Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M786/2021

In the matter between:-

LUVON INVESTMENTS (PTY) LTD Applicant

and

TSHUFI GAMING AND RESORT (PTY) LTD Respondent

JUDGMENT

FMM SNYMAN J

Introduction

[1] This is an application for the eviction of the respondent company from a commercial property situated at Shop 12A, Boitekong Mall, at the corner of Tholo and P16-2, Rustenburg, North West Province (the property).

[2] The applicant is represented by the Adv J Vorster and the respondent is represented by Adv C van der Merwe.

[3] The background to the matter can best be illustrated with reference to the correspondence between the parties. Most of the factual events are common cause and are summarised as follows:

3.1. On 13 September 2018 the parties entered into a written agreement of lease of the property. Investec Property Fund Ltd & Luvon Investments (Pty) Ltd (herein after referred to as the applicant) entered into the agreement as a Joint Venture (JV) as the lessor and Tshufi Gaming and Resort (Pty) Ltd (herein after referred to as respondent) was identified as the lessee for the property. I will refer to this agreement as the "lease agreement". The lease agreement was for the period of 1 June 2018 and would terminate on 31 May 2021 with an option to renew it from 01 June 2021 to 31 May 2024, subject to certain conditions set out in an attachment to the agreement.

3.2. The parties were contractually obliged to exercise a renewal option of the lease agreement by 30 November 2020. This has not happened and after 30 November 2020 the respondent remained in occupation of the property whilst the terms of a renewal of the contract was negotiated. In the Standard Terms and Conditions of the lease agreement, paragraph 4,

deals with the temporary lease of the property after the expiration date of the contract when the tenant remains in occupation of the property and the lease of the property will continue on a month to month basis.

3.3. On 3 March 2021 the respondent's employee Gloria Romoroa directed an email to the applicant's representative requesting a renewal of the lease agreement.

3.4. On the same date 3 March 2021 the applicant sent a first renewal addendum under cover of an email which read "*Further to our telecom, attached please find the renewal documents."* The attached renewal document contains a proposed commencement date of 1 June 2021.

3.5. On 29 March 2021 the respondent responded with an e-mail that read *"Kindly include another renewal clause on the addendum. The renewal period must be at least 5 years instead of three."*

3.6. On 31 March 2021 a second renewal addendum was sent to the respondent under cover of an email which read: *"Attached please find the amended offer document."* The extension of the lease agreement from three years to five years were agreed to by the applicant. None of the other proposals were accepted by the applicant.

3.7. On 21 May 2021 an email was received by the applicant from the respondent which read *"We humbly request you to reconsider to reduce the rental rate… We also request the renewal period to be for 5 years… We also request the attached force majeure clause be inserted… We look forward to your response with much anticipation."* The applicant elected to not include the requested *force majeure* clause on the basis that *"… we have already our standard clause in the leases which covers both parties equally."*

3.8. Adv Voster argues on behalf of the applicant that the lease agreement effectively expired through the effluxion of time on 31 May 2021, and in terms of the lease agreement continued on a month by month basis thereafter.

3.9. On 7 June 2021 the applicant addressed an email to the respondent which read "*You will note that your lease expired end of May and therefore the new term commences 1st June subject to the renewal Addendum being signed and finalised by both parties. We were in agreement that the Addendum will be signed and delivered and therefore cannot renegotiate the terms… Kindly also note that you currently do not have an Agreement in place as per clause 4.1.2 of your agreement and that it is of [o]utmost importance that we have the signed Addendum back."*

3.10. On 14 June 2021 the respondent indicated in correspondence that it understood the lease to be an automatic renewal and requested a reduction in the rental rate, lamenting their plight in the dire economic after-effects of the national lockdown due to Covid.

3.11. On 27 June 2021 in response to the respondent's email the applicant answered *"Further to our telecom, for us to review your counter-proposal, can you please provide us with the turnover numbers of your business for the past 36 months."*

3.12. These figures were provided to the applicant on 9 July 2021. The applicant responded to the respondent and indicated that the counter-proposal is being considered by the shareholders. It is noted in the e-mail correspondence that *"… the agreement will remain on a monthly tenancy."*

3.13. On 26 October 2021 the parties continued with negotiation discussions, but were not able to reach an agreement on the monthly rental amount.

