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

**Case Number: 25975/2011**

In the matter between:

**TRANSNET LIMITED** Plaintiff

and

**CIVILS 2000 (PTY) LTD** Defendant

**Coram: Wille, J**

**Date of Argument: 4th of September 2019**

**Date of Judgment: 10th of October 2019**

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**JUDGMENT**

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**WILLE, J:**

[1] This is a trial involving a dispute about the occupation and use of a "stock-piling" area and a "storage" area[1], situated on the plaintiff's land in Culemborg, Cape Town.

[2] The plaintiff is Transnet Limited and the defendant is Civils 2000 (Pty) Ltd. Mr Loots SC appears for the plaintiff and Mr Bremridge SC, represents the defendant.

[3] Three different portions of land belonging to plaintiff located at the Culemborg site are relevant to this trial action, namely, a camp site, a stock-piling site and a storage site.

[4] No dispute exists in connection with the camp-site as certain leases were concluded with the plaintiff in connection with this site and all the rentals were paid by the defendant.

[5] The defendant's potential liability for "compensation" to the plaintiff in respect of the stock-piling site and the storage site is heavily disputed and it is these disputes that form the subject of this trial action.

[6] Prior to the commencement of the trial, an inspection in loco was held with counsel, the parties' legal representatives, together with some of the witnesses. Two specific areas were pointed out by Mr Conradie[2] and Mr Keating;[3]

[6.1] A stock-piling area as depicted on exhibit "A", in extent 5762.9 square meters, together with;

[6.2] A storage area as depicted on exhibit "B", in extent 1876.7 square meters.

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[1] The two "additional" sites
[2] On behalf of the plaintiff
[3] On behalf of the defendant

[7] The first witness to be called on behalf of the plaintiff was Mr Seaton. Mr Seaton was a senior manager, employed by the plaintiff during the period from 2008 to 2012 and the executive manager in charge of "special projects" at that time.

[8] One of the special projects assigned to Mr Seaton was to oversee and conclude the negotiations in connection with a ***"right of way servitude***" over property belonging to the plaintiff, in favour of the City of Cape Town[4], during the construction phase of the Bus Rapid Transport Routes.[5] Mr Seaton's role was limited to the "negotiations" and the subsequent contracts flowing from these servitudes in favour of the City, over the plaintiff's property.

[9] Any and all ancillary matters or issues relating to any adjacent property would fall within the purview of the plaintiff's property division under the control of Mr Billett. Mr Billett was the regional manager for the leasing of property[6] belonging to the plaintiff, specifically excluding any "special projects" and the servitudes for the BRT lanes.

[10] It emerged during the testimony of Mr Seaton that he specifically recommended[7], that;

> **"***As all interactions in respect of the BRT route are between Transnet and the City, it is appropriate to also conclude site camp leases with the City as opposed to the contractor"*

[11] Mr Seaton testified that in the event that any contractor required any more land (other than that as was envisaged under the servitude grants), then in that event, he[8] would have referred these contractors to Mr Billett to negotiate and conclude the appropriate leases.

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[4] The City
[5] These "BRT" lanes were constructed as part of the transport infrastructure for the Soccer World Cup in 2010
[6] General leasing of property
[7] In his email dated the 27 November 2008
[8] Mr Seaton

[12] During cross-examination, Mr Seaton readily conceded that this specific access over the plaintiff's property was regulated and controlled by the City. The City negotiated and agreed access over plaintiff's property with its contractors.

[13] It was further conceded that any access requirements with the contractors was not to be negotiated and regulated as between the plaintiff and the various contractors directly, but rather with the City. In this particular case, the defendant accessed the plaintiff's property under the auspices of the City.

[14] Reference was made to a letter written by Mr Seaton to the transport engineer of the City[9] in this connection, regulating the City's access over the plaintiff's property which concluded as follows;

> "*By signature and return of this letter or by the City or its contractors entering into the property of Transnet for the purposes of construction, the City signifies its agreement to the terms and conditions of this letter*"

[15] The second witness to testify on behalf of the plaintiff was Mr Conradie. Mr Conradie had been working for Transnet for the last forty (40) years and he was employed in Transnet's property division as a supervisor dealing with leases for at least the last twenty nine (29) years. From an operational perspective, a prospective tenant would submit a written application to the plaintiff, indicating a "property of interest" and Mr Conradie would then determine the size of the property, obtain a layout plan of the property and obtain a valuation to determine the appropriate rental. The rental terms would then be negotiated, a lease agreement would then be drafted and signed by both parties.

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[9] Mr Haden

[16] According to him the two additional sites were required by the defendant and verbal agreements were concluded with the defendant[10], to rent these areas at an agreed, alternatively market related rental. These two verbal agreements were concluded during March 2010.

[17] Measurements and valuations followed and thereafter lease agreements were prepared for signature. These lease agreements were never signed by the defendant.[11] The lease prepared for the stock-piling area was for the period from the 1st of January 2010 until the 31st of October 2011. The lease prepared for the storage area was to run from the period of the 1st of June 2010 until the 31st of October 2011.

[18] The renewal lease concluded and signed for the camp-site was to run from the period of the 1st of April 2010 until the 31st of October 2011.

