REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR353/13

In the matter between:

GATEWAY PROPERTIES (PTY) LTD **Appellant**

And

BRIGHT IDEA PROJECTS 249 CC **First Respondent**

VISHNU LAKHRAJ **Second Respondent**

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Ncube AJ sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

SEEGOBIN J:

[1] By definition a contract of lease is entered into when parties who have the requisite intention, agree together that the one party, called the *lessor*, shall give the use and enjoyment of the immovable property to the other, called the *lessee*, in return for the payment of rent.[1] As simple as this may sound, contracts of lease invariably provide fertile grounds for litigation as is evident from our case law. This is due mainly to the fact that parties to such agreements often fail to carry out their reciprocal obligations which flow from the agreement. The present is one such matter. It is an appeal against the judgment and order of Ncube JA (sitting as a court of first instance) which was handed down in the KwaZulu-Natal High Court, Durban, on 4 December 2012. The learned acting Judge dismissed with costs an application brought by the appellant for the eviction of the first respondent from the appellant's premises, for the payment of arrear rental in an amount of R207 841.29 and for certain ancillary relief. Leave to appeal having been refused by the court *a quo*, the present appeal is with leave of the Supreme Court of Appeal in terms of an order dated 24 April 2013.[2]

[1] AJ Kerr, *The Law of Sale and Lease*, 3ed (2004) 245. According to WE Cooper, *Landlord and Tenant*, 2ed (1994) 2, a lease of immovable property is a reciprocal agreement between one party (the lessor) and another party (the lessee) whereby the lessor agrees to give the lessee the temporary use and enjoyment of the property in return for the payment of rent. The temporary use and enjoyment of the property is an essential ingredient of a lease.

[2] Record, page 109.

THE PARTIES

[2] The appellant is the owner of certain immovable property situated at 605 South Coast Road, Clairwood, Durban ('the premises'). The first respondent is a close corporation. The second respondent is the sole member of the first respondent. I intend referring to the parties as they were in the court *a quo*.

MOTION PROCEEDINGS

[3] The applicant approached the court *a quo* by way of motion proceedings for final relief. It is well-established that such proceedings are appropriate for the resolution of legal issues based on common-cause facts and are not designed to determine probabilities. Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] set out succinctly the approach to be adopted to factual disputes which arise on application papers as follows:

> "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. . . . 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 . . . 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. . . . 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

[3] 1984 (3) SA 623 (A) at 634 H - 635 C.

untenable that the Court is justified in rejecting them merely on the papers. . . ."

[4] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,[4] Heher JA dealt with the manner in which courts should consider the adequacy of a respondent's denial in motion proceedings for the purposes of determining whether a real, genuine or *bona fide* dispute of fact had been raised. He said the following in this regard:

"[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. . . .

[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

[4] 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512) paras 11 – 13.

> 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 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."

[5] In *Naidoo and Another v Sunker and Others*,[5] Heher JA, with reference to his judgment in *Wightman, supra,* stated that what he had said in that case about the adequacy of allegations for the purpose of the rule in *Plascon-Evans*, 'applies with equal force to a respondent who endeavours to raise a special defence'.

[6] With reference to the general rule in *Plascon-Evans*, Harms DP in *National Director of Public Prosecutions v Zuma*[6] pointed out that the position may be different 'if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'. Shongwe JA in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading*

[5] [2011] ZASCA 216 para 23.
[6] 2009 (2) SA 277 (SCA) para 26.

(Pty) Ltd and Another[7] stated that this could be done where the 'version propounded by the respondents was fanciful and wholly untenable'.

[7] I have set out in some detail the principles that generally guide a court when faced with genuine disputes of fact in motion proceedings. In the context of the present matter these may be relevant insofar as the issue of delivery and occupation of the premises is concerned in light of the allegations contained in the papers. I will revert to this aspect later in this judgment. For now it is convenient to set out the background facts giving rise to the dispute between the parties.

BACKGROUND

[8] On 16 August 2011 the applicant and the first respondent concluded a written contract of lease ('the agreement') in terms of which the applicant let to the first respondent a portion of the premises consisting of a service station, forecourt and convenience store. Although the agreement was concluded by the signature thereof on 16 August 2011, the effective date was the 1 August 2011. The termination date of the agreement was 31 May 2016. The second respondent signed the agreement in his representative capacity and in his capacity as surety and co-principal debtor for the payment of all rentals and the performance of all obligations of the first respondent arising out of the said agreement. The date of occupation in terms of the agreement was 1 August 2011.

