IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATL DIVISION, PIETERMARITZBURG

CASE NUMBER: 5302/2021P

In the matter between:

THE SOUTH AFRICAN NATIONAL ROADS AGENCY

SOC LIMITED **APPLICANT**

and

ARCHIWAYS SYKE (PTY) LTD **RESPONDENT**

CAMRY TRADING ENTERPRISES (PTY) LTD **THIRD PARTY**

JUDGMENT

BEZUIDENHOUT J:

[1] Applicant instituted an application against Respondent for an order:

> "The Respondent Archiways Skye (Pty) Ltd which trades as Hayfields Service Station (Engen) is ordered to vacate the premises described as follows erf 3O45 Pietermaritzburg FT, street address and name 101 New England Road, Hayfields, Pietermaritzburg, KwaZulu-Natal, measuring approximately 1,376 hectares and is ordered to restore to the Applicant vacant and unrestricted access to the premises within three (3) days of the granting of the order."

It further seeks relief that in the event of Respondent failing to comply with the said order that the Sheriff or his deputy are authorised to do what is necessary to ensure that

the premises is vacated and there be unrestricted access to the premises. If necessary to enlist the services of South African Police Services. Costs is also sought on an attorney and client scale. The application is opposed by Respondent.

[2] Respondent on 19 May 2019 filed a Third Party notice on Camry Trading Enterprises (Pty) Ltd. (Camry) Third Party. It is contended that the questions and issues in the main application are substantially the same as those between Respondent and the Third Party and that it should be heard together. The Third Party conducts the business of a Kwik Spar from a shop on the said premises which Applicant wishes to evict Respondent from. The said application is opposed by the Third Party and also by Respondent.

Background

[3] In 2019 Applicant, the owner of the property in question, called for tenders to lease the said property. Respondent on 15 May 2019 submitted its tender which was the highest tender and was accepted by Applicant. Respondent also tendered but its tender was much lower and was unsuccessful. On 31 July 2020 Applicant and Respondent entered into a written lease agreement. It is contended that although the lease indicates the date of signature as 31 July 2020 it was actually signed during November 2020. In terms of the lease the premises was let to Respondent and would commence on 1 August 2020 and would be for an initial period of nine (9) years with the termination date being 30 June 2030. Rental would be paid in advance from 1 August 2020 and escalate at 8% per annum. The monthly rental would be the sum of R 528 000-00 plus vat thus a total of R 607 200-00. The premises were being used for the filing station, the Kwik Spar outlet and also certain other businesses which operated from the said premises. The lease provided for costs of any litigation to be on an attorney and client scale. Respondent was granted permission to sublet the premises but such subleases had to be subject to a three (3) months termination clause. If Respondent failed to comply with any terms of the lease and after notice thereof served

on it, fails to remedy it the lease could be terminated. Both Applicant and Respondent would inspect the said premises prior to Respondent taking over the premises.

Submissions by Applicant: Eviction

[4] It is contended by Applicant that after the signing of the lease it duly complied with all its obligations in terms of the lease agreement and gave Respondent vacant possession of the premises. Respondent breached its obligations in terms of the lease in that it failed to pay any of the monthly rental which was due. A demand was made on 30 November 2020 as an amount of R 1 925 964-99 was overdue and payable and despite demand Respondent failed to pay the said amount. An extension was granted to Respondent until 1 February 2021 and a further notice was then duly given to Respondent at which stage the outstanding amount exceeded R 3 000 000-00. Pursuant to this Respondent paid the sum of R 230 000-00 on 1 February and 2 February 2021.

[5] Respondent did not pay the overdue amount but contended that Applicant breached the said lease agreement as it failed to grant Respondent vacant possession of the premises as the previous tenant Camry (Third Party) were still in occupation of the Kwik Spar outlet. It also required suspension of the payments due to covid-19. It was contended by Applicant that Camry was in occupation of the said premises when Respondent took over and that Respondent was well aware thereof.

