

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

CASE NO: 2023/081996

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

18/10/2023
Nieuwenhuizen.
DATE

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SIGNATURE

In the matter between:

INYANDA CAPITAL (PTY) LIMITED

Applicant

and

M SOHAG TRADING (PTY) LIMITED

Respondent

JUDGMENT

VAN NIEUWENHUIZEN AJ

[1] This is a matter involving the applicant (“Inyanda”), a property investment holding company, exercising a *rei vindicatio* as owner against the respondent (“Sohag”) for the return of its property which is at present occupied in the sense that Sohag trades from Shop 8,

being part of a shopping mall, built on the immovable property known as Portion 246 of Erf 534 Wadeville Extension 2 Township (“the property”) and situated at 246 Dekema Road, Wadeville, Ekurhuleni.

- [2] Inyanda only became owner of the Property after it acquired same for R17.9 million at a public auction on or about 20 July 2022 and took transfer of the property during November 2022.
- [3] At the time Inyanda became owner of the property, Shops 7, 8 and 9, situated in the property, were let to an entity known as Mmaitumeleng Trading Enterprises (“Enterprises”), which was paying R670 695.00 a month in rent for its tenancy of Shops 7, 8 and 9.
- [4] Unbeknown to Inyanda, Enterprises sublet Shop 8 to Sohag. It is common cause that Enterprises’ lease was terminated shortly after Inyanda took transfer of the property and Enterprises has since vacated the property on 3 February 2023.¹
- [5] It is also common cause that, at all times after Inyanda became owner of the property, Sohag was in possession and occupation of Shop 8, which is a portion of the property.
- [6] Notwithstanding demand and numerous requests that Sohag vacate the property on or before 25 August 2023, it has failed to do so and also refused to provide an undertaking to do so.

¹ See Replying Affidavit p104 paragraph 7.5.

- [7] Inyanda contends that it entered into a new lease with a new tenant (“Plus DC”) in respect of Shops 7 & 8 and, given that Sohag was a sub-tenant and has no rights vis-à-vis Inyanda, it should vacate Shop 8. Sohag refuses to vacate the premises contending it has an oral five-year lease.
- [8] Part of the urgency in this matter is the fact that the applicant is unable to give possession to Plus DC, and a risk exists that it may lose a contract valued some R3 065 963,91 (excluding the contributions to operating costs, municipal rates and water and effluent charges over the next 60 months). Hence, it approached this court on abridged time periods as a matter of urgency.
- [9] I am satisfied that, although the matter is of a commercial nature, that it is urgent and was worthy of the Urgent Court’s attention and should be adjudicated as soon as possible. If this matter is not treated as an urgent matter, the first opportunity it may have become enrolled and heard is somewhere in the final term of 2024.
- [10] I have requested both counsel for Inyanda and Sohag, after argument on urgency and merits, to provide me with a joint chronology given that I had to hear the matter amidst a crowded urgent roll and to simplify my task in analysing the facts. For reasons best known to counsel, they were unable to provide me with a joint chronology and I was ultimately provided with two separate chronologies. It is

lamentable that counsel who are no longer baby juniors are unable to do a joint chronology.

[11] It is also common cause that Inyanda engaged extensively with Sohag in relation to its continued occupation of Shop 8. It is contended by Inyanda that most of the engagements were in the form of without prejudice correspondence, which is inadmissible as evidence before the court.

[12] Inyanda further contends that, in the course of these engagements, it offered Sohag another shop, i.e., Shop 11, at the property and invited Sohag to enter into a written lease with Inyanda in respect of Shop 11. It is common cause that no lease was ultimately entered into between Inyanda and Sohag in respect of Shop 11.

