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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 76664/2014

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

24 April 2026

DATE

SIGNATURE

UNYUKO INVESTMENTS 29 CC

Plaintiff

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

First defendant

MINISTER OF PUBLIC WORKS

Second defendant

DIRECTOR-GENERAL: PUBLIC WORKS

Third defendant

JUDGMENT

FRANCIS-SUBBIAH, J:

[1] The plaintiff, Unyuko Investments 29 CC, claims compensation for damages against the defendants, that arises from an alleged breach of contract, a repudiation of a lease agreement concluded between the plaintiff and the defendants.

[2] The plaintiff alleges that on 01 August 2013 the second defendant, Department of Public Works (“DPW”) duly represented by the third defendant, the Director General at the time, who was Mr Mziwonke Dlabantu (“DG Dlabantu”) and the plaintiff was duly represented by its sole member Mr Tembile Manata (“Mr Manata”) concluded the lease agreement.

[3] The plaintiff alleges that Mr Oageng Mogale, a legal officer within the DPW repudiated the lease by issuing correspondence on 09 September 2013 stating that the lease was irregular as it exceeded the square meterage that was approved. The plaintiff further claims that it was unable to secure funding for the purchase of the immovable property “Die Meent” situated at 1[...] M[...] Street, Potchefstroom (“the property”) due to the repudiation by the defendants and the termination clause in the lease agreement.

Background

[4] At the relevant time, the property was owned by a private party, Athlone Park Shopping Centre Investments (Pty) Ltd (“Athlone”) that had entered into a sale of the property to the plaintiff. The purported lease agreement was a material and inducing

factor for the plaintiff's entry into the sale. The sale agreement was extended in conjunction with the lease agreement with the intention of keeping the sale agreement alive. It was contemplated that, upon signing of the lease agreement, the plaintiff would step into the shoes as the landlord to the South African Police Service ("SAPS"), which occupied the property.

[5] The property, measuring approximately 4300 square meters, was subject to a lease requiring renewal by SAPS for office space of 2722,21 square metres and additional office space that brought the total to 4,300 square meters. The DPW acting on behalf of government entities, bore responsibility for concluding the lease agreement. On 01 August 2013, DG Dlabantu signed a letter of acceptance of offer to lease, with area space of 4,300 square meters of the property. A lease agreement was drafted by DPW and sent to the plaintiff for signature on 08 August 2013. The lease agreement contained the floor space of 4,300 square meters. On the same day, Mr Manata counter signed and through the attorney's office sent it back to the defendants and requested that the DG initial all pages. The agreed rental was R70.00 per square metre per month, together with 30 parking bays at a rate of R300.00 per bay per month, exclusive of VAT. The lease was to commence on 01 August 2013 as per the acceptance of offer, for a fixed period of five (5) years. Later the commencement was adjusted to 01 October 2013.

[6] The plaintiff's claim for damages is premised on the alleged breach and/or repudiation of the agreement. The primary claim is in the alternative sums of R32,180,000 and R29,500,000 representing damages flowing from the first five-year lease period. In the alternative, the plaintiff claims damages in the amount of R27,560,000 being the value of the property on 01 October 2018, at which time the plaintiff contends that the property would have been fully paid off. Interest at the prescribed rate per annum is further claimed.

[7] The defendants deny any liability for the alleged damages, contending that the purported lease agreement never came into existence and in the alternative is void. They explained that the defendant's conduct was consistent with its constitutional and statutory obligations to ensure lawful procurement and administrative regularity. It is the plaintiff that failed to meet the specific conditions required to conclude a binding lease agreement.

[8] The defendant's version is that the approval for the lease agreement was 2722,21 square meters of the office space that SAPS had always renewed. These square meters were approved in line with the needs assessment of SAPS. However, the plaintiff's procurement for the lease agreement was 4,300 square meters, which was not approved by the Bid Adjudication Committee, it had approved 2722,21 square meters. There is an excess area of approximately 1,578 square meters beyond what was originally approved.

[9] The legal issue for determination is whether a valid and binding lease agreement, operating within the sphere of public administration, was concluded between the parties. On 01 August 2013, the document reflecting an 'acceptance of offer to lease' constituted no more than an expression of an intention to contract. Such an intention is, by its nature, provisional and typically subject to a written lease agreement, further negotiation and fulfilment of specified conditions.

