IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 14251/2008

Reportable

In the matter between

AZULENE INVESTMENTS CC (CK1997/026209/23) **Applicant**

And

AUDE TAP (PTY) LTD **Respondent**

JUDGMENT

Cele AJ

Introduction

[1] This is an application for the amendment of the particulars of claim of the applicant by the addition of two new sub-paragraphs and the addition of a new prayer to the existing paragraphs in the main action now pending before this court so as to read:

"20A

At the time of the oral agreement referred to in paragraph 18, it was further expressly agreed by the parties referred to in paragraph 19, that:

20A. 1 the Plaintiff would be entitled to an option to renew the lease for a

period of 12 (twelve) months commencing 1st August 2010, provided such option was exercised on or before 30 June 2010;

20A. 2 the agreed rental was to be 10% (ten per centum).

20B

The plaintiff has duly exercised the option referred to in paragraph 20A hereof alternatively hereby exercises such option:

3A

3A. 1 that the Plaintiff was further granted an option to renew the tenancy agreement referred to in prayer 3, for a period of 12 (twelve) months commencing 1 August 2010 provided such option was exercised before 30 June 2010;

3A. 2 that the agreed rental for the renewal period would be 10% (ten per centum) above the rental payable on 1 July 2010

[2] The applicant also sought to have the existing prayers 4 and 5 preceded by the words; *"That this Honourable Court grant judgment for"* and that the applicant was to be directed to pay the respondent's wasted costs occasioned by the amendment, unless the respondent opposed the application, in which instance the respondent was to be ordered to pay the costs hereof. The applicant also sought to be granted further and/or alternative relief.

[3] The respondent opposed the application simply on the basis that it was not *bona fide,* had no legal basis and that the respondent did not in fact conclude the fourth lease agreement.

Background facts

[4] On 10 March 2004 the applicant and the respondent concluded a written agreement of lease in terms of which the applicant let the premises from the respondent for manufacturing purposes for a period of twenty four months beginning from 1 March 2004 to 1 March 2006. The premises are described as 1A; 1B 1C and Admin Lower Floor situated at 51 Morton Road, Rossburgh in Durban. Parties referred to this as the first agreement of lease. The rental payable was R13 500 00 and R2 500 plus value added tax per month, payable on or before the first day of the month. Clause 5 of the agreement contained an option to renew the agreement for one year.

[5] On 12 October 2005 the parties concluded a further written agreement of lease. The same premises were let by the applicant from the respondent for a further period of twenty four months, commencing on 1 March 2006 to 30 February 2008, the second agreement. It is to be noted that 30 February never exists in a calendar. This agreement does not have the option to renew the lease as clause 5 of it is silent on renewal. Clause 18.4 of the agreement contains a non-variation provision which reads:

> *"No variation of the terms and conditions of this agreement or any consensual cancellation thereof shall be of any force unless reduced to writing and signed by the parties concerned."*

[6] According to the applicant the parties concluded a third lease agreement on 3 August 2007, which was in writing although, and it is common cause that, the respondent did not sign it. The respondent took the position that the third written agreement was only a draft which it did not sign and it was therefore not binding on the respondent. The material terms of the third written agreement are that:

- The applicant let the premises from the respondent for twenty four months commencing 1 July and terminating on 30 June 2009;
- There was no option to renew;
- There was a non-variation clause which provided that: *"no amendment or variation to this agreement shall be binding upon the lessor until reduced to writing and signed by the lessor."*

[7] The applicant further said that the parties concluded an oral agreement of lease, on 3 August 2007, just before the respondent could sign the third agreement. According to the applicant Mr Feroze Sheik represented the applicant while Mr Keeran Devnath represented the respondent in those discussions. The pleadings filed by the applicant show the material terms of this agreement to be that:

- The third written agreement of lease would be void and of no effect;
- The applicant would be entitled to occupy the premises from 1 August 2007 for a further period of 36 months terminating on 31 July 2010, in view of the applicant having expended substantial amounts in effecting improvements to the leased premises in respect of power upgrades thereon.
- The applicant would pay a monthly rental of R22 000 00 with an annual escalation of 10%
- In the event of the applicant electing to vacate the leased premises, the applicant would give the respondent reasonable notice;
- The terms agreed to between the parties would, in due course, be formalized into a written agreement of lease.

[8] The explanation proffered by the applicant for not pleading the material term of the lease in the summons was that the omission was due to a *bona fide* oversight on the part of Mr Feroze Sheik, a Manager of the applicant, when he consulted with attorneys of the applicant. According to Mr Sheik, the circumstances and urgency under which he consulted the attorneys was to be viewed against the backdrop of the respondent's notice to vacate. The applicant was faced with a real fear of being evicted from the lease premises despite a valid lease in operation. Its apprehension under the circumstances was *bona fide*, in that, if it took no action to protect its rights, the respondent would have simply proceeded to evict the applicant from the leased premises, its unlawful action notwithstanding.

[9] On 1 September 2008 the respondent issued a letter and delivered it to the applicant, containing a notice of the cancellation of the lease agreement and it demanded the vacant possession of the leased premises. The respondent has denied the conclusion of the fourth agreement of lease and has contended that on the applicant's own version, at the time of the conclusion of the fourth agreement of lease, the second agreement of lease was in force. The result was then that the oral agreement constituted a variation which was not reduced to writing and signed by the parties as required by clause 18.4 of the second lease agreement and was consequently of no force and effect.

