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

Case Number: 2507/2013

In the matter between:

Shabros Property Investment (Pty) Ltd **Plaintiff**

And

Mobile Telephone Networks (Pty) Ltd **Defendant**
(Registration Number: 1[…])

JUDGMENT ELECTRONICALLY DELIVERED 23 MAY 2023

Baartman, J

[1] The plaintiff issued summons against the defendant in which it claimed damages arising from the defendant's alleged breach of contract. In the alternative, the plaintiff relied on the doctrine of quasi-mutual *assent* for relief. The defendant has denied that it had entered into the agreement as alleged. Papier J presided over the trial in respect of the merits[1] but became indisposed; the parties

[1] Order dated 19 November 2019: '1. The question of law and fact contained in paragraph 3 to 22 and 25 to 28 of the plaintiff's amended particulars of claim, dated 26 January 2016, (read with the corresponding paragraphs of the defendant's plea and the plaintiff's replication), are to be determined separately by the trial Court in terms of Rule 33(4) and prior to any other question of

therefore agreed that I should finalise the matter. Although, I have not had the benefit of observing the witnesses, I have had regard to the transcript of the proceedings and the parties presented oral argument before me.

[2] The plaintiff, a commercial property owner, acquired the property at 6[..] Roeland Street, Cape Town **(the property)** in 2004. At the time, the defendant was a tenant at the property and the plaintiff took over the lease that would end on 31 October 2006 **(the parking lease).** When the parking lease expired, the parties entered into a verbal lease for the period 1 November 2006 to 31 May 2008. However, on 3 April 2008, the parties concluded a written parking lease for 6 months: 1 June 2008 to 31 January 2009. In terms of clause 7 of the latter parking lease, it would automatically renew for 4 years on the same terms and conditions except for an annual escalation of 10% in the rental, unless either party gave written notice to the contrary. Neither did so; hence, the parking lease automatically renewed for a 4-year period from 1 February 2009 to 31 January 2013. The dispute that forms the subject of this judgment, is whether the parties had an agreement to renew the parking lease after 31 January 2013.

[3] The plaintiff alleged that on 19 August 2013, the parties had concluded new parking lease commencing on 1 February 2013 until 31 January 2017. The defendant denied that it had entered into the alleged lease and therefore vacated the property on 31 January 2013. Mr Sha'Altiel, one of the plaintiff's directors, was a single witness for the plaintiff and Mr Lubbe, the defendant's attorney, was its only witness. I deal with the evidence to the extent necessary for this judgment.

The plaintiff's evidence

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law and/fact.

2. The remaining issues arising in the action are to be determined, if necessary after the final determination of the issues referred to in paragraph 1 above... '

[4] Mr Sha'Altiel said that Adrian Rohland **(Mr Rohland),** the defendant's senior regional manager at the property, had approached him in July 2011 expressing interest in renting space on the property's roof to install an antenna and base station. However, to facilitate the installation, the plaintiff would have had to undertake costly structural renovations to the roof. The income the plaintiff would generate from the rental for the roof area *vis-a-vis* the cost of the structural reinforcement did not make the proposed project economically viable for the plaintiff. Therefore, Mr Sha'Altiel indicated that the plaintiff would only engage with the base station project if the defendant renewed the parking lease that was due to expire on 31 January 2013. That was the plaintiff's condition for entering into negotiations for the base station.

[5] On 19 August 2011, Mr Rohland told Mr Sha'Altiel, 'Good news, we're going ahead'. He further said that someone from the defendant would contact Mr Sha'Altiel to confirm everything: 'It's a done deal'. Later that afternoon, Ms Nokulunga Sikutshwa **(Ms Sikutshwa)** contacted Mr Sha'Altiel and confirmed that the defendant would renew the existing parking lease as follows:(I quote from the transcript)

> 'We discussed the premises that they were going to be renting, the rental, the terms, all the details moving forward. We confirmed it telephonically and then to make sure I said "Look, please confirm we have an agreement. The thing is done" because they want to proceed with the base station. I've got to spend money to reinforce that slab. I'm only doing it if this is done and confirmed, which she did telephonically …….Confirmed it in writing.'

