IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case no: A295/2024
Court *a quo* case no: 6347/2020

In the matter between:

RENOWN PROPERTIES (PTY) LTD	Appellant
and	
ESUS-2-GROUP (PTY) LTD t/a THE KORNER GILLES BLANC	First Respondent
GILLES BLANC	Second Respondent
NICOLAS DA COSTA	Third Respondent

Heard: **7 March 2025**
Judgment: **13 March 2025**

JUDGMENT

Handed down by email to the parties on 13 March 2025

The date of the judgment is 13 March 2025

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1. The appellant will be referred to as the plaintiff and each of the respondents as the first defendant, second defendant and third defendant, respectively.

2. In this matter:

   2.1. The plaintiff and the first defendant concluded a written lease agreement in respect of section 188 of the Mandela Rhodes Place sectional title scheme ("the Premises") on 20 July 2019 ("the Lease").

   2.2. The plaintiff claimed from the defendants the sum of R2 134 398.33 and ancillary relief in respect of the first defendant's occupation of the Premises for the period from 1 May 2020 to 7 December 2021.

   2.3. The claim against the first defendant was on the four bases listed in paragraph 3 below.

   2.4. The claim against the second and third defendants is based on them being sureties and co-principal debtors for the liability of the first defendant to the plaintiff in terms of a written deed of suretyship concluded on 20 July 2019 ("the Suretyship").

   2.5. The first defendant's counter-claim is for restitution of R15 395.16 and R18 376.74 in respect of amounts paid by the first defendant to the plaintiff in March and April 2020 pursuant to the Lease and payment of the sum of R280 000.00 in respect of the plaintiff calling up payment under a bank guarantee provided by the first defendant in circumstances where the plaintiff was not entitled to do so.

3. The plaintiff's claim against the first defendant was advanced on four alternative bases:

3.1. First, in terms of the Lease, for rent, utilities and levies for the period April 2020 to 7 December 2021. The plaintiff abandoned this claim in argument. The Lease and the basis for its termination, however, remain relevant for reasons explored below.

3.2. Second, the conclusion of a tacit lease (tacit relocation), i.e. a new lease agreement, in respect of the Premises on identical terms to those contained in the Lease. Aligned to this alternative claim is an alternative based on a waiver of rights under clause 41 of the Lease. The question of waiver will be dealt with separately below.

3.3. Third, unlawful occupation in respect of the period 27 March 2020 to 7 December 2021.

3.4. Fourth, enrichment based on the first defendant's occupation of the premises from 1 May 2020 to 7 December 2021.

4. The merits and the quantum of both the plaintiff's claim in convention and the counter claims were separated, with the merits of both to be determined first. The specific ruling of the court *a quo* in this regard reads as follows and explains the formulation of the orders made by the court *a quo*, referred to below:

> "… it will indeed be a matter of convenience for the separation of quantum and merit issues and therefore the Court today will proceed to hear evidence on merits for both claim in convention and re-convention."

5. The court *a quo* dismissed the plaintiff's claims against the defendants with costs and upheld the first defendant's counterclaim on the merits with costs, with the quantification thereof postponed *sine die*.

6. The plaintiff appeals against the whole of the judgment and costs order of the court *a quo*.

7. There is no cross-appeal.

8. The following material facts are either common cause or have been established in the evidence:

8.1. The conclusion of the Lease in respect of the Premises and the express written terms thereof.

8.2. The conclusion of the Suretyship and the express written terms thereof.

8.3. The first defendant took occupation of the Premises on or about 1 August 2019 and vacated the Premises on 7 December 2021. This latter date was when it returned the keys and the alarm code to the plaintiff.

8.4. Payment by the first defendant of the full amount due in terms of the Lease for March 2020 in the sum of R145 140.61.

8.5. Payment by the first defendant of the amount of R18 376.74 for parking, levies and rates for April 2020.

8.6. On or about 9 October 2020, the plaintiff made demand for what it claimed to be arrear rental, and received payment, under the terms of a bank guarantee which had been provided by a bank on behalf of the first defendant in the sum of R280 000.00 for which the first defendant was ultimately held liable ("the Guarantee").

8.7. The plaintiff was only entitled to call for and receive payment under the Guarantee if the first defendant was in fact indebted to the plaintiff for that amount in terms of the Lease, and payment was in arrears.

8.8. Other than the payments referred to above, the defendants have not made any other payments to the plaintiff relating to the period April 2020 to December 2021.

9. The defendants referred to and relied on the test for permissible interference by a court of appeal with a trial court's factual findings imposing a high threshold as recently reaffirmed by the Constitutional Court in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) at paragraphs 147 to 150 as follows:

> "… the test for permissible interference by a court of appeal with a trial court's factual findings imposes a high threshold. It is, of course, trite that the powers of a court of appeal against factual findings are limited. There must be demonstrable and material misdirection by the trial court before a court of appeal will interfere.
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> In Mashongwa, it was unanimously held that it is undesirable for this court to second- guess the well-reasoned factual findings of the trial court. Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitute those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong. Otherwise, trial courts are best placed to make factual findings.
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> [149] This court has also explained that the principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is recognition of the advantages that the trial court enjoys that the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading 'the cold printed word', the main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it." [emphasis added]

10. In my view, the determination of this matter does not depend on the application of the aforesaid authority, as will appear from what follows below.

Claim A: The claim based on the Lease

11. In the court *a quo* and in its Notice of Appeal the plaintiff relied on the Lease to claim rental and other amounts in terms thereof. In other words, this was a purely contractual claim for amounts which accrued in terms of the Lease.

12. The defendants' case was that the Lease had terminated on 27 March 2020 by operation of clause 41 of the Lease, alternatively the common law, due to the lockdown imposed pursuant to the Covid 19 pandemic.

