

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 414/2013

In the matter between:

LOT 695 HIBBERDENE (PTY) LIMITED

Applicant

and

COALITION TRADING 689 CC

Respondent

JUDGMENT

THATCHER AJ:

[1] The applicant, Lot 695 Hibberdene (Pty) Limited is the owner of an immovable property known as Lot 695 Hibberdene on which there is a shopping centre known as the Marlin Mall. It comprises nine retail outlets, nine offices and an Engen filling station. The respondent, Coalition Trading 689 CC, took occupation of shops 3 and 8 at the Marlin Mall in October 2011, and continues to occupy them. As a result of the respondent's occupation of shop 8 and the position and state of a loading area at the rear of shops 8, 5, 6 and 7, the tenants of shops 5, 6 and 7 cannot use the loading area. There has been litigation between the parties in the Magistrate's Court regarding the respondent's occupation of shop 8. It is not necessary to set out all the details of that litigation but I will refer to aspects of it where it is relevant to this application which was brought by the applicant in January 2013 for the ejectment of the respondent from shop 8, the vacation of the loading area, and the restoration of access to shops 5, 6 and 7 through the loading area. That application was opposed by the respondent. Disputes of fact emerged on the papers and so the application was

referred for the hearing of oral evidence on those disputed facts. The issues referred for the hearing of oral evidence were set out in a document, exhibit "D", which was handed up at the commencement of the hearing of oral evidence.

[2] Those issues were set out in exhibit "D" as follows:

- (a) whether the respondent is in occupation of shop 8 ("the premises") by virtue of the lease agreement which is annexure "GA5" to the applicant's founding affidavit, or alternatively the lease agreement annexure "GA8" to the founding affidavit, or whether the respondent occupied the premises by virtue of an oral lease;
- (b) whether the conduct of the respondent by ceasing to trade from the premises during July 2012 resulted in the termination of the respondent's entitlement to occupy the premises;
- (c) whether the respondent is entitled by virtue of a tacit relocation to remain in occupation of the premises;
- (d) whether the applicant is, by virtue of the doctrine of estoppel, prevented from seeking the eviction of the respondent from the premises; and
- (e) whether the applicant is the cause of the respondent not trading at present as a supermarket from the leased premises.

[3] Two witnesses testified on behalf of the applicant, namely Mr George Afonso, a director of the applicant, and Mr Adrian Raw, who testified as an expert in the administration of *inter alia* retail shopping centres. The respondent relied upon the evidence of three witnesses, namely Mr Hemanth Singh (the sole member of the respondent), Mr Viman Singh and Mr Balan Naidoo.

[4] At the commencement of the hearing, and before any evidence was led, *Mr Khan*, who appeared for the respondent, placed on record that the respondent objected to the expert evidence of Mr Raw. The basis of the objection was the following. In terms of rule 36(9)(a), a notice of intention to lead the evidence of an expert must be delivered not less than fifteen days before the hearing and in terms of rule 36(9)(b), a summary of that expert's opinion and his reasons therefor must be delivered not less than ten days before the hearing. The hearing was set down for the 11th March 2015. Accordingly any notice in terms of rule 36(9)(a) was to be served not later than the 17th February 2015. The notice was in fact served on the respondent's attorneys on the 19th February 2015. The summary ought to have been served not later than the 24th February 2015. At 12.30pm on the 24th February 2015, a scanned copy of the expert summary of Mr Raw was sent to the respondent's attorneys and the summary was served on the 25th February 2015. *Mr Khan* submitted that the respondent was prejudiced by this as it was not in a position to lead evidence in answer to Mr Raw's affidavit. He stated that it had only been possible to consult with an accountant on the 10th March 2015, one day before the commencement of the trial. *Mr Troskie*, who appeared for the applicant, submitted that there was no valid basis for excluding Mr Raw's evidence.

[5] I ruled that Mr Raw's evidence should be admitted and stated that I would give my reasons for my ruling when I delivered judgment. These are my reasons.

