IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 535/2016

In the matter between:

TRANSNET SOC LTD t/a TRANSNET PROPERTY Applicant

and

DEFENSOR ELECTRONIC SECURITY SYSTEMS (PROPRIETARY) LIMITED Respondent
(Registration No: 2012/038837/07)

HEARD ON: 05 MAY 2016

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 21 JULY 2016

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[1] These were motion proceedings. The applicant, as the lessor, sought to have the respondent, as the lessee, evicted from certain business premises. Adjunct to the main relief of eviction, the applicant also sought a subsidiary relief. It sought also to

have its t landlord tacit hypothec against the respondent's movables on the leased premises perfected by having them attached with the aid of the sheriff. The respondent opposed the option.

[2] There were certain undisputed facts in the matter. The applicant was the rightful owner of an immovable property. The property was situated on an industrial piece of land technically known as a portion of the remaining extent of Erf 1964 Bloemfontein commonly known as 9 Long Street, Hilton, Bloemfontein.

[3] The parties entered into a written lease agreement, in respect of the applicant's property as described above. The material terms of the lease agreement were, among others; that the lease would endure for a period of 3 years; that it would effectively commence on 1 August 2012; that it would terminate on 31 July 2015; that the respondent would be obliged to pay rental to the applicant at the rate of R28 000.00 per month excluding value added tax; that the rental would annually escalate at the rate of 10%; that the respondent would be obliged to pay a down deposit of R84 000.00 plus monthly contribution towards the municipal bill in respect of water consumption, property assessment tax, sewerage and refuse removal and electricity supplied, and that the respondent would use the leased premises for business purposes only - vide "annexure b"

[4] The applicant duly complied with its contractual obligations towards the respondent. It made the leased premises available to the respondent. The respondent took beneficial occupation of the

leased premises. The respondent remained in such occupation at all times material to these proceedings.

[5] Notwithstanding its beneficial occupation and unhindered enjoyment of the leased premises, the respondent failed to pay the monthly rental on regular basis in terms of the lease agreement.

[6] On 27 January 2015 the applicant addressed the first letter of demand to the respondent. It averred that the latter's account was in arrears and that the exact sum of the arrears was R491 752.07. It called upon the respondent to rectify the account within seven days. It warned the respondent that unless the arrears were paid in accordance with the demand, legal proceedings would be initiated to evict the respondent and to recover the arrears. The applicant also forewarned the respondent that the respondent would not be permitted to remove any of its movables from the leased premised in those circumstances since they were subject to the its landlord's tacit hypothec - vide "annexure f". The first demand notwithstanding, the respondent failed to settle the arrears, but remained in occupation of the leased premises.

[7] On 27 May 2015 the applicant addressed the second letter to the respondent, averred that the respondents' account was still in arrears, and claimed that the exact sum thereof was R497 003.34 as on 1 May 2015. As a result of the breaches the applicant gave written notice, by way of the said letter, of its decision to cancel the lease agreement with effect from 27 May 2015. The

respondent was called upon to vacate the leased premises by no later than 31 May 2015. The respondent was once again warned that an application would be launched to have the respondent evicted unless he vacated the leased premises in compliance with the notice whereby the lease agreement was terminated – vide “annexure g”.

[8] The very next day, on 28 May 2015 to be precise, the applicant addressed yet another letter of demand to the respondent. In the third demand it averred that the respondent’s account was still in arrears and that the exact sum thereof was R315 391.80. It once again called upon the respondent to pay the arrears within seven days. Again it warned the respondent that, unless the respondent complied, legal proceedings would be instituted to evict the respondent and to recover the arrears. Again the respondent was forewarned about the landlord’s tacit hypothec over the lessee’s movables on the leased premises - vide “annexure “d”.

