

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 11388/2015

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

.....

DATE

.....

SIGNATURE

In the matter between:-

SOLGAS (PTY) LTD

Applicant

And

TANG DELTA PROPERTIES CC

Respondent

JUDGMENT

CORAM: CRUTCHFIELD AJ

[1] The applicant, Solgas (Pty) Ltd, is the former lessee of the respondent, Tang Delta Properties CC, from which the applicant previously leased premises.

[2] Upon termination of the lease, the respondent asserted a tacit hypothec over certain movables on the leased premises, which resulted in the applicant launching these proceedings. The applicant sought vindictory relief, in particular, delivery of the movables and costs of the application.

[3] The respondent opposed the application and brought a counter-application in which it claimed:

3.1 Confirmation of the respondent's hypothec over the movables.

3.2 That the order sought immediately above, operate as an interim interdict preventing the applicant from removing the movables or causing them to be removed, pending final determination of the action proceedings instituted by the respondent in the Gauteng Division, Pretoria under case number 19589/2015 ('the action'), and the execution of such order as may be granted by that court; and

3.3 Costs of the counter-application on an attorney and client scale.

[4] The common cause facts relevant to the issues are the following:

4.1 The applicant leased the premises situated at stand 1234, corner Max and Tang Streets, Germiston Ext 13, Germiston ('the premises'), from the respondent.

- 4.2 The lease was renewed between the parties until 31 October 2014, when it terminated automatically.
- 4.3 Upon termination of the lease, the respondent retained certain movables, comprising an Isuzu bakkie, industrial batteries, hydraulic jacks, tow chains, and miscellaneous tools and toolboxes ('the movables'), on the premises.
- 4.4 The applicant is the owner of the movables.
- 4.5 In terms of the lease, the applicant was obliged to repair any damage and restore the premises to the satisfaction of the respondent on or before the termination of the lease agreement, failing which the respondent reserved the right to hold the applicant liable for the payment of the monthly rental up to the last day of the month in which the restoration work was completed and the premises able to be re-let (clause 11.9).
- 4.6 Further, in the event of the premises not being handed back to the respondent in the same good order and condition as at the commencement of the lease, fair wear and tear excepted, the lessor would, in addition to any other remedies it might have, be entitled to utilise the deposit paid by the lessee to effect the necessary repairs and / or to pay any other amounts due by the lessee to the lessor without prejudice to the lessor's rights to hold the lessee liable for any additional amount which might be required for the restoration of the premises (clause 17.5).
- 4.7 Should the respondent be compelled to utilise the services of an attorney in respect of the collection of any amounts due and payable to it in terms of the lease, or in respect of any other relief to which it might become entitled in terms of the lease, then the applicant would be liable for all costs incurred by the respondent for the purposes of enforcing any of its rights in terms of the lease on the attorney and own client scale, inclusive of any tracing agent's fees, counsel's fees and collection commission (clause 23.6).

[5] Counsel for the parties were agreed that the value of the movables, and that value relative to the quantum of the damages claimed by the respondent, were not issues in respect of which I needed to concern myself.

[6] The terms of the lease are not in dispute. Hence, the applicant is contractually liable to repair and restore the premises to their original condition, fair wear and tear excepted.

[7] I was not referred to any provision in the lease that is contrary to, or, serves to negate, the hypothec claimed by the respondent, which is residual and not susceptible to exclusion by contract.

[8] It is trite that in these circumstances, the respondent was obliged to allege facts sufficient to justify its possession and retention of the movables.¹

[9] This the respondent did by relying upon the lessor's common law tacit hypothec over *invecta et illata* (things carried in and things brought in), arising from the lessee's obligations in terms of the lease to effect any necessary repairs, make good any damage and restore the premises to the same good order and condition as at the commencement of the lease, fair wear and tear excepted.

[10] The respondent alleged that the applicant had failed to repair and restore the premises as it was contractually obliged to do, and was liable to the respondent for damages in the amount of R137 343.62.

[11] Given the provisions of the lease, the respondent contended that it provides for circumstances that recognise the landlord's hypothec for damages suffered by the lessor, against the lessee's assets on the premises.