[6] The purpose of sub-rules 36(9)(a) and (b) is to remove the element of surprise so that the party receiving the notice may consider the nature of the expert evidence to be led and obtain rebutting evidence if necessary. The notice in terms of rule 36(9)(a) would not set out any of the evidence and accordingly the respondents were not placed at a disadvantage because it was served on the 19th and not the 17th February 2015. With regard to the rule 36(9)(b) notice, while that notice was, strictly speaking, served one day late, having been served on the 25th and not the 24th, the respondent nevertheless did receive the notice electronically on the 24th February 2015. No reason was given by the respondent why an expert who could counter Mr Raw's opinion could not have been consulted and

interviewed prior to the 10th March 2015. That was the date when *Mr Khan* stated that it had only been possible to consult with an accountant. Neither was it submitted that had the summary been served (as opposed to being sent electronically) on the 24th February 2015, the respondent would have been able to consult with an accountant earlier or that the respondent would not have been prejudiced. If the respondent intended disputing Mr Raw's evidence, it could and should have, as a matter of urgency, canvassed the contents of the expert summary with a person of similar experience to that of Mr Raw. The respondent does not appear to have done so with any degree of urgency and tendered no reason why it had not done so.

[7] I thus ruled that the respondent's objection to the hearing of the evidence of Mr Raw be dismissed.

[8] I turn now to the issues set out in exhibit "D".

(a) Whether the respondent is in occupation of shop 8 by virtue of the lease agreement which is annexure "GA5" to the applicant's founding affidavit, or alternatively the lease agreement annexure "GA8" to the founding affidavit, or whether the respondent occupied the premises by virtue of an oral lease

[9] I shall now set out those facts which are either common cause or which are not in dispute regarding the respondent's occupation of shop 8. I shall also set out my findings on those facts which are in dispute.

[10] In approximately 1998, the Marlin Mall had been demolished and rebuilt after which an OK Grocery store had operated from shop 8 for approximately three years. That business had then been operated under the name "Food Zone" for two years. In approximately 2003, a Spar franchise as well as a Spar Tops shop (which is the Spar trading name for its liquor outlets) started to operate from shop 8 and shop 3 respectively. The Spar franchisee of those shops were Jean Pretorius and his father, who also held the franchise for a SuperSpar and a Tops store at a shopping centre across the road from the Marlin Mall.

[11] Mr Pretorius and his father operated their Spar franchise from shop 8 in terms of a lease with the applicant, the lessee being Nomad Trading 1080 CC ("Nomad"), an entity controlled by Mr Pretorius.

[12] Spar is a public company listed on the Johannesburg Securities Exchange and is the Spar franchisor in South Africa. Spar is represented in KwaZulu-Natal by a division which Mr Singh called "Spar DC". Mr Singh, either personally or through entities controlled by him, is a Spar franchisee operating approximately four Spar stores and five bottle stores in the Alberton area.

[13] Mr Singh testified that he had been approached by Spar to take over a Spar franchise at Shelley Beach where the partners who held that Spar franchise were in dispute. He testified that in October 2011, a dispute arose between Mr Pretorius and his father. It had been Spar's experience that when partners in a franchise fall out, the partners lose interest in the business which in consequence deteriorates. It was accordingly a priority for Spar to replace Mr Pretorius and his father with a new franchisee. Spar DC requested Mr Singh as a matter of urgency to take over the Spar and the Tops store franchise at the Marlin Mall.

[14] Mr Singh testified that he and his wife had journeyed to Johannesburg and had attended a meeting with Mr Afonso which had been arranged by Mr Pretorius. It is not disputed that it was at that meeting that Mr Afonso and Mr Singh met for the first time. What transpired at the meeting and what the result of the meeting was is disputed. According to Mr Singh, he told Mr Afonso that he was to be the new Spar franchisee at Marlin Mall. He stated that Mr Pretorius had given him a copy of the lease agreement for the Spar and Tops at Marlin Mall held by Mr Pretorius. Mr Singh testified that he told Mr Afonso that he wanted a new lease with the same rental and on the same terms. Again according to Mr Singh, Mr Afonso "saw no issue" with this and stated that he would send Mr Singh a lease. If Mr Singh desired, he could make changes to the lease and return it to Mr Afonso, and if Mr Afonso had any problems with the amendments, Mr Afonso would call Mr Singh or get his assistant to call Mr Singh's assistant.

