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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 2024-059610

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 7/3/2025

SIGNATURE:

In the matter of:

BAGON INVESTMENT HOLDINGS (PTY) LTD

Applicant

and

RAN HADAR

First Respondent

(Identity No: 7[...])

HOWARD JOSELOWITZ

Second Respondent

(Identity No: 7[...])

t/aPALMS INTERNET LOUNGE

PALMS INTERNET LOUNGE

Third Respondent

JUDGMENT

DE BEER AJ

Introduction

1. This is an application for an order declaring the lease agreement ("the lease") concluded between the parties on 29 March 2021, attached to the founding affidavit marked "MSJ2"¹ has terminated in consequence whereof relief is sought to eject the respondents from the leased premises situated at Shop No's 8 and 9, Palm Centre, 35 Main Road, Newlands, Johannesburg on Erf 1[...], Newlands Township ("*the property*").

2. The application concerns the lease agreement pertaining to the commercial property. The lease commenced on 1 May 2021. Clauses 5.1 and 5.2 are applicable to the controversy of whether the applicant is entitled to the relief sought. The respondents opposed the relief sought, the grounds are detailed in the answering affidavit and are dealt with in the heads of argument prepared on behalf of the respondents.

Opposition to the main application

3. The respondents raised a point *in limine*, arguing that the main application stands to be dismissed with costs due to the applicant's failure to deal with Rule 41A, i.e. that the matter be subjected to mediation which could have offered expeditious relief to both parties. This point *in limine* was not persisted with save for what was stated in the papers. Events and time have taken over whether a consensual mediation was possible; reference is made to a letter dated 1 April 2022,² wherein the applicant demanded the respondents to vacate the property during 2022 for the reasons dealt with therein. It is common cause that any reference to 2022 is erroneous; the lease only expired as per clause 5.1 on 30 April 2024 by virtue of the

¹ Caselines pages 02-25 to 02-40.

² Caselines pages 02-130 to 02-133.

handwritten amendment. Be that as it may, it is difficult to envisage consensual mediation between the parties. The respondents wish to remain, the applicant seeks an ejectment. The point *in limine* is consequently dismissed.

4. On the merits, the respondents contend that the lease was timeously and validly renewed six (6) months prior to expiry on 30 April 2024, provided in clause 5.2.

Renewal of the lease

5. The salient controversy between the parties concerns whether the respondents exercised their right to renew the lease in terms of the applicable clause and, if so, whether the renewal was effected for 1 (one) or 3 (three) years. The respondents seek a rectification of clause 5.2 of the lease to record that the renewal period constituted 3 (three) years, not one.

6. As contended, the renewal was effected by way of an email dated 25 October 2023.³

7. To consider and decide whether the lease was renewed, if any, reference must be made to the written recordal as detailed in paragraph 5 which is quoted herein *verbatim* for ease of reference:

"5. COMMENCEMENT, DURATION AND RENEWAL

5.1. Notwithstanding the date of signature of this agreement by all the parties hereto, this Lease shall be deemed to have commenced on the 1st May 2021 and shall endure for (one) [amended by hand to read three] year (hereinafter called the "the initial period") until 30st April 2022 [amended by hand to read 2024].

³ Annexure RS, Caselines pagination 02-94.

5.2 Provided that the Lessee is not in breach of, or in arrear with any obligation in terms of this Lease, same shall be renewable by the Lessee for a further period of 1 (one) year reckoned from the end of the initial period of Lease, by written notice to the Lessor by the Lessee given by not later than 6 (six) calendar months prior to the termination of the initial period and upon the same terms and conditions as this Agreement, save and except that the rentals shall be agreed upon."

8. To consider whether respondents renewed the lease, the email referred to above regarding whether the lease renewal was duly exercised must be interpreted and applied in accordance with the specific wording. For ease of reference, the email is quoted herein *verbatim*:

"From: Ran Hadar <r[...]>

Sent: Tuesday, October 25, 2023 9:29 PM

To: Cili bao <i[...]>

Subject: Renewal of lease agreement

Hi Linda I would like to renew the lease agreement for Palms Internet Lounge for a further period as contained in the lease agreement, with the rental amount to escalate by 10% per year. Let me know when we can meet to discuss further should you wish to do so.