13. The plaintiff abandoned reliance on this contractual claim in it heads of argument. I consider this to have been well-advised.

14. Clause 41 of the Lease provides as follows:

> "**VIS MAJOR**
>
> It is hereby agreed between the Landlord and the Tenant that, notwithstanding anything to the contrary contained in this Agreement, if fulfilment of any term or condition of this Agreement becomes impossible due to vis major, casus fortuitus or any other reason beyond the control of the Landlord or the Tenant, **this Agreement shall forthwith terminate** and neither the Landlord nor the Tenant shall have any further rights, obligations or claims against the other of them provided that the aforegoing shall not prejudice the right of either party in respect of existing claim against the other of them, including the right of the Landlord in respect of any Rental and other monies in arrears, and payable by the Tenant for any period proceeding such termination." [emphasis added]

15. The effect of clause 41 of the Lease is that, on the happening of an event as described therein (which, it is common cause, Covid-19 and the lockdown were) it "*shall forthwith terminate*". In other words, the termination occurred *ipso facto* on the

happening of an event, and did not require a party to cancel it in consequence thereof. The Magistrate was correct in this regard.

16. In my view, this is material to the question of the tacit lease (tacit relocation) relief relied on by the plaintiff in the alternative, canvassed below.

Claim B: Tacit Lease/Tacit Relocation

17. The establishment of a tacit relocation of a lease or the tacit conclusion of a new lease agreement on identical terms (as relied on by the plaintiff), is dependent on the facts and circumstances of the case. To succeed with such a claim, the plaintiff is required to prove that the parties (lessor and lessee) conducted themselves in a manner that (*Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822 (SCA) at paragraph 4; see also *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C) at paragraphs 31 to 36):

> "… gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before."

18. The aforesaid authority also confirms that a tacit relocation of a lease agreement is a new lease agreement and not a continuation of a previous lease agreement.

19. In determining whether a tacit contract was concluded a court has regard to the external manifestations of the parties and not the subjective workings of their minds (*Golden Fried Chicken* at paragraph 4).

20. The fact that a lessee remains in occupation of leased premises after the expiration of the term of a lease does not mean that there is a tacit renewal of the lease or tacit acceptance of an offer, particularly where there has been express refusal (*Nedcor* at paragraph 36, *Dayaljee v Naido* 1915 36 NPD at page 68).

21. In *Rand Trading Co v Lewkewitsch* 1908 TS 108, a lease was entered into on behalf of a company before its incorporation. As the law then stood, the lease was not binding and could not be ratified by the company after incorporation. At page 115 the

court rejected the argument that a contract of lease was concluded by conduct (i.e. a tacit lease) as follows:

> "But I think the answer to that argument is a very clear one, and it is this – that all these facts are explained on the single ground that both parties erroneously assumed that there was a contract in existence between them … And the mere fact … that both parties erroneously assumed that there was a contract in existence at that date altogether precludes us from inferring a new contract."

22. By parity of reasoning, in my view, the fact that the plaintiff believed that the Lease was still in existence, which it endeavoured to enforce somewhat vociferously, precluded the inference of a new contract having been concluded. This is explored further in some more detail below.

23. At its barest essentials, the plaintiff would have to establish two fundamental aspects:

    23.1. The intention to conclude a new agreement.

    23.2. Agreement on (at least the material) terms thereof.

24. The evidence, both oral and documentary, was to the effect that, at least until September 2023, the plaintiff contended that (1) the Lease had not been terminated by operation of clause 41 and (2) had remained in place until it was cancelled for breach in the summons issued by it out of the Court *a quo* in October 2020 ("the Summons"). This included detailed correspondence between attorneys acting for the parties and the fact that the plaintiff relied on the original Lease in the letter of demand sent on 11 September 2020. An example from the correspondence includes the plaintiff's attorney's letter of 5 October 2020 to the first defendant's attorneys in which it was recorded as follows (a letter which was dated as late as between the issue and service of the Summons):

> "… there is no basis upon law that it can be argued that the lease agreement terminated on 27 March 2020. [The plaintiff] does not intend to conclude any

[new] lease agreement with [the first defendant]. To make it very clear, our client believes that there is no merit in your client's contentions that the lease agreement has been terminated …" [underlining added]

25. Two things could not be more clearly stated, namely that (1) the Lease had not been terminated and (2) there was no intention to conclude a new lease agreement

26. The fact that the plaintiff was of the view that the Lease remained in place and did not intend to conclude a new lease agreement with the first defendant means that the plaintiff could not have intended to conclude a new agreement of lease. In my view, this alone means that the plaintiff's contractual claim grounded in a tacit lease cannot succeed.

27. There is much further material which I consider to support this conclusion, examples of which are considered in the following paragraphs.

28. First, the parties expressly (including in writing) attempted to negotiate the conclusion of a new lease agreement over an extended period but failed to reach agreement. This was mainly because they failed to reach agreement on both the quantum and duration in respect of rent which was to be paid during the Covid 19 period.

29. Second, the first defendant did not pay any 'rent' after the termination of the Lease (*Nedcor Bank Ltd v Withinshaw* at paragraph 32).

30. Third, Gilles Blanc ("Blanc", the second defendant, and the defendants' sole witness) testified that, although the first defendant was desirous of entering into a new lease agreement with the plaintiff, the first defendant never intended to agree to, and in fact never agreed to, any new lease agreement on the same terms and conditions contained in the Lease. This is borne out by the correspondence which reveals:

    30.1. from the first defendant's perspective, a steadfast attitude that there must at least be reduced terms for relief during the Covid period;

30.2. from the plaintiff's perspective, a willingness to reach some form of compromise;

30.3. but a failure to reach a new agreement; and

30.4. without any question, that no new lease agreement on the same terms and conditions as contained in the Lease was concluded.

