

IN THE MATTER BETWEEN:

Saanthamurthi Naidu

Plaintiff

and

James Choonoo

Defendant

.....  
JUDGMENT  
.....

1.

**Introduction**

- This is a matter in which the plaintiff's capital claim in his simple summons is based on a contract of lease wherein which he claims payment of the sum of R 1300.00 in respect of arrear rental he alleges is owing to him for defendant's occupation and tenancy of a certain Flat 205, City Heights, 67 Broad Street for some 13 months during the period 1 August 2005 to 31 August 2006.
- The claim for ejectment was abandoned.
- Plaintiff does not allege in his summons who represented the respective parties at the relevant time/s of entering into the lease
- Defendant filed a plea in response to the plaintiff's summons
- Plaintiff did not replicate to the plea
- Plaintiff lead two witnesses in support of his case, whilst the defendant was the only person who gave evidence in support of his case
- It appears to be a common case from the evidence that, at the stage prior to the alleged arrears rental accruing, no written contract of lease subsisted between the parties and that the lease that existed between them i.r.o. the premises was a periodical oral lease for the monthly payment of R 1000.00 rental.
- The thrust of plaintiff's case, as it emerged from the evidence (which incidentally was not pleaded) , was that there was a tacit agreement by defendant to pay an additional amount of R 100.00 per month over and above the R 1000.00 previously agreed upon, (i.e. he was to pay R 1100.00 per month) with effect from August 2005.
- Neither party sought to amend or supplement their papers by way of amendment, the plaintiff especially being content to proceed to trial on the basis of the barest of allegations surrounding the cause of plaintiff's action as delineated in the summons.

**Defendants defence in his plea:**

- Defendant denies that he is indebted to the plaintiff on the "bald" grounds as pleaded by plaintiff and, in amplification his plea was couched in the following terms:

1.

.....

2.

.....Defendant avers that he entered into an agreement of lease with the plaintiff at a rental of R 1000.00 per month. The defendant avers further that he has paid the rental every month in full and final (sic) timeously.

3.

The defendant further avers that he at no stage agreed to the variation of the terms of the said lease.

4.

Consequently the plaintiff is not entitled to vary the lease unilaterally.....

- The lack of replication to the aforesaid plea meant that, i.t.o. Rule 23(3) of the Magistrates Court rules, the plaintiff's non replication shall be taken to mean that the plaintiff effectively has denied all the allegations of fact contained in the plea.

2.

**The Legal Position**

- In order to resolve factual disputes it is necessary to examine the versions of the two parties against their merits and demerits as well as the merits and demerits of the witnesses, and the inherent probabilities or improbabilities such as they emerge from the evidence.
- It is trite that in order for liability to arise ex contractu, there must be privity of contract between the plaintiff and the other party sought to be held liable on the contract.

The Law of Contract in South Africa by R H Christie, 2<sup>nd</sup> ed. pg 64

- A contract is an agreement entered into with the intention of creating an obligation or obligations. An oral contract is enforceable at law and the contract and its terms need not be in writing. In an express, as compared to a tacit contract, the party alleging the contract must prove the terms of the agreement which he seeks to enforce. The onus is squarely on his/her shoulders to prove the terms of the contract.

Da Silva v Janowski 1982 (3) S A 205 (A) at 219C

McWilliams v First Consolidated Holdings (Pty) Ltd 1982(2) S A 1 (A)

Kriegler v Minitzer and another 1949 (4) S A 821 (A) at 827

- The agreement must be firm, clear, unequivocal and unambiguous in its terms. The parties to the contract are thus bound to the four corners of the contract agreed to. The intention of the parties to a contract must be gathered from the language used in the contract and not from what either party understood it to be, were busy contemplating or had in mind.

Philomatt (Pty) Ltd v Mosselbank Developments CC 1997 JOL 59 ( A )

- A claim based on a contract is to be put within the four corners of the agreement. A proper setting out of the clause of action requires the averment

of the fulfilment of such conditions as the agreement might attach to the obligation sought to be relied upon

Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 90

- A party alleging a contract must allege and prove those terms (express or tacit) of the agreement he or she seeks to be enforce.

*McWilliams v First Consolidated Holdings (Pty) Ltd 1982 (2) SA 1 (A)*  
*Badenhorst v Van Rensburg 1985 (2) SA 321 (T) at 335 Amlers*  
*Precedents of Pleadings 6<sup>th</sup> ed. Pg 95*

- A party relying on a contract of letting and hiring must allege and prove a contract containing at least the following essential terms:

- (a) an undertaking by the lessor to deliver a thing to the lessee;
- (b) an agreement between the parties that the lessee will have temporary use and enjoyment of the thing; and
- (c) an undertaking by the lessee to pay rent.

*Genac Properties Jhb (Pty) Ltd v NBC Administrators CC 1992 (1) SA 566 (A)*  
*Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 (A)*  
*Hurwitz NNO v Table Bay Engineering (Pty) Ltd 1994 (3) SA 449 (C)*  
*Engen Petroleum Ltd v Kommandonek (Pty) Ltd [2001] 1 All SA 636 (W); 2001 (2) SA 170 (W)*  
*Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 218*

- A lessor claiming arrear rental must allege:
  - (a) the contract;
  - (b) fulfilment of the lessor's duties in terms of the contract, especially the duty to deliver the thing to the lessee;
  - (c) non-payment of the rent.

The plaintiff bears the onus of proof, except that it will be for the lessee to allege and prove payment.

*Ramnath v Bunsee 1961 (1) SA 394 (N)*  
*Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 219*

- A lease contract is one of location conduction (re) and as appears from the above it consists in a **bilateral agreement** between the parties
- Terms which, in terms of the parol evidence rule, cannot be proved, may not be pleaded unless a rectification of the contract is sought.

Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 97

- If a party intends to rely on a term implied by law in a contract, the implied term must be pleaded since the relief sought will depend on it. However, it is not necessary to allege facts giving rise to the term, because it is a legal question of whether the term is to be implied.

See, in general: *Sishen Hotel (Edms) Bpk v SA Yster & Staal Industriële Korp Bpk* 1987 (2) SA 932 (A) at 948/949  
Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 96

- As with implied terms, if a party intends to rely on a tacit contract, it is necessary to plead that fact. If an express contract is alleged, the pleader may not lead evidence to prove a tacit contract.