[13] It is further common cause that, by no later than 10 July 2023, Sohag became aware of the fact that Inyanda had concluded a lease with a new tenant in respect of Shop 8 and urgently required vacant possession thereof to prepare it for the new tenant's occupation. This was recorded in a letter sent by Inyanda's attorneys to Sohag's attorneys on 10 July 2023 in the following terms:

"3. You and your client are aware that:

3.1 our client has concluded the lease with the tenant and is urgently required to prepare shop 8 for the new tenant's occupation;

- 3.2 *the new tenant was scheduled to take occupation on 1 July; and*
- 3.3 *as a result of your client's refusal to vacate shop 8 our client was forced to negotiate an extension by which it is required to provide vacant occupation of shop 8 to the new tenant.*
4. *Your client's conduct is now causing our client damages as a result of the delay in providing vacant possession of shop 8 to the new tenant, your client is not paying for its use of shop 8 and as a result of shop 11, into which your client was required to move. Our client reserves its rights to address these losses in due course."*

[14] This letter is annexed as "**FA3**" to Inyanda's founding affidavit.

[15] Paragraph 17 of this letter further concludes with the following:

"17. In the circumstances your client has until 14 July 2023 to either accept our client's final offer or vacate shop 8 by 25 August 2023."

[16] It is common cause that Sohag never took up occupation of Shop 11 and its version of events will soon emerge from the further details.

[17] The lease agreement with the new tenant provides that Shops 7 and 8 are let to Plus DC (Pty) Limited ("Plus DC") for purposes of a liquor store for a period of 60 months from 1 July 2023, which rent escalates

at an annual rate of 6%. The rent payable by Plus DC for Shop 7 is R19 182.38 and R26 140.20 for Shop 8.

[18] Plus DC will pay a contribution towards rates and taxes for Shop 7 in the amount of R1 592.77 and R2 169.56 in respect of Shop 8 and a contribution towards operating costs in the amount of R3 729.05 for Shops 7 and R5 081.65 in respect of Shop 8.

[19] Plus DC will pay for electricity as metered and water and effluent as metered. A copy of the lease is annexed to the papers as annexure "FA4".

[20] It is of some importance to look at this lease. In this court's experience, leases in shopping centres are usually of a detailed nature and are usually replete with terms and conditions and typically contain provisions for what happens in respect of late payments, how payments should be appropriated, agent's commission, use of the premises, subletting and cession, general rights and obligations of the tenant, insurance of the premises, insurance of movables on the premises, suretyships, the landlord's rights and obligations, exclusion of liability, damage or destruction of premises, limited damage or destruction of premises, breach of the agreement, cancellation, parking, *domicilia* and notices, the need for fire extinguishers and various other general terms, including terms regarding costs, the offer to contract and what happens in the event of change of ownership or

when a need for renovation arises. Such leases are invariably reduced to writing.

[21] Sohag met Inyanda's application to justify its possession by way of an assertion that an oral lease was concluded between one Ronell van Deventer ("Ms Van Deventer"), an employee of Mafadi, the letting agent, acting on behalf of Inyanda.

[22] It is clear that Sohag asserts that it is entitled to be in possession of Shop 8 and will remain in possession thereof on the basis that, according to Mr Mohamod Ikramul Hoque, Sohag has had occupation of Shop 8 from 18 March 2019 as sub-lessee to Enterprise and contends that Mafadi (the letting agent) had consented and agreed to Shop 8 being sublet to Sohag.

[23] Sohag also contends that, in terms of the oral arrangement between itself and Mafadi, the monthly rent payable by Sohag for Shop 8 would be in the amount of R31 200.00 and would be inclusive of the water, electricity and effluent charges.

[24] Sohag contends that the aforesaid took place prior to the expiry of the sublease period and during or about 15 February 2023 when a meeting took place with Ms Van Deventer of Mafadi. It also contends that it was confirmed that Sohag could continue to occupy Shop 8 for a further period of five years (presumably while the original sub-lease

runs out), but that the rental would then become R38 019.00, escalating at 7% per annum as from 1 March 2024.

[25] It is further contended that Sohag had to pay a deposit of R33 060.00 over a period of 2 months and, in support hereof, Sohag attaches a tax invoice and statement from Mafadi marked "MIH2" from which it is clear that half of the deposit amount was indeed raised as a debit against Sohag in the Invoice for March 2023.