[6] In an email shortly after their conversation, Ms Sikutshwa confirmed as follows:

'Dear Roni Sha'altil

As per our telephonic discussion this afternoon ...I would like to confirm as follows:

MTN will renew the existing parking agreement at Roeland Street, which expires on 31 January 2013.

Salient terms of the New Lease Agreement: Commencement Date: 01 February 2013 Lease Period: 5 (five) years

Option Period: 4 years -to be agreed. Rental: Current plus 9% escalation Escalation 9% per annum compounded.

It is also recorded that the further negotiations on a separate Lease will be entered into for an MTN Base Station and a Transmission Installation by MTN Network Specialist - Adrian Rohland.

The landlord will prepare an agreement of lease for MTN's signature... '

[7] Shortly, after sending the above email, Ms Sikutshwa sent a second email from which the following appears:

'Dear Ronnie

I have made an error on the lease period, and I have amended as follows:

Lease Period: 4 years

I trust this is still in order…..'

[8] The plaintiff, satisfied its precondition for entering into the base station project had been met, spent approximately R1 million on reinforcing the roof as per the defendant's requirements. In the interim, the plaintiff had prepared the lease and forwarded it to Ms Sikutshwa, as follows:

> 'Hi Lunga
>
> We attach hereto the written agreement prepared by attorneys, which agreement reduces to writing the terms and conditions of the agreement reached between us recently. Please attend to signature thereof as soon as possible with the authorised people. Once signed, please return to us for signature by the LESSOR.
>
> If you have any queries, please don't hesitate to call me.'

[9] On the same day, Ms Sikutshwa responded as follows:

> 'Hi Ronni
>
> We acknowledge receipt of the agreement; we are forwarding it to our legal department. As soon as it is signed, same will be forwarded to you….'

[10] Mr Sha'Altiel said that he had believed that Ms Sikutshwa was authorised to engage in the negotiations as she had contacted him after Mr Rohland had said that the defendant would renew the contract and that someone would contact him. She contacted him the same day to confirm the parking lease as earlier discussed with Mr Rohland. He had no reason to doubt her authority. Annexed to the draft lease was the floor plan depicting the area the defendant was renting in 2011 and the reduced area it would be renting as

per an earlier agreement. Mr Sha'Altiel said that he and Mr Rohland had earlier agreed that the defendant would give up a corner portion on the ground floor of its rental space in future. That corner portion would then be converted into retail space, a coffee shop. Mr Sha'Altiel explained that the defendant was unable to properly utilise the corner portion therefore the agreement to convert that area.

[11] The plaintiff rented out commercial space per square metre and would charge the defendant for the reduced meterage once the conversion had taken place. In 2012, the conversion was effected without demur from the defendant; instead, the defendant facilitated the process by allowing access to effect the renovation. Mr Sha'Altiel explained that the defendant parked vehicles with specialised and expensive equipment in the area and had tight security at the site. The plaintiff would not have gained access without the defendant's co-operation. After the conversion, the defendant's rental area was reduced from 1 400m^2 to 1 226m^2; this appears from the August and September 2012 rental invoices. Although, the rate per m^2 remained the same in September 2012, due to the reduced rental area, the defendant's rental was less.

[12] On 3 October 2011, the plaintiff received an email from Ms Sikutshwa informing that the extension of the lease had been 'put on hold'. The plaintiff viewed the communication as an attempt by the defendant to renege on the parking lease already entered into and he communicated that view to Ms Sikutshwa. The defendant requested that an exit clause be included, which the plaintiff refused. Ultimately, the defendant refused to sign the parking lease and alleged that the parties had intended that the lease would only be binding once signed by both parties. The plaintiff has throughout asserted that a binding parking lease had been concluded telephonically and confirmed in writing on 19 August 2011.

[13] Mr Sha'Altiel said that the defendant owned and occupied the building opposite the property. He learnt, subsequent to this dispute arising, that the defendant had required more space to accommodate personnel and equipment. Therefore, the defendant had, on 27 July 2011, put in an offer to purchase a vacant plot next to its property to expand its premises. The plaintiff learned, from documents discovered in this litigation, that at the time when the parties concluded the parking lease, the defendant had viewed its purchase of the plot as a *'fait accomplti.* When that deal fell through, the defendant had to move its operations to an alternate venue. Therefore, the defendant no longer needed the plaintiff's premises and reneged on the parking lease agreement.

