



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case number: 15860/2006

Date: 9 January 2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
9/1/2013	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

LANSERIA INTERNATIONAL AIRPORT (PTY) LTD

Applicant

And

IMPERIAL BANK

Respondent

JUDGMENT

PRETORIUS J.

- [1] This is an application that was referred to oral evidence in accordance with an order granted by Ebersohn AJ on 13 April 2007, as read with

the record of the Full Bench Appeal Court which additionally referred the issue of the applicant's *locus standi* to oral evidence on 13 April 2007.

- [2] Oral evidence was heard in this court on the issues of *locus standi*; whether the applicant had waived its rights to rely on the notice of cancellation dated 3 October 2005 and whether the applicant is estopped from cancelling the notarial deed of lease. In **Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 SCA** Cloete JA found at paragraph 32:

"A referral to trial is different to a referral to evidence, on limited issues. In the latter case the affidavits stand as evidence, save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute."

- [3] Counsel for the respondent indicated that the main issue that the court has to decide is that of *locus standi*. Should the court decide the matter in favour of the respondent regarding *locus standi*, then that would be the end of the matter, according to counsel for the respondent.

- [4] The respondent occupies certain premises described as lease area number 11, also referred to as Hangar site 4 or Erf 57, which is situated on the remaining extent of Portion 12 of the Farm Zwartkop of

Rooiwal 530, Registration Division JQ (the premises). This is a hangar situated at Lanseria Airport.

- [5] The respondent occupies the premises in terms of a notarial deed of lease which was registered on 24 November 1994 and which commenced on 1 June 1993. The notarial deed of lease was registered between Southern Life Association Ltd (SL) and Avfin Marketing Proprietary Limited (Avfin).
- [6] It is common cause that the respondent is the successor in title to Avfin in terms of the notarial deed of lease, as Avfin ceded its rights in and to the notarial deed of lease by a notarial cession to Transafrican Aviation (Pty) Ltd on 18 March 1998. On that date the respondent registered a mortgage bond in respect of all Transafrican Aviation's right, title and interest in and to the said notarial deed of lease. When Transafrican was liquidated the respondent purchased at auction the rights of Transafrican to the notarial deed of lease from the liquidators.
- [7] The applicant seeks the eviction of the respondent from the premises of Hangar 4 at Lanseria International Airport, on the basis that the applicant is the tenant of the premises and there existed an agreement of sublease between the applicant and the respondent, which had duly been cancelled by the applicant.

- [8] The undisputed evidence is that Lanseria Airport 1993 (Pty) Ltd is the registered owner of the property comprising the premises of the Lanseria Airport. The premises which are the subject matter of the present application are situated on the property comprising Lanseria International Airport and is identified as Hangar site 4.
- [9] The chronological ownership of the properties in question is that Lanseria Airport Properties (Pty) Ltd purchased the properties from the former Transvaal Provincial Administration and Krugersdorp- and Roodepoort municipalities.
- [10] Southern Life Association Ltd was the owner of the premises during the period 9 December 1993 to 17 August 1998 when Lanseria Airport 1993 (Pty) Ltd became the registered owner when buying the property from Southern Life on 17 August 1998.
- [11] Southern Life leased these properties to the applicant in terms of a written agreement of lease concluded in October 1993. The applicant avers that the applicant has been the lessee of the properties since 9 December 1993, as on 9 December 1993 the headlease came into effect, when the registration of the transfer of the property in the name of Southern Life took place on 9 December 1993.

[12] According to the applicant when Southern Life transferred the properties to Lanseria Airport 1993 (Pty) Ltd on 17 August 1998 Lanseria Airport 1993 (Pty) Ltd stepped into the shoes of Southern Life as lessor of the applicant by operation of law.

[13] The applicant argues that if that is the case then the court must accept that at all relevant times the applicant has been and is the lessee of the properties, including Hangar Site 4, since 9 December 1993.

[14] Avfin concluded a written agreement of lease on 1 October 1993 with Lanseria Airport Properties (Pty) Ltd in respect of the said premises. This lease was subsequently notarially registered. Clause 18 (a) and (b) of the Avfin lease provides:

"It is hereby recorded that –

- a) the lessor (landlord) had sold the properties on which the premises are situated to a new owner ('new owner') in terms of a written agreement of sale ("sale agreement") and the new owner has leased the properties to Lanseria Airport (Pty) Limited ("Airport") in terms of a written agreement of lease ("head-lease"), all with effect from the date upon which the properties are registered in the name of the new owner ("effective date")*
- b) in terms of the sale agreement and the head-lease, the LESSOR (landlord), Airport and the new owner*

have agreed that, with effect from the effective date, this lease will be ceded by the LESSOR (landlord) to the new owner and thereafter be ceded by the new owner to Airport;" (Court's emphasis)

[15] The applicant interprets these clauses to indicate that the parties' intention was that Southern Life would be the owner of the properties and that Southern Life would lease the properties to the applicant as head tenant, where the applicant as sublessor would lease the leased premises to Avfin as sublessee.