3.14. On 27 October 2021 the applicant sent a notice to the respondent to terminate the month-to-month lease agreement. The content of the correspondence reads as follows:

> *"Your current agreement has expired on 31 May 2021 and has thereafter remained on a month-to-month tenancy. You are hereby being informed that the Lessor will not continue with the month-to-month agreement and you are hereby given notice of cancellation. You are requested to reinstate, vacate and hand over occupation of the premises by no later than 31 January 2022. The Lessee will reinstate the premises as per the Lease Agreement."*

3.15. On the same date, 27 October 2021 the respondent sent an e-mail to the applicant attaching the first renewal addendum dated 2 March 2021. The respondent indicated in the covering e-mail: *"Please see attached herein signed renewal lease addendum for your countersignature."* The respondent thus accepted the rental rate determined by the applicant and intended to revive the first renewal addendum dated 2 March 2021. The respondent did not vacate the property and currently remains in tenancy thereof. The respondent proceeded to pay the monthly rental as agreed in the lease agreement.

3.16. The applicant's attorney informed the respondent's attorney that failure of the respondent to vacate the premises will lead to legal action. On 28 October 2021 the applicant received correspondence from the respondent's attorney indicating that any action instituted against the respondent, will be opposed.

3.17. On 12 November 2021 the respondent received correspondence from the applicant's attorney in which it is stated that the applicant does not accept the signed renewal lease addendum. The applicant's position is that the rental agreement has been terminated, the respondent was given three months' notice to vacate and the respondent was expected to vacate the property.

[4] The application is instituted on 13 December 2021. The parties attempted to resolve the matter, but when no amicable resolution could be reached, the answering affidavit was filed on 25 April 2022. The late filing of the answering affidavit is condoned.

[5] The respondent attaches to the answering affidavit the Continuing Covering Mortgage Bond (the bond agreement) in favour of Investec Bank granted to the applicants. This bond agreement is dated 22 May 2020.

[6] In terms of clause 8 of the cession clause in the bond agreement, only the bank could terminate the lease agreement and not the applicant. Clause 8 reads as follows:

> *"**8. CESSION OF RENTALS AND REVENUES***
> *The Mortgagor (sic- the applicant) hereby cedes, in security to the Bank all the Mortgagor's rights, title and interest in and to all rentals and other revenues of whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by the Morgagor of all*

amounts owning as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Bank at any time …. With the express right in favour of the Bank irrevocably and in rem suam:-

8.1 to institute proceedings against lessees for the recovery of unpaid rentals, and/or eviction from the mortgaged property;

8.2 to let the mortgaged property or any part thereof, to cancel or renew and enter into leases in such manner as the Bank decides, to evict any trespasser or other person from the mortgaged property;

8.3 to collect on behalf of the Mortgagor any moneys payable in respect of the alienation by the Mortgagor of the mortgaged property or any portion thereof…"

[7] It is argued by Adv van der Merwe on behalf of the respondent that the applicant cannot pursue eviction without terminating the right of occupation. Further it is argued that the applicant cannot terminate the lease agreement and only the bank could do so.

[8] On 4 May 2022 the applicant and Investec Bank Limited entered into a (re-)cession in relation to the property. This re-cession was attached to the applicant's replying affidavit. The cession serves as a security for the mortgage bond on the property which the respondent rents. The most pertinent aspects of the re-cession are as follows:

*"**AND WHEREAS** as security for the Loan agreement and the Lessor's (sic- the applicant) obligations in terms thereof (sic-*

of the loan agreement covering the mortgage bond on the property):

1. *…*

2. *The Lessor entered into a cession of lease agreement/s with Investec (the **Cession of Lease Agreement**) in terms of which the Lessor ceded and made over unto Investec, inter alia, all the Lessor's rights, title, interest, claim and demand in and to all rents, fruits and income due to or which may become due to the Lessor …*

***AND WHEREAS** the Lessor has instituted legal proceedings and/or is about to institute legal proceedings against certain lessee/s and/or sureties for the recovery of unpaid rentals and/or eviction from the Property and for this purpose has requested that Investec cede the Claims against those lessee/s and/or sureties stipulated in…*

