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|------------------------------------|------------------|
| Reportable:                        | <del>YES</del> / |
| NO                                 |                  |
| Circulate to Judges:               | YES /            |
| <del>NO</del>                      |                  |
| Circulate to Magistrates:          | <del>YES</del> / |
| NO                                 |                  |
| Circulate to Regional Magistrates: | <del>YES</del> / |
| NO                                 |                  |

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)

Case No: 2231/2018

In the matter between:

DAWID KRUIPER MUNICIPALITY

Applicant

and

ORANJE WATERSPORT CC

Respondent

*Coram:* Lever AJ

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JUDGMENT

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1. This is an application to evict the respondent from a business premises after the expiry of a written lease agreement. At the time of hearing, it

was common cause that the lease had terminated by the effluxion of time.

2. It is necessary to give some background to place the matter in its proper context. The applicant owns a property on the banks of the Orange River in Upington, being erf 15747. The respondent leased this property from the applicant and applicant's predecessor in title for a period of approximately 18 years in terms of several lease agreements most of which were for a fixed period of 5 years.
3. The respondent ran a business which consisted of a river barge named "Sakkie sê Arkie". The respondent made certain improvements to this property to accommodate such business. The written lease agreement provided that on termination of such lease the applicant would become owner of such improvements and that the applicant would not be liable to compensate the respondent for such improvements. The said written lease agreement also provided that the reason why the rental for the relevant property was not a market related rental during the subsistence of the lease was because respondent had made such improvements to the said property.
4. Subsequent to the lease being entered into, and a relatively short time before such lease came to an end, the applicant decided to dispose of the relevant property by way of a public tender. The respondent submitted a tender. The tender was not awarded to the respondent but was awarded to another entity. The respondent took this decision on

review. The said review was heard in this division and the judgment went against the respondent. The respondent then sought leave to appeal, which was refused.

5. I was informed by both Counsel that the respondent petitioned the President of the Supreme Court of Appeal (SCA) for leave to appeal. Counsel then informed me that a ruling has been issued that the parties should be prepared to argue both the application for leave to appeal and the merits of such appeal, but that no date has yet been set for such hearing in the SCA.
6. It was necessary to set out this background to the present application because some of the arguments raised by the respondent to avoid eviction relate to how, potentially, its rights might be affected in the event that it is ultimately successful in such appeal, but is evicted before such appeal is decided.
7. The applicant relies on the fact that it is still the registered owner of the property concerned and that the lease has terminated by the effluxion of time as grounds to evict the respondent from the relevant property. The respondent in answer to this has raised four points *in limine* and the fact that it would potentially suffer prejudice if it is evicted and subsequently wins its appeal. Respondent has also contended that a tacit lease agreement between the parties has come into existence.

8. The four points *in limine* raised by the respondent are as follows: In terms of the provision of the lease agreement, the parties were first obliged to negotiate in good faith and if that failed to proceed by way of arbitration; Although applicant has pleaded it is the owner of the property it has not dealt with the subsequent agreement of sale in respect of the said property and the right to occupy the property in terms of the said agreement of sale. It is submitted by respondent that in the absence of clarifying these issues and specifically relating to the right to occupy the said property, the applicant cannot seek the eviction of the respondent; That the person authorised to depose to the affidavits in this matter did not have the authority to bring an application to evict the respondent on behalf of applicant; and That the purchaser of the property, being the Uppington Hotel (Pty) Ltd has not been joined in these proceedings to evict the respondent.
9. In its heads of argument filed in the matter respondent indicated that the applicant filed its replying affidavit out of the period allowed for the filing of such document. Applicant alleged that it filed its replying affidavit out of time by virtue of the knock-on effect of the respondent filing its answering affidavit out of time. At the hearing hereof, Mr Snyman SC, who appeared on behalf of the respondent, indicated that the respondent would not be pursuing this particular preliminary point.
10. In addition to the issues raised by the respondent and set out above, in relation to the merits, the respondent in its papers filed herein raised the issue of it having a lien or right of retention in

respect of the improvements and maintenance on the relevant property. In addition to this the respondent also raised in its papers that the eviction should be suspended or postponed pending the outcome of the SCA appeal referred to above.

