

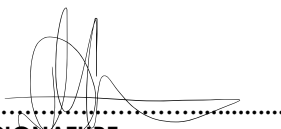
REPUBLIC OF SOUTH AFRICA



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

CASE NO: 21158/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


.....
SIGNATURE

DATE 22 May 2023

In the matter between:

FAST MOTION TRADE AND INVESTMENT (PTY) LTD

Plaintiff

and

AVON JUSTINE (PTY) LTD

Defendant

Neutral citation: *Fast Motion Trade and Investment (Pty) Ltd Vs Avon Justine (Pty) Ltd* (Case No: 21158/2019) [2023] ZAGPJHC 540 (22 May 2023)

JUDGMENT

MAHON AJ:

- [1] In July 2010, a lease agreement was concluded between New Frontier Properties (Pty) Ltd ("New Frontier") and the defendant, in respect of a certain property described as "Faritec House" situated in Gallo Manor ("the premises").
- [2] In terms of an amalgamation agreement concluded between New Frontier and the plaintiff (amongst others), New Frontier's rights and obligations in terms of the lease were ceded and assigned to the plaintiff and, ultimately, the plaintiff became the owner of the premises.
- [3] The lease agreement provided that the defendant was required to maintain the premises at its own cost. It also provided that if any alterations or additions were made by the lessee, it would, on the expiry of the lease, remove them and reinstate the premises to the condition it occupied before the additions and alterations were effected.
- [4] The lease terminated on the 28 February 2019 and the defendant vacated the premises.
- [5] The plaintiff contends that the defendant breached the lease agreement by failing to maintain the leased premises and by failing to re-instate the leased premises into the condition it occupied prior to any additions and alterations.
- [6] As a consequence of these breaches, the plaintiff claimed damages in an amount of R12 834 041.05, made up as follows:
- [6.1] R6 089 250.69 for reinstating the premises into its proper condition;
- and

[6.2] R6 744 790.36, for being unable to re-let the premises for the months of March to June 2019.

[7] Prior to the termination of the lease and seemingly in an effort to identify the work which was to be undertaken by the defendant in order to reinstate the premises to the required condition, the parties appointed Delta Built Environment Consultants (Pty) Ltd (“Delta”) to undertake an assessment of the condition of the building and to provide a report in relation thereto (“the Delta report”).

[8] The defendant contends that the parties had agreed that the defendant’s obligations to reinstate the property would be discharged upon completion of the work required to be undertaken as identified in the Delta report and that no further work would be required of the defendant. The plaintiff disputes this contention. I will return to this issue presently.

[9] The plaintiff called two factual witnesses, Mr Wilkie and Mr White, as well as an expert, Mr Bush. The defendant called Mr Van Rensburg as its factual witness and Mr Adams as an expert witness. A further expert, Mr Hartman, provided a report on behalf of the defendant in regard to the reasonable monthly rental payable in respect of the premises. The contents of Mr Hartman’s report were admitted by the plaintiff, thereby dispensing with the need to call Mr Hartman as a witness.

[10] Mr Bush and Mr Adams were called in order to address the question of quantum. They prepared expert summaries and a joint minute dated 8 October 2020. After further meetings between them on 16 and 17 March 2023, they ultimately produced a final joint minute on 23 March 2023 (“the joint minute”).

[11] The joint minute:

[11.1] takes the form of a spreadsheet comprised of two parts. Part A is said to consist of a series of items of work which, according to the plaintiff, are to be carried out in order to reinstate the property to the appropriate condition. Part B is said to comprise of items of work which have been carried out, the existence of which is said to be corroborated by documentary evidence of work undertaken;

[11.2] sets out various categories and sub-categories of work, the corresponding action required and the experts' respective views in regard to each item and its associated quantification. In Part B, the contractor who is alleged to have carried out the work in question is also identified; and

[11.3] comprises 63 line items of work in Part A and a further 20 items in Part B (some of the item numbers do not relate to items of work but to totals or sub-totals and the item numbers therefore run to 86).

[12] The experts concluded, subject to what is stated below, that in respect of the 83 line items of work making up the minute, the defendant is liable to pay the plaintiff an amount of R6 414 009,56 made up as follows:

[12.1] Defects total: R4 694 778,17

[12.2] Contingency (10%) R329 906,17 (applicable only to work yet to be undertaken);

[12.3] Professional fees (11%) R552 715,28;

[12.4] VAT (15%) R836 609,94.