[12] Hence, the damages claimed by the respondent, for which the applicant is alleged to be liable, give rise to the hypothec in respect of which an attachment is the appropriate form of relief.²

¹ Dreyer NNO v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) [4]; Van der Merwe v Taylor NO 2008 (1) SA 1 (CC) [22].

[13] Further, an attachment order will be granted even if only slight grounds exist for apprehending that the *invecta et illata* on the premises, will be removed³ by the lessee.

[14] The applicant argued that the respondent's claim to the hypothec in respect of damages arising from the alleged failure to repair and restore the premises, was no longer competent, even if the applicant was contractually obliged to make good the premises upon termination of the lease.

[15] The overwhelming body of authority, according to the applicant, was to the effect that the lessor's tacit hypothec does not apply to any claim other than arrear rental. It operates solely to secure fulfilment of the lessee's obligation to pay the rental stipulated in the lease, an easily and speedily determinable obligation. Thus, the hypothec serves as security in respect of the stipulated rental and is accessory to the lessee's rental obligation.

[16] Hence, the applicant submitted that the hypothec does not operate to secure an illiquid claim, which stands to be determined at a later stage. Damages, being illiquid, require to be quantified and proved, a potentially lengthy process, and, are not appropriate to an attachment, effectively a 'set-off', under the hypothec.

[17] Whilst the respondent's alleged damages had been quantified for the purposes of the counter-application, they remained to be proved at trial.

[18] In the event that the respondent's reliance upon the lessor's tacit hypothec for damages was found to be sound in law, then the applicant argued that the respondent had not sufficiently established the quantum of its damages.

[19] The respondent relied upon the same averments in respect of its alleged damages in the counter-application, as in the pending action. The applicant criticised the respondent's quantification thereof as being insufficient to ground the interim interdictory relief claimed by the respondent. Furthermore, that the respondent's

² *Webster v Ellison* ('Webster') 1911 AD 73 at 79 and 89.

³ *Lieberman v Guardian Assurance and Trust Co of Port Elizabeth* 1909 TS 1050 at 1052; *Webster* at 87.

allegations were vague to the extent that the applicant was precluded from properly answering thereto.

[20] The applicant referred to *Eight Kaya Sands v Value Irrigation Equipment*⁴ ('*Kaya Sands*'), a full bench decision of the Transvaal Provincial Division, in which the majority of the court stated:

'The only remaining tacit hypothec from the common law which still exists in South African law is the tacit hypothec of the landlord over the movables of the tenant on the leased property for arrear rental. In respect of arrear rental, the tenant is the debtor and the landlord is the creditor. The lease agreement out of which the debt arises exists between those two parties. The tacit hypothec affords the creditor/landlord a right of attachment to establish a real right over the movables of the debtor/tenant as security for payment of the arrear rental.'

[21] *Kaya Sands*, however, was concerned only with the hypothec arising from arrear rental. That court did not consider the question raised by this matter, being whether or not the lessor's tacit hypothec in respect of damage to the leased premises, applies in our law today. Nor did that court find that the lessor's hypothec does not apply in respect of obligations other than rental. Hence, *Kaya Sands* is distinguishable from the matter before me.

[22] *Kaya Sands* referred to and relied upon *Webster v Ellison*⁵ ('*Webster*'), a full bench decision of the Appellate Division. *Webster* also dealt with an exercise of the landlord's hypothec in the context of arrear rental, which Innes JA stated, 'is operative only when and so long as rent is in arrears'.⁶

[23] The applicant relied upon Innes JA's statement, whilst the respondent contended that it was not authority for the proposition that the hypothec does not apply to a lessee's obligations other than rental, in terms of a lease.

[24] Further, the respondent argued that the phrase '*only when ... the rent is in arrear*', was intended to refer to the timing and duration of an exercise of the hypothec, being whenever the rent is in arrear, within the context of arrear rental, and not to the nature of the debt secured by the hypothec.

⁴ 2003 (2) SA 495 (T) at 500 G-H.

⁵ 1911 AD 73.

⁶ Id at p 85 – 86.

[25] The court in *Webster*, however, was tasked specifically with a claim to a tacit hypothec pursuant to arrear rental, and not with an attempt to invoke the hypothec in respect of damages arising from a lessee's failure to restore and repair the leased premises. Hence, *Webster* is also distinguishable.