11. Turning now to the first point *in limine*, being the negotiation/arbitration clause contained in the lease agreement. Mr Snyman for the respondent argued that the correspondence that is annexed to the founding affidavit as annexures "C" up to and including annexure "G" clearly evidences a dispute between the parties flowing from the agreement between them.<sup>1</sup> At best for Mr Snyman, this is a mischaracterisation of the said correspondence. In this context the relevant agreement is the lease agreement. It is clear from the said correspondence that both parties accepted that such lease would or had ended due to the effluxion of time. Such disputes as are raised in the said correspondence do not flow from the relevant lease agreement.

12. Mr Snyman developed the respondent's argument in relation to this first point *in limine* by referring to clause 30 of the relevant lease agreement. The said clause 30 reads as follows:

"30 Enige dispuut of geskil wat mag voortspruit uit hierdie ooreenkoms, uitgesluit die betalings van huurgelde, dienstegelde, belasting en enige ander betalings waarvoor die HUURDER in terme van hierdie kontrak aanspreeklik is, sal soos volg mee gehandel word:

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<sup>1</sup> Respondent's Heads para 4.2

1. By wyse van onderhandeling tussen die partye tot die ooreenkoms.
2. Indien die dispuut of geskil nie by wyse van onderhandeling binne 14 (viertien) dae na die ontstaan daarvan opgelos kan word nie, word die dispuut of geskil, vir beslissing binne 21 (een-en-twintig) dae vanaf datum van sy aanstelling, na 'n onafhanklike arbiter waarop die partye ooreenkom, verwys.
3. Die partye kom ooreen dat die beslissing van die arbiter bindend en finaal op beide partye sal wees."

13. Mr Snyman then submitted that if one had regard to the provisions of clause 25 of the relevant lease agreement, it was clear that the parties intended the arbitration agreement to survive the termination of the said lease agreement. Clause 25 of such lease agreement reads as follows:

"25. Ingeval die VERHUURDER hierdie huurkontrak of enige verlenging daarvan kanselleer ooreenkomstig die regte aan hom verleen uit hoofde van hierdie ooreenkoms en ingeval die HUURDER die VERHUURDER se reg om te kanselleer bestry en/of betwis en/of voortgaan om die EIENDOM te gebruik, sal die HUURDER, hangende die beslissing van sodanige dispuut, hetsy by wyse van onderhandelings, hetsy by wyse van geding, voortgaan om 'n bedrag gelykstaande aan die maandelikse huurgeld bepaal in hierdie ooreenkoms, maandeliks vooruit op die eerste dag van elke en iedere maand te betaal en sal voortgaan om alle bedrae waarvoor hy uit hoofde van hierdie ooreenkoms aanspreeklik mag wees, te betaal en die VERHUURDER sal geregtig wees om sodanige betaalings te ontvang en te verhaal en die ontvangs daarvan

sal geskied sonder benadeling van die VERHUURDER se eis wat die VERHUURDER teen die HUURDER mag hê enigsins te affekteer. Indien die dispuut ten gunste van die VERHUURDER besleg word, sal die betaalings gemaak en ontvang in terme van hierdie klousule, behou word as bedrae betaal deur die HUURDER ten opsigte van skade gelyk deur die VERHUURDER as gevolg van die kansellering van die huurkontrak en/of die onwettige gebruik en besit deur die HUURDER van die EIENDOM, maar streng sonder benadeling van enige eis wat die VERHUURDER mag hê vir skadevergoeding andersins.”

