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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 2809/2022

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 3 AUGUST 2023

In the matter between:

STRATLAW (PTY) LTD

Applicant

and

WOUTER VAN HOVEN N. O.

First Respondent

SUZANNE VAN HOVEN N.O

Second Respondent

Summary: *Enforcement of an oral agreement reached after termination of a written agreement of lease – such an agreement not precluded by non-variation clause – existence of agreement dependent on evaluation of weight and credibility of oral evidence – onus discharged – landlord ordered to pay agreed amount for the valuable renovations retained in the premises.*

ORDERS

1. The first and second respondents, in their capacities as the trustees of the Wouter and Suzanne van Hoven Trust, IT3[....]8 are ordered to pay the applicant the amount of R262 163.20, together with interest thereon at the prescribed mora rate of interest from 26 August 2020 to date of payment.

2. The first and second respondents, in their aforesaid capacities, are ordered to pay the applicant's costs of the application, including the previously reserved costs and the costs of hearing oral evidence.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] This matter is firstly about whether the parties have reached an oral agreement in terms of which the Wouter and Suzanne van Hoven Trust, IT 3[....]8 (the Trust) would retain certain renovations effected by the applicant, Stratlaw (Pty) Ltd, as an erstwhile tenant to a property belonging to the Trust at an agreed price and secondly, whether such an agreement was precluded by a non-variation clause contained in the previously existing lease agreement.

[2] Customarily, a legal point such as the second dispute referred to above, would feature as a point *in limine*, a special plea or as a first issue to be decided. In this case, however, this was not done. In fact, the second point was only raised at a very late stage in the proceedings. In addition, the factual dispute regarding the existence

of the agreement had been referred for the hearing of oral evidence by way of an order by the judge who had initially heard the matter as an opposed motion.¹

[3] Accordingly, the determination of the existence of an agreement has to take place in terms of an existing order. Should such a determination be made in favour of the applicant, it would also provide the necessary context for any interpretive exercise in respect of the terms of the pre-existing lease agreement.

Background facts

[4] Most of the background facts leading up to the applicant vacating the premises and the eventual termination of the pre-existing lease agreement are common cause. I shall therefore summarise them as succinctly as possible before dealing with the oral evidence.

[5] The premises in question were business premises situated in Brooklyn, Pretoria, belonging to the Trust.

[6] The premises were rented by the applicant in terms of a written lease agreement from 1 June 2015 to 31 May 2018 from the Trust. After the expiry of the lease due to the effluxion of time, the applicant (initially known as Durbacare (Pty) Ltd but, after a name-change, known as Stratlaw (Pty) Ltd) continued to rent the premises on a tacit month to month basis on the same terms.

[7] During the existence of the lease, save for certain improvements scheduled in an annexure to the original agreement, the applicant had to obtain the prior written consent of the Trust, should it wish to effect any other structural improvements or material alterations to the premises.

[8] Apart from the fact that it was not in dispute that no such prior written consent had been obtained, it is common cause that various renovations had been effected during the course of the initial lease, some structural and others not. As conceded by

¹ Wesley AJ on 1 February 2023.

the respondents in their answering affidavits, these were principally done via New Brook Interior Design & Décor (New Brook) during 2015 and were noticed by the respondents during the existence of the lease, without demur. Nothing turns on this, however, as the applicant does not claim reliance on prior written consent. What is of significance, is that the consent issue was raised by the first respondent, Professor Van Hoven, for the first time, many years later, in his answering affidavit of 2 May 2022 as a principal part of the Trust's defence.

[9] It is also not in dispute that the applicant had expressed an interest in purchasing the premises and a right of first refusal to effect such a purchase had been included as clause 15 in the written lease agreement. In the end, the applicant decided against purchasing the premises and sought to relocate to premises in a safer environment. This was, in particular, prompted by a spate of break-ins in the area, including a burglary at the premises in February 2020.

[10] Consequently, the applicant on 25 February 2020 gave oral notice of its intention to terminate the month-to-month lease, intending to vacate the premises by 31 March 2020. The notice of termination was subsequently done in writing on 26 February 2020. By arrangement with the Trust, represented by Mrs Van Hoven, the deposit held by the Trust was to be utilized as payment of the last month's rent. This, Prof Van Hoven later stated, was done "... *in line with [Mrs van der Hoven's] caring personality*".

