REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO. A5028/17

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

17/10/2018
DATE

SIGNATURE

In the matter between:

MAWENZI RESOURCES AND FINANCE COMPANY (PTY) LIMITED (IN LIQUIDATION)	First Appellant
VAN DEN HEEVER, THEODORE WILHELM N.O.	Second Appellant
MOTSHEKGA, MATHOLE SEROFO N.O.	Third Appellant

and

NESTLIFE ASSURANCE CORPORATION LIMITED	First Respondent
SITHOLE, HENDRICK VUSUMUZI	Second Respondent

JUDGMENT

Van Vuuren AJ (Opperman J and Petersen AJ concurring):

Introduction

[1] The appellants, the liquidators of Mawenzi Resources and Finance Company (Pty) Limited (in liquidation) ("**Mawenzi**") appealed against the judgment and order of Keightley J arising from a claim instituted by Nestlife Assurance Corporation Limited ("**Nestlife**") and Mr Hendrick Vusumuzi Sithole ("**Mr Sithole**") for *inter alia*: repayment of the purchase price of a property in Chislehurston, Sandton ("**the property**"); the value of Nestlife's bargain in the value of the property; and for repayment of payments made by Mr Sithole under his suretyship undertaking to Standard Bank of South Africa ("**the Bank**") to which the property was bonded. Mawenzi counterclaimed for unpaid rental due under an alleged tacitly relocated lease between it and Nestlife. All but an initial three of Mawenzi's bond instalments to the Bank were paid by Nestlife over the period 2001 to 2014. The characterisation of these bond payments was at the heart of the dispute *a quo*.

[2] Nestlife and Mr Sithole contended that a valid agreement of sale was concluded in terms whereof Nestlife acquired the property from Mawenzi in 2005 (the "**Agreement of Sale**"), that the Agreement of Sale had been revived by a written addendum in August 2007 (the "**Addendum Agreement**") and was extant as at 21 January 2011, the date of Mawenzi's liquidation. They contended that the relevant bond payments were made in consideration of the purchase price of the property.

[3] Mawenzi was wound up in 2011. Several years later, during November 2014, Mawenzi's liquidators communicated their election not to be bound by the Agreement of Sale. During that time Nestlife continued to pay the outstanding bond on the property and in so doing had paid the full purchase price. It had also paid the rates and taxes as they fell due and had maintained the property as purchaser.

[4] Mawenzi and the liquidators claimed that the Agreement of Sale had lapsed and had not subsequently been revived. Mawenzi contended that a tacitly relocated lease came into being upon the lapse of the Agreement of Sale and remained extant until Nestlife vacated the property in 2014. Keightley J upheld Nestlife's and Mr Sithole's claims and dismissed Mawenzi's counterclaim.

[5] To contextualise these disputes, it is necessary to provide a brief history of its evolution.

[6] The property concerned was thought to be a business opportunity between two friends in 2001. This investment project over time however evolved into various disputes in part attributable to a degree of informality in the business arrangements of Mr Mzilikazi Khumalo and Mr Sithole through Mawenzi and Nestlife, the entities they respectively represented. The property was acquired by Mawenzi on 17 April 2001 and paid with a loan secured by a mortgage bond with the Bank registered over the property.

[7] The Bank required both a lease agreement to be concluded in respect of the property and for a suretyship to be signed in respect of Mawenzi's indebtedness under the loan. Mr Sithole provided surety in favour of the Bank

for Mawenzi's obligations and to comply with the Bank's requirements, Mawenzi[1] concluded a written 5 year Lease Agreement with Nestlife (the "**Lease Agreement**").

[8] The Lease Agreement was concluded on 27 June 2001 and provided for monthly payments commencing at R60 000 in the first year increasing to R87 846 in the fifth year. The 5 year Lease Agreement would terminate on 31 May 2006.

[9] Nestlife only took occupation of the property some 2 years later, in April 2003. This initial period was later defined by the parties as "*the pre-occupation period*".

[10] The existence of the written 5 year Lease Agreement is relevant to two subsequent events: (i) the Agreement of Sale (in terms whereof Mawenzi entered into a written agreement for the sale of the property to Nestlife); and (ii) the alleged tacit relocation of the Lease Agreement for Nestlife's occupation of the property for the period 31 May 2006 to 2014 when Nestlife vacated the property.

Nature of the Lease Agreement

[11] The court *a quo* classified the written Lease Agreement concluded between Nestlife and Mawenzi as one which functioned within the context of the broader underlying investment project – it was not a stand-alone lease divorced from the investment project. The lease was necessitated by a requirement from the

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[1] At the time named *Interstaff Services (Pty) Limited*

Bank upon granting a loan against the bond over the property and was not intended to be a self-standing commercial arrangement in its own right.