[15] Mr Afonso testified that in approximately October 2011, Mr Singh, without notifying him, had taken over the Spar and Tops franchises of Mr Pretorius and his father. He only became aware of this and of Mr Singh's intention to take occupation of the Spar and the Tops operated from shops 8 and 3 in the Marlin Mall when he met Mr Singh for the first time when the latter and his wife arrived at the head office of the applicant in Johannesburg and advised him of this.

[16] Mr Afonso and Mr Singh both testified that the document, annexure "GA8", signed by Mr Afonso, was faxed to the respondent on the 18th October 2011. From the typed heading at the top of annexure "GA5", which reads as follows: "18-Oct-2011 16:56 From: AFONSO FAMILY TRUST 0116157951", this would appear to be correct and that the document containing Mr Afonso's signature was faxed to the respondent that day at 4.56pm.

[17] Mr Singh's evidence was that, as agreed with Mr Afonso, he caused his assistant, Prathima, to make hand written alterations to the terms of the lease unacceptable to him. He then signed the lease containing the hand written alterations, and faxed it back to the applicant. A copy of that document with the hand written alterations and Mr Singh's signature is annexure "GA5" to the founding affidavit. He also stated that when the lease had been faxed by the applicant, he printed two copies, caused the hand written amendments to be made on one copy and signed it, and then signed the other copy, unaltered, and gave it to his professional assistant, Prathima.

[18] According to Mr Singh, the hand written amendments set out in annexure "GA5" were the rentals he knew Nomad had been paying as he, Mr Singh, had been given a copy of that lease by Mr Pretorius.

[19] Mr Singh testified that he heard nothing more from Mr Afonso and he assumed that he did not do so because the terms of the altered lease were acceptable to Mr Afonso.

[20] Mr Afonso testified that at the meeting, Mr Singh requested a new lease be drawn up. He (Mr Afonso) suggested that the lease with the then tenant, Nomad, be left in place. Mr Afonso stated that Mr Singh said he did not wish to carry on with Nomad's lease. Mr Afonso testified that it is possible that Mr Singh said that he would be happy to accept a new lease on the same terms as that with Nomad. It was put to Mr Afonso in cross-examination that Mr Singh recalled Mr Afonso telling him that he would send Mr Singh a draft of a lease and that if there was anything Mr Singh was not happy with, he should amend it and send it back to Mr Afonso and if Mr Afonso was unhappy with the amendments, he would contact him and discuss it. Mr Afonso stated that he did not remember that but testified that if he was not happy, instead of altering it, he queried why Mr Singh did not write to him instead of altering the lease.

[21] Mr Singh felt justified in regarding the lease as having been concluded upon the terms set out in the lease with the hand written amendments ("GA5") because on the 1st November the applicant had invoiced the respondent for R49 500.00 (invoice number 5236) being the deposit according to the unaltered lease. That deposit had been reversed by the applicant on the same date by way of a credit note number 445. Also on the 1st November 2011, a tax invoice number 5321 for R43 671.68 was raised being the amount of the deposit reflected on the amended lease. In addition, on the 1st November 2011, the tax invoices for the pro rata October rent and the November rental in terms of the unamended lease, annexure "GA8", were raised and then reversed by credit notes and replaced with a pro rata October rental and a revised November rental in accordance with the amended lease. Likewise on the 1st December 2011, the December rental of R28 302.78 was reversed and replaced with a revised December rental of R24 980.64, the amount of the monthly rental in terms of the altered lease. Similarly on the 1st January 2012, the January rental was invoiced at the unaltered lease rental and on the same day was reversed and replaced with a revised January rental in accordance with the altered lease. The February rental was invoiced out at the altered lease rate and the March and April 2012 rentals were invoiced out at the unaltered lease rate.

[22] Mr Afonso appeared not to have a clear recollection of what transpired at the meeting at his offices. Mr Singh testified with more confidence as to what he said transpired at that meeting. However, if one has regard to the correspondence by email which it is common cause flowed between the parties over this time, I have grave reservations as to the reliability of Mr Singh's evidence. The emails which flowed between the parties over this period are a far more reliable indication of what transpired between the parties than their attempted recollections in the witness box some three and a half years after those events occurred.

[23] During the cross-examination of Mr Afonso, two pages, annexures "A85" and "A86", comprising two emails, were added to the applicant's bundle. It is these emails which are in my view a more reliable indication of what transpired with regard to the conclusion of the lease.

