IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 104/19

Reportable	

In the matter between:

GARY DAVID MEYERS in his capacity as TRUSTEE for the time being of the MEYPROP TRUST — **First Appellant**

JACK MEYERS in his capacity as TRUSTEE for the time being of the MEYPROP TRUST — **Second Appellant**

HILTON SAVEN in his capacity as TRUSTEE for the time being of the MEYPROP TRUST — **Third Appellant**

and

TORNADO EXPRESS FREIGHT (PTY) LTD — **First Respondent**

MRS SHALIMA ABRAHAMS — **Second Respondent**

APPEAL JUDGMENT

D VAN ZYL DJP:

[1] This is an appeal against orders made by the Magistrate for the District of Port Elizabeth dismissing the appellants' (the plaintiffs / the Trustees) claim against the respondents (the first and second defendants respectively) for payment of the sum of R9 262 500, and giving judgment in favour of the first defendant on its counter claim for payment in the sum of R18 289 500. Both orders were granted with costs. The defendants elected not to oppose the appeal and to abide the decision of this Court.

[2] Both the claims in convention and reconvention were on the pleadings founded on a lease agreement (the lease) concluded on 27 July 2013. In terms of the lease, the three plaintiffs in their respective capacities as trustees of the Meyprop Trust (the Trust) agreed to let to the first defendant (a company with limited liability), a warehouse described as part of erf 474, Swartkops situated at 142 Burman Road, Deal Party in Port Elizabeth (the property). The duration of the lease was for a period of three years. The agreed rental for the first year of the lease was in the amount of R8 125-00 with it to escalate thereafter.

[3] The plaintiffs' claim was for rental for the month of October 2013 and service charges. The plaintiffs' claim against the second defendant was based on

a written deed of suretyship in terms whereof she bound herself as surety and co-principle debtor *in solidum* to the first defendant for the due and proper fulfilment by the first defendant of its obligations to the plaintiffs arising out of the lease. The amount claimed by the first defendant in its counter claim in turn represented monies paid to the plaintiffs' as a deposit and rental for the month of September 2013. In terms of clause 1.6 of the lease a deposit was to be advanced **"equivalent to one month's net rental .... upon acceptance of this offer by the lessor."**

[4] In their plea, the defendants admitted that they entered into both the lease and the suretyship agreement. They pleaded in avoidance of the plaintiff's claim and in support of the counter claim that the lease was subject to a suspensive condition in clause 29 thereof, and that the plaintiffs had failed to comply therewith. This failure, it was alleged, resulted in the first defendant having been unable to take occupation of the property, and that it is consequently entitled to the repayment of any monies paid to the plaintiff in terms of the lease. It was further alleged that the plaintiffs were unable to give the first defendant *vacuo possessio* due to the failure of the previous tenant to vacate the property.

[5] The first defendant's counterclaim was similarly premised on the failure of the Trust to comply with clause 29 of the lease, and its inability to take occupation of the property as a consequence.

[6] Clause 29 provided as follows:

> **"ADDITIONAL CONDITIONS**
>
> **The Lessor, at the Lessors expense undertakes to attend to the alterations as marked on Annexure "B" prior to the lease commencement;**
>
> **The Lessee acknowlegdges that the Lessor shall provide two toilet facilities in total as indicated on Annexure "A" marked Toilet Block Z, being one male and one female toilet.**
>
> **Only one 8-ton truck shall be allowed to park outside at all times. No other trucks may park outside at all. There shall be no dedicated yard allocated to the Lessee."**

Annexure "B" formed part of the lease agreement, and consisted of a sketch plan indicating the alterations that were to be made to the property.

[7] In terms of clause 1.4.3 of the lease the Trust was obliged to give the first defendant occupation of the property **"as soon as possible but by no later than the 1st September 2013."**

[8] The main issues for determination at the trial were confined by the parties to whether the Trust affects the alterations to the property, and whether there was a previous tenant that remained in occupation of the property. The pre-trial minute further recorded that it was agreed that the lease existed, and that a Mr Warren Jack **"brokered"** the agreement.

[9] The plaintiffs presented the evidence of two witnesses. The first witness was a Mr Domingo, who was a building contractor employed by the Trust to effect the alterations to the property. His evidence was that he completed the work to the property before the 1st of September 2013. He produced into evidence invoices which he presented to the Trust for payment for the work done. The invoices specified the nature of the work performed. The last invoice was dated 29 August 2013. He also testified that there were no tenants in the property when he did the work to effect the alterations.