[16] The parties are *ad idem* that when Southern Life became the registered owner of the properties on 9 December 1993 Southern Life, as a matter of law, stepped into the shoes of Lanseria Airport Properties (Pty) Ltd as the lessor in terms of the lease with Avfin and that it was unnecessary to cede the lease to Southern Life.

[17] The respondent argues that the applicant is not privy to the contract upon which the applicant relies and has no right to cancel the contract.

[18] The applicant contends that in terms of clause 18 (6) the cession of the Avfin lease to the applicant by Southern Life was done tacitly. The period it encompasses is 9 December 1993 to February 2004. During this period the respondent had no involvement or knowledge of the

leased premises at all, as admitted by Mr Crous, for the defendant, under oath.

[19] Avfin ceded their lease to Transafrican Aviation (Pty) Ltd (Transafrica) by way of a notarial cession of lease which was registered in the Deeds Office on 18 March 1998.

[20] From 18 March 1998 until 17 August 1998 the parties concerned acted on the basis that Southern Life was the lessor and the applicant was the lessee of the leased premises in terms of the head lease. From 17 August 1998 all concerned acted on the basis that the Lanseria Airport 1993 (Pty) Ltd was the lessor in terms of the head lease and Transafrican was the sublessee of the premises in terms of the lease agreement between Lanseria Airport Properties (Pty) Ltd and Avfin.

[21] The applicant made payments as lessee to Southern Life, until the property was sold to Lanseria Airport 1993 (Pty) Ltd on 14 April 1998. Invoices were first addressed to Avfin and thereafter to Transafrican's liquidators who all paid the rental amounts according to the relevant invoices supplied by the applicant. There was never any query from the respondent as to why payments had to be made throughout into the applicant's bank account.

[22] The right, title and interest in and to and arising from the notarial deed of lease was sold to the respondent by public auction on 9 March 2004. As a result of this the respondent became the lessee of the premises in terms of the notarial deed of lease. The period of the lease would expire on 31 May 2013, twenty years after it had been concluded.

[23] It is common cause that the applicant was not initially a party to the notarial deed of lease, but the applicant argues that it became a party to the notarial deed of lease by tacit cession on 9 December 1993. It is common cause that the applicant relies on the notarial deed of lease for the relief sought. The applicant must thus prove that the respondent had a right to possess the premises and had a valid right to terminate the right to possess.

[24] The applicant started invoicing the respondent for rental of the leased property in July 2004. This leased property was referred to as Hangar Site 4. The respondent admitted making payments on these invoices, albeit on an irregular basis, but always into the applicant's bank account.

[25] The respondent's case is based on the fact that the applicant has no *locus standi* based on the absence of privity of contract.

[26] The existence of a cession is a matter of fact. The court must consider all the evidence before it is to decide whether the cession has been proved on a balance of probabilities.

[27] To be able to do so the court has to consider the oral evidence lead by both parties as well as the affidavits in the application. It must be noted that Mr Henwood, for the applicant, testified to actions which had taken place 19 years previously. Both Mr Rippon and Mr Henwood gave oral evidence on behalf of the applicant.

[28] Mr Rippon was the group property investment manager of Southern Life who had signed the head lease agreement in respect of Lanseria Airport between Southern Life and Lanseria Airport Properties (Pty) Ltd. He confirmed that from the time Southern Life became the registered owner of the property, both Southern Life and the applicant treated the head lease as valid. The applicant received all the rentals from the sublessees. The applicant paid rent in terms of the head lease to Southern Life. The applicant contends that Southern Life had ceded its rights in terms of the lease to the applicant by its conduct. This evidence was confirmed by Mr Opperman. There was never any contracts between Southern Life and the tenants on the premises and no rental was ever paid by the sublessees to Southern Life. This evidence was confirmed by Mr Rippon, as Southern Life never invoiced the tenants.

[29] It is clear from the evidence, the relevant invoices and the payments that the applicant invoiced Avfin who paid the applicant directly. According to the financial statements at 31 March 1998 the applicant received a rental income of R6,256,830.00 for the financial year ending 31 March 1998. Mr Opperman was clear that the amount represented all the rental income paid to the applicant by the sublessees for the subleases, including that of Hangar 4. The applicant paid Southern Life rental in the amount of R5,833,116.00 during the same period. According to all the evidence this payment to Southern Life was not linked or subject to the payment of the subleases in any way.

