IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case Number: 3691/2020

In the matter between:

PAUL ANTHONY KALIL N.O.	**FIRST PLAINTIFF**
WILHELMINA CECILIA KALIL N.O.	**SECOND PLAINTIFF**
STEPHANUS ABRAHAM CLOETE BEZUIDENHOUT N.O.	**THIRD PLAINTIFF**
[In their capacities as Trustees of the Paul Kalil Trust, Registration number: TMP550/1997]	
and	
COOBAH DEVELOPMENT CC	**FIRST DEFENDANT**
PANNO JOANNIDES	**SECOND DEFENDANT**
SUZETTE ROBBERTS	**THIRD DEFENDANT**
NIEL CRONJÉ N.O [In her capacity as executrix in the estate of late Johannes Hendrik Cronjé]	**FOURTH DEFENDANT**
BT SERVICE PROVIDERS (PTY) LTD	**FIFTH DEFENDANT**
MUJAKACHE RAYMOND CHIMBA	**SIXTH DEFENDANT**

Neutral Citation: *PA Kalil N.O. and Others v Coobah Development CC and Others* (3691/2020) ZAFSHC 315 (3 October 2025)

Coram: Reinders, J

Heard: 24 March 2025

Delivered: This judgment was handed down in open court on 3 October 2025 and distributed to the parties via electronic mail communication.

Summary: Contract – written lease agreement – *Shifren* principle – tacit termination – non-variation clause – repudiation or waiver – principles restated.

ORDER

Judgment is granted against the second to fourth defendants, jointly and severally, the one to pay the other to be absolved, for:

1 Payment in the amount of R829 122.14;

2 Payment in the amount of R127 617.80;

3 Interest on the aforesaid amounts at the current *mora* interest rate as determined in the Prescribed Rate of Interest Act 55 of 1975, currently 11,25% per annum *a tempora morae*;

4 Costs of suit on Scale B;

5 The claim against the fifth and sixth defendants are dismissed.

JUDGMENT

Reinders J

[1] The three plaintiffs are the trustees of the Paul Kalil Trust (the Trust/plaintiff), which owns several properties and lease it out. On 1 September 2015, the Trust concluded a written lease agreement (the lease agreement) with the first defendant, Coobah Development CC (Coobah) in respect of Shop Number 9 (the premises) in the Preller Walk Shopping Centre in Bloemfontein.

[2] The lease agreement was to endure for a period of five years, with a fixed termination date of 31 Augustus 2020. In September 2020, the Trust issued summons against Coobah and the second to fourth defendants. The second to fourth defendants are cited as sureties and co-principal debtors, having bound themselves for Coobah's indebtedness to the Trust for the due and punctual payment of all monies, and performances of all obligations (including the payment of damages) which may become due, owing or payable in terms of the lease agreement. The plaintiff seeks payment against the first to fourth defendants in the amount of R829 122.14 in respect of arrear rentals for

the period July 2019 to February 2020. The plaintiff, furthermore, seeks payment against the first to fourth defendants in the amount of R127 617.80 for alleged damages incurred to have the premises restored to the same condition as when it was initially rented out (the so-called 'white box' status), as agreed upon in the lease agreement.[1]

[3] It is common cause that the mentioned agreement was entered into for the five years' period. It is further common cause that the first to fourth defendants did not pay any rent for the period claimed by the Trust. The first to fourth defendants defended itself against the claims by averring in its plea that the rental agreement between the first defendant and the plaintiff was tacitly terminated. It is averred that the fifth defendant (BT Service Providers) took occupation of the leased premises, and that the Trust accepted monthly rental payments from it for the period June 2017 until at least June 2019.

[4] It is worth mentioning that Coobah was deregistered on 1 September 2020, one day after the termination date of the lease agreement concluded on 1 September 2015. The summons was issued on 30 September 2020. The fifth and sixth defendants did not defend the matter and the claim against them was based on the alternative claims in the event I find that a lease agreement had been concluded by the Trust with the fifth defendant (the sixth defendant, MR Chimba, being the director of the latter).