[6] Applicant contends that as Respondent paid only a total amount of R 345 000-00 to Applicant, Applicant is entitled to cancel the agreement and that Respondent should accordingly vacate the said premises. Attached to the founding affidavit are monthly invoices from Respondent to Camry. Respondent was collecting rent from Camry and other businesses who were sub tenants until the order of Seegobin J. in case number 6971/2021 which will be dealt with later.

[7] In its answering affidavit Respondent contends that Applicant gave the manager of Camry notice on 9 May 2020 to vacate the filling station and the Kwik Spar. There were negotiations between Respondent's representative and that of Camry to purchase the Spar franchise but no agreement was reached. Camry refused to vacate the said premises and a lease was presented to Camry for signature which it refused to accept. It was therefore contended that Respondent was not given vacant possession and that the date of the commencement of the lease would occur when all trading licenses were in place. It therefore denied that it was in breach of the lease and expressed the view that it was excused from paying monthly rental because it had not been given undisturbed occupation and possession of the said premises. It further contends that payments it received have been receipted as damages which it was suffering.

[8] In response to the above contentions it was submitted on behalf of Applicant that Respondent had inherited Camry as a subtenant. At page 358 annexure "SR6" is a minute of a meeting on 2 June 2020 for the handover from Engen to Applicant and to record ownership of the buildings and structures at the said premises. The representatives of Respondent were present and it is apparent there was no objection to the Kwik Spar operating on the said premises. A draft lease between Respondent and Camry appears at page 360 of the record and the lease period therein was for an indefinite period subject to a three (3) months written notification of cancellation. At page 382 dated 30 September 2020 is a letter from Respondent to Camry terminating what it refers to as the month to month lease and stating that they should vacate the property by 31 October 2020. It was submitted that that was indicative that Respondent had no objection at that stage to Camry occupying the said premises. On page 385 annexure "SR11" is a letter addressed to Camry from Respondents attorneys about a draft purchase proposal which would follow. At page 399 annexure "SR14" a letter was addressed to Respondent's attorneys by the attorneys of Camry enquiring about the form of agreement in regard to the Kwik Spar to be put in place as soon as possible. At page 400 annexure "SR15" a letter dated 5 October 2020 addressed by Respondent's

attorneys to Applicant requesting that the monthly rental be reduced to R 100 000-00 per month for six (6) months due to the covid-19 epidemic and the drop in sales that had occurred at both the Kwik Spar and also that the license for the filling station had not yet been granted.

[9] On page 433 annexure “SR30” Respondent addresses a letter to Applicant dated 4 December 2020 wherein it contends that as Camry refused to move out and give it vacant possession Applicant was obliged to do so. Further that the lease was to commence when all trading licenses were in place and that its ability to trade has been hammered. It also then once again refers to the implications of covid-19 and denies that they are in breach of the agreement.

[10] It was submitted that that was the first time that Respondent raised the issue that it did not have full use of the property. In a letter addressed by Respondent’s attorneys on 5 February 2021 it contends that Applicant failed to give vacant occupation as Camry was still in occupation of the Kwik Spar premises. They refer to the letter of 30 June 2020 to Camry to vacate the said premises. It further contends that Camry refused Respondent’s short term lease and will defend any action to evict them. Therefore Applicant has failed to give vacant possession. It further contends that a resolution of Applicant dated July 2019 in terms of which the lease was accepted states that the commencement date would be the first day of the month following the date when all the necessary licenses are in place to trade. It then refers to not having yet received the necessary license and also refers to the covid-19 epidemic.

[11] It was submitted that Respondent was aware that Kwik Spar was operating and even entered into a lease with it and allowed it to continue operating. Respondent thus had undisturbed possession of the premises. It also only requested a reduction in rent due to covid-19 epidemic.