14. Mr Snyman in the Heads of Argument he filed on behalf of the respondent, then referred to the authorities where the arbitration clause survived the termination of the contract and submitted that on the strength of such authorities that on the termination of the contract, for whatever reason, the arbitration clause does not fall away unless the contrary intention emerges from the relevant contract. In support of this proposition, Mr Snyman cited *Paley v Michaelian*<sup>2</sup>, *De Goede v Venter*<sup>3</sup> and *Atteridgeville Town Council v Livanos*<sup>4</sup>.

15. However, during oral argument in this matter Mr Snyman conceded that the relevant lease agreement had terminated due to the effluxion of time. This concession effectively puts paid to the argument raised by the respondent in the paragraph set out above. As can be seen from the arbitration clause, which is set out in full above, save for the

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<sup>2</sup> 1929 CPD 309.

<sup>3</sup> 1959 (3) SA 959 (O).

<sup>4</sup> 1992 (1) SA 296 (A) at 303I to 306C.

express exclusions the arbitration clause applies to disputes that arise from the relevant agreement.

16. The pertinent question then is, does the applicant's cause of action herein arise from the relevant lease agreement? Properly construed the applicant's cause of action as set out in the papers it filed in this application, is that: Applicant is the registered owner of the land concerned; Such rights as the respondent may have had to occupy the land concerned terminated when the latest lease between the parties had run its course and come to an end by the effluxion of time; Once the said lease had terminated by the effluxion of time, the respondent had no lawful right to occupy or be in possession of the land concerned; and As an incident of its rights of ownership the applicant is entitled to have possession and occupation of such land restored to it.

17. Once respondent conceded that the lease had run its course by the effluxion of time there was no longer any possibility that respondent could raise any issue that arose from the agreement which could be the subject of an arbitration as contemplated in clause 30 of the said lease agreement. Accordingly, this first point *in limine* has no substance and stands to be dismissed.

18. Turning now to the second point *in limine*, being that whilst the applicant has pleaded it is still the registered owner of the property it has not furnished the deed of sale relating to the said property and the rights that the purchaser might have to occupy have not been



disclosed. Respondent then submits that if applicant has given another party a right to occupy in such circumstances the applicant does not have *locus standi* to evict the respondent.

19. Mr Snyman did not seriously pursue this point *in limine*, in my view for good reason. Even if the sale of the property gave the purchaser the right to occupy, it would not mean that the applicant would not have the right to evict a former tenant. Ownership of immovable property in our law is determined by registration. It is an incident of ownership that the registered owner will have the right to occupy and even if the registered owner has given the right to occupy to another person, the registered owner still has the right to evict an occupier with no lawful right of occupation. Indeed, if the registered owner has given the right to occupy to another person such owner may indeed be obliged to evict the unlawful occupier or assist the lawful occupier in evicting the unlawful occupier. In either case, the right to evict rests with the registered owner.

20. The respondent faintly disputed the ownership of the relevant property. It is a matter of public record that the applicant was formed by combining the //Khara Hais Local Municipality with a smaller municipality that was not viable to form the DAWID KRUIPER LOCAL MUNICIPALITY. A computerised Deeds Office search was conducted and the printed result was annexed to the replying affidavit. This printed result shows that the relevant property is registered in the

name of the applicant's predecessor in title. This fact does not materially affect the applicant's rights of ownership.

21. Even though the case of **BETTA EIENDOMME (PTY) LTD v EKPLE-EPOH**<sup>5</sup> was decided in a very different context, it correctly reflects the law that is to be applied in this instance. In the **BETTA EIENDOMME** case Flemming DJP set out the position as follows:

"[10.1] Ownership still carries within it the right to possession. Similar to the inflatable ball, ownership still re-inflates to its full content as and when any burden such as the rights created by tenancy falls away.