[13] The experts qualified their opinion in respect of items 1, 4, 5, 13, 14, 18, 19, 23, 31, 37, 45, 74, 83 and 84 of the joint minute.

[14] Prior to the presentation of argument, the defendant indicated that it accepted liability for items 4, 23, 45, 74, 83 and 84 in the joint minute and that they were no longer in issue.

[15] During closing argument, the defendant indicated that it also accepted liability for items 31 and 37.

[16] Items 1, 2, 5, 13, 14, 18 and 19 remain in dispute, as does the plaintiff's claim for loss of rental.

[17] It is accordingly necessary to consider the parties' respective contentions in regard to each of these items of work. I shall thereafter deal with the loss of rental claim.

[18] However, I consider it necessary at this juncture, to address the defendant's defence to the effect that its reinstatement obligations were confined to those items of work which had been identified by Delta.

THE AGREED REINSTATEMENT OBLIGATIONS

[19] The express provisions of the written lease agreement concluded between the parties are not in dispute. This agreement required the defendant to reinstate the property into the condition which it occupied at the commencement of the lease.

- [20] As previously stated, the defendant contends that the parties had agreed that the defendant's obligations to reinstate the property would be discharged upon completion of the work required to be undertaken as identified in the Delta report and that no further work would be required of the defendant.
- [21] The defendant further contended that, at a meeting between the parties which took place on 15 January 2019, the parties "... *amplified the said report in the respects as set out in the email confirmations dated 25 January 2019...*", attached to the defendant's plea marked "A" and "B".
- [22] It is difficult to understand how an agreement which limited the defendant's obligations in this regard, in the absence of a valid variation of the written lease agreement or a waiver, could validly operate in conjunction with the written lease agreement – especially where clause 32.1 of the agreement provided that no alteration or variation of the lease would be of any force or effect unless it was recorded in writing and signed by both the lessor and the lessee.
- [23] The defendant did not rely upon a waiver and, although it sought to rely on an variation to the agreement in argument, it accepted that a variation to the agreement had not been pleaded. In an attempt to overcome this difficulty, the defendant relied upon the decisions in **Courtis Rutherford and Sons CC v Sasfin Pty Ltd (1999) 3 ALLSA 639 (C) at 649** and **E C Chenia and Sons CC v Lame and Van Lerk (2006) JOL 16965 (SCA) at paras 12 and 13**. These judgments echo the principle which rose to prominence more than 80 years ago in **Robinson v Randfontein Estates G.M. Co Ltd 1925 AD 198** and **Shill v Milner 1937 AD 101**, namely that:

“The importance of pleadings should not be unduly magnified. The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been...”

[24] Even if I were to assume that a full enquiry into the question of variation had been fully canvassed and investigated, I would still have to be persuaded that the variation contended for is sustained on the facts. This requires an examination of the import of the confirmation emails annexed to the plea marked “A” and “B”.

[25] The enquiry begins with the email from a certain Mr Murray which was sent to all parties at 10:41 on 25 January 2019. It states as follows:

“Rob / Ian

I refer to the meeting held at the Avon offices on 15th January. The meeting was attended by Rob Wilke, Clinton White, Ian Van Rensburg, Dale Holshausen and Kieron Murray.

I felt that it was a very productive meeting and as agreed, I understand that the Avon and Tri-Colour representatives have subsequently met on the site to work through what is needed to be done to the building to allow for successful hand over at lease end date. For absolute clarity, I confirm what was agreed on the 15th January as follows...”

[26] The email then lists a series of bullet points, each describing what had apparently been discussed in relation to outstanding items of work.

- [27] The email was responded to by Mr Wilkie of the plaintiff, on the same day, in the following terms:

“Hi Kieron

I agree with the below, thank you.

Just for clarity, by minor repairs we mean snagging of work already done...”.

- [28] The defendant’s argument, as I understand it, is that these emails constitute a written recordal of what had been orally agreed at a meeting between the parties which took place on 15 January 2019 and that, having been reduced to writing in the form of email correspondence, they constituted a valid variation to the lease agreement in compliance with the non-variation clause.

