IN THE HIGH COURT OF SOUTH AFRICA,

NORTHERN CAPE DIVISION, KIMBERLEY

Case no: 2307/2016

Not reportable

In the matter between:

ANANI TRAINING ENTERPRISE (PTY) LTD	**FIRST APPLICANT**
JOHANNES TLAISHI MOTHOA	**SECOND APPLICANT**

And

TRANSNET LIMITED	**FIRST RESPONDENT**
TRANSNET FREIGHT RAIL	**SECOND RESPONDENT**
PERGUELL VELDMAN	**THIRD RESPONDENT**

Heard: 08 December 2017

Delivered: 21 May 2018

JUDGMENT

Phatshoane ADJP

[1] This is a vindicatory application in which Anani Training Enterprise (Pty) Ltd ("Anani Training") and Mr Johannes Tlaishi Mothoa ("Mr Mothoa"), the first and second applicants, seek an order substantially in the following terms:

1.1 That Transnet Limited, Transnet Freight Rail, and Mr Perguell Veldman, the first, second and third respondents return all the diamond-cutting equipment as specified in an appendix to Anani Training's founding affidavit within 24 hours from date of the order; alternatively:

1.2 That the above named respondents jointly and/or severally provide Anani Training with security in a form of a bank guarantee in the amount of R4 277 020.00 (four million two hundred and seventy seven thousand and twenty rands) within 24 hours from date of the order.

[2] In addition to the above application (the main application) there are two counter-applications before me. In the first Transnet Limited and Transnet Freight Rail ("Transnet") claims from Anani Training payment of all amounts owing, in terms of the lease agreement dated 18 October 2010 concluded between Transnet and Anani Training, in the aggregate sum of R 267 968.12 together with interest calculated in terms of clause 37 of the lease. For present purposes it is important to note that Transnet Freight Rail is an operating division of Transnet Limited and not a separate legal entity. The two entities are for all intends and purposes the same party and therefore one respondent.

[3] In respect of the second counter-application Mr Veldman, representing himself, claims from Anani Training and Mr Mothoa an amount of R 1 050 000.00 (one million and fifty thousand rand) being damages purportedly flowing from the termination of the service level agreement concluded on 27 January 2010 between an entity called Anani Capital Holdings (Pty) Ltd and Businvest Investment CC, a close corporation he managed. The latter two entities are not before Court.

[4] There is also before me for consideration a Third Party Notice filed by Transnet on Mr Veldman in terms of which it claims indemnity from him in the event it is found liable to return the equipment or to pay Anani Training in lieu of its value. Transnet also seeks a declarator that Mr Veldman is liable to return the equipment to Anani Training, alternatively, that Mr Veldman is liable to indemnify Transnet for any judgment debt obtained against it in this litigation including the payment of its costs. The Third Party Notice is not opposed by Mr Veldman.

[5] Anani Training took a point *in limine* attacking the authority of Ms Welekazi Jabosigo to depose to the answering affidavit on behalf of Transnet. I must

immediately say that the point is unmeritorious. In *Ganes and Another v Telecom Namibia Ltd*[1] the Court pronounced:

> '[19] ...The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.'

In this case the deponent is the executive manager (litigation) in Transnet Legal Governance, Compliance and Fraud Risk Department. She attached, to her replying affidavit, the delegation of authority which demonstrates that she is authorised to act on behalf of Transnet. In addition, she has authorised Tshabalala attorneys to institute this proceedings on behalf of Transnet. This authority was not questioned by Anani Training.

[6] Both the main application and the first counter-application are founded on the lease agreement that was concluded between Anani Training and Transnet Limited on 18 October 2010 in terms of which Transnet leased a certain immovable property known as Mess & Ablution (Asset Number: 02DH001k), situated in Kimberley, to Anani Training for a period of three years, commencing on 01 November 2010 and ending on 30 October 2013, for purposes of conducting training thereon.

[7] In its founding papers Anani Training avers that prior to entering into the aforesaid lease it had been awarded a tender by Sol Plaatje Municipality ("Sol Plaatje") to conduct training within the diamond and jewellery cutting sector. It

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[1] [2004] 2 All SA 609 (SCA) at 615 para 19

further states that one of the tacit conditions of the tender was that it would have to work in collaboration with local partners. For purposes of complying with this prerequisite it entered into some arrangement with a local enterprise, Businvest Investment, whose managing director is Mr Veldman. As it turned out, the tender was awarded to an entity known as Anani Capital Holdings (Pty) Ltd. Anani Capital Holdings, in its capacity as a project manager in respect of the tender in issue, concluded a service level agreement with Businvest in terms of which the latter was required, *inter alia*, to support and assist learners; support project sponsor and stakeholder relationship where required; and so forth[2]. At some stage the relationship between Anani Capital Holdings and Mr Veldman turned sour and was severed around 23 August 2010. As for the contract between Anani Capital Holdings and Sol Plaatje it came to an end during 2012. No training was offered following such termination.