[5] To prove its case, the Trust called five witnesses, to wit Mr P Kalil, Mr J Botha, Me A Otty, Me S L Van Wyk and Mr S Wiesenaar. On behalf of the first to fourth defendants, the testimonies of Mr P Joannides and Me S Robberts were presented.

[6] I find it appropriate at the onset to convey my indebtedness to counsel for both parties for their able submissions and comprehensive heads of arguments, which I found of great assistance in adjudicating this matter. Both counsel dealt thoroughly, not only with the oral evidence tendered by the witnesses (inclusive of documentary evidence), but also with the leading authorities of relevance. I do not intend to regurgitate all the evidence tendered before me, and I agree with the submission by counsel for the first to fourth

[1] Clause 11.2 of the lease agreement *inter alia* provides as follows:

"*If any alterations and/or additions are made by the Tenant, it shall, on the expiry of the lease or the expiry of any renewal hereof, remove them and reinstate the Premises to the condition in which they were before the additions and alternation were effected, unless the landlord otherwise notifies in writing ...*" (Emphasis added) defendants that none of the witnesses on behalf of either of the parties 'intentionally or maliciously attempted to misrepresent the facts of the matter'.

[7] Mr Kalil is a Trustee of the plaintiff which owns and rents out approximately 28 properties. He testified that, due to his vast experience in the rental business spanning more than 40 years, only written agreements were being entered into on behalf of the Trust. He confirmed the written lease agreement between the Trust and the first defendant. It was common cause that Broll Property Group (Pty) Ltd (Broll) was the managing agent on behalf of the Trust for the leasing of the latter's properties. This entailed that Broll would provide draft lease agreements for the Trust to consider and, if satisfied, Mr Kalil would proceed to sign a lease agreement on behalf of the Trust, being the sole person authorised to do so. Broll held no mandate to conclude any lease agreements on behalf of the Trust. He conceded that during September 2017, BT Service Providers made an offer to lease the premises or put differently, to take over the lease from the first defendant. No agreement, however, came into place with BT Service Providers as the Trust was not satisfied with the sureties offered in respect of BT Service Providers. He only learned that BT Service Providers was occupying the premises after the rental payments fell in arrears. He did not sign any draft nor final lease agreement with BT Service Providers. Mr Kalil also testified as an expert witness on the restoration of the premises to a white box.

[8] Mr Botha was the divisional director at Broll at the time when the Trust and Coobah entered into the lease agreement, a position he held until 10 October 2018. He confirmed the process that ensues before a rental agreement would be concluded between a potential lessee and the lessor, namely the completion of an internal application form, the drafting of so-called heads of agreement, to be signed by both the lessor and lessee, followed thereafter by the actual rental agreement to be signed. He was referred to e-mail communication and documentation in the trial bundle, compiled and utilised by both parties. BT Service Providers had filled out an application in September 2017 to rent the premises, however, the heads of agreements were signed only by BT Service Providers and never by the Trust, as Mr Kalil refused to do so, not being satisfied with the sureties preferred by BT Service Providers. Mr Botha testified about an incident during 2024 when Mr Joannides made certain accusations against the Trust which confirmed that no lease agreement was concluded with BT Service Providers.

[9] The testimonies of both Me Otty (the lease administrator at Broll) and Me Van Wyk (the credit controller of Broll at the time) dealt with the administrative functions performed by them at the time. Both were referred to the aforementioned trial bundle, and they explained their respective actions and inputs. Neither of them was directly involved in the final conclusion of a rental agreement between any of the parties. Me Otty confirmed the statement of account attached to the particulars of claim and the calculation of the total amount of arrears as claimed by the plaintiff. Mr Wiesenaar is a craftsman and owner of a construction business who testified on the work that he had performed in restoring the premises to a white box as fully set out in the particulars of claim, and which amounts he considered to be reasonable.