***AND WHEREAS** Investec wishes to enable the Lessor to proceed with such action/s against those lessee/s… and has agreed to cede only the Specified Claims to the Lessor subject to certain terms and conditions set out in this deed of cession.*

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. *Cession*

   Investec hereby cedes all of its rights, title and interest in and to the Specified Claims to the Lessor with effect from the date of signature of this deed of cession by both parties. Investec is aware of litigation between the Lessor and the lessee stipulated in

> *Annexure A hereto with regards to the Specified Claims. Investec hereby authorises the Lessor to pursue the Specified Claims in the lessor's own name, and retrospectively condones any litigation or action instituted by the Lessor in the Lessor's own name to recover and/or collect the Specified Claims."*

[9] It deems to be mentioned that Annexure A referred to in the re-cession specifies this legal proceeding identifying it as *"Shop no 12A – Boitekong Mall, Tshufi Gaming and Resort (Pty) Ltd"*.

[10] It is common cause between the parties that the respondent, at no stage, failed to pay the agreed upon amount of monthly rental for the property.

[11] It is argued by Adv van der Merwe on behalf of the respondent that the background to the renewal as signed on 27 October 2021 gives rise to a factual dispute between the parties that should have been foreseen by the applicant. He argues that the application should be dismissed as it ought to have been brought on action proceedings.

[12] Adv van der Merwe further argues on behalf of the respondent that the lease agreement was concluded with a Joint Venture of which the applicant is one partner. The other partner is Investec Property Fund Ltd, which is not a party to these proceedings.

[13] At the onset it deems mentioning that the prescripts of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act** 19 of 1998 is not applicable as the property is a commercial property and not a residential property.

Issues before court

[14] The following issues are to be decided by this court:

14.1. The applicant's *locus standi* having regard thereto that the lease agreement with the respondent was entered into with the applicant and Investec Bank as a Joint Venture.

14.2. Whether there is a factual dispute that the applicant could foresee and the matter should be dismissed.

14.3. Whether the renewal of the rental agreement dated 27 October 2021 is a valid and binding agreement between the parties.

14.4. Should the applicant have the necessary *locus standi* and there not be a foreseeable factual dispute, and the renewal of the rental agreement dated 27 October 2021 is not valid and binding, the applicant will be entitled to the relief sought in the notice of motion.

Locus Standi

[15] It has to be determined whether the applicant has the requisite *locus standi* to pursue eviction and the ancillary relief sought in the notice of motion. The *locus standi* of the applicant is challenged on two bases:

15.1. Both Investec Property Fund Limited and the applicant is the lessor who entered into the lease agreement with the respondent as a Joint Venture; and

15.2. The re-cession attached to the replying affidavit does not cure the requisite legal standing of the applicant and this is fatal to the application.

[16] In paragraph 10 of the founding affidavit the deponent states that:

> *"Subsequent to the conclusion of the lease agreement the application bought out Investec Property Fund Limited's interest in the joint venture and continued its contractual relationship with all the tenants in the Boitekong Mall as the only lessor."*

[17] In its answering affidavit, the respondent denies the allegation but does not give any factual basis for the denial.

[18] Disputes of fact are customarily identified with reference to the judgment in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) where it is held that:

> *"The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of a dispute of fact conclusive of such existence."*

[19] It is argued by Adv Vorster on behalf of the respondent that the applicant does not have the necessary *locus standi* to enter in proceedings to evict the respondent on the basis that:

19.1. The Lease Agreement was entered into by the respondent with a Joint Venture of which the applicant and Investec Bank are members and at the time of the institution of the application, the applicant does not provide any evidence that the application is made with the knowledge and approval of Investec Bank.

19.2. Should the re-cession be accepted in the replying affidavit, it does not cure the lack of *locus standi* as the cession is not a so called "out–and–out" cession providing the applicant with sufficient *locus standi* to launch the application against the respondent.