- [29] I readily accept that an exchange of email correspondence between the parties which purports to vary the terms of a written agreement will satisfy the requirement of a non-variation clause which requires a variation of the agreement to be contained in writing and signed by the parties.

See Spring Forest Trading Cc v Wilberry (Pty) Ltd t/a Ecowash and Another 2015 (2) SA 118 (SCA)

- [30] However, I am unconvinced that the email exchange indeed records an agreement to vary the provisions of the written lease agreement in the manner contended for by the defendant.

- [31] As a starting point, the email exchange does not expressly state that the defendant’s obligations would be limited to what was contained in the Delta report, as amplified by the discussions held on 15 January 2019. It merely identifies a number of items of work and records what the parties’ respective

understanding was in relation to how *those* items of work were to be carried out for purposes of compliance with the written lease agreement.

[32] If the plaintiff was willing to agree to the curtailment of its rights under the lease agreement, one would have expected the defendant to ensure that that was expressly recorded. Indeed, when the plaintiff subsequently made it clear in its email of 25 February 2019 that, in its view, “... *the Delta report is simply a guide line for the re-instatement of the building and does not supersede the lease agreement*”, Mr Van Rensburg appears to have suggested that the defendant’s obligations were “*well documented and minuted*”. Whilst this response must, of course, be seen in the context of an assertion by Mr Van Rensburg that the defendant’s obligations had been narrowed, the fact remains that, despite a number of issues being “*well documented and minuted*” the curtailment of the plaintiff’s rights under the agreement, does not appear from the documents of record.

[33] But if this were not enough to dismiss the notion of a variation on the terms contended for, then the issue can be put to bed with reference to Mr Van Rensburg’s own *ipsissima verba*. Mr Van Rensburg expressly conceded that his understanding of the prevailing position was that if a legitimate defect was identified but not included in the Delta report, the defendant would not be ‘*off the hook*’ in respect of that defect. Counsel for the defendant submitted that Mr Van Rensburg’s subjective opinion in this regard was irrelevant. I disagree.

[34] It is true that a witness’ subjective interpretation of a written agreement is not admissible when attempting to interpret the meaning of a written document. However, this is a different scenario. Presently, one is not concerned with the

interpretation of a written document, but with the establishment of an oral agreement, the key feature of which does not appear from the written recordal relied upon.

[35] Therefore, even if I were inclined to permit reliance upon the defence of an alleged variation, notwithstanding that it had not been pleaded, I would reject it on a conspectus of the facts before me.

[36] I cannot accept the contention that the parties agreed that the defendant's obligations to reinstate the property would be discharged upon completion of the work required to be undertaken as identified in the Delta report and that no further work would be required of the defendant.

[37] The matters discussed on 15 January 2019, as recorded in the subsequent email exchange of 25 January 2019, merely served to capture the discussion which the parties had had in relation to the manner in which the items of work referred to, would be carried out.

[38] I turn now to each of the items which remain in dispute.

ITEMS 1 AND 2

[39] Line item 1 consists of internal painting work and line item 2 is the repair of cracks.

[40] The defendant contends that it should be credited for other internal painting work allegedly undertaken by a contractor by the name of GFC (Gauteng Furniture Manufacturers) and for other work relating to the repair of cracks, chips and loose paint.

- [41] In regard to Item 1, the experts agreed that the defendant is liable to pay the plaintiff an amount of R631 198,89 (which includes a credit of 425m² for painting work), subject to the qualification that if the defendant is able to prove that other additional painting work was done by GFC, then the value of such work ought to be deducted from the amount payable.
- [42] Mr Van Rensburg testified for the defendant. Under cross examination he stated that he was present when GFC painted the interior and exterior of the building, prior to vacating same and that he could confirm that GFC did indeed paint the interior and exterior of the building. The defendant's expert was, however, of the view that this painting work could not be quantified in the light of the absence of sufficient documentary evidence in regard to the quantification of this activity.
- [43] In evidence, reference was made to a quotation from GFC for R12 285,00 in respect of painting work and another one for R750,00 which appears to relate to an undercoat.
- [44] In support of his view that painting work ought to be deducted, Mr Van Rensburg referred to what was called the "GCS Document", which apparently reflected the work undertaken by GCS. I was urged to infer from this document that GCS had undertaken additional painting work, the value of which had to be deducted from the amount payable by the defendant in respect of Item 1.
- [45] The difficulty with that proposition, however, is that the document does not make any attempt at quantifying the work with reference to any rates or quantities. Moreover, although the document apparently shows locations, none of the defendants' witnesses attempted to identify, with reference to this document,

what portion related to the work which was to be deducted and the extent of such work.