Legal position

[10] A contract under South African law is formed when there is *consensus ad idem* between the contracting parties on all material terms, accompanied by an intention to create legally binding obligations (*animus contrahendi*). As stated by the Supreme Court of Appeal in ***Withok Small Farms (Pty) Ltd v Amber Sunrise***

Properties 5 (Pty) Ltd¹, the general rule is derived from the information theory that a contract is concluded only when the offeror receives notification of the acceptance. The question is whether the offeror knew of the acceptance so that conscious agreement exists between the parties.

[11] The court at paragraph 11 held that:

“In each case it will be necessary to consider the terms of the offer to determine the mode of acceptance required. Where, however, the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of acceptance required is no more than the offeree's signature. This is particularly so where provision is made in the written contract for the offeree to specify the date on which he or she signs the contract. In *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 (3) SA 134 (C) at 137D-G E M Grosskopf AJ (as he then was) said the following (my translation):

“However, even when writing is not a formal requirement, written contracts are an everyday occurrence in the commercial world. The object of reducing a contract to writing (whether voluntarily or required by statute) is normally to achieve certainty and to facilitate proof (cf, eg, *Woods v Walters*, 1921 AD 303, *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)). It is presumably for the same reason that the date and place of signature is normally specified in written contracts. The signing of a written contract is the usual manner in which parties indicate their agreement to its terms and certainty as to the place and date of the conclusion of the contract can be equally as important for the parties to the contract as certainty as to its content.

Consequently, it is inherently improbable that any of the parties to such a contract would intend that the time and place of the conclusion of the contract would be determined not from the document itself but by way of evidence *aliunde*.”

¹ 2009 (2) SA 504 (SCA) at para 10.

[12] For a valid contract to exist, the following requirements must be satisfied²:

- (a) There must be consensus *ad idem* between the contracting parties;
- (b) The parties must have seriously intended to result in terms which can be enforced (*animus contrahendi*);
- (c) The parties must have the capacity to contract;
- (d) The agreement must have certain and definite terms;
- (e) The necessary formalities must be observed;
- (f) The agreement must be lawful; and
- (g) The contractual obligations must be possible of performance.

The essentials of a Lease Agreement

[13] A lease agreement (*locatio conductio rei*) is a nominate contract requiring agreement on the following essentialia³:

- (a) The leased property (the *res locata*) must be identified;
- (b) The rental must be fixed or ascertainable; and
- (c) The duration of the lease must be agreed or determinable.

[14] Where any of these *essentialia* is absent, there is no concluded lease, regardless of what the parties may have subjectively intended.

² RH Christie and GB Bradfield, *Christie's The Law of Contract in South Africa*, 7th ed (LexisNexis 2016).

³ See: Kerr, *The Principles of the Law of Contract*, 6th ed (Butterworths 2002) at 59; Zulman and Memory, *The Law of Hire-Purchase in South Africa*, 5th ed.

The Position on 08 August 2013

[15] The defendants deny having received a signed copy of the lease agreement on 08 August 2013 from the plaintiff. Under the information theory applicable in South African law, acceptance must come to the knowledge of the offeror for a contract to be concluded. In the circumstances if the signed lease was not received by or communicated to the defendants, there can be no *consensus ad idem* and no concluded contract.

[16] Mr Alan Jeftha, witness for the plaintiff, testified that on 08 August 2013, Mr Manata arrived at his reception desk, where the agreement was scanned and together with a covering letter e-mailed to the parties. It was put to him that DPW did not receive the signed copy of the agreement. To date this copy has not been located between the parties.

[17] On closer examination the e-mail sent by Mr Alan Jeftha on 08 August 2013 at 13h22 reveals that it was addressed to Mr Manata and copied to DPW officials, Ms Ivy Mahlaule and Ramabele Matlala. It was not sent to Mr Tube of DPW, who had issued the acceptance of the offer to lease. It was put to Mr Jeftha that, according to Ms Mahlaule, the email in question did not include any attachment containing a signed contract. Mr Jeftha conceded that the email reflected at page 008–166 contained no attachment, and he was unable to confirm whether any such attachment had accompanied the email. This evidence was important to the plaintiff's case, but it did not support its position.

[18] The defendants maintained that they could not confirm receipt of any attachment allegedly transmitted by email and contended that, in the absence of such receipt, the necessary conditions for the conclusion of the agreement were not satisfied.