[12] It was further submitted that as far as the occupation of the property was concerned that Seegobin J. in the judgment relating to the interim application found that Respondent had full use and benefit of the said property. It was submitted that in Tudor Hotel Brassenie & Bar (Pty) Ltd. v Mencetrade 15 (Pty) Ltd (793/2016) (2017) ZSCA 111 (20 September 2017) (Tudor Hotel) a portion of the property let was not given to the Applicant and it was held where rental is paid in advance the payment of rent was not reciprocal on the obligation of the lessor to grant beneficial use of the entire leased premises and that the cancellation and eviction was justified. This it was submitted was correct and that Respondent was collecting all rentals from the subtenants but did not make any payment to Applicant. As appears from annexure "SR26" page 419 of the papers on 20 July 2020 a lease agreement was sent to Respondent for signature as well as the signing of a suretyship. As appears from page 64 paragraph 3 of the lease agreement annexure "DN2" paragraph 3 dealing with occupation of the property has been deleted from paragraph 3.1 to 3.6 on page 65. In paragraph 3.7 it specifically sets out that the lessee which is Respondent warrants that the premises are under its effective control from the commencement date of the agreement and assumes liability in respect of claims arising out of the Occupation and Health Safety Act. In paragraph 2.22 the commencement date of the agreement is set out in paragraph 1.8 thereof which is 1 August 2020. Rental was accordingly payable from the date of occupation which is 1 August 2020, as set out in paragraph 4 on page 66. In terms of clause 25 at page 76 if for any reason the lessee occupies the premises and the lessor disputes its rights the lessee shall continue to pay the rental provided in the agreement.

[13] Respondent did not make out any case why a reduced rental payment should be made during covid-19.

[14] The lease which was signed is what applies and Respondent cannot rely on the unsigned draft document. Respondent has been in occupation since July 2020. The clause Respondent relies on is deleted in the signed lease. Edwards v Firstrand Bank

Limited t/a Wesbank (20734/14 (2016ii) ZSCA 1141 30 September 2016). Respondent gave contradictory facts in his affidavits as to when the petroleum lease was granted.

[15] In an affidavit signed by one Wulagantham (T Reddy) the managing director of Respondent on page 525 of the papers annexure "DN26" he states that he attaches a letter marked "A" dated 24 March 2020 indicating that the company has been granted the necessary license from the controller of petroleum products. Annexure "A" on page 526 states that:

> "The Controller of Petroleum Products (the controller) has approved your application for a Retail New (change of hands) License in terms of the Petroleum Products Act 1977."

Accordingly the license was granted to Respondent on 24 March 2020. It is therefore submitted that vacant possession was granted that it collected rent and that a license had been granted. Respondent however failed to pay the rental in terms of the agreement to Applicant. Applicant was therefore entitled to cancel the lease and is therefore entitled to seek the ejectment of Respondent. The submissions relating to the Third Party notice will be dealt with later.

<u>Submissions: Respondent: Eviction</u>

[16] It was submitted on behalf of Respondent that Applicant seeks final relief and that it must be decided on Respondent's version. It was further submitted that what was set out in the tender document had to apply to the lease agreement signed and that it could not be changed. It was a contract by tender and unilateral changing thereof could not be done and the clauses could not be changed. MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Rye and Lazer Institute 2014 (3) SA 451 (CC at paragraphs 64 and 106.

[17] It was submitted that clause 3.1 of section 4 of the tender document states that if the lessor is unable to give the lessee occupation of the property or an existing lessee not having vacated the property the lessee shall have no remedy and shall accept occupation and commence paying rental on such later date on which the property is available. It was submitted that clause 3.1 of section 4 of the tender document contained the terms “and conditions applicable to the lease”. It was submitted that annexure “SR2” on page 347 recommended and approved the lease to Respondent. It is submitted that in paragraph 4 of the tender document it states that no unauthorised alteration or addition shall be made to the tender documents and if so then the tender may be rejected. It further was submitted that paragraph 14 states that “the MAJV and San Ral reserve the right to correct any arithmetical errors in the rates and totals in the tender”. The tenderer shall be informed of such amendments prior to their acceptance of the tender and as such shall have the right to accept or reject such amendments. It is therefore submitted that the terms and conditions in the tender could not be amended.