[10] Mr Joaniddes was a member of the first defendant and, as stated, a surety. He testified that Coobah conducted the business of a restaurant at the premises until approximately June 2017 whereafter the restaurant was sold to BT Service Providers. The late Mr Cronje (replaced by Mrs Cronje as executric of his estate, as fourth defendant) was the member who actually managed the administration of business. To his knowledge and understanding, a new tacit lease agreement was concluded between the plaintiff and BT Service Providers when the latter took occupation of the premises in June 2017, rendering BT Service Providers, in his view, liable for rental payments and the premises' reinstatement upon vacation thereof. He confirmed that the written rental agreement between Coobah and the Trust was never cancelled in writing as stipulated; he assumed that it was cancelled tacitly. During cross-examination, Mr Joannides testified that he had a telephonic discussion with Mr Chimba, on or about March 2019, during which an upset Mr Chimba informed him that the Trust refused him as tenant. Me Robberts, also a member and surety of Coobah, testified that she started working at the restaurant during 2010 and remained its manager once it was sold to BT Service Providers. The restaurant was still called Coobah and remained on the premises.

[11] It is necessary to refer to certain undisputed clauses in the lease agreement entered into between the Trust and first defendant. In clause 19.6 of the agreement the parties agreed that:

'The Tenant shall further not give up occupation or possession of the Premises, or any portion thereof to any person or permit any person, whether a licensee, agent, occupier, custodian or

otherwise, to enter into possession or occupy or take possession of the Premises or any portion thereof for either a definite period or at all without the Landlord's prior written consent.'

This should naturally be read in conjunction with clause 35 of the rental agreement, which reads as follows:

'This lease and all the Annexures hereto constitute the whole agreement between the parties and no warranties or representations whether express or implied not stated herein shall be binding on the parties. No agreement at variance with the terms and conditions of this lease nor any consensual cancellation hereto shall be binding on the parties unless reduced to a written agreement signed on behalf of the parties. No relaxation or indulgence which the Landlord may show to the Tenant shall in any way prejudice its rights hereunder, and in particular no acceptance of the Landlord of rental after due date (whether on more than one occasions) shall preclude or stop it from exercising any rights enjoyed by it hereunder by reason of any subsequent payment not being made strictly on due date. Unless otherwise stated by the Landlord in writing, the receipt by the Landlord or its agents of any rental or any other payment shall in no way whatsoever prejudice or operate as a waiver, rescission or abandonment of any cancellation effected or acquitted prior to such receipt.'

[12] From the aforementioned clauses, it is evident that it was expressly agreed that the tenant shall not give up occupation or possession to any person without the plaintiff's written consent.[2] It was further agreed that any cancellation of the agreement must be reduced to writing and signed on behalf of the parties. Furthermore, the plaintiff's receipt of any rental or other payment will in no way operate as a waiver, rescission, abandonment, or cancellation of the agreement.

[13] Counsel for the first to fourth defendants summarized the gist of the issues to be adjudicated to be whether the parties tacitly agreed or could have agreed to terminate the

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[2] See also clause 29 of the agreement which deals with acts which constitute a breach of the agreement:
'29. Should the Tenant:
29.1.1 fail to pay any rental or other amount due by the Tenant in terms of this lease agreement on due date; or
29.1.9 repeatedly breach any of the terms of the Lease in such manner as to justify the Landlord in holding that the Tenant's conduct is inconsistent with an intention and ability to carry out the terms of the lease; or
29.1.10 commit any breach of any other provision of the lease other than referred to above and fail to remedy that breach within 7 (seven) days after the Landlord has given the Tenant written notice calling upon it to do so,
then and in any of such events, the Landlord shall have the right, but shall not be obliged either: to forthwith cancel the Lease on written notice and retake possession of the Premises without prejudice to any other rights under the Lease or at law including the right to claim damages . . .
or
to claim the fulfilment of all the terms and conditions of this Lease.'(Emphasis added)

lease contract contrary to the written clause 35 in the lease agreement which required that a variation to the written contract would only be valid and enforceable if reduced to writing and accepted by both parties in writing. It was also submitted that the court is additionally required to determine whether the Trust entered into a tacit lease agreement with BT Service Providers and whether the acceptance by the Trust of BT Service Providers' use and occupation of the rental premises as well as their monthly rental payments and deposit amounted to waiving the reliance placed on the non-variation clause contained in the written contract. The first to fourth defendants pleaded that the lease agreement between the Trust and Coobah was tacitly terminated when BT Service Providers moved into the premises in September 2017. Accordingly, so the argument of counsel went, not only was the suretyships resultantly terminated, but the averred termination of the lease agreement at that time consequently had the effect that the claim for the reinstatement had prescribed, as summons was issued more than three years after the said date.

