



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

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

Case number: **2184/2017**
Date heard: **02/01/2018**
Date delivered: **09/02/2018**

In the matter between:-

NG WHITE FARM PROPERTIES (PTY) LTD

APPLICANT

AND

JOHANNES DIEDERIK LATEGAN N.O.

FIRST RESPONDENT

PETRUS JOHANNES ERASMUS N.O.

SECOND RESPONDENT

Coram: Stanton AJ

JUDGMENT

Stanton AJ

INTRODUCTION:-

1. This is an application for the eviction of the respondents, JD Lategan N.O. and PJ Erasmus N.O., the trustees of the JDL Trust (IT981/2005), ("the JDL Trust"), as well as all persons claiming possession through or under them from the immovable property known as Lot 588, Vaal-Harts Settlement A,

Registration Division Vryburg, Northern Cape Province, 91,4895ha in extent and held by Deed of Transfer T1619/1995 ("the immovable property").

2. The JDL Trust opposed the granting of the relief on the merits and also raised two points *in limine*, namely the non-joinder of the Elnathan 2011 Trust (IT781/2012 ("The Elnathan Trust")) and a dispute of fact pertaining to extension of the lease agreement.

RELEVANT FACTS:-

3. It is not in dispute that the applicant, NG White Farm Properties (Pty) Ltd, is the registered owner of the immovable property or that the applicant and the JDL Trust entered into a written lease agreement in terms of which the JDL Trust leased approximately 75 hectares of the immovable property from the applicant for commercial farming purposes ("the lease agreement").
4. It is also not in dispute that on 07 November 2012, four years prior to the expiration of the lease agreement on 31 December 2016, the applicant entered into a written sale agreement in terms of which the applicant sold the immovable property to the Elnathan Trust ("the sale agreement").
5. The respondents *in casu* are trustees of both the JDL Trust and the Elnathan Trust. Mrs C Lategan is, however, not a trustee of the JDL Trust, but she is a trustee of the Elnathan Trust.
6. The first respondent concluded the lease agreement on behalf of the JDL Trust. He also concluded the sale agreement on behalf of the Elnathan Trust.
7. The JDL Trust raised three defences in respect of the merits of the application. In the first instance, it was argued on behalf of the JDL Trust that the applicant ought to have foreseen an intractable dispute of fact relating to

the extension of the lease agreement and that the application should for this reason alone, be dismissed with costs.

8. In the second instance, the JDL Trust, relies on an express, alternatively a tacit extension of the lease agreement, and further in the alternative, on a tacit relocation of the lease agreement.
9. The JDL Trust raised a third defence that it had a retention right in respect of its improvements on the immovable property. The JDL Trust, however, in its heads of argument, abandoned this defence and conceded, correctly in my view, that a lessee of a rural tenement has no right to assert a *lien* in respect of the improvements of agricultural land.
10. In terms of Clause 2 of the lease agreement:-
 - 10.1 the lease period was to be for a period of five and a half years, commencing on 01 July 2011 and terminating on 31 December 2016;
 - 10.2 upon termination of the lease, the parties would negotiate a further lease period on the terms set out in the lease agreement; alternatively, the applicant could decide to sell the property and undertook to first negotiate with the JDL Trust in that regard, and
 - 10.3 the applicant and the JDL Trust agreed to give each other notice of their respective intentions six months before expiry of the written lease agreement.
11. In addition to the lease and sale agreements, two further documents are pertinent to this application, namely the written acknowledgement of debt and the registered mortgage bond.

12. The Elnathan Trust lent and advanced an amount of R2 500 000,00 to the applicant and on 07 November 2017 the applicant signed a written acknowledgment of debt in respect of the loan. The applicant agreed to repay the amount of R2 500 000,00 to the Elnathan Trust on or before 31 March 2017.
13. As security in respect of the applicant's indebtedness to the Elnathan Trust, the applicant registered a first mortgage bond in favour of the Elnathan Trust over the immovable property. In terms of the mortgage bond, the applicant ceded to the Elnathan Trust its right to collect rental payments. The relevant paragraph in the mortgage bond provides:-

"Dat alle huurgelde wat van tyd tot tyd verskuldig mag wees deur die huidige of toekomstige huurder of huurders van die eiendom hiermee gesedeer en oorgemaak word aan die genoemde Verbandhouer/s of ander wettige houer/s van hierdie Verband, as kollaterale sekuriteit; en die genoemde Verbandhouer/s of ander wettige houer/s hiervan word hiermee gemagtig, met mag van substitusie, om genoemde huurgelde in te vorder, te verhaal en daarvoor te dagvaar, en om geldige kwitansies daarvoor te verleen; maar geen gebruik sal van genoemde sessie van huurgeld gemaak word nie tensy die Komparant se Prinsipaal in gebreke bly om die Hoofsom of rente op die vervaldag of vervaldae te betaal."

