between Cisco, NSM and Murec ('the Murec agreement'); and the *'shredder portion'*, which forms part of the services site, lately used by NSM for housing a shredder – a large piece of equipment that is capable of fragmenting larger pieces of scrap metal. The situation of the various separate portions comprising the premises appears clearly from a site plan attached to the notice of motion and also to the founding affidavit and the Murec agreement.

[8] The acquisition of the shredder featured prominently in these proceedings. It is common cause that the applicants were keen to obtain a shredder so as to increase their output of scrap metal. At a board meeting of NSM held on 19 June 2008, the acquisition of a shredder by NSM at a cost of approximately R45 million was discussed. The minutes record:

'The board has agreed to go ahead with the installation of this shredder on condition that a long term lease agreement be entered into with Cisco where the shredder is to be erected.'

[9] According to the respondents, it was after this board meeting, and before the next board meeting, held on 5 August 2008, that Mr Michael Movsas and Mr Dave Kassel of NSM met with Mr Robert Noonan, who was a director of each of the applicants and also a director of NSM, and concluded the disputed oral lease.

The disputed 2008 oral lease

[10] The evidence adduced on behalf of the respondents in support of the disputed oral lease is contained in the answering affidavit of Movsas, who states:

'To the best of our recollection the meeting took place at the Johannesburg airport. . . . Noonan's demeanour and conduct at this meeting was assertive. . . Noonan reiterated:

> "We (a reference to the Murray & Roberts Group) can't be in the hands of our opposition (a reference to SA Metal) for the supply of shredded scrap and if you (a reference to the first respondent, which Kassel and I [i.e. Movsas] were representing at the meeting) won't purchase a shredder, we will."

'Kassel and I [Movsas] advised Noonan that as he was aware, the board of [NSM] had resolved to proceed with the purchase of a shredder on condition that a long term lease agreement be entered into with the third applicant in respect of the premises where the shredder was to be located and provided that Noonan agreed on behalf of the applicants that a long term lease would be entered into we (on behalf of the first respondent) would, in accordance with the directors agreement [at the 19 June 2008 NSM board meeting] confirm that the first respondent would purchase and install a shredder to meet the Murray & Roberts Group's requirements as detailed above.

'Noonan immediately responded by saying that Murray & Roberts (ie a reference to the applicants) was prepared to let the premises to the first respondent for a further period of 10 years following 31 October 2010. During the discussion, Kassel and I

made it plain to Noonan that the first respondent would not invest in the massive capital commitment for the shredder unless the terms of a long term lease were agreed, a fact of which Noonan was well aware. After a brief discussion, Noonan (representing the applicants) and Kassel and [Movsas] (representing the first respondent) agreed that following the expiry of the existing lease on 31 October 2010, the first respondent would continue in occupation of the premises (including the premises in which the Shredder would be installed) on the same terms and conditions as those recorded in the existing lease and that such occupation would be for a period of at least 10 years commencing 1 November 2010. The rental was to be on the basis of the built in escalation in the existing lease over the 10 year period. He agreed with us that all was in order and we responded by stating that on this basis, the first respondent would proceed with the purchase of the shredder, which it did.

'Following this meeting, I advised the remaining board members who were not Murray & Roberts appointees that agreement had been reached with Murray & Roberts as to the terms which would govern the first respondent's continued occupation of the premises (which was now to include the shredder portion) and we proceeded with the purchase of the shredder.'

The applicants' version

[11] In the applicants' replying affidavit Noonan denies ever having attended such a meeting, or ever having purported to conclude such a lease. According to him, the respondents appear to have taken a couple of earlier meetings, placed them out of sequence and out of context, and then tacked on a discussion and agreement about an alleged new lease. He admits that at one of the meetings, held prior to March 2008, he presented the NSM representatives with an 'ultimatum' about the acquisition of a shredder. He is quite unequivocal, however, that at none of the meetings was an oral lease ever discussed or concluded. In addition, Noonan was in any event not authorised to conclude a ten-year

lease on behalf of any of the applicants. A ten-year lease – which would have been highly unusual in the circumstances – would have required the approval of the first applicant's board of directors. This was neither sought nor obtained.