[14] As was expected, counsel for the plaintiff relied heavily on the *Shifren* principle as enunciated in *Sentrale Co-op Graanmaatskappy Bpk v Shifren en Andere*,[3] governing non-variation clauses in agreements which requires that once parties agreed in writing that an agreement cannot be altered or varied unless certain conditions are met, no amendments or variations to the contract will be valid unless such prescribed condition has been met. In *HNR Properties CC and Another v Standard Bank of SA Ltd*[4] the Supreme Court of Appeal held:

'The appellants contend that they were released as sureties by virtue of the conduct of the Bank, coupled with a consensual waiver of the provisions of clause 15. In my view, a factual basis for such a contention was not established on the evidence. But even if it had been, it would have amounted, in the circumstances of the present case, to no more than a variation of clause 15 which was not in writing. This is precluded by clause 16. <u>To hold otherwise, would render the principle in *Shifren* wholly ineffective</u>.'[5](emphasis added)

Counsel for the plaintiff referred me to *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*[6] where an agreement contained a clause which stated that in the event of either party

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[3] *Sentrale Co-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A)
See also *Sadar Investments (Pty) Ltd v Caldeira* 1971 (1) SA 193 (O) at 196H and *Barnett v Van der Merwe* 1980 (3) SA 606 (T) at 609H-610A.
[4] *HNR Properties CC and Another v Standard Bank of SA Ltd* [2003] ZASCA 135; 2004 (4) SA 471 (SCA).
[5] Ibid para 21. See also *Cecil Nurse (Pty) Ltd v Nkola* [2007] ZASCA 154; 2008 (2) SA 441 (SCA) para 17.
[6] *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A).

breaching a material term of the agreement and failing to remedy such breach within 30 days of being called upon in writing by the other party to do so, the other party shall be entitled, by notice in writing to the other party in breach, to forthwith cancel the agreement without prejudice to any claim for damages or other relief to which it may be entitled.[7] It was, however, held that the innocent party in that matter was not compelled to comply with the machinery created in the aforesaid clause because the conduct of the defaulting party is such as to constitute a repudiation of the contract.[8]

[15] Counsel for the first to fourth defendants relied on *Standard Bank of South Africa Ltd v Ocean Commodities Inc*[9] (*Ocean Commodities*) where Corbett JA held that:

'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem.'[10]

I was also referred to *Buffalo City Metropolitan Municipality v Nurcha Development Finance Pty Ltd*[11] where the Supreme Court of Appeal found that the party alleging a tacit contract need to prove unequivocal conduct giving rise to an inference of consensus on a balance of probabilities.[12] The same Court also held in *Butters v Mncora*[13] that '[a]t the end of the exercise, . . . the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement.'[14]

[16] My attention was specifically invited to the matter of *Ocean Echo Properties v Old Mutual*[15] (*Ocean Echo Properties*) as counsel for the defendants submitted that the facts therein are on all fours with the facts in *casu*; The following summary followed in his heads of argument:

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[7] Ibid at 678E.
[8] Ibid at 683G.
[9] *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A).
[10] Ibid at 292B.
[11] *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd* [2018] ZASCA 122; 2019 (3) SA 379 (SCA).
[12] Ibid para 20.
[13] *Butters v Mncora* [2012] ZASCA 29; 2012 (4) SA 1 (SCA).
[14] Ibid para 34.
[15] *Ocean Echo Properties 327 CC and Another v Old MutualLife Assurance Company (SA) Limited* [2018[ZASCA 9; 2018 (3) SA 405 (SCA).