[9] The entire agreement was subject to the fulfillment of a suspensive condition contained in Clause 33. Clause 33 recorded the following:

[7] 2011 (1) SA 8 (SCA) para 21.

"33.

33.1 It is recorded that the Lessee has applied for the necessary site and retail licences to conduct a service station and to sell petroleum fuel from the premises.

33.2 This agreement of lease is subject to the suspensive condition that the Lessee will be granted the aforesaid licences, as contemplated in 33.1. If for any reason whatsoever such licences are not granted at inception, then this agreement shall be deemed to be null and void ab initio, save that the Lessee shall not have any claim for the refund of any rental, or any other amounts that it has paid to the Lessor as from the 1st June 2011.

33.3 It is recorded that the site licence will not be cancelled if the Lessee vacates the premises, or for any reason whatsoever ceases to trade therefrom. The Lessee agrees that the site licence shall be ceded to any incoming tenant, and for that purpose, unconditionally authorizes the Lessor to sign all documents as may be necessary, on the Lessee's behalf, to effect cession and transfer of the site licence to any incoming tenant."

[my emphasis]

[10] It is common cause that the first respondent was issued with site and retail licences[8] by the Department of Energy acting in terms of the Petroleum Products Act No.120 of 1977, as amended. These licences were issued on 9 September 2011. On 5 November 2011 the second respondent sent an email[9] which read as follows:

"Please note that we have just received the retail licence from DOE. We are waiting for the petroleum company to start construction. Once we are on site, we will sort all outstanding rent."

[my emphasis]

[8] Annexures B1 and B2 to the founding affidavit at pages 50 and 51.
[9] Annexure D to the founding affidavit at page 55.

[11] On 15 November 2011 the applicant's attorneys sent a letter[10] to the first respondent informing the first respondent that it was in breach of the agreement in that it failed to pay any rental and utility charges from inception of the agreement. The second respondent was given seven (7) days within which to rectify the breach.

[12] On 16 November 2011 and in response to the letter of the 15th from the applicant's attorneys, the second respondent sent an email[11] to the applicant's attorneys. In view of the fact that the contents of this email go to the heart of the respondent's case, I consider it necessary to quote it *in extenso*:

> "I am in receipt of you (sic) letter dated 15th November 2011, contents of which have been noted. In order for me to start the above operation the following has to be obtained:
>
> 1. Environment Impact
> 2. Re Zoning of land
> 3. Clearance from the Fire Department.
>
> I have rectified the environmental issue, the zoning is in its last stages as there was no objections from the adverts placed. Although the license to trade has been approved, it is subject to zoning being changed, proof has to be submitted to DOE. The biggest problem arose from the Fire Department during September. I have met with the Chief Directorate of the Fire Department. On our meeting which was held on site, he found after inspection that there was no fire regulation in place. His initial move was to condemn the building and switch off the electricity and water due to failure to comply. I have persuaded him not to do so, he further requested that I submit a complete set of new plans and follow all the by laws for approval. After three subsequent meeting (sic) with the Durban and Queensburgh Fire Department it was agreed verbally that I shall bring the building within regulation requirement. As I write this, the building can be condemned, if so it will take a further six to eight months to re-apply. I have spoken to Mr. Essop Salajee yesterday and have explained

[10] Annexure C to the founding affidavit at pages 52 – 53.
[11] Annexure VL1 to the respondent's answering affidavit at page 86.

> to him the difficulties I am having, however I did not mention that the building would be condemned, as he being a senior man I did not want to put him under any form of undue pressure. The estimated cost to get the building compliant with all regulations, will be in the region of fifty to seventy thousand rands, this will include electrical, water reticulation, sprinklers etc. This building does not conform for the purpose of its use. Your client should have been aware of this as they operated Gateway Service Station. Please advice (sic) me on the way forward, as my next meeting with the Fire Department is on Friday 18th November 2011."
>
> [my emphasis]

[13] There was no response from the applicant to the above email nor was it referred to by the applicant in its founding affidavit or dealt with in its replying affidavit. On 22 November 2011 the applicants attorneys wrote to the first respondent and made certain proposals regarding the payment of the arrear rentals[12] and for the payment of R10 000.00 to be paid by the second respondent by 24 November 2011. In an email[13] from the second respondent dated 24 November 2011 the respondents agreed to pay an amount of R10 000.00 by the end of that month. A portion of this email reads as follows:

> "Also inform your client that as soon as I have the cost of requirements from the Fire Department, I shall forward it to them for payment."