[18] It was submitted that the license was obtained during November 2020 and the lease was only due to commence when all trading licenses were in place which occurred during November 2020. Therefore the commencement date would be November 2020 and was the reason why Respondent complained about its occupation of the said premises for the first time. It was submitted that it was immaterial whether full occupation was granted or not. Notice was given to Camry by Engen on 12 May 2020. As the tender was accepted Applicant had to ensure that Respondent was granted vacant possession. In the affidavit of Steve at page 219 of the papers he sets out that on 5 October 2020 he instructed his attorney to write to Applicant’s representative to point out that he had not received his license. He also therein refers to the sales which have plummeted. It was submitted that there was also a dispute between Camry and Respondent as Wimble of Camry sought an amount of R 2.5 million rand for the Kwik Spar operation. The lease agreement annexure “SR7” between Camry and Respondent was never signed. Respondent during November

2020 signed the lease with Applicant and then later saw that it was backdated to 28 July 2020.

[19] Due to the petroleum license not being in place, Camry still operating the Kwik Spar and covid-19, Respondent did not sign the lease when he received it. Respondent did not read or check the lease when he signed it as he accepted it would be the same as the tender. The *exceptio non adimplteti contractus operates* as an absolute bar against Applicant's claim. The facts of the Tudor Hotel case are distinguishable because rental could only be paid once there was an obligation to do so. When Respondent took occupation it had no obligation to pay rental. It was only obliged to do so when full occupation was given. Applicant is responsible to evict Camry.

Third Party Proceedings Submissions

[20] It was submitted by Respondent that the Third Party has no lawful right to remain on the premises and that it is accordingly entitled to its eviction and the relief claimed in the Third Party notice. The Third Party was previously given notice to terminate its lease but despite this has refused to vacate the premises and Respondent is therefore unable to take full occupation of the said property. There were negotiations regarding the conclusion of an agreement between the Third Party and Respondent but the Third Party refused to sign the lease. The Third Party alleged an oral agreement of sale which Respondent disputes. The Third Party wishes to raise the issue of estoppel which cannot be used as a defence. It is submitted that there was no binding lease agreement reached and that the Third Party changed its version as time was progressing. The payments made to Respondent by the Third Party has been accepted for damages caused by the Third Party to Respondent.

[21] It was submitted on behalf of the Third Party that Applicant is entitled to the eviction of Respondent. The lease was beneficial to Respondent as it was receiving

rental from the Third Party. The Third Party had a lease with Respondent. Camry had been paying for its rental occupation all along, although Respondent has since 1 July 2020 not paid any rental to Appellant. The rental required from Camry has been paid as appears from the invoices. Camry is a subtenant of Respondent and no eviction is required. If the eviction order of Applicant is successful then the Third Party must also go. It was further submitted that it was the contention of Respondent that paragraph 3.1 of the tender document protected it and allowed it to stay on and allowed it not to pay the rental as it was not given vacant possession. It was submitted that Respondent allowed Camry to stay on and accordingly paragraph 3.1 of the tender document was not applicable. It was submitted that the Third Party proceedings should be dismissed. It was submitted that the existence of a sale agreement between Respondent and the Third Party as set out in paragraph H (e) to H (i) of the papers on pages 7 and 8 has no relevance. Applicant was not seeking the eviction of the Third Party and that Respondent has no grounds to evict the Third Party. The supplementary affidavit filed by Wimble, a director of Camry, sets out in paragraphs 13, 17 and 18 that it considered selling the Kwik Spar to Respondent if Spar agreed and would control the premise until such sale was completed. He accepted the rental proposal by Mr. Reddy on behalf of Respondent and such was paid. Respondent sent invoices to the Third Party for rental which was paid every month. It was therefore submitted that Camry was entitled to a month to month lease until terminated and that the Tuder Hotel case was applicable. The Third Party notice is incorrect and the relief claimed therein is not applicable.

[22] It was submitted on behalf of Applicant that the dispute between the parties was not the same. Respondent had full use of the premises. It was not an issue that Respondent and Camry were in occupation. The relationship between Respondent and Camry as well as the sale of the Kwik Spar between Camry and Respondent has nothing to do with Applicant. It was a private dispute between them and the issue accordingly was not the same as that between Applicant and Respondent. The lease agreement between Applicant and Respondent had been cancelled. The Third party notice was irrelevant and it should be dismissed with costs.