'. . . the Supreme Court of Appeal had to consider the correctness of an exception taken against pleadings dealing with the claim of a landlord who sued his tenant for rental and other charges which were in arrears. The landlord who sued his tenant for rental and other charges which were in arrears. The tenants pleaded that they had abandoned the premises at an earlier date when they were not in arrears, and alleged that the landlord had subsequently entered into a tacit agreement with a new tenant. In opposition, the landlord pleaded that the lease agreement contained a non-variation clause and that the alleged tacit termination amounted to an alteration or variation of the lease without reducing it to writing and signatures by the parties, thus denying that the tacit termination was valid, since it was contrary to the express provisions of the lease contract. The Supreme Court of Appeal held that such a termination does not mean that there is a variation of the terms of the original contract. Even though there was a non-variation clause, the defence of a tacit election to terminate was a proper defence.'

[17] Heavy reliance on the aforementioned judgment was placed by counsel for the defendants in bolstering his arguments. Counsel for the plaintiff, however, argued that reliance on *Ocean Echo Properties* is misplaced as the facts therein are distinguishable from the facts in *casu*. Firstly, the matter was decided on exception with no evidence having been led by the parties, and adjudication of the matter was thus not on a balance of probabilities at that stage. Moreover, so the argument went, the non-variation clause relied upon in *Ocean Echo Properties* read: 'No alteration, variation of or addition to the Lease shall be of any force or effect unless it is reduced to writing and signed by both the Plaintiff and the First Defendant'[16] whilst clause 35 of the agreement in *casu* states, with my emphasis: 'No agreement at variance with the terms and conditions of this Lease <u>nor any consensual cancellation</u> hereto shall be binding on the parties unless reduced to a written agreement and signed on behalf of the parties.'

[18] Reliance was also placed on *Ocean Echo Properties* for the first to fourth defendants' allegation that the Trust elected not to enforce the lease agreement against them, and that election cannot be altered. Counsel for the Trust, in my view, correctly submitted that the Trust had an election to either cancel or enforce the agreement and was well within their rights to elect enforcement of the agreement, as they did in issuing summons against the first to fourth defendants.

[16] Ibid para 4.

[19] Counsel for first to fourth defendants pressed upon me not to enforce the harsh consequences of the non-variation clause on the defendants, relying on *Ocean Echo Properties* where the Supreme Court of Appeal found good reason not to enforce such. Even though I have sympathy with the first to fourth defendants, their defence of a tacit termination of the written agreement cannot be sustained in light of the aforementioned authorities in respect of the *Shifren* principle. The principles enunciated in *Ocean Echo Properties* also do not assist the defendants. Although the court found that a defence of a tacit election to terminate could indeed be a proper defence, the evidence in *casu*, in my view, does not establish that the parties agreed to any tacit election. Moreover, they were in any event prevented from doing so in light of clause 35 of the rental agreement. Additionally, neither witnesses on behalf of the plaintiff nor the first to fourth defendants testified to a written cancellation of the agreement. Based on the authorities, I have to conclude that the plaintiff has proven its case. Having reached the conclusion that the rental agreement between the Trust and Coobah had not been terminated in any way (specifically not tacitly as pleaded by Coobah), it follows that the second to fourth defendants' indebtedness to the plaintiff as sureties, remains binding. For the same reason, the defence of prescription in respect of the claim for the reinstatement costs of the premises, cannot be sustained.

[20] What remains is the issue of costs and it should follow the result. Counsel representing the plaintiff requested costs to be taxed on Scale B, which is in my view warranted.

[21] For legal certainty, the claims against the fifth and sixth defendants should be dismissed, although it has no cost implications since the matter was not defended. In view thereof that the first defendant had been deregistered, I shall make no order against it.

[22] Accordingly, I make the following order:

Judgment is granted against the second to fourth defendants, jointly and severally, the one to pay the other to be absolved, for:

1 Payment in the amount of R829 122.14;

2 Payment in the amount of R127 617.80;

3 Interest on the aforesaid amounts at the current *mora* interest rate as determined in the Prescribed Rate of Interest Act 55 of 1975, currently 11,25% per annum *a tempora morae*;

4 Costs of suit on Scale B;

5 The claim against the fifth and sixth defendants are dismissed.

[redacted]

C REINDERS

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiffs:	WJ Groenewald
Instructed by:	Bezuidenhouts Inc
	Bloemfontein
On behalf of the First to Fourth Defendants:	S Rautenbach
Instructed by:	Van der Merwe Sorour Attorneys
	Bloemfontein