[9] The aforesaid notice, “annexure g”, was served by the Sheriff upon the respondent on 3 June 2015 - vide “annexure h”. Notwithstanding service and knowledge that the applicant has terminated the lease agreement; that the applicant had given the respondent final ultimatum to vacate the leased premises and that the respondent was financially unable to settle the arrears that had accumulated over time – the respondent stayed put on the applicant’s property. Days went by. Weeks went by. However, the respondent neither paid the arrears nor vacated the leased premises. The respondent stayed put and continued to enjoy the beneficial occupation of the applicant’s property. The applicant

took no decisive and immediate legal steps to reclaim possession of its occupied property from the defaulting respondent.

[10] On 5 July 2015 a certain Mr Gert Renier van Rooyen, the respondent's director and deponent, signed an acknowledgment of debt, in his personal capacity, in favour of the applicant. He acknowledged that he was lawfully indebted to Transnet Limited in the sum of R25 000.00 in respect of rental. He then undertook to pay such a capital debt from 1 August 2015 at a specified rate per month.

[11] The 3 years lease agreement was supposed to come to its natural end on 31 July 2015. However, it did not completely run its expected natural course on account of its earlier cancellation. Despite its early cancellation, the respondent did not vacate the leased premises. It remained in occupation thereof. These facts were common cause as far as the original lease agreement was concerned. So far the common cause was extrapolated from the digestion of the founding and answering affidavits only. Later on I shall make a synopsis of the further common cause of facts emanating from the answering and replying affidavits.

[12] On 09 October 2015 the applicant's attorney e-mailed the respondent's attorney. He remarked that the respondent's arrears in respect of the outstanding rentals were substantial. He reminded him that the respondent last paid an amount of R68 692.32 in reduction of the arrears on 24 June 2015. He demanded the full payment of such outstanding rentals by 30 October 2015 - vide "annexure aa3"

[13] The respondent's attorney also demanded payment of the agreed rental down deposit for the initial six month period of the extended lease agreement by 30 November 2015. He also restated that the rental in respect of the remaining six months period of the extended lease agreement would have to be paid in six equal monthly instalments as from 1 December 2015 - vide "annexure aa3".

[14] The applicant's attorney further advised the respondent's attorney the applicant would determine the exact amount of the monthly rental to be paid by the respondent in respect of the extended lease agreement once the evaluation of the property, which was still occupied by the respondent, had been done. All the same he urged the respondent to continue paying rental in accordance with the rate of the expired lease agreement pending the outcome of the evaluation - vide "annexure aa3".

[15] This now completes the common cause arising from the answering and the replying affidavits.

[16] Now I turn to the disputed factual allegations. In the first place, I summarise the respondent's denials of certain allegations made by the applicant. The respondent denied the allegation that all the facts as stated by the applicant were true and correct. The respondent also denied the allegation that as at 1 November 2015 it was R711 417.93 in arrears with its rental payment - vide specified reconciliation statement of account on p 67 of the record. The statement was referred to at paragraph 4 "annexure

f," being notice of termination. However, it was erroneously attached to "annexure b", the lease agreement.

[17] Moreover, the respondent denied the allegation that the applicant had established a clear right to justify its eviction from the applicants property; that the respondent and all those who occupied the property through or under the respondent were in unlawful occupation thereof; that the applicant had a valid landlord's tacit hypothec over all of the respondent's immovables stored on the leased premises; that the respondent was holding over without any legitimate cause and that the applicant had any landlord's tacit hypothec to be perfected.

[18] These then were the respondent's key denials. In the second place I summarise the applicant's denials of certain allegations made by the respondent:
The applicant denied the allegation that the respondent had remained in occupation of the leased premises by virtue of a new lease agreement or by virtue of a fixed relocation of the old lease agreement.

The applicant denied the respondent's assertion that the landlord's tacit hypothec the applicant had was premised on the alleged outstanding rental occasioned by the respondent's subsequent breach of the new lease agreement and not the respondents initial breach of the old lease agreement.