*Roos v Engineering Fabricators (Edms) Bpk* 1974 (3) SA 545 (A)  
*Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd*  
Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 94

- A tacit term may not be read into a unilateral document (such as an offer) unless surrounding circumstances are pleaded and proved.

*Multilateral Motor Vehicle Accidents Fund v Thabede* 1994 (2) SA 610 (N)  
Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 95

- The court does not readily import a tacit term

ALFRED McALPINE & SON (PTY) LTD v TRANSVAAL PROVINCIAL  
ADMINISTRATION 1974 (3) SA 506 (A) at 532 H

- A tacit contract is established by conduct. Regarding the legal principles pertaining to a tacit contract *The Law of Contract in South Africa* by RH Christie (5<sup>th</sup> ed.) (“Christie”) at 81-90 is informative in this regard and also with regard to a contract concluded by quasi-mutual assent. Christie points out at 8283 that there is a clear difference between the two enquiries and he says that:
- “An inquiry into whether a contract has been concluded by conduct differs from an inquiry into whether a contract has been concluded by quasi-mutual assent. In the *quasi*-mutual assent situation it is accepted that there is no true *consensus ad idem*. The one party says ‘But I never agreed’, to which the court replies ‘Quite so, but your conduct led the other party reasonably to believe you agreed, so you will be treated as if you agreed’. The inquiry is concerned with the effect of the one party’s conduct upon the other as a reasonable person. In the tacit agreement situation the one party says ‘But we truly agreed; our (or my, or his) conduct proves it’, and the inquiry is concerned with the proper inference to be drawn from the proved facts.”

See also *OCV Investments (Pty) Ltd SAB Ltd* {2007} JOL 20237 (T)

- As aforesaid, a tacit contract is established by conduct. The court infers the existence of the contract from the conduct of the parties {see *Bremer Meulens (Edms) Bpk v Floros* 1966 (1) PH A56 (A)}. The conduct of the

parties must be such that it justifies an inference that parties actually agreed. There must be evidence of conduct of the parties which justifies and inference that the parties intended to, and did, contract on the terms alleged, or, in other words, that there was consensus and idem (see Gordon Lloyd Page & Associates v Rivera 2001 (1) SA 88 ) (SCA) at 95J- 96A; Frame v Palmer 1950 (3) SA 340 (C) at 345; Vaughan-Spink v Blignaut 1952 (2) PH A41 (E); Salisbury Municipal Employees Association v Salisbury City Council 1957 (2) SA 554 (SR) at 557; Salisbury Bottling Co (Pty) Ltd v Lomagundi Distributors (Pty) Ltd 1965 (3) SA 503 (SR) at 512). For many years this has been a fundamental requirement. In Merriman v Williams 1881 Foord 172, Maasdorp J formulated the test as follows:

“In order to constitute a valid tacit contract, the conduct of the parties must not only be such as to be consistent with consent, but such as will allow of no other interpretation according to the rules of the common sense”.

OCV Investments (Pty) Ltd v SAB Ltd {2007} JOL 20237 (T)

- As expounded in Amlers Precedents of Pleadings 6<sup>th</sup> ed. at Pg 05, “In order to establish a tacit contract, it is necessary to allege and prove unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was agreement.  
Standard Bank of SA Ltd v Ocean Commodities Inc 1983 (1) SA 276 (A) at 292  
Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A)  
*Muhlmann v Muhlmann* 1984 (3) SA 102 (A) at 123-124  
*Bezuidenhout v Otto* 1996 (3) SA 339 (W) at 342-343  
*Muller v Pam Snyman Eiendomskonsultante* (Edms) Bpk {2000} 4 All SA 412 (C); 2001 (1) SA 313 (C)”
- **The party alleging a tacit contract must catalogue and prove the unequivocal conduct** and circumstances from which the tacit contract is to be deduced, **and must also allege the terms of the contract.**  
*Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A)  
*Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 267  
*First National Bank of Southern Africa Ltd v Richards Bay Taxi Centre (Pty) Ltd* {1999} 2 All SA 533 (N)  
Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 95
- In order to prevent absolution, the plaintiff must produce evidence of conduct of the parties that justifies a reasonable inference that the parties intended to, and did, contract on the terms alleged- in other words, that there was, in fact, consensus *ad idem* amongst the parties.

Gordon Lloyd Page & Associates v Rivera {2000} 4 All SA 241 (A); 2001 (1) SA 88 (SCA)

Amlers Precedents of Pleadings 6<sup>th</sup> ed. Pg 95

- An inference must be based on properly proved objective facts otherwise it is simply speculation (see S v Mtsweni 1985 (1) SA 590 (A) at 593E-F; Caswell v Powel Duffryn Associated Collieries Ltd {1939} 3 All ER 722 (HL) at 733E-F). The inference sought to be drawn must comply with the first rule stated in R v Blom 1939 AD 188 at 202-3: ie: “It must be consistent with all the proved facts. If it is not, the inference cannot be drawn” (see AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) at 614H). generally, where more than one inference is possible on the objective proved facts the court may, by balancing probabilities, select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one. In this context “plausible” means “acceptable, credible, suitable” (see Govan v Skidmore 1952 (1) SA 732 (N) at 734C-D; Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159C-D; AA Onderlinge Assuransie Assosiasie Bpk v De Beer, supra, at 614H-615B; Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) Sa 978 (A) at 981A-D).

See OCV Investments (Pty) Ltd v SAB Ltd {20237} JOL (T) and see further below under “Standard of proof required”

- If reliance is placed on the tacit acceptance of an offer, **it is necessary to allege such tacit acceptance and to allege and prove the basic facts on which the party relies in order to substantiate such acceptance.**

*Clegg v Groenewald* 170 (3) SA 90 (C)

Amlers Precedents of Pleadings 6<sup>th</sup> ed.Pg 97

- The appellate division has formulated two conflicting tests for inferring the existence of a tacit contract. In *Standard Bank of South Ltd v Ocean Commodities* 1983 (1) SA 276 (A) at 292 B-C the court formulated the test as follows:

“In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.”

- In *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165G the court, after pointing out that the correctness of this formulation had been questioned, as it seemed to indicate a higher

standard of proof than that of a preponderance of probability, formulated the following less stringent test at 165B-C:

“ . . . it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant facts and circumstances is that a contract came into existence”.

