

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 43571/19

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

DATE: 29 JANUARY 2021

In the matter between:

SINGYUNG INVESTMENTS CC

APPLICANT

and

THE METROPOLITAN MUNICIPALITY
OF TSHWANE

FIRST RESPONDENT

ALL OCCUPIERS OF PARKVIEW UNITS
218 ZEEDERBERG STREET PRETORIA

SECOND RESPONDENT

SCHUBART PARK RESIDENT'S ASSOCIATION

THIRD RESPONDENT

JUDGMENT

ANTULAY AJ:

- [1] This matter has been allocated to me for adjudication. The parties requested that they should address the court in the matter. The matter was not adjudicated in toto. Arguments were led by the parties with regard to the point raised by the First Respondent, namely is there a factual dispute. Whether a factual exist, is denied by the Applicant. The court found it prudent to hear the Argument in this regard before hearing the rest of the matter.

EVIDENCE OF THE APPLICANT

- [2] The argument revolved around whether there is a factual dispute in relation to the Tri-partite Agreement and whether this aspect can be decided on motion proceedings and by way of affidavit.
- [3] The Applicant is of the view that there is no factual dispute, the Applicant submitted that there is no valid existing lease agreement between the Applicant and the First Respondent. The Applicant further submits that having regard to the Answering Affidavit deposed to on behalf of the First Respondent in an urgent application under case number: 33225/2018 that the First Respondent specifically relied that there is no agreement between the Applicant and the First Respondent.
- [4] Before adjudicating the matter it was imperative to consider whether a factual dispute existed and further if it could be decided on in motion proceedings.

[5] The Applicant is of the view that the common cause issues be set out before looking at whether there is a factual dispute.

[5.1] The First Respondent and the Applicant concluded a lease agreement on the 29th of September 2011, which lease agreement was cancelled on the 27 of March 2013.

[5.2] The Applicant launched an urgent application on 14 May 2018 under case number: 33225/2018, it is common cause the First Respondent was also present in the urgent application

[6] The Applicant respectfully submits in its Founding Affidavit that:

"6.15 The draft of the said tri-partite agreement is attached hereto as Annexure "G". The said agreement was never finalised and due to the fact that there was no meeting of the minds no agreement came into existence. Furthermore the First Respondent was in arrears with the monthly rental."

[7] The Applicant further brought to the attention of the Honourable Court and extraction of the First Respondent's 2018 Answering Affidavit from paragraph 15.15 that:

"From September 2011 until now, and despite the back-and-forth discussions between the Applicant and the First Respondent's attorneys, the parties have been unable to resolve the issues and regarding the signing of an agreement of lease in respect of the Parkview building."

[8] The Honourable Court's attention is further drawn to the fact that the Applicant launched the urgent application in 2018 for relief that the First Respondent vacate the premises, being the same premises in this application. Further relief that the First Respondent pay the Applicant R 6 089 927.20. Reference is made to this since a submission was made to the Honourable Court on behalf of the First Respondent that the 2018 Answering Affidavit should not be read out of context, and the 2018 Answering Affidavit was deposed to under a different context.

[8.1] It is respectfully submitted by the Applicant that this application as well as the 2018 application relates to the occupiers of the Parkview building and the relationship between the Applicant and the First Respondent.

[8.2] It is noteworthy that many of the paragraphs containing in the First Respondent's 2018 Answering Affidavit and the Answering Affidavit in this application starts the same and some paragraphs are exactly the

same, but some of the submissions made in the 2018 Answering Affidavit is left out in the First Respondent current Answering Affidavit.

- [8.3] It is therefore submitted by the Applicant that reference to the 2018 Answering Affidavit cannot be taken out of context when the paragraphs are specifically quoted to the Honourable Court, and it is the Applicant's view that these two affidavits relate to the same issues.

- [8.4]. The Honourable Court is respectfully referred to what is set out in the First Respondent's 2018 Answering Affidavit:

- [8.4.1] The First Respondent sets out the sequence of events since 2013, and also refers to the tri-partite agreement in paragraphs 7.25 to 7.45. Paragraph 7.45 specifically states that:

"The discussions and negotiations happened during the latter part of 2017 up until March 2018 and April 2018. The discussions turned at naught because the parties could not reach an agreement on the issue regarding the fact that the First Respondent was not in occupation of the Parkview building and its only responsibility would be to pay rent on behalf of the building."

- [8.4.2] The Honourable Court is also referred to Annexure "GOTT" the email on 23 April 2014 08:41

"Kindly indicate when should we bring the rest of the leases for your signature, as you previously indicated that we should send only one copy so you can go through it which was sent to your office, it is challenge on our side if the process to sign delays as the leases must also be sent to the City of Tshwane representative to sign."

- [8.4.3] The above email was answered by Mr. Botha that due to the parties locked in negotiations with the First Respondent's debt the tripartite agreement cannot be finalised.