[24] On the 27th October 2011 at 11:02am, an email was sent by the applicant's office to Prathima, Mr Singh's assistant, which was in the following terms:

"Subject: Marlin – Lease

Hi Prathima

George [Afonso] has returned from Cape Town and we have discussed the lease with regards to Spar Marlin Mall.

He has requested that you inform us whether you would like to continue with the "old" lease, held by Juan Pretorius, until its maturity date in May 2012 at the current rate, with revised options to be discussed at maturity date. Hence, this would mean that we would still require all terms and conditions to be adhered to by Juan Pretorius.

Or

Whether you would like to enter into a "new" lease agreement (for five years plus option for a further five years), as has been presented at the new prescribed rates, as would have been imposed, in the case of maturity of the old lease.

Please advise us of your intentions pertaining to the above in order for us to finalise proceedings.

Kindest Regards
Shaun"

[25] On the 7th November 2011 at 10:50am, Prathima, sent an email to the applicant's office in the following terms:

"Subject: FW: Marlin – Lease

Dear Shaun

Your email of the 27th ultimo has reference.

Kindly note we prefer the second option of your email in that we would like to enter into a "new" lease agreement.

Further, we would also like a Restraint of Trade Clause to be included in the lease agreement. It has come to our attention that Michael Frey butchery is looking for premises and we think it is unfair to us as we are paying you a substantial amount of rental herein and this will effect (sic) our profitability in the stores.

We look forward to hearing from you.

Kind regards

HR Singh"

[26] That those two emails accurately record the position regarding the negotiations for a lease is further demonstrated by the following.

[27] It is common cause that the respondent sought the inclusion in the lease to be concluded between the parties of a term restraining the applicant from leasing any shop in the Marlin Mall to a butchery. It is not disputed that a gentleman named Michael Frey had over the years obtained the right to operate butcheries within Spar stores on the south coast, and that at this time endeavours were being made to terminate his right to do so. Apparently the respondent had succeeded in halting his trading as a butchery from within the SuperSpar across the road from the Marlin Mall. Having done so, there was a fear that he would attempt to obtain a foothold in the Marlin Mall and in order to prevent this, the respondent requested that there be a restraint clause inserted in the lease. This

explains the request in the email of the 7th November 2011 that the "new" lease include a restraint clause in those terms.

[28] Those two emails are inconsistent with Mr Singh's evidence that Mr Afonso and he had agreed that Mr Afonso would send a lease acceptable to the applicant to Mr Singh who could alter it and return it to the applicant and if he did not hear from Mr Afonso or anyone on his behalf again, he would assume that his alterations were acceptable to the applicant.

[29] When asked about the email sent by Prathima on the 7th November 2011, Mr Singh's response was that that email was sent without his authority. I find Mr Singh's explanation unconvincing. If Mr Singh's version of what transpired at the meeting in October was correct, one would have expected the content of the replying email of the 7th November 2011 to be very different: it would have stated that there was a binding contract of lease, that document being the lease faxed to the respondent on the 18th October 2011, signed by the respondent on that date and returned to the applicant who had never raised any objections to the alterations made to the lease by the respondent.

[30] I do not regard Mr Singh as a reliable witness for a further reason. He is an attorney of some sixteen years' experience. As such he would appreciate the gravity of court proceedings, whether they are in the Magistrate's Court or in the High Court, and in particular the importance of affidavits prepared for those proceedings. Under cross-examination he was referred to an affidavit he had deposed to in a spoliation application brought by the respondent in August 2012 to regain possession of shop 8. Annexed to his affidavit, deposed to on the 14th August 2012, is a copy of the document, "GA8". In his affidavit he stated that the respondent occupied shop 8 in terms of that agreement of lease. Under cross-examination he conceded that that affidavit was made with the object of the respondent being placed back in occupation of the premises. He conceded that these were serious court proceedings. When it was put to him that he lied to the court in stating under oath that that was the lease in terms of which the respondent occupied shop 8, he stated that his professional assistant had

"compiled the documents" which he had then signed. He stated that he expected his professional assistant to be more diligent.