OCV Investments (Pty) Ltd v SAB Ltd [2007] JOL 20237 (T)

NEDCOR BANK LTD v WITHINSHAW PROPERTIES (PTY) LTD 2002 (6) SA 236 (C) at 237

- As aforesaid, a lease is a bilateral agreement and must not be vague or uncertain- as such, it is allowable for the **parties** to nominate a particular third person to fix rent for them, but they **may not agree that the rent may be fixed by the unfettered will or discretion of one of them alone.**

BENLOU PROPERTIES (PTY) LTD v VECTOR GRAPHICS (PTY) LTD 1993 (1) SA 179 (A) at 182 G and 185 A – F

Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991(1) S A 508 (A) at 514 G – H

- The law requires certainty in legal relationships. To be binding upon him, the lessee must either expressly or impliedly agree to any increase in rent proposed by the lessor. By itself, **a mere statement by the lessor that rent will be increased from a certain date or occurrence will not render the lessee liable to pay the higher rent because the lessor cannot unilaterally change the terms of the lease.** In the absence of express agreement, the lessee will be bound to pay the higher rent only if by his conduct he gives an unequivocal indication to the lessor of his intention to do so.

Landlord and Tenant 2<sup>nd</sup> ed. by W E Cooper at page 60

Commercial Law 2<sup>nd</sup> ed. by Lexis Nexis para 16.21 at page 226

- In the event of a lessor exercising his right to terminate a lease and he gives such notice to a lessee and simultaneously informs him that he may continue to remain in occupation if he pays a higher rent specified, and the lessee does not reply to the notice but remains in occupation after the expiration of the notice, he will be taken to have agreed to pay the higher rent.

Landlord and Tenant 2<sup>nd</sup> ed. by W E Cooper at page 60

However, should the lessee refuse to pay the higher rent or vacate but tender the rent originally agreed upon, the lessor will have to elect whether to accept

the lessees refusal or to sue for ejectment (and concomitant holding over damages, if any) – Landlord and Tenant 2<sup>nd</sup> ed. by W E Cooper at page 60

- In determining whether or not an agreement between the respective parties existed in the terms alleged or at all, this Court will thus have regard, inter alia, to the substance of the alleged agreement, the background or circumstances in which it was made and the subsequent conduct of the parties.

3.

### **The standard of proof required**

- It is trite that since a civil standard of proof is required, the existence of a contract between the respective parties in the terms alleged thus has to be proven **on a balance of probabilities.**
- Reference has already been made to the onus that rests on the shoulders of a plaintiff to prove a tacit term of an agreement.
- The test essentially is whether the plaintiffs version is the more plausible amongst several conceivable ones – in this regard the dictum of the learned Judge Holmes in the matter of Ocean Accident and Guarantee Corporation v Koch 1963 (4) SA 147 (AD) is most instructive where he says the following at page 159 B to D:  
“.....the degree of proof required in a Court of law is not ‘absolute science’ but merely (this being a civil case) a balance of probability; see West Rand Estates Ltd v New Zealand Insurance Co. Ltd., 1925 AD 245 at p.263. As to the balancing of probabilities, I agree with the remarks of SELKE, J., in Govan v Skidmore, 1952 (1) SA 732 (N) at p.734, namely **‘... in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3<sup>rd</sup> ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one’.**”

I need hardly add that ‘plausible’ is not here used in its bad sense of ‘specious’, but in the connotation which is conveyed by words such as acceptable, credible, suitable. (Oxford Dictionary, and Webster’s International Dictionary).”

- The civil onus is discharged by the applicant producing credible evidence. The following dictum of the Learned Judge Eksteen in the case of National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) is informative in this regard – at page 440 to 441 he says:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a

civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are **two mutually destructive stories**, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe H Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[My underlining]

- In short, where the court is faced with two irreconcilable versions, the court is impelled firstly to interrogate the general probabilities or improbabilities of the versions before it. In **weighing up two irreconcilable versions** the following dictum of the Learned Judge Nienaber in the case of *Stellenbosch Farmers Winery Group Ltd and Anor v Martell et Cie and Others* 2003 (1) SA 11 (SCA) is instructive in this regard – at page 14 to 15 he says:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows, to come to a conclusion on the disputed issues a court must make findings on

(a) the credibility of the various factual witnesses;

- (b) their reliability; and
- (c) the probabilities

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail."

- In summary, it is thus clear that where the court is faced with two irreconcilable versions, the court is impelled firstly, to interrogate the general probabilities or improbabilities of the versions before it. If these are found to be evenly matched, then the **next leg** of the enquiry relates to the credibility of the witnesses, the reliability of his/her testimony and the probabilities or improbabilities of the version put forward by each party.
- All evidence requires a court to engage in inferential reasoning.

See: *S v Zuma* [2006] JOL 17305 (W) at page 145

- To determine the question which of the parties should succeed in a civil case, courts often have to rely on inferences. The view expressed in *Govan v Skidmore* (quoted above) i.c.w. inferential reasoning was expounded upon by the Supreme Court of Appeal and expressed as follows in the case of *hulse-ruetter and others v Godde 2001 (4) SA 1336 (SCA)* at para 14:

“What is clear is that the ‘evidence’ on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which, by balancing probabilities, is the one which seems to be the more natural or acceptable from several conceivable ones. (See *Govan v Skidmore* 1952 (1) SA 732 (N) at 734B-D as explained by Holmes JA IN *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.) While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of *prima facie* case would be rendered all but nugatory.”

- It is permissible to draw adverse conclusions or inferences from a party’s own evidence [See: *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (AD) at 662 H and *Tonyela v South African Railways and Harbours* 1960 (2) S A 68 (C) at 73 G]

4.