[26] Upon receipt of the invoice, Sohag discovered that Mafadi had levied it charges for electricity, water, and effluent and thereupon it contacted Ms Van Deventer and reminded her that the respondent was not liable for electricity, water, and effluent as it was included in the monthly rental of R31 200.00. It is alleged that Ms Van Deventer concurred herewith and advised that same should be ignored.

[27] It is contended by Sohag that, at this stage, Ms Van Deventer informed Sohag that the ownership of the centre had changed from March 2023 and that Sohag would, in addition to the monthly rental of R38 019.00, have to pay a proportionate share of the water, effluent and pay for electricity consumed as per the reading of the sub-meter in Shop 8. Sohag contends that it agreed to this change and asserts that Ms Van Deventer undertook to reduce the agreement to writing.²

² See Answering Affidavit paragraph 3.9.

- [28] Sohag also states that it paid the monthly rental until 31 August 2023 and the water and effluent charges as until 31 July 2023. The water and effluent charges were paid in arrears.³
- [29] Sohag disputed the exorbitant and excessive amount levied by Mafadi for the electricity consumed on the basis that same was not calculated in accordance with the readings of the sub-meter in Shop 8. It also attached, as “MIH3”, copies of the sub-meter readings as on 10 March 2023, 14 April 2023, and 25 May 2023. These readings differ drastically from the meter readings as rendered by Mafadi on behalf of Inyanda.
- [30] It is further asserted that Sohag repeatedly enquired from Ms Van Deventer as to when the written lease would be forwarded for signature. Sohag alleges that it was informed that the lease was being prepared and that it would be send to Sohag in due course. There is, however, no documentary evidence of the demands for a written agreement.
- [31] Matters took a different course not that long thereafter.
- [32] On 24 April 2023, Sohag received a notice from Mafadi that it should vacate Shop 8 by 31 May 2023, a copy of which is annexed as “MIH4”. In this notice, Inyanda purportedly exercised its right to cancel “the agreement of lease” concluded with Sohag due to

³ See Answering Affidavit paragraph 3.10.

renovations to the property. It will emerge lower down what the content of the lease was that Inyanda referred to. The period of notice already suggests that the lease referred to was of a monthly nature.

[33] After consultation with its attorney of record, a letter was sent to Mafadi, which was annexed as "MIH5". In this letter, it asserts that Inyanda had no right to cancel the agreement of lease given that:

33.1 there is an oral agreement of lease between the parties for a period of five years;

33.2 Sohag seriously doubts that Inyanda intends effecting renovations to the property as it is the only tenant to have received a notice to vacate;

33.3 in the event that Inyanda intended to renovate the property, it offered to relocate to other empty premises within the mall until such time as the renovations were complete, whereafter it intended to return to Shop 8.

[34] It made it clear that it would not be vacating the property by 31 May 2023. It also stated that, should Inyanda interfere with any of its rights, including disconnecting the electricity at the premises or locking the premises on 31 May 2023 or at any time prior thereto or thereafter, Sohag would approach the court urgently for relief.

- [35] I should point out that Inyanda does not deal in detail with the defences of Sohag in its founding affidavit, nor do I believe it was necessary to do so, given that it was relying on the *rei vindicatio*.⁴ It would be entitled to deal therewith in its replying affidavit.
- [36] As was to be expected, Inyanda then, in the replying affidavit, dealt in detail with the defence raised. Inyanda makes it clear, in the replying affidavit, that the lease with Enterprises was terminated on or about **27 January 2023** by mutual consent between the parties. At the time, Inyanda was represented by Mafadi, and specifically by Ms Van Deventer and one Siphokazi Matyalana (“Ms Matyalana”).
- [37] On the same day, Ms Van Deventer informed Sohag that Inyanda had purchased the property, and that Enterprises would have to vacate the premises.⁵ Ms Van Deventer did inform Sohag that it should stop paying rent to Enterprises and she then caused the correct banking details (presumably Mafadi’s) to be shared with Sohag via WhatsApp by Ms Matyalana. A copy of this Whatsapp message is attached as annexure “**RA1A**” and receipt thereof is acknowledged.
- [38] In paragraph 7.4 of the replying affidavit the deponent to Inyanda’s replying affidavit specifically denies that there was any discussion regarding a lease or lease terms.