AD NON-JOINDER OF ELNATHAN TRUST:-

14. Mr Van Aswegen, on behalf of the JDL Trust, submitted that the applicant's failure to join the Elnathan Trust as a respondent to the proceedings is fatal due to the direct and substantial interest the Elnathan Trust has in the outcome of the application.

15. It was contended by Mr Van Aswegen that Elnathan's interest in the matter is premised on the mortgage bond registered in its favour and its right to collect rental payments due under the lease agreement.
16. It was furthermore submitted by Mr Van Aswegen that the JDL Trust and the Elnathan Trust are in reality the same legal entity by virtue of the fact that they have the same trustees. As the two trusts are separate legal entities, I cannot agree with this submission in the absence of evidence that justifies the lifting of the corporate veil.
17. Mr Nel, on behalf of the applicant, argued that the mortgage bond only granted the Elnathan Trust a right with respect to rental of the property and that if the lease agreement did in fact come to an end, there is no interest that the Elnathan Trust could conceivably have in these proceedings and the eviction would not prejudicially affect the Elnathan Trust.
18. In addition, Mr Nel argued that the eviction of the JDL Trust will allow the conclusion of another lease agreement, to the benefit of the Elnathan Trust, who will then again have collateral security in the form of rental.
19. It is settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.¹ The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings has thus been held to be a limited one.

¹ JUDICIAL SERVICE COMMISSION V CAPE BAR COUNSEL 2013 (1) SA 170 (SCA) AT PAGE 176 PARAGRAPH 12; BOWRING NO V VREDEDORP PROPERTIES CC AND ANOTHER 2007 (5) SA 391 (SCA) AT PARAGRAPH 21. SEE ALSO BURGER V RAND WATER BOARD AND ANOTHER 2007 (1) SA 30 (SCA) AT PARAGRAPH 7

20. With reference to *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*,² the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make
21. In *Henri Viljoen (Pty.) Ltd. v. Awerbuch Brothers*,³ Horwitz AJA and Van Blerk J analysed the concept of such a "direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that:-
- "... an interest in the right which is the subject-matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation".*
22. With regard to the interest of sub-tenants in eviction applications, it is the generally accepted view that the sub-tenant has no legal interest in the contract between the landlord and the tenant *"... although he may have a very substantial financial or commercial interest therein which may be prejudicially affected by the judgment"*.⁴
23. As I understand the case of the JDL Trust, Elnathan Trust's collateral security will effectively evaporate if the Elnathan Trust is not joined as a party to the application. In view of the fact that the mortgage bond is registered as security in favour of the Elnathan Trust, this submission cannot be sustained.

² [1972] 4 ALL SA 493

³ 1953 (2) SA 151 (O) AT PAGE 169

⁴ UNITED WATCH AND DIAMOND CO (PTY) LTD AND OTHERS V DISA HOTELS LTD AND ANOTHER AT PAGE 501

24. I find that the Elnathan Trust's interest is at most a financial interest, and therefore an indirect interest pursuant to the mortgage bond, which does not warrant its joinder in this application.
25. In light of the foregoing, the point *in limine* of non-joinder is without merit, and is dismissed.

RELEVANT LAW:-

26. In *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd*⁵, Van Zyl J confirmed that an implied agreement can come into existence only if there has been a tacit acceptance of a tacit offer. The offer and acceptance, indicating unqualified *consensus ad idem* on all essential aspects of the agreement, must clearly and unequivocally be inferred from the conduct of the parties. It must, in accordance with what has been described as the "traditional" approach, in fact be the only reasonable inference that can be drawn from such conduct. Corbett JA in *Standard Bank of South Africa Ltd and another v Ocean Commodities Inc and others* stated that⁶:-

"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."

27. Corbett JA adopted a somewhat less stringent approach in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd*:⁷

"In this connection it is stated that a court may hold that a tacit contract has

⁵ 2002 (6) SA 236 (C) AT PARAGRAPH 32

⁶ 1983 (1) SA 276 (A) AT 292B

⁷ 1984 (3) SA 155 (A) AT 165B-C

been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence ..."

28. In *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk*⁸, Comrie J expressed a preference for "the so-called traditional test, the only reasonable interpretation test, provided that the test is applied in a common-sense and businesslike way".
29. In *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd*, Van Zyl J, with regard to tacit relocation of lease agreements held that:-⁹

"Whether or not there was an implied agreement to renew an existing lease (a so-called 'tacit relocation'), or to conclude a new lease on the same terms as the previous one, is likewise dependant on the facts and circumstances of the case. More specifically, it must be unequivocally inferred from the conduct of the parties (lessor and lessee) that a renewed or new lease has come into existence. Under normal circumstances this would be the case when the lessor allows the lessee to remain in occupation of the leased premises after termination of the lease and the lessee continues to pay rent that the lessor accepts.

