

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 2335/19

In the matter between:

JOHN MICHAEL (PTY) LTD

Applicant

v

BEX HOTEL (PTY) LTD

Respondent

Neutral citation:

Coram: Swanepoel AJ

Heard: 13 September 2019

Judgment delivered: 19 September 2019

JUDGMENT

[1] The applicant is a private company, John Michael (Pty) Ltd, which is the registered owner of certain immovable property more fully described as Erf 2399 Summerstrand, Nelson Mandela Bay Municipality, Eastern Cape (*“the property”*)¹. The respondent concluded a lease with the applicant on 3 December 2015 at Port Elizabeth, and carried on the business of a hotel from the property, known as the Summerstrand Hotel.

[2] In this application, the applicant seeks the ejectment of the respondent from the property and of all those holding occupation under it, following the cancellation of the lease. The applicant avers that the respondent had committed material instance of breach of the lease, which entitled the applicant to cancel the lease and to retake possession of the property.

¹ Applicant's ownership of the property is not in dispute.

[3] The respondent opposes the relief sought, contending that the parties never intended to hold each other to the terms of the admittedly concluded lease and asserting further, somewhat inconsistently, that the monthly rental as stipulated was not the actual rental and was only supposed to cover the amount of a bond repayment to Nedbank in respect of the property.

[4] In the respondent's heads, the issue to be determined is identified as being "*whether the parties intended the written lease, and in particular the payment of the rental, to be binding on them*".

[5] The respondent contends that the parties "*never intended that the relationship between them would be a commercial one in the sense that applicant would lease the premises to the Respondent for profit*".² At the end of the financial year there would be a balancing of the books, as it were, and the respondent was "*never expected to actually comply with the terms of the written lease, nor did it*".³

[6] The question posed in paragraph 17 of the respondent's heads: "*what was the nature of the contract and what were the terms*", is answered by reference to paragraph 5 (on page 103) of respondent's answering affidavit as follows:

"The two entities existed for tax efficient reasons and were never intended to be lessor and lessee, the reference to a "lease" being a misnomer".

[7] With reference to a preceding oral lease which had been in place from 1995 to 2015, with terms allegedly "*not detailed by either party (probably because there was never any agreement in this regard)*", it is argued⁴ that "*had it not been for the Nedbank mortgage bond, the so-called oral lease would probably have continued to*

² Respondent's heads, paragraph 16.

³ *Ibid.*

⁴ In paragraph 17 of respondent's heads.

this day". It is further suggested in respondent's heads,⁵ that "*what was probably intended by the persons who thought up the scheme (in 1995) was a partnership*".

[8] Applicant's registered ownership of the property and the conducting of the business of a hotel; the conclusion of the written lease; its duration (with a renewal period of 10 years from 1 December 2015), as well as the rental as stipulated in writing, are all admitted.

[9] The duration period,⁶ as well as the rental for the period commencing 1 December 2015 of R380 354.18 per month, to be paid free of deduction or set-off as required on the due date, was specified in annexure "A" to the lease (record page 53 read with clauses 3 and 4 on pages 31 and 32).

[10] Of relevance to the contentions of the respondent are the following admitted provisions of the lease, namely clauses 18.1 to 18.4:⁷

"18.1 This lease constitutes the whole agreement between the parties and no warranties or representations, whether express or implied, not stated herein shall be binding on the parties.

18.2 No agreement at variance with the terms and conditions of this agreement and no consensual cancellation hereof or any of the terms hereof shall be binding on the parties unless reduced to a written agreement signed by or on behalf of the parties.

18.3 No relaxation or indulgence which the Lessor may show to the Lessee shall in any way prejudice or be deemed to be a waiver of its rights hereunder, and in particular, no acceptance by the Lessor of rent after due date (whether on one or more occasions) nor any other act or omission by the Lessor or its servants shall preclude or estop it from exercising any rights enjoyed by it hereunder by reason of any

⁵ Paragraph 18.

⁶ Which also refers in annexure "A" to the preceding period from 1995 to 2015 (record page 53).

⁷ Record page 47.

subsequent payment not being made strictly on due date or by reason of any subsequent breach by the Lessee.

