

SOUTH AFRICA / JUDGMENT

## Arcelormittal South Africa Limited v Norman and Gary Abkin Dunswart (Pty) Ltd (25729/2018) [2019] ZAGPJHC 330 (23 August 2019) [2019] ZAGPJHC 330

COURT

South Gauteng High Court, Johannesburg

BEFORE

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CASE / FILE NUMBER

25729/2018

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 25729/2018

In the matter of

ARCELOMITTAL SOUTH AFRICA LIMITED APPLICANT

and

NORMAN AND GARY ABKIN RESPONDENT

DUNSWART PROPERTIES (PTY) LTD

JUDGMENT

DOSIO AJ:

### INTRODUCTION

- [1] This is an application for an eviction of the respondent, and all those holding through it, from certain immovable properties (“The occupied properties”). The properties are referred to as Erf 8736 Benoni Extension 74, Erf 8737 Benoni Extension 74 and remaining extent of Erf 2668, Benoni Township.

- [2] The applicant, Arcelormittal, is a public company. The respondent which is Norman & Gary Abkin Dunswart properties, is also a company. Accordingly, the provisions of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act of 1998 do not apply.
- [3] The application is opposed and the respondent has raised seven defences.
- [4] The matter was called on the 27th of May 2019, however the respondent's legal representative indicated that it he had been briefed recently. I stood the matter down to the Tuesday, the 28th of May 2019, whereupon a postponement was sought by the respondent's legal representative. I did not believe that it was in the interests of justice to postpone the matter any further and the request for a postponement was denied. The matter stood down until 11h15, whereupon the application proceeded.

## BACKGROUND

- [5] Prior to 2000, both parties, entered into a written agreement to lease premises. The parties entered into new lease agreements from time to time, each lease usually being entered into for a five year period. The applicant attached a copy of one such lease agreement, namely Annexure "A", which it had in its possession. This attached lease was for the period from the 1st of August 2008 to the 31st of July 2013. It confirmed the terms upon which the premises were let.
- [6] Neither of the parties were in possession of previous lease agreements entered into between the applicant and the respondent.
- [7] The applicant avers that the lease agreement marked as Annexure "A" pertained to the above-mentioned occupied premises, however the respondent denies that there was ever a lease agreement entered into pertaining to the above-mentioned occupied premises, as Annexure "A" refers to "Bay B" and not the occupied premises. The respondent further alleged that the lease agreement is only partially signed by the lessee and not the lessor.
- [8] During or about March 2003 the parties entered into a written option agreement in terms whereof the applicant granted to the respondent an option for one year to purchase the following immovable properties for the sum of R8 million. These properties constituted all the farm portions making up the whole of the Benoni Extension 74 township.
- [9] On the 7th of September 2004 the respondent issued a summons in the Transvaal Provincial Division of the High Court against the applicant under case number 23395/04, where it sought a declaratory order that the option was exercised and that a valid sale agreement was concluded ("the 2004 action"). It also sought an order where the applicant had to transfer the immovable properties to the respondent.
- [10] The parties settled the matter by entering into a written agreement of sale on the 18th of April 2006 in terms whereof certain of the immovable un-surveyed portions of the option properties were sold to the respondent. This agreement is marked as Annexure "C". In the respondent's answering affidavit at paragraph 10, the respondent stated that the leased

premises formed part of the un-surveyed Portions. The applicant contends that these properties were consolidated and as a result of the town planning process and were now known as the occupied properties. As a result of this agreement, the respondent withdrew the action under case number 23395/04.

- [11] On the 25th of February 2011 the respondent issued a new summons against the applicant under case number 8528/2011 (“the 2011 action”).

In terms of this summons the respondent sought an order in terms whereof the applicant would be ordered to take all steps to obtain

the necessary consent for the establishment of a township on the immovable properties, and to transfer the properties to the respondent.

- [12] Both the option agreement and the sale agreement were invalid by virtue of the provisions of Section 67 of the Town-Planning and Township Ordinance, 15 of 1985. The applicant raised this as a special plea in the 2011 action. The applicant had a similar matter with another respondent and when the applicant was successful on this other matter, the respondent in casu abandoned the 2011 action and sought to revert to the 2004 action. The intention to abandon the 2011 action was confirmed by the

respondent in an affidavit where it stated “it is patently clear that the sale of the properties in terms of the new agreement

and the settlement was void ab initio pursuant to the contravention of Section 67 of the Town Planning and Townships Ordinance 15 of 1985 ...”