[10.2] In the absence of legislative interference, postulating that nothing more is known than that the plaintiff is the owner and the defendant is in possession, it is right and proper that an owner be granted an ejectment order against someone who has no business interfering with the possession. A court must protect a legal right when it is not clearly barred from doing so. That applies also to ownership and the right to possession which is its core. A court should require a clear restraint before it fails to act against a wrong. That applies also to the theft of land and to the grabbing the right to possess, which is after all of the same quality and has the same effect."<sup>6</sup>

22. Nothing set out by the respondent can materially affect this position. There is no substance to this second point *in limine* and it stands to be dismissed.

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<sup>5</sup> 2000 (4) SA 468 (W).

<sup>6</sup> Betta Eiendomme, above at p 475E-G.

23. The third point *in limine* is to the effect that Mr Bernard Fourie has not demonstrated his authority to launch the present application on behalf of the applicant.

24. The applicant relies on two documents to establish the authority of Mr Bernard Fourie to launch the present application on its behalf. The first is an extract of the minutes of a special council meeting held 'in committee' on the 23 July 2018. The second document is in the form of a written delegation from the municipal manager of such authority to Bernard Fourie, the applicant's Head: Legal Services, dated the 8 August 2018. Due to the manner in which this was initially raised and later pursued by the respondent, I will have to set out both documents in their entirety. The relevant extract of the minute of the special council meeting reads as follows:

"STRENG VERTROULIK

IN-KOMITEE

NOTULE : SPESIALE RAADSVERGADERING GEHOU OP MAANDAG,  
23 JULIE 2018

8. VERVREEMDING VAN ERF 15747, OLIVIERPARK : SAKKIE SE  
ARKIE : (SRV) : 8.2.1 : (DIREKTORAAT KORPORATIEWE  
DIENSTE)

8/07/2018 (SRV) BESLUIT (IN-KOMITEE)

1. Dat die raad kennis neem van die uitspraak ten gunste van die Raad in die saak tussen die Raad en Oranje Watersport BK, rakende die vervreemding van Erf 15747, Upington.

2. Dat die Raad verder kennis neem dat die huurooreenkoms met Mnre Oranje Watersport BK op 30 Junie 2018 verstryk het en dat Mnre Oranje Watersport BK nie Erf 15747 ontruim het nie.
3. Dat, na sorgvuldige oorweging van die aangeleentheid en nadat regsadvies ten opsigte daarvan van die Raad se regsadviseurs ingewin is, word besluit en instruksies en opdrag aan die Munisipale Bestuurder om die nodige stappe te neem, wat die verkryging van 'n uitsettingsbevel teen mnr Oranje Watersport mag insluit, vir die ontruiming van die Erf 15747.
4. Dat, indien nodig, die Munisipale Bestuurder, Mnr E Ntoba en/of enige amptenaar deur hom daartoe versoek en beopdrag hiermee, gemagtig en gelas word om die Raad te verteenwoordig in sodanige aansoek en om die nodige beëdigde verklarings af te lê (tesame met sodanige verdere verklarings van amptenare van die Raad betrokke by die aangeleentheid) namens die Munisipaliteit en/of die Raad en om alle ander verdere stappe te neem wat nodig mag wees om uitvoering te gee aan hierdie besluit.
5. Dat, indien nodig, die nodige kostebevel teen die aansoeker, warna in punt 1 verwys word, ook aangevra word."

25. The relevant written delegation dated 8 August 2018, reads as follows:

"TO WHOM IT MAY CONCERNS (sic)

I, Elias Ntoba, in my capacity as Municipal Manager, in terms of resolution 8/07/2018 (SCM) dated 23 July 2018, a copy of which is attached hereto, duly authorizes (sic) Bernard Fourie in his capacity as

Head: Legal Services to sign all the necessary affidavits, documents and forms relating to the matter between the Dawid Kruiper Municipality and Oranje Watersport CC, regarding the purchase of Erf 15747, Uppington.”

26. Originally, in its heads of argument the respondent approached the matter by contending that the minute of the resolution was a suspicious document and it ought to be approached with caution because it did not name those present who had taken the decision on Council’s behalf and that it was not signed by anybody. Further, in it’s Heads of Argument, respondent also attacked the delegation by the Municipal Manager to Mr Fourie.