18.4 *Unless otherwise stated by the Lessor in writing, the receipt by the Lessor or its agent of any rent or other payment shall in no way whatsoever prejudice or operate as a waiver, rescission or abandonment of any cancellation or rights of cancellation effected or acquired prior to such receipt”.*

[11] Accordingly, the lease contains an integration provision, an entrenched non-variation clause requiring writing and provisions expressly excluding reliance on waiver or estoppel. When a contract is reduced to writing, the writing is in general regarded as the exclusive memorial of the transaction. In a suit between the parties to such a contract, no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence. *Vide: Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43* at 47.

[12] The respondent's contentions to suggest that the lease is something other than a lease, attracts a substantive *onus*: **Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A)** at 615 to 616; **Michau v Maize Board 2003 (6) SA 459 (SCA)** at 464 E.

[13] In motion proceedings, a party such as the respondent *in casu*, which has admitted the conclusion of a written lease, will be faced with considerable difficulty to acquit itself of the onus to persuade a court that the lease is not a lease, but something different. (Compare **Michau v Maize Board**, *supra*, at 464 D). The well-known approach to disputes on affidavits, as enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**, presents a major evidential hurdle to the respondent.

[14] As a matter of substantive law, the validity of **Shifren**-clauses⁸ is beyond doubt – contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject-matter of a contract, which they may alter only by again resorting to writing. *Vide*: **Brisley v Drotsky 2002 (4) SA 1 (SCA)** at paragraph [89], per Cameron JA.

[15] The parties have *in casu* recorded their lease agreement in a document which they themselves have described as their “*whole agreement*”. Consequently, the respondent’s contention that it is not a “commercial” lease and supposedly not a binding document, amounts to evidence being tendered on affidavit which contradicts or modifies the meaning of the lease. This amounts to tendering inadmissible evidence: **Johnson v Leal 1980 (3) SA 927 (A)** at 943 B.

[16] Evidence of the intention of the parties relating to negotiations or understandings prior to the conclusion of the lease, are also inadmissible: **Van Wyk Rottcher’s Saw Mills (Pty) Ltd 1948 (1) SA 983 (A)** at 991; **Van Aardt v Galway 2012 (2) SA 312 (SCA)** at paragraph [9]; **The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA)** at paragraphs [76] and [77].

[17] The respondent asserts correctly that an established exception to the parol evidence rule⁹ relates to proof of a simulated contract, with reference to **Kilburn v Estate Kilburn 1931 AD 501** at 507. That may be so, but the respondent, which has not brought any counter-application, merely asserts that an arrangement was concluded between the shareholders of the applicant and the shareholders of the respondent to the effect that the respondent would be responsible for the day-to-day

⁸ Derived from the decision in **SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren 1964 (4) SA 60 (A)**.

⁹ **Johnson v Leal**, *supra*.

affairs of the hotel business, with the respondent *“intended to be the income generating entity and the property company (the applicant) to build asset value”*.¹⁰

[18] It is vaguely asserted that this arrangement was suggested by the auditors of two companies, for *“fiscal”* reasons, and that *“[I]n short, the lease between the applicant and the respondent was never intended to be a commercial transaction in terms of which the applicant made a profit”*.¹¹

[19] However, it is expressly asserted in the respondent’s answering affidavit that a Nedbank loan secured by a mortgage bond registered over the property was *inter alia* conditional *“on there being a written lease agreement between the applicant and the respondent”* (in place).¹² In the replying affidavit, this is confirmed:

“It furthermore required that this lease agreement be ceded to it as security. Nedbank, being the bankers of both the applicant and the respondent, conducted a due diligence enquiry before agreeing to the loan and satisfied itself that payments were being made between the two entities in respect of rental. Should this not have been the case, Nedbank would not have granted the loan as the applicant would not have had the means to service the monthly mortgage bond repayments”.

[20] That payments had been made by the respondent to the applicant; that the applicant’s primary source of income was rental from the lease and that the loan from Nedbank to the applicant was granted on the basis that it would receive such income, are not in dispute.¹³ The averments that *“such rental that was payable”* (paragraph 5.18, paragraph 107) *“was dealt with by the auditors by way of authorized loan account book entries”*, if anything affirm the existence of a lease.