[26] I am supported in this regard by the author W E Cooper *Landlord and Tenant*,⁷ to the effect that Innes JA's statement:

'...is wide enough to support the argument that our courts recognise a lessor's hypothec for rent only, but it must be borne in mind that when making the statement the learned judge may not have had the question under discussion in mind.'

[27] Furthermore, A J Kerr⁸ provides additional support, in that:

'.. the learned judge was considering, as was appropriate to a case in which rent was in fact in arrear, "the general nature of the security *for arrear rent* given by the Common Law" ... If therefore the phrase "only when ... the rent is in arrear" were to be read to mean "for no obligation other than the payment of rent" it would be *obiter*.

[28] Both parties referred me to various authors, both old and modern, the content of which I deal with hereunder.

[29] As a general proposition, the modern authors⁹ accept that the landlord's tacit hypothec as developed in Roman-Dutch law, (and which applied to the lessee's obligations in terms of the lease over and above payment of the rent) was received, and accepted by our courts as part of South African law. Indeed, evidence of its use is discernible in the early reported case law.¹⁰

⁷ W E Cooper *Landlord and Tenant* p 179 – 180 n 184.

⁸ A J Kerr *The Law of Sale and Lease* 3 ed p 390 n 383.

⁹ Cooper *Landlord and Tenant* p 179 – 180; F du Bois *Wille's Principles of South African Law* 9 ed p 655 – 659; Kerr *The Law of Sale and Lease* p 391; 17(2) *Lawsa* 2 ed para 438; R W Lee *An Introduction to Roman-Dutch Law* 5 ed p 189; Van der Merwe *Sakereg* 2 ed p 698 – 699.

¹⁰ *Waverley Trust and Trading Co v Depaux* 1902 TH 73.

[30] Notwithstanding, the majority of the common law hypothecs are described as having fallen into disuse, been abolished by subsequent legislation, included in later statutory enactments, or reduced to rights of retention.¹¹

[31] The authors diverge, however, along two lines on the question of whether or not the landlord's hypothec in respect of damage to the premises, applies today.

[32] The applicant referred primarily to Cooper,¹² to the effect that:

'In one *Digest* text the lessor's hypothec is said to cover any claim the lessor has against the lessee for damaging the property let to him.¹³ Voet accepted this to be the position in Roman-Dutch law.¹⁴ He is supported by Schorer,¹⁵ but no other institutional writer deals with the question. In the only reported case in which this question has been considered, the court held that a lessor has a tacit hypothec for rent only.¹⁶ Most modern writers simply state that a lessor has a tacit hypothec for rent.¹⁷ However, two modern writers accept that the lessor's hypothec is not limited to rent but applies to the due fulfilment of the lessee's obligations under the lease.¹⁸

If the lessor's hypothec in Roman-Dutch law applies to the fulfilment by the lessee of obligations other than the payment of rent, it has received no judicial recognition in South Africa. On the contrary, it was abolished in Natal in 1887,¹⁹ and in the Insolvency Act the legislature confined the lessor's hypothec to rent. Since 1884 there has been no reported case in which a lessor has claimed a tacit hypothec for damage caused by the lessee to the property hired by him and, assuming that the court's reasoning in *Woodrow and Co v Rothman* was erroneous, it is submitted that in the Cape, Transvaal and the Orange Free State the lessor's hypothec for the fulfilment of obligations other than the payment of rent has become abrogated by disuse.²⁰

¹¹ Du Bois *Wille's Principles of South African Law* p 655 n 222 and 223.

¹² Cooper *Landlord and Tenant* p180, selected footnotes omitted.

¹³ D 20.2.2.

¹⁴ 20.2.2; 46.1.12.

¹⁵ Note 248.

¹⁶ *Woodrow & Co v Rothman* (1884) 4 EDC 9

¹⁷ ... De Wet & Van Wyk 365 say that the lessor's tacit hypothec does not serve as security for the due fulfilment of the terms of a lease in general. ...

¹⁸ Bodenstein 87; Kerr *Sale and Lease* 249. (I was not able to locate the text of Bodenstein.)

¹⁹ Law 13 of 1887 (N) sec 5 – 'Any tacit hypothec not herein before specially provided for is hereby abolished.' The Natal Act recognised the lessor's hypothec for rent only.