[20] Adv van der Merwe acting on behalf of the respondent refers to the matter of **First Rand Bank Limited v Fondse and Others** (65596/17) [2018] ZAGPPHC 316 (4 May 2018) paragraph 10 that reads as follows:

> *"10. Confronted with an objective fact of the applicant not being the owner at the relevant time it attached to its replying affidavit proof of registration of the property in the name of the applicant which occurred on 23 November 2017, almost three months since the application was launched. Whilst it is ordinarily not permissible to make out a case in reply what compound the applicant's problem in this instance is that the registration took place long after the application was launched. Such a defect is one that is not capable of being cured in reply. The effect of this is that the applicant lacked the requisite legal standing to launch this application."*

[21] It is the applicant's case that the re-cession attached to the replying affidavit is sufficient to establish sufficient *locus standi* to apply for eviction of the respondent. It is argued by Adv Vorster on behalf of the applicant that the re-cession, in as far as it does not cure the *locus standi* of the applicant, is sufficient enough to bestow the applicant with *locus standi* as it amounts to a technicality that the Court can condone. Should the application be dismissed on the basis that the applicant has no *locus standi*, a separate application will be issued between the same parties, on the same subject matter, where the re-cession is attached to the founding affidavit. This, so the argument goes, would eventually result

in piece-meal litigation which should be avoided and is against the principle of finality in legal proceedings. The argument is that litigation between the parties should not be curtailed by formalistic requirements which would only delay the inevitable.

[22] It is a requirement that the *locus standi* to institute proceedings (in the circumstances where a right has been ceded) is that the re-cession of the totality of the ceded rights took place prior to the institution of the proceedings. In this regard **LAWSA** Cession, Volume 3 par 173 reads as follows:

> *"Once the right has been ceded the cedent may enforce it only if it has been receded to him or her. In that event the cedent must do so in his or her capacity as cessionary and not in his or her capacity as original creditor. The pleadings must be formulated accordingly."*

[23] The **Law of South Africa (LAWSA) Cession,** Volume 3, 3rd Edition, par 173 reads as follows:

> *"Once the right has been ceded the cedent may enforce it only if it has been receded to him or her. In that event the cedent must do so in his or her capacity as cessionary and not in his or her capacity as original creditor. The pleadings must the formulated accordingly."*

[24] Adv van der Merwe argues on behalf of the respondent that the complete cause of action, which includes the standing of the applicant / plaintiff, must exist at the time that the proceedings are instituted. In the matter of **Philotex (Pty)**

Ltd v Snyman 1994 (2) SA 710 (T) at 715 – 716 the following was held:

> *"The effect of the cessions was that the plaintiff had no cause of action at date of institution of action. The right to institute action vested in the banks….*
> *The plaintiff's counsel argued that the later waivers and re-cession by the banks cured this defect. The general approach in this Division has for many decades has been that a cause of action should exist at the time of institution of action. This has also been the approach in other Divisions and in the Appellate Division*
> *…*
> *"I do merely have to decide the crisp point whether a summons may disclose a cause of action which did not exist when it was issued. So put, it is a contradiction in terms. It would be in conflict with the cases set out by me, except* ***Barclays Bank International v African Diamond Exporters (Pty) Ltd*** *1976 (1) SA 93 (W)…"*

[25] The counter argument to this legal position and as advanced by the applicant, can be found in the matter of **Zeta property Holdings v Lefatshe Technologies** 2013 (6) SA 630 in paragraph 6 thereof as follows:

> *"[6] I was presented by both parties with detailed and comprehensive argument which incorporated an analysis of the relevant authorities. Those authorities reveal a movement away from the stringent application of the general rule that a cause of action should exist at the time of the institution of an action, as formulated, for example, in cases such as* ***Ritch v Bhayat*** *1913 TPD*

589 at 592, ***Mahomed v Nagdee*** *1952 (1) SA 410 (A) and* ***Dinath v Breedt*** *1966 (3) SA 712 (T) at 715F – H to the more indulgent position adopted, for example, by Wunsh J in* ***Marigold Ice Cream Co (Pty) Ltd v National Co-operative Dairies Ltd*** *1997 (2) SA 671 (W) at 677I and by Flemming DJP in* ***Bankorp Ltd v Anderson-Morshead*** *1997 (1) SA 251 (W) at 253C – J In Bankorp Flemming DJP expressed the development of the law in the following terms:*

'Our practice has seen various instances of that which was thought to be axiomatic, if not a rule of law, losing its absoluteness. An observer may view those instances as distinct exceptions or aberrations, or when approved of, developments and refinements. But when viewed collectively an underlying explanation is exposed insofar as pleadings are concerned: the increased realisation that Court Rules, procedural principles and pleadings are not there for their own sake or for any other reason than to advance the good order and the administration of justice. Accordingly, the stream has turned away from regarding a document or procedural step as a nullity and has come to manage that which previously was thought to be unworkable or even unthinkable. I mention a few examples. Many cases of a summons being a nullity have been discarded. Conditional claims and conditional counterclaims are managed. Conflicting alternative claims are often tolerated. Arguments that amendments are to be refused only because of delay in seeking amendment repeatedly fail. . . .