[19] The reason why the plaintiff approached the defendant about signing a lease for the stock-piling area was because the actual stock-piling was getting "bigger and bigger" and the defendant's trucks were also destroying some of the tarmac on the plaintiff's property.

[20] The two subject leases[12] were presented to the defendant for signature between the period of the 17th of November 2010 to the 26th of November 2010. The negotiations for the renewal of the camp-site lease occurred on or about the 16th March 2010.

[21] For this latter purpose, a meeting was called for the 18th March 2010 and it was at this meeting, that the plaintiff's representatives put to the defendant[13], that a lease needed to be negotiated and concluded in respect of the stock-piling area.

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[10] Represented by Mr Brian Marcus
[11] This is common cause
[12] For the stock-piling area and the storage-area
[13] Represented by Mr Keating

[22] Mr Conradie testified that he received no objections to his proposals in connection with a lease to be negotiated in connection with the stock-piling area and that is why he initiated the process for the "measuring up" and the valuation of the stock-piling site and the storage site.

[23] Significantly, he testified that he only met Brian Marcus[14] on site on the 28th April 2010, in order to specifically discuss the location and the extent of the storage site. Sometime thereafter an email was sent to the defendant[15] on the 11th of October 2010, setting out the proposed rentals for the stock-piling site and the storage site.

[24] According to Mr Conradie, no response was received to his email and accordingly a meeting was arranged for the 26th of November 2010. Mr Groenewald chaired this meeting and , inter alia, conveyed to the defendant[16], that the defendant was obliged to pay rental for the stock-piling site and the storage site, failing which the defendant was to vacate these two sites. According to Mr Conradie, the defendant agreed at this meeting to pay rental for these two additional sites.

[25] Mr Conradie confirmed that, as far as he was aware, the plaintiff had no contract with the City regarding the stock-piling site and the storage site. These two additional sites were subsequently measured up, plans were drawn and valuations obtained so that the appropriate rentals could be determined.

[26] These valuations were received on the 13th of September 2010 and the two subject leases were eventually thereafter presented to the defendant for signature. The defendant refused to sign these leases. These two unsigned leases were then "cancelled" by the plaintiff on the 31st of January 2011.

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[14] Mr Marcus has since passed away
[15] By the plaintiff
[16] As represented by Mr Marcus and Mr Keating

[27] As far as the construction site-camp was concerned, the sole reason why a "renewal lease" was negotiated and signed was because the defendant leased certain office space from a third party[17] under a "sub-lease" and this sub-lease was contrary to the policy of the plaintiff.[18]

[28] Mr Conradie was at a loss to explain why the commencement dates for the two new proposed leases was only to be effective from the 1st of January 2010, taking into account that these sites, according to him, had already been utilized by the defendant since at least, March 2009.

[29] He was driven to concede that the camp-site lease was a very different lease in nature to the two additional leases contended for and he acknowledged that the only authorized signatory for any leases on behalf of the defendant, was Mr Shapiro.[19]

[30] According to Mr Conradie, the two additional leases were verbal leases. On this score, he conceded that no invoices were rendered in respect of these two additional verbal leases. It was suggested to Mr Conradie, that the real reason for initiating the discussions in connection with the two additional leases was due to the fact that the plaintiff's representatives had formed the view that the stock-piling site had been utilized for different and other projects, other than the BRT lane project.

[31] Mr Conradie conceded that this was indeed the main reason for approaching the defendant during March 2010 and accordingly, the purpose for the meeting. According to him, the site-camp lease was for a fixed term from the 1st of April 2010 until the 31st of October 2011, but was subject to a one month notice period at the "instance of the defendant".

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[17] SCAN
[18] Sub-leases were impermissible
[19] A director of the defendant

[32] He confirmed that it was contrary to the plaintiff's rental policy to enter into any verbal contracts of lease or vary the terms of any lease, verbally. His evidence was further, that at the meeting on the 18th of March 2010, no deposit was discussed, no lease fee was discussed and no escalation of any proposed rental was discussed.

[33] In addition, no explanation could be advanced as to why the alleged rider to the two leases in favour of the defendant, relating to the one month's notice termination period, was only discussed as late as November 2010.

[34] Further, it was pointed out to him that according to the documentary evidence relating to the completion of the BRT project, it was recorded that the "works" had been completed on the 10th of September 2010. This, against the backdrop of the fact that the valuation of the properties had only been completed three (3) days later, on the 13th of September 2010.

[35] It was common cause that the two draft leases were only presented to the defendant for signature during the period from the 17th of September 2010 to the 26th of November 2010, seemingly after the "works" had been completed. The evidence of Mr Conradie, further confirmed that no other leases had been entered into with any other contractors in connection with these sites in the area. No written applications for leases for the two additional sites were ever submitted by the defendant to the plaintiff for its consideration.

[36] A number of photographs, relating to the two additional sites were handed in by consent and marked as exhibits. These photographs depict, inter alia, vast open areas consisting of un-compacted soil and rocks. Some of the areas depicted on the photographs are overgrown by weeds and are strewn with discarded rubble.