²⁰ *Wille Landlord & Tenant* p 195. A statement by Innes JA in *Webster v Ellison* (n175) 86 is wide enough to support the argument that our courts recognise a lessor's hypothec for rent only, but it must be borne in mind that when making the statement the learned judge may not have had the question under discussion in mind. See too *Waverley Trust & Trading Co v Depaux* 1902 TH 73 where it appears to have been accepted that

[33] Cooper's reference to 'the only reported case', is to *Woodrow and Co v Rothman*²¹ ('*Woodrow*'). The lessor's hypothec for damages, however, was also raised in *Waverley Trust & Trading Co v Depaux*²² ('*Waverley Trust*').

[34] *Woodrow* is cited by current authors²³ as authority for the proposition that our case law does not reflect the common law recognition of the lessor's hypothec for damages.

[35] Notwithstanding, a perusal of the report of *Woodrow* reflects that it does not serve as such authority, as the court, in 'deciding that a lessor did not have a tacit hypothec for repairs',²⁴ was referred by counsel to section 8(5) of the Tacit Hypothecation Act 5 of 1861 (C), which the court appears to have accepted although the reported judgment does not refer specifically to that, or any other, section of the act. Regard to the text of the act reveals that section 8(5) thereof, dealt with the tacit hypothec of builders and repairers, of ships and houses.

[36] The Tacit Hypothecation Act 5 of 1861 (C),²⁵ although it dealt with the lessor's hypothec for arrear rental, did not deal with the lessor's hypothec for damages. Nor did the equivalent statute in the Transvaal, the Administration of Estates Proc 28 of 1902 (T),²⁶ refer to the lessor's tacit hypothec for damage to the leased premises.

[37] Hence, subsequent reliance upon *Woodrow*, as authority that the lessor's tacit hypothec for damage to the leased premises is not recognised by our courts, is erroneous. Cooper²⁷ appears to accept as much.

[38] The applicant looked to G Wille,²⁸ for support in respect of the nature of the debt secured by the hypothec. Wille states that:

a lessor has a hypothec for rent only. For the principle to be applied in determining whether a rule of law has become abrogated through disuse see *Green v Fitzgerald* 1914 AD 88.

²¹ (1884) 4 EDC 9.

²² 1902 TH 73. The case was decided upon a clause in the lease.

²³ H J Erasmus C G, Van Der Merwe and A H Van Wyk *Lee and Honoré: Family, Things and Succession* 2 ed para 485; Van der Merwe *Sakereg* p 699; Du Bois Wille's *Principles of South African Law* p 656 n 235; Cooper *Landlord and Tenant* p 180 n 179.

²⁴ Cooper *Landlord and Tenant* p 180 n 179.

²⁵ Act 5 of 1861 operated in the Cape Province and was repealed in its entirety by the Pre-Union Statute 36 of 1976.

²⁶ Section 72 was repealed by the Pre-union Statute 36 of 1976.

²⁷ Cooper *Landlord and Tenant* p180.

'The *Digest*²⁹ says the *invecta et illata* are bound not only for rent, but also for damage caused to the premises by the tenant's fault; Voet,³⁰ in one passage, agrees with this statement, and in another³¹ extends the liability to all the obligations of the tenant.

In *Woodrow & Co. v Rothman* it was expressly held that the landlord's hypothec covered rent only, and was not a debt due by the tenant for repairs which he had failed to make. Further, the Insolvency Act confers a preference on the landlord in the insolvency of the tenant in respect of rent only, and consequently it may safely be concluded that in South African Law the *invecta et illata* are not bound for any debts of the tenant other than rent.'

[39] I have dealt with *Woodrow*, which is not authority for Wille's 'conclusion'. Furthermore, the provisions of the Insolvency Act do not serve to limit the operation of the hypothec in matters outside of insolvency.

[40] Voet's support of the lessor's hypothec for damage to the premises is clear. The applicant submitted that even if Voet's position is accepted, the lessor's hypothec has not been applied by our courts in respect of damages over the years.

[41] The applicant referred me to Lawsa,³² to the effect that:

'The tacit hypothec of the lessor exists to secure the fulfilment of the lessee's obligation to pay the rent stipulated in the lease. Whilst there is Roman-Dutch authority suggesting that the hypothec extends in addition to a claim for compensation for damage inflicted on the *merx* by the lessee, this attitude is not reflected in South African case law.'