[12] What at the time motivated Nestlife to pay the bond instalments was Mawenzi's failure to honour its obligations to the Bank as purchaser of the property, and in particular, the suretyship obligations for Mawenzi's liabilities to the Bank. Mawenzi, in its 2008 rental action averred that an oral agreement in 2005 gave rise to Nestlife's obligation to effect the bond payments. No 2005 oral agreement in terms whereof Nestlife was to make Mawenzi's bond payments in lieu of rental was proven. The underlying motivation for Nestlife paying Mawenzi's bond is central to the dispute between the parties.

[13] Mawenzi only paid the first three bond payments. It was not disputed *a quo* that all subsequent bond payments were paid by Nestlife with the final payment in 2014. Nestlife's case was that the latter constituted payment of the purchase price of the property whilst Mawenzi sought to typify such payments as payments under a tacitly relocated lease. These competing contentions are considered below.

Nestlife sought to protect its position

[14] This investment was at the time not achieving its aim by reason of the failure of Mawenzi to honour its obligations to the Bank leading to the directing minds of the entities agreeing that Nestlife would acquire the property. It was the party to the initial investment idea to have made significant payments towards the acquisition and retention of the property. Accordingly, and as Mr Sithole of Nestlife grew wary of the business relationship he, on behalf of Nestlife, sought

it prudent to approach Mawenzi to enter into an Agreement of Sale of the property as a method of protecting Nestlife's position in circumstances where it had been paying Mawenzi's bond payments and in respect of which obligations Mr Sithole had signed as surety in his personal capacity.

[15] The parties concluded the Agreement of Sale of the property to Nestlife which took the payments that Nestlife made on behalf of Mawenzi into account.

The Agreement of Sale

[16] The written Agreement of Sale in respect of the property was concluded on 28 March 2005. Mawenzi was represented by Mr S Mkwanazi, a director, and Nestlife, by Mr Sithole, its managing director. At this time the written Lease Agreement was extant with 14 months of the 5 year term remaining to 29 May 2006. Terms and conditions of relevance include the following:

Payment of the purchase price

[17] The purchase price of the property was R7,800,000 exclusive of Value Added Tax. Payment by Nestlife was to be made as follows:

> "*5.2.1 The value of improvements done by the purchase[r] to the value of R2,409,938.87 ... is to form part of the payment;*
>
> *5.2.2 A deposit of R2 million ... already paid by the purchaser is to form part of the payment;*
>
> *5.2.3 The balance of the purchase price ... shall be secured by a bank guarantee in favour of the seller or its nominee payable free of exchange at Johannesburg. Such guarantee shall be delivered to the conveyancer within 45 days from the signature date.*"

Transfer of the property

[18] Transfer of the property would be effected "*within a reasonable time after the purchaser has complied with all of its obligations in terms of this agreement.*"

[19] The agreement recognised that Nestlife was "*already in occupation of the property in terms of a lease agreement*".

The Agreement of Sale's effect on the Lease Agreement

[20] Clause 7.2 of the Agreement of Sale reads:

> "*7.2.1 The purchaser and seller concluded a Lease Agreement on or about 27th June 2001 in terms of which the purchaser leased the property from the seller with effect from 1 June 2001;*
>
> *7.2.2 The purchaser however, took occupation of the property in April 2003 and the seller agreed to waive VAT inclusive lease rentals in respective of pre-occupation period amounting to R1 347 480.00 ... and instead charged the purchaser a R943 909.00 ... VAT inclusive rental on 1 April 2003;*
>
> *7.2.3 As at 7 July 2005 the VAT inclusive lease instalments due by the purchaser to the seller after taking into account the waived pre-occupation rental and the special rental amounted to R1,406.050.68 ... This total amount is, in addition to the purchase price, also due in terms of clause 5.2.3 of this agreement and the Lease Agreement*"

[21] The Agreement of Sale thus recognised that Nestlife only took occupation of the property in April 2003 (despite the conclusion of the Lease Agreement with effect from 1 June 2001) and waived Nestlife's pre-occupation lease liability to Mawenzi of R1,347,480 and instead charged Nestlife a sum of R943,909 as at 1 April 2003 for the pre-occupation period.

[22] This meant, so they agreed, that as at 7 July 2005, the lease instalments due by Nestlife to Mawenzi amounted to a total of R1,406,050.68 which was due in addition to the purchase price (R7.8 million) of the property.