[31] However that was not the only occasion when Mr Singh made an affidavit alleging that the respondent occupied shop 8 in terms of the lease, annexure "GA8". In October 2012 he deposed to an affidavit in support of an application by the respondent in the Magistrate's Court at Scottburgh to set aside an order obtained by the applicant in terms of section 32 of the Magistrate's Court Act, to set aside the attachment of the respondent's goods obtained by the applicant pursuant to a rent interdict summons issued out against the respondent, and to rescind a default judgment obtained by the applicant against the respondent. Mr Singh in his affidavit alleged that the respondent had concluded two lease agreements with the applicant, one for shop 3 and one for shop 8. He attached to his affidavit both lease agreements. The lease agreement for shop 8 attached to his affidavit was the lease agreement a copy of which is annexed "GA8" in this application.

[32] Thus on two occasions, in proceedings before the Magistrate's Court, Mr Singh signed two affidavits in which he stated that the respondent occupied the premises in terms of the lease, annexure "GA8". Notwithstanding this, in these proceedings, he testified under oath that the respondent occupies shop 8 in terms of the lease, annexure "GA5".

[33] It is also significant that in the founding affidavit in this application Mr Afonso dealt with annexures "GA5" and "GA8" and contended that the respondent occupied shop 8 in terms of an oral lease which ran from month to month and contended that the respondent did not occupy shop 8 in terms of either "GA5" or "GA8". One would have expected to find in the answering affidavit an assertion by Mr Singh that the respondent occupies shop 8 in terms of annexure "GA5". There is no such assertion.

[34] In the circumstances, I reject the evidence of Mr Singh as to what transpired at the meeting in October 2011.

[35] It is following this finding that I now deal with the issues for determination.

(i) Whether the respondent's occupation is in terms of the lease, annexure "GA5"

[36] It is common cause that the applicant faxed to the respondent the document in the typed form in which it appears in annexure "GA8". The only handwriting on the lease when the respondent received it was Mr Afonso's initials on each page and his signature at the appropriate place and the initials and signatures of the witnesses to his signature. Mr Singh's evidence is that he directed Prathima to make the hand written alterations, altering, *inter alia*, clause 4 of the schedule (the amount of the monthly rental and the annual escalation rate), and clause 9 of the schedule (the amount of the deposit).

[37] Agreement on the rent is a requirement of all contracts of lease: *The Law of South Africa (2nd Edition)* Vol 14 Part 2, paragraph 3.

[38] Rent is an essential element of a lease and if the parties fail to agree on the rental payable there is no lease. The return by the respondent to the applicant of the document signed by the applicant which the respondent had amended in hand writing and signed constituted a counter-offer which was open to the applicant to accept or reject. *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) [1] and [11]

[39] The applicant did not accept those amendments. I say so because of the email of the 27th October 2011 offering the respondent a continuation of the lease with Mr Pretorius or a new lease "at the new prescribed rates".

[40] Mr Afonso was asked in cross-examination to explain why the invoices which were sent to the respondent reflecting the deposit and the rentals for the subsequent months reflected amounts in accordance with annexure "GA5". Mr Afonso testified that he could not recall what the amounts were on the invoices but that the invoices would have been sent from the applicant's head office in

Durban. The probabilities are that the amended lease was forwarded to the applicant's head office in Durban without Mr Afonso having sight of it and it was only when the dispute regarding electricity charges erupted in the beginning of 2012 that his attention was directed to the invoiced amounts and the applicant's records were amended. It must also be remembered that the respondent in the email of the 7th November 2011 elected the option of a "new lease ... at the new prescribed rates" and thus the respondent had no valid basis for accepting as accurate the amounts set out in the initial invoices.

[41] In my view therefore the respondent's occupation is not in terms of the lease, annexure "GA5", because that document is simply a counter-offer which was never accepted by the applicant.

(ii) Whether the respondent's occupation is in terms of the lease, annexure "GA8"

[42] The respondent's occupation of the premises cannot be in terms of annexure "GA8". Mr Singh was pertinently asked by his counsel in terms of which agreement the respondent occupied shop 8. His answer was the agreement amended in hand writing, annexure "GA5". Thus the respondent's occupation of the premises cannot be in terms of annexure "GA8".