27. Mr Rautenbach who appeared for the applicant raised the issue, in the applicant’s Heads of Argument, that the authority to bring the present application had not been challenged by the procedure set out in Rule 7 of the Uniform Rules of Court and relied on the authority of the SCA in the matter of **Unlawful Occupiers, School Site v City of Johannesburg**<sup>7</sup> for the submission that challenges to the authority of a person launching an application must be brought under the provisions of the said Rule 7.

28. In his oral argument, Mr Snyman only referred to the delegation and dropped all reference to the minute of the council meeting. Mr Snyman then argued that in such circumstances the decision of the

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<sup>7</sup> 2005 (4) SA 199 at para [16].

SCA in the **Unlawful Occupiers, School Site** case<sup>8</sup> did not apply to the present case.

29. In making this argument Mr Snyman focuses on the words "..., regarding the purchase of Erf 15747, Upington." In short Mr Snyman's argument is that the delegation did not authorise the application to evict respondent.

30. Clearly, the delegation being, annexure "A1" to the founding affidavit is inelegantly drawn. However, Mr Snyman loses sight of the fact that the resolution is specifically referred to and identified. Furthermore, a copy of such resolution was attached to the delegation when it was made. It is clear from the resolution itself that the present application is indeed authorised by the applicant's council.

31. Mr Snyman also loses sight of the underlying reason for establishing the authority of a person who is not a natural person, but who is a party to the application. Such reason being that the said party should not be able to deny being a party to the litigation pursued in its name when an adverse costs order is in the offing or being a party to such litigation no longer suits it for any reason. This aspect was referred to by the SCA in the **Unlawful Occupiers School Site** case when it quoted with apparent approval, the ratio decidendi of Flemming DJP in the *Eskom v City Council of Soweto* matter<sup>9</sup>.

32. Reading the delegation together with the minute of the decision, being annexures "A1" and "A2", it is quite clear that Mr Bernard Fourie

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<sup>8</sup> Above.

<sup>9</sup> *Unlawful Occupiers School Site* case above at para [14].

had the necessary authority to launch the present application for the eviction of the respondent. In the circumstances evidenced by annexures "A1" and "A2", there is no way that applicant can deny it is a party to this application. This third point *in limine* also has no substance and stands to be dismissed.

33. The fourth point in limine is the non-joinder of the purchaser of the relevant property, being the Upington Hotel (Pty) Ltd to the present application to evict the respondent.

34. Mr Rautenbach submitted on the applicant's behalf that applicant is still the registered owner and that in the present circumstances as Upington Hotel (Pty) Ltd was merely the purchaser that it did not have a direct and substantial interest in the matter. Accordingly, Mr Rautenbach submitted that there was no need to join the Upington Hotel (Pty) Ltd to these proceedings.

35. In the current circumstances, I believe Mr Rautenbach is correct. Accordingly, this point *in limine* also stands to be dismissed.

36. Turning now to the merits, here the respondent essentially raised three issues. Firstly, it had a lien or right of retention based on certain repairs, maintenance and improvements it had affected to the relevant property. Secondly, it had initiated an appeal process that was currently pending before the SCA. That if it was ultimately successful in such appeal, it stood to suffer prejudice if it was evicted and ultimately was successful in its appeal and was also ultimately awarded the right to buy the relevant property. Respondent developed this argument by

referring to a number of parks and other recreational facilities for which applicant was responsible and showed by way of photographs how the applicant had allowed such facilities to deteriorate and become vandalised. Thirdly, the applicant by invoicing respondent for rental after the expiry of the lease had brought into existence a tacit agreement of lease.

37. Dealing with the first issue raised on the merits, being the alleged right of retention or improvement lien. This argument was not pursued by Mr Snyman in his oral argument with any vigour or enthusiasm. Accordingly, I need not deal with it in any great detail.