Discussion

[12] When evaluating these competing and mutually inconsistent versions, one is struck, first of all, by the vagueness of the respondent's version regarding time and place: 'to the best of [their] recollection' the meeting took place at the Johannesburg airport. Time-wise, it could have been any day after 19 June 2008 and before 5 August 2008, i.e. a period spanning more than six weeks. One is also struck by the inherent improbability that an agreement of such magnitude and with such far-reaching consequences for both groups of companies would have been concluded in such a cavalier and informal manner – all the more so when one learns that no record of the disputed oral lease is to be found anywhere. Thus, there is not a single item of correspondence or any document emanating from any of the parties which supports or confirms the existence of the purported oral lease, let alone refers to such a lease in terms. To the contrary, as pointed out by the applicants, the existing documentation is inconsistent with, and in many instances destructive of, the respondents' version.

[13] Moreover, the purported oral lease was also not discussed at any subsequent board meeting of either NSM or any of the applicants. Given the importance of the purported oral lease for NSM, it is inconceivable that there would have been no reference to it at a board meeting of NSM or Cisco, had such an agreement actually been concluded. Again, copies

of the minutes of various board meetings of NSM, held between December 2009 and December 2010, indicate repeatedly – and with an increasing note of urgency on the part of NSM – that a new lease agreement must be 'concluded' with Cisco; in other words, no oral lease was yet in place.

[14] Not only that; the first time that the existence of the alleged oral lease of 2008 was mentioned by anyone was in the respondents' answering affidavit, *jurat* 9 September 2011, in these proceedings.

[15] There are certain further internal inconsistencies regarding the respondents' version of the disputed oral lease which, individually and cumulatively, are destructive of the such version. Thus, with regard to the *premises*, the whole reason for the conclusion of the alleged oral lease, according to the respondents, was because the respondents required security of tenure 'in respect of the premises where the shredder was to be located'. However, the disputed oral lease purports to regulate the *whole* premises on the same terms as the existing lease agreement of 2007, even though portion thereof, namely the 'services section' (of which the 'shredder portion' forms part), was governed by the separate written Murec agreement, which could only be varied in writing. Had Cisco and NSM been desirous of ensuring that NSM could occupy the slag handling area and the shredder portion on a long-term basis, they should therefore have included Murec in any agreement. In a nutshell, it is inherently improbable that discussions about a shredder to be installed on the shredder portion would have led to an oral long-term lease arrangement between the applicants and NSM for the leased portion and

the services section (including the slag handling area and the shredder portion), on the same terms as the existing lease agreement.

[16] Furthermore, regarding the *rental*, the respondents claim that it was agreed to be 'on the basis of the built in escalation in the existing lease over the 10 year period'. But they seem to forget that there was no 'built in escalation' in the existing lease; instead, there was a table of specified rentals payable in each of the years until 2010.[3] The built in escalation of the 1999 lease fell away when the amending lease was concluded in 2007.

[17] Moreover, it also does not make business sense to fix the same rental that applied in respect of the 'rental portion' for the much larger premises, including the shredder portion. The rental allegedly in terms of the disputed oral lease is so unrealistic that it could not seriously be suggested that Noonan would have agreed to it, especially bearing in mind that the rental payable for the leased portion under the lease agreement was nominal when compared to rentals payable for similar properties in the Kuils River industrial area. Such rental was not only well below market value, but did not even cover the electricity bills which Cisco was contractually obliged to pay in respect of NSM's electricity consumption in terms of the lease agreement.

[18] The suggestion that Noonan would have consented to that rental without even deferring to the boards of directors of any of the applicants or referring to the terms of the existing lease is even more far-fetched.

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[3] Clause 3.2.3.