[46] No doubt mindful of this difficulty, the defendant's counsel sought to argue that if the quantity of work performed by the defendant could not be determined, then the experts were unable to state the amount of work that needed to be done when the defendant vacated the premises and that the plaintiff's claim for this work ought to fail for want of quantification.

[47] This submission is in conflict with what the experts had agreed. Contrary to suggesting that an amount payable to the plaintiff in regard to the painting work could not be quantified, they in fact agreed on the plaintiff's entitlement subject to the qualification that such amount fell to be reduced by such amount of additional painting work as could be demonstrated. The amount of such additional painting work was not demonstrated and the amount regarded by the experts as having been proved, that is, the amount of R631 198,89, is thus payable.

[48] Insofar as Item 2 is concerned, the defendant sought to similarly argue that this amount fell to be reduced by proven work undertaken by GCS in regard to the repair of cracks.

[49] Again, however, it was clear that the defendant sought to rely solely on the GFC document referred to above. Its defence in relation to Item 2 must accordingly fail for the reasons already mentioned in respect of item 1.

[50] The amount of R28 080,00 is accordingly payable in respect of Item 2.

ITEM 5

[51] I have already dealt with the defendant's defence relating to the alleged variation and the reasons why I do not accept it. Item 5 is the only item which is presently in dispute which is implicated by that finding. In light of my finding on the variation, I must necessarily find that Item 5 was required to have been carried out by the defendant.

[52] The only question which remains in relation to this item relates to the manner in which this item of work was to be carried out.

[53] Item 5 is described in the joint minute as "*Repaint all louvres (20mm) to achieve uniformity*".

[54] There was a further email exchange between the parties dated 25 January 2019 which dealt with louvres. Paragraph 4 of the e-mail sent by Mr Van Rensburg reads as follows:

"There was a question from one of the contractors on a bend louver. Avon will reinstate or try and match existing as close as possible. But let's just all keep in mind matching existing is not always possible. The contractor then mentioned that we need to then replace all the louvers. This will by no means be the case. Avon will not be replacing every louver in the building just cause we cannot match existing. It now feels that there is nit-picking on things that should we rather find a common solution for both parties. Unrealistic expectations on matching existing cannot be done. Especially on things like louvers. We have attic stock of certain items. We will try our utter best to match existing. However if we cannot match existing it would be as close as possible."

[55] Mr White responded on behalf of the plaintiff by stating: "*Please replace all bent or damaged louvers. These should match existing louvers as close as possible.*"

[56] Under cross-examination, Mr Van Rensburg stated that his reliance upon an obligation to "*match existing as close as possible*" related to item 4 ("*Replace*

damaged/bent louvres") and not to item 5. The defendant was therefore not excused from re-painting the louvres. He also accepted that that if the experts determined that the louvres required repainting, then the defendant was obliged to have re-painted.

- [57] The experts determined that, subject to any agreement to the contrary, the defendant was liable for an amount of R46 710,00 in relation to this item. No agreement to the contrary has been established and the defendant is accordingly liable for this amount.

ITEM 13

- [58] Item 13 is described in the joint minute as "*Remove heavy commercial carpet tiles including skirting*".

- [59] The joint minute reflects that an amount of R29 131,10 is payable by the defendant unless it can be proved that the parties had agreed that certain areas of carpet tiles could permissibly remain in place.

- [60] On this score, the defendant again relies on the contents of the email exchange recording the agreement reached on 15 January 2019, in which the following is stated:

"Vinyls to be removed in certain areas (pink vinyls). Common areas to stay in place and all vinyls that are neutral colour.

Re-instatement will be done according to Avon's plans attached."

- [61] Under cross-examination, it was put to Mr Van Rensburg that the reference to common areas could not have been intended to refer to open office areas and that it could only have referred to common areas in the typical sense of the

phrase. According to my understanding, the term “*common areas*” normally refers to the areas in a premises which would typically be available for use by more than one tenant.