[23] It is necessary to consider the status of the Lease Agreement in the Agreement of Sale before turning to the particular suspensive conditions contained in clauses 16.1 and 16.2 of the Agreement of Sale.

[24] Clause 16.3 of the Agreement of Sale reads:

> *"16.3 should the purchaser fail to fulfil the above suspensive conditions after all reasonable extensions have been granted, the Lease Agreement mentioned in 7.2.1 above will continue to operate as originally signed after taking into account clause 7.2.2 above."*

[25] On a plain reading of this clause the written Lease Agreement terminated on 31 May 2006 if the suspensive conditions (16.1 and 16.2 to which I refer below) were not fulfilled.

The other suspensive conditions

[26] The suspensive conditions in 16.1 and 16.2 recorded that the agreement would be of no force or effect unless:

> *"16.1 The board of directors of* [Nestlife] *approves the acquisition of the property and takes a formal resolution to that effect. Should this condition not be fulfilled within 10 days of the signature date ... this agreement shall lapse. ..."*

> *"16.2* [Nestlife] *is granted a loan by a financial institution for an amount not less than the amounts due in terms of 5.2.3 and 7.2.3" i.e. R..... and R....."Should this condition not be fulfilled within 30 days from the signature date ... this agreement shall lapse. ..."*

[27] It was common cause *a quo* that neither a formal resolution by the board of directors of Nestlife was taken nor was a loan granted by a financial institution within a period of 30 days and thus that neither of these suspensive conditions were met at the time.

[28] In consequence the Agreement of Sale lapsed and the written 5 year Lease Agreement remained extant until 31 May 2006.

[29] In practical terms though, Nestlife continued to service the monthly bond payments, payment of utility bills to the City and expending on maintenance and improvements of the property. Nestlife made these payments at all relevant times: both before conclusion of the Agreement of Sale; and thereafter, beyond its lapse; beyond expiry of the written Lease Agreement on 31 May 2006; and after signature of the Addendum Agreement on 31 August 2007.

The interregnum between the lapse and revival of the Agreement of Sale

[30] Mr Sithole, the controlling mind of Nestlife, was the only witness who testified to the events giving rise to the Agreement of Sale and the nature of the relationship between Mawenzi and Nestlife during the period between the lapse of the Agreement of Sale and conclusion of the Addendum Agreement on 31 August 2007. Mr Sithole testified that as between Mawenzi and Nestlife there was an agreement for the sale of the property to Nestlife which endured throughout, aptly described as a putative agreement by the court *a quo*. Mr Sithole's evidence, despite rigorous cross-examination, was held to be plausible and I find no reason to disturb that finding.

[31] It was only when KPMG, auditors of Nestlife, advised that in order to give effect to the Agreement of Sale an addendum would be required to achieve its revival, that this feature was formally addressed. This was of course necessary from both statutory and contractual perspectives.

The Addendum Agreement – revival of the Agreement of Sale

[32] Following the advice received from KPMG, Mr Sithole on behalf of Nestlife approached Mr Khumalo regarding the formalisation of the revival of the Agreement of Sale. Mr Khumalo told Mr Sithole that he should contact Mawenzi's Mr Mkwanazi in this regard.

[33] On 31 August 2007, Nestlife, represented by Mr Sithole and Mawenzi, represented by Mr Mkwanazi (as was the case when the Agreement of Sale was concluded) entered into an agreement which later became known during the trial as the "*addendum*". The Addendum Agreement provides as following:

> "*This document confirms that the Agreement of Sale of the immovable property at 17 Acacia Road, Chislehurston, Sandton, by Mawenzi Resources (seller) to NestLife Assurance (purchaser) is still in force and will remain so until the agreed upon purchase price has been settled by NestLife Assurance.*"[2]

[34] The Addendum Agreement aimed at revival of the Agreement of Sale complied with the non-variation, amendment or cancellation clauses contained in the Agreement of Sale.[3]

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2 My emphasis

3 *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) 766G-H

The effect of the Addendum Agreement

[35] The court *a quo* held that in consequence of the conclusion of the Addendum Agreement on 31 August 2007, the Agreement of Sale for Nestlife's purchase of the property was revived and thus remained extant as at the date of the *concursus creditorum* forming in the liquidation of Mawenzi.

[36] A ground of appeal raised by Mawenzi and its liquidators was that the court *a quo* "*should have found that the addendum did no more than revive the sale agreement in its express terms*".