31. Fourth, while, as mentioned in the above paragraph, the parties negotiated and attempted to agree the terms of a new lease agreement, they ultimately failed to reach agreement, a state of affairs which is further reinforced by the evidence of Mr Nico van der Westhuizen (Van der Westhuizen), the sole witness for the plaintiff, and the documentary evidence, some examples of which are traversed below:

31.1. From 30 March 2020 to 3 June 2020, the parties were negotiating and attempting to reach agreement on the terms of a new lease agreement.

31.2. At issue between the parties, and on which no agreement could ultimately be reached, was the rental to be paid during the Covid 19 period and the duration for which such rental would be payable.

31.3. Various proposals and counter proposals were made, but ultimately no agreement was reached.

31.4. In evidence, it appeared that the plaintiff contended that Van der Westhuizen's email of 12 May 2020, in reply to Blanc's proposal of 9 April 2020 is evidence of an agreement reached between the parties (as to a 75% reduction in the rental for the lockdown period). This can be disposed of briefly:

31.4.1. While Van der Westhuizen's email of 12 May 2020 could have been an offer, it could not have been an acceptance. This is because that email was preceded by at least three counter proposals to Blanc's offer on 9 April 2020, on 14, 16 and 22 April 2020.

31.4.2. A counter-offer *amounts to a rejection* of an offer and, once rejected, an offer is *dead* and cannot be accepted unless it is revived, as held in *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) at paragraph 17 and *Robarts v Antoni N.O. and Others* [2014] 3 All SA 160 (SCA) at paragraph 21, which reads as follows (footnotes omitted):

> "An offer lapses if it is rejected by the offeree and a counter-offer by the offeree amounts to a rejection of the offer. Brand JA described a counter-offer as follows in *Legator McKenna Inc v Shea*:
>
> > '[A] binding contract can only be brought about by an acceptance which corresponds with the offer in all material aspects. "Yes, but" does not signify agreement. At best it is a counter-offer.'
>
> Once rejected, the offer is dead and cannot thereafter be accepted, unless it is revived."

31.4.3. Van der Westhuizen confirmed in his evidence that he had made a counter proposal to Blanc's proposal of 9 April 2020. There is no evidence that Blanc accepted Van der Westhuizen's offer of 12 May 2020 and accordingly there is no evidence of agreement based on the proposals contained in Blanc's email of 9 April 2020 or Van der Westhuizen's email of 12 May 2020. The evidence, I believe, is in fact to the contrary.

31.4.4. In any event, any assertion that agreement was reached based on an agreed 75% reduction in rental to be paid during the lockdown period is inconsistent with the plaintiff's pleaded case that it and the first defendant agreed to revive the Lease, or concluded a new lease agreement on identical terms to those contained in the Lease.

32. Fifth, the failure to reach agreement on a new lease agreement was expressly confirmed in Blanc's letter of 3 June 2020 in which he stated:

"To date, and despite numerous attempts at negotiations, no long-term agreement has been signed for all the tenants co-signing these letters and we all regret this."

A final proposal was made, to which the plaintiff did not respond.

33. Sixth, on 11 September 2020, the plaintiff, through its agent Pam Golding, made demand for payment of outstanding rent expressly on the basis of the Lease. No mention was made of any other agreement. In the first defendant's attorney's letter of 17 September 2020, in response to this demand, the (correct) state of affairs was spelt out with clarity, recording that since 27 March 2020:

"10.1. our Client made numerous attempts at reaching a new agreement/ lease arrangement with your Client;

10.2. despite our Client's repeated attempts, no new agreement/lease arrangement was concluded between our Client and your Client; and

10.3. our Client has not re-opened its restaurant business." [emphasis added]

34. Seventh, the plaintiff never denied or disputed the statements that no new agreement had been concluded. The contrary appears from the evidence, in that the plaintiff relied on the Lease in the letter of demand sent on 11 September 2020 and in the Summons it subsequently caused to be issued on 2 October 2020.

35. Eighth, until the delivery of its Heads of Argument as the appellant in this appeal on 14 February 2025, the plaintiff has consistently denied the termination of the Lease by operation of clause 41 and sought to cancel it for breach in the Summons. This is incompatible with a new lease agreement having been concluded.

36. Ninth, the plaintiff's reliance on a new tacit lease is at odds with the claim originally advanced by the plaintiff in the Summons which was based solely on the alleged breach of the Lease. No mention was made of any tacit relocation or new lease

agreement having been concluded. The plaintiff advanced the alleged tacit relocation or tacit conclusion of a new lease agreement for the first time on or about 1 September 2022 by way of an amendment to the Particulars of Claim, almost two years after the plaintiff had caused the Summons to be issued and after it had briefed new attorneys to represent it in these proceedings.

37. In my view, therefore, plaintiff's case based on tacit relocation of the lease agreement, or a tacit conclusion of a new lease agreement, fails.

Waiver

38. The plaintiff contends that both "*[t]he Plaintiff and First Defendant waived rights which they may have had in terms of clause 41 of the Lease Agreement*".

39. It is correct that, if waiver is to be a possibility, both the plaintiff and the first defendant, as the parties to the Lease, would have had to waive their rights. This is because clause 41 provides for an automatic termination of the Lease on the event of *vis maior* taking place (i.e. it is not a termination at the instance of either party).

40. By reason of the fact that no-one is presumed to waive rights, clear proof is required of an intention to do so (*Ellis and Others v Laubscher* 1956 (4) SA 692 (A) at 902E).