⁴ See Harms, Amlers on Pleadings, 9th Edition p312 read with p372.

⁵ That communication also had the effect that Sohag’s sub-lease was terminated. See Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W) par 34 and further.

[39] Enterprises vacated the shops it had let from Inyanda on 3 February 2023. On 31 January 2023, one Sahadat Hossain wrote, on behalf of Sohag, to Mafadi, recording:

“Dear Sir [sic]

“My name is Abdur rahaman [sic], Dekama Mall S. I want shop lease.”

[40] A copy of this is annexed to the replying affidavit as “**RA1**”.

[41] Sohag, in paragraph 3.7 of its answering affidavit, specifically alleges that, prior to the expiry of the sublease and during and about **15 February 2023**, it had met with Ronell (presumably Ronell van Deventer) of Mafadi when it was confirmed that the respondent could continue to occupy Shop 8 for a further period of five years but at a rental agreed in the amount of R38 019.00, escalating at 7% per annum as from 1 March 2024.

[42] On an analysis of the affidavit, it appears that this rental is extrapolated from the agreement between Sohag and Enterprises, which it is alleged that Inyanda was aware of and what Sohag is contending for is at least the same terms it had with Enterprises, inasmuch as that agreement did not include the duty to pay water, electricity and effluent charges and escalation would only take place from 1 March 2024.

- [43] In my view, the point made by Inyanda in the replying affidavit, that there was already a request for a lease on 31 January 2023 and hence no need for the discussion on 15 February 2023, is of great importance.
- [44] Inyanda makes it clear, in its replying affidavit, that, pursuant to the email, annexure “**RA1**”, a vetting process was undertaken in respect of Sohag’s creditworthiness and that no lease agreement would have been concluded by Inyanda with Sohag until its creditworthiness had been investigated. It is contended that this is a standard procedure in the commercial letting industry.
- [45] To this end, Sohag supplied Inyanda with a series of documents, together with its request for a lease, same being annexed as annexure “**RA2**”. An analysis of annexure “**RA2**” demonstrates that it is an email sent by one Siphokazi Matyalana (“Ms Matyalana”) (referred to with an email address as credit11@mafadi.co.za). This email is addressed to vetting3@mafadi.co.za and also to ronell@mafadi.co.za and simply states “see attachments”. The attachments which Ms Matyalana clearly had by 31 January 2023 include a photocopy of a passport document of the Republic of Bangladesh in the name of Rahman Abdur. Further attached thereto is a certificate issued by CIPC attesting to the incorporation of M Sohag Trading (Pty) Limited as a company in business. This document is dated 9 May 2014 by CIPC.

[46] A further document also annexed to the replying affidavit certifies that Mr Abdur Rahman is a director of M Sohag Trading (Pty) Limited. This also includes certification from CIPC that M Sohag Trading (Pty) Limited has been registered as a company with effect 09/05/2014. Further annexed thereto are three bank statement of M Sohag Trading (Pty) Limited issued by Nedbank reflecting the fact that Sohag conducts a current account with Nedbank and the statement periods are 29/11/2022–29/12/2022, 29/10/2022–29/11/2022, and 29/09/22–29/10/2022.

[47] Given that there was a proper application made by Sohag via the email of Mr Sohadat Hossain on 31 January 2023 the notion that an oral agreement for a 5-year lease was agreed on as between Sohag and Inyanda with Ms van Deventer appears to me unlikely. If it was concluded on 15 February at Sohag's request one would have expected the vetting period to only commence at that point as opposed to the earlier communications and vetting.

[48] In its answering affidavit, Sohag has, however, indicated that, in line with its contentions regarding payment of a deposit a debit for part of a deposit was raised by way of the March 2023 invoice issued through the offices of Mafadi. The invoice appears as an attachment to the answering affidavit and include a debit for a deposit of R16 530.00 (50% of the monthly rental) and rental of R33 060.00. It is virtually illegible and annexed marked Annexure "MIH2". As appears below

Inyanda annexed a more legible version of this invoice as part of Annexure “**RA7**”.