(iii) Whether the respondent occupies the premises in terms of an oral monthly tenancy

[43] In the founding affidavit in this application, Mr Afonso contended that "after certain negotiations" (which was the meeting about which both he and Mr Singh testified), he sent a written lease which he had signed, to the respondent. That document was returned to him with a number of manuscript changes. That constituted a counter-offer which was not accepted. However within a day or two of the meeting in Johannesburg in October 2011, the respondent was in occupation of shop 8. In those circumstances in his affidavit Mr Afonso contended that the respondent occupied the premises in terms of an oral lease

which was on a month to month basis and therefore terminable on one calendar month's notice.

[44] It is clear from the evidence that the applicant was content for the respondent to take occupation of shop 8 and the respondent did so. Given that the document "GA5" is not a contract of lease but a counter-offer, the respondent cannot occupy shop 8 in terms of the lease "GA5". Mr Singh expressly disavowed any reliance upon the lease "GA8" for the respondent's occupation of shop 8. The question which then arises is whether if the respondent occupied in terms of an oral lease, what were the terms of that lease and in particular what was the rental (for there can be no contract of lease unless the rental is agreed), and what was the duration of the lease?

[45] As to what the rental was, the parties were never in agreement. Mr Singh said that the agreed rentals were those set out in annexure "GA5". Mr Afonso disagreed with this and his version is supported by the two emails I have referred to. There being no agreed rental, nor any mechanism for fixing the rental, there can therefore be no lease in existence whether monthly or otherwise. The respondent thus has no right to occupy shop 8.

[46] If I am wrong in finding that the respondent did not occupy the premises in terms of an oral monthly tenancy or in terms of any other contract of lease, its occupation can only have been in terms of a monthly tenancy with its duration undefined. In those circumstances, the law requires reasonable notice to be given by one to the other for the termination of the lease. A monthly contract of letting and hiring for an indefinite period requires a month's notice. *Tiopiazi v Bulawayo Municipality* 1923 AD 317 at 326. Accordingly the occupation by the respondent of shop 8 was terminable on a month's notice.

[47] Service of proceedings for ejectment is notice to a tenant of a landlord's intention to terminate the contract of lease.

Bhagwantha v Tarr & Co 1964 (2) SA 586 (N) at 589 A-D

Win Twice Properties (Pty) Ltd v Binos & Another 2004 (4) SA 436 (W) at 443 C-G

[48] On the 3rd August 2012, the applicant brought an action against the respondent in the Magistrate's Court at Scottburgh in which it sought an order *inter alia* for the ejectment of the respondent from shop 8. Service of the summons in that action is notice to the respondent of the applicant's termination of the lease. On receipt of that summons, the respondent was aware that the applicant was intent upon terminating the lease agreement. The institution of the present application is merely a sequel to that notice.

[49] Thus if there was a monthly tenancy, it has been properly terminated.

(b) Whether the conduct of the respondent by ceasing to trade from the premises during July 2012 has resulted in the termination of respondent's entitlement to occupy the premises

[50] In the light of my finding in the issue under (a) above, it is unnecessary for me to resolve the issue as to whether the conduct of the respondent, by ceasing to trade from the premises during July 2004, has resulted in the termination of the respondent's entitlement to occupy the premises. I accordingly decline to make a finding on this issue.

(c) Whether the respondent is entitled by virtue of a tacit relocation to remain in occupation of the premises

[51] A tacit relocation is an implied agreement to re-let and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease. I have found that there was no lease in terms of which the respondent occupied shop 8. There being no lease, there can be no tacit relocation of any lease.

- (d) Whether the applicant is by virtue of doctrine of estoppel prevented from seeking the eviction of the respondent from the premises

[52] I understood the respondent's argument on this issue to be as follows: because the applicant dispatched invoices for the deposit and rent in accordance with those set out in "GA5", the applicant is precluded from asserting that "GA5" is not the true agreement of lease between the parties.