[37] During argument, counsel for the appellants clarified that they do not contest the conclusion of the Addendum Agreement or Mr Mkwanazi's authority to have done so. The argument was instead that the revived Agreement of Sale self-destructed at the moment of conclusion of the Addendum Agreement for want of fulfilment of the suspensive conditions contained in clauses 16.1 and 16.2 of the Agreement of Sale. Counsel for the appellants asserted that in the absence of compliance with the suspensive conditions at the time (a board resolution within 10 days and a loan granted within 30 days from 28 March 2005 – the signature date of the Agreement of Sale) the Agreement of Sale, so it was argued, would effectively self-destruct immediately upon its revival for want of fulfilment of the suspensive conditions *ex tunc*.

[38] This line of reasoning furthermore was necessary to enable argument in support of Mawenzi and the liquidators' counterclaim for the tacitly relocated lease. In this regard it is both significant and relevant that no evidence was led in support of the appellants' claim or defence. Neither Mr Khumalo nor

Mr Mkwanazi, the controlling minds of Mawenzi, were called to testify. Their evidence would have been instrumental to the alleged tacitly relocated lease. I will return to a known external manifestation by Mr Mkwanazi, signatory to both the Agreement of Sale and Addendum Agreements on Mawenzi's behalf. There was thus no evidence led to contradict the testimony of Mr Sithole.

[39] A tacitly relocated lease, as an explanation of how the bond payments paid by Nestlife ought to be typified for the period post 31 May 2006 upon expiry of the written 5 year lease, cannot co-exist with Nestlife's contention that the bond payments made by Nestlife were made towards the purchase price under the revived Agreement of Sale.

[40] The appellants advanced in argument that Mr Sithole's evidence on trial was contradicted by certain circumstantial evidence on how the bond payments ought to be typified – i.e. whether as rental payments or as purchase consideration. Their reasoning *inter alia* included: (i) in Nestlife's 2007 annual financial statements (for the year ended 31 March 2007) certain expenses were described as "*leasehold improvements*"; and (ii) in the action for arrear rental instituted by Mawenzi during 2008 (which it did not pursue to finality), Nestlife, in its plea, referred to a "*lease agreement*".

[41] In response, respondents' counsel argued that the annual financial statements of Nestlife do reflect an extant agreement of sale (the putative agreement described by the court *a quo*). The notes to the annual financial statements for the year ended 31 March 2007 contain the following narrative which confirms Nestlife's position through its director, Mr Sithole:

"*27. CAPITAL COMMITMENT*

The company has entered into an agreement to purchase the property, which it currently rents and on which it has raised leasehold improvements, for an amount of R7 800 000. The amount of R2 409 939 relating to the cost of leasehold improvements will be set-off against the purchase price. At year end an amount of R1 545 854 has been paid as a deposit on the property. The balance of R3 844 207 will be financed by the company from its own resources."

[42] Counsel for the appellants also referenced a note in Nestlife's annual financial statements for the year ended 31 March 2008:

"*7. PROPERTY AND EQUIPMENT*

The land and buildings consist of an office building at 17 Acacia Road, Chislehurston, Sandton. The property was acquired in the current year. The purchase transaction has not, however, been finalised and at the approval date of the annual financial statements, the transfer has not registered yet."

[43] The amounts previously under "*leasehold improvements*" in the 2007 AFS had since been moved to "*buildings*" in Nestlife's 2008 AFS.

[44] The notes in the respective annual financial statements are accordingly not inconsistent with a putative agreement found to have been in existence subsequent to the lapse of the Agreement of Sale during the interregnum prior to conclusion of the 31 August 2007 Addendum Agreement. Nestlife's position, through Mr Sithole, was thus that it had "*entered into a purchase agreement*" in respect of the property. Mr Sithole testified that it was only upon KPMG's advice that the Addendum Agreement between Nestlife and Mawenzi (drawn up by KPMG), was signed by Mr Sithole and Mr Mkwanazi.

Mawenzi's conduct with reference to a tacitly relocated lease

[45] As stated, neither Mr Khumalo nor Mr Mkwanazi were called to testify. I express no view on whether either were available or willing. Mawenzi's defence and counterclaim premised on the averred tacitly relocated lease was instead pursued by the liquidators upon such documents as were available to them.

[46] In order for the appellants to succeed in their defence to Nestlife's and Mr Sithole's claims, and to succeed in its counterclaim, it was necessary for the appellants to argue that the Agreement of Sale had lapsed and that, despite the conclusion of the Addendum Agreement in August 2007, the revived Agreement of Sale lapsed immediately upon its conclusion for want of fulfilment of the suspensive conditions. This approach appears to be one of necessity viewed from the liquidators' perspective.

Mr Mkwanazi's letter – 15 April 2008

[47] An important external manifestation on the part of Mawenzi is Mr Mkwanazi's 15 April 2008 letter.