[23] It was further contended by Mr. Harpur that the Third Party was joined because the issues between the parties were common. The fundamental issue was Camry remaining on the property. It was submitted that Camry was occupying illegally because there was no lease agreement - there were two letters of cancellation - there was no sale agreement and that in terms of paragraph 3.1 of the tender document no rental was payable. It was therefore submitted that the issues were the same and that Camry had to be evicted from the said premises.

Issues

[24] The issues of the late filing of the supplementary affidavit by the Third Party and the striking out thereof were not pursued and it was accepted that the matter would proceed on the papers complete as before me and bound in volumes which included the supplementary affidavit and the response thereto. It is therefore not necessary to deal with these issues any further.

[25] The issues that have to be determined is whether Applicant is entitled to an order evicting Respondent from the said premises. When did the lease agreement come into operation and whether vacant possession was given to Respondent? The further issue is the Third Party notice which was filed by Respondent and whether any order should be granted in respect thereof. The issues are set out in the summary of the submissions made on behalf of the parties and it is therefore not necessary to repeat it again.

Third Party Notice

[26] It is prudent in my view to firstly deal with the issue of the Third Party notice that was given. The Third Party notice states as follows:

> "The above named Respondent claims that there are questions and issues in the main application which are substantially the same as questions and issues which have arisen or will arise between the Respondent and the Third Party and should properly be determined not only as between the Applicant and the Respondent as parties to the main application but also as between such parties and the Third Party or between any of them on the grounds set forth in the annexure hereto."

There is no annexure to the Third Party notice but an affidavit by Respondent's director and at the end thereof its sets out what the order is that is sought by Respondent against the Third Party. Besides referring to rental which may be due it seeks an order that Respondent be able to evict the Third Party from the portion of the premises which it occupies.

[27] Rule 13 states as follows:

> "13(1) Where a party in any action claims:
>
> (a) As against any other person not a party to the action (in this Rule called a third party) that such party is entitled, in respect of any relief claimed against him, to the contribution or indemnification from such third party; or
>
> (b) Any question or issue in the action is substantially the same as the question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them, such party may issue a notice hereinafter referred to as third party notice as near as may be in accordance with form 7 of the 1st Schedule which notice shall be served by the Sheriff.
>
> (2) Such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, and any relief or remedy claimed. Insofar as the statement of the claim and the question and issue are concerned, the rules with regard to pleadings and to summonses shall *mutatus mutandus* apply."

[28] It is indeed so that the Third Party notice does as has been submitted on behalf of the Third Party does not strictly comply with the provisions of the said Rule. Further that it is a procedure which is deemed mainly to be used in action proceedings. At the end of the affidavit attached to the Third Party notice by Respondent's director it does set out what relief is being claimed, and I accordingly accept that that is the relief claimed.

[29] In the tender document it clearly sets out that the premises for which tenders are sought consists of a filling station, a Kwik Spar and various other small businesses. The tender is in respect of the whole premises which include all these businesses to which I have just referred. It was therefore apparent to anyone tendering that the premises for which it tendered included those portions occupied by these other businesses including the Kwik Spar (Camry). In the Third Party notice it seeks final relief against the Third Party in that it seeks relief that Respondent be entitled to evict the Third Party. Respondent proceeded by way of application and accordingly any dispute of fact would have to be determined in terms of the decision of Plascon Evans and the approach that is set out therein.