[10] The second witness was a Mrs Cooney who was employed by the Trust as a leasing administrator. Her evidence was that the property was vacant at the time the lease with the first defendant was entered into. She testified that the Trust would not pay a contractor on an invoice presented for payment unless an employee of the Trust had verified that the work had in fact been done. She further testified to the internal procedures adopted by the Trust in paying contractors for work performed, and the buying and paying for materials required for that purpose. The documentation, on her evidence, showed that the work to the property was completed prior to the date of occupation agreed to in the lease.

[11] In cross-examination she was asked about the lease and payments made by the first defendant in compliance therewith. Her evidence was that the trustees

would approach agents to look for tenants for properties which are available for rent. The agent would then go out and find a tenant. A letter of interest would be completed. If approved by the Trustees, she would draw up a lease agreement and hand it to the agent concerned for signature by the prospective tenant. In the present instance that agent was Mr Warren Jack. If there were any alterations to be made to the property concerned, it would be dealt with in the lease agreement, and a contractor would be appointed to do the work.

[12] The two witnesses for the defendants were the second defendant and her husband, Mr Ridwaan Abrahams. Mr Abrahams saw to the running of the first defendant's business operations. They testified that they at all times dealt with Mr Jack of Warren Jack Properties. When they went to view the property with Mr Jack, they pointed out to him alterations that they wanted to the property, so as to facilitate its use for the first defendant's transport business. Mr Jack agreed to the alterations. They never dealt with any of the trustees of the Trust.

[13] According to Mr Abrahams he told Mr Jack that they would take the property on condition that the alterations were made. With regard to the nature of the alterations that were agreed to, the evidence of the first defendant and of Mr Abrahams was that they settled on the erection of an office inside the property, a door leading into the office from the outside of the property, and a garage roll up

type door that would allow access to their trucks to the property. These specifications, which Mr Jack agreed to were, according to the two witnesses, not complied with, in that the walls of the office were not dry walling as agreed, and the door leading into the office and the roll up garage door had not been installed.

[14] In cross-examination, the second defendant admitted that she had signed the lease on behalf of the first defendant, and that she had also initialled the diagram marked annexure "B" that was annexed to the written document embodying the lease. She further acknowledged that the specifications with regard to material to be used in the construction of the office, and that the alterations would include an outside door and a roll up type door, did not form part of the alterations specified in the annexure to the lease. These alterations, according to her, were agreed to verbally by Mr Jack. When she was asked to put a date to the agreement with regard to the type of door to be installed, the second defendant replied that it could have been about two weeks before the first defendant was to take occupation of the property. She acknowledged that the defendants' case was premised on the failure to effect the alterations agreed to by Mr Jack. The witness further acknowledged that the persons, whom she noticed were inside the building during August 2013 when she visited the premises, could have been workmen, and that she was no longer pursuing her claim that the first defendant could not take occupation of the property as a result of the failure of a previous tenant to move out.

[15] The presiding magistrate adopted, what he termed a **"holistic"** approach to the evidence. On this approach he held that the matter should not be decided simply on the terms of the lease, but that the probabilities must also be considered. In his assessment of the probabilities the magistrate considered the fact that, despite the alterations having been made to the property by the Trust, the first defendant did not take occupation of the property. This, according to the magistrate raised the question **"Why not?"**, and he concluded that the **"only answer to that is because the alterations did not fulfil their requirements."**

[16] The premise of this finding of the magistrate is the acceptance of the evidence of the defence witnesses, namely that the alterations which were agreed to by Mr Jack, were not effected. This finding cannot be sustained. It fails to account for the issues raised for determination and the legal principles applicable to written contracts. It is also not supported by the evidence. It is evident that the import of the evidence of the second defendant and Mr Abrahams is that the oral agreement with Mr Jack fell outside the express terms and conditions of the lease in clause 29 thereof, and that the reason for the first defendant not having taken occupation of the property on 1 September 2013, was the failure to comply with the terms of the oral agreement. The finding of the magistrate that the alterations did not meet the requirements of the defendants, can accordingly only be justified on the terms of the oral agreement.