[14] On 12 March 2012 the first respondent sent a letter[14] directly to the applicant in which the following was recorded:

> "Please note the following:
>
> 1. I have advised Mr. Essop Salajee that there is no clearance from the fire department.
> 2. The above reason was the withdrawal of the first Petroleum Company.
> 3. I am in no breach of the lease agreement, as far as I am concerned you are.

[12] Annexure 'E' to founding affidavit at page 56.
[13] Annexure 'F' to founding affidavit at page 58.
[14] Annexure 'H' to the founding affidavit at page 60.

4. I have not been difficult on this matter and chose to rectify this matter on your behalf.
5. Should you want me to with draw from obtaining the clearance certificate, I most gladly will do so.
6. Shall then demand from you the clearance certificate, so we may move forward.
7. Thus far we have had an understanding relationship, I would prefer for this to continue.
8. Please note that I am not in breach and have the right to recover from you, all my expenses to date.

Hope the above has shed some clarity on the matter. I await your response."
[my emphasis]

[15] On 20 March 2012 the applicant's attorneys wrote[15] to the first respondent and drew its attention to the fact that except for the sum of R10000.00 that was paid on 30 November 2011, no further rental was forthcoming. In response to the first respondent's letter of 12 March 2012, the applicant's attorney stated that "the contents thereof is devoid of substance". In paragraph 7 of their letter they record the following:

"We further confirm and record that you have obtained the necessary licences in order to conduct a service station and sell petroleum fuel from the premises, with the result that the suspensive condition referred to in clause 33.2 of the lease has been fulfilled. In so far as you allege that the fire clearance certificate has not been granted by the Municipality, we draw you (sic) attention to clause 23 of the lease, which provides as follows:

``The Lessor does not warrant that the premises are suitable for the purposes of the business of the Lessee nor does the Lessor warrant that the premises comply with all legal requirements and by-laws that may be applicable for the purposes of carrying on business as contemplated by the Lessee. The Lessee

[15] Annexure 'I' to the founding affidavit at page 61.

> accepts all risks in this regard and undertakes to obtain the requisite licences and permits and approvals to carry on business from the premises.'
>
> Please note further, that in terms of clause 31 of the lease, your Mr Vishnu Lakhraj is bound as surety and co-principal debtor."

[16] Thereafter various other correspondence[16] passed between the parties, the final one being on 17 July 2012[17] when the applicant's attorneys informed the respondents that the lease agreement *was cancelled* with immediate effect. The respondents were further advised that the applicant will be instituting legal proceedings '*on application*', for the recovery of the arrear rental and other relief. On 18 July 2012 the applicant instituted proceedings against the respondents in which it sought an order for, *inter alia*, the ejectment of the first respondent from its premises and for the payment of arrear rental. In its founding affidavit[18] the applicant claimed that its cause of action was based on the *rei vindicatio*.

[17] In the answering affidavit[19] delivered by the respondents two primary defences were raised. The first was that the first respondent was never given delivery and vacant occupation of the premises from inception of the agreement in that the keys to the premises were never handed to it by the applicant. The second was that the entire agreement was subject to a suspensive condition (Clause 33 *supra*) the effect of which was that the agreement would only come into effect once the first respondent was granted the site and retail licences to conduct a service station and to sell petroleum fuel from the premises. In terms of the suspensive condition it was agreed that in the event of the requisite

[16] See the correspondence which appear from pages 65 – 74 of the record.
[17] Annexure 'Q' to the founding affidavit at page 75.
[18] Applicant's founding affidavit, pages 6 – 22.
[19] Pages 78 – 85.

licences not being granted to the first respondent for whatever reason from inception, the agreement would be null and void *ab initio*.