The applicant's cause of action

[11] The case of the applicant, represented by its sole director, Mr Van Vuuren was that he had met Mrs Van Hoven at the premises on 25 February 2020, principally to inspect the damage caused by the burglary as well as to discuss the applicant's intended relocation to new premises.

[12] Pursuant to the discussion with Mrs Van Hoven, Mr Van Vuuren made two proposals to the Trust, represented by Mrs Van Hoven: 1) the applicant could remove all the renovations and alterations and return the premises to the original state it had been in at the commencement of the initial lease or 2) as some of the

original fixtures has been removed by Prof Van Hoven at the time, making it difficult or impossible to restore the premises, to return the premises as a so-called “white box”, that is a repainted and vacant set of offices.

[13] Mrs Van Hoven however, expressed a preference for the return of the premises with the renovations and alterations effected by the applicant remaining intact, save for some lighting, a projector screen and a bulkhead in the boardroom, which the applicant wanted to remove. The applicant was amenable to do this, on condition that the applicant be recompensed for the renovations and alterations at the prices it paid for it in 2015. For this purpose, Mr Van Vuuren e-mailed Mrs Van Hoven the original New Brook invoices and a composite invoice in the name of the applicant, on 26 February 2020. This e-mail was the same one which included the notice of termination. Apparently this e-mail was forwarded to Prof Van Hoven who responded from the USA, also via e-mail later the same day, that he would discuss the vacating of the premises with Mr Van Vuuren upon his return to South Africa.

[14] This was followed up by a meeting with both Prof and Mrs Van Hoven shortly after Prof Van Hoven's return on 3 March 2020. At this meeting, Prof Van Hoven expressed dissatisfaction with some of the prices contained in New Brook's invoices after which an agreement was reached that the Trust would retain the improvements against payment of a reduced amount. The reduction of the amount was calculated by way of a 50% reduction on certain of the invoice items and the deduction of the whole amount spent on structural work in the bathroom. These reductions had been noted by Mr Van Vuuren on the invoices in manuscript after which a revised composite invoice was issued and sent by the applicant to the Trust.

[15] The total revised amount was R227 968.00 plus 15% VAT, totaling R262 163.00. The applicant had expected payment of this amount by 31 March 2020 but, due to the consequences of the Covid 19 emergency “lockdown” regulations imposed by the government, the applicant granted the trust an extension to pay within 90 days after the relaxation of the level 5 lockdown period.

[16] Consequently, the applicant expected payment by 31 July 2020. When this was not forthcoming, letters of demand were sent on 26 August 2020, 9 December 2020, 18 March 2021, 4 May 2021 and finally, on 10 June 2021 via its attorneys.

[17] When neither payment nor any request for extension of time was forthcoming, the application for payment was launched on 20 January 2022. The answering affidavit was delivered on 3 May 2022 whereafter the respondents had to be compelled to deliver their heads of argument, when they had failed to do so after receipt of the applicant's heads of argument. This led to the matter eventually being heard and dealt with by Wesley AJ as pointed out in paragraph 2 above.

The case for the Trust

[18] The case for the Trust was made out in an answering affidavit deposed to by Prof Van Hoven and in respect of which Mrs Van Hoven had delivered a brief confirmatory affidavit.

[19] In his answering affidavit, Prof Van Hoven repeatedly denied the applicant's *locus standi*, claiming that the Trust had "never" contracted with the applicant and that any cession by Durbacare (Pty) Ltd to Stratlaw (Pty) Ltd was prohibited by the terms of the written lease agreement. This stance was displayed without any research of facts and despite the applicant's attorneys as long ago as in the demand of 10 June 2021 having indicated the name-change of the applicant, with retention of the same company registration. This was clearly a spurious and unfounded attempt at a defence.

[20] In his answering affidavit further, much was made by Prof Van Hoven of the fact that no prior written consent had been obtained for the renovations and alterations. Repeated references to the terms of the agreement were made in this regard. These allegations completely missed the point that the applicant never claimed that any such consent had been requested or obtained.

