IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED.	Case no.: 2023-067763
[redacted] ..... **10 December 2024** **SIGNATURE** **DATE**	

In the matter between:

SWISSPORT SOUTH AFRICA (PTY) LTD **APPLICANT**

and

CEMAIR (PTY) LTD **RESPONDENT**

JUDGMENT

WINDELL, J:

Introduction

[1] In this matter, Swissport South Africa (Pty) Ltd (the applicant) approached the opposed motion court for an order against Cemair (Pty) Ltd (the respondent) for the return of its equipment.

[2] The applicant operates as an aviation services company covering ground and cargo handling as well as airport lounges. It is common cause that it is the owner of the equipment, which consists of airport passenger buses, baggage wagons, ground power units, air start units, a narrow body tug and 3 passenger aid units.

[3] The respondent conducts business within the aviation industry as a passenger airline carrier and also offers aircraft leasing services. The equipment is currently in their possession. In essence the respondent's defence is that the parties entered into a tacit lease agreement in terms of which the applicant leased the equipment to the applicant pending a sale agreement that may or may not be entered into at a later stage. The argument is that it is thus entitled to retain possession of the equipment.

[4] The application for vindicatory relief was launched on 11 July 2023. Khangekile Zamambiwa Khoza ("Ms Khoza"), a director and chief executive officer of and in the employ of the applicant deposed to the applicant's founding and replying affidavits. The respondent delivered their answering affidavit together with an application to strike out various portions of the applicant's founding affidavit in terms of Rule 30 of the Uniform Rules of Court on 30 October 2023. It also subsequently launched a further application to strike out the applicant's replying affidavit *in toto* on 13 February 2024.

Striking out applications

[5] The respondent has sought to strike out certain portions of the applicant's founding affidavit (the first striking out application) and the whole of the replying affidavit (the second striking out application).

[6] The first striking out application is brought on the basis that it contains irrelevant material. The basis of the second striking out application is that the content of the replying affidavit is unduly lengthy and an abuse of the process of court.

[7] Uniform Rule 6(15) provides that the Court may, on application, strike out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs. This Rule further provides that the Court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted. [1]

[8] On the day of the hearing, the second a striking out application was dismissed with reasons to follow. Firstly, the paragraphs in the replying affidavit cannot be severed. If the replying affidavit is then considered as a whole, the court was not persuaded that it was unduly long and an abuse of process. Secondly, the tacit agreement defence was only disclosed in the answering affidavit. The applicant was required to provide a comprehensive response to these allegations, and the replying affidavit includes relevant information to counter the respondent's defence. Thirdly, other to claim that it suffered prejudice, the respondent had not indicated in what manner prejudice is or was suffered.

[9] As far as the first striking out application is concerned, I am also unconvinced that portions of the founding affidavit should be struck out. The respondent's grievances are predominantly concerning the background and history of the matter and the relationship between the parties. This information is essential because it pertains to the manner in which the respondent acquired the applicant's property,

---

[1] See *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2 SA 1 (CC) at paras 27 and 28 for a discussion on striking out applications.

failed to return it, and thus prompted the application. In the circumstances of this case. those facts are material and do not in any way prejudice the respondent.[2]

[10] Both striking out applications are dismissed with costs.

Background facts.

[11] It is imperative to provide a comprehensive account of the background facts and the correspondence between the parties, as the facts ultimately influenced the decision that was made in this instance.

[12] In accordance with numerous agreements between the parties, the applicant had furnished the respondent with aviation ground handling-related apparatus and services for approximately seven years prior to April 2023. On 28 March 2023, after the previous agreements had come to an end, the chief executive officer of the respondent, Mr Miles van der Molen ("Mr van der Molen") requested a month-to-month lease for the equipment. Consequently, on 31 Marc 2023, the applicant and respondent executed a written 'Equipment Lease Agreement' ("the ELA") in terms of which the applicant leased the equipment to the respondent.

[13] The respondent was granted permission by the ELA to lease the equipment at a numerous airports located throughout South Africa. The agreement was only valid for one month, with an expiration date of 30 April 2023, unless it was extended by mutual consent. The ELA contained a table that delineated the equipment and the corresponding amounts payable per item. The rental fee was required to be paid in advance.

---

[2] See *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733.

[14] On 31 March 2023, the conclusion of the ELA between the parties was recorded by way of an email addressed to Mr van der Molen from Mr Bob Gurr, an erstwhile employee of the applicant. In the email it was emphasised that the agreement '*is valid for an initial period of one month but may be extended by mutual consent.*'

[15] Once the ELA came into effect on 1 April 2023, the respondent was entitled to take possession of the equipment. The respondent was also obligated to make payment of the lease amount in accordance with the ELA. No payment for April 2023 was received from the respondent, despite an invoice sent to the respondent on 6 April 2023.