[37] The third witness to testify on behalf of the plaintiff was Mr Billett, who has since retired. During the relevant period he was employed as the regional manager of the "Western Region" for Transnet Properties. He was employed in this position with effect from 2008 and he is a quantity surveyor by profession.

[38] A number of property transactions undertaken by the plaintiff (during the period 2006 to 2007), formed the subject of an "investigation" and as a direct result thereof certain "Standard Operating Procedures" and "Leasing Protocols" were put into place at the instance of the plaintiff.

[39] While Mr Seaton (the first witness) was appointed as the official liaison with the City in connection with all servitude and right of way issues, Mr Seaton was not in any manner tasked with any issues in connection with the land belonging to the plaintiff adjacent to these servitudes.

[40] He testified that another contractor had met with Mr Klomp[20], regarding the sites that they were utilizing at the "Culemborg" site and the plaintiff had issued "Vusela"[21] with pro-forma invoices for their "occupation" of certain sites on the plaintiff's property.

[41] No pro-forma invoices were issued to the defendant by the plaintiff for the two additional sites as the plaintiff's "new policy directives", dictated that no further "pro-forma" invoices were allowed to be issued at the instance of the plaintiff.

[42] The site-camp lease differed substantially in nature and content to the other two additional leases. The initial site-camp lease was the subject of a "regulatory rectification" as the defendant enjoyed a sub-lease, whilst sub-leases were prohibited by the plaintiff's "leasing protocols".

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[20] Who represented "HHO" (the engineers contracted to the City)
[21] Vusela was a different contractor in a similar position as the defendant

[43] Mr Billett conceded that certain concessions were made [22] in respect of contractors (including the defendant) due to the City's "involvement" in the project of the building and the completion of the "BRT" lanes for the World Cup.

[44] Access to the site was somewhat relaxed and permitted in view of the involvement of the City. Mr Billett took an active role when he noticed that the stock-piling site was getting "bigger" in size and he formed the view that the defendant may very well be utilizing this stock-piling site for different projects, which were not necessarily linked to the BRT project.

[45] He was present at the site meeting with two of the representatives of the defendant[23] in order to discuss certain operational issues in connection with the location of a power cable that was located in the vicinity of the stock-piling site. Certain operational directives were agreed upon with the defendant and those directives were duly complied with by the defendant.

[46] The testimony of Mr Billett was focused on the various procedures adopted by the plaintiff in order to place the "site-camp" lease within the parameters of the operational procedures and requirements of the plaintiff. All this evidence and material however related to a "site-camp" lease occupied and paid for by Vusela.

[47] Whilst, Mr Billett was of the view that the plaintiff's leasing procedures and protocols were "inflexible", he conceded that certain concessions were made between the City and the plaintiff in view of the "sensitivity" relating to the construction of the BRT lanes due to the pending World Cup.

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[22] Resulting in deviations from the policy directives and standard operating procedures of the plaintiff
[23] During June 2010

[48] Mr Billett conceded that the plaintiff's leasing protocols were not strictly applied and certain concessions and indulgences were granted between Mr Seaton (on behalf of the plaintiff) and the City because of the Soccer World Cup project. He conceded that access into the plaintiff's property by the various contractors (including the defendant) was somewhat relaxed taking into account the involvement of the City.

[49] Further, the plaintiff's leasing policy did not permit and did not cater for leases to be entered into retrospectively. It was also conceded that HHO[24], represented the City and that the first communication by the plaintiff with the contractors in connection with the occupation of the plaintiff's property, was ex post facto[25].

[50] Indeed, it was the City's engineers, represented by Mr Klomp who facilitated and allowed the contractors onto the land and sites owned by the plaintiff. However, he expressed the view that Mr Klomp was wrong to allow the defendant and other contractors onto various sites.

[51] At the time that he attended a meeting with certain representatives of the defendant on the 17th June 2010[26], the stock-piling area was no longer occupied by the defendant. It was suggested to him that the reason for approaching the defendant to negotiate and conclude a lease for the site-camp area, was because the defendant was sub-leasing "offices" from a third party and not "land" from the third party[27].

[52] It was also suggested to him that the defendant was allocated a "site-works" area by the City, which included a stock-piling site, a storage site and a camp site. Further, that the reason why the defendant was prepared to enter into a lease with the plaintiff for the camp site was solely because they elected out of their own volition not to utilize the

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[24] The engineers
[25] Once the property had been occupied by the contractors for sometime
[26] In connection with the power-cable issue
[27] SCAN

camp site offered up by the City, but instead, elected to use a different camp site which they sub-leased from a third party.

[53] Mr Billett was referred to a series of letters in the Vusela bundle, which clearly indicated that it was contemplated that the City would indeed lease various "site-works" areas from the plaintiff for the construction and completion of the BRT lanes. It was suggested to Mr Billett that the first communication directed by the plaintiff to the defendant [28], regarding potential leases and payment for the "site-works" areas, only took place sometime after the actual occupation of the sites by the various contractors and was "ex post facto".