[53] As I understand the law of estoppel, the respondent is required to prove that as a result of a representation, it (the respondent) acted or failed to act to its detriment or prejudice. The representation relied upon by the respondent is the despatch by the applicant of invoices for the deposit and rent in accordance with "GA5". In the light of the email sent by the applicant to the respondent on the 27th October 2011 and the respondent's reply on the 7th November 2011, in which the respondent opts to enter into a "new" lease agreement at "the new prescribed rates" the respondent cannot validly contend that the applicant, by invoicing the respondent for the deposit and at the rentals set out in the hand written amended lease, had in the face of the respondent's election contained in the email of the 7th November 2011, disregarded the respondent's choice and reverted to the hand written amended lease, "GA5". At the very least when the respondent received the invoices with the rentals as set out in "GA5", it ought to have put the respondent on enquiry and it should have sought clarity on this aspect from the applicant. In any event, I do not think that as a result of any conduct on the part of the applicant, the respondent acted or failed to act to its detriment or prejudice.

[54] Accordingly the applicant is not prevented from seeking the eviction of the respondent from the premises by virtue of the doctrine of estoppel.

- (e) Whether the applicant is the cause of the respondent not trading at present as a supermarket from the leased premises

[55] It is common cause that the respondent is not trading at present as a supermarket from shop 8. It is not trading from there because, the applicant

contends, the respondent has no lawful right to occupy shop 8. The respondent's attitude is that it does not wish to operate from the premises "but cannot do so by virtue of the uncertainty caused by the applicant". This is set out in paragraph 26.4 of Mr Singh's answering affidavit. The respondent was understandably not prepared to incur the expense of refitting the premises because of the uncertainty as to whether it had the right to occupy those premises.

[56] Thus the cause of the respondent not trading at present from the leased premises is a combination of factors, those being the applicant's assertion that the respondent has no right to occupy shop 8 and the respondent's reluctance to incur the expense of refitting the premises until its right to occupy the premises, if any, is determined. Whether it has such a right is the very issue in this litigation.

[57] The applicant is either entitled to an order for the ejectment of the respondent from shop 8 or it is not. Whether the applicant is the cause of the respondent not trading at present as a supermarket from the leased premises is irrelevant. I have found that the respondent has no right to occupy shop 8. It is accordingly unnecessary to determine whether the applicant is the cause of the respondent not trading at present as a supermarket from these premises.

CONCLUSION

[58] The referral to oral evidence of the five issues I have set out above arose from an application by the applicant for the ejectment of the respondent from shop 8. My determination of these issues carries with it the necessary consequence that the respondent has no right to occupy those premises. In those circumstances it follows that the applicant is entitled to an order that the respondent and all parties claiming right of occupation through it vacate the premises described as shop 8, Marlin Mall, Hibberdene.

[59] The applicant also sought an order that the respondent vacate the loading area as described and depicted in blue on annexure "GA4" to the founding affidavit and that the respondent forthwith restore access to shops 5, 6 and 7

through that loading area.

[60] As the respondent's occupation of the loading area arises from its occupation of shop 8, it is a necessary consequence of the order that the respondent vacate shop 8 that it also be ordered to vacate the loading area.

COSTS

[61] The applicant having achieved substantial success, I see no why reason why the applicant should not be entitled to its costs of suit. Senior counsel for the applicant asked that the order for costs include the costs occasioned by the employment of senior counsel. Counsel for the respondent was in agreement that if judgment was granted in favour of the applicant, the applicant ought to be permitted the costs of senior counsel.

[62] I accordingly grant an order in the following terms:

1. The respondent and all parties claiming right of occupation through it:
 - (a) vacate the premises described as Shop 8, Marlin Mall, Hibberdene;
 - (b) vacate the area described as the "loading area" and depicted in blue on annexure "GA4" to the founding affidavit of Mr George Afonso;
 - (c) restore access to Shops 5, 6 and 7 Marlin Mall, Hibberdene through the loading area depicted in blue on annexure "GA4" within ten (10) days of the grant of this order.
2. The respondent is ordered to pay the applicant's costs of this application including the costs consequent upon the employment by the applicant of senior counsel.

Date of Hearing	:	11, 12 and 13 March, 2 April 2015
Date of judgment	:	30 April 2015
Counsel for Applicant	:	Adv. AJ Troskie SC
Instructed by	:	Tomlinson Mnguni James 031 566 2207 (David Randles)
Counsel for Respondent	:	Adv. MS Khan
Instructed by	:	Hemanth Singh & Company 032 586 0230 (Mr H Singh)