[49] There is also a reference on the invoice of March 2023 to lease fees of R2 400.00 and electricity charges of R41 582.27, as well as water in the amount of R1 235.10 and effluent in the amount of R425.23. This invoice and the one issued for the month of May 2023 appear as “**RA7**” in Inyanda’s Replying Affidavit.

[50] The existence of this invoice is consistent with both Inyanda’s version that a lease was requested on 31 January 2023 as per Mr Hossain’s email and Sohag’s version that there was a discussion on 15 February 2023 and in itself **may** show an indication of some sort of an agreement, albeit there’s no written agreement.⁶

⁶ See Spes Bona Bank v Portals Water Treatment 1981 (1) SA 618 (W) on p 632C where Nestadt J (as he then was) held that:

“It seems to me that an invoice could, depending upon the circumstances, be: (i) a notification that the goods therein mentioned had been sent or were being sent to the addressee thereof or some other destination; (ii) a claim for payment, usually, though not necessarily, based on an underlying, already concluded contract of purchase and sale between the parties; (iii) an offer to sell. It is only in the event of the invoice being construed as an offer to sell that an agreement of purchase and sale, as contended for by the plaintiff, could have arisen.”(my underlining)”

The judgment was confirmed on Appeal and is reported as Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A) and the following was said about the meaning of an invoice:

“Accordingly I do not propose to comment on the three possibilities postulated by NESTADT J (at 632C - D of the reported judgment), save to observe in passing that other possibilities come readily to mind (eg that an invoice may constitute notification of the acceptance of a prior offer to buy, or that it may be no more than a mere statement of the price that is owing or will become payable in respect of goods sold and delivered or still to be delivered). For the purposes of my judgment it is sufficient to find, as I do, that the invoice by itself clearly did not constitute an offer to sell” – See p983B-D.

- [51] I specifically focus on the period between January and March, given the various parties' contentions as to when any interactions between Mafadi, acting on behalf of Inyanda, took place with Sohag. In this context, this invoice is of some significance, although not conclusive.
- [52] Inyanda also annexes another invoice for May 2023 as part of "RA7" reflecting a carried over balance of R123 425.97 and, at the same time, reflecting a write back of 50% of the lease deposit of R16 530.00 and the lease fees of R2 400.00. This invoice raises a further debit of R562.31 as interest against Sohag, leaving a balance of R64 698.28 as same being due. This document is equally important.
- [53] I say so for two reasons, inasmuch as it reflects a balance due for the previous period, which was carried over, in the amount of R123 425.97 and inasmuch as it suddenly, at the beginning of May 2023 writes back a fairly important component appearing on the March 2023 invoice, i.e., a write back of the lease fees and the deposit. One may well ask what led to this.
- [54] In argument, Sohag's counsel, Mr Coleman, sought to persuade me that there is only one explanation for this, and this is the fact that, in between March and May, Inyanda, via the offices of Mafadi, entered into a more lucrative agreement. That agreement, it was contended, appears as an attachment to the founding affidavit, annexure "FA4", and reflects a written agreement entered into between Inyanda and Plus DC.

[55] I should point out that this agreement commences on 1 July 2023 and terminates on 30 June 2028 and specifies the rental of Shop 7 as R19 182.38 as well as Shop 8 at R26 140.20. Altogether, given that it is a rental package for Shops 7 and 8, it is a more lucrative agreement, even if one assumes that the oral agreement entered into allowed for a rental payment of some R38 000.00 per month. In view of my ultimate conclusion below I am of the view that Inyanda was entitled to enter into this new lease with Plus DC in respect of shops 7 and 8.

[56] The date of this agreement is 15 April 2023, reflecting same as being signed by Plus DC on 14 April 2023. I have not been provided by any party with any April 2023 invoice (if one was rendered to Sohag at all) but I must assume this was not fully paid given that a balance was brought forward in May 2023. The argument by Mr Coleman is not completely without substance but overlooks the commercial requirements of leases in shopping malls (the detail of which is referred to in paragraph 20 above).