[14] After the 3 October 2011 correspondence, Mr Sha'Altiel and Mr Rohland met and the latter expressed his dissatisfaction that the defendant's purchase of the plot had not materialised and that it had resulted in the defendant having to move its operations to another venue. He further explained that was also the reason for the belated insistence on an exit clause.

[15] Ms Sikutshwa, on 15 November 2011, contacted Mr Lubbe and requested him, as the defendant's attorney, to engage with the plaintiff. Mr Lubbe met the plaintiff on 18 April 2012, at the time the defendant considered renting the 6th and 7th floors of the property which would have obviated the need for the defendant to move out of the property and would have kept the parking lease intact. The defendant wanted simultaneously to renegotiate the parking lease and obtain a better rate per square metre. The plaintiff was not prepared to include the parking lease in the discussion as it maintained that the lease had been concluded. After the meeting, Mr Lubbe, per email, made a counter proposal in respect of the 6th and 7th floors; he also proposed a reduced rental for the parking lease. The proposal did not find favour with the plaintiff and further negotiations were unsuccessful as the plaintiff perceived that

the defendant was trying to renegotiate the parking lease with the negotiations in respect of the 6th and 7th floors. The plaintiff was not open to any discussion that attempted to renegotiate the parking lease.

[16] On 26 April 2012, Mr Lubbe sent a letter to the plaintiff advising that the parties had been unable to reach consensus and placing on record that the current parking lease would expire on 31 January 2013 and that it had not been renewed. He further informed that the initial declaration of intent to renew had been expressly revoked. The plaintiff denied that version in correspondence dated 2 May 2012. Further correspondence followed in which each party asserted its position as set out above.

[17] In correspondence dated 8 January 2013, the plaintiff's attorney advised that the plaintiff's position was that the parking lease had been renewed on 19 August 2011 and that the defendant had repudiated the agreement by denying its existence. However, the plaintiff elected to reject the defendant's repudiation and instead insisted on enforcing the parking lease agreement.

[18] In correspondence dated 15 January 2013, the defendant denied that the parking lease had been renewed. The defendant alleged that as no written lease had been signed, no consensus had been reached in respect of renewal. Mr Sha'Altiel said that this was the first time that the defendant had indicated that a written agreement was a requirement for there to have been a binding agreement. He said the parties had concluded verbal agreements in the past. Therefore, the plaintiff considered the latter correspondence as further proof of the defendant's repudiation of the parking lease.

The defendant's evidence

[19] Mr Lubbe was not an employee of the defendant; instead, he was

consulted in his capacity as an attorney. On 15 November 2011, he received the following correspondence from Ms Sikutshwa:

> 'Hi Johan, Please will you assist and please read email from the bottom page. This parking deal has fallen through. As [you] may be aware of the proposed move of team from Harrington and buying land. I've been receiving annoying phone calls from the landlord Roni Sha'altiel, of the Roeland Street parking agreement which agreement expires on 31 January 2013. He is claiming that we have an agreement based on the email. He sent us a lease to sign after the email and I told him we would like to have an escape clause in case our plans are successful, which he refused. Please assist us with a legal letter advising him per Adrian's email below...'

[20] He subsequently arranged a meeting with the plaintiff on 18 April 2012. The defendant's architect and technical person also attended the meeting. Prior to the meeting, he had sent an email to the plaintiff with 'sticky notes for discussion'. He said the following about the notes:

> 'If I recall correctly, that would have been the lease for the entire - building. For the sixth-top two floors and total parking. If I recall correctly.'

[21] The next day, he wrote the following email to the plaintiff:

> 'Hi Roni. Thank you for meeting with us on Wednesday. The issues of concern for MTN as raised during the meeting are:
>
> (1) The inclusion of the strip balconies plus/minus 296 square metres in the computation of the rental.

(2) The high cost per parking bay, that is R3000 per bay, and:

(3) The election of rent free beneficial occupation May and June or a limited ...allowance R345 000, taking into account MTN's additional costs of upgrading and securing the parking area in Buitenkant Street.

(4) Pursuant of reaching consensus, MTN hereby wish to make the following counteroffer:

(a) R100 per square metre for the usable space and close area plus/minus 1 044 square metres and R25 per square metre for the strip balconies plus/minus 296 square metres.