The Position on 02 September 2013

[19] The alternative case is that the lease was concluded on or about 02 September 2013 when the lease contract was signed and initialled by DG Dlabantu.

[20] Mr Manata testified that once again a lease agreement, duly signed and initialled by DG Dlabantu, was sent to him on or about 29 August 2013. He, in turn, signed the agreement and returned it to the DPW by 02 September 2013. On this basis, he submits that a legally binding lease agreement had come into existence by no later than 02 September 2013, when the signed document had been exchanged between the parties.

[21] Based on the above analysis, I find that no lease was concluded on 08 August 2013, given the defendants' denial of receipt of the agreement and the evidence of Mr Jetha conceding that he could not confirm that the agreement was an attachment included in the e-mail send from his office. The evidence of Mr Manata remained untested on the lease agreement of 02 September 2013. In confirmation of this position, a signed lease agreement was in possession of Mr Oageng Mogale who raised the exceedance of square meters. As a result, it is acceptable that the lease was eventually signed and accepted by 02 September 2013.

Suspended Conditions

[22] Even if execution is accepted, the agreement was subject to unfulfilled suspensive conditions, which suspended the operation of the contract. At the relevant time, certain suspensive conditions remained unfulfilled. This included the provision of an occupational health and safety certificate, electrical compliance certification, a fire extinguisher register and a valid tax clearance certificate.

[23] In ***Mia v Verimark Holdings (Pty) Ltd***⁴, the Supreme Court of Appeal stated:

"The conclusion of a contract subject to a suspensive condition creates 'a very real and definite contractual relationship' between the parties. Pending fulfilment of the suspensive condition the exigible content of the contract is suspended. On fulfilment of the condition the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure. In the absence of a stipulation to the contrary in the contract itself, the only exception to that is where the one party has designedly prevented the fulfilment of the condition."

[24] This principle was recently confirmed in ***Vantage Goldfields SA (Pty) Ltd v Siyakhula Sonke Empowerment Corporation (Pty) Ltd and Another***⁵, where the Supreme Court of Appeal held that an agreement subject to unfulfilled conditions precedent lapses automatically, and subsequent addenda cannot revive a lapsed contract where the parties failed to extend the deadline for the condition before its expiry.

[25] The effect of the unfulfilled suspensive conditions is that the rights and obligations under a lease remain suspended. Neither party will be in a position to enforce the lease until the outstanding documents were obtained. If these conditions were never fulfilled, the lease falls away by operation of law.

[26] As held in ***Gravitek CC v Cartmel Investments CC and Others***⁶:

⁴ [2010] 1 All SA 280 (SCA) at para 1

⁵ (853/2023) [2025] ZASCA 01 (SCA, 9 January 2025)

⁶ [2019] ZAKZDHC 11 at para 16 – 17.

"Suspensive conditions suspend the rights and obligations of contracting parties until an uncertain future event occurs. Upon the occurrence of the event, the contract is brought into existence and the rights and obligations of the parties become enforceable. The effect of the non-fulfilment of a suspensive condition is that the suspended rights and obligations of the contracting parties never come into existence..."

[27] It was argued that DG Dlabantu accepted the contract on a conditional basis. The tax clearance certificate was required within 7 days. Mr Manata explained that the plaintiff was a shelf company that had not yet commenced trading and, for that reason, a tax clearance certificate was not issued and provided the DPW with the plaintiff's application for a tax clearance certificate. Mr Mabinja, witness for the defendants, confirmed that when a party does not have the necessary tax clearance certificate and other documents, they are afforded 6 months from date of signing an agreement to furnish the outstanding documents to enable compliance.

[28] Mr Manata testified that he was not in possession of the occupational health and safety certificate, the electrical compliance certificate, or the fire extinguishers register at the relevant time. He explained that these documents were held by Athlone, which remained the owner of the building at that stage. In any event, the plaintiff would have been in a position to furnish the defendants with the necessary certificates upon transfer of ownership of the property from Athlone to the plaintiff. He further indicated that DPW already had access to copies of these documents from Athlone.

[29] Furthermore, I find that the plaintiff had been afforded a period of six months within which to furnish the outstanding documentation required for compliance. The outstanding documentation were formalities or resolute conditions and not suspensive conditions. In these circumstances, the fulfilment of the resolute

conditions was contemplated within that period, with the result that, upon signature of the lease agreement, it would have come into full force and effect subject to such compliance at that stage.