[48] Mawenzi and the liquidators' approach appears inconsistent with the contemporaneous letter of demand by Mawenzi to Nestlife under signature of Mr Mkwanazi as its then executive director. Contrary to the conclusion sought to be advanced by appellants Mr Mkwanazi, as at 15 April 2008, seven months after conclusion of the Addendum Agreement, and during which time Nestlife's bond payments to the Bank continued, wrote a letter of demand to Nestlife.

[49] Mr Mkwanazi's letter is premised upon an extant Agreement of Sale. Significantly, Mr Mkwanazi places no reliance on the non-fulfilment of any suspensive conditions which were to have been fulfilled within 10 and 30 days respectively of the conclusion date of the Agreement of Sale at the time. Mr Mkwanazi's letter is consistent with the revival and continued force of the Agreement of Sale, which of necessity can no longer be conditional upon suspensive conditions for which the time of performance had come and gone prior to the conclusion of the Addendum Agreement.

[50] This breach notice, to the contrary, and in recognition of the revival of the Agreement of Sale sought to demand, within 14 days: (i) The provision of a bank guarantee; (ii) That transfer be effected within a reasonable time; and (iii) That Nestlife should pay Mawenzi the instalments due in terms of the Lease Agreement concluded in 2001 (the written 5 year Lease Agreement) after taking into account the waived pre-occupation rental as described in clause 7.2.2 of the Agreement of Sale.

[51] Mawenzi's demand further records the following, which is a manifestation of Mr Mkwanazi and thus Mawenzi's position in relation to the sale of the property:

> "*We record that various meetings have taken place between you in you*[r] *capacity as a Nestlife representative and Mr Mzilikazi Khumalo and the writer of this letter in our capacity as representatives of Mawenzi in which amongst other things we discussed:*
>
> - *Mawenzi's concerns about Nestlife's failure to implement the sale agreement in light of changing conditions in the property market.*
>
> - *Mawenzi's position that Nestlife should settle the outstanding bond balance as at the date of concluding the Agreement of*

> *Sale. The concluded sale agreement is currently silent on this matter.*
>
> *I hope this letter clearly sets out Mawenzi's position on the Agreement of Sale. All our rights in terms of sale agreement* [sic] *and the lease agreement referred to above are reserved.*"

[52] At least three conclusions can be drawn from Mr Mkwanazi's 15 April 2008 letter: (i) Mawenzi regarded the Agreement of Sale as extant; (ii) The Lease Agreement referred to by Mr Mkwanazi was the written 5 year Lease Agreement identified and defined by Mr Mkwanazi as the "*lease agreement concluded on or about 27 June 2001*"; and (iii) Mawenzi, as was argued on behalf of Nestlife, expected that payment of the purchase price in terms of the Agreement of Sale would be performed by Nestlife who "*should settle the outstanding bond balance*" - which payments it is common cause Nestlife made.

[53] This letter concludes with the following: "*I hope this letter clearly sets out Mawenzi's position on the Agreement of Sale*". It is informative that Mr Mkwanazi does not reference any tacitly relocated lease in the letter.

[54] The appellants in their grounds of appeal accepted that the Addendum Agreement revived the Agreement of Sale. The evidence and subsequent conduct of Mr Mkwanazi went further and was not only consistent with the conclusion of the Addendum Agreement but also its effective revival of the Agreement of Sale - for if the revival was not effective, no breach notice and threat of cancellation would have been required.

[55] Nestlife executed its obligations in terms of the revived Agreement of Sale with the same understanding. Nestlife made all bond payments subsequent to the conclusion of the Agreement of Sale and in so doing discharged its payment obligations thereunder.

Mawenzi's 2008 rental action - first mention of a tacit lease

[56] In the rental action against Nestlife instituted during 2008, Mawenzi *inter alia* premised its claim upon an alleged *oral* agreement concluded in July 2005 after the Agreement of Sale had lapsed. The oral agreement, so the pleadings allege, obliged Nestlife to make the bond payments in lieu of rental due to Mawenzi. It was pleaded that "*during or about July 2005 ... the parties ... concluded an oral agreement in terms of which* [Nestlife] *would settle the bond instalments on the property on behalf of* [Mawenzi] *due to Standard Bank ... in reduction of the rental due and payable by* [Nestlife] *to* [Mawenzi] *("the oral agreement")*." Nestlife denied such an agreement and no oral agreement was proven in the present action.