It is necessary to recognise that the trend which thus broke through a multiplicity of trammellings to amendment has also

surfaced in regard to the introduction of causes of action which arose after the issue of summons.'

[7] In a counter to the judgment by Wunsh J in Marigold supra, Mr Georgiades relied on the decision by Van Dijkhorst J in ***Philotex (Pty) Ltd and Others v Snyman and Others****;* ***Textilaties (Pty) Ltd and Others v Snyman and Others*** *1994 (2) SA 710 (T) wherein the learned judge said (at 716F – I):*

> *'I do merely have to decide the crisp point whether a summons may disclose a cause of action which did not exist when it was issued. So put, it is a contradiction in terms. It would be in conflict with the cases set out by me, except* ***African Diamond Exporters and Simonsig Landgoed****, which both require exceptional circumstances.*
>
> *On the other hand, practical considerations have in the past dictated that causes of action which arose after issue of summons be joined to the existing ones in the same action . . . .*
>
> *This is not the ex post facto introduction of a fresh cause of action to an action between parties who were properly before Court, because there is no objection to locus standi of some plaintiffs. The effect of this amendment is that it seeks to introduce parties to an existing action with causes of action which arose after the issue of summons.'*

[8] Having found that there were no exceptional circumstances present, his lordship disallowed the amendment sought by the plaintiff in that matter.

And also:

> *"[15] For the purposes of determining the defendant's special plea in this matter I can conceive of no principled difference between an automatic re-cession after the institution of action and an express agreement of re-cession in the terms contended for by the plaintiff in its replication. In either circumstance, and given the defendant's failure to object to the introduction of the re-cession in the replication, any defects in the plaintiff's cause of action which may have existed at the time of the service of the summons have been cured."*

[26] The general position in our law is clear: without *locus standi* that exists at the time of the institution of the proceedings, the applicant or plaintiff cannot be successful. The exception to the general position is where exceptional circumstances exist in a specific matter on a specific set of facts which would require the court to not follow a pure formalistic approach in the interest of justice and finalisation in litigation between parties.

[27] I find myself in agreement with the argument levelled on behalf of the applicant, that a narrow approach should not be followed in this instance. Should the point *in limine* be upheld, the court would in all probabilities be saddled with another application of the exact similar nature, between the same parties, in relation to the same cause of action. The factual basis and events are common cause and the occupation of the respondent proceeds on a month to month basis, as catered for in the initial contract. Investec Property

Fund Ltd indicates its support of the applicant in the institution of the proceedings. This, in my view, constitutes exceptional circumstances that warrant a departure from the normal rules of *locus standi.*

[28] For the reasons mentioned above, I accordingly hold the view that the point *in limine* is to be dismissed and the applicant has the necessary *locus standi* to institute the proceedings.

Factual dispute

[29] The common cause facts set out above provides the factual background for the legal questions to be determined. Since the e-mail correspondence between the parties are done in writing, and there is no factual dispute about any oral statements made by either party, little can be left to be disputed on a factual basis. The parol evidence rule negates any facts outside the written agreement.

[30] The argument of Adv van der Merwe is that a factual dispute exists on the issue of whether a legal and binding agreement was entered into between the parties, and that the intention of the parties should be considered by the court, which can only be done by hearing evidence. I do not agree with this argument. I do not find any factual dispute, only two legal questions: (a) whether the applicant has *locus standi* and (b) whether a contract validly came into existence.

[31] In the premises, I find that there is no factual dispute that warrants the application to not be heard in motion proceedings.

Lease agreement dated 27 October 2021

[32] The next issue to be decided by the court is whether the renewed lease agreement of 27 October 2021 was duly entered into or not.