[54] Mr Billett confirmed that the decision to "charge" the defendant rent and to conclude leases with the defendant, was effectively an "operational' decision. By the time that he had become involved, the defendant had already been in occupation of the stock-piling site for approximately one year. He conceded that he had no actual knowledge of the contract that existed between the City and the defendant and agreed that Vusela was in the same position as the defendant and had also been in occupation since at least December 2008. They too, were only approached in March 2010 in connection with the signing of a lease for a camp site. Invoices were indeed sent to Vusela without a contract in place and this was in conflict with the standard operating procedures of the plaintiff. Vusela occupied the camp site on the plaintiff's property without payment and without a valid lease agreement from at least December 2008 to March 2010.

[55] His reason for insisting on a lease with the defendant was because he was of the view that the defendant was using the stock-piling site for work not linked to the BRT lanes. The contemporaneous emails tendered into evidence to a large extent confirm this position. The plaintiff wanted the defendant to commence paying rent for the stock-

[28] With reference to Vusela

piling site because they suspected the defendant was using the site for other projects. He agreed that the defendant was legally entitled to use the stock-piling site as long as it was for work in connection with the BRT lanes.

[56] The actual occupation of the stock-piling site by the defendant gave “credence” to such “occupation” so long as it was related to the building of the BRT lanes. He was driven to concede that the occupation of the stock-piling site by the defendant was in fact related to the BRT lanes and accordingly that same was “legal”. If the stock-piling site was being utilized for any other purpose then a rental should be paid.

[57] The contracts bundle that was tendered into evidence by consent does reveal an “arrangement” between the City and the defendant in connection with the provision of the use of land adjacent to the land being used for the BRT lanes. On re-examination on this aspect, it was confirmed that in the plaintiff’s litigation against Vusela on this issue, the City had indeed been joined as a co-defendant.

[58] A significant concession was made to the effect that the defendant was not in “illegal occupation” of the stock-piling site as long as this site was used for the building of the BRT lanes. This must be seen against the backdrop of the plaintiff’s leasing policy which did not allow for verbal leases or leases with retrospective effect.

[59] Mr Nkoma was initially employed as a technical manager and he was the acting property portfolio manager of the plaintiff.

[60] His previous duties included looking after the utilities of tenants so as to ensure that the structures of the plaintiff's properties were habitable and compliant. He played a supportive role to the leasing department and he spent approximately one week out of every month on the Culemborg site.

[61] The defendant occupied three (3) sites namely the camp site, the stock-piling site and the storage site. During April 2010, Mr Marcus[29] made a request to lease some extra space on a short term basis. Mr Nkoma was not in a position to deal with any other leasing issues as these fell within the purview of Mr Conradie and Mr Groenewald. He conceded that Mr Marcus would not be able to conclude any leases on behalf of the defendant.

[62] Mr Groenewald had been employed by the plaintiff for forty-one (41) years before he opted for early retirement in 2014. He was employed in the commercial leasing department since at least 2008. Previously having dealt with loans and residential properties on behalf of the plaintiff. He expressed an uncompromising view that if the plaintiff's property was occupied, then that occupier was obliged to pay rent and enter into a written lease agreement.

[63] He not surprisingly, was accordingly unable to explain the content of a number of emails that exhibited the contrary position. He attended the meeting on the 18th of March 2010 and he expressed the view that the defendant was illegally occupying the stock-piling site. He became aware of the stock-piling on the site at the end of 2009 and accordingly formed the view that this state of affairs fell to be governed by a lease. According to him, the meeting was to conclude a formal lease for the stock-piling site and there was no room for any negotiation. He recommended that the term of the lease should be for the period from the 1st January 2010 to the end of December 2011.

[64] He indicated that as far as he could recall, he chaired the meeting on the 18th of March 2010. He conceded he knew very little about the storage site and he was unsure if the lease for the site camp was also included in the "area" for the storage site.

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[29] On behalf of the defendant

[65] As far as the stock-piling site was concerned, he conceded that his statement in connection with the email he sent was incorrect.[30] He was further driven to concede that the content of a number of emails sent during this period, supported what factually occurred, despite this as being contrary to the policy of the plaintiff. He further conceded that he recommended that the lease for the stock-piling area was to commence with effect from the 1st of January 2010, solely because he had formed the view that the stock-piling area was being used for another project.

[66] The plaintiff further tendered the evidence of Mr Avenant. Mr Avenant was the resident engineer for this specific project and is a director of the engineering company to the project.[31] He agreed that the term "resident" engineer and "representative" engineer, within the context of this contract, fell to be used interchangeably. Mr Klomp was the actual engineer on the ground representing HHO and the City. Mr Avenant led the design team and drew up the contracts for this project. The original site camps for both the defendant and Vusela were identified by HHO. Both these sites were declined by the contractors and were not utilized by them in connection with this project.

[67] The defendant elected to rent a site camp and some offices from a third party.[32] As far as the obligation of the contractors in connection with any additional sites was concerned, this applied to land outside the "road reserve". Certain specified procedures needed to be followed in this connection and he made reference to a document[33] which regulated this process.