[16] The respondent collected the leased equipment from the applicant as provided for in the ELA on 6 April 2023, 14 April 2023 and 17 April 2023. The respondent claims that they did not collect all of the equipment.

[17] The ELA was not extended and lapsed through the effluxion of time. On 30 April 2023, the respondent failed to return the leased equipment in their possession to the applicant.

[18] On 1 May 2023, the applicant did not request the equipment's return. Rather, on 15 May 2023, the respondent, through an email from Mr. van der Molen to Ms Khoza, enquired about the potential sale of the equipment by the applicant to the respondent.

[19] Ms Khoza responded on the same day. She advised that a possible sale could be considered subject to the approval from the Swissport Group and provided that all monies outstanding owed to the applicant by the respondent were settled. She also

requested the respondent to provide a list of equipment that it was considering purchasing.

[20] It is common cause that the reference to settlement of all monies outstanding was from the previous agreements between the parties and not to the ELA in this matter. To date no such list was provided and the dispute about the outstanding monies between the parties is ongoing.

[21] The respondent received correspondence from the applicant's instructing attorney on 18 May 2023, three days later. The email contained a portion that seems to pertain to outstanding invoices from the parties' previous agreements. It also addressed the ELA in the following manner:

7. Lastly, writer has been provided with an Equipment Lease Agreement (the Agreement) entered into between Cemair and our client on 31 March 2023.

7.1 The Agreement required an advance payment by Cemair for the use of the equipment and an invoice was duly issued by our client on 1 April 2023.

7.2 Notwithstanding a request for payment, an amount of ***R569 010.19*** *remains outstanding and payable.*

7.3 We have instruction to demand, as we hereby do, that payment of the amount of mentioned in 7.2 above, together with interest at prime plus 2% is payable by no later than ***16h30 Tuesday 23 May 2023****, into our client's account, the details of which you are in possession of.*

8. Our client's rights remain reserved'

[22] On 19 May 2023, the respondent was permitted to collect further equipment from the applicant's premises. The applicant clarified that it was a mistake and that it

happened because the instruction to prohibit any further collection of equipment by the respondent had not yet reached the applicant's delivery department and personnel. On 22 May 2023, when the respondent again attempted to collect further equipment, it was barred from doing so by the applicant. The respondent was not permitted to collect any further equipment after that date.

[23] The respondent replied to the applicant's correspondence on 31 May 2023 by way of an email. It was marked "without prejudice" and contained settlement proposals and other discussions that relate to a separate matter. The relevant letter was not attached as an annexure to the founding affidavit. A portion of the letter relating to the ELA, however, was disclosed in the founding affidavit. In this letter the respondent expressed dissatisfaction with the applicant's request for payment in terms of the ELA, as not all of the equipment had been delivered to the respondent. Additionally, they complained that some of the equipment was outdated and required repairs. The respondent also argued that the applicant had not provided the correct details of the equipment and had misrepresented its condition and functionality to them. It subsequently stated:

'*We had no alternative but to proceed and contract with another ground handling company to assist where we are unable to operate due to the state of your client's equipment.*

Your client is thus in breach of the equipment lease agreement for its failure to deliver all the equipment in the condition and operating manner in which it was represented to us. We have incurred costs to repair two busses in the meantime as nothing was operable. The agreement period was for 30 days due to the consideration of entering into a sale agreement. Despite the aforesaid, your client insists on the full lease amount despite failure to properly to deliver. Our rights to proceed with a claim of

damages for the immense prejudice suffered daily due to your client's breach remain reserved".

[24] A written demand for the return of the equipment on or before 9 June 2023 was sent to the respondent on 6 June 2023. In this letter, the applicant reminded the respondent that the agreement was only for one month, which expired on 30 April 2023 and that failure to return the equipment will result in legal action. The respondent failed to adhere to the demand to return the equipment and no reply was received in respect of this letter.

[25] The increasingly fraught situation between the parties was sketched out in a letter from the applicant's attorney to the respondent, including the respondent's legal advisor, dated 11 June 2023. It had come to the knowledge of the applicant that some of the equipment had been removed from OR Tambo International Airport (ORT) without their permission. The respondent was again afforded the opportunity to return the equipment to the applicant on or before 12 June 2023, failing which they would approach the High Court for urgent relief.

[26] The letter of 11 June 2023 was followed up by an email addressed to four employees of the respondent including Mr van der Molen and Ms Botha by the applicant's legal representative, Mr Jacobs, on 12 June 2023. The email stated that the respondent had not received a response to the applicant's request regarding the equipment that had been taken from ORT. Mr Jacobs also expressed his dismay that he had not been provided with a list of equipment that had been removed from ORT and that the respondent had still not returned any equipment to the applicant.