- [13] On the 15th of November 2017 the respondent launched an application for an interdict to prevent the applicant from disposing, alienating or

selling the immovable properties, under case number 78274/17. The respondent has not taken any further steps to prosecute this

application.

- [14] On the 23rd of March 2018 the applicant’s attorney addressed a letter to the respondent stating the lease agreement between the parties had lapsed and a market-related rental was demanded from the respondent. This letter was marked Annexure “G”.

- [15] The respondent’s attorney responded on the 25th of April 2018, denying that the respondent was indebted to the applicant in the amounts claimed. This letter was marked as Annexure “H”.

[16] On the 10th of May 2018 the applicant's attorney cancelled the lease agreement with effect from the 1st of July 2018. It placed on record that the applicant was amenable to enter into a new lease agreement at a market-related rental, but if no agreement could be reached by the 31st of May 2018 the respondent was to vacate the properties by no later than the 1st of July 2018. This letter was marked Annexure "I".

[17] No agreement could be reached between the parties on the terms of a new lease agreement.

#### SUBMISSIONS MADE BY APPLICANT

[18] The applicant's council commenced the proceedings by referring to the letter dated the 10th of May 2018 Annexure "H" which referred to the cancellation of the lease agreement in respect of erven 8736 and 8737, Benoni Extension 74.

[19] Counsel argued there is nothing ambiguous about the above-mentioned letter and that the cancellation is clear in that it states that whatever lease agreement that was in place between the two parties would be cancelled with effect from the 1st of July 2018.

[20] Counsel argued that the parties were at idem that there were written lease agreements entered into between the parties from time to time. However, the last of those written agreements had lapsed by 2018, nobody knew exactly when. Furthermore there was no dispute between the parties that no written agreement was in place at that stage.

[21] Counsel referred to the letter dated the 25th of April 2018, Annexure "H", from the respondent's attorney, where it is clear from the contents that the respondent's attorney confirmed that the respondent was occupying erven 8736 and erven 8737. Counsel argued these are also the same properties that are mentioned in the notice of motion, with the exception of the third property mentioned in the notice of motion which is the "Remaining Extent of Erf 2668, Benoni Township".

[22] Counsel argued that there was a tacit lease agreement in existence between the parties and that after the last written agreement had lapsed, the tacit agreement was on the same terms and conditions as the lapsed agreement. Counsel argued that this is a common cause fact as it is admitted by the respondent in the answering affidavit and that the legal consequences flowing from this, is that either the lessor or lease had the right to terminate such a lease agreement by giving reasonable notice.

[23] Counsel referred to the case of *Airports Company South Africa Soc Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books* (2017

(3) SA 128 (SCA) (27 September 2016), where the learned Lewis JA in paragraph [20] referred to the case of *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 637B-C, where the learned Levy J stated;

*“ [W]here there is a lease with no terminal point, that is, a periodic or open-ended lease, eg a week to week or month to month lease, the common law imposes a legal duty on the lessor to give reasonable notice to terminate the lease.”*

[24] Counsel also referred to paragraph [17] in the case of *Airports Company v Airport Bookshops* (supra) where reference is made to the learned author Francois du Bois in Wille’s *Principles of South Africa Law*, 9 ed (2007). At page 908 the learned author states;

*“An express agreement may provide that the lease shall endure for a definite time, short or long; or until a certain event takes place (which is bound to occur); or the duration may be at the will of the lessor, or of the lessee; lastly, the lease may be periodic, ie the lease continues from week to week, month to month, or year to year (according to the period expressly or impliedly agreed upon) until it is terminated by reasonable notice given by either party.”*

[25] Counsel argued that the legal principle is that where the lease is indeterminable, as it is in the present case, being a tacit agreement and not for a specified time period, it was on a month to month basis, therefore either party could terminate the agreement or the lease on reasonable notice, which is what the applicant did in this matter. Therefore, Counsel argued, once notice was given the respondent should have vacated the premises.