[42] Lawsa refers to Voet and Schorer in respect of the Roman-Dutch law, and, to Cooper³³ (as does Van der Merwe³⁴), in respect of the case law, particularly to Cooper's view that 'insofar as the hypothec applied in Roman-Dutch Law in respect of obligations other than the payment of rent, its sphere of operation has been restricted by abrogation through disuse in SA law.'

²⁸ G Wille *Landlord & Tenant in South Africa* 5 ed p 195.

²⁹ 20.2.2.

³⁰ 20.2.2.

³¹ 46.1.12.

³² 17(2) Lawsa 2 ed para 438, footnotes omitted.

³³ Cooper *Landlord and Tenant* p 160.

³⁴ *Sakereg* p 699 n 746.

[43] In summary, the applicant contended that Innes JA's statement in *Webster* was *ratio*, and even if it was only *obiter*, it was highly persuasive and far more so than the old authorities, who do not reflect the position in our law today, especially as regards the nature and purpose of the hypothec in its current usage. As to Kerr's dissenting voice, the applicant contended that Kerr did not fully appreciate the ratio in *Webster*.

[44] The applicant submitted that the reference in *New Life Communal Property Association v Draigri Boerdery Bpk*³⁵ ('*New Life Communal Property*'), to Kerr's view supported the applicant, as the court assumed³⁶ for purposes of the judgment that the hypothec is only available to a lessor in respect of arrear rental.

[45] The respondent's answer to *New Life Communal Property* was that it does not progress the matter any further, as the court relied upon an assumption without considering the issue.

[46] The purpose of the hypothec, according to the respondent, was to provide security to the lessor pending determination of its claim, and was not limited in its application to arrear rental. Basing its claim upon the common law, the respondent conceded that there is no reported decision in support of its position, and submitted that the body of authority relied upon by the applicant was not on point.

[47] The respondent relied upon Kerr,³⁷ sourced in Grotius and Voet, in so far as:

'A number of text-writers consider that of the various obligations of the lessee the hypothec secures the payment of rent only; but this does not appear to be borne out by the authorities. There is no mention of any such limitation in the discussion of the hypothec in Grotius, Van Leeuwen, Van der Keessel, or Van der Linden, whilst the *Digest* Voet, and Shorer expressly include other matters such as the obligation to repair if that obligation rests on the lessee in the circumstances of the case.'

[48] The respondent referred to the *Digest*,³⁸ to the effect that 'Property brought on to an urban tenancy is hypothecated not only for the rent, but for any deterioration of the premises due to the tenant's fault, such as gives rise to an action on the lease'.

³⁵ (1616/2007) [2007] ZAECHC 101 (22 November 2007).

³⁶ *Id* para 15.

³⁷ Kerr *The Law of Sale and Lease* p 390 – 391, footnotes omitted.

[49] In addition, the respondent drew attention to Voet's statement that '... things brought in or carried in shall be fast bound for the whole obligation of the hiring',³⁹ and, Voet's references⁴⁰ to 'depreciation' and 'dilapidation'.

[50] Whilst *Reynolds v Cornforth*⁴¹ is not directly on point, the respondent argued that it served to reaffirm the statements of Voet relied upon by the respondent.

[51] The respondent's answer to Cooper was that the author does not furnish authority for his view that the lessor's hypothec operates only in respect of arrear rental.

[52] The thrust of the respondent's submission was that absent any case law, Kerr's exposition of the law, based as it is upon the common law, prevails.

[53] The applicant, in reply, pointed to Kerr's most recent work,⁴² in which the author states⁴³ that Innes JA's statement in *Webster* suggests that the hypothec is limited to the recovery of arrear rental only.

[54] Although the author reneges somewhat upon the view previously expressed,⁴⁴ (albeit without reference to any new or additional authority), the distinction is marginal as the author continues (in line with the earlier contention), to note that 'since the case was specifically about arrear rent, the question whether the hypothec goes beyond arrear rent was not before the Court'.⁴⁵

[55] Accordingly, given that the lessor's hypothec for damage to the premises was received from the common law, and, was not abolished subsequently by The Administration of Estates Proc 28 of 1902 (T), (in the Transvaal), together with the fact that *Woodrow* is not authority for the demise of the hypothec, the issue becomes whether the lessor's hypothec for damages has fallen into disuse, or not.