Exceedance of Approved Square Meters — Ultra Vires and Legality

[30] The next dispute with the lease agreement is the recordal of the square meterage of floor/office space. Where a lease exceeds the meterage approved, it is *ultra vires* the authority granted. The constitutional principle of legality, confirmed in ***Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA***⁷, requires that every exercise of public power be authorised by law. Ms Mahlaule, testifying for the defendants, explained that lease renewals are to be effected based on the square meterage previously occupied. Any additional square meterage in excess of that utilised during the prior lease period must be subjected to a formal tender process. SAPS previously occupied 2,722.21 square meters but subsequently indicated it required the full 4,300 square meters. Consequently, the additional 1,578 square meters required had to be advertised for tender, as required by the procurement procedures.

[31] Plaintiff argued that any challenge to the procurement process should have been brought as a review application and not as a defence to this action. Where a contract is invalid by reason of non-compliance with procurement law, and the difference in square meters for lease, the innocent party cannot recover contractual damages because there is no valid contract.⁸ In ***Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province***⁹ the SCA confirmed that agreements concluded without proper authorisation in the public procurement

⁷ 2000 (2) SA 674 (CC) at para 20.

⁸ *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA); *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA).

⁹ 2008 (2) SA 481 (SCA) at 490E–F

context are reviewable under PAJA¹⁰ - Section 6, and may be set aside, with the court retaining a discretion on appropriate remedy.¹¹ The Bid Committee approved a lease for

2,722.21 square meters. The executed lease for 4,300 square meters exceeded this mandate. Public functionaries must act within the bounds of their delegated authority and a lease concluded *ultra vires* or without proper authority cannot hold the defendant liable. The plaintiff will bear the risk of relying on a lease that was not properly authorised.

[32] In ***Minister of Finance v Afribusiness NPC***¹², the Constitutional Court expanding on its earlier authority and that of the SCA in ***Afribusiness NPC v Minister of Finance***¹³ confirmed that the *ultra vires* doctrine is a subset of the principle of legality and is central to the lawfulness of every exercise of public power. The Bid approval of 2722.21 square meters of office space is not what the DG Dlabantu had agreed to in the lease agreement. Instead, the lease agreement records 4,300 square meters. Conduct by an organ of state that lacks lawful foundation is inconsistent with the principle of legality. Where a lease exceeds what was approved, the lease, or at least the portion exceeding the approval lacks legal foundation. (my emphasis)

[33] Mr Mabinja, Acting Director General testified that the difference between 2,722.21 square meters and 4,300 square meters undermines established government procurement and approval processes, and the square meters for lease must align with what was authorised. In the circumstances where the agreement, even duly signed and sealed by the parties, exceeds the approved extent, it is

¹⁰ Promotion of Administrative Justice Act 3 of 2000.

¹¹ The PAJA application is not before this court for consideration, but a claim based on repudiation of contract.

¹² [2022] ZACC 4; 2022 (4) SA 362 (CC)

¹³ [2020] ZASCA 140.

without legal foundation. It follows, in view of **Afribusiness**¹⁴ that only the approved 2,722.21 square meters of office space can be regarded as valid and binding between the parties and thus will qualify for inclusion in any appropriate claim.

Clause 22

[34] It was submitted that the lease agreement was in a standard form and that DG Dlabantu lacked the authority to amend its terms, in particular clause 22. It was further explained that, once the lease had been approved, it was subject to a vetting process.

[35] Clause 22 reads:

“TERMINATION

The lessee shall be entitled to terminate the agreement by giving 6 (six) months written notice in the event that the lessee was reasonably of the opinion that there is no need to lease the premises. In such an event, the lessor shall be entitled to claim damages suffered, excluding economic loss.”

[36] The evidence indicates that clause 22, dealing with the right of first refusal on renewal, became contentious only after the lease agreement had ostensibly been signed and accepted by the parties. This raises the question whether the agreement was indeed final and binding at that stage.

¹⁴ [2022] ZACC 4; 2022 (4) SA 362 (CC)

[37] While a renewal or right of first refusal clause is ordinarily a material term in a commercial lease of this magnitude, its subsequent re-negotiation does not, on its own, render the agreement void if consensus had already been reached. However, Mr Manata's insistence that the clause be deleted on the basis that Investec Bank will not approve financing if it remains, suggests that consensus on a material term was not, in fact, complete.