[33] The applicant's case is that the offer for an extended renewal of the rental agreement dated 31 March 2021 was rejected by the respondent, and further negotiations did not come to fruition. It is argued by Adv Vorster on behalf of the applicant that the respondent's requests to change certain terms of the initial contract as counter-proposals, which was rejected by the applicant, amounts to a rejection of the new contract. The contract which was signed by the respondent on 27 October 2021 is not a valid agreement as an offer that was initially rejected cannot be revived retrospectively.

[34] In the matter of **Price v Price** 1990 ZASCA 97 the Supreme court of Appeal deals with the topic of counter offers as follow:

> *"This problem is usually encountered and discussed in reference to offer and acceptance in the field of contract. In this regard in Williston on Contracts (Third Edition) Volume 1 paragraph 51 (pages 164 – 167) it is stated that:*

> *"When an offer has been rejected it ceases to exist, and a subsequent attempted acceptance is inoperative, even though the acceptance is made within a time which would have been sufficiently early had there been no rejection. Any words or acts of the offeree indicating that he declines the offer or which justify the offeror in inferring that the offeree intends not to accept the offer, or give it further consideration, amounts to a rejection. This principle is most commonly illustrated where a counter-offer is made by the offeree. This operates as a rejection of the original offer."*

[35] Once there are variations to the terms of an offer while purporting to accept the offer, this will destroy the validity of the offer and is interpreted as a counter-offer (**Jones v Reynolds** 1913 AD 366 at 370 – 371, where it is *inter alia* stated: *"It is an elementary principle of law that an acceptance of an offer must not be conditional"*). Put differently, the legal position is that a contract can only come into existence on acceptance of an offer. If an acceptance of an offer is on certain conditions (thus a conditional acceptance) it amounts to rejection of the offer and a counter-offer being made. A contract can only come into existence on an unconditional acceptance of an offer.

[36] The request from the respondent to the applicant to reconsider the rental amount, is tantamount to a conditional offer and no contract could come into existence. For the respondent to accept the initial rental amount after the applicant indicated that the rental amount would not be

reduced, would be a belated acceptance and as such an afterthought after the applicant's cancellation of the contract.

[37] This principle was worded as follows by the Supreme Court of Appeal in **Legator McKenna Inc and Another v Shea and Others** 2010 (1) SA 35 (SCA) at 42 [17]:

> *"What gives rise to the question is of course the trite principle that a binding contract can only be brought about by an acceptance which corresponds with the offer in all material aspects."*

[38] In **Gaap Point of Sale (Pty) Ltd v Valjee NO & Others** 2011 (6) SA 601 (KZD) at 605E-F the following is said:

> *"The situation was now as follows: the counter-offer of the applicant had destroyed the original offer of the respondents and in turn the respondent's rejection of the applicant's counteroffer created a situation where there was no longer an offer for the respondents to accept and thus no agreement existed between the parties. In my view, the respondents, having rejected the applicant's counter-offer created a situation where there was no longer a counteroffer open for acceptance … Therefore the respondent's contention [that they] accepted the applicant's counter-offer on 21 September 2009 cannot be correct because by then there was no longer a counteroffer open for acceptance."*

Legal requirements of a contract

[39] In the **Law of South Africa (LAWSA)** Contract (Volume 9 – Third Edition) 2014, Lexis Nexis, Adv van Rensburg *et al* a

contract is defined at 295 as *"an agreement entered into with the intention of creating a legal obligation or obligations."*

[40] Further in **LAWSA** at 299 that: *"Such conscious agreement is normally reached when one party accepts an offer made by the other party and informs the other party that his or her offer has been accepted. Both offer and acceptance must comply with certain requirements."*

And further that:

> *"Once it is decided to depart from the general rule that acceptance must be brought to the mind of the offeror (the information theory), logic is unable to dictate the choice between the writing of the letter of acceptance (the declaration theory), the posting of the letter of acceptance (the expedition theory) and the delivery of the letter of acceptance to the offeror (the reception theory) as the time for the conclusion of the contract. The courts adopted the expedition theory for reasons of practical convenience**: Cape Explosives Works Ltd v SA Oil & Fat Industries Ltd, Cape Explosives Works Ltd v Lever Bros (SA) Ltd** supra 266. See further **Kahn** 1955 SALJ 246 255 et seq; De Wet and Van Wyk **Kontraktereg** 38–41.*