(b) R1 000 per parking bay, 44 in total.

(c) Maryke will provide us with the exact measurements. We sincerely trust for your favourable consideration ...'

[22] He further said that the issues referred to above were those that the defendant had identified after the meeting with the plaintiff. These issues were not discussed in the meeting with the plaintiff. On the same day, the defendant received the following correspondence from the plaintiff:

'Hi Johan. It was good to meet. .. yesterday. Please find attached a schedule of the areas and relevant details as per our meeting. As discussed, we are prepared to offer 354 000 towards the tenant installation or two months free rental for new areas May and June. In return, MTN will take care of the fitting out of the premises to meet its requirements. Please also bear in mind that MTN's parking needs are complex and unique, as the technical vehicles are larger than normal and do not fit

easily into regular bays. With regards to retail space, it would be a great pity to lose the impact of the billboards and the branding on the building and not have a retail store right there to service your clients. You would have all this exposure with no outlet to benefit from it. Once we are able to conclude this lease agreement, we would also be able to give MTN naming rights to the building. that is MTN House, MTN Cape Town or MTN on Roeland. Please advise if you require any further details….'

[23] The plaintiff's mail was sent at 12h03 and the defendant's at 19h45 on the day following the meeting. On 20 April, the plaintiff responded to the counter proposal in which it asserted the following about the parking lease:

'...Current Lease:

(1) Parking, ground floor and first floor, 1 400 at R95,16 from 1 June 2012. Ant that will be R133 224.

(2) This lease ends 31 January 2013.

(3) Another lease agreement has already been entered into, commencing from 1 February 2013 for four years, plus a four year option at 9% yearly escalation.

(4) We will email all correspondence regarding this new lease.'

[24] Mr Lubbe said that as far as he was concerned, the parties had not entered into a new parking lease as alleged. He reasoned as follows:

'... it wouldn't have made sense to renew the old - let's call it the old parking area, because MTN had to look at the entire package of the new

> offices and adequate parking. The other alternative was to move the staff complement out of the switching centre and that would have taken away the requirement for any parking in any case.'

[25] However, as he was not involved in the negotiations on which the plaintiff relied, he sought clarity from the technical staff in Cape Town as follows:

> '...It appears that Roni is now attempting to hold MTN over a barrel, alleging that the parking lease has already been renewed. He sent correspondence attached from Lunga in support of his allegation. As far as I'm aware, this renewal was put on hold and the agreement never signed. Adrian, can you shed any light on this. We need to discuss to prepare an unambiguous reply to Roni's email.'

[26] Mr Lubbe admitted that he was not involved in the negotiations with the plaintiff. He got the defendant's version afterwards from Mr Willem Weber. He was called upon to write a legal letter based on Mr Rohland's version. He said that he could not understand why Ms Sikutshwa had got involved. He conceded that if the court found that the parties had concluded a renewal of the parking lease in August 2011, the further unsuccessful negotiations would not have affected the validity of that agreement. He further agreed that the parties did not reach agreement in respect of the 6th and 7th floor lease. He further testified that, as far as he could recall, Ms Sikutshwa 'didn't have the authority to conclude that lease'. However, he accepted that her letterhead depicted that she was 'lease manager, building projects, building optimisation'.

[27] He recalled that MTN had wanted to purchase 'a small property adjacent to [its] building'. He did not know why the sale had not gone through but accepted that the defendant had at one stage considered the deal to have been a *'fait accompli'.* The defendant had to find alternative space when the deal

unexpectantly fell through. One such alternative was moving to alternate office space; in that eventuality, it would no longer need to rent the plaintiff's parking. He confirmed that Mr Rohland had indicated that the plaintiff would not allow 'the base station and antenna mask' if the defendant vacated and no longer required the parking space. He was not aware that MTN had wanted to include an exit clause in the parking lease but learnt about it from correspondence.

The relief sought

The* 19 *August 2011 partly oral partly written lease

[28] The plaintiff in its particulars of claim alleged that the 19 August 2011 lease was entered as follows:

> '3. On 19 August 2011 and pursuant to a telephonic discussion between the Plaintiff, represented by Ahron Roni Sha'Altiel and the Defendant, represented by Nokulunga · Sikutshwa, the Plaintiff and the Defendant entered into a partly written, partly oral lease agreement ("the lease Agreement").
>
> 4. The relevant terms of the aforesaid telephonic discussion were subsequently confirmed in email correspondence transmitted by the Defendant to the Plaintiff on 19 August 2011. A copy of the aforesaid correspondence is attached hereto marked "A".'