Regards Ran"

9. From the above documents, it is common cause between the parties that the lease would endure for 3 (three) years until 30 April 2024, as recorded and amended by hand in clause 5.1 of the lease.

10. However, clause 5.2 is not common cause in its import, which is the part of the lease the respondents seek to rectify. This clause records that the lease shall be renewable for a period of one year, which right must be exercised 6 (six) calendar months prior to its determination of the initial period on 30 April 2022. Clause 5.2

also states that the renewal will be "*upon the same terms and conditions as this Agreement, save and except that the rentals shall be agreed upon.*"

11. Interpretation is the duty of the court.⁴ Duly formulated, interpretation entails the following:

*"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context, it is to make a contract for the parties other than the one they, in fact, made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*⁵

The words and concepts used in a contract and their relationship to the external world are not self-defining. The meaning of a contested term of a

⁴ AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa (CCT 385/21) [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) (20 September 2022); Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA).

*contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.*⁶

12. Clause 5.1 was amended by hand, clause 5.2 directly underneath was not. Put differently, clause 5.2, which succeeds 5.1, was not amended. The parties did not *ex-facie* the document amend the renewable period from 1 (one) to 3 (three) years, which pertains to the second issue to be resolved if the first is resolved in favour of the respondents.

13. Concerning the first issue, the email dated 25 October 2023 seemingly indicates that the author "*would like to renew the lease agreement ... for a further period as contained in the lease agreement, ...*" and further invited the applicant to "*Let me know when we can meet to discuss further should you wish to do so.*".

14. Nothing on the papers suggests that the parties met or discussed this aspect before the cut-off date of 31 October 2023 and whether the applicant accepted this invitation "*to discuss ... to do so*".

15. The aspect of the escalation as recorded in the email does not constitute a renewal exercised by the respondents, alternatively it does not seem to be a renewal duly effected and finalised. The wording suggests an invitation and negotiation, not a renewal duly exercised and effected.

⁶ Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] 3 All SA 647 (SCA), 2022 (1) SA 100 (SCA) para. 50; Novartis v Maphil [2015] 4 All SA 417 (SCA), 2016 (1) SA 518 (SCA); City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association [2019] 1 All SA 291 (SCA) (also reported as Tshwane City v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA)) paras 56-69.

16. It therefore does not comply with the manner in which to renew the lease as recorded in clause 5.2.

17. Interpretation is a matter of law and not of fact; it is accordingly a matter for the court and not for witnesses.⁷

18. Procedurally, this email had to be sent to the *domicilium* address detailed in clause 25 of the lease; the email does not confirm or record the commensurate details stipulated in clause 25. This clause has, therefore, not been complied with.

19. On a conspective of the evidence detailed above and the common cause facts, the court finds that the lease was not renewed in terms of clause 5. In the premises, it becomes irrelevant to consider whether the lease should be rectified to record the renewal period from 1 (one) to 3 (three) years, which is the basis of the respondents' request to refer the matter to oral evidence and rectification of the lease.

20. Even if the court is wrong on whether the renewal was duly effected, seeking a rectification will prove to be problematic for the following reasons:

20.1. The controversy regarding whether the renewal period was erroneously recorded as 1 (one) year instead of 3 (three) years was raised for the first time in the answering affidavit deposed to on behalf of the respondents on 25 July 2024.⁸

20.2. The same was not mentioned or recorded in a letter prepared on behalf of the respondents by their attorney of record some 6 (six) months earlier on 31 January 2024. This letter⁹ stipulates the following:

"6. In terms of clause 5.2, thereof our clients are entitled to have the lease agreement renewed for a further period of 1 (one) year as from 1 May 2024 onwards.

⁷ KPMG Chartered Accountants v Securefin Ltd [2009] 2 All SA 523 (SCA), 2009 (4) 399 (SCA).

⁸ Caselines page 02-86.

⁹ Caselines page 02-48.

7. ...