[57] In its particulars of claim in the rental action, Mawenzi defined the written 5 year Lease Agreement as "*the lease agreement*". This is relevant to the admissions made in Nestlife's plea in that action. Appellants argued that Sithole's oral evidence in the action *a quo* was inconsistent with the plea filed on Nestlife's behalf in the rental action. Counsel for Nestlife argued to the contrary and pointed to the context within which reference to the *lease agreement* as defined in that action was made. The plea filed on Nestlife's behalf in the rental action cannot be construed as an admission of any tacitly relocated lease.

[58] The pleadings in the rental action do accordingly not support the contention that the court *a quo* ought to have found Mr Sithole's oral evidence inconsistent with Nestlife's plea in the rental action.

Conclusions in respect of the rental recovery action

[59] The concept of a tacitly relocated Lease Agreement first received mention in Mawenzi's 2008 rental recovery action. It is common cause that Mawenzi did not pursue that action – nor did the liquidators subsequently appointed elect to do so.

[60] The written 5 year Lease Agreement contained a non-variation clause requiring amendments, variations or consensual cancellation to have been recorded in writing and signed on behalf of Mawenzi and Nestlife. An oral variation as pleaded by Mawenzi in its rental action in terms whereof, so it alleged, Nestlife was to effect payment of Mawenzi's bond in lieu of rent is inconsistent with the non-variation clause in the written 5 year Lease Agreement.

[61] Nestlife denied any alleged *tacit agreement* of lease averred to have commenced upon termination of the written Lease Agreement on 31 May 2006. Curiously, and contrary to its case *a quo,* the tacit agreement alleged in the rental action was said to have been on the same terms as the 5 year written Lease Agreement.

[62] Counsel for the appellants argued that reference to the Lease Agreement in Nestlife's plea in the rental recovery action stood to contradict Mr Sithole's oral evidence. On an analysis of the pleadings in the rental action it is however apparent that the lease agreement referenced in Nestlife's plea relates to the

written Lease Agreement which terminated on 31 May 2006. The written Lease Agreement was only amended by virtue of the provisions of the Agreement of Sale which, conditionally, affected its terms for the period that it (the Agreement of Sale) remained extant. It is on this basis that the court *a quo* held that Nestlife failed in its Claim C. The latter was a claim for repayment of instalments to the Bank in the period between the conclusion of the Agreement of Sale and the termination of the written Lease Agreement on 31 May 2006.

Admission by Nestlife of a Rental Agreement?

[63] A ground of appeal relied upon by Mawenzi and its liquidators was that, in the rental recovery action instituted by Mawenzi, Nestlife, so the ground reads, admitted that arrear rentals were owed. It was put to Mr Sithole that this was effectively an admission that *outstanding rentals* were due under a tacitly relocated lease.

[64] I agree with the court *a quo*'s conclusion that on a proper construction of the pleadings in that action, *outstanding rentals* was a reference to outstanding rental payable under clause 7.2.3 of the Agreement of Sale. The court *a quo* correctly held that this did not amount to an admission that any rentals were due under a tacitly relocated lease. (The 2005 Agreement of Sale was concluded whilst the written Lease Agreement was extant – which on its terms would have lapsed by 31 May 2006).

The court *a quo*'s findings on the suspensive conditions (16.1 and 16.2) in the Agreement of Sale

[65] Central to the matter are the findings by the trial court in relation to the effect of the addendum in reviving the Agreement of Sale and, in particular, the effect of the revival agreement on the suspensive conditions. It was reasoned by the learned trial judge that the time for compliance with the suspensive conditions had long since expired whilst, in terms of the addendum, the parties recorded that the Agreement of Sale was still in effect.

[66] On a proper interpretation, this means that the consensus of the parties was that they placed no reliance on the suspensive conditions and that, as such, they were not revived with the addendum. The Court held that the addendum effectively constituted an amendment to the Agreement. The conduct of the parties (and one may add the conduct in particular of Mr Mkwanazi in his August 2008 letter) supports the intended continuation of the Agreement of Sale.

[67] The court *a quo* held that, on a balance of probability, Nestlife established that the effect of the addendum was to reinstate the Agreement of Sale without the suspensive conditions, fulfilment of which would have been impossible within the time limits stipulated *ex tunc*. Counsel for the respondents argued that the conditions in clauses 16.1 and 16.2 were, at the time of conclusion of the addendum, no longer relevant nor was the period for the fulfilment thereof. I agree with their submission that the probability is that the parties intended by the addendum to reinstate the agreement without these conditions. This accords with the finding of the court *a quo*. Further, this finding by the court *a*

quo accords with the manner in which the parties conducted themselves and continued in their relationship both prior to and following the Addendum Agreement up to the time of Mr Mkwanazi's breach letter and Nestlife's responses thereto. The revival of the agreement and that it was properly regarded as having continued in operation throughout is consistent with the words of the addendum "... *is still in force and will remain so* ...". It accordingly follows that the bond payments made by Nestlife to the Bank were made towards the purchase consideration in terms of the Agreement of Sale.