[68] The representative engineer would be obliged to approve all variations to the contract in connection with the remuneration to be paid for any additional land that may be required for construction purposes and "COLTO" set out the appropriate procedures

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[30] As it appears on page 26 of the record
[31] HHO
[32] SCAN
[33] COLTO

to be followed. All negotiations for any additional land would have to be channelled via HHO and they in turn would get approval from the City. Any and all additional contractual remuneration would be via the mechanism of a formal variation to the contract. Any additional rental that needed to be paid by the defendant for any additional land would in turn be the subject of a contractual claim for re-payment by the City. The defendant would be entitled to claim any additional rent outlay from the City.[34]

[69] He testified to the effect that HHO were always aware of the two additional sites being utilized by the defendant and that the correct procedures were never followed by the defendant. During cross-examination, he readily conceded that if land for these activities was not provided for by the employer, then in that event, the COLTO procedure had to be followed. This procedure was not followed for the two additional sites despite the fact that HHO was aware of the fact that these sites were being utilized by the defendant. He further agreed that on reflection, HHO should have intervened and Mr Klomp should have become more involved. He agreed that the incorrect procedure was followed in connection with the storage and the stock-piling sites. According to him, HHO did not get involved with these two additional sites as they were allocated to the defendant.

[70] These sites fell within the definition of the "works" area and the witness could not explain why HHO did not get involved. He was driven to concede, with reference to certain site minutes, that HHO was aware of the fact that certain material would be crushed, stock-piled and thereafter utilized on site. It was further suggested by him that because the defendant did not follow the appropriate procedure in connection with the leasing of the two additional areas, these areas fell outside the site. I do not follow his reasoning in this connection as the facts do not support this "conclusion".

[34] The employer

[71] The final witness to testify on behalf of the plaintiff was Mr Siljeur. He is employed by the plaintiff as a property technician and he works in the plaintiff's drawing office. He scrutinizes plans which are then used as annexures to leases prepared by the plaintiff. He testified that Mr Groenewald was incorrect when he stated that the storage area as depicted in the diagrams "overlapped" with an area that was leased together with another area, upon which the offices of SCAN were situated. The storage site and the area comprising the camp site area were discrete areas, both as to their location and extent. This was the plaintiff's case.

[72] The only witness to testify on behalf of the defendant was Mr Keating. Mr Keating, at that time[35] was employed by the defendant as a contracts manager in charge of the construction at the Culemborg site. His function was to administer the contract with the defendant's team and also the team of sub-contractors. The defendant was obliged to work in tandem with a number of other contractors to complete the BRT lanes and the other services in time for the Soccer World Cup. A contract was awarded to the defendant after their tender was accepted and the contract for the "works" was to commence in January 2009. The initial date for completion was the 31st March 2010.

[73] The time frames for the completion of the transport and infrastructure project at the instance of the City were narrow and all the contractors and the role players had to co-operate and compromises were made by all in order to complete the project timeously.

[74] As time was of the essence, projects were fast tracked and daily penalty clauses applied in the event of delays. HHO was instrumental in giving the defendant the necessary authority to enter onto the various sites so that the projects could be completed. Mr Keating liaised with HHO in this connection and Mr Klomp, being a representative of the City, was vested with this authority.

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[35] Mr Keating now works for a different company

[75] Mr Klomp identified the site camp for use by the defendant. It was common cause that the defendant would not be required to make any financial contribution for the use of the site camp so allocated. Alternatively, if any cost was to be levied in this connection, same would be recoverable under the preliminary and general items[36], as "fixed" or "time" related claims in terms of the contract with the City. The defendant elected not to utilize this site camp, but elected instead to sub-lease certain space from SCAN. This was beneficial from a logistical perspective and the defendant decided to utilize its own budget as provided for in the P&G allocation for this purpose.[37] During February 2009, it was brought to the attention of the defendant, that the plaintiff (as the owner of the land concerned), prohibited sub-leases. The defendant was under the impression that SCAN was authorized to sub-lease this space to the defendant. Mr Klomp was informed of this arrangement and he was advised of the mechanism that would be used for the recovery of these costs by the defendant.

[76] He confirmed that Mr Marcus had made enquiries regarding the use of a further storage area, but that he was not aware of this at the time of the enquiry. Mr Marcus was not authorized to enter into these negotiations and was not authorized to enter into lease agreements on of behalf of the defendant. Various other sub-contractors also stored plant and material on this storage area, both for and relating to other contracts for the World Cup project.

[77] Mr Keating advised that if he was made aware that payment would be required for this storage area, the defendant would have moved its goods and materials off-site and stored same in its own storage area situated in Blackheath. Mr Keating understood this storage area to have been allocated by the City for the contractors to the project. The project was completed during October 2010 and the completion certificate[38] was signed on the 11th of September 2010. The defendant left the site on the 15th of October

[36] The P&G items in terms of the contract
[37] With reference to establishment costs
[38] Not the final completion certificate

2010 with some of the logistical offices being manned for other projects until May 2011.[39] The location of the stock-piling site was pointed out and jointly agreed with Mr Klomp from HHO.