#### SUBMISSIONS MADE BY THE RESPONDENT

[26] The respondent raised seven defences. They are as follows;

1. The first defence is that the applicant failed to specify or deal with the occupied properties and also failed to explain how the occupied properties relate to annexure “A”.
2. The second defence relates to the fact that the applicant has not set out the basis for the cancellation of the lease agreement and hence was not entitled to cancel the lease agreement.
3. The third defence concerns the fact that the applicant cancelled the lease agreement on the condition that a new lease agreement could be negotiated and entered into. The respondent contends that such an obligation rested upon the applicant to negotiate a lease agreement in good faith, and that it failed to do so, accordingly, the condition was not fulfilled and the lease agreement could not be cancelled.
4. The fourth defence concerns the raising of a lien by the respondent in respect of necessary and useful improvements to the leased premises.
5. The fifth defence concerns the question of whether the respondent’s occupation is protected through clause 4.1 of the sales agreement.
6. The sixth defence concerns whether the applicant is entitled to relief evicting all persons occupying the leased premises and holding occupation through and under the respondent. The respondent contends these parties are subtenants of the respondent and should also have been cited.

7. The seventh defence concerns whether reasonable notice was given to terminate the lease.

[27] As regards the first defence, the respondent's legal representative argued that there is nothing in the papers which

identifies the occupied properties stipulated in the notice of motion with the actual premises that the respondent occupies. The respondent contended that the applicant has failed to specify how the occupied properties are related to annexure "A". The respondent's legal representative argued that the premises referred to in clause 1.1.9 of Annexure "A" is "Bay B" and not the three erven referred to in the founding papers. Accordingly, the actual premises are not described with sufficient particularity to constitute a basis for the conclusion that the respondent is in occupation and possession of the properties that it is to be evicted from.

[28] As regards the second defence, the respondent argues that the applicant set out no basis for cancellation of the lease agreement and was not entitled to cancel the agreement. In support of this the respondent contends that the applicant relied on a letter dated the 23rd of March 2018 marked as annexure "G" where at paragraph 2 of the letter it states that;

*"The lease agreement has lapsed and you are presently in occupation of the said property on the same terms and conditions as recorded in the lapsed lease agreement, on a month to month basis."*

[29] The respondent contends that the cancellation of the lease is ineffective because the letter evidencing the breach set out as Annexure "G" did not set out an intention to cancel the agreement and on such basis no cancellation is effective as between the parties. A creditor who intends to cancel a contract on the ground of a debtor's mora must also warn the debtor that in the event of his failing to rectify his default within a stipulated period, the creditor reserves the right to cancel the contract. The exact wording is immaterial provided the notice clearly and unequivocally informs the debtor that his failure to perform timeously may result in cancellation of the contract.

[30] As regards the third defence, the respondent contends that the applicant in a letter dated the 10th of May 2018, marked as Annexure "I" alleges that it was amenable to enter into a further lease agreement and that the

cancellation of the agreement was conditional upon a new lease agreement being formed on a good faith basis, which did not occur.

The respondent contended that in accordance with the decision of *Roazar CC v Falls Supermarket CC* (232/2017) [2017] ZASCA 166 the applicant was compelled to conduct negotiations in good faith and could not cancel the lease agreement without doing this.

[31] As regards the fourth defence, the respondent contended that it has validly raised sufficient facts and circumstances to justify the defence of a lien for useful and necessary improvements to the leased premises in the sum of R1 386 477.60, which have not been disputed in the applicant's replying affidavit. The respondent contends that it affected the improvements whilst under a valid contract of lease and in terms of the occupation of the

leased premises, and that it did so with the knowledge, concurrence and consent of the applicant. The respondent contends that the leased premises were valued by C2C Valuations CC, wherein the improvements increased the value of the premises by the sum of R4 275 000.00. As such the respondent contends it is entitled to the lesser of the sum of R4 275 000.00 or R1 386 477.60 (being the actual expenditure incurred in respect of the improvements). The respondent contends that the applicant's reliance on clause 10 of Annexure "A" which excludes a lien in terms of the written lease is problematic as Annexure "A" does not refer to the leased premises. The respondent contends that a further problem for the applicant is that an exclusion of a lien term is not incidental to the relation between landlord and tenant and any such term is not amenable to being relocated into a tacit lease agreement as is alleged by the applicant. Reference was made to the case of Doll House Refreshments (Pty) Ltd vs O'Shea and Others 1957 (1) SA 345 (T). Accordingly the respondent contends it is entitled to be compensated for the improvements affected to the leased premises and the applicant is not entitled to the eviction of the respondent from the property until such compensation is indeed paid.