[18] The respondents further averred that despite being issued with the site and retail licences on 9 September 2011, the first respondent was unable to commence its business operations on the premises due to the fact that the premises were found to be unsuitable by the Fire Department of the eThekwini Municipality for the selling of petroleum fuel. The respondents accordingly maintained that the premises were not suitable for the purpose for which it was leased, that they had no use and enjoyment of the premises and as such they were not liable to pay any rental to the applicant.

[19] In the replying affidavit[20] delivered on behalf of the applicant it was alleged, for the first time, that the keys to the convenience store were in the custody of the workshop tenant, a Mr Farouk Khan (Khan) who also conducted business on a portion of the premises. It was further alleged that the second respondent was instructed to uplift the keys from the workshop tenant "which he did". In a confirmatory affidavit[21] deposed to by Khan he confirms that the keys to the premises were in his custody at all times and that "the second respondent had full and complete access to the premises during workshop working hours, as the premises were never locked during these hours. *Furthermore, the second respondent was at all times free to make a copy of the keys for the premises if he so required*". [my emphasis]

[20] With the above background in mind, I turn to consider whether the learned acting Judge *a quo* was correct in dismissing the application on the

[20] Pages 87 – 92.
[21] Pages 96 – 97.

basis of the defences raised by the respondents in their papers. I propose dealing with these defences in reverse order.

FULFILLMENT OF SUSPENSIVE CONDITION

[21] Ordinarily a contract containing a suspensive condition is enforceable immediately upon its conclusion but some of the obligations are postponed pending fulfillment of the suspensive condition.[22] In a contract of lease, however, a contractual relationship comes into existence between the lessor and the lessee on the signing of the lease although the resultant obligations arising from the lease maybe suspended.[23] In interpreting the provisions of the suspensive condition, in particular those contained in sub-clauses 33.1 and 33.2 of the agreement, in order to determine whether the condition was fulfilled, it is necessary to have regard to the agreement as a whole starting with the words used. The words contained in the relevant provisions are required to be examined in the context in which they were used, regard being had to the factual matrix. The correct approach to interpretation in this regard is that set out by the SCA in *KPMG Chartered Accountants (SA) v Securefin Ltd*[24] followed more recently in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[25] in which the following was stated:

> "'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

[22] If the condition is fulfilled the contract is deemed to have existed *ex tunc*. If the condition is not fulfilled, then no contract came into existence. Once the condition is fulfilled '[T]he contract and the mutual rights of the p arties relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of the fulfilment of the condition, i.e. *ex tunc*'. (See *Absa Bank Ltd v Sweet and Others* 1993 (1) SA 318 (C) at 323). See also generally, RH Christie and GB Bradford *The Law of Contract in South Africa* 6ed (2011) at 151 – 153 and the authorities collated by Tebbutt J in *Absa Bank Ltd v Sweet and Others supra*, at 322– 323.

[23] *Absa Bank Ltd v Sweet and Others supra*, at 323. See also: *Africast (Pty) Ltd v Pangbourne Properties Limited* 2014 JDR 0616 (SCA).

[24] 2009(4) SA 399 (SCA) para 39.

[25] 2012 (4) SA 593 (SCA) para 18.

> Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and *l*egislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." [footnotes omitted]

[22] Having regard to the fact that the agreement under consideration is one for letting and hiring, according to the common law the use to which the leased premises is to be put is of real and substantial importance.[26] The main purpose behind the present agreement was to enable the first respondent to operate a convenience store and to conduct a service station which of necessity entailed the selling of petroleum fuel from the premises. This is made clear from the wording used in clause 33.1 which recorded 'that the Lessee has applied for the necessary site and retail licences to conduct a service station and to sell petroleum fuel from the premises. [my emphasis] The respondent's complaint from the outset was that despite being issued with site and retail licences by the Department of Energy on 9 September 2011, it was simply unable to sell petroleum fuel from the premises as the site was found to be unsuitable for this

[26] See the remarks of Potgieter JA in *Oatarian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785G. See also Pothier in his *Treatise on the Contract of Lease* in which he states: "22. It is of the essence of the contract of lease that there be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract."

purpose by the Fire Department of the eThekwini Municipality. In effect the first respondent was unable to comply with other statutory requirements and municipal by-laws due to the condition of the premises. This fact was brought to the attention of the applicant as early as 16 November 2011.[27] The respondents made it clear at that stage that "this building does not conform for the purpose of its use". They further recorded that the Chief Directorate of the Fire Department was ready to condemn the building and to switch off the electricity and water but was persuaded by the second respondent not to do so. So despite the fact that the first respondent applied for and was issued with site and retail licences as aforesaid, the *de facto* position was that it could not sell petroleum fuel from the premises. This situation prevailed up until the time the agreement was cancelled by the applicant on 17 July 2012. There was no obligation, in my view, on the part of the respondents to ensure that the leased premises were fit for the purpose for which it was hired: that obligation fell squarely on the applicant.