[38] This is reinforced by Mr Manata's email of 20 September 2013, to Mr Christopher Makgoba, conveying Investec Bank's concerns regarding compliance with procurement processes, statutory requirements and the authority to conclude the lease. Against this backdrop, Mr Manata testified that, that he had e-mailed his request to delete clause 22 at the instance of Investec Bank, which required its removal as a condition for financing. In particular, Mr Manata addressed an email on 14 October 2013 to Ms Ivy Mahlaule expressly requesting that clause 22 be removed in order for the lease to be acceptable to him. This correspondence constitutes clear evidence that clause 22 was a material term of the lease agreement and the parties lacked consensus on the lease thereby undermining the validity of the agreement.

[39] Although, the defendants also pleaded that they were entitled to cancel or terminate the lease agreement in terms of clause 22. No evidence, however, was led at trial to substantiate this contention. None of the defendants' witnesses testified of taking any steps to terminate the agreement in accordance with clause 22 or on any other lawful basis.

Other defences

[40] DPW submits that the plaintiff failed to mitigate its loss and could have re-let the property. Importantly, SAPS remained in occupation of the property throughout the relevant period. In these circumstances, DPW required a lease agreement to

regulate SAPS's continued occupation. At the time, rental was being paid on a monthly basis to Athlone, the then owner of the property, thereby ensuring that the occupation was already regulated and that compensation for such occupation was being made. Had the lease agreement been finalized, the plaintiff would have secured the necessary financing, enabling transfer of ownership of the property. This, in turn, would have resulted in rental payments being made to the plaintiff, which would have been applied toward servicing the bond with Investec Bank.¹⁵ In these circumstances, this constitutes a weak defence of the plaintiff's claim that it failed to mitigate its damages.

[41] The defendants submitted that the sale agreement between the plaintiff and Athlone was due to expire on 20 August 2013, whereas the lease agreement was only concluded on or about 02 September 2013. On the evidence, the sale agreement had previously been extended on more than one occasion. In those circumstances, the plaintiff could, on a balance of probabilities, reasonably have expected that a further extension would have been granted to accommodate the timing of the lease agreement. Accordingly, the alleged misalignment in dates does not, without more, undermine the plaintiff's claim.

Repudiation

[42] The onus is on the plaintiff to prove that the conduct of the defendants results in repudiation and that the loss suffered has flowed from the repudiation that was foreseeable at the time of contracting.

¹⁵ Investec had approved a loan facility of R 20,900,00.00 over the property subject to all terms and conditions on 30 October 2012.

[43] In ***Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou***¹⁶ the Appellate Division held that repudiation occurs when one party to a contract, without lawful grounds, indicates to the other party, by words or by conduct, a deliberate and unequivocal intention to no longer to be bound by the contract.

[44] The test is objective whether a reasonable person in the position of the innocent party would conclude that the defaulting party does not intend to honour the contract. In ***Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd***¹⁷ Nienaber JA held that the emphasis is not on the repudiating party's state of mind or what he subjectively intended, but on what someone in the position of the aggrieved party would conclude. The test is whether a reasonable person would conclude that proper performance would not be forthcoming.

[45] This objective test means that even where a party acts in good faith, genuinely believing it has a right to adopt a particular position, the conduct may still constitute repudiation if a reasonable person would view the conduct as evincing an intention not to be bound.

[46] The plaintiff characterises the correspondence of 09 September 2013 from Mr Oageng Mogale as a repudiation of the lease. In that correspondence, Mr Mogale stated that the lease was irregular because it exceeded the square meterage approved by the DG Dlabantu and the Bid Adjudication Committee.

[47] There is a real question whether this correspondence constitutes repudiation or, alternatively, a legitimate raising of a concern about the lawfulness of the lease. If the lease was indeed concluded in excess of the approved meterage, and if this

¹⁶ 1978 (2) 835 (A).

¹⁷ 2001 (2) SA 284 (SCA).

constituted a breach of procurement law then the DPW official's communication by Mr Mogale may have been a lawful assertion of a right rather than an unlawful repudiation.

[48] As established in ***Datacolor***, the question is objective, would a reasonable person in the position of the plaintiff have concluded that the DPW intended to no longer be bound by a lease? In favour of repudiation a reasonable person might view this as an unequivocal statement that performance would not be forthcoming. Plaintiff argues that the defendants, as a government entity, simply cancels the lease agreement because they know the other side cannot succeed.