38. In the main these issues are dealt with in the appropriate provisions of the lease. Clauses 8.1 and 8.2 of the lease deal with these issues. These clauses read as follows:

“8.1 Die HUURDER sal die reg hê om op eie koste verbeterings op die EIENDOM op te rig of aan te bring. Die verbeterings moet inpas by die beoogde Noerdoewer ontwikkeling. Planne en/of spesifikasies van sodanige verbeterings moet egter ingevolge die toepaslike verordeninge vooraf aan die VERHUURDER vir goedkeuring voorgelê word en moet esteties aanvaarbaar wees. Die VERHUURDER onderneem om nie sodanige goedkeuring onredelik te weerhou of te vertraag nie.

8.2 Met beëindiging van hierdie huurkontrak of enige verlenging daarvan, hetsy weens verstryking daarvan of andersins, sal alle veranderings of byvoegings, onmiddellik die eiendom van die VERHUURDER word en duur die HUURDER ongeskonde gelaat word vir die voordeel van die VERHUURDER, wie nie aanspreeklik sal wees om die HUURDER ten opsigte daarvan



te vergoed nie, tensy die VERHUURDER verlang dat die persele na hulle oorspronklike toestand herstel word in welke geval die HUURDER die herstelwerk sal aanbring binne 30 (dertig) dae na beëindiging van die ooreenkoms.”

39. Respondent has not alleged nor established that the improvements it relies on in respect of this defence to the eviction fall outside the provisions of the lease agreement quoted above. The respondent has not alleged or established that insofar as it relies on maintenance or repairs for its right of retention that it falls outside the provisions of clause 15 or clause 16 of such lease. Further, in respect of the alleged improvement lien, the respondent has not established that the alleged improvements were both necessary and useful.

40. In all of these circumstances, I find that this is not a defence to the applicant’s application to evict the respondent from the property concerned.

41. Turning now to the second defence on the merits, being that the appeal process is currently pending before the SCA and in the event that respondent is successful in its appeal, it might ultimately be awarded the tender to buy the relevant property.

42. In support of this argument respondent contended that it had spent some R900,000.00 (nine hundred thousand Rand) on improvements to the property. It followed this with the submission that if respondent was deprived of possession of the relevant land before the appeal process was finalised, it would be at risk of ultimately losing the

benefit of the improvements that it had made to the property. In support of this contention respondent has given a list of parks and entertainment facilities run and maintained by the applicant which the applicant has either not maintained or allowed to be vandalised.

43. Respondent submits that if this were to happen to the property concerned and it was successful in its appeal and if it were ultimately awarded the right to buy the property concerned that it would be severely prejudiced. It argued that it should be allowed to retain possession of the property pending the finalisation of the appeal in order to protect and safeguard it.

44. In response Mr Rautenbach argued that even if the respondent was successful in its appeal that this did not mean that it would necessarily be awarded the right to purchase the relevant property. He submitted that all the respondent had was a hope or a *spes* that it would one day be able to purchase the property concerned. It was further submitted that this was not sufficient to defeat the applicant's rights as owner of the property concerned.

45. Mr Snyman argued that I had a discretion to postpone the eviction and could order respondent to pay rental in the interim while the appeal is processed in the SCA. What Mr Snyman overlooks is that the property concerned is not residential property. Also, that I am not in a position to make an agreement for the parties. The applicant has established its right as the registered owner in the present circumstances. Having established its rights as the registered owner I

cannot without lawful reason deprive the registered owner of such right. Especially in circumstances where even if it is successful in its appeal, this does not mean it will ultimately win the right to purchase the property concerned.

46. The final argument raised by the respondent on the merits is that a tacit lease came into existence when the applicant invoiced the respondent for rental and other municipal imposts and charges.