8. *Our clients herewith provide your client with notice that they shall not be vacating the premises on 30th (sic) of April 2024 and they shall continue occupying the lease premises for a further year in terms of the renewal clause."*

20.3. The letter corresponds and accords with the wording of clause 5.2 in that the period of the renewal clause is 1 (one) year, not 3 (three) years.

20.4. In the answering affidavit, paragraph 19.10, the respondent's deponent stipulates that:

"At the time of the signing of the agreement this was picked up by us and our business brokers Starogard, we all stated to the Applicant that this should be amended to read that the initial period of the lease agreement should be for three years renewable for a period of three years."

20.5. At paragraph 22.3, the deponent states that:

"It must be noted Vardakos letter to the Applicant's agent was based on the lease agreement that was provided with him on 31 January 2024. It is only when the Respondents consulted with him on the application for eviction that was brought by the Applicant, we established that the lease agreement incorrectly reflected the renewal period as a year and not three years as was orally agreed by the parties, which we are now seeking rectification of the agreement."

20.6. Reference is made to "*the Applicant*" being a company, the deponent does not state the identity of the representative that had to amend the renewable period, as alleged. It is also not therein detailed which one of "*the Respondents*" consulted with the attorney when this took place, nor does it specify particulars that were apparently conveyed.

20.7. Seeing that this issue was raised in the answering affidavit without providing specific details referred to above, the court is left with what is stated on the papers in this regard and has to make a consequent finding.

21. It is reiterated that the rectification of the renewal period will only become applicable if the contract was renewed, for the reasons detailed above, the contract was not renewed in accordance with clause 5.2. It is therefore unnecessary to venture further as to whether this application should be referred to oral evidence.

22. Procedurally, the respondents did not prosecute a counterapplication for the rectification. In paragraph 19.17¹⁰ the deponent states that "... *the Respondents will seek a rectification of the lease agreement by way of a counter application to reflect the common intention of the parties ...*". Notwithstanding this intention, counter-relief was not instituted as intended or undertaken. The Court can still condone this aspect if the underlying facts existed to grant such relief, for reasons detailed above, the papers are devoid of such facts.

23. A further defence raised revolved around whether alleged improvements give rise to an improvement lien as a valid defence to eviction. During argument, this issue was not persisted. The court's *prima facie* view on the facts of the matter is that such an ostensible lien does not constitute a valid defence to eviction. The contents of clause 13.2, perhaps also read with clause 14.5 of the lease, negates such defence, which is therefore bad in law.

Motion proceedings

24. The basic principle in motion proceedings is that the affidavits define the issues between the parties and the affidavits embody evidence. An applicant who seeks relief from a court must make out a case in its notice of motion and founding affidavit.¹¹

¹⁰ Caselines page 02-78.

¹¹ *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at [27].

25. In *Betlane v Shelley Court CC*,¹² the Constitutional Court stated that it is trite that an applicant ought to stand and fall by the notice of motion and the averments made in its founding affidavit.

26. In *National Council of Societies for the Prevention of Cruelty to Animals Openshaw*,¹³ the SCA referred with approval to *Shakot Investments (Pty) Ltd v Town Council of Borough of Stanger*,¹⁴ Muller J stated:

"In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such fact as would, if true, justify the relief sought..."

27. Because motion proceedings are concerned with the resolution of legal issues based on common cause facts, where there are disputes of fact in proceedings in which final relief is sought, those disputes are to be determined in accordance with the Plascon-Evans rule.¹⁵

28. The accepted approach to deciding factual disputes in motion proceedings requires that subject to "robust" elimination of denials and "fictitious" disputes, the Court must decide the matter on the facts stated by the respondent, together with those the applicant averse and the respondent does not deny. On the accepted test for fact-finding in motion proceedings, where disputes of fact arise, it is the respondent's version that will prevail.¹⁶

29. In this regard, it is further apposite to refer to guiding principles enunciated by the court in the *Venmop* judgment, which stated the following:¹⁷

¹² 2011(1) SA 388 (CC) at 2. See also *Brayton Carlswald (Pty) Ltd and Another v Brews* 2017 (5) SA 498 (SCA) at [29].