[19] A further aspect concerning the disputed oral lease that does not make business sense is the fact that a long-term lease agreement was dependent on the existence of a long-term supply agreement between Cisco and NSM, and the terms of the latter would determine what could be agreed for the former. It was thus imperative that clarity first be obtained as to what was permitted under the Competition Act as the Competition authorities had already found that the previous relationship between Cisco and NSM involved the commission of prohibited practices. This requirement had not been met in 2008 – or at any stage prior to the expiry of the lease agreement and the supply agreement on 31 October 2010. There is still no new supply agreement, and none is likely to be concluded in the future. NSM resolved its competition issues only in December 2010 when the Competition Tribunal approved a settlement agreement between NSM and the Competition Commission; while the competition complaint against the Murray & Roberts Group is still outstanding. It therefore defies belief that, sometime around the third quarter of 2008, Noonan would have allegedly committed the applicants to a long-term lease from 1 November 2010 to 31 October 2020.

[20] Objectively, it would have made no sense for Noonan – *after* the 19 June 2008 board meeting of NSM – to have issued the ultimatum regarding the purchase of a shredder. The 'ultimatum meeting' would logically have happened before the 19 June 2008 board meeting, which precipitated the decision of NSM to purchase and install the shredder, as testified by Noonan. The ultimatum from Noonan was therefore not followed by the conclusion of any lease at the same meeting, as the respondents allege.

[21] The strongest argument advanced on behalf of the respondents in support of the disputed oral lease was the improbability that NSM would have been prepared to incur the 'massive' capital expenditure of acquiring and installing the shredder without having the security of a long-term lease. This argument is by no means without merit. However, I bear in mind what was said by Harms JA in a similar context in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*:[4]

'Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work. But when they are at loggerheads, it appears to be futile to consider whether they would have been able to do so.'

Having regard to the evidence as a whole, I have little doubt that this is what happened in the instant case: NSM went ahead with the purchase of the shredder before having all their ducks in a row. In doing so, they relied largely on 'hope, good spirits, *bona fides* and commercial expediency', based on the special relationship between itself and the Murray & Roberts companies as quasi-partners in the joint venture, confident that agreement would eventually be reached regarding the renewal of the lease. As a fact, however, such renewal never materialised. Now that the parties are 'at loggerheads', NSM is left clutching at straws in an attempt, through reconstruction, to find snippets of evidence that lend some support to their version as to the existence of an oral lease.

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[4] 1997 (2) SA 548 (A) at 561G–H.

[22] On a conspectus of the evidence as a whole, I am driven to the conclusion that the respondents' allegations about the disputed oral lease are too implausible to be seriously entertained. In the words of Corbett JA in *Plascon-Evans*, the respondents' version is 'so far-fetched or clearly untenable[5] that the Court is justified in rejecting them merely on the papers'. I am fortified in this conclusion by the failure of the respondents to avail themselves of their right to apply for the applicants' deponents, especially Noonan, to be called for cross-examination in terms of rule 6(5)(g).[6]

The alleged 42-month notice period

[23] As a fall-back position, the respondents submitted in the alternative, that, if their allegations about the disputed oral lease are disbelieved, then NSM should nevertheless be given 'a reasonable opportunity to locate new premises and establish its business operations from such premises'. That 'reasonable opportunity', according to the respondents, must not only take account of the time required for decommissioning the shredder, but also the time needed for reassembling and re-commissioning it. According to the respondents, a 'reasonable period of notice' would be 'no less than forty two months', i.e. 3½ years.

[24] This aspect of the matter received scant attention during argument and can be briefly disposed of. The applicable legal principles are succinctly summarised by Cooper:[7]

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[5] 'Vergesog of klaarblyklik onhoudbaar', as it was put by Botha JA in *ASA Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 924A, referred to with approval in *Plascon Evans* at 635C See also *Wightman v Headfour (Pty) Limited* 2008 (3) SA 371 (SCA) paras 12 and 13.
[6] Cf *Plascon-Evans* at 635A.
[7] *Landlord and Tenant*, pp 65–66 (footnotes omitted).

'A periodic lease continues until it is terminated by notice given by either party. In the absence of agreement to the contrary, notice must be given a reasonable time before the date on which a party desires to terminate the lease. The period of such notice must be such that the lessor has a reasonable opportunity of letting his premises or the lessee of finding other premises.
A day's notice is considered reasonable in the case of a daily lease; a week's notice in the case of a weekly lease, and a month's notice in the case of a monthly lease; but there is no fixed ratio between the period of the lease and the notice period. Consequently, a year's notice is not required to terminate a yearly lease; three months' notice has been held to be reasonable notice.'