[10] The respondent contended that the action in relation to which the amendment is sought was instituted in 2008. The pleadings have been closed. On 16 April 2010 attorneys of the respondent wrote to attorneys of the applicant, pointing out that on the applicant's version the lease would terminate on 31 July 2010 and they requested an undertaking that the applicant would vacate on that date. The applicant reciprocated by delivering a notice of application to amend, in terms of

rule 28 of the High Court rules.

Submissions by the parties

[11] Mr Tobias for the applicant contended that the amendment of pleadings may be granted after pleadings are long closed and that rule 28 (9) of the rules of this court provides that the party giving notice of an amendment is liable for the costs of the other party. In any event the applicant had tendered for the payment of waisted costs occasioned by the amendment, even though there was no need, except costs incidental to opposing the application. As regards the lack of *bona fides*, the absence of a legal basis for the continued occupation and the abuse of the process contended by the respondent, the applicant submitted that it had given an explanation in regard thereto. The further submission is that there would be no point in referring the matter to oral evidence since the facts under which the amendment is sought are part and parcel of the applicant's pleaded case.

[12] Ms Annandale for the respondent submitted that the amendment was sought in bad faith and constituted an abuse of the process of this court. It was advanced to the sole cause of contriving a situation where the applicant can remain in occupation of the premises in circumstances where no legal basis for that occupation existed. Further, in the founding affidavit the applicant advanced no reasons whatsoever why the clearly material term had not been pleaded until after the letter had been sent by the respondent's attorney demanding the applicant to vacate the premises on the date on the applicant's own version the oral lease agreement expired. The first time such an explanation was tendered was in the replying affidavit.

Evaluation

[13] For purposes of this application the terms of the oral agreement allegedly entered into by the parties on 3 August 2007 need to be examined closely. The relevant provision is the second paragraph and it reads:

> *"The applicant would be entitled to occupy the premises from 1 August 2007 for a further period of 36 months terminating on 31 July 2010, in view of the applicant having expended substantial amounts in effecting improvements to the leased premises in respect of power upgrades thereon."*

[14] This agreement purports to have been entered into during the currency of the second lease agreement which commenced on 1 March 2006 to end on 30 February 2008. It must be 28 February 2008. The first date of the fourth agreement, 1 August 2007, interrupts the period of the second lease agreement. Effectively therefore, the fourth lease agreement cancels the second agreement. In terms of the non variation clause of the second lease agreement no variation of the terms and conditions of that agreement or any consensual cancellation thereof shall be of any force unless reduced to writing and signed by the parties concerned. As the fourth lease agreement is verbal, assuming without deciding that it was made, it is in sharp contradistinction to the clear obligatory terms of the non variation clause. The consequence is that the alleged verbal lease agreement is of no force and effect, see *De Villiers v BOE Bank Ltd 2004 (3) SA*

1 (SCA).The amendment of the particulars of claim was dependent on the validity of the fourth lease agreement, to which the amendment refers. The further result is that no legal basis exists for the amendment sought by the applicant and on this basis alone this application should not succeed.

[15] In the event the conclusion I have reached is for any reason incorrect, I am further persuaded by the probabilities of this matter. The applicant conceded that the term of the lease agreement which had been omitted in the pleadings was clearly a material term. On 1 September 2008 the respondent gave notice to the applicant to vacate the leased premises by 30 November 2008. On 30 October 2008 the applicant issued the summons in the main action of this matter. This was about one month before the applicant was due to vacate the leased premises. The explanation for the omission is not convincing. The circumstances and urgency under which Mr Sheik consulted the attorneys of the applicant are rather vague. On 16 April 2010 attorneys of the respondent wrote to attorneys of the applicant pointing out that in applicant's own version the verbal agreement was due to expire on 31 July 2010. They sought an assurance that the applicant would vacate the leased premises on 31 July 2010. The applicant and its attorneys did not respond to that letter. It was only on 5 July 2010 that the application to amend was filed. That left the circumstances and urgency under which the applicant consulted its attorneys very strange as they had more than two months to do so, after 16 April 2010. This questions the *bona fides* of this application. The version of the applicant is not favoured by the probabilities of this matter. I am persuaded by the submission of the respondent that this application was lodged with the sole cause of contriving a situation where the applicant could remain in occupation of the leased premises in circumstances where no legal basis for that occupation existed. This was clearly an attempt by the applicant to use for ulterior purposes machinery devised for the better administration of justice and it constitutes an abuse of the process, see *Price Waterhouse Coopers Inc. v National Potato Co-Op. Ltd 2004 (6) SA 66 (SCA).*

[16] In the circumstances, the following order falls to be made:

1. The application to amend the particulars of claim in this matter is dismissed.
2. The applicant is ordered to pay the costs of this application.

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Cele AJ.

DATE OF HEARING : 09 NOVEMBER 2010

DATE OF JUDGMENT : 26 NOVEMBER 2010

APPEARANCES

FOR APPLICANT : Adv D G TOBIAS

Instructed by : OMAR & ASSOCIATES

FOR RESPONDENT : Adv A M ANNANDALE

Instructed by : COX YEATS ATTORNEYS