### **The Evidence**

#### 4.1 The exhibits introduced into evidence.

- Plaintiffs bundle of documents consisting of a reconciliation of alleged rentals owing in respect of Flat 205 City Heights (page 1) and a letter from Dowland Investments (Pty) Ltd t/a Sky Administration and Management Services dated 29/6/2005 addressed to one “Choonoo” (page 2).
- Defendant’s bundle of documents numbered from pages 1 through to 18

#### 4.2 Plaintiffs evidence (1<sup>st</sup> Witness Allan Stanley Jordan)

##### In Chief he said that:

- Sky Administration was a property management company. He was employed by such company as a property manager. One of the buildings he managed is City Heights which is a sectional titles scheme and is controlled by a body corporate. Sky Administration purely carried out a management function and had no vested interest in the ownership of the building. Sectional titleholders leased out units/flats in the building. He had been with Sky Administration for 5/6 years, but had consulted with such company for approximately 15/16 years. He was employed

by Sky Administration during June to August 2005. He has had sight of and access to the records in respect of Flat 205 leased by the defendant. The relationship between him and one Ranjith Mohanlall in respect of Sky Administration was that Mohanlall was employed at the relevant time as a portfolio manager and he reported directly to Jordan. Mohanlall oversaw the day-to day running of some of the buildings, one of them being City Heights. Mohanlall had no discretionary powers and reported everything of importance to the body corporate or to the individual owners of the units and he would take instructions and act on those instructions.

- In connection with the letter dated the 29<sup>th</sup> June 2005, Jordan had taken instructions from the owner of a particular sectional unit viz. one S Naidoo to increase rentals by 10%. This was not an isolated increase; in fact, it was for the whole floor. Naidoo was the sectional owner of the whole floor. Upon receiving such instructions, Jordan went to Mohanlall to do the necessary written one calendar month's notice to the respective tenant, including the tenant of Flat 205. The first paragraph of the letter advised the respective tenant that rental would be increased by 10% from R 1000.00 to R 1100.00. Having regard to the date of the letter and the date of the effective increase, being a periodic lease, a calendar month notice was given. With regards to the last paragraph of the said letter the tenant was invited to contact them in respect of any query or disputes. The said letter was signed by Mohanlall. In response to the letter the defendant made no written or verbal contact with them. The instruction given to Mohanlall was that if a communication was received in response to the letter, it would be referred to Jordan, who would then refer it to the owner of the sectional unit. He assured the court that had Mohanlall received a phone call in response to the letter, not only would Mohanlall have requested such response to be recorded in writing, he would also have lodged a verbal response with Jordan-this was not done
- He confirmed that the defendant was in occupation.
- He also confirmed that one of plaintiff's bundles was a reconciliation of the defendant's payment history recording the balance brought forward in August 2005, the rental due, payments received and what there was owing. This particular reconciliation had been prepared by Mohanlall. Jordan had checked the reconciliation and confirmed that it was correct-from August 2005 to August 2006 (13 months) the defendant had not paid the extra monthly R 100.00 and the accumulated rental due was R 1300.00
- In response to a question posed as to what was expected of a tenant if he/she was not happy with the increment, his response was that the tenant was invited to contact

Mohanlall or his office if there was none-acceptance of the R 100.00 monthly increment, but that was never done. When the tenant did not vacate and stayed on at the premises it was assumed that there was tacit acceptance of the notification of the rental increase.

- The majority of the tenants paid the increased rental although there were some who had not
- The letter advising of the increase in rental was brought to the notice of the tenants by the building manager, one Mrs Moodley, hand delivering same alternatively putting such letter under the respective tenants door/s
- His offices were situated about 300 yards down the road from the building (City Heights)

### Cross Examination

In cross examination he said that:

- he had a lot of experience in property management. In the instant matter, he acted for the owner of the particular section and the Body Corporate across-the-board. City Heights comprised of 14 floors of flats. Sectional units on each floor had been sold to different investors in the past. Sky acted for some of the section owners while other section owners looked after their own floors. Sky however acted for the whole Body Corporate. The letter dated 29 June 2005 was addressed to one “Choonoo”. He did not know if there were other tenants in the building with the same name. There may well have been a “Choonoo” living elsewhere in the building in a flat which may have been looked after by an individual section owner.
- the letter did not indicate who sky was acting for. It was not indicated in the letter who authorised Sky to act. Sky was an independent property manager. He did not agree that, on a reading of the face of the document, it appeared that Sky was the landlord-he maintained that the letter could be interpreted in either of two ways i.e. that Sky was the landlord or that Sky was acting on behalf of someone.
- he agreed that the rental originally charged for the premises was R 1000.00 and at that time that rental amount was a term of a verbal lease.
- There was a tacit agreement to increase the rental inasmuch as Sky had given the tenants notice of the increase and invited them to respond, which they didn't do. When the tenants stayed on, the tacit understanding of their actions was that they accepted the increase.
- When it was put to him that the law was that a non-response did not amount to a tacit agreement he maintained that the action of the tenants in staying on in the flats amounted to a response. His reasoning was that if the increase was unacceptable to the tenants they had an opportunity to dispute it or move out. The fact that the tenants did not communicate with Sky and they stayed on showed a tacit acceptance.
- he accepted that in order for there to be a change in the rental from R1000.00 to R1100.00 there would have to be an agreement and in fact, there was
- he believed that there was a meeting of two minds

- immediately after the tenant received the letter in regard to the increase the tenant paid R1000.00.
- in response to the proposition put to him that, by the tenant paying only R1000.00 instead of R 1100.00 such conduct amounted to a tacit refusal or an indication that the tenant was willing to pay the R1100.00 asked for, the witness was at sixes and sevens and remained silent for a while and responded that he could not explain such reasoning. When pressed for an answer he conceded that the converse could be true, i.e. it could be argued that the tenants conduct could amount to a refusal or non-acceptance of the term proposed.
- he agreed that there wasn't any place in the letter which indicated that Sky was acting on behalf of the owner or that the owner had authorised the increase.
- he did not agree that, regard being to the letter, it did not therefore amount to a notice of increase. He did not agree that it could be interpreted that the Body Corporate had authorised Sky to send the letter. He said that the Body Corporate had nothing to do with the letter, because the Body Corporate did not have individual instructions over the ownership of the individual units and could not instruct increases in rentals-it was only the sectional owners who could do so.
- he was aware that the plaintiff had met with the representatives of the tenants as well as the tenants of City Heights. He was present at a meeting which was held earlier in the year(2007)
- he disputed that Mr Choonoo and the other tenants had indicated at the meeting that they were not prepared to accept the increase proposal. He attended the meeting with the section owner Mr Naidoo and the issues discussed were around issues of maintenance. When pressed on whether he denied that the tenants objected to the increase he added that he had had two meetings in the year- one with Mr Afzal Mohammed and one at the Sky offices. When further pressed on whether it was possible that an objection to the increase was noted at the meeting/s he finally conceded that it possibly could have occurred, but he did not recall it.
- With regards to the meeting with Mr Afzal Mohammed, he recalled that it was made clear and minuted at a meeting at Mohammed's offices in May/June 2007 that Naidoo was not prepared to discuss or negotiate with anybody with regards to the issue/s of arrears.
- in response to a query as to whether it was normal to not indicate in letters to tenants who the owner of the unit/s was or who Sky was acting on behalf of he said that he had been involved in the business for the past 30 years and it is normal to indicate such particulars in commercial/industrial/retails sector letters, but in the case of residential properties it was not done.
- He oversaw the contents of letters and checked the amounts claimed. He did not believe that the lack of particularity in the letter was a problem and if it was a problem, he would have addressed it.
- The lack of particularity in regard of the principal on behalf of whom Sky was acting was not a problem at all, as he had done the same in the past