[17] The defence and the claim based on the terms of the oral agreement was not raised by the defendants on the pleadings. It was first raised in evidence. The defendants' pleaded case was that the plaintiffs failed to comply with their obligations in clause 29 of the lease. The evidence presented by the Trust was directed at refuting that allegation. The witnesses for the Trust testified that the alterations agreed to in the lease were completed before 1 September 2013, and consequently that there existed no reason for the first defendant not to be able to take occupation of the property. The purpose of pleadings is to clearly bring to the attention of the trial court and the parties to an action what the question at issue is, to place the parties in a position to adequately meet the facts upon which reliance are to be placed, and to tender evidence to disprove the allegations made. (*Imprefed (Pty) Ltd v The National Transport Commission* 1993 (3) SA 94 (A) at 107C and *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198)

[18] The defendants failed to plead, either in convention or reconvention, that they were relying on an oral agreement. The terms of the agreement were consequently not **"clearly and concisely"** pleaded, nor was it alleged when, where and by whom it was concluded as prescribed in Rules 6 (6) and 17 (2) of the Magistrates' Courts Rules. As stated, the defendants' evidence was that they dealt with the estate agent, Mr Jack, and that their agreement was with him. This evidence immediately raises the issue of Mr Jack's authority to contract on behalf of the Trust and to bind it to the alleged oral agreement. An estate agent is generally

engaged to find a buyer or, as in this instance, a tenant, and not to conclude the sale or the lease on behalf of the principal (Du Bois **Wille's Principles of South African Law** 9th edition at page 988). It was not pleaded that Mr Jack also had authority to bind the Trust. That was a necessary allegation, particularly so in light of the provisions of clause 23.2 of the lease, namely that any representations **"whether express or implied not stated herein, shall be unenforceable."** It was in the circumstances unfair and prejudicial to the plaintiffs to determine their claim, and the first defendant's counter claim, with reference to issues that were not raised and specified in the pleadings.

[19] A further difficulty with the reasoning of the magistrate is the notion that the agreement with Mr Jack formed part of, or somehow had a separate existence from the written lease. As a general rule a written contract between parties is regarded as the exclusive memorial of their common intention, and no evidence may be led to prove its terms other than the document itself, nor may its contents be contradicted, altered, added to or varied by parol evidence (Kerr **The Principles of the Law of Contract** 6th edition at page 151 and 348; *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at paras [64] to [69] ; and recently *Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd* (922/2018) [2019] ZASCA 159 (28 November 2019)). In the absence of a claim for, or a defence based on rectification, such evidence will not be allowed as it is inadmissible (*Standard Bank of SA Ltd*

v Cohen 1993 (3) SA 846 (SECLD) and *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at paras [38] to [39], and *Van Aardt v Galway* 2012 (2) SA 312 (SCA) at paras [9] and [10]).

[20] Even if the agreement on which the defendants rely was concluded after the signing of the lease, as was somewhat vaguely suggested by the second defendant in her evidence, the difficulty is that it is irreconcilable with the express terms of the lease. Clause 23.5 provides for the non-variation of the lease unless reduced in writing and signed by the landlord and the tenant. Accordingly, an oral alteration or variation of the terms of the lease would be invalid and of no force and effect. It is trite that a non-variation clause, such as clause 23.5, is in itself binding and enforceable (See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 776 and *Brisley v Drotsky* 2002 (4) SA 1 (SCA)).

[21] In my view the oral agreement amounts to an **"alteration or variation"** of the lease in two respects. Clause 29 limited the obligation to make alterations to the property to those alterations **"as marked on Annexure B".** Further, on a reading thereof, clause 29 in the lease does not constitute a suspensive condition as alleged by the defendants in their pleadings. A suspensive condition suspends the operation of all or some of the obligations flowing from the contract until the condition is fulfilled (Bradfield **Christie's Law of Contract in South Africa** 7th

edition at page 164). On a reading thereof the existence, or the operation of the lease was clearly not intended to be subject to compliance with clause 29. In terms of clause 1 the commencement date of the lease was 1 September 2013. The lease accordingly became operational from that date. In clause 6 the lease provides pertinently for any delay caused by the property not being ready for occupation upon the commencement date by reason of building operations not having been completed. It prohibits the tenant from cancelling the lease for that reason, and creates a mechanism for the determination of new date of occupation and the commencement of the lease. The relevant portion reads as follows:

> **"The Tenant shall have no claim for cancellation of this Lease or damages or other right of occupation against the Landlord. The Tenant agrees to take occupation of the Premises upon the date the premises will be available for occupation by the Tenant. The decision as of an architect appointed by the Landlord as to when the Premises will be available for occupation shall be final and binding on the parties and the Lease shall commence on that date and shall continue thereafter for the period set out in clause 1.4 with the date of termination being extended accordingly."**

[22] The import of these provisions is that, unless otherwise determined in accordance with clause 6, the lease commenced on 1 September 2013, and was enforceable from that date. Any suggestion that the enforceability of the lease was

conditional upon the making of the alterations verbally agreed to with Mr Jack, is therefore inconsistent with the unconditional nature of clause 29 read with clause 6, and would consequently contradict the express terms of the lease. The oral agreement consequently constituted an alteration or variation of the lease as contemplated in clause 23.5.