[68] Accordingly, the payments made towards the purchase consideration under the Agreement of Sale as revived, is inconsistent with the existence of a tacitly relocated lease.

Mr Sithole's evidence

[69] Appellants' counsel invited us to depart from the court *a quo*'s assessment of Mr Sithole's evidence in various respects. In my view, the trial court appropriately considered and dealt with the evidence of Mr Sithole. His evidence corroborated the central matters for adjudication before the trial court which related to the question whether or not the Agreement of Sale was revived and remained extant and that, in terms thereof, bond instalment payments made to the Bank were paid in lieu of the purchase price paid by Nestlife for the property. I am not convinced that any reason exists to depart from the findings regarding Mr Sithole's evidence *a quo*.

Did a tacitly relocated lease come into being?

[70] In the usual course, a tacitly relocated lease would occur where a lessee, after termination of an initial Lease Agreement merely remains in occupation of the property and continues to pay rent whilst both occupation and rental is accepted by the lessor.[4] In the present instance the appellants sought to contend that, by virtue of Nestlife's continued possession of the property and its continued payments of Mawenzi's bond obligations to the Bank, a tacitly relocated lease had come into existence.

[71] In contrast, Mawenzi had never acted consistent with that of a landlord under any alleged tacitly relocated lease agreement as was averred on its behalf.

[72] The liquidators of Mawenzi bore the onus of establishing a tacit relocation of the Lease Agreement alleged to have existed after 31 May 2006 in order to succeed with their counterclaim. The onus on Mawenzi and its liquidators could only be discharged if a conclusion of the existence of a tacit agreement could be drawn from all relevant facts.

[73] Harms JA in *Golden Fried Chicken*[5] stated and applied the principle in respect of establishing a tacit relocation as follows:

> "*Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease) ...* (Shell South Africa (Pty) Ltd v Bezuidenhoud and Others *1978 (3) SA 981 (N) at 984B-E).*"

The Court continued:

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4 *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236C at [32]

5 *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822

> *"A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement (*Fiat SA v Kolbe Motors *1975 (2) SA 129 (O) at 139D-E;* Shell *at 985B-C). ... in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds. (*Fiat SA *at 138H – 139D)."*

[74] A further principle referred to by the learned Judge of Appeal was as follows:

> *"My reference to the 'same terms' does not imply that each and every term of the initial agreement forms part of the tacit contract (*cf Dollhouse Refreshments (Pty) Ltd v O'Shea and Others *1957 (1) SA 345 (T))."*[6]

[75] To prove a tacit agreement, as the appellants set out to do, it had to prove facts from which it could be inferred, unequivocally, from the conduct of both parties that a tacitly relocated lease had come into existence after termination of the 5 year Lease Agreement. The appellants thus bore the onus to prove, on balance of probability, unequivocal conduct on the part of both parties capable of no other reasonable interpretation than that they in fact did contract as the appellants aver.

[76] Corbett JA, in *Ocean Commodities* set out the requisites for establishing a tacit agreement as follows:

> *"In order to establish a tacit contract it is necessary to show, by preponderance of probabilities, unequivocal conduct which is of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact* consensus ad idem."[7]

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6 *Golden Fried Chicken* at [4] to [5]

7 *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (AD) 292B

[77] The onus to prove unequivocal conduct of both parties on balance of probability capable of no other reasonable inference applies equally to establish a tacitly relocated lease.

[78] To consider whether or not a tacitly relocated lease can be held to have existed it is necessary to refer to some particular facts and circumstances of relevance: (i) Neither Mr Khumalo nor Mr Mkwanazi was called to testify to advance the appellants' cause of action. (ii) Mr Sithole testified that no tacitly relocated lease was entered into. (iii) Mr Sithole testified that the continued occupation of Nestlife of the property was pursuant to the Agreement of Sale - although putative at that time because the parties conducted themselves consistent with an extant Sale Agreement. (iv) The evidence does not support that Mawenzi, at any stage after termination of the written Lease Agreement, conducted itself as lessor of the property. (v) A tacitly relocated lease for the period 2006 to 2014 in the context of the present matter is inconsistent with the existence of the Addendum Agreement and consequently the revival of the Agreement of Sale.

[79] It is further relevant to consider when, on the evidence, Mawenzi first sought to allege the existence of a tacitly relocated lease.