[78] This site was located in close proximity to the corner of a shed situated on the plaintiff's property that had to be demolished and was outside the road reserve. Certain portions of the rubble from the demolition was utilized for the project after the rubble was tested and met the specifications as set out in the contract, read with the tender documentation. All the rubble that was capable of being utilized again was used in connection with this specific project. According to Mr Keating, HHO and the plaintiff were fully aware of what was happening with regard to the demolition and the subsequent establishment and utilization of the stock-piling site. Very belatedly, a complaint was received from the plaintiff in March 2010, regarding the use of the stock-piling site, which in turn, was the trigger to the meeting held on the 18th March 2010.

[79] When this complaint was first advanced by the plaintiff it was close to the end of the completion of the project. The complaint by the plaintiff seemed to focus on the allegation that the defendant was utilizing the stock-piling site for other projects not linked to the BRT lane project in terms of the contract with the City. Group 5[40], also used portions of the plaintiff's land as "temporary storage" areas for their electrical cables and light poles for use on the project.

[80] Mr Klomp never requested the defendant to make payment for the leasing of the stock-piling site. At the meeting on the 18th of March 2010, the plaintiff enquired as to the operations being conducted on the stock-piling site and advised that as the defendant was occupying their land, they insisted that the defendant pay rent. Mr Keating advised that it was not normal for the defendant to pay for the rental costs now demanded by the

[39] Payment for the latter not being disputed
[40] A different contractor

plaintiff and that accordingly, he would not enter into any lease agreement. Mr Keating discussed a possible lease for this stock-piling site with Mr Schapiro who indicated that he was not interested in entering into a lease agreement with the plaintiff.

[81] At the time of the renewal lease[41], two additional leases were presented to the defendant for signature in connection with the stock-piling area and the storage area. Mr Keating discussed this with Mr Schapiro who advised that he would not be prepared to enter into any leases with the plaintiff for the two additional sites. These leases were presented to the defendant during the period of the 17th to the 26th November 2010 and prior to a letter (setting out the defendant's position), written by Mr Keating dated the 29th of November 2018.[42]

[82] The leases for the two additional sites contained lease terms and lease periods that were never ever discussed or negotiated with the defendant. Mr Keating could not specifically recall the meeting on the 26th of November 2010 which was referred to in his letter sent on the 29th November 2010, but does recall that by that stage, the defendant had already left the site in connection with this particular project. The two leases for the additional sites were never signed by the defendant. The "renewal" lease was signed and it was to terminate on the 31st October 2011, subject to the rider (although this was against the policy of the plaintiff), that this lease was subject to a specific verbal one month's notice period, by either party. This lease was in fact terminated on one month's notice by the defendant and came to an end, by mutual consent, during May 2011.

[83] The cross-examination of Mr Keating focused mostly on the storage lease and negotiations in connection therewith. The storage "lease" was somewhat different in nature as this "area" was not pointed out by Mr Klomp and same was not discussed at

[41] For the construction site and the Scan office
[42] The letter appears on page 42 of the trial bundle.

the meeting of the 18th of March 2010. An email was sent to the plaintiff with the request that certain storage space be made available on a short term basis.[43]

[84] Mr Keating advised that he had no prior knowledge of this communication and advised that Mr Marcus would not have any authority to have made this request. In retrospect, had Mr Keating been aware of the fact that payment would be required for the storage site, he as the contract and site manager would have stored the defendant's goods and materials elsewhere at another location, off-site.

[85] Mr Keating's view was that as the defendant was employed by the City to undertake and complete this project that all access to the plaintiff's land and the storage and stock piling areas in this precinct would as a matter of course, be made available by the City, via the engineers, HHO.

[86] Further, it was not competent to claim for any extra expenses under the category of P&G's after the stage of practical completion had been reached and these extra costs demanded by the plaintiff, surfaced very late in the day. The costs associated for the use of the small additional portion of land by the defendant (adjacent to the construction site), was not the subject of a formal variation order for payment via HHO to the City.[44] These extra costs were verbally agreed and claimed at various intervals under the P&G items.

[87] As far as the stock-piling site was concerned, the site was pointed out by Mr Klomp and he was kept abreast of all developments and was always aware of what occurred on this site.

[88] The defendant thereafter closed its case and tendered no further evidence.

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[43] This email was only sent during April 2010
[44] The small portion of land next to the SCAN site.

[89] The plaintiff concedes that its claims against the defendant are not sustainable in contract. The plaintiff cannot contend for contractual lease agreements for the additional sites. Plaintiff advances that the defendant is not factually in a position to seriously dispute that the defendant "occupied" the additional sites and under the circumstances, where an expectation exists that the defendant would compensate the plaintiff for its occupation of these sites, the defendant is liable under "condiction".

[90] In order for the plaintiff to succeed in its claims against the defendant, the plaintiff must show, inter alia, that the sites were occupied by the defendant and that in this occupation there came into being a "relationship" akin to creating an expectation that the defendant would compensate the plaintiff for its occupation of the sites.

[91] Despite the fact that the merits and the quantum were separated out at the inception of the trial, the plaintiff advances that the plaintiff's impoverishment as a direct result of the occupation of the sites equates to a "reasonable rental".

[92] The occupation of the sites by the defendant is not in dispute.

