

SOUTH AFRICA / JUDGMENT

JBF Investments (Pty) Ltd v Stewarts Lloyds Holding (Pty) Ltd (2016/01916) [2018] ZAGPJHC 399 (28 May 2018)

[2018] ZAGPJHC 399

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mashile

CASE / FILE NUMBER

2016/01916

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OF THE CHIEF JUSTICE

REPUBLIC

OF SOUTH AFRICA

HIGH COURT

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO:

2016/01916

Date

of Hearing:

Date

of Judgment: 28 May 2018

(1)

REPORTABLE

(2)

OF

INTEREST TO OTHER JUDGES

(3)

REVISED.

In the matter

between: JBF
INVESTMENTS (PTY)
LTD
Applicant
and
STEWARTS
LLOYDS HOLDING (PTY) LTD
Defendant

JUDGMENT

MASHILE J:

Introduction

[1] The defendant is a conglomerate of previously fragmented independent private companies with presence virtually in all the provinces in this country. One of those companies conducted business in Hazyview from premises let to it by the Plaintiff as a lessor. The premises comprised Shops 1, 2, 3 and 4 situated on Portion 52 (a Portion of Portion 1) known as Dagbreek of the farm De Rust 12 JU Mpumalanga (“the premises”), The written lease agreement (“the 2010 lease”) between the predecessor of the Defendant and the Plaintiff endured for a period of three years having commenced on 1 May 2010 and ended on 31 May 2013. The termination of the 2010 lease happen together with the consolidation

of the various independent private companies under one umbrella from which date they all operated their businesses as the Plaintiff.

[2] The parties subsequently commenced negotiations aimed at entering into another written lease agreement. I shall henceforth refer to that lease agreement as ‘the 2013 lease’. The Plaintiff alleges that the 2010 lease that was used between it and the predecessor of the Defendant was transposed and became the 2013 lease with few changes relating to the amount of monthly rental and lease period. The Plaintiff pleads that the 2013 lease was presented to the Defendant as an offer capable of acceptance by the Defendant. Subsequently and on a date unknown to the Plaintiff,

the offer was accepted by the Divisional Managing Director of the Defendant, Mr Hadley (“Hadley”), who represented the Defendant.

[3] Conversely, the Defendant pleads acknowledgment of receipt of the 2013 lease from the Plaintiff but avers that in its unsigned form, it was purely an invitation to business and was not an offer capable of acceptance. The Defendant asserts that no lease agreement, other than as alleged below, came into existence between the parties after the termination of the 2010 lease. The Defendant pleads further that when the 2010 lease ended between the predecessor of the Defendant and it on 31 May 2013, a month-to-month lease agreement terminable by furnishing a one month notice to the Plaintiff came into operation. The

Defendant cancelled the month to month lease by furnishing the one month written notice reckoned from 31 December 2014. The Plaintiff seeks an order declaring that the 2013 lease came into being which, if decided in its favour, will enable it to claim rentals beyond August 2014.

The issue

[4] The principal issue that requires resolution is whether or not the 2013 lease is an agreement capable of enforcement notwithstanding that it has been signed or not by the one party or the other. In answering that question, one must determine whether or not:

4.1 Animus contrahendi existed between the parties;

4.2 The parties concluded a month to month lease immediately at the expiration of the 2010 lease on 31 May 2013.

[5] The parties are on opposite sides of the fence on this matter, which is what prompted these proceedings in the first place. In its endeavour to prove its case, the Plaintiff adduced the evidence of Mr Gardee (“Gardee”) alone and the Defendant called Hadley and Mr Thomas (“Thomas”) to give evidence on its behalf.

The case of the plaintiff:

[6] Gardee was the only witness of the plaintiff. His testimony is that he was in charge of the negotiations aimed at the conclusion of a new lease agreement, the 2013 lease, between the Plaintiff and the Defendant. He played a similar role when the 2010 lease between the Defendant’s predecessor and the Plaintiff was concluded. Accordingly, he bore the administrative responsibility of the affairs of the Gardee family business. He recalled signing the 2013 lease at the offices of the Defendant in Bedford View in the presence of a certain lady whose name escaped him at the time of his evidence

in court.