[29] The plaintiff consistently alleged that there had been good reasons for the parties to have entered negotiations for the parking lease 2 years in advance. It was common cause that the parking lease would have expired on 31 January 2013. I accept that the only reason for the early negotiations is as testified to by the plaintiff's witness, namely the defendant's intention to install a base station

and antenna on the plaintiff's roof and he plaintiff's condition that it would only engage in those discussions once an agreement for the renewal of the parking lease was in place. The plaintiff's version is corroborated in email correspondence between Ms Sikutshwa and Mr Rohland as follows:

(a) On 4 August 2011, Ms Sikutshwa said: 'I am...back in office...will start engaging...[the plaintiff] on the renewal. .. which will be effective from 1 February 2013... Please will you confirm... this is in order and I will keep you posted on progress... I have copied both our GM's and my Manager for approval.'

(b) On 5 August 2011, Mr Rohland responded: 'Thanks Lungs - but please liaise with me first re. the associated base and TX installation?' (my emphasis)

(c) On 19 August 2011, Ms Sikutshwa, in correspondence with the plaintiff referred to above, said: 'It is also recorded that the further negotiations on a separate lease will be entered into for an MTN Base Station and a Transmission Installation by MTN Network Specialist - Adrian Rohland.'

(d) On 22 August 201·1, Ms Sikutshwa informed Mr Rohland as follows: 'Subject Renewal of Agreement of Lease for Parking at Roeland Street. .. I believe this will be sufficient to commence your Antennae and TX Lease.' (own emphasis)

[30] I accept, from the above, that the defendant at times relevant to the disputed parking lease wanted to negotiate the installation of a 'Base Station and a Transmission Installation by MTN Network Specialist - Adrian Rohland'. The latter had approached Mr Sha'Altiel, one of the plaintiff's directors who was the

plaintiff's representative in respect of the negotiations that form the subject of this judgment. The plaintiff considered the project would require a substantial financial layout which was not economically beneficial to it. Therefore, the plaintiff, as a precondition to negotiations for the base station, insisted that the defendant commit to renewing its existing parking lease. I accept the plaintiff's version in this respect as the defendant did not lead available evidence, Mr Rohland or Ms Sikutshwa, to contradict the plaintiff. Mr Lubbe was not part of the relevant discussions and was therefore unable to shed light on the reason for the early negotiations in respect of the parking lease.

[31] Ms Sikutshwa, who was so authorised, was tasked with engaging the plaintiff in respect of the parking lease. She did so with the approval of senior managers involved, namely Mr Rohland and, as is apparent from her mail referred to above, also 'both our GMs and my Manager for approval'. I am persuaded that she was authorised to negotiate and enter into the renewal of the parking lease.

[32] The plaintiff relied on email correspondence, dated 19 August 2011, from Ms Sikutshwa for the terms of the alleged contract. A lease agreement does not require any formalities. The discussion between the plaintiff's and the defendant's representatives on 19 August 2011 resulted in agreement on the essential terms to renew the existing parking lease. No formalities were required for a binding lease agreement to come into existence. The plaintiff's evidence was that Mr Sha'Altiel had requested that the agreement be put in writing because of the expected costs to reinforce the roof in preparation for the base station installation. In the circumstances, the request reflects business efficacy. The parties had a long business relationship and the operation of the parking lease was well known to both. Therefore, the agreement that the defendant would give up, in future, part of its rented premises was verbally agreed with no formalities. The rental premises was reduced without demur from the defendant and the

reduced rental paid in accordance with the oral agreement without any problems.