[93] The "dispute" in essence amounts to the circumstances under and surrounding the occupation of these sites and whether or not any relationship akin to creating an expectation that the defendant would compensate the plaintiff for its occupation of the sites, was "founded" as a result of the occupation aforesaid.

[94] Because a formal written lease agreement was indeed concluded in connection with the site-camp area, Mr Loots advances that this in itself lends some support for the "creation" of the relationship contended for by the plaintiff. Further, the evidence suggests that a rental for these additional sites was raised for discussion between the parties. The issue is, is this enough to establish the necessary "relationship" between the plaintiff and the defendant which, would make the defendant liable under "condiction".

[95] Belatedly, a formal lease was drafted by the plaintiff and presented for acceptance and signature to the defendant. It is submitted that this would not have taken place had permission been given to the defendant to use the storage site. This issue is however somewhat more complicated as the defendant suggests that the necessary permission, if indeed it was required, was granted by the City.

[96] As far as the stock-piling site was concerned, Mr Loots submits that a formal demand was made to the defendant for rental for its occupation of the site, with effect from the 1st of January 2010.

[97] Finally, the stance is taken that on receipt of the rental estimates and the draft leases for the additional sites, the defendant[45], responded as follows:

> "*If we were aware what these costs would amount to, then we would have been able to either make arrangements to seek compensation through our contract, or not use these areas at all".*

[98] The plaintiff's case is underpinned by the contention that the defendant should have, by reason of its lease of the site-camp, be taken to have understood that it would become liable for rental on the additional sites. Further, that the defendant was told about one (1) year after it had occupied land owned by Transnet, that it would be obliged to pay rental. This, not merely under the renewal of its lease for the site camp, but also in respect of the stock-piling site.

[99] At the subsequent meeting held[46], there had been no request as yet for rental for the use of the storage-site. The issue of payment of rental for this storage-site was only

[45] As per the evidence of Mr Keating
[46] In March 2010

raised with the defendant after practical completion and when the subject area was no longer in use by the defendant.

[100] The factual background events that led to the leasing of the camp site by the defendant, were, inter alia, that it had been allocated a site camp in close proximity to the Vusela site camp. Further, that because the SCAN offices already had the facilities it required, it preferred to expend monies in the "preliminary and general allocation" on renting the SCAN offices, with its existing facilities.

[101] The defendant elected not to use the allocated site camp, it accordingly procured an arrangement with the City, whereby the rental for the site camp it did use, was covered by compensation under the contract, which compensation it received. The use and occupation of such facility was never intended to be and in fact was not at the defendant's cost.

[102] The background facts supporting the "relationship" contended for in connection with the stock-piling site, also require further scrutiny. The evidence supports the view that firstly, the defendant was entitled to use this site without payment for the purposes of the BRT contract. This does not seem to be disputed.

[103] Secondly, the defendant was only notified about one (1) year after the contract had commenced that it would now be obliged to pay a rental for this stock-piling site. This, seemingly because the plaintiff was of the view that the stock-piling site was now being used by the defendant for a different project.

[104] In summary, the factual basis for the plaintiff's case on the merits is that because the defendant did not clearly and definitively refuse to pay rental to the plaintiff for these additional sites, the relationship contended for by the plaintiff came into existence and the plaintiff accordingly seeks judgment in its favour on these claims.

[105] The plaintiff advances the legal principle of a "condictio" in support of its claims and relies essentially on two authorities, namely the Liebenberg [47] and the Lobo Properties[48], judgments.

[106] It is the plaintiff's case that, on the basis of the decision in Liebenberg, that in order to establish the defendant's liability, it must show that the defendant occupied the premises under circumstances which would ordinarily have created the expectation with the defendant that the defendant would have to pay compensation for such occupation. In this decision, the Court, inter alia, held that the specific circumstances contended for had not been proved, but rather had been pertinently denied by the occupier who had alleged that he was entitled to occupation without any charge.

[107] Lobo Properties was a judgment on an exception taken to a declaration and the Court did not uphold the claim. The Court, however found that in the case of a putative tenant[49], a cause of action for enrichment exists and that;

> "*In the large generality of cases, the putative tenant would be enriched to the extent of the rental value of the property.....it would be only in somewhat unusual or exceptional circumstances that this would not obtain"*

[108] This decision was prior to the judgment in Nortje[50], and the courts have since been reluctant to allow a claim for enrichment based merely on the use or occupation of another's property. Further, in Lobo, it was pointed out that the defendant's approach on the merits may be comprised of any one or more of a number of alternatives which may establish that the defendant had;

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[47] Liebenberg v Liebenberg 1971 I SA 878 (C),
[48] Lobo Properties (Pty) Ltd v Express Liftco (SA) (Pty) Ltd 1961 I SA 704 (C)
[49] Who enjoys use and occupation by way of a "prospective, inchoate or defective lease",
[50] Nortje en 'n Ander v. Poole, N.O. 1966 (3) SA 96 (A)

*"not been enriched at all or to the extent prima facie suggested by the allegations in the declaration"*

[109] On behalf of the defendant, it is submitted that the defendant did not take occupation as a putative tenant under an inchoate lease, but rather, it is submitted, that the defendant occupied the land in its capacity as construction contractor appointed in terms of a construction contract concluded with the City.[51]

[110] The defendant's case is that the evidence overwhelmingly shows, that the defendant[52] occupied under the auspices of the City, as it's contractor and agent[53], and it did not occupy the premises on the basis stipulated in Liebenberg or Lobo Properties. Further, there is no claim founded in enrichment as the defendant would not have been out of pocket for such expenses but would have been compensated under the contract with the City for any such expenses incurred.