[30] The parties throughout acted on the basis that Southern Life was the lessor and the applicant was the lessee of the leased premises in terms of the head lease. From 17 August 1998 all parties acted on the basis that Lanseria Airport 1993 (Pty) Ltd was the lessor in terms of the head lease and Transafrican the sublessee of Hangar site 4. Transafrican paid the rent to the applicant after the applicant had invoiced Transafrican.

[31] Mr Rippon confirmed, whilst testifying, that there was never any written or formal cessions, as they did not believe it to be necessary. There was a tacit acceptance by all parties that the applicant had an agreement with all the tenants regarding all the subleases. The

evidence is that Southern Life never had any intention of managing the airport. Southern Life, according to the evidence, had no intention of getting involved with the day to day management of the airport in any manner what so ever. Mr Rippon confirmed several times during cross-examination that the subleases were held by the applicant and not by Southern Life. Southern Life was only interested in collecting the agreed rental amount each month from the applicant. The payment by the applicant to Southern Life was not subject to the payments by the sublessees to the applicant.

[32] Mr Henwood, who has been the director of the Lanseria International Airport since 1993, gave evidence that Southern Life never had any direct dealings with the tenants. It was never contemplated at any stage that Southern Life would be involved with the tenants. The tenants were invoiced directly by the applicant and never by Southern Life and the tenants paid the applicant – never Southern Life.

[33] Mr Opperman, the assistant manager of the airport, gave evidence that at all times, since he had been involved with the airport since 1991, all tenants paid the amount of rental into the applicant's bank account. He confirmed that Erf 57 was Hangar 4, which is the subject matter of this application. He recalls the specific events when the respondent's lease was cancelled due to non-payment of the rent. He and the airport manager decided to cancel the lease at the end of September 2005. On 3 October 2005 Mr le Roux, the applicant's attorney, wrote a letter

to the respondent cancelling the lease agreement. According to Mr Crous, for the respondent, he only received the original invoices on 3 October 2005, the same day that the lease agreement was cancelled. Answering a question, under cross-examination, Mr Rippon declared that the tacit cession was effected on the same date on which Southern Life became the owner of the properties on 9 December 1993 and the head lease became effective on the same date.

[34] The *dictum* in **Landmark Real Estate (Pty) Ltd v Brand 1992 (3) SA 983 (W)** cannot be used to argue the respondent's case that the parties were under a mistaken perception that the cession had been effected, as Mr Rippon's evidence was clear that no formal cessions were envisaged at any stage.

[35] In **Christie, The Law of Contract in South Africa, 6th edition** the learned author confirms at p89 that it is possible to use both the "*no other reasonable interpretation test*" and "*the balance of probabilities test*" and that it could be stated as follows:

"in order to establish a tacit contract it is necessary to prove, by preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit contract established."

[36] Both cases decided in the former Transvaal Provincial Division **Samcor Manufacturers v Berger 2000 (3) SA 454 (T)** at 461 G–I and **Kropman & Others N.N.O. v Nysschen 1999 (2) SA 567 (T)** at 575 E – G dealt with these tests. Although in the latter case the court referred to the test as requiring unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to and did in fact agree upon, the court, nevertheless, applied the test of probabilities to establish whether a cession had been concluded.

[37] The reason as to why the applicant had to be the party dealing with tenants was explained by Mr Henwood. The applicant received different sources of revenue and some tenants, who purchased substantial amounts of fuel from the applicant, got more favourable terms for leasing of their particular property. This stands to reason and would have had no bearing on the rental payable to Southern Life.

[38] There is no explanation on the pleadings or during oral evidence as to why the respondent continued to pay the rental to the applicant even after the cancellation of the contract, despite not receiving any invoices. This, in contrast to Mr Crous's evidence, that the respondent only made payment for rental to the applicant on receiving original invoices. The respondent complied with clause 10.

[39] Mr Crous insisted that no payments were made if the respondent had not received the original invoices. This, in spite of the fact that the respondent could not point to any clause or provision in the notarial deed of lease setting out that payment by the respondent would only be effected once an original invoice had been received.