41. In my view, the plaintiff's reliance on waiver is misconceived for a number of reasons:

    41.1. For waiver to be effective, a party must have full knowledge of the right which it is alleged to have decided to abandon (*Laws v Rutherford* 1924 AD 261 at 263, *Nelon Ltd v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 873-874). This is plainly not established because Van der Westhuizen had no knowledge of the effect of the clause.

    41.2. As considered above, the Lease terminated *ipso facto*, and was not terminated by means of a cancellation by either or both of the parties. On the facts, therefore, there was nothing left for them to waive.

41.3. The effect of clause 41 of the Lease is that the "**Agreement shall forthwith terminate**". Once this has happened, the lease has terminated *ipso facto*. A waiver thereafter cannot revive an agreement which has terminated. To achieve that the parties would have to conclude a new agreement. A well-known analogy is that of waiver of compliance with a suspensive condition which must take place before the time for its fulfilment (*Trans-Natal Steenkoolkorporaise Bpk v Lombaard* 1988 3 SA 625 (A) at 640). The reason for this is that the effect of non- compliance with a suspensive condition is that the agreement lapses. In the case of clause 41, the Lease terminated forthwith. Similarly, there was therefore nothing left to waive. There was no act of waiver by any of the parties prior to the termination of the Lease by operation of its clause 41. This was plainly the case in the instant matter and no attempt was made to make out a case otherwise.

41.4. The facts, as considered above, illustrate that there was no such waiver on the first defendant's part – on the contrary, it consistently (and correctly, in my view) contended that the Lease had terminated.

42. Some of the legal principles are neatly summarised in *Coppermoon Trading 13 (Pty) Ltd v Government of the Province of the Eastern Cape* 2020 (3) SA 391 (ECB) at paragraph 27:

> "The burden of proof is on the party who alleges that an election has been made, or that a right has been waived. By reason of the fact that no-one is presumed to waive his rights, clear proof is required of an intention to do so. (Ellis and Others v Laubscher 1956 (4) SA 692 (A) at 902E). In Laws v Rutherford 1924 AD 261 (at 263) the position was stated as follows: "**The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."** (Also Montesse Township & Investments Corporation v Gouws & Another supra at 381B; Borstlap v Spangeberg supra at 704; Feinstein v Niggli and Another supra at 698H, and The Road Accident Fund v Mothupi supra at para [19].) The conduct from which waiver is to be inferred, must be unequivocal,

"**that is to say, consistent with no other hypotheses"** (The Road Accident Fund v Mothupi supra at para [19]).)" [emphasis added]

43. The *onus* rests on the party relying on a waiver (in this case the plaintiff) to allege and prove waiver on a balance of probabilities. The plaintiff must show that the first defendant, with full knowledge of its rights, decided to abandon them, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. The evidence must be clear especially where tacit waiver is asserted (*Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704FH).

44. There is no evidence that the first defendant waived reliance on clause 41 of the Lease. The evidence is in fact to the contrary: While the first defendant was desirous of retaining the Premises, Blanc's evidence was that in the circumstances of the Covid-19 pandemic and the uncertainty surrounding it, the first defendant was not prepared to do so on the terms of the Lease. That is why he engaged in negotiations in an attempt to conclude a lease agreement on different terms. This is entirely at odds with any suggested waiver of clause 41 or election to uphold the Lease on the same terms and conditions. For example, he stated on 3 June 2020 in a letter to the plaintiff that "*It is in our common interest to find a viable, long term agreement*" and "*Who would be ready to sign a new lease in such an uncertain period?*". While 'sign' relates to a written lease, the context would apply equally (even more so, I apprehend) to an agreement which is not in writing, with the word 'conclude' in place of 'sign'.

45. As to the plaintiff, it considered the Lease to be in place notwithstanding clause 41 and was therefore not even aware of its rights and therefore could not have waived them.

46. While this aspect of waiver has been dealt with separately in this judgment, the plaintiff's pleaded case in respect of waiver forms part of its case as to a tacit relocation or tacit conclusion of a new lease agreement on identical terms. It is not the plaintiff's pleaded case that the first defendant waived its right to rely on clause 41 of the Lease and that therefore the Lease survived. Its claim B (the tacit lease) is premised on the assumption that the Lease immediately terminated upon

commencement of the lockdown (as it has now conceded, correctly, in my view, to be the case).

47. In the premise, I am of the view that the plaintiff's case based on waiver fails.

Claim D: Enrichment

48. The aspects of enrichment and the counter-claims will be dealt with prior to that of unlawful occupation because it appears that the latter is the main contentious issue and the former two are, in my view, capable of being dealt with briefly.

49. Enrichment was not relied upon in the plaintiff's heads of argument in these proceedings. Although it was not abandoned in oral argument, it was not pressed with any conviction.

50. The first defendant leased the Premises from the plaintiff for the purpose of operating the business of a restaurant. On 27 March 2020, a nationwide lockdown was imposed in terms of the Disaster Management Act 57 of 2002 ("the DMA" and "the Lockdown"). The evidence was that following the Lockdown the first defendant never traded from the Premises. Mere physical occupation or possession does not constitute beneficial occupation or use and enjoyment of the Premises (*Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust* 2023 (5) SA 68 (SCA) at paragraphs 19 to 21, in which it was held that mere physical occupation or possession does not constitute beneficial occupation in the context of premises to be used as a restaurant in terms of a lease in the Covid era).

51. Similarly, there is no evidence that the plaintiff has been impoverished by the first defendant's occupation of the premises. There is no evidence that the plaintiff was able to obtain an alternative tenant for the Premises which was prevented by the first defendant's occupation of the Premises. Van der Westhuizen's evidence was that it sold the Premises.