- [8.4.4] The Honourable Court is further referred to paragraph 15.14 that reads as follows:

"This interaction prompted the new administration of the First Respondent to investigate the further. Following these investigations, it was discovered that no signed lease agreement was in place. This posed a serious problem for the First Respondent, who, in accordance with its Supply Chain and Procurement Policies (own emphasis), must have a written agreement in place before it can make payment to service providers such as the applicant. This is especially so having regard to the amounts in question."

[8.4.5] That left the Applicant with paragraph 15.15 that was quoted in the founding affidavit.

[8.5] The Applicant never signed any tripartite agreement, and according to the First Respondent's 2018 Answering Affidavit there is no agreement between the parties. Therefore, the Applicant is of the view when the application was launched that there is no factual dispute and it is common cause that there is no lease agreement between the parties, and the fact that the First Respondent failed to pay rent.

[8.6] It is further submitted that taking into account the lease agreement of September 2011 which is common cause was the initial agreement and valid agreement, this was also quoted in the 2018 Answering Affidavit that clause 24 stipulated "the parties record expressly that it their intention is not to be bound by any verbal agreement of lease". Clause 34 stipulated that "the agreement contains all the terms and conditions...the agreement may not be varied, added...in writing and under signature of both parties."

[9] The First Respondent deposed to the Answering Affidavit in the current application, and raises the point of dispute of fact. It is respectfully submitted that the First Respondent attempts to create the impression to the Honourable Court that the matter cannot proceed or should be dismissed as a result of the dispute of fact, which aspect was not the First Respondent's version in the 2018 Answering Affidavit.

[9.1] The First Respondent in the Answering Affidavit to this application indicates that about September a part written agreement alternatively a part written part oral agreement was concluded between the CoT, the Applicant and each occupier. However the First Respondent previously specifically indicated that the agreement must be in writing.

[9.2] The First Respondent is further not in any position to provide a signed agreement to this Honourable Court, and the agreement attached to the Answering Affidavit is also not signed by the First Respondent nor the Applicant.

[9.3] The First Respondent makes reference that "Issues in respect of the tripartite lease agreement arose when the CoT fell in arrears with the payment of monthly rentals owed to the applicant, the Applicant was unable to finalise the signing of the Tripartite lease agreement. This is clearly indicative that there is no factual dispute and that the First Respondent is well aware of the Applicant's stance.

[9.4] The First Respondent further attempts to create the impression that the tripartite agreement was accepted by all the parties, which is not the case and clearly not the version of the First Respondent in the 2018 Answering Affidavit. The First Respondent further indicates that in 2016 the Applicant "apparently reverted back to the terms and conditions of the initial lease agreement concluded between the parties in 2011, whilst at the same time, relying on terms and conditions in Tripartite lease agreement." It is strange that the First Respondent failed to emphasise to this Honourable Court on what specific term of the Tripartite lease agreement the Applicant alleged wanted to rely upon.

[9.5] It is respectfully submitted by the Applicant that the First Respondent attempts to create a factual dispute and to allege that there "exists a material dispute of fact between the Applicant and the CoT with regards to the agreement which governs the relationship between the parties

[9.6] However, the First Respondent specifically states that "*There were various discussions and negations between the applicant's attorneys and Ms. Phosa in an attempt to find a resolution to the impasse that has arisen between the parties. Eventually, there was a total breakdown in the discussions...*"

[10] The First Respondent response to the 2018 Answering Affidavit that was quoted in the founding affidavit, and merely states that "*Even if the Tripartite lease agreement was never signed by the applicant, it makes no difference because the parties had agreed in September 2013, that the residents of the Parkview building would occupy the building on the terms of the Tripartite lease agreement*".

[11] It is with respect noteworthy that the First Respondent fails to deal with the statements in the 2018 Answering Affidavit that there are no agreement between the parties as referred to above.

[12] The Applicant alleges that the First Respondent failed to provide this Honourable Court with any proof that even if there was no signed agreement that there was performance in terms of this alleged tripartite lease agreement, by either the First Respondent, the occupiers and/or the Landlord.

[13] That any amounts were collected on behalf of the First Respondent or that the First Respondent enforced the tripartite lease agreement, if there was no compliance' The First Respondent makes a vague allegation that it was

attempting to invoke certain terms and conditions, but fail to take the Honourable Court into its confidence stating what terms and conditions.

- [14] The First Respondent indicate that the triparty lease agreement was concluded during September 2013, the First Respondent refers to a part oral and part written agreement. This differs from a statement of the First Respondent, alleging that the lease agreements were signed and delivered after the meeting of June 2015.

[14.1] The reference to a part oral, part written agreement differs from a previous affidavit deposed to by the representatives of the First Respondent in the urgent application in 2018 that on the First Respondent's version was there "never any partly written or partly oral agreement.

[14.2] The Applicant further submitted because there is no such an agreement, the agreement is blank with regards to the rental amount payable, the duration of the agreement, the termination date.