[30] As already set out Respondent was well aware when tendering that the Kwik Spar was operating from the premises. Even if the incorrect form of the Rule 13 notice is overlooked by taking into account the relief as set out in the final paragraph of the affidavit on behalf of Respondent, Respondent knew very well that Camry was in occupation of a portion of the premises. This was also so when it took occupation and even provided Camry with monthly invoices relating to rental payable by Camry. This is indicative of the fact that Respondent accepted Camry to be a subtenant of Respondent. It is common cause that there were also draft lease agreements and negotiations between Camry and Respondent for the purchase of the Kwik Spar by Respondent from Camry. The drafting of the lease agreement, although not signed,

and the issuing of invoices and the receiving of the rental by Respondent all indicate that Respondent accepted Camry as a subtenant and that any rental which was payable by Camry was due to it. Therefore it was never an issue that Applicant had to evict Camry. Respondent was well aware that it took occupation of the premises with Camry in occupation thereof and that if Camry had to be evicted it would have to be done by Respondent. All these dealings and consultations in respect of the sale of the Kwik Spar by Camry and any leases are dealt with in the papers and it is not necessary to repeat it herein.

[31] Accordingly the issue which has to be decided between Applicant and Respondent is not substantially the same as that between Respondent and the Third Party. The issue between Respondent and Applicant concerns the cancellation of Respondent's lease agreement and their eviction by Applicant. As already stated Respondent leased the whole premises including that of Camry and there is therefore at this stage no issue between Camry and Applicant. Accordingly the Third Party notice does not make out a case for the relief sought in terms of the Third Party notice and the application is therefore to be dismissed with costs.

Eviction of Respondent

[32] As set out above the tender document made it clear that the premises which was to be let out included Camry. The argument of Respondent that Applicant failed to grant it vacant possession of the premises accordingly has no basis because it was all along clear to and accepted by Respondent that it was leasing the whole property which included Camry. This is further fortified by the conduct of Respondent by issuing Camry with invoices for rental and by negotiating with it about a lease etc. which all indicated that it was quite prepared to accept the premises with Camry as a tenant as was clear from the tender document to which it tendered and was successful. It also accepted rent from Camry until the judgment of Seegobin J. ordered it be paid to Applicant.

[33] The other issue was whether Respondent was only to commence paying rental once it had obtained its licenses. It is apparent from the documentation and even from the letter which is attached to the affidavit of Mr. Reddy that the petroleum license was granted during March 2020. Annexure "DM26" an affidavit by the said Reddy, a director of Respondent, clearly states: "I annex hereto marked "A" a copy of a letter dated the 24 March 2020 advising me that the company has been granted a license aforesaid." Accordingly the petroleum license was granted at that date and the rental thus payable from that date if the version of Respondent is to be accepted. It is however, common cause that to date Respondent has not paid any rental over to Applicant in respect of the said premises but has continued trading from the premises. This failure resulted in an application being brought by Applicant on 27 October 2021 for temporary relief pending finalisation of this application that all rentals which was paid by Camry and the other businesses be paid over to Applicant which order was granted by Seegobin J.

[34] It was submitted by Respondent that the judgment of Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd had to be distinguished from the facts of the present case. In the present matter the rental was payable monthly in advance. This was also the case in Tudor Hotel. Just as in Tudor Hotel in the present matter even if vacant possession could not be given of the whole property the rental was still payable. However as I have indicated above in the present matter Respondent was well aware of Camry's occupation and that the issue of vacant possession therefore is therefore not an issue. It was held in paragraph 11 of the Tudor Hotel case:

> "The lease agreement therefore altered the reciprocal nature of the applications of the lessor and the lessee. The obligation of the lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee."

It was also held in paragraph 17:

> "The provision that the rental was to paid on or before the Thursday of each month has the effect that it was to paid in advance by the appellant. The

> obligation of the appellant to pay the rental was accordingly not reciprocal to the obligation of the respondent to provide beneficial occupation of the entire premises."

In paragraph 18 it was held:

> "The terms of the lease therefore precluded suspension of the payment of rental by the Appellant, as a result of the failure by the respondent to afford the appellant beneficial use of the entire leased premises. As a result the cancellation of the lease by the respondent was justified, the appellant being in arrears with the rental payments."

[35] The facts in the present matter are, in my view, very similar to that in Tudor Hotel decision. It is common cause that Respondent has not paid the rent due. However, as I have already mentioned, the vacant possession in the present matter is in actual fact not an issue as Respondent was well aware thereof, accepted it and was content to accept the monthly rental from the subtenant Camry until this was stopped by the High Court order in the judgment of Seegobin J. In the judgment of Seegobin J. he referred specifically to the judgment of Tudor Hotel and found that it was applicable and that it had to continue paying rental for the entire premises in terms of its contractual obligation and that it was not dependent upon any reciprocal obligation. I am in agreement with his judgment and the finding in this regard.