[23] There is authority for the proposition that the parol evidence rule does not prevent a party from presenting evidence of a separate oral agreement constituting a condition precedent to the attachment of any liability under a written contract. (See by way of example *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA15 (SCA) at 23 B – F). In the present matter the oral agreement relied on cannot form part of this qualification to the parol evidence rule, as the leading of extrinsic evidence to prove the existence of a suspensive condition will in principle not be allowed, if that condition is inconsistent with the express terms of the written contract, and would amount to a variation thereof (Bradfield *op cit* at page 232; *Du Plessis v Nel* 1952 (1) 513 (A) and *Johnston v Leal* 1980 (3) 927 (A)).

[24] It is however not necessary to deal with this aspect in any detail in this judgment, as there was in my view insufficient evidence from which to conclude that the oral agreement relied on established the existence of a suspensive condition, whatever its nature or effect. There was no mention of such a condition

in the evidence of the second defendant, and the evidence of Mr Abrahams went no further than that he **"did explain to Mr Jack that we will take the premises on condition that they will have to put a pedestrian door for me that will lead into the warehouse from the side".** It cannot be concluded from this statement alone that the condition was a true condition suspending the operation of the lease without varying any of its terms, as opposed to it simply being a condition that was intended to be a term of the lease as was expressed in clause 29 thereof. When a written contract is on the face of it unconditional, the *onus* is on the party who alleges that it was subject to a condition (*Pillay v Krishna and Another* 1946 AD 946 to 960). On the evidence the defendants have failed to discharge that *onus*.

[25] I am accordingly of the view that the defendant's reliance on the agreement with Mr Jack, cannot succeed. I am satisfied that the evidence of the plaintiffs is to be preferred, that they have proved their case on the evidence placed before the trial court, and that they were entitled to the relief claimed in the action. The magistrate did not deal with the credibility of any of the witnesses. There does not appear to exist any reason not to accept the evidence of the plaintiffs' two witnesses that the alterations agreed to, were indeed effected by 1 September 2013, and there was no reason for the first defendant not to have taken occupation on that date. There were no inconsistencies or inherent improbabilities in their evidence. On the contrary, it is supported by the documentary evidence presented, and is consistent

with the observations recorded at an inspection *in loco* that was conducted at the commencement of the trial.

[26] The evidence of the second defendant and her husband on the other hand raised a number of questions. It is difficult to understand how Mr Abrahams could have been under the impression that Mr Jack was the owner of the property, or how there could have been any uncertainty with regard to the nature of the alterations agreed upon in light of the fact that the second defendant signed the lease, and that she and Mr Abrahams both initialled Annexure "B" to the lease. It is further improbable, considering the importance on the defendants' version of the alterations to the effective operation of the first defendant's business, that they would not have ensured that the alterations which they were promised, were incorporated and formed part of the written lease. Their version of what was agreed upon further leaves unexplained the coming into existence of the alterations actually recorded in Annexure "B".

[27] For these reasons the appeal must succeed. It is accordingly ordered that:

(a) The appeal is allowed with costs.

(b) The orders of the magistrate are set aside and substituted with the following orders:

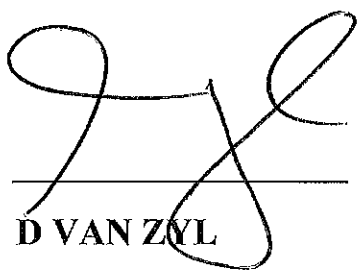
"1. Judgment is entered for the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

(a) payment of the sum of R9 262-50;

(b) interest on the aforesaid amount at the rate of two per cent above the prime overdraft rate of the plaintiff's designated bankers from the date of summons to the date of payment; and

(c) costs of suit on an attorney and client scale.

2. The first defendant's counter claim is dismissed with costs."



D VAN ZYL

DEPUTY JUDGE PRESIDENT

I agree.

I.T. STRETCH
JUDGE OF THE HIGH COURT

Counsel for the Appellants:	Adv S A Sephton
Instructed by:	Huxtable Attorneys 26 New Street GRAHAMSTOWN 046 - 6222961
No appearance for the Respondents:	
Date heard:	8 November 2019
Date delivered:	10 December 2019