[14.3] The First Respondent attempts to avoid its responsibility as was ordered by the Constitutional Court and simply indicate that this order is irrelevant in the said application.

- [15] It is further noteworthy regarding the notes that was made on the draft lease agreement and the different triparty lease agreement relied upon by the First Respondent. With regards to the termination date, a note was made that the duration is a problem. In the draft the rental was stipulated to be R 635 800.00, but a note was indicated regarding an escalation. In the First Respondent's triparty lease agreement, the rental was removed under clause 2.2 and no provision is made for any escalation.

- [16] On the draft agreement clause 4 makes provision for termination with two months prior written notice, whereas the First Respondent's triparty agreement the said provision was removed.

- [17] Without going into every aspect of the draft Triparty agreement it is evident that the Applicant points out various notes which indicates that there was no meeting of minds between the parties.

- [18] As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute of facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers.

- [19] In the matter of WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER it was stated that:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit

seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

- [20] It is respectfully submitted that taking into account, that what is put before the Honourable Court is not merely allegations made by the Applicant, it is gathered from the First Respondent's affidavit under oath. The First Respondent later wish to bring another version before this Honourable Court which clearly contradicts the sequence of events and should be regarded, with respect, as untenable and palpably implausible, and should be rejected.
- [21] In light of what set out above the Applicant submits that there is no real genuine factual dispute and that the point raised by the First Respondent should be dismissed with costs and that the relief sought by the Applicant should be postponed sine die for further determination.
- [22] It is respectfully submitted the representative of the Second and Third Respondents indicated that they appear on a watching brief, but it needs to be noted that the Second and Third Respondents also filed a Notice to Oppose.
- [23] Legal points were raised, without filing a Notice in terms of Rule 6(5)(d)(iii), and specific reference was made to the Rental Housing Act. The Applicant were faced with these oral arguments and wish to reply as follows:
- [24] The Applicant is of the view that the Rental Housing Act is not applicable in the relationship between the Applicant and the First Respondent. The First Respondent is governed by its own set of legislation, rules and policies.
- [24.1] The submission was made on behalf of the Second and Third Respondents that according to the definitions of the Rental Housing Act, the Applicant is the landlord and the First Respondent is the tenant. It is submitted by the Applicant that this is not the relationship between the Applicant and the First Respondent.
- [24.2] According to the definition of the tenant in terms of the rental housing act, act 50 of 1999 - "tenant" means the lessee of a dwelling which is leased by a landlord. It is common cause between the parties that the First Respondent is not occupying the building and cannot be regarded as the tenant in the normal sense.

[24.3] The submission that it need not be in writing is in contradiction with the Chain Supply and Procurement policies as was referred to in the 2018 Answering Affidavit and furthermore in terms of Section 116 of LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT 56 OF 2003.

[25] If the Honourable Court is of the view that the matter cannot be decided on the papers, the Applicant wish to raise the following points:

[25.1] The following paragraph is quoted from the Erasmus Superior Court Practice:

"The court will dismiss an application if the Applicant should have realized when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop."

[25.2] The Applicant specifically based the application on the First Respondent's 2018 Answering Affidavit, and the Applicant could not have realised when the application was launched that the First Respondent would change the version.

[25.3] The fact that the First Respondent put another version before this Honourable Court in these proceedings, the Applicant should not be penalised in this regard.

[25.4] If the Honourable Court is of the view that the matter cannot be decided on papers, the Honourable Court have the discretion to refer this specific aspect for oral evidence or refer the matter to trial.

[25.5] With relation to costs, that the Applicant should not be penalised with a cost order in this regard, and that the cost should be cost in the cause.

EVIDENCE OF THE FIRST RESPONDENT

[26] The Applicant brings an application for the eviction of the Respondents from the property described in the papers as "the Parkview Building".

[27] The Applicant seeks final relief in the form of an eviction order. To succeed with its eviction application, the Applicant had to allege and prove the right which the Respondents had to possess the Parkview Building and the valid termination of that right.

[28] The First Respondent says that there are material disputes of fact on the papers and that the court should apply the well-known Plascon Evans Test in deciding

the matter. In doing so, the court should accept the First respondent's version and dismiss the application, an order the Applicant to pay costs.