[32] As regards the fifth defence, the respondent contends that its occupation of the leased premises rests in the alternative upon

clause 4.1 of the agreement for purchase of the un-surveyed properties referred to Annexure "C". The respondent contends that the occupation clause is severable from the voidness of the agreement. The respondent contends that regardless of the expiry

of the lease, the occupation and possession of the premises is to be accorded to the respondent pending the transfer of the un-surveyed

properties. The respondent contends further that it is common cause that the properties forming part of the sale agreement have not been transferred in any respect or at all to the respondent and hence the respondent's occupation is unassailable.

[33] As regards the sixth defence the respondent contends that there is no contradictory evidence as to the presence of tenants or not and as a result the applicant is not relieved from joining the said persons.

[34] As regards the seventh defence, the respondent contends that a month is not a reasonable period for the applicant to have given the respondent notice to vacate the premises as this was an indefinite lease.

#### APPLICANT'S SUBMISSIONS IN RESPECT TO THE SEVEN DEFENCES RAISED

[35] As regards the first defence, the applicant contends that as a result of a town planning process, the occupied properties became known as erf 8736 Benoni Extension 74, erf 8737 Benoni Extension 74 and the remaining extent of erf 2668, Benoni Township. The applicant further contends that it has personal knowledge of which properties are being occupied by the respondent, and they have always been the same properties.

- [36] As regards the second defence which is whether the lease agreement has been properly cancelled, counsel stated “annexure G” was not a letter of cancellation, it was a letter of demand. Counsel argued that this letter was incorrectly written by the applicant’s attorney to demand rental in respect of a new lease agreement which never came into being. Accordingly, this letter was not a letter of cancellation. Counsel stated this letter should be ignored as the applicant is not relying on a breach, instead the applicant is relying on reasonable notice of an indeterminate tacit lease agreement. Counsel argued the applicant was entitled to cancel on reasonable notice as per the authorities mentioned at paragraphs [23] and [24] (*supra*). Counsel argued that the tacit agreement was for an indeterminate period, and it was cancelled on reasonable notice.
- [37] As regards the third defence, where the respondent alleges that the applicant should have negotiated a new lease agreement on good faith is according to the applicant’s counsel factually incorrect as paragraph two of the letter dated the 10th of May 2018, namely Annexure “I”, unambiguously states that the agreement is cancelled. Paragraph three of the same letter, states that although the agreement is cancelled the applicant was amenable to enter into a new lease agreement, however if no lease agreement was entered into on or before the 31st of May 2018 the respondent was to vacate. Counsel argued the cancellation was not subject to a condition to negotiate a lease on good faith and that the respondent was wrong to rely on the case of *Roazar v Falls Supermarket* (*supra*), as that decision goes against the notion of placing a duty on parties to negotiate in good faith before cancelling a lease agreement. In fact Counsel argued, the case of *Roazar v Falls Supermarket* held that the parties had consciously bound themselves to a contract that provided that each party could terminate the contract of lease on one month’s notice in the event that there was no agreement on the renewal terms, and that a court was not competent to import a term not intended by the parties simply on the basis of the principle of “Ubuntu”.
- [38] As regards the fourth defence which pertains to a lien, Counsel argued that the tacit agreement in existence was on exactly the same terms and conditions as the lapsed agreement. Accordingly, if there was an exclusion of a lien in the original written agreement, then the tacit agreement also contained an exclusion of the lien. Counsel argued that although the actual agreement was not in the hands of either of the parties, the agreement that was annexed to the founding papers, namely Annexure “A” was an example of a lease agreement used and in each of the agreements entered into, the same clauses applied, with specific reference to clause 10 which states:

*“10 ALTERATIONS, ADDITIONS AND IMPROVEMENTS*

10.1 The lessee shall not make any alterations or additions to the Premises without the Lessor’s prior written consent.

10.2 Should such consent be given, upon vacating the Premises the Lessee is liable for the cost of cleaning, clearing and restoring the Premises and all parts thereof, including but not restricted to, the floors and foundations, to the condition in which it originally was fair wear and tear only excluded, unless the Lessor exempts the Lessee in writing or choices to retain such alterations or additions, which become the property of the Lessor without reimbursement or compensation.

10.3 Should the Lessee fail to return the Premises in a condition as stipulated in

10.2 hereof, the Lessor will have the right to rehabilitate the Premises to such condition and to recover the cost thereof from the Lessee on demand”.

Accordingly Counsel argued that in light of the contents of clause 10 there is no room for a lien to be exercised by the respondent.