[40] It is quite clear that at the time of cancellation and prior to cancellation Lanprop invoiced the tenants, who then paid the rental into the same bank account which had been utilized throughout, since 1991. The statement by Mr Crous that:

"As is evident from the headings to the statements and invoices themselves, LANPROP carries on business effectively as a managing agent. It is not clear from the documents what kind of entity LANPROP is."

must be untrue as it is set out on each invoice that Lanprop is a division of Lanseria Airport Properties (Pty) Ltd. The court disregards the respondent's contention that it did not know that payment was effected to the applicant as the documentary evidence confirms the applicant's case. It must be reiterated that Mr Crous had no personal knowledge of the agreement of the lease between Lanseria Airport Properties and Avfin as he was not involved at the time. He testified that it is not the same notarial lease as between Southern Life and Avfin. Mr Rippon stated in the answering affidavit and confirmed during evidence:

"The contention is incorrect. The correct position is that the previously existing lease between LANSERIA AIRPORT PROPERTIES LTD and Avfin was subsequently notarially executed and registered after the initial lessor, being LANSERIA AIRPORT PROPERTIES (PTY) LTD, was replaced as lessor by SOUTHERN LIFE as the new owner of the property." (Court's emphasis)

[41] The court compared both documents and can come to no other conclusion but that it is the same lease which had subsequently been registered.

[42] In **Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318**

AD Joubert JA found at p 331 G – H:

"Sessie kan gesien word as 'n oordragshandeling (act of transfer) om die oordrag van 'n vorderingsreg (translatio juris) te laat plaasvind. Dit geskied deur middel van 'n oordragooreenkoms (agreement of transfer) tussen die sedent en die sessionaris uit hoofde van 'n justa causa waaruit die bedoeling van die sedent om die vorderingsreg op die sessionaris oor te dra (animus transferendi) en die bedoeling van die sessionaris om die reghebbende van die vorderingsreg te word (animus acquirendi), blyk of afgelei kan word." (Court's emphasis)

[43] The court cannot agree that the parties operated on the understanding that the cession intended to be concluded had been concluded. Mr Henwood's evidence was clear that the tacit cessions took place on 9 December 1993. The evidence confirms that all the parties from that date onwards conducted themselves in a way which made it abundantly clear that all the facts supported the tacit cession.

[44] The court was referred to **Govan v Skidmore 1952 (1) SA 732 N** where Selke J held at p734:

"Rex v Blom, supra, was a criminal case, and, in my opinion, it is a fallacy to suppose that the second principle of Blom's case represents the minimum degree of proof required in civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not only reasonable one." (Court's emphasis)

[45] Having considered all the evidence, all the affidavits and all the authorities that both counsel for the applicant and the respondent had referred the court to, the court finds unequivocally that on the probabilities, the conduct of the parties and the circumstances which existed that the parties were in agreement and that the applicant has established that there was a tacit cession at all times.

[46] The defence of estoppel is raised as a result of the invoice which the respondent, according to Mr Crous, only received on 3 October 2005 and which had a sticker affixed stating *"unless this account is paid within 7 days proceedings will be taken."* This invoice was received on the same date as the letter of cancellation, that is 3 October 2005.

[47] Although Mr Crous referred to the letter of 3 October 2005 as a *"letter of demand"* it is quite clear from a proper reading of the letter that it is a cancellation letter as it sets out quite clearly:

"As a result of your breach to pay your monthly rentals on due date you are herewith notified that your lease agreement is cancelled forthwith and you must accordingly vacate the leased premises immediately and arrange for all improvements to be removed in terms of the provisions of your lease." (Court's emphasis)

[48] There can be thus no doubt in anybody's mind that the letter of 3 October 2005 was a letter of cancellation of the lease agreement.

[49] Mr Crous conceded during cross examination that he was confused by the mixed signals of 3 October 2005, that is the original invoices that he had received with the sticker and the letter of cancellation of the lease agreement. He refrained from

calling the applicant or any representative of the applicant at any stage to clarify the matter or to make any enquiries. In **Southern Life Association Ltd v Byleveld NO 1989 (1) SA 496 (AD)** the court found that for a representation to constitute an estoppel it must be unambiguous.

[50] Mr Crous' concession that he was confused as to the applicant's intention can never be that an unambiguous representation had been made.

[51] Mr Opperman disputed that he had agreed that he would send the latest invoice and that the respondent could pay one lump sum for Hangars 3 and 4 upon receipt of the invoice. It is clear from all the evidence that the payment by the respondent for Hangar 3 had nothing to do with the present dispute and the court is not dealing with payment for Hangar 3. Mr Opperman was adamant that he had not given the respondent any extension of time to pay the rental for Hangar 4. The court cannot find that on a balance of probabilities the extension was granted as testified by Mr Crous. Clause 8 of the lease provides *inter alia*:

"Variation

Except as specified herein, no variation of the Agreement shall be of any force or effect unless reduced in writing and signed by the LESSOR and LESSEE or their agents acting under written authority." (Court's emphasis)

[52] The respondent did not prove which representation was made on which the respondent acted to its' prejudice. Mr Crous did not testify that the applicant made a misrepresentation fraudulently and the court finds that no such misrepresentation was made. The extension of time was given at the end of September 2005 according to the respondent, before the applicant decided to cancel the contract on 3 October 2005 – there could thus be no misrepresentation by the applicant at the end of September 2005.