[19] The applicant further denied the following allegations made by the respondent:

- That the applicant had continued to collect monthly rental from the respondent subsequent to the expiry of the original lease until the launch of the present eviction application without complaining that the respondent was an unlawful occupier;

- That the respondent had a legal right to remain on the leased premises until 30 June 2016;

- That the applicant had established no clear case that motion procedure was a suitable method for obtaining the relief sought by the applicant to sustain the grant of an eviction order against the respondent;

- That, on the facts before the court, the applicant had no landlord's tacit hypothec over the respondent's movable goods that were on the leased premises;

- That the respondent was not indebted to the applicant in the total sum of R711 417.93 in respect of accumulated arrears of unpaid rental.

Here ends my summary of the disputed factual allegations.

[20] The scope of the dispute raised a number of issues in connection with the alleged arrears, settlement agreement, landlord's tacit hypothec and the appropriate procedure for the resolution of the

current dispute. However, in my view, the decisive issue in the matter was whether or not the respondent was, on the facts, an unlawful occupier of the applicant's property.

[21] On the one hand, Mr Motloung, counsel for the applicant, submitted that the applicant was indeed an unlawful occupier. Accordingly counsel urged me to determine the real issue in the affirmative and to grant the eviction order against the respondent.

[22] On the other hand, Mr Van Aswegen, counsel for the respondent, submitted that the respondent was a lawful occupier of the applicant's property and that the application for the respondent's eviction was specious and still born. Accordingly counsel urged me to answer the crucial question in the negative and inevitably dismiss the eviction application

[23] I deem it necessary to give an exposition of some principles of law applicable to the remedy of eviction from land. The lawful acts of dispossession or unlawful acts of occupation of another's land entitle the disposessed landowner to reclaim possession of his unlawfully invaded or occupied land by way of the restorative remedy of *action rei vindicatio* **Graham v Ridley** 1931 TPD 476 and **Chetty v Naidoo** 1974(3) SA 13(A).

[24] Where a lessee breaches a material term of a lease agreement, a lessor is entitled to terminate a lease agreement and to evict a defaulting lessee from leased premises. **Myaka v Haveman** 1948 (3) SA 457(A) **Sigh v Santawn Insurance Co Ltd** 1997(1) SA 291 (SCA).

[25] Before an aggrieved lessor approaches a court to seek an eviction order against a lessor, it is incumbent upon him (or her or it) to ensure that all the formalities applicable to cancellation of a lease contract have been complied with – **Seite v Berlein & others** [2009] Jol 23757 (KZP).

[26] The landlord's tacit hypothec provides, a lessor with security for a lessee's arrears in respect of the rental. **Timmerman v Le Roux** 2000(4) SA59(W).

According to the law of contracts, almost all agreements manifest two important features, namely: an offer and a corresponding acceptance. In **Watermeyer v Murray** 1911 AD 61 on 70 Solomon J went on to say :

> "*… every contract consists of an offer made by the one party and accepted by the other.*"

It is hackneyed law that a lessor's common law remedy termed a landlord's tacit hypothec, provides a landlord whose tenant is in arrears with the payment of the agreed rental, to seize movable goods of such a tenant which are on the leased premises, and to sell them in order to recoup the arrears.

[27] The concept of tacit relocation was elucidated in **Pareto Limited & others v Mythos Leather Manufacturing (Pty) Ltd t/a Venucci** 2000 (3) SA 999 (W). In concluding that there was tacit relocation in that matter and that the notice of termination which

preceded such tacit relocation was rendered ineffective by the subsequent tacit relocation, the court relief on the opinion of the author W.E. Cooper: Landlord and Tenant, second edition on p350.

[28] Cooper writes:

> "The tacit relocation of a lease is an implied agreement to relet the premises and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property."