[8] Anani Training says that it purchased the training equipment for an amount of approximately R 4 277 020.00 for use by the learners during their training sessions. In the period between 2012 and 2016 Anani Training and Mr Mothoa abandoned the leased premises and never set foot on it again. However, they left the training equipment behind and, for this reason, claim to have been in occupation of the premises. Anani Training says that it's training equipment were stored on the leased premises for safekeeping in the hope that the tender agreement between Anani Capital and Sol Plaatje would be renewed. It further contends that the lease continued to be in existence on a month to month basis following its expiry date on 30 October 2013 in that it was not ended officially by means of a letter of termination. Anani Training also claims to have continued to pay the rental in light of the storage of its equipment.

[9] Transnet explained that in terms of clause 16.1 of the lease:

> 'The lessee shall not vacate the leased premises or allow the leased premises to remain unused unless the prior written consent of the lessor is obtained, which consent shall not be unreasonably withheld.'

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[2] The duties and responsibilities of Businvest are set out in clause 6 of the service level agreement entered into between Anani Capital and Businvest. It is not necessary, for present purposes, to enumerate them in any detail.

[10] Transnet argued in terms of clause 8 of the agreement the lease could only be used for a specified purpose. In Annexure A to the lease it is set out that: *"The lease premises shall be used for Training purpose and for no other purpose whatsoever."* Transnet says that it did not consent to the use of the premises as a storage facility and did not conclude a lease on a month to month basis as alleged by Anani Training. It further intimates that upon the expiry of the lease Anani Training was in unlawful occupation of the premises.

[11] According to Transnet its two officials, Messrs Norman Papenfus and Patrick Segone, when realising that the leased premises were no longer being used for its assigned purpose, they attempted to contact Mr Mothoa using various means of communication but to no avail. For instance, letters were dispatched by registered post to Anani Training but returned undelivered. During April 2013 Mr Papenfus arranged that the locks on the doors to the leased premises be changed to prevent Mr Mothoa from gaining entry in the hope that he would contact Messrs Papenfus and Segone to discuss the reason for vacating the premises. On 24 June 2015 they drew up an inventory of the equipment found on the premises which they updated on 09 November 2016.

[12] It must be borne in mind that Transnet received a letter dated 26 April 2016, prior to the updating of the inventory, from Mr Veldman in which he sought permission to remove the equipment from the leased premises alleging that the equipment were required for use in the exit strategy of a project which was being conducted at the Kimberley Jewellery and Diamond Academy. Mr Veldman informed Transnet that this was part of the training business that he conducted on the leased premises with Mr Mothoa. He further informed Transnet that all possible means to contact Mr Mothoa for a period of 5 years were in vain and that the latter had disappeared without trace. He wrote:

> 'I took to swear on [oath] and indemnify Transnet against any material liability whatsoever that may occur before, in between, and after the release of the equipment to us. It is understood that as there is access [by] other sub-contractors to Transnet's premises where the benches are held, the inventory is actually decreasing sparking concerns to the possibility of the success of the exit strategy.

Hence our request that Transnet saves our project by releasing the benches in order for us to continue with the training and beneficiation program.

It is our humble request that Transnet will consider our appeal [favourably] for the benefit of the program. Any further enquiry by any party with [regard] to the benches can be referred to the premises where we will be operating from, the Kimberley Jewellery and Diamond Academy, Kimberley.'

[13] On 28 April 2016 Mr Papenfus gave Mr Veldman permission to remove the benches (the training equipment) contingent upon indemnifying Transnet against liability for any damage to the property. The declaration of indemnity signed by Mr Veldman on 28 April 2016 reads in part:

'I the undersigned Perguell Veldman (hereinafter referred to as the applicant) hereby indemnify Transnet and holds it harmless against:

1. Any damage to Transnet's property, whether movable or immovable, including consequential damage arising directly from physical damage to the property.
2. Liability in respect of any damage to the property, whether movable or immovable, of the applicant or third parties.
3. Any legal costs or expenses reasonably incurred concerning claims or actions arising [from] any of the aforegoing.'