#### Re examination

In re-examination he said that:

- Dowland Investments (Pty) Ltd in fact traded as Sky Administration and Management services. Sky Administration was duly authorised agent of the Body Corporate and the landlord Mr Naidoo.
- as was evident from the deposit slips evidenced in pages 8 through to 12 of defendants bundle deposits, were made into Dowlands trust account and thereafter transferred into the individual owner's account.
- as was evident from a receipt issued on the 4<sup>th</sup> of May 2006 on page 12 of defendant's bundle, such receipt was issued to the defendant by the building manager one Mrs Moodley for the building City Heights. The receipt of the money without prejudice indicated that the landlord's rights reserved.
- the tenants knew who the managing agents were:

Questions arising from re examination-he said that:

- the collection and receipt of rental was by virtue of a specific mandate from the landlord
- if the landlord had not instructed Sky to increase rentals, Sky could not do so on their own as there would be no authority for such an increase. Sky worked on instructions.
- he agreed that the collection of rental would constitute one instruction whilst the increase of rental would constitute another instruction
- Sky had received specific instructions to increase the rental
- he agreed that the fact that Sky had an instruction to collect rental did not necessarily mandated Sky to increase the rental.
- in response to the question posed to him that if it was a new instruction to increase rental, why it wasn't then indicated in the letter that such instruction was received, he had replied that he could not answer such a question- Sky used a formal letter, which didn't contain such specific clause.
- he believed that it was not necessary to indicate in the letter that Sky was authorised to so act.

4.3 plaintiff's evidence (second witness Ranjit Mohanlall

In Chief he said that:

- he was currently employed by Colliers
- he was previously employed by Sky Administration and Management services and resigned from Sky in May 2006. He had been employed by Sky as a portfolio manager for approximately 13 years.
- he was the author of and wrote the letter dated the 29<sup>th</sup> of June 2005. Sky was the administrating agent for and on behalf of landlords of properties administered by Sky in and around the Durban area. Sky was given instructions by the landlord via his manager, Allan Jordan who was his senior then, to increase the rental of the tenants that occupied the City Heights by 10%.
- he drafted the letter addressed to all the tenants and sent them to the building supervisor to deliver the letters to the tenants.
- According to his knowledge Mr Choonoo did not contact him between the date of the letter and the 1<sup>st</sup> of August 2005. If Mr Choonoo had done so,

and had expressed any grievances, he would have requested Choonoo to put such grievances in writing whereafter he would have referred same to his senior Jordan and Sky would have, in accordance with the procedure, reverted to Choonoo in writing as well.

- Choonoo did not vacate the premises on the 1<sup>st</sup> of August 2005
- inasmuch as Choonoo did not approach him with any grievances, he effected the necessary escalation increase as per normal.
- the majority of the other tenants paid the escalated rental
- if Choonoo had expressed his unhappiness with the escalation he would have asked Choonoo to put his complaint in writing, which complaint would have been referred to the landlord for his opinion. He, Mohanlall, would not have made any decision on his own
- in regard to whether he still expected the full amount of increased rental of R 1100.00 to be paid in the event of a dispute arising, he advised that he expected such money to still be paid inasmuch as the tenant had been duly notified of the increase in rental.

#### Cross examination

In Cross examination he said that:

- he regarded the letter as an instruction to the tenant to pay rental and not as a request to enquire whether the tenant/s was/were happy or not with the increase
- in regard to the proposition posed that the letter did not constitute an invitation to accept the offer of an increase but that it merely informed the tenant that the tenant had to pay the increase if the tenant wanted to stay on, he said that the letter was worded as an instruction, but an option was offered to the tenant to contact him to discuss the matter.
- In the event of there being a dispute, the increased rental would be put on hold i.e. the rental would not go up whilst the dispute was referred to the landlord.
- he could not explain why he offered the latter response which differed from his earlier contention that the increased rental would still have to be paid even if there was a dispute lodged.
- he did not have authority to tell the tenant not to pay as he did not make such decisions.
- when tasked again on whether, if a tenant approached him and disputed that he would pay R 1100.00, he would in such a certain a circumstance then instruct the tenant to pay R 1100.00 increase, he recanted and said that the tenant would have to pay the R 1100.00 required.
- he repeated that he did not have any discretion at all and all he did was to send the letter.
- Sky worked for the Body Corporate. When the letter was sent he was acting on behalf of the Body Corporate and landlords. Instructions were given to him by his superior Allan Jordan. He did not know the reason why it was not stipulated in the letter who Sky was acting on behalf of was because such fact was not known. He reiterated that he had no knowledge of the mandate given to Sky.