¹³ 2008 (5) SA 339 (SCA) at [29] - [30].

¹⁴ 1976 (2) SA 701 (D) at 704F-G.

¹⁵ *National Director of Public Prosecutions v Zuma* 2009 (1) SA 277 (SCA) at [26].

¹⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 632 (A) at page 634E-635J; *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [63] to [64]; *Snyders v De Jager and Others* 2017 (3) SA 545 (CC) at 566, [71].

¹⁷ *Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* (2014/14286) 2016 (1) SA 78 (GJ).

[7] The efficient conduct of litigation has as its object the judicial resolution of disputes optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.

[8] In motion proceedings, affidavits serve a dual function of both pleadings and evidence; Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793 D - F; Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA) at 200 para 43, ABSA Bank Ltd v Kernsig 17 (Pty) Ltd 2011 (4) SA 492 (SCA) at 498 - 499 para 23; Foize Africa (Pty) Ltd v Foize Beheer BV and Others 2013 (3) SA 91 (SCA) at 103 para 30. In Choice Holdings Ltd v Yabeng Inv Holding Co Ltd 2001 (3) SA 1350 (W) at 1360 para 34, Goldstein J, in a judgment of the full court, summed up the principal thus:

"In application proceedings the affidavits serve two purposes: first that of pleadings, i.e. delineating the facta probanda or essential averments necessary to found a cause of action or defence, and, secondly, the supply of the facta probantia or evidence to support a finding of the correctness of the facta probanda."

[9] A consideration of these references reveals that the emphasis on the dual function of affidavits in motion proceedings is highlighted where the affidavits contain conclusions or allegations of a depth that is sufficient for a declaration

but are deficient in evidence of the facts upon which those conclusions or allegations are based. Deponents to the affidavits are testifying in the motion proceedings. Save in urgent applications for interim relief to restrain irremediable injury and to keep matters in status qua, where otherwise inadmissible hearsay might be permitted, Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149 (T) at 157E - G, there is no authority that the admissibility of the evidence of a witness in motion proceedings is somehow different from that in a trial action."

Conclusion

30. Upon the evidence and common cause facts before this court, the question of renewal does not involve an inquiry into the state of mind¹⁸ of "*the Respondents*". Rather it involves a consideration of the objective conduct of the parties hereto and the conclusion to be drawn from the facts presented. Therefore, the court's finding is that the only reasonable inference and conclusion to be drawn from a summary of the evidence referred to above is that the lease was not renewed in terms of clause 5.

31. The lease therefore expired and terminated due to effluxion of time. The respondents have not discharged the onus in proving that they exercised the option to renew the terms of the lease.

32. The court is also not convinced that there is any basis for the respondents' claim for rectification or that the matter should be referred for oral evidence in this regard. The express non-variation clause, the entire contract and relaxation clause, clauses 22 to 24 militates against such a finding.

33. Clause 20.3 addresses the aspect of costs, the parties agreed that legal costs incurred is payable on the scale as between attorney and own client.

Order

¹⁸ Venmop *supra* at [25].

34. For the reasons detailed above, the court hereby grants the following order:

34.1. The lease agreement concluded between the parties on 29 March 2021 and attached to the applicant's founding affidavit marked Annexure "MSJ2" has terminated;

34.2. The respondents are to vacate and are ejected from the premises at Shop No's 8 and 9, Palm Centre, 35 Main Road, Newlands, Johannesburg on Erf 1[...] Newlands Township ("*the property*");

34.3. The respondents and all who are occupying the property, by, through or under them, are ordered to vacate the property within 30 (thirty) days from the granting of this order, failing which the applicant may request the relevant Sheriff to evict the respondents and all those occupying the property through them, from the property;

34.4. The respondents shall pay the costs of this application jointly and severally, the one paying, the other to be absolved on the scale as between attorney and own client.

DE BEER AJ
Acting Judge of the High Court
Gauteng Division

Date of hearing: 3 March 2025

Judgment delivered/Uploaded: 7 March 2025

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