[14] Transnet claims to be unaware that the partnership between Messrs Mothoa and Veldman had ended. Quite unexpectedly, four years later, following Anani Training vacating the leased premises and leaving its equipment, Mr Mothoa made contact with Mr Segone of Transnet by way of an e-mail dated 21 June 2016 requesting access to the diamond-cutting machines and undertook to pay the outstanding arrear rental owing to Transnet in terms of the lease. On 22 June 2016 Mr Segone replied to Mr Mothoa that permission was granted to Mr Veldman to remove the equipment based on his request of 26 April 2016. On 22 July 2016 Transnet revoked the consent it granted to Mr Veldman to remove the equipment and instructed him to return the keys to the leased premises.

[15] Anani Training disputes that the inventory drawn up by Messrs Papenfus and Segone during June 2015 and updated in November 2016 accurately reflects the training equipment it left on the leased premises during 2012 and says that

Transnet should take full responsibility for the loss of its equipment. In its replying affidavit Anani Training acknowledges that Mr Veldman removed the equipment from the leased premises without its consent. It further contends that Transnet acted negligently in releasing the said equipment to Mr Veldman. It says that its relationship with Mr Veldman was terminated prior to the conclusion of the lease and had never introduced him as a partner to Transnet during the currency of the lease.

The main application

[16] The issues arising for consideration in respect of the main application can be summed up as follows:

16.1 Whether Anani Training proved its ownership of the equipment and whether Transnet and Mr Veldman are liable to restore possession of the equipment to it;

16.2 In respect of the alternative claim, whether Anani Training has proved its claim for the payment of the cost price of the equipment in the amount of R4 277 020.00 and whether Transnet and Veldman are jointly and severally liable for the payment of the said amount;

16.3 Whether Transnet's liability towards Anani Training is excluded in terms of clause 33.1 of the lease;

16.4 In the event that Transnet's liability is not excluded in terms of clause 33.1 whether its liability is limited to three months rental amounting to R12 078.84 in terms of clause 34 of the lease;

16.5 In the event that Transnet is liable for the payment of any amount to Anani Training then it should be considered whether it is entitled to claim indemnity from Mr Veldman in terms of its Third Party Notice.

[17] Mr Veldman contends that the diamond-cutting equipment left behind, when Anani Training abandoned the leased premises during 2012, did not belong to Anani but were purchased with State funds. According to Mr Veldman Mr Mothoa received funds from Sol Plaatje and bought the equipment for the sole purpose of conducting the training. He says the equipment was required for the exit strategy of the project and was being used at the Kimberly Diamond and

Jewelry Centre in Kimberly and that the equipment was and remains the property of the project.

[18] Mr Mothoa attested to a separate affidavit[3] in which he states that Anani Training purchased the equipment from a certain AMS Engineering and Jewellery Equipment Goldsmith. He compiled a list of the equipment allegedly left behind on the leased premises. He appended three invoices made out to Anani Training by the named supplier on 16 and 30 June 2010 as evidence of the latter's ownership of the equipment. Apart from Mr Veldman's unsubstantiated allegation that the equipment belonged to the project there is no evidence to controvert Anani Training's evidence that the property belonged to it. The letter dated 25 April 2009 by Sol Plaatje, appointing Anani Capital Holdings as a service provider in respect of the training project, is silent on the ownership of the equipment to be used for training[4]. In my view, it can safely be accepted that the equipment belonged to Anani Training as there is virtually no shred of evidence pointing to the contrary.

[19] Apparent from the factual matrix sketched Anani Training acknowledged that Mr Veldman, in his personal capacity, removed the equipment from the leased premises without its consent. It therefore remains to be considered whether both Transnet and Veldman are liable to restore possession of the equipment to Anani Training.

[20] Anani Training relies on negligence in seeking to hold Transnet liable for the return of the equipment. It avers that Transnet acted negligently in releasing the benches/equipment to Mr Veldman. In amplification, Mr Ryneveldt, for Anani Training and Mr Mothoa, argued that Transnet gave Mr Veldman access to the leased premises without assessing the nature of the relationship between Anani Training and Mr Veldman including the latter's credentials. Ms Lapan, for Transnet, contended that no allegations was made in the founding affidavit that Transnet owed any duty of care to Anani Training, either at common law or in

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[3] Annexure "JTM4" to the founding affidavit

[4] The letter is attached as an annexure to Mr Veldman's answering affidavit and appears at page 395 of the record.

terms of the lease agreement, to safeguard the equipment on the leased premises.