30. The Court went on to state that¹⁰:-

"The mere fact that a lessee remains in occupation of the leased premises after the expiration of the term of the lease does not, of course, mean that there is a tacit renewal of the lease. Similarly, the belief, or impression, of one of the parties to the lease that there has been a tacit relocation is not

⁸ [2000] 4 ALL SA 412 (C) AT 418J-419B

⁹ 2002 (6) SA 236 (C) AT PARAGRAPH 3 SEE IN GENERAL W E COOPER LANDLORD AND TENANT 2ND ED (1994) AT 350, 352; WA JOUBERT (ED) THE LAW OF SOUTH AFRICAN (FIRST REISSUE 1999) VOL 14 PARAGRAPH 217

¹⁰ AT 419 D – H

sufficient to bring a new lease into existence. There must be compliance with the requirements for an implied or tacit agreement."

31. These principles have, in substance, become part and parcel of South African jurisprudence, as appears from *Bowhay v Ward* where Innes CJ held that:¹¹

"[T]acit relocation depends upon this, that both parties adopt and continue the position which the termination of the lease found them in; in other words, that the lessor is content that the lessee should remain, and the lessee is content to remain"

32. The effect of a tacit relocation is, in general, that a new lease is concluded on the same basis as the original lease.¹²

APPLICATION OF THE RELEVANT LAW:-

33. It is not in dispute that the JDL Trust and the Elnathan Trust chose the two entities which concluded the written lease agreement on the one hand and the sale agreement on the other hand.
34. JDL Trust's version is that the parties had expressly, alternatively tacitly agreed that the period of the lease agreement would be extended to coincide with the registration and transfer of the immovable property into Elnathan Trust's name. This submission was made based on the "interconnectedness" of the JDL Trust and the Elnathan Trust and the sale of the immovable property to the Elnathan Trust.
35. It is common cause that:-

¹¹ 1903 TS 772 AT PAGE 779

¹² POTHIER OP CIT 363; LICENCES AND GENERAL INSURANCE CO V BASSANO 1936 CPD 179 AT 185-186; R V CUMMING 1956 (4) SA 143 (E) AT 145C-148A)

- 35.1 neither the applicant nor the JDL Trust confirmed their respective intentions regarding their positions six months prior to 31 December 2016; and
- 35.2 the Elnathan Trust purchased the immovable property in terms of a written sale agreement concluded on 07 November 2012, which was three years and eleven months prior to the termination of the initial period.
36. Clause 6 (improvements) and Clause 15 (expiry of the lease period) of the lease agreement furthermore underlines the fact that a further lease had to be concluded explicitly.
37. Clause 1 of the sale agreement explicitly provides that the lease agreement between the applicant and the JDL Trust would terminate on 31 December 2016. The sale agreement furthermore contains a provision that the purchase price should be paid two months prior to the expiration of the lease agreement between the applicant and the JDL Trust on 31 December 2016. In addition, the sale agreement provides that the applicant will give possession and vacant occupation of the immovable property to the Elnathan Trust on date of registration of the immovable property.
38. The acknowledgment of debt stipulates that the amount of R2 500 000,00 will not incur interest until the expiration of the lease agreement on 31 December 2016.
39. Significantly, the mortgage bond also contains a reference to the expiration of the lease agreement between the applicant and the JDL Trust.
40. Mr Nel referred me to the various correspondence exchanged between the applicant's attorneys and the attorneys acting on behalf of the JDL Trust.

41. In a letter, dated 07 March 2017, the applicant's attorneys confirmed that the lease agreement expired on 31 December 2016 and afforded the JDL Trust thirty days to vacate the property. The letter specifically recorded that *"The lease period has not in any way been extended nor has the lease agreement been renewed whatsoever."*

42. In response, JDL Trust's attorneys, in an e-mail dated 24 March 2017, with reference to Clause 2 of the lease agreement stated as follows:-

"Ek verstaan dat daar ten gunste van JDL Trust 'n reg van verlenging, asook 'n Verkoopsreg beding is."

43. The JDL Trust's attorneys by e-mail to the applicant's attorney on 29 March 2017, stated as follows:-

"Neem hiermee kennis daarvan dat ons kliënt begerig is om die huurkontrak te verleng, soos hy geregtig is om te doen, vir 'n verdere jaar."

44. On 10 July 2017 the JDL Trust's attorneys addressed a further e-mail to the applicant's attorneys. They reiterate:-

"Ons kliënte is begerig om die huurkontrak te verleng vir 'n verdere 6 maande en tender hiermee betaling in die bedrag van R197 004.09 daarvoor."

45. On 24 July 2017 JDL Trust's attorneys e-mailed the applicant's attorney, alleging as follows:-

"Paragraaf 2 van die huurkontrak bepaal dat die partye, na verstryking van die huurkontrak, sal onderhandel vir 'n verdere termyn."