[57] The replying affidavit contends, in paragraph 7.9 to 7.11, that, pursuant to the request made in annexure "**RA1**", a vetting process with regard Sohag's creditworthiness was undertaken and that no lease agreement would have been concluded until its creditworthiness had been vetted. This seems to me to be consistent with commercial

practice and my own experience in dealing with leases in shopping malls.

[58] It further states that this is the purpose why the documents referred to in “RA2” were applied for.

[59] Paragraph 7.11 of the replying affidavit states that, in the interregnum Sohag occupied Shop 8 in terms of, at best, a month-to-month tenancy and that no five-year lease agreement, as contended for by Sohag, was ever concluded. This is to my mind more plausible than the case put up by Sohag. If I have to accept the version contended for by Sohag, the 5-year lease was already agreed on 15 February 2023 with no vetting process involved at all.

[60] After the cancellation letter was sent (annexure “MIH4” to the answering affidavit), Sohag responded thereto on 18 May 2023 challenging Inyanda’s right to cancel the lease and claiming the existence of an oral lease agreement with a duration of 5 years. If indeed Mafadi’s Ms van Deventer had accepted such terms on the basis that it would draw up a written lease agreement one would by now have expected a demand for such lease papers to have been delivered given that on Sohag’s version the arrangement dates back to 15 February 2023.

[61] The aforesaid letter challenges the notion that shop 8 is required for renovation but in same Sohag tenders to move to shop 11 pending such renovations whereafter it would return to shop 8.

[62] Hereafter Inyanda's attorneys made very specific enquiries from Sohag, on 31 May 2023, requesting the following:

"5. Without making any concessions or waiving any of its rights, our client requests the following:

5.1 Who represented the parties when the alleged five-year oral lease was concluded?

5.2 When was the alleged oral lease agreement concluded;

5.3 What were the terms of the alleged oral lease agreement;

5.4 Any contemporaneous correspondence evidencing the foregoing.

5.5 Copies of the necessary permits and licences permitting your client to conduct a supermarket business at the property."

[63] All of this was requested from Sohag to be delivered to Inyanda by 12 o'clock on Friday, 2 June 2023. This demand is annexed to the replying affidavit and marked "**RA3**".

[64] No response was ever received hereto notwithstanding the fact that Sohag should have been in a position to answer this request without

difficulty. If indeed the events of 15 February 2023 took place as contended by Sohag for the first time on 18 May 2023 and in its answering affidavit one would have expected a detailed response to “**RA3**”. It is only in the answering affidavit that the details regarding the oral agreement of lease and who represented whom, emerges.

[65] It is noteworthy that Inyanda’s attorneys contend that their letter of 31 May 2023 (“**RA3**”) refers to the existence of a month-to-month lease (i.e that being the lease they cancelled on 24 April 2023) whilst there is no specific mention thereof in “**RA3**”. This emerges from paragraph 2 of “**RA4**” when they attempt to explain why they posed the questions referred to in paragraph 5 of “**RA3**” Whilst there was no reference in “**RA3**” to a month to month lease it stands to reason that until Sohag was vetted and had signed a written lease agreement its status would be that of a month-to-month lessee.

[66] “**RA4**” continues with a denial of the existence of a 5-year oral lease agreement and purports to accept Sohag’s offer to move to relocate to another shop and then purports to withdraw the “Notice” which is defined in “**RA4**” as the letter of 24 April 2023. This withdrawal was, however, conditional on a 5-year lease being signed for the other shop and the letter alludes to same being sent in due course.

[67] It is clear that nothing came of the relocation. It would appear that Sohag thought it would only be temporary and until shop 8 is renovated whereafter it would move back to shop 8. The fact that

Inyanda's condition was never fulfilled in that a 5-year lease for a different shop was signed ultimately left the notice standing and operative.

[68] "RA4" also refers to arrear rentals which would be addressed in due course.