[21] Prof Van Hoven elevated this issue by claiming, with reference to the email of 26 February 2020 from the applicant to Mrs Van Hoven whereto the initial New

Brook invoices had been attached, that the applicant was falsely attempting to fabricate a purported consent. Justifiably, Mr Van Vuuren deemed this insinuation to be defamatory and it was clearly made without any foundation. It amounts to another spurious defence.

[22] On behalf of Mrs Van Hoven, Prof Van der Hoven “submitted” in his affidavit that no payment obligation had been assumed by her on 25 February 2020. The applicant, however, was relying, not so much on the discussion with Mrs Van Hoven, but on the alleged agreement reached with the Trust, represented by both Prof and Mrs Van Hoven after 3 March 2020.

[23] Furthermore, Prof Van Hoven accused the applicant of having launched the application as an abusive procedure in the hope of obtaining evidence and discovery in circumvention of a trial. I find this to be another spurious accusation devoid of a factual basis. Prior to the launch of the application, the applicant had absolutely no inkling as to why the Trust had not made payment. All its demands had gone unanswered without explanation. Even when Mr Van Vuuren had finally gotten hold of Mrs Van Hoven telephonically before the final demand by the applicant’s attorney, she only said that the Trust was not going to pay, without furnishing any reason or explanation. In the absence of any prior version put forward by the Trust, I find that the applicant was justified in not foreseeing a factual dispute, let alone opposition on the spurious bases referred to above. To the list of spurious defences I add the misguided and unfounded contention by Prof Van Hoven that the Trust should also have been cited as a respondent and to claim a fatal misjoinder in this regard.

[24] The only actual dispute eventually raised, was the denial of an agreement in the terms claimed by the applicant. It is this dispute which Wesley AJ had referred to oral evidence in the following terms:

“8.1 The application is postponed ... for the hearing of oral evidence in terms of Uniform Rules 6(5)(g) on the issue set out in paragraph 8.2 above.

8.2 The issue upon which oral evidence is to be led at the aforesaid hearing is whether or not the oral contract on which the applicant relies was concluded between the parties, as alleged by the applicant in its founding papers”

(lastmentioned being a reference to the initial and subsequently allowed supplementary founding affidavits).

The oral evidence

[25] When the matter came before me, evidence was led by Mr Van Vuuren, Mrs Van Hoven and Prof Van Hoven.

[26] Mr Van Vuuren testified exactly in conformity of the version of the applicant's case set out above. He identified each of the invoices and e-mails sent first to Mrs Van Hoven and, after the adjustments had been negotiated by him with both Prof and Mrs Van Hoven, testified about the invoices sent for the second time, but with his deduction of the respective items indicated in manuscript by himself. He added that, in consequence of it having been negotiated that the lights, the projector screen and the bulkhead would not be included in the renovations left behind but would be removed and retained by the applicant, he pointed out to Prof Van Hoven at the premises, the indentations in the ceiling left by the bulkhead. He asked Prof Van Hoven whether he should have the removal contractor, a certain Mr H Nortje repair and repaint the ceiling or not. Prof Van Hoven enquired as to the costs, which was indicated to be R1 500.00 whereupon Prof Van Hoven preferred to be paid the amount rather than have the contractor do the job. Mr Van Vuuren complied with this request and paid over the R1 500.00. He also testified as to the 90-day extension granted to the Trust, having taken into account the effects which the Covid 19 restriction of travel might have had on Prof Van Hoven's business relating to bringing foreign veterinarians into South Africa for training. He also testified about the various demands for payment subsequently sent to the trust.

[27] During cross-examination, Mr Van Vuuren explained how the initial incorrect referral to a date for the second meeting with the Van Hovens in his founding affidavit came about, which meeting had taken place after Prof Van Hoven's return to South Africa on 3 March 2020. This aspect had been addressed in the supplementary founding affidavit and again in reply. It was put to Mr Van Vuuren that he had demanded R260 000.00 (which is close to the eventual invoice amount) but that Prof Van Hoven had refused, offering only R100 000.00. Mr Van Vuuren

dismissed this as a blatant lie. It was also put to Mr Van Vuuren that Mrs Van Hoven had no power to bind the trust to which Mr Van Vuuren responded that even during the negotiations about the initial lease, all discussions were with Mrs Van Hoven with the Professor merely subsequently having signed the agreement. Mr Van Vuuren had no doubt in his mind that Mrs Van Hoven could negotiate on behalf of the Trust, but despite this, the applicant was relying on the agreement subsequently reached with both the Van Hovens as trustees. Mr Van Vuuren was asked about adding VAT to his invoice and he explained that New Brook had charged the applicant VAT and that the applicant was in terms of the Income Tax Act and the VAT Act similarly obliged to raise VAT.