[41] In the matter of **Legator McKenna Inc and Another v Shea and Others** 2010 (1) SA 35 (SCA) it was held by the Supreme Court of Appeal that:

> *"a binding contract could only be brought about by an acceptance which corresponded with the offer in all material*

aspects. Since the second respondents offered an unconditional agreement while the second appellant agreed to a conditional one, the second appellant did not accept the offer by the second respondents. As a matter of law his purported acceptance constituted no more than a counter-offer. (Paragraph [17] at 42G - I.)"

and further in paragraph 17 that:

"[17] The words inserted by McKenna would therefore render any agreement between him and the Erskines subject to the suspensive condition of the master's approval. The question that immediately arises is whether in these circumstances a conditional agreement of sale had been concluded between McKenna and the Erskines, or whether there was no agreement at all. What gives rise to the question is of course the trite principle that a binding contract can only be brought about by an acceptance which corresponds with the offer in all material aspects. ***'Yes, but' does not signify agreement. At best it is a counter-offer*** *(see eg* ***Jones v Reynolds*** *1913 AD 366 at 370 - 371;* ***Pretoria East Builders CC and Another v Basson*** *2004 (6) SA 15 (SCA) in para 9; RH Christie* ***The Law of Contract in South Africa*** *5 ed at 62 - 3 and the cases there cited). Since the Erskines offered an unconditional agreement while McKenna agreed to a conditional one, I think the difference between offer and acceptance is clear. It follows that in my view McKenna did not accept the offer by the Erskines, even though they may all have thought that he did. As a matter of law, this purported acceptance constituted no more than a counter-offer."*

[42] The legal position that a counter-offer does not constitute an acceptance, was confirmed in the matter of **GAAP Point of Sale (Pty) Ltd v Valjee and Others NNO** 2011 (6) SA 601 (KZD) as follows:

> *"The admitted facts are that: (1) the applicant occupies the premises in question; (2) prior to this dispute the applicant's occupation of the property was on a monthly tenancy; (3) negotiations took place between the parties in order to conclude a five-year lease agreement; (4) the applicant signed a lease agreement on 22 June 2009 which had been presented to it by the respondents; (5) the applicant effected an amendment to the paragraph dealing with the payment of a rental deposit on the said agreement before transmitting it to the respondents."*

And further from page 604 to page 605:

> *"The respondents allege that they accepted the aforesaid amendment and duly signed the lease agreement on 21 September 2009 and therefore an agreement was concluded by the parties. The respondents further allege that, according to the lease agreement, the applicant's occupancy of the premises will come to an end on 31 January 2014. The applicant disputes that an agreement exists between the parties and avers that its tenancy is on a month-to-month basis.*
>
> *I am of the view that no lease agreement was concluded and existed between the parties and I set out my reasons below.*

The applicant's amending and signing of the agreement on 22 June 2009 amounts to the applicant having advanced a counter-offer to the respondents. It is trite that an acceptance of an offer must be clear, unequivocal or unambiguous and correspond with the offer made.

Once there are variations to the terms of an offer while purporting to accept the offer, this will destroy the validity of the offer and is interpreted as a counter-offer. ***Jones v Reynolds*** *1913 AD 366 at 370 – 371. The effect of a counter-offer is that it constitutes a rejection of the original offer and therefore destroys the original offer; see the English case of* ***Hyde v Wrench*** *(1840) 49 ER 132:*

> *'Wrench offered to sell a farm to Hyde for 1000 pounds. Hyde counter-offered 959 pounds, which Wrench rejected. Hyde then purported to accept the previous offer of 1000 pounds. The counter-offer amounted to a rejection of the previous offer, which was therefore no longer open for acceptance.'*

On the facts of this matter the counter-offer was rejected by the respondents by way of their correspondence of 31 August 2009. In this document they indicated that they were adamant that the applicant re-sign the lease agreement which they had prepared, with the rental-deposit clause left unaltered. This clearly indicated the respondents' rejection of the applicant's counter-offer.

The situation was now as follows, the counter-offer of the applicant had destroyed the original offer of the respondents and in turn the respondents' rejection of the applicant's counter-offer created a situation where there was no longer

an offer for the respondents to accept and thus no agreement existed between the parties.