Ons kliënt het dit gedoen en betaling van die huurgelde getender en tender dit nog steeds."

46. In the correspondence attached to the affidavits, the JDL Trust never claims the right to have extended the lease agreement or that the lease agreement was extended, but merely expressed a desire to do so.
47. In addition, the lease agreement contains an express undertaking that the JDL Trust will not plant crops that would under normal circumstances not be reaped by the end of the lease period.
48. With regard to the tacit extension of the lease agreement, Mr Nel submitted that the tacit extension thereof had to take place before the expiration of the lease agreement, being 31 December 2016 and as such that any tacit extension would most likely have been concluded when the sale agreement was concluded.
49. The first indication by the JDL Trust that it was desirous of extending the lease agreement is reflected in an email from its attorney to the applicant's attorney, dated 24 March 2017, almost three months after the expiration of the lease agreement. In the correspondence, the JDL Trust did not claim or propose that the lease be extended to coincide with the registration of the transfer of the immovable property into the name of the Elnathan Trust.
50. I agree with Mr Nel's submission that the JDL Trust was not desirous of purchasing the immovable property and that an extension of the lease agreement was concomitantly never discussed or tacitly agreed to by the applicant and the JDL Trust.
51. On the basis of the foregoing facts, an agreement to extend the lease period to coincide with the date of registration of transfer of the immovable property into Elnathan Trust's name was not concluded expressly or tacitly.

52. In my view, the JDL Trust failed to provide any facts from which the express or tacit extension of the lease agreement can be inferred.
53. I therefore cannot find that the lease agreement was expressly or tacitly extended.
54. As an alternative to their argument that the lease period was extended, the JDL Trust contends that there was a tacit relocation of the lease.
55. In the present case, the applicant at all times intended to sell the property and provide the Elnathan Trust with vacant occupation of the immovable property. This intention was clearly known to the JDL Trust. In addition, the JDL Trust, when called upon to vacate the immovable property, did not postulate a tacit relocation of the lease, but sought to negotiate an extension of the lease agreement, which had already expired.
56. The JDL Trust also did not, before or after being called upon to vacate, pay any rental with respect to the immovable property, but merely offered to pay rental in their endeavours to negotiate an extension.
57. In the circumstances I cannot find that there was a tacit relocation of the lease agreement. I can arrive at no other other conclusion than that none of the parties believed that a renewed or new lease has come into existence.
58. From what has been stated above, it is clear that the JDL Trust has no justification for remaining in occupation of the immovable property.

DISPUTE OF FACT:-

59. Based on the foregoing, I can also not find that the JDL Trust raised a real, genuine or *bona fide* dispute of facts that cannot be resolved on the papers as envisaged by the Plascon-Evans rule.¹³

COSTS:-

60. Mr Nel submitted that the JDL Trust's opposition of the application and the grounds raised are clearly without merit and so untenable as to be vexatious in effect. He therefore sought an order for costs on a scale as between attorney and client against the JDL Trust.
61. Mr Van Aswegen submitted that the costs should follow the cause and should be awarded on a scale as between party and party.
62. I am not convinced that the JDL Trust's opposition was objectively vexatious or an abuse of legal process that will warrant a punitive cost order.

IN THE CIRCUMSTANCES I MAKE THE FOLLOWING ORDERS:-

1. The JDL Trust, represented by JD Lategan N.O. and PJ Erasmus N.O. (as well as all persons claiming possession through or under them) are evicted from the immovable property known as Lot 588, Vaal-Harts Settlement A, Registration Division Vryburg, Northern Cape Province, 91,4895ha in extent and held by Deed of Transfer T1619/1995 ("the immovable property");

¹³ PLASCON-EVANS PAINTS LTD V VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (AD) AT 634E – 635C

2. The JDL Trust, represented by JD Lategan N.O. and PJ Erasmus N.O. (as well as all persons claiming possession through or under them) are ordered to vacate the immovable property within 30 (thirty) calendar days of this order;
3. The sheriff and the sheriff's deputy are authorised and ordered to evict the JDL Trust, represented by JD Lategan N.O. and PJ Erasmus N.O. (as well as all persons claiming possession through or under them) from the immovable property in the event that the order in terms of paragraph 2 is not complied with;
4. The sheriff and the sheriff's deputy are authorised and ordered to obtain the assistance of the South African Police Services for purposes of complying with and executing this order; and
5. The costs of this application to be paid by the JDL Trust, represented by JD Lategan N.O. and PJ Erasmus N.O., on a scale as between party and party.



A STANTON

ACTING JUDGE

Northern Cape Division, Kimberley

On behalf of Applicant:

Adv E JJ Nel (Duncan & Rothman)

On behalf of First Respondent:

Adv W A Aswagen (Mervyl Joel Smith Attorneys)