[7] He subsequently left it in her possession to hand over to her superiors to sign and to return it to him for safe keeping. He testified further that the 2013 lease remained in the Defendant’s possession even on the date of hearing of this matter. As the period of expiry of the 2010 lease agreement was drawing closer, he contacted Mr Lavis (“Lavis”), with whom he concluded the 2010 lease, to establish what the Defendant’s position was whereupon Lavis gave him the particulars of Hadley who had taken over as the head of the Defendant in the Mpumalanga area.

[8] Following his establishment of contact with Hadley, the latter paid him a visit at his home in White River where they embarked on introductory discussions regarding the 2013 lease. Their White River discussions culminated in Gardee furnishing the 2010 lease to Hadley to acquaint himself with the terms and conditions thereof. Thereafter, they went their separate ways until they met again at the Protea Hotel in Midrand in or around April 2013. He stated that

at their second meeting in Midrand, they concluded that the terms and conditions would be similar to the 2010 lease save for the difference in the duration, rentals and escalation. They also agreed that Hadley would compile a snag list of matters that the Plaintiff would repair.

[9] It was not contested that the snag list comprised predominantly of items, which in terms of the 2010 lease, the Defendant was to have repaired. The 2010 lease provides that all internal items were to be fixed by the Defendant failing which the Plaintiff was entitled to repair them and be reimbursed. Gardee testified that the Plaintiff agreed to attend to the faulty items on the snag list covering mainly interior items which would otherwise have been the Defendant's obligation. He stated that the Plaintiff was beholden that the Defendant was entering into a 5-year lease agreement with it. Besides, Gardee did not want any disputes about maintenance issues in the future.

[10] The period of the 2013 lease was also discussed and agreed. After haggling on whether the duration would be the same as the 2010 lease or that it should be as per the three year option as provided in the 2010 lease, the parties ultimately settled on a five-year lease. Gardee also offered the Defendant more space in the basement of the building to which Mr Hadley said he would revert. Following that meeting, Gardee formulated the proposed lease on the basis of the 2010 lease except that it had a five-year period and different rental as agreed with Hedley. According to Gardee, his impression when he left the Protea Hotel meeting was that a lease agreement had been concluded. Preparing the 2013 lease was,

therefore, in his opinion, a matter of record.

[11] On 2 May 2013, Gardee forwarded an e-mail message to Hadley advising him that he would be in Johannesburg for two weeks from 8 May 2013 to finalise the 2013 lease. Hadley informed Gardee that in view of the restructuring of the Defendant, the previous tenant as per the 2010 lease was to be substituted for the present Defendant. On the same day, 2 May 2013, Hadley responded to Gardee by e-mail to which he attached the snag list that was discussed between them at the Protea Hotel meeting. On 6 May 2013, Hadley sent a document, which had all of the Defendant's details. The document was completed in manuscript by a representative of the Defendant.

[12] The document described Hadley as the Divisional Managing Director of the Defendant at the time and contained most of the information that he required for the 2013 lease, Gardee settled it. He subsequently contacted Hadley to establish a convenient place where they could meet for purposes of appending their signatures to it. Hadley advised him that he would not be available but directed him to the Defendant's head office in Bedfordview where

he would leave it. Gardee testified further that he had to physically go to the offices of the Defendant in Bedfordview because he wanted to sign it and leave it with the Defendant for its signature.