[21] The facts in *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Pha Phama Security*[5] although distinguishable from the present bear some striking similarities. In that case a security guard allowed some men to remove a truck from the site on the strength of a letter purporting to be from the truck repairs depot. In that manner the truck was stolen and never recovered. The Court found the loss suffered to have been purely economic in consequence of which the law does not impose a legal duty on the guard to prevent the loss. The Court held that where the loss sustained is purely economic, in other words it does not arise directly from damage to the plaintiff's person or property but in consequence of the negligent act itself,[6] the question to be asked is whether public policy or the conviction of the community require that there be such a duty. I am of the view that in evaluating the convictions of the community in this case it is pertinent to have regard to some contractual terms between Transnet and Anani Training.

[22] Clause 33.1 of the lease agreement concluded between Transnet and Anani Training stipulates:

> '**The lessee [Anani Training] shall not have any right, remedy or claim of any nature whatsoever against the lessor [Transnet] for any loss, damage (whether general, special or consequential), expense or injury which may be suffered by the lessee, directly or indirectly, arising out of or relating to this lease agreement, irrespective of whether or not such loss, damage, expense or injury shall have been caused by the negligence of the lessor or any person for whose acts or omissions the lessor is vicariously liable.** Without derogating from the generality of the aforegoing, the lessor, shall have no liability to the lessee in respect of any such loss, damage, expense or injury which may be suffered by the lessee by reason of any latent or patent defect in the leased premises, or from any fire in or on the leased premises, **or any theft from the leased premises,** or by reason of the leased premises or any part thereof being in or falling into a defective condition or state of disrepair, or as a result of any

[5] [2011] 1 All SA 34 (SCA)
[6] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2006] 1 All SA 6 (SCA) para 1

particular repair not being effected by the lessor either timeously or at all, or arising out of *vis major* or *casus fortuitous*, or arising out of any act or omission of any other lessee of premises or which the leased premises might form part or due to a change of the leased premises' façade, appearance or any feature thereof , **or arising in any manner whatsoever out of the use of the leased premises by any person**'. (My emphasis)

[23] Clause 33.1, in my understanding, exempt Transnet from liability for the loss suffered by Anani Training, whether such loss arose as a result of Transnet's negligence or as a result of theft of the equipment from the leased premises or arose in any manner whatsoever, out of the use of the leased premises by any person. In *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[7] the Court made this instructive pronouncement on the approach to the exemption clauses:

> 'The correct approach is well-established. If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens* (see *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C). But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote" (cf *Canada Steamship Lines Ltd v R* [1952] 1 All ER 305 (PC) at 310C–D).'

See also *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Pha Phama Security* (Supra) at 41 para 16; *Walker v Redhouse* [2007] 4 All SA 1217 (SCA) at 1221 para 14.

[24] There was no contestation aimed at impugning clause 33.1. The clause is, in my view, plainly unambiguous. The conduct of the Transnet officials and/or that of Mr Veldman falls within the ambit of the disclaimer. For the very first time, in its replying affidavit, Anani Training argued that Transnet was grossly negligent in releasing the equipment to Mr Veldman on the basis of a letter he wrote

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[7] [1999] 1 All SA 411 (A) at 415

claiming that they were in partnership. In *MV Stella Tingas, Transnet Ltd t/a Portnet v Owner of the MV Stella Tingas and Another*[8] the SCA examined the concept of "gross negligence" and held:

> 'Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also *Philotex (Pty) Ltd and others v Snyman and others* 1998 (2) SA 138 (SCA) at 143C–J.) This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (*Van Zyl*'s case (*supra*) at 557A–E.) If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, *dolus eventualis*; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (*Van Zyl*'s case (*supra*) at 559D–H.) It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross… <u>It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity</u>.' (My emphasis)

[25] Reliance on mere negligence and/or gross negligence as Anani Training sought to do in its papers cannot avail it. In *First National Bank of Southern Africa Ltd v*

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[8] 2003 (2) SA 473 (SCA) para 7

Rosenblum and another[9] interpreting a clause similar to clause 33.1 of the lease the SCA held:

> 'Nothing in clause 2 suggests that only *culpa levis* is to enjoy immunity but not *culpa lata*. Indeed, in the case of *Fibre Spinners and Weavers* [1978 (2) SA 794 (A)] (*supra*) a clause which made no mention of negligence at all was held to cover both negligence and gross negligence. (Here negligence is expressly mentioned in clause 2.) It was also held that there was no reason, founded on public policy, why a clause exempting a person from liability for gross negligence should not be enforceable. (At 807D.)'