- [29] The existence of a material dispute of fact was specifically raised by the first respondent in its Opposing Affidavit and yet the Applicant persisted with the application. There were also two pre-hearing conferences held between the parties, one on 17 November 2020, and a second on 20 January 2021. The minutes of both conferences show that the Applicant was made aware of the existence of a material dispute of fact regarding the existence of the lease agreement and that it was invited to agree to a referral of the matter to oral evidence. The Applicant simply refused the invitations and maintained, as it did in argument, that there are no disputes of fact in this matter and that the court should evict the respondents.
- [30] The factual dispute which exists concerns the existence or non-existence of the agreement which governs the relationship between the parties and whether that agreement was ever terminated. In summary:
- [30.1] The Applicant says that the lease agreement concluded between the parties was terminated during 2013 (the termination notice relied upon by the Applicant is dated March 2013⁴). According to the applicant, there is no agreement between the parties.
- [30.2] The first Respondent admits that the initial lease agreement was cancelled in 2013 but continues to say that during September 2013 the parties concluded a new lease called the "Tripartite Lease Agreement". The First Respondent explains that the Applicant invoiced the First Respondent in terms of the Tripartite Lease Agreement for services and rent and the First Respondent paid the applicant's invoices for many years. "
- [30.3] There is no evidence about the cancellation of the Tripartite Lease Agreement because according to the Applicant the agreement was never concluded. So, if the court accepts the First Respondent's version about the conclusion of the Tripartite Lease Agreement it is the end of the matter. It follows that the application must then fail.

APPROACH TO THE MATTER:

- [31] Because of the nature of these proceedings (namely, application proceedings) and the content of the affidavits, it is necessary that I deal at the outset, with the proper approach that is in my respectful submission to be followed by the honourable court in deciding the matter.
- [32] The approach, which is to be followed in this matter is colloquially known as the Plascon Evans test. The test determines that a final order (as sought by the applicant) can only be granted if the facts averred by the Applicant in its

affidavits, which have been admitted by the First Respondent, together with the facts alleged by the Applicant in its Replying Affidavit justify the final order sought.

- [33] The rationale behind the Plascon Evans test is to be found in the principle that, in motion proceedings, the court is not equipped to determine the probabilities or improbabilities of the opposing factual propositions expressed by the parties.
- [34] In considering the evidence contained in the affidavits filed by the parties, the approach set out in the case of *The National Director of Public Prosecutions v Zuma, Mbeki and Another (intervening)* 2009 (2) All SA 243 (SCA) is to be followed. In that case, at paragraph 26, Judge Harms said

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon- Evans rule that where in motion proceedings disputes of fact a final order arise on the affidavits can be granted only if the facts averred in the applicant's Mr Zuma's affidavits which have been admitted by the Respondent the NDPP together with the facts alleged by the latter justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

- [35] The court below imposed an onus on the NDPP to prove a negative. This appears from the finding that it was not convinced that (Mr Zuma) was incorrect in relation to political meddling (para 216). It reasoned that the question whether there had been political meddling fell within the peculiar knowledge of the NDPP and was difficult for Mr Zuma to prove; and so, it held, less evidence would suffice to establish a prima facie case (para 168-169). This rule of evidence namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case a lies to trials.
- [36] In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph irrespective of where the legal or evidential onus lies. In applying the 'rule' the court omitted to determine whether the NDPP had failed to adduce evidence on the particular issues; it used the 'rule' in spite of evidence to the contrary; and it did so in instances where no answer was called for because the allegations were either not incorporated into the founding affidavit or were inadmissible.

[37] Finally the court failed to have regard to another principle namely that the more serious the allegation or its consequences the stronger must be the evidence before a court will find the allegation established." (Own emphasis)

[38] When, at the hearing of application proceedings, a dispute of fact arises on the affidavits filed which cannot be decided without the hearing of oral evidence, the court has a discretion as to the future course of the proceedings, and may (i) dismiss the application with costs; (ii) order that oral evidence be heard in terms of the rules of court; or (iii) order the parties to go to trial.

[39] Rule 6(5)(g) provides:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[40] When a dispute of fact was foreseeable, the court should dismiss the application or penalise the Applicant with a punitive order as to costs.

[41] The authors of Herbstein & Van Winsen: THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA FIFTH EDITION, Volume 1, Chapter 14 at 461 explain the position thus:

"The application may be dismissed with costs when the Applicant should have realised when launching the application that a serious dispute of fact was bound to develop. It does not follow that the application will always be dismissed with costs in such a case. There may still be circumstances that will persuade a court not to dismiss the application but to order the parties to trial together with a suitable order as to costs. Also, in a proper case and where the dispute between the parties can be determined speedily, it may even be proper to invoke the provisions of the Rules of Court as to the hearing of oral evidence. The wide ambit of the court's discretion is evident from rule 6(5)(g), according to which 'the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision'."

[42] Thus, even when the application is not dismissed it is open to the court, by means of an appropriate order as to costs, to penalise an Applicant who deliberately initiates proceedings by way of application, knowing that there must

necessarily arise fundamental disputes of fact for the resolution of which action is the appropriate procedure.