³⁸ Kerr *The Law of Sale and Lease* p 391 n 390.

³⁹ Id n 391.

⁴⁰ Id n 393.

⁴¹ 1914 NPD 209 at 305.

⁴² G Glover *Kerr's Law of Sale and Lease* 4 ed p 452.

⁴³ Id at p 453.

⁴⁴ A J Kerr *The Law of Sale and Lease* 3 ed p 389 – 390 n 383.

⁴⁵ Id.

[56] Cooper⁴⁶ posits that if obligations other than the payment of rent were ever secured by the lessor's hypothec (in provinces other than Natal⁴⁷), the operation of the hypothec in respect of such obligations, in such provinces, 'has become abrogated by disuse.' Kerr⁴⁸ refutes Cooper's view.

[57] The applicant's submission that the lessor's hypothec for damages should not now be invoked, in the light of its absence from our case law for some time, is satisfactorily answered by *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* ('*Seacat*'),⁴⁹ in that:

'The mere fact that our Courts have overlooked and were unaware of a rule of our common law ... does not serve to excise that rule from our law⁵⁰ ... nor could it be said that the rule now under consideration is *contra rationem juris*. ...

... it is difficult to hold that D.3.3.34, ... was not received in South Africa, or that it is now undesirable to apply it. On the contrary, the eminent equity of the rule demands its continued recognition unless there is some obstacle as *stare decisis* or abrogation by disuse. *Stare decisis*, clearly, does not operate ... This is eminently a case where "*we should be doing wrong were we now, though satisfied that a mistake has clearly been made, to perpetuate that mistake and thus cause an injustice, not only to the present (appellant), but also, no doubt, to many litigants in the future*" ...

... The question whether D.3.3.34 has been abrogated by disuse ... may be dealt with very briefly. The basis of the doctrine of abrogation rests upon a supposed tacit repeal "through disuse by silent consent of the whole community" (*per Innes, JA, in Green v Fitzgerald* ...). In my view, there can be no question of such silent consent in the circumstances of the present case where the community was for a comparatively short period of time not aware of a rule which has existed for centuries, and the Courts have expressed the desirability of such a rule being enacted. ...'

[58] The statements of the SCA apply, in my view, equally to the matter at hand.

[59] It is apparent from the cases already referred to, that *stare decisis* is not an obstacle to the application of the lessor's hypothec in respect of damages.

⁴⁶ Cooper *Landlord and Tenant* p 180.

⁴⁷ Law 13 of 1887 (N) (now repealed by the Pre-Union Statute Law Revision Act 36 of 1976) limited the hypothec in Natal to securing the obligation to pay rent.

⁴⁸ A J Kerr *The Law of Sale and Lease* 3 ed p 390 - 391 n 385.

⁴⁹ 1974 (1) SA 747 (A) at 770 – 771.

⁵⁰ *Id* at 770H.

[60] Kerr⁵¹ accepts that instances of the invocation of the hypothec in order to secure obligations other than the payment of arrear rent, have been few. However, 'disuse' of the hypothec over the years can be ascribed to various factors.

[61] The disuse cannot be pursuant to the 'silent consent of the whole community,' in the face of the erroneous decision, (regarding the lessor's hypothec for damages), in *Woodrow*, which was accepted by the authors,⁵² published, and, proliferated in the standard reference books.

[62] In considering 'disuse' of the hypothec, cases involving insolvency must be excluded from consideration, resulting in few instances in which the issue may arise.⁵³ Further, *Waverley Trust*⁵⁴ has been overlooked,

[63] In so far as reliance upon *Woodrow* rested upon a misapprehension, it should not now be mistaken for 'disuse by silent consent of the whole community'. Past reliance in error, does not provide a platform for 'disuse (of the hypothec) by silent consent'.

[64] I refer in addition, in this regard, to *Business Aviation Corporation (Pty) Ltd & Another v Rand Airport Holdings (Pty) Ltd*,⁵⁵ to the effect that:

'... the mere fact that decisions based on a wrong interpretation of the law were given many years ago, would not be sufficient reason for refusing to correct the error, because, so Innes J said (at 93): "If it were otherwise, the result would be an unfortunate one. For when does a decision become so venerable that its original error is to be regarded as modifying the law?" ...'