[111] The plaintiff's witnesses conceded that access to their land was negotiated through the City; there being no direct contractual obligation with the contractor; that it was the City that was beneficially occupying the land for the purpose of building the BRT route and finally that in order to facilitate the contractor's access "concessions" were negotiated, not with the contractors, but with the City.

[112] There is evidence that suggests that when the contractors[54] entered upon the defendant's property, there was no understanding that they would be required to lease land from the defendant. It was contemplated that the facilities necessary for them to perform their contractual obligations would be afforded to them, at no cost.

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[51] Under the umbrella of a wider public works project to provide transport for the purposes of the 2010 Soccer World Cup.
[52] As in the case with other contractors
[53] As the latter's contractor and agent
[54] Inclusive of the defendant

[113] The bill of quantities and the contract documentation between the defendant and the City, catered for stock-piling, recycling and crushing of material to be used in the sub-grade. Further, storage areas would be provided to the defendant under and in terms of the contract.

[114] A chronological analysis of the evidence demonstrates that the defendant commenced demolition of certain buildings and the subsequent stock-piling and crushing of materials on the stock-piling site, for at least a year prior to the Soccer World Cup in June 2010. The defendant continued to use the stock-piling site, without any suggestion that it should pay rental for the use thereof, until March 2010.

[115] The plaintiff accepted that as long as this stock-piling site was being used in the performance of the defendant's contract with the City, it would be available to the defendant at no charge. Factually, this is in accordance with the defendant's professed understanding, that defendant occupied the site in its capacity as contractor to the City.

[116] Whilst no specific storage area was allocated to the defendant, the evidence suggests that the defendant's understanding was that they would be allocated a storage area by the designated engineer to the project, employed by the City.

[117] The plaintiff's issue with the storage area, related, inter alia, to the fact that this storage area was seemingly utilized by the defendant in connection with other projects. The defendant's response to this complaint was that if its use of the storage area had been limited to the defendant's contract, the defendant would have moved its goods to its own premises. In my view, nothing much turns on whether the storage area was utilized to store goods for other projects.

[118] Further, in support of the Liebenberg theory, the plaintiff takes the position that Mr Marcus[55], approached the plaintiff to lease a storage area and this lends some support to the "relationship" akin to that of landlord and tenant and the "condiction" contended for by the plaintiff. The defendant, in turn submits that this approach, per se, did not interfere with the underlying basis upon which the defendant occupied the storage area. In addition, the position is taken that Mr Marcus was not a director of the defendant and he was not authorized to contractually amend the basis of which defendant took occupation of the various facilities on the plaintiff's property.

[119] It is common cause that the proposed leases for the additional sites were only presented to the defendant at a time when the works had virtually been completed and the defendant had vacated the project site.

[120] In my view, this lends some support for the defendant's understanding of its occupation of the additional sites. Had the defendant understood that it was obliged to pay rental, it would have been in a position to seek compensation for these additional costs from the City.

[121] I agree with the submissions by the defendant's counsel that, taking into account the factual matrix of the evidence, that the defendant's "understanding" was that the defendant would not be obliged to carry the costs of the additional sites out of its own pocket. The plaintiff's then Regional Manager[56] for the Western Cape conceded that this could very well have been their understanding.

[122] I am satisfied that on a balance of probabilities, on the facts of this case as presented, the requisite "relationship or circumstance" has not been established between

[55] Representing the defendant
[56] Mr Billett

the plaintiff and the defendant[57], to found a liability on the part of the defendant in "enrichment" for rental.

[123] Even if I am wrong in this connection, I am further of the view that no enrichment, per se, has been established. This, partly in view of my finding that it was the understanding of the defendant, that it would never have had to meet the costs of the rental of these additional sites, out of its own pocket.

[124] Further, because had the understanding of the defendant been the contrary, then in that event, the defendant would have contractually been in a position to have been compensated for this extra expense by the City, alternatively been afforded the choice of making different arrangements.

[125] This is further demonstrated by the fact that the defendant elected not to use the allocated site-camp area, but rather elected to enter into an financial arrangement with SCAN regarding the use of their site camp area, for which the defendant received compensation, under their contract with the City.

[126] It is my finding that on the facts of this case, that the defendant was not exposed to the danger of any costs associated with the use of these additional sites and was not unjustifiably enriched, which would, in turn, render the defendant liable to the plaintiff.

[127] In the result, the following order is granted, namely;

1. That the plaintiff's claims against the defendant are dismissed.

[57] In connection with the additional sites

2. That the plaintiff is liable for the defendants costs, including the costs of and incidental to the postponement (and the wasted costs as a result thereof), together with the costs of senior counsel, on the scale as between party and party, as taxed or agreed.

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**WILLE, J**