[29] Now I turn to the application of the law to the facts. It was common cause that the respondent took lawful occupation of the applicant's landed property on 1 August 2012; that the respondent subsequently failed, not once but on numerous occasions, to regularly pay the monthly rental as contractually agreed; that the lease agreement was supposed to endure until 31 Jul 2015; that as a result of the respondent's contractual breaches coupled with the concomitant ever-rising respondent's arrears, the applicant gave the respondent notice in terms of clause 37 whereby the lease agreement was terminated. The lease agreement was prematurely terminated about two months before it was due to expire in the ordinary course of events. The untimely cancellation was occasioned by the respondent's default. By then the respondent's total sum of arrears was well in excess of R497 003.34

[30] It will be readily appreciated that in spite of its warning of 27 May 2015 to launch an application for the respondent's eviction from the leased premises, the applicant neglected to take an immediate, decisive and appropriate legal action to evict the respondent. The respondent did not vacate the leased premises but remained in occupation, not only for the last two remaining months of the lease but rather for almost eight and half more months before the applicant eventually initiated these proceedings on 9 February 2016.

[31] The respondent defied the applicant's ultimatum to vacate the leased premises by no later than 31 May 2015. The notice of termination was valid and good in law. However, the applicant's lack of resolve to act decisively and promptly against the respondent by virtue of such notice enroded its legal efficacy. Since then until the eviction application was argued before me, almost twelve months later, the respondent had remained in occupation. In its founding affidavit, the applicant proffered no explanation as to how such a state of affairs came about. After reading the founding papers, I was left wondering as to how the respondent still remained in occupation of the applicant's property after the lapse of the ultimatum on 31 May 2015.

[32] Still wondering why the applicant tolerated such a state of unlawful occupation of its property to prevail for so long, I turned to the respondent's answering affidavit. It then emerged that the respondent had made certain proposals to the applicant on 10 June 2015, seven days after receiving the notice of termination.

On behalf of the respondent, Attorney Slabbert wrote:
Quote:

> *"We hold instructions* to propose the following in order to settle the matter amicably. **These proposals are made entirely without prejudice and without the acknowledgement of any indebtedness by our client to your client.**
>
> 1. Our client made a payment of R150 000.00 (one hundred and fifty thousand rand) in respect of the arrear amount of 20 April 2015 (see appended);
> 2. Our client will make payment of the amount still due in respect of arrears by 30 June 2015 subject to the following:
>
>   2.1 Your client agree to an extension of the lease agreement for a further period of 12 months commencing on 1 July 2015 and ending on 30 June 2016;
>
>   2.2 On 30 June 2015 our client will make an upfront payment equal to 6 month's rental in respect of the extended lease period;
>
>   2.3 Thereafter our client will make monthly payments in respect of the remainder of the extended lease period on or before the last day of each month;
>
>   2.4 The effect therefore would be that the all rentals due in respect of the extended lease period will be paid for in full withion the first 6 months thereof;
>
>   2.5 For the duration of the extended lease period our client will pay for water, rates, sewerage removal and electricity as per existing lease agreement.
>
> We submit that these proposals are more than reasonable especially as a business consideration. At the end your client wants his money rather than be embroiled in costly and time consuming litigation."

vide “annexure aa1”. The date of the letter was significant to bear in mind. The letter laid down a foundation for the respondent’s further and lawful occupation of the applicant’s property.

[33] Fifteen days later, on 25 June 2015 the applicant replied through its attorney, Mr Jooma. The reply indicated that the applicant was amenable to the respondent’s proposed terms of the settlement. Through the reply the applicant accepted:

- That the original lease agreement which was on the verge of expiring on 31 July 2015 would be extended;
- That the subsequent lease agreement would commence on 1 July 2015 and terminate on 30 June 2016;
- That the respondent would make a single, composite and upfront payment of rental to cover the first six months of the extended lease period;
- That the respondent would pay monthly rental from the last day, of the seventh month in respect of the remaining six month period of the extended leased period;
- That the respondent would pay the arrears in respect of the old lease agreement in full by 30 June 2015, in other words before the new lease agreement commencement on 1 July 2015.