- [13] He met a lady, whose name slipped his mind at the time of his testimony, in the boardroom of the Defendant. He explained the purpose of his visit notwithstanding that the lady was expecting him. He told her that he wanted to sign the 2013 lease and to leave it with the Defendant for signature by the designated executives and specifically requested that the original document be forwarded to him once the relevant individuals have attached their signatures to it. He initialled all the pages except the signature page on which he signed in full and then left it in the possession of the lady.
- [14] On 1 June 2013, and following his visit to the head office of the Defendant, Gardee wrote an e-mail message to Hadley advising that in terms of the new lease which had been signed (referring to the 2013 lease) the rental payable increased. Gardee's further testimony is that the Defendant responded by paying the escalated amount as per the 2013 lease. On 17 June 2013, Gardee was once again in Johannesburg and he took that opportunity to inform Hadley by e-mail message that he had until then not received the 2013 lease. He told Hadley that he would be willing to reschedule his plan to ensure collection of the document if it was ready.
- [15] On 19 June 2013, Hadley replied to Gardee's message of 17 June
2013. The subject of the e-mail message of Hadley is, "Lease and outstanding balances on rent and electricity". It is common cause that Hadley was silent to Gardee's request that the rental would be in terms of the new lease and that he did not sound astounded at the expression, 'new lease'. (2013 lease). With regard to the signature of the 2013 lease, Hadley advised that the two directors of the Defendant had asked that his (Hadley's name) be added to the suretyship agreement, which was an integral part of the 2013 lease. Hadley added that the rest of the 2013 lease had been signed and asked Gardee if he could modify it accordingly.
- [16] Gardee stated that insofar as he was concerned the issue pertaining to the addition of his name to the suretyship was a post contractual variation the 2013 lease having been concluded between the parties already. On 1 July 2013, Gardee wrote to the Defendant to which he annexed a copy of a statement that showed a balance that matched with the first period in the new 2013 lease and reminding it that the escalated rental in terms of the new lease must be paid.
- [17] On 8 August 2013 and noting that the Defendant was not favouring him with positive answer to his previous e-mail messages regarding the 2013 lease, Gardee wrote a letter to the Defendant for the attention of Hadley advising that he would be in Hazyview on 12 August 2013 and asked if he could collect the 2013 lease as arranged. Gardee stated that he had always thought that the 2013 lease had been signed. On 4 October 2013, Hadley responding to Gardee by letter, wrote: "As advised previously the new lease has been signed and is in Nelspruit."

- [18] On 12 March 2014, the Defendant acknowledged in writing to the Plaintiff that the snag list had been completed to its contentment. In March 2014, Hadley resigned and Mr Henry Kershaw (“Kershaw”) replace him as the new regional director of the Defendant in Mpumalanga. The Defendant through Kershaw, on 23 July 2014 gave a one month written notice effective from 1 August 2014 to vacate the premises to the Plaintiff stating that it was tendering the August rental as its last and that no further rentals would be forthcoming from it from that date onwards. The Defendant was aiming to leave the leased premises at the end of August 2014.
- [19] Again, on 1 September 2014, Kershaw wrote another letter to the Plaintiff wherein he confirmed that the Defendant had officially left the premises and sought acknowledgment of receipt of his notice dated 23 July 2014. In response, Gardee wrote to Kershaw on 9 September 2014 and said:
- “Please be advised that your above referenced communication to us is a clear repudiation of our lease agreement and our rights in this regard remain reserved. We do not accept such repudiation and our agreement remains of full force and effect. We dispute your assertion that no lease agreement exists between us.”*
- [20] Responding to Gardee’s letter on the same day, Kershaw requested that he be furnished with the ‘lease agreement’ mentioned in the third paragraph of Gardee’s letter dated 9 September 2014. On 29 September 2014, Kershaw wrote another letter to the Plaintiff stating that payment for August rental 2014 would be released upon confirmation of the cancellation of the 2013 lease at the end of August 2014. In the same letter, Kershaw also expressed the Defendant’s readiness to assist in finding a new tenant should it be necessary.
- [21] Gardee testified further that a representative of the Plaintiff held a meeting with Kershaw. It is recorded in the minutes of that meeting that Kershaw was “informed by his management” that a “month-to-month lease agreement” was in place and he also acknowledged that there was no proof of this agreement in writing given to him. Kershaw also acknowledged the e-mail message that was sent on 4 October 2014 by Hadley wherein he states that the proposed lease was signed.
- [22] On 2 October 2014, Gardee wrote to the Defendant to advise that the Plaintiff would not consent to the cancellation of the 2013 lease and that he regarded the Plaintiff’s right to claim rentals for the balance of the lease period as still intact. On 10 November 2014, the Defendant’s attorney of record, Mr Christie (“Christie”),

acting under instructions of Messrs DP Franks and GD Thomas who were the duly authorised representatives of the Defendant, wrote a letter to the Plaintiff stating that his client was unaware of the terms of the 2013 lease since Hadley was no longer in the Defendant’s employ.