[25] I agree with the submission by counsel for the applicants that the notion that a tacit month-to-month lease could potentially have a notice period of forty-two months is absurd. It appears from the respondents' own papers that it is only in relation to the shredder portion that a longer period of notice is required; the respondents appear to concede that it is possible for them to vacate the rest of the property well within the notice period of three months that they had been afforded. However, as pointed out earlier, the services site as a whole (including the shredder portion) has been regulated by the Murec agreement since 2003, and has continued to be governed by that agreement since 1 November 2010, rather than by any purported oral lease. That agreement provides for termination on no less than six calendar months, i.e. on 31 December 2011.

[26] The respondents' claim about the supposed need for a notice period of 42 months is in any event also contradicted by what NSM stated in a letter addressed to Cisco during August 2009, where it stipulated that 'NSM shall, at the termination of [any lease in respect of the land on which the shredder is situated]; alternatively, in the absence thereof, at any time on 90 (ninety) days written notice to Cisco, be

entitled to remove the shredder and all the component parts of which it is comprised'. NSM thus recognised that three months (the notice period given by Cisco) was adequate for NSM to remove the shredder and vacate the premises.

[27] In these circumstances, I am satisfied that the period of notice given to the respondents was adequate. It follows that the tacit lease as well as the Murec agreement have been validly terminated.

Conclusion

[28] It follows from the foregoing that the applicants are entitled to the relief set out in prayers 1 to 4 of the notice of motion. Regarding costs, the applicants have asked for costs of the application on an attorney and own client scale. Punitive costs are appropriate, so it was submitted, given the fabrications in the answering affidavit, as well as the respondents' attempts to delay the hearing of the matter. I agree with these submissions. The parties were agreed that costs should include the costs of two counsel. It should in addition be payable by the first and second respondents, jointly and severally.

[29] The respondents should also bear the costs of the interlocutory applications pursuant to the respondents' rule 35(12) notice, which were considered by Binns-Ward J on 31 August 2011, as well as the costs of the hearing before Dolamo AJ on 13 September 2011 relating to urgency. The applicants were substantially successful in both instances, but in each case the costs were reserved. There is no reason why the applicants should not be awarded the costs of those hearings.

Conclusion

[30] For the reasons set out above, an order is granted:

(a) Evicting the first respondent, its employees, and sub-contractors, ordering the first respondent, its employees, and sub-contractors to vacate, and ordering the first respondent to remove all machinery, equipment, stockpiles and office structures under the first respondent's control from the Remaining Extent of Erf 5926; Township: Kuils River (Registration Division: Stellenbosch RD) situated in the Province of the Western Cape, being the premises situated off Fabriek Street, Kuilsrivier ('the premises'), in particular from the areas labelled the 'leased portion' (labelled 'B') and the 'Shredder portion' on the site map annexed to the notice of motion marked 'NOM1' ('the map'), with effect from 8 August 2011;

(b) Declaring that the waste removal and disposal agreement concluded by the third applicant, the first respondent and the second respondent on or about 17 October 2003 ('the Murec agreement') has been validly cancelled by the applicants with effect from 31 December 2011;

(c) Evicting the second respondent, its employees, and sub-contractors, ordering the first respondent, its employees, and sub-contractors to vacate, and ordering the second respondent to remove all machinery, equipment, stockpiles and office structures under the second respondent's control from the premises, in

particular from the area labelled 'Services Site' on the map, with effect from 31 December 2011;

(d) Authorising the sheriff to take all steps and do all things necessary to give effect to paragraphs (a) and (c) above in the event of the respondents, their employees and sub-contractors failing to comply with the orders in the said paragraphs;

(e) Ordering the respondents jointly and severally to pay the costs of the application on the scale between attorney and own client, including the costs of the interlocutory proceedings on 31 August 2011 and 13 September 2011, as well as the costs of two counsel (where so employed).

B M GRIESEL
Judge of the High Court