- in the building City Heights he did not know how many people bore the surname Choonoo, but he was aware in respect of Flat 205 that the occupant was Choonoo. He did not specify the initials of the recipient of the letter inasmuch as same might have slipped his mind.
- he was not aware if Choonoo had a lease with the landlord prior to him sending the letter to Choonoo.
- He was aware that Choonoo had occupied the particular flat for the past 15 odd years.
- He surmised that a verbal lease was in place which entitled Sky to receive rental on behalf of the landlord.
- Choonoo had paid rental prior to the letter being sent
- he agreed that if Choonoo's tenancy was to be terminated, there would have had to have been a cancellation of his lease agreement. There was no termination clause in the letter in question. There was no implication in the letter that if Choonoo did not want to pay the increase in rental, he would have to move out. There was no intention to evict Choonoo if he did not pay the additional rental

#### Re examination

There was none

Plaintiff's case was then closed

#### 4.4 Defendants Evidence (James Choonoo)

##### In Chief he said that:

- He was a tailor by profession. He has resided at Flat 205 City Heights, 67 Broad Street Durban for the past 15 years. The flatlet was previously owned by the Paruks and administered by Big Den properties before being owned by Mr Naidoo. The new landlord took over on or about the 30<sup>th</sup> December 2004. At such time representatives of the new landlord came and knocked on his door and informed him that they were taking over the property, and that he would have to vacate. He and other tenants approached the O.C.R (Organisation of Civic Rights), headed by Iqbal Mohammed who took up his case. The O.C.R sent Naidoo a letter which was not responded to. The tenants marched, but the landlord did not revert to them and the tenants remained occupying the building. During this period he paid all rent requested. In 2004 the rent increased to R 1000.00. When he first entered the building the rent was R 530.00. Prior to the R 1000.00 increase the rent was R 900.00. At the stage that the rent was increased to R 1000.00 he did not have any objection to paying the rental.
- When he first moved into the building it was like a five-star building and everything was in order-they had movies twice a day, they had security, the two lifts were worked, the garbage chute worked, and everything was in order up to 1993. Since then, they have had problems up to the present day. Presently the front door of the

building was missing, their movie privileges were taken away, one lift was completely out of order, whilst the other only stopped on two floors and broke down three times a week, there were rats, cockroaches, and even cats running around in the building passages and messing the passages and the mess was just left there. The landlord was aware of the problems since he had phoned and informed relevant person/s of the problems at least a hundred times.

- he had informed the landlord of the aforementioned conditions prior to the letter of the 29<sup>th</sup> June 2005.
- when he received the letter he went to Mohammed with the letter. Mohammed advised him that, because of the state and condition of the building, he should continue paying the then current rental of R 1000.00 per month inasmuch as the increase was not valid.
- He found the letter after it had been pushed under his door and he was not happy with the contents of the letter. He was not informed that Sky was acting for and/or on behalf of the landlord.
- After he received the letter he did not have any contract with Jordan or Mohanlall. He had seen Mohanlall on occasion but had not had any contact with him. Whenever he phoned Sky offices and had requested to speak to Mohanlall, he was always informed that Mohanlall was not available.
- Mohammed did not inform him to contact Sky; rather he was informed to pay the R 1000.00 rental, which he did-he paid rental to Mrs Moodley.
- He did not accept that he was liable to pay the increase rental of R 1100.00, and he would never accept it.
- He did not bother to contact Sky in response to the letter sent to him inasmuch as he expected them to reply to Mohammed's letter which had been sent prior to Skys letter of the 29<sup>th</sup> June 2005.
- he reiterated that he did not consider that there was an agreement to pay R 1100.00 per month.
- He had met Naidoo during the course of the current year (2007). At such meeting he and the other tenants put forward their grievances, and they told him that in response to the rental increase they were putting a hold on it- Naidoo said that it was okay that a hold could be put on the extra R 100.00 per month, as long as they paid their R 1000.00 a month.
- no resolution was reached with Naidoo insofar as the conditions of the building was concerned and he merely made promises.
- he reiterated that he did not have any contact with the plaintiffs witnesses
- he had not stopped paying his R 1000.00 rental at any stage. For the past 15 years that he had been in the building he had always paid his rental.
- he sent a letter to Vinodha Pooran dated 20<sup>th</sup> April 2006 in response to plaintiff launching a claim for arrear rentals. It was after he sent this letter that he had received a summons.

In cross examination he said that:

- he confirmed that a meeting was held with the landlord in the current years and that he was present at the meeting. It was not the City Heights Tenants committee which held the meeting, but rather he and Mohammed who facilitated the it and took tenants along. He was not a member of the Tenants Committee neither was he a member of the O.C.R. Whenever he had problems he would go to the O.C.R for assistance. He was not a close friend to Mohammed and prior to meeting Mohammed, he had not known him. He did not pay fees to the O.C.R. He confirmed that 74 tenants had given a mandate to the O.C.R and that he was one of the 74. He advised that a letter by the O.C.R dated 1<sup>st</sup> March 2007 was directed to the tenants of City Heights in reaction to a further proposed increase of the rental to R 1300.00 and the mandate given to O.C.R was in response to such increase.
- he could not recall if there was a letter of mandate by the O.C.R in respect of the June 2005 increase.
- There was nothing in writing that was exchanged between him and Mohammed and their communication was oral.
- after he was informed in 2004 and told to vacate he saw Mohammed. His letter of the 22<sup>nd</sup> February 2005 had nothing to do with the proposed increase.
- He confirmed that the complaint in respect of the notice to vacate was responded to in writing by Mohammed.
- He confirmed that he had occupied Flat 205 since or about 1992.
- The term managing agent or administrator was not foreign to him. He understood that the term landlord can mean someone who runs a building. The concept of a landlord and the concept of an administrator would not confuse him.
- Over a period of 15 odd years the rent had gone up to a sum of R 900.00 or in about 2004. He did not expect the rental to remain the same and anticipated an increase from year to year.
- He was not sure that the rent had gone up in August 2004 to R 1000.00; he recalled that it was in or about March.
- he confirmed that he was currently paying a rental of R 1000.00 per month.
- He confirmed that from 2004 to 2007 the rental that he had paid remained unchanged at R 1000.00 per month.
- He did not want to pay the increased rental, because he was not getting beneficial use and enjoyment of the property rented by him by reason of the facts adverted to by him in his evidence in chief. Before he paid an increase in rent he expected the landlord to fix up the building so that he could get beneficial use and enjoyment of the building.
- He conceded that in the year 2005 the front door of the building was there.
- He believed that if he and the landlord could not agree on the issue of rental, he expected the landlord to get together and discuss matter with him so as to solve the problems that they were facing.