[28] Despite probing questioning, Mr Van Vuuren never wavered or changed his version about the agreement negotiated on behalf of the applicant. Both in how he presented the applicant's version of events and how he conducted himself in the witness box, he impressed as a credible witness. The e-mails sent also provided written corroboration of his version of events.

[29] Prof Van Hoven testified that he had indeed returned from the USA in early March but testified that the meeting with Mr Van Vuuren was only on 12 March 2020. He said Mr Van Vuuren was friendly when he arrived but then produced invoices regarding renovations to which Prof Van Hoven objected as he had never seen the quotes, had not been a party to any agreement in terms of which improvements could have been made and had not consented thereto. He knew that "certain things had to be fixed" and that's why he was prepared to pay R100 000.00. He thought that was more than reasonable but when Mr Van Vuuren rejected this offer, that was the end of the negotiations. He was aware of subsequent demands but his response to the fact that demands had been sent was simply that the Trust would not pay the amount claimed. He conceded having not reacted to the invoices sent by Mr Van Vuuren with the adjusted amounts indicated thereon. When asked whether his wife could have negotiated on behalf of the Trust he was quite vehement in his response that she could not and that no agreement could have been concluded by way of discussions with her. He conceded though, that Mrs Van Hoven had said that "they" might have to reimburse the applicant, but no figures or amounts had been discussed.

[30] During cross-examination Prof Van Hoven conceded that the first time a reason for objection to pay was raised, was in his answering affidavit. He also conceded that the deposit of the applicant had been accepted as payment for the last month's rental. He also conceded that all the improvements and renovations mentioned in the invoices under discussion had been left in the premises by the applicant (save for the exclusions already mentioned above). Prof Van Hoven also conceded that he had seen the e-mail from Mr Van Vuuren (with the initial invoices) after his return from the USA.

[31] Mrs Van Hoven testified that she had indeed visited the premises on 25 February 2020. Her brother was a handyman and she wanted to assess the damages caused by the burglary. She had a discussion with Mr Van Vuuren and was of the opinion that the improvements were indeed useful and beneficial to the premises. These included blinds and renovation of the bathrooms, the kitchen and the boardroom. She acknowledged that these had indeed increased the value of the premises. She reiterated that during this discussion, she conveyed the sentiment that "they" were prepared "to come to the table" to discuss the value of what the applicant had put into the premises. In respect of the meeting after Prof Van der Hoven had returned from the USA on the 3rd of March 2020, she testified that it had indeed taken place on 12 March 2020. At this meeting Mr Van Vuuren's invoices were discussed and her husband stated that the maximum he would be prepared to pay, was R100 000.00. She couldn't remember Mr Van Vuuren's response and the Van Hovens then left. She did remember though, the subsequent e-mail with amended invoices. Although she had acknowledged receipt, she couldn't understand how the amount was labelled "outstanding". Mrs Van Hoven responded to a question regarding the applicant's relocation that Mr Van Vuuren had told her the applicant was moving to a gated area in Lynwood which was safer and needed money for the relocation. She then thought: "well, he did do all these renovations, maybe we can come to an agreement". She said that, in the end this did not happen.

[32] In cross-examination Mrs Van Hoven conceded that she had received Mr Van Vuuren's first email of 26 February 2020 with the initial invoices and that she had forwarded that to her husband in the USA. She said that although she was a co-

trustee and attended negotiations, she was a “traditional” house-wife and that her husband was “conservative”. As he was head of the household, she could not take any decisions and this was also the case with the Trust. She conceded that, apart from acknowledging receipt of the second e-mail and amended invoices, the Van Hovens never responded to this e-mail or any of the subsequent demands.