[80] The Addendum Agreement concluded on 31 August 2007 does not recognise or reference any tacitly relocated lease. The Addendum Agreement was followed by Mawenzi's 15 April 2008 letter written by Mr Mkwanazi which demanded compliance from Nestlife with its obligations in the Agreement of Sale. This letter does not reference any tacitly relocated lease. To the contrary, it confirms the existence of the Agreement of Sale and called for payment of the outstanding balance of the bond. This is inconsistent with bond

payments being made in lieu of a lease. In response, and consistent with an extant Agreement of Sale, Nestlife on 29 April 2008 through its then attorneys issued a guarantee and tendered compliance for purposes of registration of transfer of the property into its name. By 16 May 2008 Mawenzi had not responded and Nestlife called for transfer of the property. This evidence does not support an inference of a tacitly relocated lease between the parties.

[81] It was only once Mawenzi instituted the rental claim that it was first alleged that "*the parties conducted themselves as before and in accordance with the terms of the Lease Agreement*" and "*as if a Lease Agreement, with the terms set out* [in the written Lease Agreement] *existed.*" Although the latter allegation in the rental action points to a tacit agreement, it differs materially from the tacitly relocated lease contended for *a quo* and on appeal before us.

[82] It was argued on behalf of Nestlife that there was no evidence from which an inference could be drawn that the parties intended to conduct themselves in accordance with the written Lease Agreement. This is relevant because in the rental action Mawenzi contended that all the terms incident upon the relationship of landlord and tenant contained in the Lease Agreement were renewed as part of the alleged tacit relocation.

[83] Nestlife correctly argued that there are a number of features of the parties' relationship that was inconsistent with a tacitly relocated lease having been concluded on similar terms to the initial written Lease Agreement. These include: (i) Utility costs such as electricity, water etc. which were paid by Nestlife directly to the City - and not to Mawenzi; (ii) Mawenzi was required to collect VAT on lease payments and consequently to submit VAT returns and

reconciliations to SARS – there was no evidence that it did; (iii) Nestlife would have had to obtain Mawenzi's written consent in order to effect structural alterations and additions to the premises - there was no evidence that Mawenzi exercised this right; and (iv) Mawenzi was entitled to make rules and regulations in relation to common facilities, parking, fire protection and emergency procedures – there was no evidence that it did so.

[84] Moreover, (i) There was no evidence of rental invoices issued by Mawenzi or demands for rental payments made by it; (ii) At no time was payment for any rental made by Nestlife to Mawenzi (nor was there any collection of rental by Mawenzi); (iii) There was no evidence of payment by Mawenzi of VAT on any alleged rental to SARS; and (iv) Mawenzi did not assert any right to consent to the structural adjustments to the property carried out by Nestlife after May 2007.

[85] The parties never conducted themselves "*in accordance with the terms of the* [written] *Lease Agreement during the period following 31 May 2006.*" To the contrary, both Mawenzi and Nestlife conducted themselves in accordance with the Agreement of Sale. The appellants failed to discharge their onus to prove unequivocal conduct of both parties to show a tacitly relocated lease and the only reason for effecting the bond payments during the relevant period are those advanced by Nestlife and Mr Sithole.

[86] I accordingly agree with the court *a quo*'s reasoning in concluding that no tacitly relocated lease was established on the evidence by Mawenzi and its liquidators. Mawenzi and its liquidators have failed to discharge its onus in connection with its claim in relation to the alleged tacitly relocated lease.

Conclusion and order

[87] In the circumstances, the 2005 Agreement of Sale, revived by the 2007 Amendment was extant at the time of the *concursus creditorum* forming in the liquidation of Mawenzi. No tacitly relocated lease came into being as was contended for by the appellants. These findings were correctly made by the court *a quo* and it follows that the appeal stands to be dismissed.

[88] I accordingly make the following order:

(a) The appeal is dismissed with costs including those consequent upon the employment of two counsel, which costs shall include the costs of the application for leave to appeal.

E van Vuuren
Acting Judge of the High Court
Gauteng Division, Johannesburg

I agree,

Ingrid Opperman
Judge of the High Court
Gauteng Division, Johannesburg

I agree

AH Petersen
Acting Judge of the High Court
Gauteng Division, Johannesburg

APPEARANCES

Counsel for the appellants	:	EL Theron SC J Heher
Instructed by	:	Alant, Gell & Martin Attorneys
Counsel for the respondents:		A Subel SC D Vetten
Instructed by	:	John Joseph Finlay Cameron
Date of hearing	:	12 September 2018
Date of judgment	:	18 October 2018