52. In the circumstances, in my view a claim in enrichment would fail.

The first defendant's counter-claims

53. It has already been found in this judgment that:

    53.1. The Lease terminated on 27 March 2020 (in the course of this appeal this became common cause).

    53.2. There was no tacit relocation or tacit conclusion of any new lease agreement on the same terms and conditions as in the Lease.

    53.3. There was no waiver of clause 41 of the Lease.

54. The counter claims concern amounts paid after the Lease was terminated on 27 March 2020 by operation of clause 41 of the Lease, being:

    54.1. The *pro rata* portion of payments made in respect of March 2020 for the period from 27 to 31 March 2020 when the Lease had terminated, in the amount of R15 395.16.

    54.2. Payments made in respect of April 2020 after the Lease had terminated, in the amount of R18 376.74.

    54.3. Payment of the amount of R280 000 which the first defendant was obliged to pay to a bank flowing from the calling up of a bank guarantee in terms of which the bank had paid the plaintiff the aforesaid amount, but which amount was not due in terms of the Lease because it had previously been terminated on 27 March 2020 (the R280 000 related to amounts which would have been due under the Lease, had it not terminated, subsequent to the date of termination).

55. The plaintiff, correctly, in my view, accepted that the counter-claims should be upheld, should the court find that the Lease was not in place and that the tacit lease had not been concluded, as has been found in this judgment.

56. The court *a quo* ordered that the quantification of the counter claims be postponed *sine die* and there was no cross-appeal against this order.

57. The plaintiff submitted that the court ***a quo's*** order in respect of the first defendant's counter-claim is 'strange' because the matter was postponed *sine die* for the quantification of the counter-claim. I do not agree, because this is what had to follow from the separation of merits and quantum of both the claim in convention and the counter-claims which had been ordered by the court *a quo* earlier in the trial, mentioned and quoted verbatim above. The plaintiff further submitted that it is not apparent what issues require further ventilation in respect of quantification. While this submission appears to me to be correct, the separation and the absence of any cross-appeal (which, in any event, I do not believe would assist because the separation was ordered and stands) renders it moot and this court is not empowered to interfere in this regard.

58. The court ***a quo's*** finding in respect of the counterclaim is therefore upheld.

Claim C: Unlawful occupation

The Covid-19 Lockdown

59. In terms of the Lockdown, every person was confined to his or her place of residence, subject to certain exceptions, none of which were applicable to the business of the first defendant. All businesses and other entities were required to cease operations during the Lockdown, save for certain exceptions, none of which applied to the first defendant's business (GN 318 of 18 March 2020: Regulations issued in terms of section 27(2) of the DMA, Government Gazette No. 43107 (as amended)). The plaintiff accepted this in argument.

60. It was common cause that, during at least the hard lockdown period between 27 March 2020 and 30 April 2020, the first defendant would have been unable to move out of the Premises. The plaintiff therefore contends that the relevant date for assessing unlawful occupation and the potential starting date for the quantification of any claim would be 1 May 2020, this being the date which the plaintiff contends that the first defendant could first have lawfully vacated the Premises.

61. Where the parties differ is whether the first defendant could only have lawfully vacated the premises from 1 June 2020 (Government Notice No. 608, Gazette 43364, regulation 42). Prior to that date, and during what was referred to as the Level 4 lockdown, persons remained confined to their place of residence save for limited purposes (Government Notice No. R.480, Gazette No. 43258, regulation 16) and the first defendant was not permitted to transport its goods from the Premises. The first defendant was accordingly prevented from vacating the premises by legislative prescription until at least 1 June 2020.

62. In my view, the first defendant is correct that it was not in unlawful occupation prior to 1 June 2020.

Consent of the plaintiff to occupy the Premises

63. The first defendant contends, in any event, that it was in occupation of the Premises with the consent of the plaintiff up until well past 1 June 2020, being until 9 October 2020 when the Summons was served cancelling the Lease and seeking the eviction of the first defendant therefrom.

64. If an occupant remains in occupation of premises with the leave of the owner, this does not constitute holding over or unlawful occupation (*Nedcor Bank Ltd v Withinshaw* at paragraphs 47 and 49, Glover, *Kerr's Law of Sale and Lease*, 4th Edition, at page 477).

65. The evidence of Van der Westhuizen and the documentary evidence indicates that until delivery of the Summons on 9 October 2020, the first defendant was in occupation of the Premises with the plaintiff's consent, if not express, at least tacit, pending their attempts to negotiate a new lease agreement. Put another way, prior to 9 October 2020, there was no communication from the plaintiff to the effect that there was no lease in place and nor that the first defendant should vacate. On the contrary, the Lease was repeatedly and firmly invoked as being in place and of force and effect. On the other hand, from 9 October 2020, such communication was firm and

unequivocal (albeit that the reason proffered by the plaintiff for the Lease having terminated was different, but that is immaterial in this context).

66. Both prior and subsequent to the commencement of the Lockdown, the parties were engaged in ongoing negotiations in an attempt to conclude a new lease agreement and its terms. At no stage during these negotiations did the plaintiff request the first defendant to vacate the premises. Plainly the plaintiff was content for the first defendant to remain in occupation during the negotiations and, accordingly, in my view, the first defendant was in occupation of the premises during this time with the plaintiff's consent. This was not surprising bearing in mind the plaintiff's (mistaken) impression that the Lease remained in place, and also that, from the perspective of practical reality, the Premises could for some time not be let out due to Covid.

67. In my view, therefore, the first defendant was in occupation of the Premises with the consent of the plaintiff until 9 October 2020.