[36] It was further submitted on behalf of Respondent that clause 3.1 of part 4 of the tender document had been deleted from the lease agreement which was ultimately singed by Respondent. It was submitted that clause 3.1 was the governing clause which could not be changed. Clause 3.1 of section 4 of the tender document, the clause in question, reads as follows:

> "Should the lessor be unable to give the lessee occupation of a property on the commencement date for any reason whatsoever, whether or not occasioned by

> the negligence of the lessor and/or the designated person, including (without limiting the generality of the aforegoing) an existing lessee not have vacated the property, the lessee shall have no remedy and shall accept occupation and commence paying rental on such later date on which the property are available."

It is submitted by Respondent that accordingly no rental was payable because the property was available. It is further submitted that the deletion of clause 3.1 in the lease agreement which was signed by Respondent was irregular and that it had to comply with that of the tender document and that no clause which appeared in the tender document could be excluded from the lease agreement presented to Respondent to sign. In this regard I was referred to the decision of the MEC for Health EC v Kirland Investments 2014 (3) SA 481 (CC) at paragraph 64 and 105 as well as Altech Radio Holdings (Pty) Ltd and Others v Tshwane City 2021 (3) SA 25 (SCA) at paragraphs 1, 2 and 17. I was further referred to the case of Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd. 2021 (4) SA 436 (SCA) paragraphs 13, 20, 51 and 62 to indicate that the amendment of clause 3.1 was contrary to section 217 of the Constitution and therefore *ulta-vires*.

[37] It was submitted by Respondent that the *exceptio non adimpleti contractus* applied as there was a reciprocal duty which has not been performed. This was that vacant possession had to be given to Respondent. This has already been dealt with above and as it has been found that the decision in the Tudor Hotel case applies and must be followed. The *exceptio non adimpleti contractus* will thus not be applicable. This would be so firstly because as set out Respondent was aware that Camry was a subtenant and accepted the tender as such. Secondly because the rental was payable in advance, as found in the Tudor Hotel case, that there was no reciprocal duty to be performed by Applicant and accordingly therefore it would also not apply.

[38] The third issue was that of clause 3.1 of the lease agreement and the cases which were referred to as set out above. I have considered the said decisions and in

my view they are not applicable to the present case. It is indeed so that if a government department wishes to correct any incorrect decision made it has to bring an application to court to do so. This is now settled that it is a legality review. In the present case what was attached to the tender documents was a draft lease agreement. It was not an agreement which had been concluded by both the parties. When the tender was accepted from Respondent a lease agreement was drafted which deleted various paragraphs of the draft lease agreement which was attached to the tender documents. This Respondent had ample time to consider and to see that it was changed. If he had any objection thereto then he should have raised this immediately and not have signed the said agreement. When Respondent took occupation of the premises it did not complain because Camry was still in occupation but accepted it. The defence by Mr. Reddy of Respondent that he did not read the lease agreement but merely signed it as he was of the view that it would be the same as that which was attached to the tender documents has no legal foundation. He should have read it and could not just accept it would be the same. The tender document was not a final document. He signed the document and accordingly Respondent is bound thereby.

[39] Considering all these factors I am satisfied that Respondent failed to pay the rental as he was expected to do in terms of the agreement which he had entered into. It is also not in dispute that he paid over no rental and the defences which he has raised for not doing so have been dealt with above and have been found to be unsustainable. Accordingly the following order is granted.

1. The Third Party application brought by Respondent is dismissed with costs.

2. An order is granted in terms of paragraphs 1, 2 and 3 of the notice of application.

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BEZUIDENHOUT J.

JUDGMENT RESERVED ON:	**27 JULY 2022**
JUDGMENT HANDED DOWN ON:	**15 SEPTEMBER 2022**
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