[65] Accordingly, the error should not now be perpetuated to the disadvantage of

[66] Neither party referred to the provisions of section 2 of the *Security by Means of Movable Property Act*.⁵⁶ Hence, I need not consider the applicability thereof.

⁵¹ See n 48 above.

⁵² See n 9 above.

⁵³ See n 51 above.

⁵⁴ 1902 TH 73.

⁵⁵ 2006 (6) SA 605 (SCA) at [38] – [42].

[67] In the final analysis, for the reasons expanded upon herein, the lessor's hypothec for damages was not abolished under The Administration of Estates Proc 28 of 1902 (T), has not been abrogated by disuse and applies in this matter.

[68] My conclusion regarding the applicability of the lessor's hypothec for damages herein, is not dispositive of the matter. The quantification by the respondent of its damages claim, remains to be considered.

[69] The respondent sought only interim relief. Hence, a case established *prima facie* although open to some doubt, is sufficient. In so far as the applicant relied upon the test applicable to disputes of fact in motion proceedings,⁵⁷ that test does not apply in matters of interim relief.⁵⁸

[70] The applicant denied failing to repair and restore the premises and alleged that the premises were in the same condition upon termination of the lease, as they were in upon its commencement, fair wear and tear excepted.

[71] Insofar as the premises were not in the required condition upon termination of the lease, the applicant alleged that the respondent denied it access to the premises, effectively preventing the applicant from restoring the premises as it was obliged to do.

[72] The respondent declined to reply in the counter-application, (this because the respondent was met with a bare denial coupled with a contradiction from the applicant in its answering affidavit, and the applicant did not raise any dispute).

[73] The applicant adequately refuted for the purposes of this application, the respondent's damages claim in respect of the security cameras, the kitchen and solar

⁵⁶ Act 57 of 1993.

⁵⁷ The so called 'Plascon-Evans' test.

⁵⁸ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [26].

geysers and the guarding service, leaving damages and costs incurred in restoring the premises to its original condition, of approximately R100 256.62.⁵⁹

[74] Other than the applicant's denial and contradiction afore, the applicant was silent in respect of the items of damage comprising the amount of some R100 256.62. The applicant's denial thereof was undermined by the inherent contradiction, in effect rendering the applicant's version untenable.

[75] Accordingly, the respondent met the requirement of *prima facie* although open to some doubt, as regards the existence of damages to the premises.

[76] Both parties agreed that the costs of this application should follow the merits. The respondent sought to rely upon the provision of the lease for costs on the scale as between attorney and own client.

[77] The fact of an agreement between parties in respect of costs does not serve to oust the Court's discretion⁶⁰ in that regard. Essentially, the question of costs is a matter of fairness to both sides. The issue at hand was novel and absent the contractual provision, the circumstances of this case would not ordinarily require consideration of costs other than on the party and party scale. Nothing in the content or conduct of this matter would otherwise have given cause for attorney and own client costs. In the circumstances, I intend to order party and party costs.

[78] I grant the following order:

1. The application is dismissed with costs.
2. The respondent's hypothec in respect of the movables particularised on annexure Z to the applicant's founding affidavit, which movables are situated at stand 1234, corner Max and Tang Streets, Germiston Ext 13, Germiston, is hereby confirmed.

⁵⁹ Comprised of R18 500 to restore the offices to their original condition; R48 500 to restore the factory to its original condition; R13 893.80 for the replacement of the alarm system; R9 362.82 for a new security system and R10 000 to obtain an electrical compliance certificate.

⁶⁰ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA).

3. The order granted in terms of paragraph 2 immediately above, shall operate as an interim order interdicting the applicant from removing or causing the removal of the movables referred to on annexure Z pending finalisation of the action in the Gauteng Division, Pretoria, under case number 19589/2015, and the execution of such order.
4. The applicant is ordered to pay the costs of the counter-application.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT	Adv L Hollander
INSTRUCTED BY	Phillip Silver Swartz INC
COUNSEL FOR RESPONDENT	Adv H P West
INSTRUCTED BY	Brazington & McConnell
DATE OF HEARING	27 January 2016
DATE OF JUDGMENT	20 April 2016