[53] In **Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter 2004 (6) SA 491 SCA** Cloete JA found at:

“Nevertheless if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position.” (Court's emphasis)

[54] In this instance the court does not hesitate to find that Mr Crous did not act reasonably as he made no attempt to clarify the position by making enquiries from the applicant. He was obliged to find out the true set of circumstances, but chose not to do so. Therefore the defence of estoppel cannot succeed.

[55] If the defence of waiver is to succeed there should be clear evidence in this regard, as waiver is a question of fact. In this instance the respondent has to prove waiver on a balance of probabilities. A party is not lightly deemed to have waived his or her rights.

[56] In **Feinstein v Niggli and Another 1981 (2) SA 684 (AD)** Trollip JA found at 698 F – G:

“The party alleging a waiver of a contractual right retains throughout the proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly abandoned it.” (Court’s emphasis)

[57] The respondent does not rely on a direct waiver, but relies on an implied waiver.

[58] The respondent relies on waiver by the applicant on the letter dated on 16 May 2006, which was sent to the respondent. Mr Crous’ evidence under cross-examination was that it was his impression that the applicant had perhaps decided to carry on with the lease. If that is the case the respondent can no longer rely on the defence of waiver, as there was no waiver at all, but according to Mr Crous the applicant decided to honour the lease agreement. Mr Crous made no effort at all to ascertain whether he had interpreted the circumstances correctly, where a reasonable person would have made enquiries.

[59] According to the applicant's replying affidavit, by Mr Opperman, the respondent's attorney and the applicant's attorney held a meeting to explore possibilities of settlement. At the meeting the applicant's attorney indicated in no uncertain terms that the applicant intended launching a fresh application to cancel the notarial lease and to have the respondent evicted from Hangar 4. Mr Crous denied these allegations by Mr Opperman in his answering affidavit, but during cross-examination he conceded that it was possible that the applicant's attorney had informed the respondent's attorney that such an application would be launched afresh. The respondent did not call any witnesses to rebut this evidence, even though Mr Haasbroek, the respondent's attorney, was present at the meeting and was present at court during the hearing of oral evidence. It would have been expedient to call Mr Haasbroek as a witness to rebutt the evidence of Mr Opperman as the onus to establish waiver rests on the respondent.

[60] As found earlier it is clear that the applicant had sent no further invoices after 3 October 2005, to the respondent but that the respondent kept on paying the monthly rental as it was obliged to do according to the provisions of clause 10 of the lease:

"In the event of the LESSOR cancelling this lease and the LESSEE disputing the right to cancel and remaining in occupation of the Premises, the LESSEE shall, pending the determination of such dispute by litigation or otherwise,

continue to pay the LESSOR an amount equivalent to the monthly rental and other sums payable hereunder on the date or dates when such rental and other sums would have been due but for the cancellation, and the LESSOR shall be entitled to accept and recover such payment." (Court's emphasis)

[61] The respondent thus treated the deed of lease as binding whilst occupying the premises and kept on paying the applicant as the lessor

[62] This conduct by the applicant is consistent with a possible cancellation and inconsistent with a defence of waiver. The court cannot find that the respondent had established waiver. Therefore this defence cannot succeed.

[63] The following order is made:

1. An order confirming the cancellation of notarial deed of lease registered by the Registrar of Deeds, Pretoria under reference number K6754/94L;
2. An order directing the respondent to vacate the premises forming subject matter of the aforesaid lease, being lease area number 11 (also known as hangar site no. 4 or Erf 57), situated on the remaining extent of Portion 12 (a portion of Portion 9), of the Farm Zwartkop or Rooiwal 530, Registration Division J.Q. Gauteng;

3. An order directing the Respondent to pay the costs of this application on the attorney and client scale including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

Judge Pretorius

Case number	: 15860/2006
Heard on	: 29 November 2012
For the Applicant / Plaintiff	: JP Voster SC
	: AM Heystek
Instructed by	: Le Roux Vivier and Associates
For the Respondent	: EF Dippenaar SC
	: AC Botha
Instructed by	: Bezuidenhout van Zyl & Associates INC.
Date of Judgment	: 9 January 2013