[62] Mr Van Rensburg accepted that the phrase “*common areas*” was perhaps an unfortunate turn of phrase, but insisted that, in *his* business, the term included open office areas other than board rooms or closed offices and that “*everyone’s understanding of common areas could be different*”.

[63] It appears therefore that Mr Van Rensburg’s version was that, what *he* intended, was a reference to common areas in an atypical sense and that the phrase ought to be understood to mean something other than what the phrase’s ordinary meaning should be.

[64] I am willing to accept that parties may use terminology in their dealings with one another which is intended to bear a meaning which is different to what would customarily be understood. However, in order for the defendant to succeed with this defence, it is incumbent upon it to establish that the plaintiff also understood the meaning of the phrase in that way.

[65] It was not suggested by Mr Van Rensburg that the plaintiff’s representatives shared his understanding of the phrase in question. On the contrary, Mr Van Rensburg, despite having accepted that the phrase would ordinarily be understood in a manner which is different to what was intended by him, emphasised that the meaning which he sought to attribute to the phrase was the meaning “*within my [his] business*”.

[66] There was no evidence to suggest that the plaintiff shared Mr Van Rensburg's understanding of the term and, as pointed out by the plaintiff's counsel in argument:

[66.1] Mr Wilkie, of the plaintiff was not cross-examined on this alleged agreement;

[66.2] when Mr White was cross-examined, it was simply put to him that the carpets had been cleaned, not that there was an agreement not to remove them; and

[66.3] similarly, when Mr Bush was cross-examined, it was not suggested that there was an agreement not to remove the carpets. It was put to Mr Bush that the defendant had complied with its obligation because it *had* removed carpets.

[67] In the circumstances, the alleged agreement that certain areas of carpet tiles could permissibly remain in place, as contemplated in the experts' qualification in regard to item 13, has not been established.

[68] The amount of R29 131,10 is accordingly payable in regard to item 13.

ITEMS 14 AND 18

[69] These items relate to the deep cleaning of carpets, tiles and basement floors.

[70] The experts have qualified these line items by stating that:

"The experts agree that in the absence of the Defendant providing evidence of the Deep Cleaningthe Defendant is liable."

[71] Mr Van Rensburg testified that the basement and offices were deep cleaned. He testified that he was present at the time and personally witnessed that the deep cleaning took place.

[72] However, numerous photographs were considered which reflected a distinct lack of deep cleaning. Indeed, the experts view was informed by numerous photographs of the property which were taken at the time that the defendant vacated the premises and it was on the basis of these photographs that they concluded that the carpets required cleaning.

[73] What is more, Mr Van Rensburg himself accepted that in a number of instances, the photographs depicted an unacceptable level of cleaning.

[74] The evidence corroborates the view held by the experts that the defendant is liable for this item. The vague confirmation that cleaning had been undertaken in Mr Van Rensburg's presence is not sufficient to rebut the view of the experts on this score.

[75] The amounts of R11 836,80 and R17 920,00 are payable in respect of these items.

ITEM 19

[76] Item 19 is described as "*Install waterproofing on exterior balconies and reapply epoxy*".

[77] The experts have qualified this item to the extent that it may be proved that a different waterproofing solution was agreed to between the parties.

- [78] The first point which is raised by the defendant is that this item differs from the waterproofing remedy which is referred to in annexure POC5 to the particulars of claim. On this basis, the defendant contends that the claim for waterproofing should be disallowed as a case was not pleaded for this line item.
- [79] It seems to me, however, that even if annexure POC5 to the particulars of claim contemplated a different waterproofing solution, this has been overtaken by the subsequent agreement between the experts to the effect that the defendant is liable for this item (subject, of course to the qualification referred to above). The experts met and specifically discussed this item on a number of occasions and the issue was fully dealt with in evidence and in argument (See **Robinson v Randfontein Estates** and **Shill v Milner supra**).
- [80] The defendant contends that the agreement regarding the waterproofing is found in the email from Mr Van Rensburg to Mr White dated the 25th of January 2019. Paragraph 2 of the said email records that:
- “Tiles on the balconies we will strip existing paint. Please let us know if you would like us to repaint. We suggest using a waterproofing epoxy.”*
- [81] The response from Clinton White is *“Please use a waterproof epoxy”*.
- [82] The evidence established an understanding between the parties that what was required in regard to this item was that the tiles would be stripped and that a waterproofing epoxy would be applied. The question, however, is what that entails.
- [83] The email, on its own terms, did not *only* require the application of epoxy. It required a stripping of the existing paint and the application of epoxy thereafter. The evidence of Mr Bush, which was endorsed by Mr Adams under cross-

examination, was that this process would necessarily involve stripping of the paint and the existing epoxy, honing of the tiles, “*making good*” the joints and then re-applying epoxy. Mr Adams also accepted that the appropriate quantity to be applied was 390 square metres.