[26] I am unpersuaded that public policy, or the convictions of the community, would require that there ought to have been a legal duty on Transnet officials to prevent the loss. Anani Training contracted out of liability arising from negligence in terms of clause 33.1 of the lease. Even if I am wrong on this score, Transnet cannot be said to have been negligent in the circumstances where Anani Training deserted the leased premises for a period of four years and was unreachable. How the officials of Transnet would have been able to determine the veracity of the letter they received from Mr Veldman, requesting the release of the benches to him on the basis of the purported partnership between himself and Mr Mothoa, in the absence of Mr Mothoa, escapes me. Anani Training never informed Transnet that it severed its ties with Veldman. Transnet officials could therefore not have had any reason to believe that Mr Veldman was not in any form of partnership with Anani Training. This notwithstanding, Transnet officials took precautionary steps before permitting Mr Veldman to remove the equipment. For instance, they took it upon themselves to compile an inventory list of the equipment found on the leased premises as at 24 June 2015 and updated this during November 2016; they ensured that Mr Veldman signed an indemnity; and ascertained the place where the equipment would be kept. The upshot of this is that Anani Training failed to establish negligence on part of Transnet.

[9] [2001] 4 All SA 355 (A) at 364 para 26

[27] In view of my conclusion above it is not necessary to determine whether clause 34 of the lease, insofar as it limits the liability of Transnet to three month's rental, applied.[10]

[28] As already alluded to, Anani Training acknowledged that Veldman was in possession of the equipment. It also appears that some of the equipment may still be on the leased premises. I say this because, in terms of para 23.12 of the annexure to the Third Party Notice, Transnet states that when the inventory was updated it appeared that some of the equipment that had been on the leased premises since 24 June 2015 had been removed by 09 November 2016. Transnet tendered the return of the remainder of the equipment still on the leased premises to Anani Training. That been the case the equipment had not been lost or destroyed and its whereabouts appears to be known to Anani Training. In light of this, its alternative claim, that it be paid the cost price of the equipment in the amount of R4 277 020.00, cannot be sustained.

[29] Mr Veldman did not dispute that he removed some of the equipment (the benches) from the leased premises which I have already determined belonged to Anani Trading. It is not clear from the evidence whether Mr Veldman took all the benches, if not then, how many he took and the value thereof. There was no evidence adduced showing the number of benches that were on the leased premises when Transnet allowed him to remove them. Be that as it may, it follows that Mr Veldman is liable to restore possession to Anani Training of all the diamond-cutting equipment he took from the leased premises pursuant to the permission granted to him by Transnet to remove the said equipment.

The first counter-application

[30] The first counter-application has its genesis in clause 44.4 of the lease which reads:

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[10] Clause 34 provides: "Notwithstanding any other provision contained in this lease Agreement, the parties agree that, in the event of the lessor [Transnet] being liable to the lessee [Anani Training] in terms of this lease agreement (for any reason whatsoever) the liability of Transnet shall be limited to no more than 3 (three) month's rental, calculated at the time when such liability arose."

'Should the lessee remain in occupation of the leased premises unlawfully after expiry of this lease agreement for the purpose of removing any machinery, plant or ancillary equipment, the lessee shall be liable for the payment of the rental in terms of the lease agreement in respect of such period of occupation as well as compensation for any damage or loss suffered by the lessor as a result thereof.'

[31] Transnet maintains that Anani Training failed to pay the rental and other charges due to it for the entire period of the lease in the amount of R267 968.12. It further intimates that Anani Training remained in occupation of the leased premises after the expiry of the lease without its consent. In view of Anani Training's unlawful occupation, it says, it was unable to re-let the premises.

[32] The claim for the payment of the arrear rental, other charges and interest is in respect of the fixed period of the lease commencing on 01 November 2010 and ending on 30 October 2013. Transnet's further claim for rental is based on the alleged unlawful occupation of the leased premises by Anani Training, after the expiry of the fixed period of the lease, commencing on 31 October 2013 and ending on the date on which Anani Training finally vacates the premises by removing its equipment.