[39] Counsel disagreed with the respondent’s reliance on the case of Doll House Refreshments v O’Shea (supra) as being authority for the principle that an exclusion of a lien term is not incidental to the relation between landlord and tenant or that such a term is not amenable to being relocated into a tacit lease agreement.

Counsel argued that the Doll House Refreshment v O’Shea case stated that if there is a term that is not incidental to the relationship between a landlord and tenant, then one would not expect that term to be relocated in a tacit agreement. However, this term specifically prohibited any alternations or additions to be effected to the premises without the applicant’s written consent. Accordingly it was a clause incidental to the relationship between landlord and tenant and did not fall within the exceptions raised in the Doll House Refreshment v O’Shea supra. Counsel accordingly argued that clause 10 was relocated to the tacit agreement.

Counsel added all the prior written lease agreements entered into between the parties contained a clause to the effect that the respondent was prohibited from effecting any alternations or additions to the premises without the applicant’s written consent and that if it did, the applicant would not be liable to the respondent therefore. Accordingly, the respondent could not now come and say this clause was expressly excluded as the respondent had admitted that the tacit agreement was on exactly the same terms and conditions as the relocated agreement, or lapsed agreement.

[40] As regards the fifth defence the applicant’s counsel stated that clause 4.1 was void ab initio. Clause 4.1 of the sale agreement which is marked as annexure “C” states as follows:

*“4. OCCUPATION AND POSSESSION*

4.1 The Purchaser is already in occupation and possession of the Property on date of signature of this Agreement in terms of a lease agreement attached hereto as Annexure “B”. The lease agreement expires on 31 May 2008. The purchaser

shall however remain in occupation of the Property on the same terms and conditions as contained in Annexure “B” but on a monthly basis until registration of the Property in the name of the Purchaser.”

Counsel pointed out that clause 2 of this sale agreement refers to certain un-surveyed portions of certain immovable properties. From the respondent’s answering affidavit it is clear that the leased premises formed part of the un-surveyed Portions. Counsel argued it is absurd that clause 4.1 could have survived the voidness as the agreement of sale was void from the outset. Clause 4.1 refers to the un-surveyed portions of these properties which can never be transferred to the respondent, and for the respondent to rely on the fact that these properties still need to be transferred to it is absurd as it would suggest that the respondent would be in possession in perpetuity.

[41] As regards the sixth defence pertaining to the non-joinder of tenants. Counsel referred me to an e-mail from Gary Abkin (the respondent) to Alex Slater (the deponent to the applicant’s affidavit) dated the 11th of October 2018, where it is stated;

*“Please note we are now confirming that as of the 01 December 2018 there will be no tenants...”*

On the basis of the contents of the above-mentioned e-mail the applicant decided it was not necessary to join any sub-tenants. In addition, Counsel argued that in eviction applications it is not necessary to join sub-tenants as the other parties who are affected by this eviction and who are sub-tenants, must look at the respondent for their relief.

[42] As regards the seventh defence that the applicant’s time period for the termination of the lease was not reasonable, Counsel referred me to the respondent’s answering affidavit at paragraphs 26 and 27 where it is stated;

#### Paragraph 26

*“As a further point of contention and for the sake of completeness, the Applicant concedes that a tacit lease was in place pursuant to the averments at paragraph 8 of the founding affidavit on a month to month basis...”*

#### Paragraph 27

*“Gary Steel CC, and later the Respondent, have been in occupation of the leased premises since 1999, ... and as such vacation in the time periods set out in annexure “I” to the Applicant’s founding affidavit were unreasonable and impossible.”*

Counsel argued that from the above statements, the respondent admits that a tacit lease agreement was in place and fails to address what a reasonable time period would be to disassemble the machinery, namely, whether it would take a month or six weeks to remove everything from the premises. Counsel argued that if the respondents are silent in this respect, then one cannot determine whether the seven week period that was given to the respondents in terms of the letter was reasonable or not. In fact, Counsel argued that the only inference that can be made is that the time period was reasonable.

## EVALUATION

[43] As regards the first defence, I find that there is ample proof on the papers that the properties as described in the notice of motion are the properties occupied by the respondent. It seems that the respondent wanted the applicant to describe the properties as they were known previously, before the town planning process was finalised. However, as stated by the applicant's counsel, the town was established and these properties are now known as erven, and that these are the erven that they are known as. The respondent has also admitted in its answering affidavit that the leased premises formed part of the un-surveyed Portions.