- [23] Christie's letter continues to state that had the Defendant been cognisant of the existence of the 2013 lease, it would not have ceased its commercial activities of the Hazyview branch. During a telephone call made by Gardee on 15 September 2014 to Hadley who was at the time not in the employ of the Defendant anymore, the latter confirmed that the agreement was signed. The telephone conversation was recorded, transcribed and forms part of the documentary evidence before this Court.
- [24] Gardee prepared and presented a statement of the amount due by the Defendant in terms of the 2013 lease. It is common cause that in spite of the Defendant having vacated the premises at the end of August 2014, ten months later, the Defendant settled the amount that was due up to and including December 2014.
- [25] Under cross-examination, Gardee persisted that he visited the offices of the Defendant in Bedford View but could not remember the precise date. He thought that the offices of the Defendant were located in Block B of the office park that he visited. He confirmed that he met the person that he was told to meet and that served as confirmation that he went to the right offices.
- [26] He reiterated that he did not take a copy of the 2013 lease because it still had to be signed by the nominated persons from the Defendant. He confirmed that he left specific instructions with the lady in whose presence he signed the 2013 lease that it must be forwarded to him immediately after the Defendant had signed. He did not sign the three pages in manuscript but did so electronically. According to him the resolution was never part of the 2013 lease. It was put to him that there was one annexure that was missing and that the 2013 lease could not therefore have been complete. His

answer was that amended page five of the proposed lease was only sent three to five months later.

- [27] It was further suggested to him that the 2013 lease could not have been the operational document at the time because it required changes. The Plaintiff was still attending to the snag list, which took it from May 2013 to March 2014. The last item of the snag list points to the back entrance being unsafe and ought therefore to have been extremely important. Thirty six lights were not working and it was put to him that it was one of those central things that had to be repaired. Water leakage was another major complaint. The suggestion here was that the 2013 lease could not be returned because the Plaintiff was still attending to some of the complaints.
- [28] It was further put to him that it took the Plaintiff ten months, May 2013 to 2014, to repair all the complaints recorded on the snag list. His response was that the complaints could not have hindered the Defendant to conduct business because it remained in occupation throughout the period. He denied that the Hazyview branch of the Defendant closed because business was bad and stated that it was rather a consolidation of the Nelspruit and Hazyview branches.

- [29] Gardee's cross-examination did not accomplish any material contradictions. This could have been due to the fact that a large portion of it was supported by documentary evidence. Most of his evidence, with few exceptions, was therefore common cause. That said, it is important to state that the difference is clearly on the meaning that each party assigned to the facts. This will become manifest when I evaluate the testimony of the various witnesses later.

The case of the Defendant:

- [30] The Plaintiff closed its case after leading Gardee. The Defendant called Hadley as its first witness. He testified that he had worked for the Defendant for twenty-six years and that he was now self-employed. He confirmed his meeting with Gardee at the Protea Hotel in Midrand and that they discussed the renewal of the 2010 lease between the Defendant's predecessor and the Plaintiff but did not finalise the terms and conditions as they had to be approved by Messrs Frank and Thomas. However, when he parted with Gardee on that day, the agreement was that Gardee would prepare the 2013 lease based on the 2010 lease, which he did.
- [31] Hadley stated that by 2 May 2013, he had obtained all the information that Gardee required to finalise the 2013 lease, which he then forwarded to him together with the snag list. He confirmed that he received an e-mail message from Gardee on 17 June 2013 asking him if he could collect the signed 2013 lease. The two shareholders of the Defendant, Messrs Franks and Thomas, decided that he (Hadley) be added as a surety. Hadley also confirmed that he received an e-mail from Gardee wherein the latter stated that he would be in Hazyview and asked if he could collect the signed 2013 lease.
- [32] His reply to Gardee's request was that the 2013 lease had been signed and was at the Nelspruit branch. His further testimony is that the 2013 lease was not handed back to Gardee because the Defendant was in the process of deliberating on the future of the Hazyview branch. Messrs Thomas and Franks debated the future of the Hazyview branch with him. The branch showed no profit and there were burglaries as a result of the state of the building. There were problems with the back door, the front door and the roof. He stated that he worked for the Defendant until the third week of November at which stage he suffered a nervous breakdown. From that time onward he had no further dealings with Gardee having handed
- over to Kershaw.
- [33] The decision that he should not hand over the signed 2013 lease to Gardee was taken by Messrs Thomas and Franks. The latter specifically instructed him to take it back to their offices in Bedfordview. He did not sign it because he was not certain of his future with the Defendant. Besides, he also thought that it was not worth his while to sign it in any capacity because he only had a 2% shareholding. He discussed his reluctance to sign it with management particularly, Franks. He saw the 2013 lease in Pretoria and Bedfordview but it was not signed on behalf of the Plaintiff. He knew that it was in Nelspruit but he did not physically see it there.