¹⁰ Record pages 103 and 104.

¹¹ Paragraph 5.6 on page 105 of the record.

¹² Answering affidavit, paragraphs 5.11 and 5.12 on page 106.

¹³ Record page 106.

[21] The history relating to disputes between the deponent's own sister (Inge), leading to the deponent being declared a delinquent director, does not change the material facts. However, *en passante*, on 10 April 2018 this Court per Majiki J, did declare the respondent's deponent, Mark Keiser Hartmann, a delinquent director in terms of section 162 (5)(c) of the Companies Act 71 of 2008, and removed him as a director. However, Hartmann applied for leave to appeal, which application effectively suspended the court order (paragraph 5.23 of the answering affidavit, record page 108).

[22] Applying **Plascon-Evans**, and having regard to:

- (1) the admitted, common cause or undisputed facts;
- (2) the *onus* resting on the respondent,

I find that the respondent has failed to show that the lease admittedly concluded ("TJH1", record pages 27 to 57), is not valid, or is anything other than a lease in respect of the property.

[23] Has the applicant showed that the lease has been validly cancelled, entitling the applicant to re-take possession of the property *qua* owner? The applicant established that:

- (a) respondent failed to pay the rental due and remained in default for seven days after written notice duly delivered in the manner stipulated by clause 17.1.1 of the lease (record page 45) – respondent itself avers that it only paid "*a round figure of R200 000 per month*" (paragraph 13.3 on page 113);
- (b) the respondent as lessee "*repeatedly breached*" a term of the lease (by short-paying or by not paying as stipulated);

- (c) Nedbank took judgment against the respondent for a total sum of R10 478 995 (see paragraph 14.1, page 115 read with the founding papers, paragraph 9.2, pages 11 and 12);
- (d) another company, Kallvest (Pty) Ltd t/a Kallvest Security, also obtained default judgment against the respondent in the sum of R299 261.73 together with interest and costs, on 31 July 2009 (paragraph 9.3 on page 12, which is not denied in paragraph 15 of the answering papers on page 116).

[24] Although the respondent seeks to challenge the applicant's legal entitlement to have cancelled the lease, the existence of the demand of 1 April 2019 and of the applicant's notice of cancellation of 31 July 2019 are not denied.

[25] The applicant merely has to establish one legally valid ground for cancellation of the lease. Non-payment of the stipulated rental is not disputed and the receipt of the cancellation letter is also not disputed. That Nedbank has taken judgment against the respondent for a significant amount in excess of R10 million, is further undisputed. Respondent contends that the judgment relates to the respondent's liability as surety, but the lease does not preclude cancellation if judgment was taken for this purpose.

[26] The primary basis on which the respondent seeks to disavow any liability under the lease, namely that the admittedly concluded lease was not an enforceable agreement, because it was not a "*commercial*" lease or was more indicative of a partnership agreement, has not been established by the respondent.

[27] The evidence tendered by respondent's deponent as to what the lease really was, or was meant for, or what it was not meant for, is inadmissible. See further:

KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at paragraph [39].

[28] The respondent has not acquitted itself on motion of the *onus* to establish simulation.

[29] It follows that the applicant should be successful in obtaining an order against the respondent and those occupying under it, to vacate the applicant's property.

[30] During argument, the respondent belatedly sought to rely on an arbitration clause contained in the selfsame lease of which the validity is being challenged. However, an immediate response to this approach is that it amounts to approbating and reprobating, or viewed differently, of a guilty contracting party inadmissibly seeking compliance by the innocent party with a term of the agreement (in this instance, an agreement disputed by the respondent). This is legally unsound. The respondent cannot have it both ways. He has made his bed (pertinently challenging and in effect repudiating the validity and enforceability of the lease) – now the respondent must lie in its bed (it cannot seek to hold applicant to a term of the very agreement the respondent itself has repudiated). Compare: **Janowsky and Others v Payne 1989 (2) SA 562 (CPD)** at 564 I to J, referring to **Ross T Smyth & Co Ltd v T D Bailey, Son & Co [1940] 3 All ER 60 (HL)**; **Vromolimnos (Pty) Ltd and Another v Weichbold and Another 1991 (2) SA 157 (C)** at 163 C to D; **CB Bradfield: Christie's Law of Contract, Seventh Edition**, LexisNexis, 612. Respondent's short-payment is moreover, undisputed. Performance being tendered substantially inconsistent with such party's actual obligations constitutes material breach, entitling the counterparty to resile from the agreement.