[44] Even if I am wrong in this regard, there is an admission made by the respondent's attorney in a letter dated the 25th of April 2018, namely Annexure "H", where the respondent refers to two of the erven in the applicant's notice of motion. The heading of that letter reads as follows;-

*"Re: OUTSTANDING RENTAL IN RESPECT TO ERVEN 8736 AND 8737 BENONI EXTENSION 74 SITUATED AT DUNSWART BENONI"*

I am further satisfied that in line with the letter dated the 23rd of March 2018, marked as annexure "G", sent by the applicant to the respondent, that the heading on that letter

confirms that the occupied properties are those mentioned by the applicant. The heading of this letter states;

*"OUTSTANDING RENTAL IN RESPECT OF ERVEN 8736 AND 8737 BENONI EXTENSION 74 SITUATED AT DUNSWART, BENONI"*

[45] Although the respondent's legal representative argued that the occupied premises were not clearly identified on the sketch plan, I corrected the legal representative and informed him that one of the three erven mentioned in the notice of motion, namely 2668, was indeed reflected on this sketch. Although the other two erven are not reflected, from the above mentioned correspondence dated the 23rd of March 2018 and the 25th of April 2018, it is clear that the applicant is dealing with the properties which the respondent occupied.

[46] The respondent has also never moved out of the original leased premises and has been there since 2008. It is clear to me that the applicant has personal knowledge of which properties are being occupied by the respondent, which have always been the same properties and that they are those described as the occupied properties in its founding affidavit. There cannot be any confusion regarding which properties the respondent is occupying.

Accordingly I find that the first defence cannot be sustained and cannot assist the respondent and is dismissed.

[47] As regards the second defence it is clear that the agreement which was in place between the applicant and respondent was a tacit agreement and for an indeterminate period. The applicant is relying on reasonable notice of an indeterminate tacit lease agreement in order to cancel the tacit lease agreement. The applicant is not relying on a breach. The letter dated the 23rd of March 2018, Annexure “G” also stated at paragraph 2 that although the lease agreement has lapsed, the respondent would occupy the said property on the same terms and conditions as recorded in the lapsed lease agreement and that would be on a month to month basis. Therefore the notification given by the applicant on the 10th of May 2018, in Annexure “I” that the lease would be cancelled with effect from the 1st of July 2018 was more than sufficient time as it was seven weeks. Accordingly in line with the reasoning of the case of *Airports Company v Airports Bookshops* (supra), this agreement was correctly cancelled on reasonable notice and the second defence fails and is dismissed.

[48] As regards the third defence the case of *Roazar v The Falls Supermarket* (supra), cannot assist the respondent. I cannot find that the applicant should have first tried its utmost to reach a new agreement with the respondent. As stated by the learned Tshiqi JA at paragraph [13] in the of *Roazar v The Falls Supermarket* (supra);

*“As general rule an agreement that the parties will negotiate to conclude another agreement is not enforceable because of the absolute*

*discretion vested in the parties to agree or disagree.[1]”*

[49] The respondent never sent a written notice to indicate its intention to exercise the right of renewal. The parties could not agree on a new agreement on new terms and accordingly the applicant was entitled to cancel the agreement as it did. Proper notice was given to the respondent to vacate and the respondent did not comply. It is clear that the parties have been at loggerheads for a considerable amount of time. This is clear from the applications and action that the respondent launched in the Transvaal Provincial Division of the High Court against the applicant under case number 23395/04, case number 8528/2011, and the application for an interdict launched against the applicant on the 15th of November 2017.

It is clear to me that no negotiation could take place and that no agreement was reached. It would be against public policy for any court to coerce a lessor to conclude an agreement with a tenant whom it does not want to have as a tenant any longer. The respondent can accordingly not rely on this third defence and it is dismissed.

[50] As regards the fourth defence there is no authority for the respondent’s contentions that, if the written agreement lapsed

the tacit agreement would have had a lien in place. Accordingly it must follow that clause 10 was incorporated into the tacit agreement

and accordingly that there was no lien. In the case of *Doll House Refreshment v O'Shea* (supra) the court held that “where the relocation of a lease which has expired is tacit, there is a presumption that the property is re-let at the same rent and that those provisions that are “incident to the relation of landlord and tenant” are renewed. But provisions that are collateral, independent of and not incident to that relations are not presumed to be incorporated in the new letting.”