[27] In this letter Mr Jacobs expressly stated that the respondent had until 16h30 on 12 June 2024 to comply with the applicant's requests. Mr Jacobs provided the mobile

number of Mr Ali Mafela and Mr Rudi Buitenbos to the respondent in the email and confirmed that both officials were available to assist the respondent with any access or logistical issues that they might have. The equipment that was not on the premises of ORT had to be delivered to Swissport Cargo SCS6 Warehouse by no later than 16h30 on Tuesday 13 June 2023.

[28] Ms. Botha, the respondent's in-house legal advisor, responded on behalf of the respondent in writing to the applicant's correspondence dated 6 June 2023, 11 June 2023, and 12 June 2023 on 12 June 2023. The respondent denied that they were in breach of the ELA and once more contended that the applicant had misrepresented the actual functioning condition of the equipment, resulting in ongoing prejudice and that they were currently in the process of calculating the contractual damages and the cost of the repairs incurred.They asserted that their *"right to retain certain equipment until the aforesaid amount has been settled in full remain reserved*" and that it was common cause that the applicant was *"no longer operation and all its equipment will be put into storage, it is not as if your client can lease the equipment as it has been rejected by ACSA for e.g. its age and condition……."* Additionally, they suggested that the applicant could make an arrangement with Mr van der Molen for the collection of specific equipment at their own expense.

[29] Thus, it was revealed that the reason for retaining possession of the applicant's equipment was that the respondent had a lien or right to retain the equipment in their possession in lieu of the recovery of unspecified contractual damages and unconfirmed repairs to the equipment.

[30] The applicant responded to this letter on 22 June 2023. It attached three invoices to be paid to the applicant. It was specifically stated that:

"The presentation of these invoices to you is simply an effort to recoup the enormous amount of money owed to our client by Cemair and should in no way be deemed as a waiver of any of our client's rights contained in the Equipment Lease Agreement and in law and our client's rights to pursue any and all amounts still outstanding remains reserved".

[31] On 30 June 2023, the respondent made the first payment in respect of the equipment to the applicant. On 11 July 2023 this application was launched. A further payment was made on 1 September 2023 and was followed by a further payment comprising of a part-sum payment after the notice of motion in this matter had been issued. The applicant received a further part-payment from the respondent on 31 October 2023.

[32] On 30 October 2023, the respondent's answering affidavit was delivered. In their answering affidavit it raised, for the first time, that there was a tacit lase agreement entered into between the parties which entitled them to retain the applicant's equipment.

Evaluation

[33] There are three requirements necessary for success in a vindicatory action. One, the applicant's ownership or co-ownership of the thing; Two, the thing must still be in existence and be clearly identifiable; and three, the respondent has possession or detention of the thing at the moment the action is instituted. All the requirements have been met.

[34] In *Chetty v Naidoo*[3] Jansen JA articulated the position as follows:

---

[3] 1974 (3) SA 285 (A)

"It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it followed that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need therefore do no more than allege and prove that he is the owner and that the defendant is holding the res — the onus being on the defendant to allege and establish any right to continue to hold against the owner."

[35] In the answering affidavit the respondent stated that it has the right to retain the equipment because the parties entered into a tacit lease agreement during May or June 2023. During argument the respondent submitted that the tacit lease agreement was entered into as early as 1 May 2023, as the ELA came to an end through the effluxion of time on 30 April 2023. It was argued that the ELA was therefore irrelevant as a new lease agreement was entered into. The respondent, however, continued to reference the ELA in the email dated 12 June 2023. In this email, the respondent expressed their dissatisfaction with the applicant's misrepresentation of the condition of the equipment delivered in accordance with the ELA and asserted that they were not in breach of the ELA. No mention was made of a tacit lease agreement.

[36] It is well-established that a party wishing to rely on a tacit agreement must plead and prove the facts from which a court can infer that a genuine and actual consensus occurred. An implied and a tacit agreement only differs from an express agreement in the manner in which the offer or acceptance is made. It is not expressed in words, gesture or writing, but is implied from all the circumstances and actions of the parties.[4] Wessels, The Law of Contract, analyses the legal position relative to tacit contracts and state that the following requisites must be present: (i) the person whom it is proposed to fix with the tacit contract must be fully aware of all the circumstances

[4] Frame v Palmer 1950 (3) SA 341 (C)

connected with the transaction; (ii) the act must not be equivocal; and (iii) the tacit contract must not extend to more than the parties contemplate. He further remarks that a tacit agreement must be restrictively interpreted in favour of the person whom it is sought to lay an obligation.[5] In Maasdorp the learned author remarks that *'in order to constitute a valid tacit contract, the conduct of the parties must not only be consistent with consent, but such as will allow of no other interpretation'*.[6]

[37] It is unclear from the answering affidavit and the circumstances of the matter as to which conduct of the applicant the respondent relied upon to infer that a tacit agreement was reached. In fact, the circumstances of this case do not provide any evidence that a tacit agreement was entered into. For instance, the respondent was denied permission to collect equipment on 22 May 2023 or any subsequent date, despite the respondent's efforts to do so. This contradicts the terms of the alleged tacit agreement. The applicant had been requesting the return of all equipment in the respondent's custody since 6 June 2023. The respondent's failure to do so was a unilateral action and does not represent a consensus between the parties or an unequivocal act on the part of the applicant that could potentially give rise to a tacit agreement.