[23] On behalf of the applicant it was argued[28] that "the fact that the first respondent has not traded from the premises is irrelevant. The first respondent accepted all risks in terms of clause 23[29] of the lease". It further argued that the duty of the applicant was simply to place the premises at the disposal of the first respondent to enable the latter to use it.[30]

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[27] Annexure VL 1 *supra.*

[28] Applicant's heads of argument, page 7, paragraph 23.

[29] Clause 23 contains a warranty provision in the following terms:

> "**NO WARRANTIES BY THE LESSOR**
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> The Lessor does not warrant that the premises are suitable for the purposes of the business of the Lessee nor does the Lessor warrant that the premises comply with all legal requirements and by-laws that may be applicable for the purposes of carrying on business as contemplated by the Lessee. The Lessee accepts all risks in this regard and undertakes to obtain the requisite licences and permits and approvals to carry on business from the premises."

[30] Applicant's heads of argument, page 8, para 26.

[24] The above argument, in my view, is devoid of substance. It is not clear how the first respondent was supposed to 'use and enjoy' premises which were not fit for the purpose for which they were leased in the first place. After all the essence of a contract of lease is that there must be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon and it is actually that which constitutes the subject and substance of the contract and not the leased property itself.[31] It would seem to me that the inclusion of the warranty clause in the agreement was simply a means for the applicant to divest itself completely of its common law obligations arising from the agreement. It is clear from the agreement as a whole that the premises were let for a specific purpose. In these circumstances, the applicant was under a duty to deliver the property in a condition reasonably fit for the purpose for which it was let.[32] In *Thompson v Scholtz*[33] Nienaber J, in analysing the defendants defence therein based on an *exceptio non adimpleti contractus*, set out the following principles which are applicable to a lessee who is deprived of or disturbed in the use or enjoyment of leased property:

> "Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him *pro rata* to his own reduced enjoyment of the *merx*. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of contract, eg because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial. (See the cases cited by *Piek and Klein (supra* at 380 footnote 112).) The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the *exceptio*, more particularly

[31] Kerr, *The Law of Sale and Lease supra,* at 247 and the authorities referred in footnote 2 thereof.
[32] Cooper, *Landlord and Tenant supra,* 85; *Bahadur v Phillipson* 1956 (4) SA 638 (FS).
[33] 1999 (1) SA 232 SCA at 247 A-C.

of the first proposition in *BK Tooling* (cf *Fourie NO en 'n Ander v Potgietersrusse Stadsraad*1987 (2) SA 921 (A)).”

[25] Bearing in mind the main purpose for which the premises were being leased, the provisions of clause 33.2 of the agreement must be interpreted to mean that if for whatever reason the first respondent was unable to obtain the requisite licences and clearances from the relevant authorities from inception, the agreement would be null and void *ab initio*. As it turned out, due to the condition of the leased premises, the first respondent was frustrated in its efforts to obtain the requisite licences and clearances to conduct business from the premises and it did not do so. Essentially it did not receive any usage whatsoever. In these circumstances, I consider that inasmuch as the agreement came into effect on its signing on 16 August 2011, the second respondent’s obligations were suspended until such time as the condition was fulfilled. This did not happen. This rendered the agreement null and void *ab initio*.

POSSESSION AND OCCUPATION OF THE LEASED PREMISES

[26] The first respondent strongly disputed that it was given possession and occupation of the premises from inception of the agreement. It maintained that it was not placed in possession of the keys to the premises and for this reason it was deprived of any use and enjoyment of the premises. As I pointed out earlier the applicant of course disputed this saying that the keys were left with its workshop tenant and that the second respondent was at liberty to uplift the keys ‘which he did’. The workshop tenant, on the other hand, while confirming that the keys were left in his custody went on to state that they were available to the second respondent during workshop hours and that the second respondent was free to make a copy of the keys if he so required. The issue which arises is

whether the leaving of the keys in the custody of a third party in these circumstances constitutes proper delivery in law.