[34] Those then were the material terms and conditions that paved the way for a new deal between the parties. I hasten to point out that the original lease agreement was terminated by the applicant on account of the respondent’s breache(s). The effective date on

which the respondent's lawful occupation of the leased premises terminated was 31 May 2015. It followed, therefore, that the unlawfulness of the respondent's occupation began on 1 June 2015 as per "annexure aa1". It endured until the new deal was clinched on 25 June 2015 as per "annexure aa2". I pause to point out that although the applicant did not expressly admit the respondent's averments relative to "annexure aa1" and "annexure aa2", it did not pertinently reject them either. Insteadthe applicant merely replied that it noted the contents of paragraphs 11 to 32.

[35] At the time of the acceptance by the applicant of the respondent's fresh offer of a new deal, the old lease agreement no longer existed. Therefore, it was absurd for the parties to talk about the new lease agreement as the "extended lease agreement" and the old lease agreement as the "expired lease agreement." The original lease agreement was dead and buried. Since it was, it could not be legally given a new lease of live. In saying so, I am fortified by the fact that the subsequent lease commenced on 1 July 2015, about 30 days before the expected natural expiry of the old lease agreement. Save for the notice of termination, the original lease agreement would still have been in place at the time. The new lease agreement was certainly not an extension of the old lease agreement. It was a break from the past - a new chapter, so to speak. Those anomalies had to be highlighted.

[36] Consequently, it followed, as a matter of logic, that the notice of termination on which the applicant relied had nothing to do with the new lease agreement. Instead it had everything to do with the old lease agreement. Its legal force and effect were limited to the

respondent's breach of the old lease agreement – vide " annexure g" Such breache(s) and the notice that stemmed from it before 31 May 2015, were part and parcel of the closed chapter. It was anomalous and illogical for the applicant to contend that a notice given on 27 May 2015 could in law have terminated a lease agreement subsequently concluded on 25 June 2015. The notice of cancellation derived its force from the breach(s) committed before 27 May 2015 and not the breach committed afterwards.

[37] The applicant denied the respondent's allegation that a new lease agreement came into operation on 1 July 2015. The denial and the related argument failed to impress me. It was reasoned that no new lease agreement was ultimately entered because, as I understood the argument, the respondent failed to comply with its contractual obligations on 30 June 2015 in accordance with "annexure aa2" read together with "annexure aa1". However, the applicant allowed the respondent to remain in occupation of the applicant's property although the respondent had not in full paid upfront the agreed six months down deposit or the arrears of the old lease agreement.

[38] Instead of giving the respondent a fresh notice of termination of the implied new lease agreement, and calling upon the respondent afresh to vacate its property, the applicant sat back relaxed and did nothing to reclaim possession of its occupied property by respondent. More than 3 months went by. On 9 October 2015 the applicant once again showed misplaced indulgence to the respondent instead of cancelling the new deal

and evicting the respondent. The applicant wrote through its attorney:

Quote: paragraph 8, “annexure aa3”

> “8. Accordingly, payment is to be made as follows:
>
> 8.1 the outstanding arrear rentals by 30 October 2015;
>
> 8.2 an upfront payment equal to 6 months’ rentals in respect of the extended lease agreement by 30 November 2015; and
>
> 8.3 the remainder of the extended lease period to be paid in 6 equal monthly instalments commencing on 1 December 2015.”

[39] In my view the applicant’s conduct conclusively evidenced willingness to allow the respondent to continue occupying the property contrary to the fresh terms and conditions of the new deal. The respondent had once again breached those fresh terms and conditions of the new lease agreement. In my view there was a tacit relocation reached by the parties on 25 June 2015. Tacit relocation is an implied agreement to relet. It is concluded by a lessor permitting a lessee to remain in occupation – **Pareto**, *supra*. Therefore, a subsequent notice of termination calling upon the respondent to vacate the applicant’s property was required to signal the end of the respondent’s lawful occupation in terms of the new lease agreement and to render the respondent liable to eviction. Such notice was never given. Since it was not, it could not be said that the respondent was in unlawful occupation of the applicant’s property, at the time the current eviction proceedings

were instituted. The respondent had the right to possess or to occupy the applicant's property. I am of the view that the applicant failed to make out a case for the respondent's eviction.