[33] My distinct impression of the Van Hovens were that Prof Van Hoven was an over-confident and stubborn person, almost to the point of being arrogant and bombastic. That is certainly the picture that came across in his manner of giving evidence. While tolerant of his wife and her actions, he deemed it of lesser consequence and he was completely dismissive of the applicant’s version or contentions regarding discussions with Mrs Van Hoven. Mrs Van Hoven indeed came across as a dutiful and subservient wife.

Evaluation

[34] The applicant contends that an express agreement had been reached in respect of payment for the renovations which the applicant had agreed to leave behind at the previously rented premises. Structural alterations, such as those affected to the bathroom which could not be removed, were not claimed and were excluded from the amended invoice, while most of the other renovations were claimed at 50% of the prices paid by the applicant some five years previously. The resultant amount was R 262 163.00 and this represented what had been agreed on. The respondents’ version was that no agreement had been reached as only R100 000.00 had been tendered.

[35] The technique customarily employed in resolving two irreconcilable versions is that described by the Supreme Court of Appeal in *SFW Group Ltd and Another v Martell et Cie & Others*² as follows:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions The technique generally employed by courts in

² [2002] JOL 10175 (SCA); 2003 (1) SA 11 (SCA)

resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such 'as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compare to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it".

[36] In respect of (a) mentioned above – the credibility of witnesses, I have already expressed certain views and observations. Mr Van Vuuren made a favourable impression as a witness, much more so than Prof Van Hoven. Mrs Van Hoven generally also made a favourable impression, except insofar as she attempted to corroborate the version her domineering husband. I base these observations on a number of factors. Firstly, it is based on the witnesses' respective demeanour and candour displayed in the witness box. Secondly, it is based on Prof Van Hoven's blatant bias and on Mrs Van Hoven's subservient following thereof.

[37] With reference to subsidiary factors such as internal contradictions, there were none in the case of Mr Van Vuuren, while there was a list of contradictory versions in respect of Prof Van Hoven. These are principally to be found in the differences between his versions in his answering affidavit and his oral evidence. While much of

the Trust's "defence" in the answering affidavit centered around the issue of an absence of prior consent to the effecting of renovations, this did not feature in his oral evidence. His objection against payment in his oral evidence was not based on the lack of consent issue as such, but that he had never seen the quotations or previously been aware of the amounts involved. He described it in his oral evidence as Mr Van Vuuren's "expensive taste". The clear impression was that he did not want to pay as he had deemed the amounts to be excessive. This contradicts the previous position taken on behalf of the Trust.

[38] A further contradiction was the repeated "defence" raised in the papers about the identity of the applicant, its *locus standi* and the alleged requirement of a cession which was absent. Although the points *in limine* raised in the papers had been abandoned at the hearing (and apparently already during argument before Wesley AJ), if they had been actual or real defences in which Prof Van Hoven had believed in, he would have raised them on 12 March already. The fact that he did not raise them then and query Mr Van Vuuren about them, but saw fit to only depose to them on oath at the time when the Trust was called upon to put its reason for non-payment on paper, only to abandon these "defences" again later, weighs heavily and negatively against his credibility.

[39] The list of contradictions inherent in his versions, also impacts on the probabilities. If the applicant had offered to either remove or leave the renovations and improvements (a fact about there is no dispute), why then would it leave the renovations if, on Prof Van Hoven's version, no agreement had been reached on payment? Surely then, absent an agreement, the applicant would simply have removed the renovations in the same fashion as the lights, the projector screen and the bulkhead had been removed. And the respondent's counsel's argument that the reason for not removing the renovations was that items such as paint and the alteration of the bathroom could not be removed, also does not hold water – the applicant had removed the renovation items relating to the bathroom *in toto* from the amended invoices and never claimed for them in any event.

[40] Another inherent improbability is the fact that, if an agreement had not been reached as reflected by Mr Van Vuuren in the second e-mailed set of amended

invoices, why had an over-confident and well-travelled businessman such as Prof Van Hoven not immediately reacted thereto? And why, if there was no such agreement, had he not reacted to the numerous demands as vehemently as he had in court against any suggestion that the Trust owes the applicant money?