THE VERSION OF THE FIRST RESPONDENT:

- [43] About 14 May 2018, the Applicant launched an urgent application under case number: 33225/2018 ("the first application"). In response, the First Respondent filed a comprehensive Answering Affidavit. In that affidavit.
- [44] The First Respondent explained that the 2011 lease agreement had been cancelled by agreement between the parties and that a new Tripartite Lease Agreement was concluded. Miss Phosa received an email from the representatives of the applicant, Mr Botha informing her that everything was in order with the signing of the Tri-partite agreement.
- [45] During April 2014, Miss Phosa, requested a copy of the signed Tri-partite agreement from the broker, Mr Johan Botha; Ms Phosa, was advised that a copy of the signed Tri-partite agreement to be sent."
- [46] The parties implement the Tri-partite agreement for years. The fact that the Tri-partite agreement was not signed, only became a real issue in September 2017, when the Applicant terminated Mid-City's mandate to act on its behalf off and appointed a property management agent known as Trafalgar to deal with the First Respondent."
- [47] The First Respondent's version is aligned with its version in the first urgent application. In this regard, I draw the court's attention to the following:
- [48] Ms Phosa received confirmation from the applicant's representative, Mr Botha, that the Applicant had approved of the terms and conditions of the Tripartite lease agreement. Mr Botha further advised that he would be sending through a copy of the Tripartite lease agreement countersigned by the Applicant.
- [49] At paragraph 33 of the First Respondent's second affidavit it states:

"After the application (referring to the first urgent application) as struck from the roll with costs. It was, withdrawn by the applicant. Ever since, the application was struck from the roll, the CoT continued to pay rent to the Applicant as provided for in terms of the Tripartite lease agreement. The CoT also pays the Applicant water and electricity charges and for security services which the Applicant renders at the Parkview building. I add, that the Applicant invoices the CoT for the aforesaid costs." 17. The first also explains in its papers that the monthly rent paid to the Applicant was not fixed in the Tripartite Lease Agreement because the number of former Schubart Park residents in the occupation of the Parkview Building changed from month to month. So, the parties agreed that the CoT would pay rent calculated per person."

THE RESPONDENTS ARGUMENT:

- [50] In applying the approach set out by Judge Harms to the facts of this case, I submit: The Applicant had to advance strong evidence in support of its claims to succeed with its application because of the serious consequences of the relief it seeks. If the relief sought by the Applicant is granted, people (many of whom are women and children) will have to vacate their homes. 18.2. The Applicant has failed to meet the "strong evidence requirement" required by the Zuma case. Its evidence is weak and unacceptable because:
- [51] In the first instance, the version of the Applicant is improbable if not impossible. It can never be that since 2013 (when the lease agreement was supposedly cancelled) residents continued to occupy the Parkview Building, the First Respondent continued to pay rent on their behalf and the Applicant accepted the rent and yet there was and is no agreement between the parties. This can never be.
- [52] In the second instance, the version of the First Respondent that the parties concluded a Tripartite Lease Agreement in 2013 has to be accepted because it is not disputed. The First Respondent's attorney, Ms Phosa, confirms that the applicant's duly authorised representative, Mr Botha informed her that the agreement had been countersigned and was in order. That version is undisputed by the Applicant because there is no affidavit from Mr Botha attached to the papers saying otherwise. The Applicant also does not say that Mr Botha or Midcity had no authority to act as the agent of the applicant.
- [53] The applicant's persistence with the absurd notion that since 2013 there has been no agreement between the parties and therefore, no dispute of fact exists is rooted in the following arguments:
- [53.1] First, the Applicant says that the First Respondent has put forward contradictory versions. According to the applicant, the First Respondent previously said that the Tripartite Lease Agreement was never concluded or something along those lines. However, from a plain reading of the affidavits and the passages quoted above, it is clear that the submission is just wrong. It is a clear attempt to mislead the court and it justifies an order that the Applicant pays the costs occasioned by the matter on an attorney and client scale.
- [53.2] Second, the Applicant says that, because the First Respondent failed to produce a Tripartite Lease Agreement signed by the applicant, the agreement was never concluded. This argument loses sight of the First Respondent's undisputed evidence that it was informed by Mr Botha that the Tripartite Lease agreement was in fact signed and accepted. That version stands undisputed and the fact that the First Respondent is not

in possession of a copy of the signed Tripartite Lease Agreement does not mean that it was never signed or that the agreement never came into existence. After all the parties acted in accordance with the terms and conditions of the Tripartite agreement for years and continue to do so.

[53.3] Third, the Applicant belatedly attempts to rely on Section 116 of the Municipal Finance Management Act No. 56 of 2003 ("the MFMA") in support of the notion that the Tripartite Lease Agreement relied upon by the First Respondent is apparently invalid because it is not signed. This argument also goes nowhere because:

[53.3.1] In the first instance, the applicant's case has never been that the Tripartite Lease Agreement with effect for want of compliance with Section 116 of the MFMA. The MFMA is a comprehensive piece of legislation and the requirements of Section 116 only applies to specific contracts. The section might not even apply to the Tripartite Lease Agreement. This is a matter of evidence and the MFMA point now relied upon should have been taken by the Applicant in its papers. Its introduction during the course of oral argument amounts to trial by ambush and should not be allowed.