- [34] Under cross-examination, Hadley stated that his position with the Defendant became somewhat precarious after November 2013, following his nervous breakdown. Before that, he had grown from a trainee to a divisional managing director. He agreed that the 2010 lease was signed by Lavis having derived his authority from a resolution. He conceded that the 2013 lease did not have a resolution accompanying it even though it contains a clause that makes a provision for such. Hadley disowned the document that emanated from Gardee on 2 May 2013 requiring further particulars for purposes of finalising the proposed lease. He acknowledged that it had been completed in manuscript but denied that the handwriting is his.
- [35] It was put to him that he in fact forwarded the further particulars as requested by Gardee on 6 May 2013. He initially denied having sent the document but when confronted with his aforesaid e-mail message showing that he had actually done so, he reluctantly admitted to sending it. Following receipt of the particulars, Gardee prepared the 2013 lease inserting his name as per the request of Messrs Thomas and Franks. He agreed that Gardee was being led on because the Defendant did not intend to sign and that this was both unfair and unethical. He further agreed that he was not happy to lead Gardee on telling him that the proposed lease was ready when he knew the opposite to be true.
- [36] He conceded that there could not have been a month to month lease in June because he had advised Gardee that the 2013 lease had been signed. Besides, he did not discuss a month to month lease with Gardee at all. He thought that the lease was dropped off at the Pretoria branch and not at the head office in Bedfordview. It was pointed out to him that his assertion in that regard contradicted a message that clearly indicates that it had been left at the head office in Bedfordview. He denied having seen a partly signed lease agreement at Bedfordview or Pretoria. Hadley also conceded that had there been a boom period, the Defendant would have insisted that the 2013 lease was valid.
- [37] The second and the last witness of the Defendant was Thomas who is one of two major shareholders and a joint Chief Executive Officer of the Defendant, the other being Franks. He testified that the Defendant would not have entered into the 2013 lease in circumstances where its Hazyview branch was experiencing a substantial loss of business. Moreover, he continued, the Defendant would not have concluded the 2013 lease with the Plaintiff because the premises had become uninhabitable and were in a state of neglect or if it needed to, it would not have been for a five year term.
- [38] Thomas agreed that he did not participate in the discussions concerning the 2013 lease, which occurred between Hadley and Gardee but Hadley kept him abreast of developments. He confirmed that he and Franks were the duly authorised signatories and that both of them signed the 2013 lease after they had perused it. He specifically instructed Hadley not to proceed with execution thereof as the Defendant was in the process of weighing the viability of Hazyview as a branch. He was steadfast that Gardee did not sign it.

- [39] He was certain that a month to month lease was concluded between the Plaintiff and the Defendant and that the latter was represented by Kershaw. According to him, it was the belief in the existence of the month to month lease agreement that Kershaw gave a one month written notice to vacate the premises.
- [40] Under cross-examination, Thomas was confronted with the fact that Kershaw could not have represented the Defendant when the month to month lease agreement was concluded firstly, because that will be in conflict with the allegation in the Defendant's pleadings to the effect that the month to month lease commenced in June 2013. Secondly, Kershaw's communication with the Plaintiff was in July 2014 when he forwarded the notice to terminate having started work with the Defendant in March 2014. Again he was told that this could not have been the case as it is head to head with the fact that the month to month was concluded in June 2013 when one has regard to the pleadings.
- [41] He later stated that it was in fact Hadley who negotiated the month to month with Gardee but this too was shot down on the basis that Hadley's testimony is that he and Gardee did not touch on the subject of a month to month lease at all. It was put to him that his assertion that he would not have entered into an arrangement with the Plaintiff because the building was in a state of neglect and that the Plaintiff was still attending to the snag list did not make sense as the matters on the snag list were those that had to be attended by the Defendant in terms of the 2010 lease.
- [42] Besides, such matters were not raised until 2013 when they were raised not by the Defendant but by Gardee on behalf of the Plaintiff. Thomas could not produce any evidence of complaints raised prior to the snag list. He appeared stunned when it was put to him that in March 2014, Hadley acknowledged to Gardee that all the matters on the snag list had been attended to the satisfaction of the Defendant.
- [43] It was put to him that his reasons for stating that he would not enter into the 2013 lease with the Plaintiff were absurd because he signed it anyway. His comment was that he had initially intended the Defendant to be bound by the terms of the 2013 lease. However, subsequently he abandoned the idea and gave instructions to Hadley not to execute in view of the Plaintiff still carrying on the repairs as per the snag list and that the Defendant was also weighing up whether or not to keep the Hazyview branch operational having regard to its loss of profit.
- [44] It was also put to him that the fact that Gardee drove to drop off the 2013 lease at Bedford View suggests that he signed it. It was proposed to him that the aforesaid must be accepted to be the case because forwarding it by e-mail would otherwise have been the most practical and sensible thing to do in the circumstances. He still denied that the 2013 lease was signed by Gardee and further stated that he did not know who dropped it off at Bedfordview.