47. In this regard the applicant explained in paragraph 40 of its replying affidavit that the finance department of the applicant is not privy to the legal issues which the Legal Department would handle. Accordingly, the finance department continued to send the accounts because the respondent had not vacated the premises. Then applicant explained that once the legal department got wind of the fact that the finance department was billing respondent for rental *inter alia*, it arranged for the finance department of the applicant to stop the billing of the respondent because to allow a tacit month-to-month lease in such circumstances would be contrary to the applicant's supply chain management policy and would thus be unlawful.

48. The respondent itself is not arguing that there has been a tacit relocation of the previous existing lease. On the respondent's version a tacit month-to-month lease came into existence.

49. The proverbial officious bystander would have to look at all the relevant facts and circumstances in their proper context. This would include the correspondence between the parties annexed to applicant's

founding affidavit. It is clear from such correspondence that the applicant had no intention of agreeing to the respondent remaining in possession after the lease had terminated by the effluxion of time. It is true that on the applicant's own version its right hand did not know what its left hand was doing. Also, it is clear from the respondent's version set out in paragraph 15.6 and evidenced by annexures "SP44" to "SP49" that invoices and payment were only made for 3 months the last payment being made on the 18 September 2018.

50. In any event the conduct of the finance department in these circumstances is equally compatible with an intention to collect damages from the respondent for holding over. In these circumstances, I do not believe the applicant can be said to have intended or acquiesced in the creation of a tacit lease agreement. To enforce a tacit lease in circumstances which would compel the applicant to break the law would be against public policy. On these facts, I do not believe that the said officious bystander could conclude that a tacit month-to-month lease came into existence.

51. In the absence of a tacit lease the respondent has no defence to the applicant's claim for eviction.

52. Even if I am wrong on concluding that a tacit lease did not come into existence, on the respondent's own version it could only be a tacit month-to-month lease. If this was the case only one months notice would be required to terminate the lease. In these circumstances such termination could be for any reason. The act of stopping to send the

invoice and refusing to accept payment would constitute such notice. The respondent has been in possession of the property for far more than a month after the invoicing for such rental stopped. In these circumstances there is at this point no longer a month-to-month lease and the respondent is holding-over the relevant property without any legal right to do so. In such circumstances, I must uphold the registered owner's rights to possession of the property.

53. For the reasons set out above, I believe the respondent has not set out a defence that would oblige me to refuse the relief claimed by the applicant. In such circumstances, I must grant the relief that the applicant seeks.

54. The only issue still to be decided is the issue of costs. The applicant seeks an order for costs on the attorney and client scale alternatively on the party and party scale. The respondent submitted that if the matter is decided against the respondent costs should be awarded against the respondent on the magistrate's court scale,

55. The applicant in seeking an order for attorney and client costs relies on clause 29.2 of the relevant lease agreement. The said clause provides that for any enforcement of any rights that arise from the said agreement, the costs incurred in enforcing such right shall be calculated on the attorney and client scale.

56. The respondent seeks to rely on clause 28 which provides that for any dispute arising from the lease agreement the parties agree to the jurisdiction of the magistrate's court Upington.

57. The answer to the contentions by the applicant and respondent respectively is the same. The current dispute is based on ownership and the right to possession. This does not arise out of the lease agreement that has terminated by the effluxion of time. It is now common cause that the lease agreement has terminated by the effluxion of time. In these circumstances, the general rule that costs should follow the event prevails. I can think of no reason why the general rule should not apply. Accordingly, the respondent shall bear the costs of this application on the ordinary party and party scale.

**The following order is made:**

1. The respondent and/or any person occupying erf 15747 Upington, Northern Cape through or on behalf of the respondent is hereby evicted from the said premises.
2. The respondent is to pay the costs of this application on the ordinary party and party scale.

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Lawrence Lever AJ

Representation:

Adv J.S Rautenbach for the applicant oio Elliott Maris Wilmans & Hay  
Attorneys

Mr M Snyman SC for the respondent oio Engelsman Magabane Inc

Date of hearing: 23 August 2019

Date of Judgment: 20 September 2019