[40] Similarly the applicant failed to activate his landlord's tacit hypothec. As earlier pointed out, the legal remedy allows a landlord to have the tenant's movebables that are onthe leased property attached and sold in order to recover the unpaid rental arrears.The landlord, who has, firstly, cancelled the lease agreement, and secondly called upon the tenant to vacate the leased premises – has the right to seize and sell the movable goods of the tenant which are on the leased premises, if the tenant fails to pay the rental. The landlord's tacit hypothec automatically operates against a defaulting tenant once the tenant has been given notice of cancellation and called upon to vacate the leased premises. The landlord's tacit hypothec remains dormant unless the requisite notice is given to the tenant to activate it.

[41] In the instant matter, the respondent raised a defence to the applicant's endeavour to perfect its landlord's tacit hypothec. The nub of the defence put up by the respondent was that the parties had reached a compromise over the dispute pertaining to the original lease agreement. Consequently the respondent defensively contended that the applicant could no longer rely on the original cause. It followed, therefore, that the contractual obligations that the respondent might have had under the original lease agreement in respect of rental arrears were extinguished by the compromise and replaced with fresh contractual obligations

that were embodied in the settlement agreement, in other words, the new lease agreement. Although the new lease agreement was never reduced to a written form, it was implicitly concluded by conduct and evidenced by “annexure aa1”, “annexure aa2” and “annexure aa3”.

[42] I am persuaded that a valid tacit relocation was concluded by the parties. By virtue of such a new deal the respondent’s prior unlawful occupation was tacitly legalised by the applicant. The mutual transition from the state of unlawfulness to the state of lawfulness that underlined the respondent’s occupation deactivated the applicant’s tacit hypothec which was activated by “annexure g”, the cancellation notice of 27 May 2015, whereby the original lease agreement was terminated, the respondent commanded to vacate the leased premises and the respondent’s movables attached by the landlord’s tacit hypothec. One of the legal effects of the compromise was to tacitly detach the respondent’s movables that were subject to the applicant’s tacit hypothec from 3 June 2015 when the sheriff served the cancellation notice upon the respondent.

[43] In my view, the only conceivable basis on which the applicant can successfully posit its claim to perfect its landlord’s tacit hypothec, would be to rely on a fresh breach of the new lease agreement, and a corresponding notice of termination. Before these eviction proceedings were launched the applicant never complained that the respondent was holding over or that the respondent was ever called upon to vacate the applicant’s property or that the respondent’s occupation of the property was unlawful. Such

deafening silence on the part of the applicant was inconsistent with the conduct one would come to expect from an unlawfully dispossessed landowner. It strongly militated against the applicant's case that the respondent was an unlawful occupier.

[44] The remedy of *actio rei vindicatio* found no application, given the peculiar circumstances of the particular case. That was so because the respondent did not, in stealth, take occupation of the property owned by the applicant. On the contrary, the applicant voluntarily surrendered possession of his property to the respondent. In the absence of any proof that the respondent committed any act(s) of dispossession through which the applicant was wrongfully deprived of possession, occupation and enjoyment of its property, the eviction application cannot succeed. In this instance the respondent's right of possession has to prevail over the applicant's of ownership. In the instant matter, the essence of the dispute concerned the possessory right and not the ownershiright per se.

[45] The respondent has emerged victorious. There is no sound reason why the general rule of costs should not apply. The respondent is, therefore, entitled to the fruits of its success.

[46] Therefore I made the following order:

46.1 The application for the respondent's eviction is refused;

46.2 The applicant is directed to pay the costs.

MH RAMPAI, J

On behalf of the applicant:	Adv. S.E Motloung Instructed by: Rosendorff Reitz Barry BLOEMFONTEIN
On behalf of the respondent:	Adv. W.A van Aswegen Instructed by: Peyper Attorneys BLOEMFONTEIN