The period after 9 October 2020

68. When it appeared that negotiations were failing (upon delivery of the plaintiff's formal letter of demand for payment of rent on 11 September 2020), the first defendant's attorneys, in response on 17 September 2020, advised the plaintiff that it was still prepared to meet with the plaintiff to discuss the terms of a new lease agreement in respect of the Premises, which would apply going forward. The plaintiff was expressly advised though that should it "… *not be amenable to enter into such negotiations, our Client will vacate the Premises*".

69. On 21 September 2020, the plaintiff's attorneys responded to the effect that "*The assets on the lease premises clearly falls under our client's hypothec for arrear rentals, and accordingly may not be removed.*"

70. The defendants argued that the plaintiff "… *indicated that the first defendant was not permitted to vacate the premises*." This is not quite correct: what the plaintiff did was to assert that the Lease was still in place, that the first defendant still had beneficial

occupation of the Premises and the keys thereto and that the goods on the Premises were subject to a hypothec and could not be removed.

71. Whether there is a distinction between these is material to this matter.

72. The first defendant appears to equate enforcing a hypothec with a lessee being unable to vacate premises. Whether this is so, is core to whether the first defendant was in unlawful occupation of the Premises for any period from 9 October 2020.

73. On 25 September 2020, the first defendant's attorneys sent a letter again recording the first defendant's tender to vacate the Premises should the plaintiff not be willing to enter into negotiations with the first defendant.

74. On 2 October 2020, the plaintiff caused the Summons to be issued, which included an automatic rent interdict, and prayed for an order confirming cancellation of the Lease and for the eviction of the first defendant.

75. On 5 October 2020 the plaintiff's attorneys recorded in writing to the defenants' attorneys that "*Our client does not intend to conclude any lease agreement with your client. To make it very clear, our client believes that there is no merit in your client's contentions that the lease agreement has been terminated and will accordingly take the appropriate steps to hold your client liable for the arrear amounts due.*"

76. The Summons was served at the instance of the plaintiff on 9 October 2020.

77. Section 31 of the Magistrates' Court Act 32 of 1944 ("the MCA") provides:

31 Automatic rent interdict

(1) When a summons is issued in which is claimed the rent of any premises, the plaintiff may include in such summons a notice prohibiting any person from removing any of the furniture or other effects thereon which are subject to the plaintiff's hypothec for rent until an order relative thereto has been made by the court.

(2) The messenger shall, if required by the plaintiff and at such plaintiff's expense, make an inventory of such furniture or effects.

(3) Such notice shall operate to interdict any person having knowledge thereof from removing any such furniture or effects.

(4) Any person affected by such notice may apply to the court to have the same set aside.

78. Similarly, clause 12 of the Lease provides:

> "For the duration of this Agreement all furniture, fittings and fixtures, equipment, etc. brought onto the Premises and which remain on the Premises, shall be subjected to the Landlord's hypothec and shall serve as collateral security for the proper fulfilment by the Tenant of all his obligations in terms of this Agreement. The Tenant may not pledge or otherwise encumber or dispose of the aforementioned assets or remove them from the Premises, except in the ordinary course of business."

79. The first defendant submitted in heads of argument that it "*… was accordingly interdicted from vacating the premises from service of the summons on 9 October 2020*."

80. As mentioned above, the first defendant appears to equate enforcing a hypothec with a lessee being unable to vacate premises. Here it goes even further, submitting that it amounts to an interdict against vacating the Premises.

81. This is echoed in the plea in convention dated 24 November 2020 in which the first defendant pleaded that "*Because of these proceedings, the first defendant has been prevented from vacating the premises, but tenders to do so.*" It repeated this in its affidavit opposing summary judgment on 21 December 2020.

82. Whether the defendants' submissions and pleading in the above paragraphs are correct is material to the claim based on unlawful occupation.

83. In February 2021 correspondence was exchanged in regard to the movable property subject to the hypothec, but it was not released.

84. The first defendant submitted in its heads of argument that "… *because of the rent interdict it was prevented from vacating the premises, and on 24 November 2020 and again on 21 December 2020 tendered to vacate the premises*" but the "*plaintiff refused to permit the first defendant to do so and asserted the rent interdict until eventually, when it suited it to do so, it allowed the first defendant to vacate the premises on or about 7 December 2021. When the plaintiff eventually, asked and permitted the first defendant to vacate the premises, the first defendant did so within a couple of days.*"

85. What happened on or about 7 December 2021 was that the plaintiff allowed the movable property on the Premises subject to the rent interdict to be removed.

86. While the submission by the first defendant of the assertion of the rent interdict by the plaintiff is correct, it is not correct that the plaintiff refused to permit the first defendant to vacate the Premises, in the sense that it did not expressly do so. As pointed out above, the defendants' case in this regard, as to the first defendant being prevented from vacating, depends on the refusal to release the property subject to the rent interdict being a refusal to permit the first defendant to vacate.

87. The first defendant's argument depends on a conflation of the invoking of a rent interdict with a refusal to permit a lessee to vacate (or preventing it from vacating). In other words, whether the invoking of a rent interdict means that a vacation of the Premises has not been permitted or has been prevented. The question is whether this argument is correct.

88. In their heads of argument, the defendants summarise as follows:

"49. To summarise, the first defendant was prevented by statutory prescripts from vacating the premises:

49.1 from 27 March 2020 to 30 May 2020 pursuant to the Covid 19 regulations referred to above; and

49.2 from 9 October 2020 to 7 December 2021 (in terms of the plaintiff's rent interdict and section 31 of the *Magistrates' Court Act*)."

50. For the period in between, the first defendant was in occupation of the premises with the express, alternatively tacit consent of the plaintiff."