[84] In regard to these activities, the experts were in agreement as to the rates and quantities which were applicable, namely:

[84.1]	Stripping epoxy	R75/m ²	R29 250,00;
[84.2]	Honing tiles	R250/m ²	R97 500,00;
[84.3]	Making good joints	R15/m ²	R5850,00;
[84.4]	Re-applying epoxy	R230/m ²	R89 700,00
			<u>R222 300,00</u>

[85] In light of my finding in regard to the agreement relating to Item 19, the amount payable by the defendant in regard to this item is R222 300,00.

THE RENTAL CLAIM

[86] The plaintiff claims that as a result of the failure on the part of the defendant to re-instate/maintain the Property, the plaintiff was unable to re-let the property for the months of March 2019 to June 2019.

[87] The expert report of the defendant’s valuer, Mr Hartman, is admitted. He opines that a fair market-related monthly rental for the premises is R524 175,00.

[88] The issue in dispute relates to the reasonable period during which it may be said that the plaintiff could have been prevented from letting the property as a result of the need to carry out the reinstatement works.

[89] The defendant's counsel submitted that the plaintiff had suffered no loss because it was clear that the plaintiff did not intend to rent out the property for the months March to June 2019 as it intended to accommodate a prospective tenant who wished to lease the entire office park – Adcorp. This was said to be evident from the following:

[89.1] the defendant requested an extension of the lease for one month, that is to the end of March 2019. The request was refused by the plaintiff in a letter dated the 18th of October 2018, paragraph 2;

[89.2] Mr Wilke testified that it was refused as the plaintiff was in discussions at the time with a prospective tenant. He testified that it was too high a risk to allow the defendant to remain for a further month. The tenant was identified as the Adcorp group;

[89.3] the written lease agreement subsequently entered into between Adcorp and the plaintiff provided for:

[89.3.1] a commencement date of 1 January 2020;

[89.3.2] a beneficial occupation date of 1 September 2019; and

[89.3.3] early occupation from 1 July 2019 to the 31st August 2019 at a reduced rental amount of 50%.

- [90] In the result, so the argument goes, because the plaintiff only intended to commence leasing the Property to Adcorp from 1 January 2020 and from that date to charge Adcorp the full rental, no rental can be recovered for the period during which the reinstatement works were being carried out.
- [91] Apart from the glaring fact that none of the defendant's contentions in relation to the Adcorp lease was put to any of the plaintiff's witnesses, I am in any event unpersuaded by the defendant's reasoning on this aspect.
- [92] This is so because I am enjoined to assess the plaintiff's damages as at the date of the breach. In this instance the date of the breach is 28 February 2019, when the defendant failed to return the property in the condition required.
- [93] In **Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another 1985 (1) SA 248 (W)**, a lessor terminated a lease as a result of a breach by the lessee and sought the lessee's immediate ejectment. After a period of holding over, the lessee ultimately vacated the property, leaving it in a state unfit to enable the lessor to relet the property for some time thereafter.
- [94] The lessor alleged that lessee's refusal to vacate the premises was wrongful and that the lessor had suffered damages. The lessee alleged that by reason of its holding over, the lessor was able to, and did, conclude a financially more advantageous lease than otherwise would probably have been the case. According to the lessee, the lessor was financially better off, and the lessee's breach, in failing timeously to vacate, had not resulted in the lessor suffering any damages.