- He confirmed that he got the notification of increase letter dated 29<sup>th</sup> June 2005 after it had been placed under his door. He did not get to contact Mohanlall with regards to the contents of the letter in as much as Mohanlall was never available whenever he telephoned.
- the letter of the 25<sup>th</sup> of April 2006 was written by Choonoo in response to a letter of demand from the landlord, which demand requested a response.
- He was not sure who the landlord of the premises was as the landlords kept on changing names. No one told him who the landlord was. Sometimes Naidoo was in charge, other times it was the Body Corporate. They didn't really know who the landlord was.
- He elaborated that the person who knocked on his door demanding him to vacate didn't identify himself as Naidoo-the person who came to his door was Naidoo's security who was armed with a holstered gun
- if he was given wrong advice by Mohammed, he would have known. He considered the advice of Mohammed and did what was right. He sought the assistance and took the advice of Mohammed inasmuch as Mohammed was knowledgeable about tenants rights and obligations.
- He reiterated that he could never take up any issues with the landlord or Sky as they did not want to hear anything whenever he phoned and the person he dealt with was the supervisor.
- Although there were no letters in the bundle of documents discovered by him in connection with complaints lodged by him, he recalled having sent hundreds of letters to Big Den e.g. in 2004 water leaked in his bathroom and his kitchen and the supervisor was informed of same.
- He disputed the proposition that he did not complain because, if he did so, the landlord would have terminated the lease-such a thought didn't even enter into his mind.

### Re examination

#### In re examination he said that:

- when he received the letter of the 29<sup>th</sup> of June 2005 he was stunned, whereupon he went to see Mohamed who advised him to pay the normal rental. Mohammed did not say that the letter per se constituted an increase. Mohammed did not mention any terms such as offer and acceptance.
- He did not in any way accept a term to pay R 1100.00. He did not do anything by his actions to indicate that he was going to pay the R 1100.00. He did not say to anybody that he would pay the R 1100.00. He did not accept the offer of increase.
- one of the reasons he did not pay the increase was because of the condition of the building. If the condition of the building was the condition that existed at the time that he took

occupation, he would have gladly payed the increased rental as he was a man of principle.

- he had had no problems in paying rental over the period of 15 years that he was in occupation.
- The reason why he did not pay the increased rental was not because he just did not want to pay the additional amount.
- The person that he contacted in connection with the affairs surrounding the rental and his complaints was Mrs Moodley.
- he has since received notice to vacate from plaintiffs attorneys.
- When he received notice of an additional increase in rental he continued paying the R 1000.00 he had always paid and he did not likewise communicate his refusal to pay the additional increase.
- did not consider that he owed the additional R 100.00 requested over and above the R 1000.00 he was liable to pay.

The defendant called no witnesses and closed his case. Defendants attorney advised the court that he intended calling One Mohammed, but due to the nature of the work that such witness performed, he was uncontactable and therefore unavailable at the time that he was required at court.

## 5.

### The Merits

- 5.1. The merits and demerits of the witnesses and the evidence presented now have to be examined.
- 5.2. As previously mentioned where the court is faced with two irreconcilable versions, the court is impelled firstly to interrogate the general probabilities or improbabilities of the versions before it.
- 5.3. The court can't search for a cause of action for a plaintiff or for that matter a defence for defendant, neither can it flirtatiously draw any inferences, reasonable or otherwise, in favour of a plaintiff/defendant based on assertions/argument/speculation/conjecture, in the absence of strong supporting or controverting objective factual evidence from a party to the litigation.
- 5.4. Taking into account that:
  - no written agreement of lease existed between the parties (in fact, it is undisputed that the defendants tenancy during his 15 year occupation of the premises was regulated via an oral agreement of lease which, by operation of law, would be terminable upon one month's notice), and
  - Plaintiff and defendant did not meet beforehand to discuss an/the increase in rental
  - Plaintiff, via the letter dated the 26<sup>th</sup> June 2005, unilaterally gave notice of an increase in rental with effect from the 1<sup>st</sup> of August 2005 from the sum of R 1000.00 to R 1100.00
  - Plaintiff, as required by our legal precedent, did not allege in his pleadings the tacit term/s of the contract establishing liability on the

part of the defendant to pay the sum/s claimed- this only emerged from the evidence which is not supported by the pleadings

- Defendant was not getting beneficial use and enjoyment of the property leased-defendants evidence in this regard remains unshaken and unchallenged
- Defendant had directly and/or indirectly brought to the attention of the landlord that he was not getting beneficial use and enjoyment of the property
- Defendant's emphatic, unequivocal and immediate response to the unilateral notification of increase was to pay R 1000.00 instead of the R 1100.00 demanded
- Defendant did not at any stage whatsoever pay the R 1100.00 demanded
- plaintiff's response to the defendant's tender and payment of the sum of R 1000.00 was to accept same and not terminate defendant's tenancy and/or take steps to immediately eject defendant it can be accepted, applying inferential reasoning, that judging from the conduct of the parties it cannot be concluded that the most plausible probable conclusion to be drawn from all the relevant facts and circumstances is that a contract came into existence in the terms alleged by the plaintiff- in fact the contrary glaringly appears to hold true.

#### 5.5 Taking into account the aforesaid:

- the most probable inference that can be drawn from defendant's conduct is that there was a tacit refusal to accept the terms proposed by the plaintiff, and that the defendant wished the contract to continue on the terms that were existing prior to the letter of increase;

and when balancing the probabilities and having regard to the fact that a court does not readily import a tacit term, it cannot be said that the plaintiff has produced evidence of conduct of the parties that justifies a reasonable inference that the parties intended to, and did in fact, contract on the terms alleged-in other words, there is no evidence that there was, in fact, consensus *ad idem* amongst the parties.

#### 5.6 Following on and taking into account the aforesaid:

- It cannot be said that the plaintiff has satisfied the test stipulated in *Standard Bank of South Africa Ltd v Ocean Commodities* 1983 (1) SA 276 (A) at 292 B-C that the plaintiff has established a tacit contract by showing, on a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged and that it has been proved that there was in fact *consensus ad idem*.
- Neither can it be said that the plaintiff has satisfied the less stringent test stipulated in *Joel Melamed and Hurwitz v Cleveland*

*Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 165 B-C that a tacit contract has been established where, by a process of inference, it can be concluded that the most plausible probable conclusion from all the relevant facts and circumstances is that a contract came into existence.

5.7 Again further following on and taking into account the aforesaid:

- On the probabilities it cannot be said that silence by the defendant, in the face of the letter of increase, amounted to an acceptance of an offer by the plaintiff in circumstances which gave rise to a duty to speak if the offeree was not prepared to accept the offer- on the contrary, it abundantly appears that the defendant was not silent, and in fact every month showed by his conduct via payment of the sum of R 1000.00 instead of R 1100.00 demanded that he was not prepared to accept the offer of increase. Accordingly, there is no room for implication of the alleged tacit term-to hold otherwise would run counter to the principles of common sense and logic.