[33] Anani Training attacked the counter-application on the basis that the claim was extinguished by prescription. Mr Ryneveldt argued that prescription began to run from April 2013 when Transnet changed the locks to the leased premises and allegedly placed Anani Trading on notice for its breach. In view of the fact that Transnet did not issue summons against Anani Training, within a period of three years from the date in issue, its claim has prescribed, the argument went. Anani Training contends that this also applies to the claim for the arrear rental in respect of the alleged unlawful occupation of the premises. In the latter instance, it argued, prescription began to run from 01 November 2013.

[34] Ms Lapan argued that Transnet's claim may well have prescribed if regard is had to the fact that the counter-application was lodged on 01 December 2016. However, she argued, in the emails exchanged on 21 June 2016 Mr Mothoa,

acting on behalf of Anani Training, acknowledged liability for the outstanding balance of Anani Training's account and expressly undertook to settle such outstanding account before removing any of the equipment from the leased premises. She also referred to an email dated 22 June 2016 by Mr Papenfus of Transnet to Mr Mothoa recording the following response: *"[T]he outstanding rental must be paid before any further arrangement are made."* In deposing to the answering affidavit (in the counter-application) Mr Mothoa admits the contents of his email of 21 June 2016 and states that Anani Training *"... comprehended its liability towards [Transnet] and, furthermore, "... that the equipment will only be released once the arrear rental as per the lease agreement has been paid in full."*

[35] Ms Lapan argued that the new debt accordingly arose on 21 June 2016 when Anani Training acknowledged its liability towards Transnet and undertook to pay its outstanding account, the amount of which would be determined in accordance with the lease agreement. Resultantly, when Transnet sought to enforce the new debt in terms of its counter-application of 01 December 2016 its claim had not prescribed, the argument continued.

[36] The following dictum in *Adams v Motor Industry Employers Association*[11] is apposite:

> 'There is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise. (Cf *Divine Gates & Co Ltd v Beinkinstadt & Co* 1932 AD 256; *Somah Sachs (Wholesale) Ltd v Muller & Phipps SA (Pty) Ltd* 1945 TPD 284; *Mahomed Adam (Edms) Bpk v Raubenheimer* 1966 (3) SA 646 (T)) In *Christou v Christoudoulou* 1959 (1) SA 586 (T) there are dicta to the effect that an admission in respect of an existing debt cannot "found an independent cause of action" unless it amounts to a novation (at 587G–588A). This, with respect, appears to rest on a misapprehension. There can be no objection in principle to a second obligation arising in respect of an existing debt, and this appears to have been

[11] 1981 (3) SA 1189(A) at 1198B-G

> recognized by this Court (*Smit v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (3) SA 338 (A) at 346G). The decisive question is whether the acknowledgment contains an express or implied undertaking to pay, a matter which relates to the intention of the parties.'

See also the judgment of this Court in *Absa Brokers (Pty) Ltd v Stoltz and others* [2002] 4 All SA 476 (NC).

[37] In *Lieberman V Santam* Ltd[12] the parties had entered into an agreement in terms of which the respondent had agreed not to plead prescription before an agreed date. A passenger travelling with the appellant had also instituted action against respondent who entered into an agreement that it would pay her for the damages caused by the negligence of the driver of the vehicle in which she and the appellant had travelled, and 50% of the damages for the negligence of the other driver. The respondent paid the appellant in respect of the first claim, but in respect of the second pleaded prescription, which was upheld. On appeal the Court held:

> "[11] ... On a proper construction of the agreement it is clear, in my view, that it created a new contractual foundation for a valid and enforceable obligation to pay which existed independently of any previous obligation under the Act. According to the express wording of the agreement a new obligation was created ie to pay 50% of such losses and damages in respect of Carter-Smith's negligence as might be agreed between the parties or ordered by the court.... In view of the express acceptance of liability for such damages and the undertaking to pay, it was thereafter no longer open to the respondent to deny liability. The new obligation created by the agreement was to pay 50% of such loss or damages as the Act provided for. In other words the obligation to pay was fixed, the only outstanding issue being the quantification of the obligation which had to proceed along the statutory lines.
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> [12] ...It is sufficient to say that the agreement provided the appellant with a contractual basis upon which to found a cause of action for payment which he was free to invoke if he so chose. In my view the appellant was entitled to found his

[12] 2000 (4) SA 321 (SCA)

claim upon the agreement and it is clear from his particulars of claim that his cause of action is based upon the agreement. The contractual obligation to pay 50% of the agreed or proved damages represented a new debt. That it had its roots in the old may be historically so but that does not derogate from the fact that it was a fresh obligation and that prescription could not begin to run against a claim to enforce it before it arose.'