[53.3.2] In the second instance, and even if the court is willing to allow the belated introduction of the MFMA point, the point does not help the Applicant because the Tripartite Lease Agreement relied upon complies with the requirements listed in Section 116. The section does not require the agreement to be signed for it to be valid and binding upon the parties. The section requires to be agreement to be in writing and says nothing about it having to be signed

[53.3.3] In the third instance, nowhere in the MFMA is it stipulated that any agreement that does not comply with Section 116 is void and unenforceable. So, the Applicant was supposed to ask the court in its Notice of Motion to declare the Tripartite Lease Agreement void before it can be said that the First Respondent's right of occupation of the Parkview Building had been terminated and the Applicant becoming entitled to an eviction order.

PUNITIVE COSTS:

[54] The ordinary rule is that the successful party is awarded costs as between party and party.

- [55] The court will not hesitate to award attorney and client costs where there is an absence of bona fides in the bringing or defending of an action or if there is something reprehensible in the manner in which a party has conducted the litigation.
- [56] There is also another basis upon which a court may award attorney and client costs and this is where people enter into litigation with the most upright purpose and most firm belief in the justice of their case, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expenses which the other side ought not to bear.
- [57] In this case there are mainly three reasons why it is submitted that the Applicant should be ordered to pay the First Respondent's attorney and client costs, namely:
- [57.1] First, before the Applicant brought the application it knew that the First Respondent's version is that the 2011 lease agreement was cancelled and that in September 2013 the parties had concluded the Tripartite Lease Agreement. There was no misunderstanding about this and yet the Applicant, with knowledge of the material dispute of fact, decided to take shortcuts and to approach the court on motion instead of issuing summons;
- [57.2] Second, the Applicant sought to mislead the court in its Founding Affidavit by creating the impression that it is common cause between the parties that there is NO AGREEMENT OF LEASE between the parties and that it is entitled to an order to evict the Respondents from the Parkview Building. That this version was plainly false and opportunistic and is debunked by the fact that since 2013 the Applicant has been invoicing the First Respondent for rent and the First Respondent has been paying rent; and
- [57.3] Lastly, the First Respondent's Opposing Affidavit and its Heads of Argument make it clear that there exists a dispute of fact concerning the existence of the agreement that governs the relationship between the parties. Furthermore, there were two pre-hearing meetings held between the parties. At both meetings, the Applicant was invited to agree to a referral of the matter to oral evidence. The Applicant refused both requests. The Applicant has been unreasonable in the manner in which it has conducted the litigation in this matter, and I submit that the court should mark its disapproval of the conduct of the Applicant by ordering it to pay costs on an attorney and client scale.
- [58] Under the circumstances, the First Respondent urge the court to dismiss the application and to order the Applicant to pay the First Respondent's costs on an attorney and client scale.

- [59] The Second and Third Respondent was on a watching brief but informed that they were also present to assist the court.
- [60] The Second and Third Respondents did not file opposing affidavits in this matter as they cannot contribute meaningfully in resolving the main disputes between the Applicant and First Respondent. They were neither party nor privy to the agreements in question.
- [61] At the heart of the matter is the fundamental dispute between the Applicant and First Respondent about the existence, form and substance of a lease agreement for the benefit of former Schubart Park residents. An occupier can only be an "unlawful occupier" if she does not have the express or tacit consent from the owner or person in charge.
- [62] The question whether the former Schubart Park residents had tacit or express consent to occupy the Parkview Units is one of proof and evidence.
- [63] This Honourable Court has to consider the proof and evidence in the matter to ascertain whether the former Schubart Park Residents had at least tacit consent to occupy the Parkview Buildings by the time this application was launched. As Moseneke DCJ observed in Thubelisha:

"The consent required is of the owner or the person in charge. It maybe express or tacit and it may be in writing or otherwise. This definition is cast in wide terms. It envisages explicit consent but it also contemplates consent that may be tacit or, put otherwise, that may be unsaid but capable of being reasonably inferred from the conduct of the owner in relation to the occupier. The Permission envisage may be in writing but need not be so. The permission may be given other than in writing. In other words, the absence of a written resolution or of a written instrument evidencing consent of permission to occupy is not conclusive that there is no consent".

- [64] Without delving too much into the merits of the matter, we submit that, prima facie from the papers before court, there is at the very least tacit consent for the former Schubart Park residents to occupy the building through some kind of agreement between the Applicant and First Respondent. This is elaborated on below.
- [65] It is of paramount importance for this eviction application to resolve those disputes first. As Harms JA said in *Ndlovu v Ngobobo, Bekker and Another v Jika* "... The question of eviction cannot arise in relation to someone who, at the time of the application, is a lawful occupier..."