[38] According to the respondent, the tacit agreement commenced upon the termination of the ELA on 30 April 2023. The respondent, however, had never settled a full invoice issued by the applicant in respect of the leased equipment pursuant to their claimed tacit agreement and most payments were only paid after the application was launched. In response, the respondent argued that the purported tacit agreement had no payment terms: The respondent pays according to their preferences at their

---

[5] Vol 1 Second Edition at para 266.
[6] Vol 3, 4th Edition Ed. At page 64

discretion. Such an agreement leaves the applicant entirely at the respondent's mercy and makes no commercial sense. There is no conduct alleged on the part of the applicant that shows that the applicant would have consented to such a term. In fact, the applicant's actions suggest the opposite.

[39] Moreover, the respondent contends that the applicant was to lease the respondent any equipment that it may require from time to time. One consequence of this is that the applicant would be required to reserve equipment for the respondent "in case" they desired to lease it. This argument ignores the fact that the respondent was explicitly informed that they were not entitled to lease or acquire additional equipment from at least 22 May 2023. Finally, the respondent asserts that it was a condition of the tacit agreement that it would be responsible for any equipment repairs. Nevertheless, the letter dated 12 June 2023, stated that **the applicant** was responsible for the repairs and that they were in the process of determining their damages.

[40] There is no indication that the parties engaged in any conduct that would suggest an offer and acceptance or a meeting of the minds on the terms of the purported tacit agreement. The applicant's comprehensive response to the respondent's claims and the commercially prejudicial terms of the tacit agreement with respect to the applicant demonstrate that the parties were consistently at odds and that no agreement was reached. The respondent's reliance on the email dated 23 June 2023, in which the applicant attached three invoices for payment, is in my view not sufficient to prove the existence of a tacit agreement. The applicant confirmed that it was merely attempting to recover at least part of the substantial monies owed by the

respondent to the applicant and is by no means an indication of the existence of a tacit agreement,

[41] There is no basis to believe that there was any tacit agreement, pending a sale agreement that reached no further than an enquiry stage. The alleged potential sale agreement claimed by the respondent clearly reached no further than the enquiry and or discussion. There was no certainty or undertaking that such a sale agreement would ever come to fruition or would even be possible

[42] The respondent's defence, which it disclosed on 31 May 2023 in a letter authored by the respondent's in-house legal advisor, was founded on a lien in lieu of contractual damages claim, as evidenced by the extensive correspondence between the parties. No reference was made to the existence of a tacit agreement between the parties that would allow the respondent to retain possession of the applicant's equipment. The respondent did not allege the existence of a tacit lease agreement until the answering affidavit was submitted on 30 October 2023.

[43] The purported tacit agreement is clearly an afterthought in an attempt to escape liability. The respondent's defence of a tacit agreement is untenable and farfetched and can be rejected outright. I am satisfied that the respondent has no legal right to retain possession of the equipment and was unable to show cause why the equipment should not be returned to the applicant.

[44] In the result, the following order is made:

1. The Respondent is ordered to return all the Applicant's equipment as reflected in Annexure "SP17" attached to the Applicant's Founding Affidavit herein, within 5 (five) days of the granting of this Order.

2. For those pieces of equipment that are located at the OR International Airport at date of this Order the equipment must be returned to the Applicant's premises located at the Swissport GSE area at the OR International Airport.

3. For those pieces of equipment that are no longer located at the OR International Airport at date of this Order, the equipment must be returned to the Swissport Cargo SCS6 Warehouse.

4. If the Respondent fails to return the Applicant's equipment described at point 1, 2 and 4 above within the stipulated time, the Sheriff of this Court is then and, in that event, authorised to attach and remove the equipment and to deliver such to the Applicant's aforementioned premises at the Respondent's cost.

5. Respondent is ordered to pay the costs of the application on Scale B.

[redacted]

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 December 2024.

APPEARANCES

Counsel for the applicant:	Ms A. De La Porte
Instructed by:	Thyne Jacobs Attorneys
Counsel for the respondent:	Advocate C.E. Thompson
Instructed by:	Hennie Bezuidenhout Inc Attorneys
Date of hearing:	19 August 2024
Date of judgment:	10 December 2024