Legal principles:

- [45] It is trite that, with the exception of certain agreements specifically mentioned in statutes such as the Alienation of Land Act 68 of 1981 and the Deeds Registries Act 47 of 1937, contracts concluded orally are recognized in law. Such contracts are commonly valid and binding despite that they are not in writing. See in this regard Christie's the Law of Contract in South Africa 2016 7th ed in Chapter 3 entitled 'Formalities'.
- [46] A more involved area is where the parties have reduced the oral contract to writing but neither party has signed it or where the contract is in writing and signed by one of the parties alone or is in writing but with no specific provision that it will not come into operation if not signed by both parties. In those instances, it is settled that a court will have to refer to the surrounding circumstances to determine what the intention of the parties was to establish its validity.
- [47] In this regard it could be instructive to refer to *Meter Motors (Pty) Ltd v Cohen* 1966 (2) SA 735 (T) 736-7 where Snyman J paraphrased the three writings envisaged by Innes CJ in *Goldblatt v Fremantle* [1920 AD 123]:

47.1 A memorandum that serves to show that the parties concluded an oral contract;

47.2 A writing which embodies the agreement of the parties, although not signed; and

47.3 A written document whose terms cannot come into operation unless signed by both parties.

- [48] In *Nedbank v Usibenzo Trading CC* 2010 JOL 26053 ECP the court considered an agreement that was signed by one of the parties only. It held that where an agreement had not been signed by the one party but only by the other, was binding. In reaching that conclusion, it stated as follows:

"[6] It was submitted on behalf of the applicant that failure by the applicant to sign the agreement is not fatal to the agreement. This is particularly so, it was argued, as the applicant had advanced the money which is the subject matter of the agreement and the respondent had accepted it. In Goldblatt v Fremantle 1920 AD 123 at 128-129 Innes CJ held that:

' Subject to certain exceptions, mostly statutory, any contract may be verbally entered into, writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court would assume that the object was merely to afford facility of proof of a verbal agreement, unless it is clear that the parties intended that the writing should embody the contract (Grotius 3.14. 26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see Voet 5.1.73 Van Leeuwen 4.2., sec. 2, Dekker's note); and in that case there will be no binding obligation until the terms had been reduced to writing and signed. The question is in each case one of construction.

In *Woods v Walters* 1921 AD 305, Innes CJ referred to the above passage and added:

‘It follows of course that where the parties are shown to have been ad idem as to the material conditions of the contract the onus of proving an agreement that legal validity should be postponed until due execution of a written document lies upon the party who alleges it.’”

Evaluation and assessment:

- [49] From the evidence of the parties above this Court is required to determine whether or not there was animus contrahendi or intention to contract between them. Inextricably linked with the question of animus contrahendi is whether the Plaintiff handed over to the Defendant a document that was capable of acceptance or not. These two questions cannot be answered without conducting a factual enquiry into the circumstances under which the agreement is claimed to have been concluded.
- [50] Hadley agreed that he met with Gardee in White River and their meeting culminated in the latter printing the 2010 lease and handing it over to him to familiarise himself with the terms as he intended to base the 2013 lease largely on it. Gardee prepared the 2013 lease and presented it to Hadley at their meeting held at Protea Hotel in Midrand. The parties finalised their negotiations and Gardee went back to prepare a final document, which he later wanted to present to Hadley for signature but was told to deliver it at the Defendant’s Bedfordview offices. At this stage there seemed to have been no loose terms and conditions lingering over the document it being irrelevant whether or not it was signed because it
- was ready for acceptance.
- [51] I am conscious that the parties spent some time on the question of ‘no variation except in writing ...’ clauses 2 and 42 and ‘entire agreement...’, clause 43’ of the 2013 lease. I do not think that the presence of such clauses in the 2013 lease presents any difficulty at all. The 2013 lease is not a variation of the 2010 lease notwithstanding that its terms owe their genesis to it in that they have been imported from it. Equally, the ‘entire agreement’ clause assumes that there is a lease in operation and what it then provides is that no extrinsic evidence can be introduced into the 2013 lease without the signatures of both parties.
- [52] The 2013 lease is a new document altogether as it was concluded with a new entity. Besides, there is no specific provision in it to the effect that no agreement will come into being unless the document has been signed by both parties nor can it be inferred from the surrounding circumstances that it is what the parties had intended. Accordingly, the issue of renewal of the 2010 does not creep in.
- [53] Gardee was categorical that when he prepared and signed the 2013 lease he intended the Plaintiff to be bound by it. Under cross-examination, both Hadley and Thomas did not take issue with Gardee’s evidence in that respect. In fact, they conceded that he did. Accordingly the question of the existence of intention to contract must be assessed independently of the question of signatures. If that is the case, it should not matter whether the lease was signed by the one or the other party just as it happened in the Nedbank v Usibenzo Trading case *supra*.

- [54] In his cross-examination, Thomas expressly stated that by appending their signatures to the 2013 lease, he and Franks had intended the Defendant to be bound by the terms thereof. However, their decision was turned on its head when it transpired that the Plaintiff was still busy with the snag list and that the Hazyview branch was not showing profit. It was for this reason that he instructed Hadley not to execute. This part of Thomas's evidence confirms what Hadley had testified earlier – the shareholders, meaning Thomas and Franks, wanted him to lead Gaardee to believe that the 2013 lease had been concluded. Hadley stated that he did not necessarily regard their conduct as being ethical and justifiable.
- [55] Thomas's concession that had it not been for the poor performance of the Hazyview branch and that the Plaintiff was still busy with the snag list, he would have executed the 2013 lease is an admission that intention to contract existed at some stage. Again, this represents a confirmation of Hadley's evidence to the effect that had the Hazyview branch done well, he would have persisted that the 2013 lease was valid and would have endeavoured to enforce it. Accordingly, the existence of intention to contract, once present, cannot be dependent on the prevalence of favourable or adverse business circumstances of the contracting parties.
- [56] Thomas' evidence that he would not have wanted the 2013 lease to come into operation because the Plaintiff was still busy with the snag list must be rejected. Firstly, there is no record that the Plaintiff raised concerns about the building prior to Gardee coming up with one. Secondly, Messrs, Thomas and Franks signed the 2013 lease notwithstanding that the Plaintiff was still attending to the repairs described on the snag list. Thirdly, the snag list comprised faults that primarily had to be fixed by the Defendant, which the Defendant raised independently and undertook to repair as a manner of persuading the Defendant to conclude the 2013 lease. Fourthly and moreover, in 2014 Hadley confirmed to the Plaintiff that the snag list had been satisfactorily completed. I am content that on the facts of this case animus contrahendi was present it being irrelevant that the one or the other party did not sign.
- [57] Turning to the question whether or not a month to month lease came into being at the expiry of the 2010 lease. According to Thomas, such lease existed and his evidence was that it was negotiated and concluded by Hadley and Gardee but under cross-examination he said that it was the latter and Hershaw who did. During his cross-examination Hadley specifically testified that the subject of a month to month lease did not feature in his discussions with Gardee. Hershaw could not have negotiated the month to month lease because when he took over from Hadley in March/April 2014, the month to month lease was in place having commenced in June the previous year.
- [58] In any event the fact that Messrs Thomas and Franks had signed the 2013 lease intending, at the time, the Defendant to be bound also negates the existence of a month to month lease. The point is that there could not have been two lease agreements running parallel to each other in respect of the same property. In addition, it is staggering that the attorney of the Defendant advised Gardee in November 2014 that Thomas was not aware of the terms of the 2013 lease. This allegation by Christie is inconsistent with the testimony of Thomas that

confirmed that the proposed lease had been signed before 19 June 2013.