FACTUAL DISPUTES

- [66] It appears to be common cause between the Applicant and First Respondent that a rental agreement between those parties were concluded on 29 September 2011, which was cancelled on 27 March 2013. 12. The First Respondent avers that, during September 2013, a new written agreement, alternatively a part written part oral agreement was concluded with the Applicant to regulate the continued occupancy of Schubart Park residents at the Parkview Units.
- [67] The Applicant disputes the existence of such agreement on the following grounds:
- [67.1] The agreement "was clearly not signed by neither the First Respondent nor the Applicant;
- [67.2] It is unclear what alleged written terms were agreed upon and that alleged oral terms were allegedly agreed upon;
- [67.3] The First Respondent was well aware of the fact that the Applicant disputed the existence of the tripartite lease agreement" as early as 2013; and
- [67.4] It is denied that the Applicant found the terms and conditions acceptable or agreed to such terms.
- [68] For their part, the First Respondent insists that such an agreement was reached, even though it is apparently not able to produce the signed agreement. It relies, an e-mail allegedly sent by a representative of the Applicant, Mr. Botha, purporting to confirm the Applicant's acceptance of the agreement.
- [69] It is submitted that the disputes of fact are clear from the above.
- [70] Furthermore, it is submitted that this Honourable Court is in no position to accept or reject any of the parties' versions or to grant the final relief sought the Applicant without ventilating the matter through oral evidence. The nature of the disputes requires this Honourable Court to draw inferences and make findings on credibility, contradictions and probabilities.
- [71] The Applicant's contention that there was no meeting of the minds between the parties supports the Second and Third Respondent's view that there is a significant dispute of facts that cannot be decided on papers.
- [72] The Applicant's reliance on a lack of a signed, written agreement to show that there is no bona fide dispute of fact, is incorrect. It is trite in the common law of contract that an agreement, bar specific exceptions such as the alienation of land, need not be reduced to writing. At common law, it was never a requirement that a lease agreement should be in writing,

- [73] This position was fortified by the codification of the legal position. Section 1 of the Formalities in Respect of Leases of Land Act 18 of 1969 stipulates:

"Subject to the provisions of subsection (2b) no lease of land shall be invalid merely by reason of the fact that such lease is not in writing."

- [74] The exceptions noted in subsection (2) relate to certain long-term leases for periods in excess of 10 years which is not applicable to the facts in this case.
- [75] Even more poignant is section 5 of the Rental Housing Act 50 of 1999 which unequivocally states that a lease need not be in writing except if the tenant demands it from the landlord.
- [76] Further the Applicant's own version that it continued to demand and receive rent from the First Respondent.
- [77] The Applicant states in the replying affidavit, at paragraph 3.2.1

"The First Respondent again was in arrears with the rental for December 20 19, January 2020 and February 2020."

- [78] In the Gauteng Provincial Gazette No. 124. Section 4 of those regulations state:

"Effect of unsigned or undelivered lease agreement.—

- (1) If a landlord does not sign and deliver a written lease agreement, signed and delivered to the landlord by the tenant, acceptance by the landlord gives the lease agreement as if it has been signed and delivered by the landlord.*
- (2) If a tenant does not sign and deliver a written lease agreement, signed and delivered to the tenant by the landlord, acceptance of possession of the dwelling and payment of rent gives the lease agreement the same effect as if it had been signed and delivered by the tenant".*

- [79] The common cause facts that the First Respondent continues to pay rental invoices for the benefit of Schubart Park residents while both parties admit to have lost track of the identity of the occupants should indeed cause alarm for taxpayers and should be addressed. However, the Applicant is not entitled to invoice the First Respondent want only for accommodation procurement legislation is being flouted.
- [80] The mechanics of how the Applicant and First Respondent managed, and still manage, to process rental payments for the Parkview Units, is a further matter

that should be ventilated in a trial and a further indication that there must be some sort of agreement pertaining to the occupation of former Schubart Park residents.

- [81] The disputes of fact were again raised at the pre-hearing meeting of 18 January 2020. All the Respondents indicated to the Applicant that the matter cannot be decided on papers and invited the Applicant to refer the matter for oral evidence. The Applicant refused. The Second Respondent further highlighted to the Applicant the difficulty of arguing there is no agreement while demanding and receiving rent.
- [82] In the premises, the dispute of fact was foreseeable by the Applicant and the application stands to be dismissed with costs.
- [83] The Second and Third Respondents did not file opposing affidavits in this matter for reasons already stated.
- [84] However, we submit that the presence of the Second and Third's Respondents counsel at the hearing was necessary to protect the interests of the Schubart Park residents.
- [85] Furthermore, the Second and Third Respondents were directed by this Honourable Court to prepare and file this heads of argument to assist the court.
- [86] We respectfully submit that this Honourable Court should exercise its discretion with regards to costs to order that the Applicant pays the costs of the Second and Third Respondent's in preparing these heads of argument, which costs include the costs of two counsel.