- [51] I find that such a clause is incidental to the relationship between landlord and tenant and can see no reason why it would not apply in the tacit agreement as well. Even if I am wrong in this regard, there is nothing preventing the respondent from launching an action against the applicant to reclaim the amount that it alleges it was entitled to. Such amounts are still in dispute and would need to be proven by the respondent. Such pending action cannot prevent me from making an order in respect to the application before me which is for an eviction. Accordingly, in respect to the fifth defence, the respondent fails and it is dismissed.
- [52] As regards the sixth defence the notice of motion was filed on the 11th of July 2018. The e-mail received from the respondent stating that there were no sub-tenants was sent on the 11th of October 2018. Although the answering affidavit states there were subtenants, I cannot fault the applicants for not bringing an application at a later stage to join sub-tenants as the letter of the 11th of October 2018 clearly stated there weren't any. Therefore the respondent's contention that there is no contradictory evidence as to the presence of tenants or not, at the date of the deposition of the founding affidavit, and that such does not relieve the applicant from joining the said persons I find holds no merit. The applicant only has locus standi against the party that it had an agreement with, and not the sub-tenants which are in any event not clearly described by the respondent. Accordingly this sixth defence is also dismissed.
- [53] As regards the seventh defence, the applicant made an allegation that a seven week period was reasonable. The respondent did not provide any facts to the contrary. I cannot find that the period of notice given by the applicant was unreasonable. The learned author W E Copper in *The South African Law of Landlord & Tenant* 2nd edition at pages 65-66 states that;

*“A periodic lease continues until it is terminated by notice given by either party. In the absence of agreement to the contrary notice must be given a reasonable time before the date on which a party decides to terminate the lease. The period of such notice must be such that the lessor has a reasonable opportunity of letting his premises or the lessee of finding other premises. A day's notice is considered reasonable in the case of a daily lease; a week's notice in the case of a weekly lease; and a month's notice in the case of a monthly lease; but there is no fixed ratio between the period of the lease and the notice period.”*

The case of *Wasmuth v Jacobs* (supra) also confirms that in the case of a lease with no terminal point, the common law imposes a legal duty on the lessor to give reasonable

notice to terminate the lease.

[54] The reliance of the respondent on the settlement agreement as being a ground upon which it could remain in the occupied property is also wrong as the settlement agreement is void ab initio and clause 4.1 is accordingly also void ab initio. The tacit lease was cancelled by the applicant so there is nothing on which the applicant can rely to extend its continued stay in the occupied properties. The contents of the letter dated the 10th of May 2018, Annexure “I”, is very clear and I accordingly find that the time period given by the applicant was reasonable and the seventh defence is dismissed.

[55] Accordingly I find that the applicant is entitled to an order for the eviction of the respondent.

## COSTS

[56] The applicant’s Counsel requested costs on the scale of attorney and client and argued that the respondent should be

penalised as the respondent has been in occupation of the premises now for almost a year where it had no grounds to be in such

occupation. Counsel has requested a punitive cost order based on the attitude of the respondent in occupying these premises when there are no grounds for the respondent to remain in occupation.

[57] In general a court does not grant attorney and client costs unless there are special grounds. There is no indication that the respondent’s conduct during litigation was reckless, malicious or frivolous. Accordingly such a request for punitive costs is denied.

## ORDER

[58] In the premises the following order is made;

1. That the respondent and all those persons holding through or under it, be ordered to vacate the following immovable properties occupied by it (“the occupied properties”) within 30 days from the date of this order:

- 1.1 Erf 8736 Benoni Extension 74;

- 1.2 Erf 8737 Benoni Extension 74;

- 1.3 Remaining Extent of Erf 2668, Benoni Township;

2. In the event of the respondent, and/or all those persons holding through or under it, refusing and/or failing to vacate the occupied properties as set out in prayer 1, that the Sheriff be duly authorized to evict the respondent, and all those persons holding through or under it, from the said properties;

3. The respondent is ordered to pay the costs.

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ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff

Adv

DT v R Du Plessis SC

Instructed Deon Rens Attorneys

On behalf of the Defendant

Mr G. Seagal

Heard on the 28th May 2019

Judgment handed down on the 23rd of August 2019

[1] (see Premier, Free State and others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA),  
Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA))

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CASE PAGE              <https://chat.esheria.ai/case-law/south-africa/arcelormittal-south-africa-limited-v-norman-unknown-topic-agpjhc-2019>

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