[41] Which brings me to another contradiction: in the opposing papers, every effort was made to point out that the Trust was not only never obliged to pay the applicant anything, but never contemplated doing so. In oral evidence however, the tune was different. The Van Hovens both testified that, primarily based on Mrs Van Hoven's approach to the matter, that the Trust was quite prepared to pay the applicant for the renovations by which had increased the value of the property, the only issue was that this willingness was limited to the maximum of R100 000.00. Neither this willingness nor the R100 000.00 featured in the answering affidavit. In fact, the position taken there was radically different. In more than one instance, Prof Van Hoven contended that *"... the alleged alterations and improvements were not worth the payment claimed as the premises were returned to the Trust, not in their original state nor was (sic) the alternations and improvements in good condition after 5 years of occupation ..."* and *"... after vacating the premises, it was clear that a lot of damages were done to the premises and the deposit had already been returned. The premises were left in such a state of disrepair that I had to obtain further contractors to repair the damages caused by Mr Van Vuuren and Durbacare upon exiting the premises"*. None of this featured in the subsequent oral evidence.

[42] It must also be borne in mind that in the answering affidavit Prof Van Hoven had alleged that he, Mrs Van Hoven and the Trust were seriously "prejudiced" by having to face an opposed motion without the benefit of a trial (with oral evidence). He even claimed vexatiousness on the part of Mr Van Vuuren and claimed punitive costs. Apart from patent bias displayed hereby, once the matter had been referred to oral evidence, none of the contradictions mentioned above had been clarified.

[43] I therefore find that, of the witnesses, Mr Van Vuuren was a credible witness and Prof Van Hoven was not. Similarly, on the crucial aspect of the agreement to pay the reduced amount contained in the second set of invoices, I find Mrs Van Hoven's evidence unreliable.

[44] On a conspectus of all of the above therefore, the applicant's version of the oral agreement is accepted and the version of the respondents is rejected.

[45] Never one to give up hope, the Trust, clearly at the instigation of Prof Van Hoven and his legal team, raised a point not taken hitherto, and sought to rely on a non-variation clause contained in the prior lease agreement. While this clause had been referred to in the answering affidavit, it was therein only raised in the context of precluding a transfer between Durbacare (Pty)Ltd and Stratlaw (Pty)Ltd or in the context that it precluded an amendment of the agreement relating to the issue of prior written consent prior to effecting improvements.

[46] Contrary to the position taken in the answering affidavit, at the end of the hearing of oral evidence, it was argued on behalf of the Trust that the non-variation clause precluded a subsequent oral agreement as had been found above to exist.

[47] The non-variation clause in question, reads as follows: *"11. Variations: The terms of this agreement form the sole contractual relationship between the parties and no variation of the agreements shall be binding or affect the terms hereof unless such variation or cancellation is reduced to writing and signed by the parties"*.

[48] In support of its contention, counsel for the Trust referred the court to the well-known Shifren-principle³ dealing with the validity and applicability of non-variation clauses in contracts.

[49] In the present instance, the applicant was not claiming any variation of the lease agreement. The applicant was quite content to remove the renovations and to effect or install them at the new premises to which it was relocating. The applicant tendered to either return the premises to their original state or as a "white box". It was in these circumstances and after the parties had already agreed to termination of the lease and the vacating of the premises, that a new and separate agreement

³ Being a reference to *SA Sentrale Ko-Op Bpk v Shifren en Andere* [1964]4 All SA 520 (A); 1964(4)SA 760(A).

had been entered into. Purposely interpreted in this context⁴ I find that the non-variation clause contained in the terminated lease agreement did not preclude the subsequent separate agreement.

[50] In the premises, the applicant is entitled to judgment in its favour. The applicant was not as vituperative as the respondent in pursuing its case and only claimed costs on party and party scale. I find no reason why the customary rule that costs should follow the event should not apply.

Orders

[51] The following is made.

1. The first and second respondents, in their capacities as the trustees of the Wouter and Suzanne van der Hoven Trust, IT 3[....]8 are ordered to pay the applicant the amount of R262 163.20, together with interest thereon at the prescribed more rate of interest from 26 August 2020 to date of payment.

The first and second respondents, in their aforesaid capacities, are ordered to pay the applicant's costs of the application, including the previously reserved costs and the costs of hearing oral evidence.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 20 April 2023
Judgment delivered: 3 August 2023

APPEARANCES:

⁴ As required by *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012]2 All SA 262(SCA); 2012(4)SA 593(SCA)

For the Applicant:	Adv W T D Ridgard
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