[33] In the absence, of any credible evidence to the contrary, I accept that there was no agreement that the parking lease would be reduced to writing. The 19 August 2011 telephonic agreement between Ms Sikutshwa and Mr Sha'Altiel was sufficient for the agreement to have been binding. The· plaintiff requested that the agreement be confirmed on email correspondence for its own convenience for the reasons articulated through Mr Sha'Altiel - this forms the basis of the 'relevant circumstance' to be considered when interpreting the lease in dispute.'[2]

[34] Mr Sha'Altiel was unambiguous;. he wanted the parking lease confirmed before the plaintiff would negotiate the lease for the base station as the latter.involved the plaintiff reinforcing the roof at great cost. The expense would only be beneficial to the plaintiff if the defendant renewed the parking lease. He said the confirmation of the parking lease was a precondition for entering into negotiations in respect of the base station. Therefore, he was confident that the defendant was bound by the parking lease despite their inability to reach agreement in respect of the 6th and 7th floor proposed lease.

[35] Mr Mokhare SC, who appeared with Ms Lithole, the defendant's counsel, said the following:

> 'When taking into account... Cool ideas[3] that words must be given their ordinary grammatical meaning unless that leads to absurdity, it must be accepted that the e-mail of 19 August 2011 was explicit in terms that there was no agreement concluded but an agreement will be concluded in future. This is embodied in the careful usage of the language that: "MTN

[2] *Mokane v Tassos Properties* & *Another* 2017 (5) SA 456 (CC) at 457.

[3] Coo/ *Ideas v Hubard* 2014 (4) SA 474 (CC).

will renew"... An important context when interpreting commercial documents is that an interpretation which is commercially sensible should be preferred to one which is unbusinesslike...·

[36] Mr Sha'Altiel testified that the plaintiff had spent approximately R1 million on reinforcing the roof after the 19 August 2011 agreement. In those circumstances, I am persuaded that the plaintiff has met its onus in proving·the·existence·of the parking lease as pleaded. The plaintiff's version is true and accords with sensible commercial practice. The defendant's version to the contrary is rejected[4]. It is important to bear in mind that Mr Lubbe was unable to confirm the circumstances that led to the early negotiations of the parking lease as he had not been involved in that process. He was called in to write 'a legal letter' when the parties were already in dispute. Therefore, he was unable to comment on the defendant's request for an exit clause; another indication that the plaintiff's version is the correct one.

[37] The plaintiff alleged that the defendant had repudiated the lease on 2 occasions, namely when Ms Sikutshwa on 3 October 2011 per email 'advised that the parking agreement was on hold' and on 14 May 2012, when Mr Lubbe confirmed that 'the current parking lease expires end January 2013 and... this facility will not be required after said date·. The plaintiff rejected the repudiation and tendered the vacant premises to the defendant. However, 15 months later, the plaintiff accepted that the defendant had no intention to return to the premises. Therefore, the plaintiff accepted the repudiation and cancelled the lease. I see no reason why the plaintiff, in those circumstances, could not act to mitigate its losses. Commercial premises, in central Cape Town, were standing empty and the plaintiff was receiving no income from it but no doubt had expenses in respect of the property. The plaintiff had to act to mitigate its losses. Although, I am persuaded that the plaintiff has met its *onus,* I deal with the

[4] *National Employers General Insurance* Co *Ltd v Jagers* 1984 (4) SA 437 (ECO).

alternative relief which was pleaded as follows:

'5. Alternatively, and in the event there was no true *consenus ad idem* between the parties in the circumstances referred to in paragraphs 3 and 4 above, then the Plaintiff avers that the Defendant is nevertheless bound by the aforesaid Lease Agreement, on the basis of the doctrine of *quasi-mutual consent [assent],*in that

5.1 The.Defendant's verbal and written conduct, as pleaded in paragraphs 3 and 4 hereinabove, 'constituted a representation to the Plaintiff that the defendant had concluded the Lease Agreement with Plaintiff;

5.2 A reasonable person in the position of the Plaintiff would have believed that Defendant, by its aforesaid conduct, had assented to the relevant terms of the Lease Agreement, as set out in annexure "A" hereto (the email of 19 August 2011)

5.3 The Defendant's aforesaid *:* representation misled the Plaintiff and induced a reasonable belief on the part of the Plaintiff:

5.3.1 That the Defendant was assenting to the terms as proposed by it in Annexure "A" hereto; and

5.3.2 That the parties had concluded the Lease Agreement, having the essential terms set out in Annexure "A" hereto.

5.4 Unbeknown to the Plaintiff, the Defendant's actual intention did not conform to- the ·Defendant's declared intention as was represented to the Plaintiff;