5.8 Taking into account one, more or all of the factors mentioned above the probabilities suggest that no contract was concluded in the terms alleged by the plaintiff. Even if the aforesaid considerations are not exclusively taken into account when assessing the two versions, the factors mentioned herein below tip the scales in favour of accepting the defendant's evidence over that of the evidence lead in support of the plaintiff's case.

### **Plaintiffs Evidence**

- The plaintiff's witnesses did not impress the court as a good witnesses-they did not easily make concessions favouring the defendant (e.g. Jordan did not recall defendant and other tenants raising an objection to the increase in rental at a meeting held in 2007' which was at a time when their chief concern was that the landlord was raising their rentals without improving their living conditions and their use and enjoyment of the properties let). At times they were argumentative. The court particularly got the impression that the witness Mohanlall was evasive at times and changed his evidence to relieve the pinch of the shoe.
- In particular the witness Mohanlall was not a satisfactory witness at all. Although his evidence-in-chief had a measure of fluidity to it, he faltered under cross-examination and he was unable to properly answer certain questions which were material and on occasion would not immediately answer the question asked. At times he would take pauses before answering questions and on certain occasions he would bend and tailor his evidence to get over the difficulties he was facing, as adverted to above-he had particular difficulty in explaining why he first maintained that the tenants were to pay the extra R 100.00 over and above the R 1000.00 previously paid even if the tenants disputed the increase; to then

- changing his version that the payment of the extra R 100.00 would be put on hold while the issue of the dispute was being sorted out.
- Jordan would not, until pressured, accept the reasoning advanced by defendants attorney that the payment of the sum of R 1000.00 only as opposed to the R 1100.00 demanded amounted to a tacit refusal to pay the R 1100.00. It is inconceivable how, applying logical reasoning, he could not have formed the latter opinion-his response to the question posed was to remain silent for a while and then answer that he could not explain such reasoning.
  - Jordan had no clear recollection of important detail regarding the rejection of the increase by tenants and the surrounding discussions held around the issue of the increase in rental.
  - Mohanlall gave nonsensical answers to questions that were asked which gave the court the impression that he was avoiding answering the question and/or trying to bide time to formulate a proper response-e.g. as a adverted to above
  - I got the impression from both witnesses that they had an urge for self justification which coloured their evidence and that their evidence as former agents of the plaintiff was distorted by partisanship. (Pienaar and Another v Commercial Union Assurance Co.1969(3)TPD 62 D-F).
  - An important feature of the onus bearing parties (plaintiffs) case was the failure of the plaintiff himself to testify and throw lights on the grey arrears featuring in his case.
  - For the above reasons there was no reason to prefer the evidence of the plaintiffs witnesses over that of the defendant.

### **Defendants Evidence**

The court was impressed with the evidence of the defendant. He gave his evidence in a clear and straightforward and honest manner. He was not shaken in any material way under cross examination. There were no improbabilities in his evidence. His evidence gelled and was congruent in all material respects.

- defendant was a simple man and a tailor by profession
- his evidence was not materially contradicted, and in many respects it was largely unchallenged.
- Despite rigorous cross examination the defendant did not falter materially and was not shaken on his version which he stuck to consistently and vigorously.
- Defendant did not display any measure of aggressiveness or truculence, despite prolonged and rigorous cross examination. He remained gentlemanly, calm and polite throughout the court proceedings.
- There was in my view, nothing in the demeanour of the Defendant that gave cause for concern
- The Defendants version was amply supported in all material aspects by the objective documentary evidence

- I have no reason to doubt him as he was candid and also made the necessary concessions when required to e.g. he did not deny receipt of the letter of increase. There is no reason for not accepting defendants evidence at face value
- The defendants evidence read well and had a measure of fluidity to it and it was plausible
- His evidence was cogent and uncomplicated. He gave his evidence clearly and without difficulty and he stuck to his guns.
- The Plaintiffs attorney did not impugn the credibility of the defendant
- There is not the slightest shred of evidence of conscious falsehood on the part of the defendant
- Defendants conduct in regularly paying rental of R 1000.00 as opposed to R 1100.00 monthly is consistent with fact of the non existence of an agreement to pay the sum of R 1100.00 monthly
- I am satisfied that the story which the defendant tells, on a balance of probabilities, is plausible and true in its essential features.
- It is not improbable, on the historical version presented by the defendant, that he did not intend to and in fact did not contract with the plaintiff on the terms alleged.

The inferences drawn out of the totality of the many factors I have already mentioned above in this judgment, lead me to the conclusion that the defendant probably did not contract with the plaintiff on the terms alleged.

Taking into account the whole conspectus of the evidence set out above, I am of the view that the probabilities do not favour the plaintiffs case and that the plaintiff has not established the contract underlying its cause of action and the consequent liability for payment on the part of the defendant. There is no evidence from which to infer that the parties agreed on the terms alleged. The court finds further corroboration in the matters which are common cause as well as the documentary evidence of the plaintiff and defendant. It therefore cannot be found, on either test referred to earlier in this judgment, that the parties entered into the tacit agreement alleged by the plaintiff. This conclusion is reinforced by the plaintiff's failure to allege a tacit agreement at any stage in his pleadings. I am accordingly of the view that the evidence presented by the defendant, viewed cumulatively, is the more probable one and it casts a serious doubt on plaintiffs pleaded cause of action which accordingly is rejected. The conclusion is inevitable that the plaintiff has not discharged the onus resting squarely on his shoulders. In view of the finding made with regard to the tacit agreement alleged by the plaintiff it is not necessary to deal with the issue of whether the plaintiff's representatives were authorised to propose or enter into the alleged agreement on behalf of plaintiff.

The court therefore finds that the plaintiff has not proved his case and that the defendant is therefore not indebted to the plaintiff in the sum claimed in plaintiffs summons.

The order I therefore make is the following, viz:

- (1.) the plaintiff's claim against the defendant is dismissed;
- (2.) the plaintiff is ordered to pay the defendants party and party costs,
- (3.) including costs of preparation for trial

G Field

Additional Magistrate  
1/9/07

Received copy of this judgment on this the                      day of                      2007

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Plaintiffs Attorney

Received copy of this judgment on this the                      day of                      2007

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Defendants Attorney