89. I agree with the submission in paragraph 49.1 of the defendants' heads of argument for the reasons set out above. It appears that this is common cause for the period up to 30 April 2020. I also agree with the submission in paragraph 50 of the defendants' heads of argument. My reason for this is that it must follow on the basis of the facts set out above, which establish that until 9 October 2020 the Lease had not been regarded as terminated by the plaintiff and the occupation of the Premises by the first defendant was with the plaintiff's consent. The effect of this, in my view, is that, for the period up to 9 October 2020, the first defendant's occupation of the Premises was not unlawful.

90. What remains is the period from 9 October 2020 to 7 December 2021. This depends on the rent interdict point taken by the defendants referred to and identified above, i.e. whether the fact of the invocation of the rent interdict prevented the first defendant from vacating the premises.

91. Ultimately, what the defendants are effectively contending, is that, when the first defendant tendered to vacate the Premises, it was actually saying that it was tendering to remove the goods subject to the rent interdict which is what they have to do to vacate. Put another way, defendants are saying that vacation of the Premises cannot be achieved without removing the goods under attachment. Put in a further way, they could not vacate without removing the goods.

92. Mr Engelbrecht, who appeared for the Defendants, argued that the Plaintiff had an election to enforce the rent interdict and because it did so it must live with the consequences. That argument, however, does not assist because it simply begs the material question which is whether, in the face of not being legally able to remove the goods attached which the lessor plaintiff desired to be on the Premises, the lessee first defendant could not vacate the Premises because it could not remove the goods.

93. I think that there is a simple and clear answer to that argument: it was the plaintiff which desired and required the movables to be attached and to remain on the Premises by invoking section 31 and obtaining the rent interdict. The plaintiff could at any time, as it later did, abandon the rent interdict allowing for the movables to be removed. It was therefore at the plaintiff's instance that the goods remained on the Premises. The result is that the plaintiff's demand for first defendant to vacate the Premises, in circumstances in which it was requiring the movables to remain in the Premises, could not involve the removal of the movables by the first defendant. This is in contrast to the situation of the Covid restrictions which were not implemented at the instance of the plaintiff. This contrast eliminates, in my view, the superficial and deceptive similarity between the two situations.

94. The law regarding the interpretation of statutes requires that, apart from the ordinary grammatical meaning of the words in a statute, its purpose and context should be taken into account when interpreting the statute. (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18, *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at paragraphs 60 and 64)

95. The first point to make in this regard is that, from its clear wording, section 31 does not prohibit the vacating of premises while a rent interdict is in place. The purpose of section 31 is clearly to put in place a rent interdict while a party, in this case the plaintiff, pursues its claim. There is no limit regarding what the claim might entail and, as on the facts of this case, it may include eviction.

96. One assumes that the legislature was aware that a situation might arise in which a rental interdict would be put in place while the plaintiff pursues its eviction claim. If the

legislature had intended for the two to be mutually exclusive, one would expect that to be provided for in the statute – to provide for an exclusion in cases should vacating premises be thwarted by the hypothec as contended by the defendants. There is no such exclusion.

97. Instead, subsection (4) provides for *"any person affected by such notice [to] apply to the court to have the same set aside"*. This includes the first defendant, and no explanation has been furnished for why it could not pursue this relief if it wanted to remove its goods. This is especially so given that the first defendant's case throughout has been to deny the existence of a lease agreement, including the hypothec for rent, which is based on a provision of the lease agreement.

98. It is no answer to say, as the first defendant does, that the plaintiff had made an election to obtain the rent interdict. Once granted, the interdict was in force as a matter of law until set aside, and it applied equally to all affected. In those circumstances, both parties had recourse to available relief based on the law. The plaintiff opted to issue the summons, coupled with the rental interdict. That is the purpose of section 31.

99. Defendant's argument, I apprehend, has the potentially absurd consequence that a party in the position of the first defendant could, with impunity and immunity from liability for the period of occupation, remain in lawful occupation indefinitely while the question of liability for past rental was determined in litigation. Effectively, the party in the position of the plaintiff (the lessor) would be penalised for enforcing its rights. I do not think that can be what our law is and allows. Mr Engelbrecht submitted that the lessor could apply to court for an order that the goods be held elsewhere. I do not see that in section 31. In any event, even were that to be a possibility, that brings with it further considerations such as paying for storage and removal costs and is therefore not a sufficient answer.

100. The plaintiff submitted as follows in its heads of argument:

> "The simple difficulty for the First Defendant is that, on its own version, it had no right to occupy that property after the alleged termination of the lease

agreement ... That argument conflates the attachment of goods which are to remain in a property with the property being vacated. It is often the case that a tenant will leave a property which is the subject of a rent interdict summons and that certain if not all of the contents of that premises will remain. The attachment and the presence of goods in the premises due to an attachment does not equate to an inability to vacate the premises … In order to vacate the premises all that would have been required of the First Defendant would be to either put up some form of alternative security in respect of the automatic rent interdict or to return the keys of the property to the Plaintiff. It did neither and was happy to simply remain in the property indefinitely. The fact that Mr Blanc indicated that he gave the Plaintiff access to the property is an indication that he was in possession and his statements that his office was part of the property and included documents and personal records, indicates that the First Defendant occupied the premises with goods which were not the subject matter of the attachment."

101. Leaving aside the question of alternative security, which need not be decided, and consent up to 9 October 2020, which has been dealt with above, I agree with these submissions for the reasons set out above.

102. I am unaware of and was unable to find any authority in support of the first defendant's argument. Counsel for both of the parties did not produce any and were not aware of any. Mr Engelbrecht submitted that the issue has first arisen in this matter. While that may be so, a possibly salient consideration, I apprehend, is that the point has never been taken because it is of no merit.