[38] Clearly on 21 June 2016 Anani Training acknowledged its indebtedness to Transnet and expressly undertook to make payment. This undertaking was accepted by Papefus on behalf of Transnet. In my view, the contractual obligation to pay represented a new debt and gave rise to "a fresh obligation" even though the debt has its roots in the history already sketched. It follows that Transnet's claim for the payment of the arrear rental had not prescribed.

[39] I now turn to consider whether Anani Training is liable for the payment of the arrear rental in the amount of R R267 968.12 together with interest as at 31 March 2017 for the fixed period of the lease and agreed damages for the alleged unlawful occupation of the leased premises after the expiry of the fixed period of the lease in terms of clause 44 of the lease.

[40] Although Anani Training acknowledged liability it denied that it is indebted to Transnet in the aforesaid sum and that its occupation was unlawful. It argued that Transnet failed to exercise its right in terms of clause 36 of the lease which provides in part:

'36.1 Should the lessee:

36.1.1 fail to pay any amount due by the lessee in terms of this lease agreement to the lessor on due date; ...

36.1.5....then on the happening of any such event, the lessor shall be entitled, without prejudice to any other rights which he may have under this lease agreement or at common law:

36.1.6 to cancel this lease agreement on written notice thereof to the lessee and claim immediate repossessions of the leased premises; **or**

36.1.7 to remedy such breach and recover the total costs incurred by the lessor in doing so from the lessee, who shall be obliged to pay the amount thereof to the lessor forthwith; **or**

36.1.8 to treat the lessee's tenancy thereof as a monthly tenancy terminable by the lessor on 1 (one) month's prior written notice to the lessee.' (My emphasis)

[41] Anani Training contended that on the basis of clause 36.1.8, absent any notice of termination of the lease, the lease continued on a month to month basis. Premised on this, it undertook to pay the arrear rental before the equipment could be released.

[42] On a proper construction of clause 36.1 of the lease agreement, it is obvious that Transnet is entitled to make an election to treat the lease as a monthly tenancy in the event of a breach by Anani Training. There is no evidence by Anani Training demonstrating that Transnet made such election. Accordingly, Anani Training was and remains in unlawful occupation of the leased premises. This would entitle Transnet to claim payment of the rental in terms of clause 44.4 of the lease.

[43] In terms of clause 37.1 of the lease should Anani Training fail to make any payment on or before the due date it shall be liable to pay interest on the outstanding amount compounded monthly and calculated from due date at the rate of 200 (two hundred) basis points above prime rate of the Bank designated by Transnet. The clause further stipulates that a certificate containing details of the applicable prime rate(s) for any period, signed by a person professing to be a manager of any branch of the Bank and submitted by Transnet during any legal proceedings, shall be accepted as prima facie proof as to correctness of the contents thereof by Anani Training. Clause 37.3 stipulates that a certificate signed by a financial manager, director, company secretary, credit manager or internal accountant of Transnet shall be prima facie proof of the amount of indebtedness owing by Anani Training to Transnet. In terms of clause 37.2 Anani Training has accepted liability for and undertook to pay on demand to Transnet all collection charges and other legal costs calculated on the scale as between attorney and own client.

[44] Transnet had initially indicated that Anani Training had only paid a deposit of R6 650.00 at the commencement of the lease agreement and never effected

any other payment during its tenancy. Anani Training disputed this and intimated having paid an amount of R10 055.00 on 13 October 2010; an amount R16 653.20 on 11 April 2011; an amount of R24 204.55 on 22 November 2011; and an amount of R10 000.00 on 19 July 2012. In its supplementary affidavit Transnet states that the total amount due and payable by Anani Training is R267 968.12 and not R243 723.57 as originally claimed. It annexed to its papers a detailed statement showing how the debt was computed.

[45] Transnet provided a certificate, duly signed by a manager of its bank, Standard Bank Corporate and Investment Banking Johannesburg, containing details of the applicable prime rates for the period of the lease and the subsequent period when Anani Training remained in unlawful occupation of the premises. Transnet also provided a certificate, duly signed by its senior manager: Credit Management, as prima facie proof of the amount of the indebtedness that is due, owing and payable by Anani Training as at 31 March 2017 in the stated amount of R267 968.12.