5.5 In the circumstances, the Defendant is now precluded from denying the existence of the Lease Agreement on the basis that the parties were not *ad idem* when concluding the said Lease '

The doctrine of quasi mutual assent

[38] The doctrine of *quasi mutual assent* is a necessary part of our law, as the law can ·only in reality concern itself with the outward manifestations of a person's actions which may be different from the subjective workings of the mind.[5]

[39] In *Sonap Petroleum*[6], the court formulated the following test to be applied:

'239 In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby?... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'

[40] Applying that test to the present matter, the plaintiff led the following evidence:

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[5] Christie's *Law of Contract in South Africa,* 7th edition at 31.

[6] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (AD).

(a) Mr Rohland, the defendant's senior manager in charge at the premises, approached Mr Sha'Altiel, one of the plaintiff's directors with whom the defendant dealt in respect of the premises, and proposed that the plaintiff consider letting roof space to the defendant to install a base station. In preparation for the installation, the plaintiff would have had to reinforce the roof to the defendant's specifications.

(b) Mr Sha'Altiel considered that the reinforcement would be costly and the rental generated therefrom minimal in comparison to the reinforcement costs. To make the project commercially viable, the plaintiff, as a precondition, required that the defendant renew the existing parking lease. At the time, the lease was approximately 2 years from expiring.

(c) In August 2011, Mr Rohland told Mr Sha'Altiel 'good news we are going ahead' and that somebody from the defendant would call to confirm. That same day, Ms Sikutshwa called and confirmed that the defendant would renew the parking lease and finalise the essential terms for a valid lease. At the plaintiff's request, she reduced the agreed terms to writing. Later, she corrected her mistake in respect of the lease period.

(d) Thereafter, at the direction of the defendant's technical personnel, the plaintiff spent approximately R1 million reinforcing the roof in anticipation of the base station installation.

(e) In the interim, the defendant sought to include an exit clause in the agreement, which the plaintiff refused.

[41] The plaintiff would not have engaged in the discussion in respect of the base station had the defendant not, through the 19 August 2011 telephonic

agreement that was confirmed by email, indicated that it had agreed to the precondition, i.e., renewing the parking lease. As indicated above, the plaintiff learnt from documents discovered that the defendant's position had changed as the sale of the vacant plot fell through. That altered the defendant's position to the extent that it no longer needed the parking space. The plaintiff was not privy to the inner workings of the defendant nor could it reasonably have been. The misrepresentation came from Mr Rohland and Ms Sikutshwa. The plaintiff acted reasonably when it accepted the representation. In the circumstances, I am persuaded that the plaintiff was misled and acted reasonably when it believed that its precondition had been met.

[42] In Kgopana[7], the court held as follows:

> 'The primary basis of contractual liability in our law is true agreement or *consensus ad idem,* in accordance with the will theory. In cases of dissensus contractual liability may nevertheless be founded on the doctrine of quasi mutual assent, which is based on the reliance theory. In these cases the first party is contractually bound because he or she led the second party, as a reasonable person, to believe that the first party intended to contract on particular terms.'

[43] The plaintiff pleaded the necessary terms for the defendant to reply and led the evidence in support of its reliance on *quasi mutual assent.* I am persuaded that at the time, 19 August 2011, the defendant intended to contract as per the email confirmation referred to above. It follows that the plaintiff has met its burden of proof in respect of its main claim. Even if I wrong, the plaintiff was reasonably misled by the defendant's actions and acted thereon. It follows that the plaintiff has also met its burden of proof in respect of the alternative claim. In the circumstances of this matter, the plaintiff also acted to its detriment.

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[7] *Kgopana v Mat/a/a* [2019] ZASCA 174 (2 December 2019) para 10.

Conclusion

[44] I, for the reasons stated above find for the plaintiff on the merits as follows:

(a) On 19 August 2011, the parties entered into an agreement to renew the parking lease for a 4-year term as from 1 February 2013.

(b) The defendant repudiated the agreement which the plaintiff initially elected to uphold. The plaintiff was entitled to change the initial election and cancel the contract on 26 January 2016.

(c) The defendant is liable for arrears rental and damages as the plaintiff may prove, in due course.

(d) The defendant is directed to pay the costs of the action, including the costs of counsel.

Baartman,J