SUMMARY OF THE MATTER

- [87] The Arguments placed before court were adequately ventilated by all counsels, it is therefor necessary to go through all arguments again.
- [88] The court looked specifically on whether or not a dispute of fact was present and further whether the matter can proceed on motion.
- [89] In order to determine whether the matter can proceed on motion, a Court must decide whether a real and genuine dispute of facts exists. The question always is whether there is a real issue of fact which cannot be determined without the aid of oral evidence. A safe test is whether the Applicant is entitled to relief on the facts stated by the Respondents, together with the admitted or undisputed facts stated by the applicant.¹
- [90] The basic test is whether the matter can be argued on affidavit and where oral evidence of witnesses are not required. A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to

¹ Frank v. Ohlsson's Cape Breweries Ltd., 1924 A.D. 289 at p. 294, INNES, C.J

raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.

- [91] In *Frank v. Ohlsson's Cape Breweries Ltd.*, 1924 A.D. 289 at p. 294, INNES, C.J., said:

"... But where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion."

- [92] A real dispute of fact can arise in one or other of the following ways:

[92.1] Where the court is satisfied that the party who purports to raise the dispute has in his or her affidavit seriously and unambiguously addressed the fact said to be disputed.

[92.2] The Respondent may deny one or more of the material allegations made on the applicant's behalf and produce evidence to the contrary or apply for the leading of oral evidence of witnesses who are not presently available or who, though averse to making an affidavit, would give evidence if subpoenaed.

[92.3] The Respondent may admit the applicant's affidavit evidence but allege other facts, which the Applicant disputes.

- [93] In the matter of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraph 13 whereat Heher JA stated:

[93.1] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him.

[93.2] But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.

[93.3] I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them.

[93.4] There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.

[94] In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) this court said:

*"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the Respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers." (Para 26.) The Plascon-Evans rule has been emphatically endorsed by the Constitutional Court. See for example *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC); [2011] ZACC 32 para 34"*

[95] *Le Roux NO and Others v Botha NO and Others* (5788/2016) [2018] ZAWCHC 86 (3 July 2018) per Binns-Ward J

*"Applying the Plascon-Evans rule, as it is bound to do when final relief is sought on paper, the court must accept this evidence unless it is palpably far-fetched. The test for departing from the ordinary incidence of the rule is a stringent one that is not easily satisfied; see *National Scrap Metal (Cape Town) Pty Ltd and another v Murray & Roberts Ltd and others* [2012] ZASCA 47, 2012 (5) SA 300 (SCA), at para. 22". In my view the evidence in this case does not justify a departure from the rule. The evidence in any event did not establish that the*

flow management methods employed by the fourth Respondent resulted in the applicants receiving less water in their dams than they were entitled to take from the river".

[95.1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

The court found that a qualification was necessary to the general rule regarding final interdicts in motion proceedings. Sometimes the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If the Respondent in such a case has failed to apply for the deponents concerned to be called for cross-examination, and if the court is satisfied as to the inherent credibility of the applicant's averments, the court may decide the disputed fact in the applicant's favour, without hearing oral evidence. This has come to be known as the "Plascon-Evans rule." When factual disputes arise, therefore, relief should be granted only if the facts stated by the Respondent, together with the admitted facts in the applicant's affidavits, justify the order. The court noted there may be exceptions to this general rule, as where the allegations or denials are so far-fetched that the court is justified in rejecting them on the papers.

[96] The court also had regard to S116 of the Local Municipal Finance Act 56 of 2003.

(1) A contract or agreement procured through the supply chain management system of a municipality or municipal entity must-

(a) be in writing;

(b) stipulate the terms and conditions of the contract or agreement, which must include provisions providing for-

(i) the termination of the contract or agreement in the case of non- or underperformance;

(ii) dispute resolution mechanisms to settle disputes between the parties;

(iii) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years; and

(iv) any other matters that may be prescribed.

[97] Finally the court had regard to the Rental Housing Act 50 of 1999. Which is discussed in paragraph [73] above.

[98] The court is satisfied that there is a dispute of fact.

[99] The court deems it necessary for further evidence to be led to establish the existence of a Tripartite agreement.

[100] The court took cognisance of all the cost arguments by counsels.

[101] I accordingly grant the following order:

- [100.1] The application be dismissed;
- [100.2] The matter should proceed by way of Action proceedings;
- [100.3] Cost to be made in respect of the First Respondent on a part and party scale, and
- [100.4] Cost for the Second and Third Respondent to be paid for one counsel for a watching brief and preparation of Heads of Arguments on a Party and party scale.


T B ANTULAY AJ
 Acting Judge of the High Court
 Gauteng Division of the High Court,
 Pretoria
 Electronically submitted

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 January 2021.

Date of hearing: The matter was heard by way of video conferencing or otherwise, the matter may be determined accordingly. The matter was set down for the motion court week of 25 January 2021.

Date of judgment: 29 January 2021

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