[49] Against repudiation, Mr Mogale may have been raising a legitimate legal concern. If the lease was concluded in contravention of procurement requirements, Mr Mogale was duty-bound to raise the irregularity. An organ of state has a constitutional obligation to comply with section 217 of the Constitution.¹⁸ Along these lines the defendant argues that the award and conclusion of the lease agreement did not constitute an acceptable tender in terms of the Preferential Procurement Policy Framework Act¹⁹ (“the PPPFA”) promulgated in terms of section 217(3) of the Constitution that is meant to give effect to the procurement process of the tenders to be in line with the principles in terms of section 217 of the Constitution for the 4,300 square meters.

[50] Further complicating the analysis is the fact that certain DPW officials continued engaging with the plaintiff after 09 September 2013. This subsequent conduct is relevant because it suggests that the DPW as a collective did not adopt the repudiation position as stated by the plaintiff, and therefore the repudiation was unclear nor deliberate. The DPW continues to engage with the plaintiff but does not

¹⁸ Constitution of the Republic of South Africa, 1996.

¹⁹ No 5 of 2000.

move away from the initial clear statement by Mr Mogale that the lease was irregular. Compliance issues were raised and not the cancellation of the lease.

[51] Mr Mogale testified that he drew the attention of the plaintiff to the irregularities in the lease agreement. He was willing to regularize the contract and assist the plaintiff to start again with the bid adjudication since the plaintiff wanted a lease of 4,300 square meters but Mr Manata was increasingly frustrated and aggrieved by the multiple errors and was unwilling to do so.

[52] 'Let's start again' does not translate to repudiation by the defendant.

[53] As held in ***Primat Construction CC v Nelson Mandela Bay Municipality***²⁰ a premature or unjustified cancellation by a party constitutes repudiation. The aggrieved party may then elect to accept the repudiation and cancel the contract, claiming damages. However, this right is only available where a valid, enforceable contract exists in the first place.

[54] The plaintiff must demonstrate that the loss it claims was foreseeable at the time of contracting. The principle is that damages for breach of contract are limited to those losses that the parties contemplated or could reasonably have contemplated at the time of concluding the contract.

[55] In ***Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd***²¹, the Appellate Division adopted the convention/contemplation test for contractual damages. The sufferer by a breach should be placed in the position he

²⁰ [2017] ZASCA 73.

²¹ 1915 AD 1

would have occupied had the contract been properly performed, but damages are limited to those that the parties contemplated, or ought reasonably to have contemplated, at the time of contracting.

[56] The question of foreseeability at the time of contracting is critical. What is evident from the evidence is the plaintiff was in the process of obtaining a loan facility from Investec Bank for the purchase of the property upon reliance of the anticipated conclusion of the lease with DPW.

[57] To establish damages the plaintiff must satisfy both the factual causation ('but for') test and the legal causation test (adequate or proximate cause). As set out in ***International Shipping Co (Pty) Ltd v Bentley***²² the question is, but for the breach, would the plaintiff have obtained the funding and been able to purchase the property?

[58] The next hurdle facing the plaintiff's case is that of causation, particularly in light of its inability to secure funding. This depended on a decision by Investec Bank, as an independent intervening act. After the signing of the agreement Mr Manata requested clause 22 of the agreement to be deleted as it was required by Investec Bank for the funding.

[59] In ***MEC for Health, Gauteng v 3P Consulting (Pty) Ltd***²³ the SCA confirmed that where contractual damages flow from a breach by the State, the plaintiff must demonstrate a direct and proximate causal link between the breach and the loss.

²² 1990 (1) SA 680 (A) at 700A–B.

²³ 2012 (2) SA 542 (SCA)

Losses that are dependent on independent decisions of third parties require particularly cogent evidence of causal connection. In the present matter it entails proof:

- (a) that a valid, enforceable lease existed;
- (b) that the correspondence of 09 September 2013 constituted an unequivocal, deliberate indication of an intention not to be bound; and
- (c) that the subsequent conduct of DPW officials did not negate or qualify that repudiation.