[69] Sohag's affidavit explains in a rather convoluted way that there was an inspection *in loco* of shop 11 and that it proposed that the dry-wall partitioning be removed, and the shop front be widened. It states that Inyanda was not prepared to agree hereto and required a proportionate share of the operating costs which Sohag in turn refused to pay as it was not previously charged and other tenants in the centre do not have to pay the same.

[70] Sohag then contends that it only became aware of Inyanda's intention to let out shop 8 to another tenant on 10 July 2023.

[71] Inyanda's attorneys' letter of 23 June 2023 specifically suggests that the refusal to respond to the questions referred to is because no five-year oral lease ever came into existence.

[72] The replying affidavit also makes the point, in paragraph 7.15, that, at the time the September 2023 invoice was raised by Inyanda's managing agent, which is annexed as "RA5", Sohag had failed to comply with its obligations under the lease agreement asserted by it.

The outstanding amount at that point in arrears in respect of the month-to-month lease (assuming any merit exists in respect of such version) amounted to R217 425.78.

[73] This, to my mind, is the final nail in Sohag's coffin. Not only is the notion that a five-year lease agreement was concluded without more specific terms, other than the rental and escalation, unbusinesslike and improbable and is finally given the lie to by the fact that the amount referred to above was outstanding by 1 September 2023. If it really believed that it had a lease it should have annexed proof of payment of the monthly rental including such amount as it contended was due for electricity.

[74] It should be said in this regard that, in motion proceedings, if the respondent wants to put up a *bona fide* defence, such defence should meet the tests laid down in the following cases:

74.1 I refer to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)⁷ where it was held that:

"The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

⁷ Pp 634E – 635A

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* [1976 \(2\) SA 930 \(A\)](#) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* [1982 \(1\) SA 398 \(A\)](#) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* [1982 \(3\) SA 893 \(A\)](#) at 923G - 924D). **It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification.** It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. **The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* [1949 \(3\) SA 1155 \(T\)](#) at 1163 - 5; *Da Mata v Otto* [NO 1972 \(3\) SA 858 \(A\)](#) at 882D - H).** If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* [1945 AD 420](#) at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* [1983 \(4\) SA 278 \(W\)](#) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A)." (my emphases)

74.2 More recently, the applicable test was formulated by Heher

JA, in *Wightman t/a JW Construction v Headfour (Pty) Ltd and*

Another [2008 \(3\) SA 371 \(SCA\)](#)⁸ as follows:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. **But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or**

⁸ See pp 375F- 376 A

ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

(my emphases)

- [75] If indeed Sohag thought it had a five-year lease, notwithstanding the dispute, it should have made payment to Mafadi, alternatively, to Inyanda. As matters stand, there is no indication that such payment was made in full, even allowing for the dispute regarding the amounts due for electricity.
- [76] In the circumstances, and without any further reference to the subsequent correspondence which takes the matter no further, I am of the view that Sohag's defence of an oral five-year lease does not meet the test required in motion proceedings i.e., that of a *bona fide* dispute.
- [77] In the premises, I am left with no other choice as to reject Sohag's version on paper. I am fully aware of the fact that, in so doing, I am taking a robust approach. I am of the view that I am entitled to do so.
- [78] Inyanda sought an attorney and client costs order against Sohag. I am of the view that no basis for same exists.

[79] On a conspectus of all the facts, I am of the view that Sohag's defence can be rejected for the reasons mentioned. Hence, the following order is made:

79.1 The matter is declared urgent in terms of Rule 6(12) of the Rules of the above Honourable Court;

79.2 The respondent is ejected from Shop 8 situated at Dekema Mall, 248 Dekema Road, Wadeville, Ekurhuleni;

79.3 The respondent is to pay the costs of the application on the party and party scale.

VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

HEARD: 14 SEPTEMBER 2023

JUDGMENT DELIVERY DATE: 18 OCTOBER 2023

Representation for applicant

Counsel: Adv. C van der Merwe

Instructed by: Edward Nathan Sonnenbergs Inc
per Dalene Moodley

Representation for respondent

Counsel: Adv. E. Coleman

Instructed by: ZAF Khan Attorneys