- [59] One would have expected the attorneys to have simply recanted the existence of such lease and would have confirmed the month to month lease as the operational one. To the letter of 10 November 2014, the attorneys of the Defendant also make a statement that had the Defendant been aware of the 2013 lease. It would not have discontinued the Hazyview branch. This is extraordinary because Messrs Thomas and Franks were, at this stage, already aware of the terms of the 2013 lease because they had signed it. The Defendant's explanation that it was a manner of avoiding embarrassment in case there was another signed lease in the possession of the Plaintiff is rejected as being improbable. In the result, it is more probable on these facts that no month to month lease existed between the parties.
- [60] Once I have concluded that it has been established that the parties were agreed on the material terms of the 2013 lease, as I did, the passage in the Woods case mentioned in the Nedbank v Usibenzi Trading supra pertaining to onus becomes pertinent. The Defendant, as the party who denies that an agreement came into existence as it was not signed by Gardee, bears the onus to show that its operation ought to be postponed until it has been signed by both the Defendant and the Plaintiff.
- [61] No attempt has been made on behalf of the defendant to discharge that onus. Neither the evidence of Hadley nor that of Thomas touched on this. In any event the 2013 lease contains no clause that expressly provides that the 2013 lease shall not come into operation unless signed by both parties.
- [62] Clause 10 of the 2013 lease deals with suretyship. However, this cannot avail the Defendant because the addition of Hadley as a signatory to the suretyship arose well after Messrs Thomas and Franks had signed both the lease and the suretyship. Accordingly, lack of Hadley's signature to the suretyship sustains the argument that the 2013 lease was complete and could not be varied by the addition of Hadley because there was no signature of all the parties. Against that background, I am constrained to conclude that validity of the 2013 was not dependent on signatures of both parties.
- [63] The Plaintiff also argued that the Defendant should be held liable on the basis of the doctrine of fictional fulfilment. In this regard, the contention is that if it is accepted that the 2013 required signatures of both parties to come into existence, the Defendant by deliberately holding onto the 2013 lease prevented the Plaintiff from signing. The requirement of the signature of the Plaintiff should be deemed to have been fulfilled. I agree with the Defendant that this Court should stay clear of this because the doctrine has not been pleaded in the papers. This assertion also holds in respect of quasi-mutual assent and I deliberately wish to circumvent the temptation of dealing with matters that are outside the papers.

[64] The issue that still requires consideration is that of costs. The Plaintiff has asked for costs as at the scale of attorney client. There is no motivation for this and I could find no reason to accede to that request. And thus cost I propose to award will be on a party and party scale.

Conclusion:

[65] Against the above backdrop, I find as follows:

65.1 The 2013 lease that Gardee delivered at the offices of the Defendant was an offer capable of acceptance by the Defendant;

65.2 The offer was accepted by the Defendant on 4 May 2013 when Hadley advised Gardee that the 2013 lease had been signed;

65.3 The Defendant has failed to show on a balance of probabilities that the parties had intended validity of the 2013 lease to be kept in abeyance until signed by both of them;

65.4 The fact that the 2013 lease was signed by one of the parties and not by the other is on the facts of this matter irrelevant;

65.5 The parties had the intention to contract;

65.6 No month to month lease was concluded between the Plaintiff and the Defendant shortly after the termination of the 2010 lease that existed between the predecessor of the Defendant and the Plaintiff.

[66] In the result, I make the following order:

1. It is declared that during or about May 2013 the plaintiff and the defendant concluded the agreement of lease on the terms set out in annexure POC-1 hereto.
2. The defendant is liable to pay the plaintiff an amount of R1 339 991,92 (one million three hundred and thirty nine thousand nine hundred and ninety one rands and ninety two cents) being rentals up to and including 31 May 2017.
3. The defendant is liable for the plaintiff's costs of suit.

BA MASHILE

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

APPEARANCES:

For the Applicant: Adv. G Ameer SC

Instructed by: Shaheed Dollie Incorporated

For the Respondent: Adv. C Roux

Instructed by: R C Christie Incorporated

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Prepared on 10 October 2026 · Esheria