[27] The applicant's argument on appeal was that since the respondents had merely denied that the keys were made available to the first respondent, this constituted a bald denial and raised a fictitious dispute of fact which was so untenable that the court *a quo* would have been justified in rejecting it on the papers. It was accordingly contended on behalf of the applicant that the learned acting Judge *a quo* had misdirected himself in failing to apply the second leg of the *Plascon-Evans* rule, *supra*.

[28] It is trite that a lessors primary duty is to deliver i.e. place at the disposal of the lessee the property let to enable the latter to use it.[34] In the case of a building this is done by the lessor by handing over the keys to the lessee.[35] In context of what transpired in the present matter and as conceded by the applicant (and confirmed by the workshop tenant, Khan) the keys to the premises were never handed to the first respondent unconditionally, but remained in the custody of Khan. Khan made it plain in his affidavit that the keys were available to the first respondent "during workshop hours". The inference that there remained an obligation on the part of the respondents to return the keys to Khan's custody before the end of the working day, is inescapable.

[29] The primary duty of the applicant was to deliver to the first respondent the use and occupation of the premises. In order to fulfil this duty it was required to give the first respondent free and undisturbed possession of the

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[34] Some authorities state that the lessor must give the lessee *vacua possessio – Tshandu v City Council, Johannesburg* 1947 (1) SA 494 (W) 497; *Soffiantini v Mould* 1956 (4) SA 150 - 153 D; *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N).

[35] *Marcuse v Cash Wholesalers* 1962 (1) SA 705 (FC) 709A.
See also: Cooper, *Law of Landlord and Tenant supra*, at 84.

premises. Leaving the keys with a third party on whom the first respondent's rights to use and enjoyment were wholly dependent did not in my view, constitute proper delivery and possession in law. The assertion by the tenant that the second respondent was free to make a copy of the keys 'if he so required' was nothing more than a misguided attempt on the part of the applicant to overcome the issue of delivery and occupation raised by the respondents in reply.

[30] It would seem to me that the denial by the respondents insofar as the issues pertaining to the keys and delivery are concerned, did not raise a genuine dispute of fact as on the applicants own version the keys to the premises were never handed to the first respondent but remained in the custody of the workshop tenant. This was the factual position which existed up until the agreement was cancelled by the applicant in July 2012. In the circumstances I do not consider that the first respondent's version consisted of any bald or uncreditworthy denials nor was it so untenable so as to be rejected on the papers as they stood. If anything the first respondent's version was supported to a great extent by the applicant itself and the workshop tenant. In my view the court *a quo* was accordingly entitled to determine the matter on the papers. The applicant, having elected to have the matter dealt with on the papers as they stood, cannot now complain about the manner in which the learned acting Judge *a quo* exercised his discretion herein. In my view the argument advanced on behalf of the applicant is misconceived and falls to be rejected.

[31] I accordingly hold that the court *a quo* was correct in finding on the facts that the first respondent was not given possession and occupation and as such was deprived of use and enjoyment of the premises. In any event the kind of possession given by the applicant, i.e. leaving the keys with the workshop tenant would not have been enough for the first respondent to protect that

possession against the whole world[36] nor would it have been in a position to prove an act of *spoliation* against anyone depriving it of possession.[37]

CONCLUSION

[32] I accordingly conclude that the applicant failed to make out a case for the relief claimed. In my view the reasoning of the court *a quo* and the conclusion it reached cannot be faulted in any way. The appeal must accordingly fail.

ORDER

[33] The order I propose is the following:

The appeal is dismissed with costs.

_____

_____ I agree
VAN ZŸL J

_____ I agree and it is so ordered.
JAPPIE DJP

[36] *Bodasingh's Estate v Suleman, supra*, at 290.
[37] *Shaw v Hendry* 1927 CPD 357 at 359.

Date of Hearing	:	6 June 2014
Date of Judgment	:	1 July 2014
Counsel for Appellant	:	Mr MS Omar (Attorney)
Instructed by	:	MS Omar & Associates c/o Cajee Setsubi Chetty Inc.
Counsel for Respondent	:	Mr Manilall (Attorney)
Instructed by	:	Manilall Chunder & Company c/o K. Ramkaran & Co.