[31] From the bar, another arrow was added to the respondent's weakening bow. It was contended that in the event of the Court finding that the lease was a lease and

enforceable at that, the applicant should have referred the matter to arbitration. The respondent now tried to raise this as a defence. But this again amounts to the respondent seeking to have it both ways. In any event, such a referral to arbitration was never pertinently and procedurally correctly pleaded, probably by reason of its inherent inconsistency with the primary defence raised.

[32] Even if the severability principle is accepted (**Wayland v Everite Group 1993 (3) SA 946 (W)**; **Cool Ideas 1186 CC v Hubbard and Another 2014 (8) BCLR 869 (CC)**, paragraph [46], footnotes 39 and 129) and one takes account of the fact that vitiation of the lease as a whole – by fraud or otherwise – is not in issue (**Northwest Provincial Government and Another v Tswaing Consulting and Others 2007 (4) SA 452 (SCA)** at paragraph [13]), the dispute resolution clause does not anticipate arbitration to resolve the validity of the lease itself. The clause does not even refer to “*any question as to the enforceability of this lease*”, which is often used to allow and anticipate such an arbitrable dispute (compare: **North-East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] 3 All SA 291 (SCA)**). The clause *in casu* (clause 23, record pages 48 and 49) refers to questions of interpretation; implementation; rights and obligations; termination and also to rectification. The dispute resolution clause as contained in the lease, was *not* intended to cover the validity or enforceability of the lease itself.

[33] It does not suffice to merely refer during argument to the existence of an arbitration clause in this manner: **PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA)** at 72. No arbitrable dispute was ever correctly and pertinently identified: **Telecall (Pty) Ltd v Logan 2000 (2) SA 782 (SCA)**, paragraphs [11] and [12] and in any event, no stay of the

proceedings was applied for as envisaged by section 6 of the Arbitration Act 42 of 1965.

[34] That was then the penultimate attempt of respondent's representative to ward off the inevitable. The last one was a request for a referral to oral evidence, but it was not put forward with persuasion. Mr Mullins conceded that in the event of a finding against the respondent on the main issue, i.e. whether the lease was anything other than a lease and whether same was enforceable, it would serve no purpose to refer the matter to oral evidence. In my view, respondent's ship has sunk and cannot be salvaged by this procedural mechanism.

[35] The urgency aspect has largely become academic. A degree of urgency clearly attached to the matter, heads were delivered and the matter was properly argued.

[36] ACCORDINGLY, THE FOLLOWING ORDER IS MADE:

- (1) The applicant's cancellation of the written Agreement of Lease dated 3 December 2015, marked "TJH1" to the founding papers, is declared to be valid;
- (2) The Respondent and all those who hold occupation under it are directed to vacate Erf 2399 Summerstrand, Nelson Mandela Bay Municipality ("*the property*") within a period of 7 (seven) calendar days from date of service of this order on the respondent;
- (3) In the event of the respondent and those holding occupation under it failing to comply with the terms of paragraph (2) of this order, the sheriff of this Court is hereby authorised, upon being provided with a Writ of Ejectment to be procured by the applicant from the Registrar, to

enforce compliance with this court order by evicting the respondent and all those holding occupation under it, from the property;

- (4) The respondent is directed to pay the applicant's costs of suit.

Swanepoel AJ

APPEARANCES:

FOR THE APPLICANT:	ADV JG RICHARDS instructed by Kaplan Blumberg Attorneys, PORT ELIZABETH
FOR THE RESPONDENT:	ADV NJ MULLINS SC instructed by Lexicon Attorneys, PORT ELIZABETH