[60] The conduct of DPW officials indicates that they continued to engage with the plaintiff after 09 September 2013 and took further steps to resolve the matter. Mr Mogale testified that he brought certain irregularities in the lease agreement to the plaintiff's attention and expressed a willingness to regularise the contractual position by recommencing the bid adjudication process, in order to ensure compliance, particularly in light of the discrepancy between 4,300 square meters offered by the plaintiff and 2,722.21 square meters approved by the Bid Committee as a renewal lease. He also addressed the deletion of clause 22.

[61] In addition, a subsequent meeting was arranged with Mr Manata at the plaintiff's request, which Mr Manata failed to attend. This conduct on the part of the defendants is inconsistent with an intention to repudiate the agreement and, instead, demonstrates a continued willingness to perform.

[62] By 06 November 2013, Athlone, the seller of property advised the defendants that the Sale Agreement between itself and the plaintiff had lapsed as it did not receive any form of guarantee from the plaintiff to secure the purchase price. Athlone

further indicated that the defendants may not enter any further correspondence with the purchaser in regarding the lease.

[63] In the result, I find that no valid and binding lease agreement exists between the parties. The plaintiff having premised its claim for damages on repudiation, failed to discharge the onus of establishing repudiation. With the result that the claim for damages cannot succeed and the question of quantification does not arise.

Costs

[64] The court retains a discretion in relation to the award of costs, which must be exercised judicially having regard to all relevant circumstances. In this regard, the circumstances surrounding the drafting of the lease agreement, including the incorrect reflection of the square meterage by DPW, contributed to the dispute between the parties and is a relevant factor in considering where the interests of justice lie in relation to costs.

[65] It was argued that the plaintiff caused multiple amendments, suggesting that it was responsible for delays in the proceedings. The plaintiff, however, disputed this contention and maintained that none of its amendments caused any material delay or prejudice to the defendants instead the plaintiff suffered substantial prejudice.

[66] The action was instituted in October 2014. Following a notice of bar, DPW delivered its plea in December 2014. The matter subsequently proceeded to trial on 4 separate occasions before ultimately commencing in September 2025. At all material times during the litigation, and more particularly by the time the plea was delivered in December 2014, DPW was aware that a written lease agreement had been concluded between the parties. Notwithstanding this, it persisted in its denial that a signed lease agreement existed. Additionally, no satisfactory explanation was provided as to why the DPW failed to make full and timeous discovery of relevant documents, or why incomplete documentation was ultimately produced for trial.

[67] The evidence reveals a fundamental failure within DPW to properly appreciate and distinguish between materially different lease transactions, namely a renewal of approximately 2,722.21 square meters and the acceptance of an offer for 4,300 square meters, that requires the administration of a tender process in terms of the Preferential Procurement Policy Framework Act²⁴ (“the PPPFA”) to give effect to the procurement process of the tenders.

[68] This confusion reflects a lack of clarity, coherence and consistency in DPW’s approach to approval and administration of the lease. Such equivocation in the context of public procurement and asset management, where precision and clarity are

²⁴ No 5 of 2000.

essential, is wholly untenable and falls far below the standard of lawful public administration expected in the exercise of public power.

[69] Although the plaintiff achieved some success on certain legal determinations, it was ultimately unsuccessful in its claim for damages. In the circumstances, a departure from the ordinary rule as to costs is justified. This includes the manner in which the dispute arose, the uncertainties within the defendant's own processes relating to the lease agreement, and the conduct of the litigation, all of which contributed materially to the protracted duration of the proceedings, spanning over 12 years.

[70] In the exercise of the court's discretion, and having regard to all relevant factors, the plaintiff is accordingly entitled to all its costs on a punitive measure.

[71] The reserved costs of Van Nieuwehuizen, J on 23 May 2022, the costs order of Vally, J dated 29 November 2024 and the costs of the plaintiff's compelling application for the defendant to properly respond to the Rule 41A application, are awarded to the plaintiff.

[72] As a result the Court Orders:

- a) The plaintiff's claim for damages is dismissed.
- b) The defendants are ordered to pay the attorney and client costs of the plaintiff including the cost of two counsel.

R. FRANCIS-SUBBIAH

Judge of the Gauteng High court: Pretoria

24 April 2026

Appearances

For Plaintiff: Adv R Wallis SC

Adv SM Mamoepa

Instructed by: De Klerk and Van Gend Inc Attorneys

For Defendant: Adv K Mokotedi SC

Adv M Boko

Instructed by: State Attorney