[46] Anani Training did not dispute the calculations made by Transnet save that it made payments as already specified, which in any event were brought into reckoning by Transnet in determining the amount it owed. In the absence of any evidence in rebuttal, the *prima facie* proof of both the arrear rental payable together with interest and other charges became conclusive proof. Anani Training has agreed to the correctness of the contents of the certificates. Consequently, it is liable to pay the amount of the arrear rental as reflected on the certificate.

The second counter-application

[47] As adumbrated earlier, in respect of the second counter-application, Mr Veldman claims from Anani Training and Mr Mothoa an amount of R 1 050 000.00 being damages purportedly flowing from the termination of the service level agreement concluded on 27 January 2010 between an entity called Anani Capital Holdings (Pty) Ltd and Businvest Investment CC. It is

apparent that the service level agreement was not entered into with Mr Veldman in his personal capacity. He was merely cited in his personal capacity in this litigation because he is said to have removed the diamond-cutting equipment from the leased premises. He did not bring the application for joinder of Anani Capital and Businvest in the proceedings. In the final analysis, the second counter-application cannot succeed because the two main potential litigants involved in that dispute, Anani Capital and Businvest are not before Court. That said, I do not find it necessary to traverse further points *in limine* raised by Anani Training in its papers.

[48] Turning now to the question of costs: in respect of the main application, Mr Ryneveld urged, without laying any justifiable basis for this, that the costs be on a punitive scale. I disagree. In my view, such costs should follow the result on party and party scale. Transnet succeed in absolving itself from any liability claimed by Anani Training. It should therefore not be out of pocket. In respect of the first counter-application Transnet is entitled to its cost on an attorney and own client scale as agreed to in terms of clause 37.2 of the lease. As for the wasted costs of the proceedings of 15 September 2017 the applicants, Anani Training and Mr Mothoa, did not prepare and paginate the Court file as they should have. They caused the delay. Consequently, they should bear those costs. I proceed to make the following order.

Order:

1. The main application is granted only to the following extend:
   - 1.1 Mr Peruell Veldman, the third respondent, is ordered to return to Anani Training Enterprise (Pty) Ltd, the first applicant, all the diamond-cutting equipment he removed from the leased premises within two days from date of this order.
   - 1.2 Mr Peruell Veldman is ordered to pay Anani Training Enterprise (Pty) Ltd and Mr Johannes Tlaishi Mothoa's (the first and second applicants') costs in respect of the main application on a party and party scale.
   - 1.3 Anani Training Enterprise (Pty) Ltd is ordered to pay Transnet Limited's (the first respondent's) costs on party and party scale.

2. The first counter-application by Transnet Limited, the first respondent, is granted.

   2.1 Anani Training Enterprise (Pty) Ltd, the first applicant, is liable to pay to Transnet Limited the amount of R267 968.12 (two hundred and sixty seven thousand nine hundred and sixty eight rand twelve cents).

   2.2 Anani Training Enterprise (Pty) Ltd is liable to pay interest on the aforesaid amount of R267 968.12 calculated at the rate of 12.5% per annum from 01 April 2017 to date of final payment.

   2.3 Transnet Limited is granted leave to approach this Court on the same papers, duly supplemented where necessary, for an order that Anani Training Enterprise (Pty) Ltd is liable to pay its rental and other charges due to it in terms of the lease agreement dated 18 October 2010 together with interest calculated in terms of clause 37 of the lease from 01 April 2017 to date on which it finally vacates the leased premises, such amount to be determined after the date on which Anani Training Enterprise (Pty) Ltd finally vacates the leased premises.

   2.4 Anani Training Enterprise (Pty) Ltd is to pay the costs of the first counter-application on the scale as between an attorney and own client as set out in clause 37.2 of the lease agreement.

3. The second counter-application by Mr Perguell Veldman is dismissed with costs on party and party scale.

4. Anani Training Enterprise (Pty) Ltd is to pay the costs occasioned by the postponement of 15 September 2017.

MV Phatshoane ADJP

APPEARANCES:

FOR THE FIRST AND SECOND APPLICANTS:	Adv D L-J Ryneveldt ENGELSMAN MAGABANE INC
FOR THE FIRST AND SECOND RESPONDENTS:	Adv A J Lapan HUGO MATHEWSON & OOSTHUIZEN INC
FOR THE THIRD RESPONDENT:	Mr P Veldman (in person)