In my view the respondents, having rejected the applicant's counter-offer, created a situation where there was no longer a counter-offer open for acceptance; Hyde's case above. Therefore, the respondents' contention that they accepted the applicant's counter-offer on 21 September 2009 cannot be correct because by then there was no longer a counter-offer open for acceptance."

[43] In application of the legal principles as set out above, the amendments to the original agreement (whether it was requests or not), amounted to a rejection of the original offer of renewal. The counter offer made by the respondent amounts to a rejection of the offer that was made by the applicant with the original amount to be paid for rental.

[44] The attempt by the respondent to resuscitate the agreement by signing it on 27 October 2021, does not bring an agreement into being, but amounts to the acceptance of an offer that is no longer open for acceptance. It is thus a nullity.

[45] It follows that the application for the eviction of the respondent must be successful.

[46] In ancillary relief to the eviction, the applicant claims that the respondent should reinstate Shop 12A to its "base building condition" before the property is vacated. This is regulated by Clause 25.9 of the lease agreement and reads as follows:

"25.9 Prior to the termination of this lease the tenant shall, at its cost, reinstate the leased premises to the condition and to the extent and within the period specified by the landlord in written notice given to the tenant. The landlord shall have the right in such notice to require the tenant, at its cost, to reinstate the leased premises to base building condition. For purposes of this clause, "base building condition" means that the tenant will have –

25.9.1 cleared the leased premises of the tenant's stock-in-trade, trade fixtures, furnishings and furniture;

25.9.2 dismantle all interior building work and/or alterations effected within the leased premises and make good any damage caused thereby and by its removal;

25.9.3 restore the ceiling to a flat, lay-in acoustic board ceiling;

25.9.4 remove the floor coverings and restore the cement screed to a condition which will receive floor finish;

25.9.5 made good damage to walls and repaint them with two coats white PVA paint;

25.9.6 remove all advertising signs or other matter, awning or canopy or any other thing of any kind from the interior and exterior of the leased premises and make good any damage caused thereby and their removal;

25.9.7 replace or repair any broken, damaged or missing articles."

[47] The parties have contractually agreed on these terms and on the vacation of the respondent from the property, the applicant is entitled to an order that the respondent is to restore the property to *"base building condition"* as defined in the contract.

Liquor Licence

[48] Since I have found that a proper case has been made out for the eviction of the respondent, it is not necessary to deal with the validity or not of the respondent's liquor licence and whether it would impact the position of the rental agreement (or rather absence of any rental agreement) between the parties.

Cost

[49] No reasons have been advanced why the normal cost order should not be granted, and as such cost should follow the outcome and the respondent be ordered to pay the costs of the application.

[50] The parties have catered for a punitive cost order in the lease agreement. Were the parties come to such an agreement, the court will seldom interfere with the parties' freedom to contract on those specific terms.

Order

[51] In the premises I make the following order:

i) The respondent is ordered to vacate the immovable

property known as Shop 12A, Boitekong Mall, corner Tholo and P16-2, Rustenburg, North West Province, by no later than 31 October 2022 (or on a date as agreed between the parties);

ii) The respondent is ordered to forthwith restore Shop 12A, Boitekong Mall, corner Tholo and P16-2, Rustenburg, North-West Province, to its base building condition as defined in clause 25.9 of the Lease Agreement;

iii) The respondent is ordered to pay the costs of the application on a scale as between attorney and client.

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FMM SNYMAN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

APPEARANCES:

DATE OF HEARING:	**10 JUNE 2022**
DATE OF JUDGMENT:	**03 NOVEMBER 2022**
COUNSEL FOR APPLICANT:	**ADV J VOSTER**
COUNSEL FOR RESPONDENT:	**ADV VAN DER MERWE**
ATTORNEYS FOR APPLICANT:	**SMIT STANTON INC** **29 WARREN STREET** **MAHIKENG, 2745**
INSTRUCTED BY:	**WEAVIND & WEAVIND INC**
ATTORNEY FOR RESPONDENT:	**STEENKAMP INC** **20 COOKE STREET** **MAHIKENG, 2745**
INSTRUCTED BY:	**MARK-ANTHONY BEYL ATT.**