- [95] The court, *per* Nestadt J, held that the lessor's damages were not to be assessed with reference to the more favourable lease. The benefits which flowed from the later lease were to be disregarded as being collateral and fortuitous and therefore *res inter alios acta* because the lessor's damages had to be assessed as at the date of the breach.
- [96] By parity of reasoning, I am disinclined to have regard to what may fortuitously have arisen in regard to the Adcorp lease. The question of whether or not the plaintiff was able to re-let the premises as a result of having to undertake the reinstatement work and the period during which it was unable to do so, must be objectively assessed as at the date of the breach, without regard to the subsequent Adcorp lease.
- [97] As for the period which it would reasonably have taken for the reinstatement work to be carried out, I must observe that this is entirely dependent upon the extent of the resources deployed to carry out the reinstatement work. The greater the number of teams employed, the faster the work can be carried out, potentially at a greater cost.
- [98] Unfortunately, the plaintiff's expert's estimation of 2 to 3 months was based entirely on his "*experience*" but was not supported by any underlying empirical evidence or meaningful reasoning. There was no programme presented which could have established a reasonable timeline detailing the various activities to be undertaken with reference to any form of critical path. It was also not clear which of the activities required in order to complete the reinstatement work could have been carried out concurrently.

[99] The defendant's estimation of 20 business day was equally unsupported by any empirical data. It also appears that this period had assumed optimal resources, planning, sequencing and programming, such that an additional float of 5 days could be assumed. This much was conceded by Mr Adams.

[100] In the absence of any underlying supporting data or reasoning, I am unable to accept the plaintiff's expert's estimation of 2 to 3 months. In light of the defendant's concession in regard to at least the first 25 business days (20 business days and 25 days' float), I can award no more than what was conceded.

[101] I would accordingly grant damages for lost rental in an amount equal to 25 business days. The figure can be ascertained by dividing the agreed monthly rental amount of R524 175,00 by the number of business days in the month immediately following the date that the property was vacated, and then multiplying that figure by 25 days, as follows:

[101.1]	Agreed monthly rental:	R524 175,00
[101.2]	Divided by 21 business days	
	(during the month of March 2019)	R24 960,71 (per day)
[101.3]	Multiplied by 25, equals	R624 017,86

FINAL ANALYSIS

[102] In light of the agreements reached between the experts, the concessions subsequently made by the defendant and my findings on the remaining items

in dispute, as set out above, the total amount due to the plaintiff from the defendant as damages is R6 832 007,02 calculated as follows:

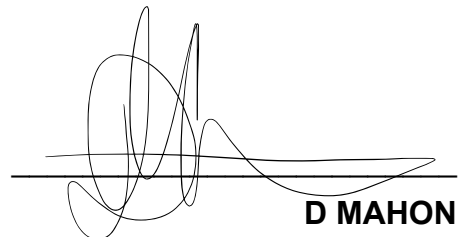
Total amount for works as per Part A of joint minute (prior to deduction as a result of findings above)	R3 299 061,70
Less reduction of Item 19 from R369 022,50 to R222 300,00 as per findings above	-R146 722,50
Equals Sub-Total for works as per Part A of Joint Minute	<u>R3 152 339,20</u>
Add Contingency of 10% (only applicable to Part A)	R315 233,92
Add total amount for works as per Part B of Joint Minute	R1 395 716,47
Equals Defects Sub-Total	<u>R4 863 289,59</u>
Add Professional Fees @ 11%	R534 961,85
Add VAT @ 15%	R809 737,72
Equals Total for Defects Claim	<u>R6 207 989,16</u>
Lost Rental	<u>R624 017,86</u>
<u>TOTAL DAMAGES</u>	<u>R6 832 007,02</u>

[103] In its particulars of claim, the plaintiff sought that costs be awarded on the attorney and client scale. This was not pressed in argument and I do not consider any case to have been made out for costs on a punitive scale. Costs will accordingly be awarded on the party-and-party scale.

[104] I accordingly grant judgment against the defendant in favour of the plaintiff for:

1. Payment of the amount of R6 832 007,02;
2. Interest on the aforesaid amount at the prescribed legal rate from date of *mora* until date of final demand; and

3. Costs of suit on the party-and-party-scale.



D MAHON
Acting Judge of the High Court
Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 22 May 2023.

APPEARANCES:

For the plaintiff: Adv D Baguley

Instructed by: Slabbert Venter Yanoutsos Inc.

For the defendant: Adv M Smit

Instructed by: Cliffe Dekker Hofmeyr Inc.

Date of hearing: 3 to 7 October 2022 and 27, 28 and 31 March 2023

Date of judgment: 22 May 2023