103. In my view, therefore, the first defendant was in unlawful occupation of the Premises from 10 October 2020 to 7 December 2021 (10 October 2020 being the day after the service of the summons when cancellation of the Lease and eviction from the Premises was first claimed). In consequence of this finding the matter will be remitted to the court *a quo* for the quantification of the liability arising therefrom (as mentioned above, the question of quantification had been separated out for later determination (if necessary)).

104. The wording of the above paragraph, and the order below, is deliberately neutral as to the basis of quantification because it is a question in that quantification to be considered by the court *a quo*.

105. The plaintiff submitted that the amount of the liability so determined should be ordered to be set-off against the amounts of the first defendant's counterclaim. No basis was laid for this submission. The amount of the claim is plainly not liquidated and set-off does not apply. In addition, the first defendant pointed out, in my view correctly, that this was not even prayed for in the amended plea to the counter claim. Be that as it may, both the claim in convention and counter claim still remain to be quantified (these aspects having been separated out by the court *a quo* for later determination, if necessary) and therefore, from a practical perspective, this finding will probably not have an effect, although this consideration is of no moment to the conclusion reached in regard to the plaintiff's request for set-off.

106. In my view, the effect of the finding to remit the matter back to the court *a quo* is that it would be appropriate for all issues of costs in the court *a quo* to stand over for later determination.

The Suretyship

107. The second and third defendants are sought to be held liable in terms of the Suretyship in terms of which they bound themselves as sureties and co-principal debtors jointly and severally in solidum to and in favour of the plaintiff for the due and proper fulfilment of all obligations of the first defendant "*… in terms of, or in connection with or arising in any way whatsoever out of the Agreement … in terms of which* [the plaintiff] *has let to the debtor* [the Premises]."

108. Although the defendants never took the point, the question arises whether a claim for unlawful occupation after the termination of the Lease falls within the scope of liability of the second and third defendants as provided for in the Suretyship. I consider the answer to be that the claim in this instance, because it follows the termination of the Lease, is a claim for holding over and that such a claim is therefore in connection with or arising out of the Lease.

Costs

109. As mentioned, the costs before the court *a quo* should stand over for later determination.

110. As to the costs of the appeal, the plaintiff has been successful in respect of its claim, albeit in part and only on one of the various bases relied upon, while the first defendant has been successful in respect of the counter claims, albeit that that aspect took up a very minor portion of the written and oral argument. Counsel for the parties both indicated that a 50/50 apportionment of costs of the appeal could be considered to be appropriate. On a robust approach, I tend to agree. I raised whether each party paying their own costs would be an appropriate equivalent. They did not consider it to be inappropriate. The parties will therefore pay their own costs of the appeal.

111. I might add that the plaintiff had requested any costs in its favour to be on the attorney and client scale as provided for in clause 39 of the Lease which reads as follows:

> "**LEGAL COSTS**
>
> Should the Landlord institute legal action against the Tenant for payments of **monies payable in terms of this Agreement**, with or without cancellation of the Agreement, the Tenant shall also be liable to the Landlord for all legal costs, including collection commission, as between attorneys and clients, and any costs incurred to trace the Tenant." [emphasis added]

112. In my view, however, a claim arising from unlawful occupation of the Premises predicates the absence of the Lease and therefore does not appear to be a claim for payment of "**monies payable in terms of this Agreement**". Any costs order which may have been awarded in the plaintiff's favour in this appeal would therefore have been on the party and party basis (and scale B in terms of Rule 67A would apply as the parties did not seem to have any dispute in this regard and there did not seem to me to be any compelling reason otherwise).

Condonation

113. The record was delivered late due to problems which the appellant experienced in obtaining the transcript. The explanation was comprehensive and acceptable. The application for condonation was not opposed. It was granted in court with the appellant to pay the costs thereof.

Order

114. In the premise, I propose that the following order be granted:

1. The late filing of the appeal record is condoned, with the appellant to pay the costs thereof.

2. The appeal against the dismissal of the plaintiff's claim in convention is upheld in part, in respect of its claim for unlawful occupation for the period from 10 October 2020 to 7 December 2021.

3. The matter is remitted to the court *a quo* for the aspects referred to in paragraph 4 and 5 below to be determined by the court *a quo*.

4. Paragraph 1 of the order of the court *a quo* is varied in regard to the plaintiff's claim in convention to read as follows:

'1. In regard to the plaintiff's claim:

1.1 The defendants are jointly and severally liable to the plaintiff in terms of its Claim C arising from the first defendant's unlawful occupation of section 188 of the Mandela Rhodes Place sectional title scheme, corner of Wale and Burg Streets, Cape Town, for the period from 10 October 2020 to 7 December 2021.

1.2 The matter is postponed *sine die* for the purpose of the quantification of this claim.

1.3 Costs are to stand over for later determination.'

5. Paragraph 3 of the order of the court *a quo* is varied to read as follows: 'The matter is postponed sine die for Quantum (in respect of the Plaintiff's claim to the extent upheld in paragraph 1 above and the counterclaim).'

6. The appeal against the upholding of the first defendant's counter claim is dismissed.

7. The parties are to pay their own costs in respect of the appeal.

_____

A Kantor
Acting Judge of the High Court

I agree, and it is so ordered:

_____

N Mangcu-Lockwood
Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case no: A295/2024
Court *a quo* case no: 6347/2020

In the matter between:

RENOWN PROPERTIES (PTY) LTD	Appellant
and	
ESUS-2-GROUP (PTY) LTD t/a THE KORNER GILLES BLANC	First Respondent
GILLES BLANC	Second Respondent
NICOLAS DA COSTA	Third Respondent

Matter was heard on: 7 March 2025
Judgment delivered on: 13 March 2025

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