THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 945/2015

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED **APPELLANT**

and

AIRPORTS BOOKSHOPS (PTY) LIMITED T/A EXCLUSIVE BOOKS **RESPONDENT**

Neutral Citation: *ACSA v Exclusive Books* (945/2015) [2016] ZASCA 129 (27 September 2016)

Coram: Lewis, Shongwe, Willis and Zondi JJA and Potterill AJA

Heard: 12 September 2016

Delivered: 27 September 2016

Summary: Contract: where a lease is terminable on the giving of reasonable notice, the lease must be interpreted to determine what is reasonable in the circumstances; an application for eviction of a lessee must be determined on the basis of the averments made by the applicant that are not disputed by the respondent, and the version of the respondent that is not implausible, far-fetched or not credible.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Dodson AJ sitting as court of first instance): judgment reported *sub nom Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ).

The appeal is dismissed with the costs of two counsel.

JUDGMENT

Lewis JA (Shongwe and Zondi JJA and Potterill AJA concurring)

[1] The appellant, Airports Company South Africa Ltd (ACSA), entered into a lease in respect of premises at the O R Tambo International Airport, Johannesburg, with the respondent, Airport Bookshops (Pty) Ltd t/a Exclusive Books (Exclusive) in March 2009. The contract followed a tender process and was for a period of five years, backdated to 1 September 2008, terminating on 31 August 2013. Exclusive successfully ran a bookstore at the premises for the full period of the lease.

[2] By mid-August 2013 ACSA had still not started the process necessary for the renewal of the lease or the award of a new tender either to Exclusive or anyone else. Accordingly, on 15 August 2013, after some negotiation, ACSA and Exclusive, signed an agreement that recorded:

'We refer to previous negotiations regarding the extension of the . . . lease agreement that expires on 31 August 2013.

The said lease agreement is, notwithstanding anything to the contrary contained in the relevant agreement, hereby *renewed on month on month at the minimum monthly rental* of R585,761.70 excluding VAT.

This letter will form an integral part of the above lease agreement but it does not waive, extend or change any of the terms and conditions of the lease agreement, except as herein stated.' (My emphasis.)

[3] Exclusive remained in occupation of the premises and continued to trade there. When ACSA issued a request for bids in respect of the premises on 4 December 2013, Exclusive submitted a bid, in effect to remain the lessee, before the deadline for submission in January 2014. In June 2014, ACSA informed Exclusive that its bid had been unsuccessful and that it could request a 'debriefing' within 21 days. Exclusive did make such a request, but before the debriefing, on 18 June 2014, it was given notice to vacate the premises by 31 July 2014. Exclusive promptly applied, on 11 July 2014, for the review and setting aside of the tender award, alleging that it had been made in conflict with a number of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It cited ACSA and the allegedly successful tenderer, Amger Retailing (Pty) Ltd (Amger), as respondents.

[4] Despite the application to review and set aside the award of the bid to Amger, Exclusive was met with an urgent application for eviction brought on 27 August 2015. The application was struck from the roll for want of urgency and was heard in the ordinary course by Dodson AJ in the Gauteng Local Division of the High Court, Johannesburg, in May 2015. Dodson AJ dismissed the application for eviction but granted leave to appeal against his order to this court.

The versions of the parties in the application

[5] It is important to note at the outset that the eviction order sought was in application proceedings. The court a quo was bound to accept those facts averred by ACSA that were not disputed by Exclusive, and Exclusive's version in so far as it was tenable and credible. The simple *Plascon-Evans*[1] test, repeated so often in this and other courts, and as adumbrated recently in *National Director of Public Prosecutions v Zuma*,[2] required the court a quo to accept the version of Exclusive in so far as there was any dispute of fact and its version was not far-fetched, not credible or implausible.

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.
[2] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1 2009 (1) SACR 361 (SCA) para 26.

[6] The factual dispute between the parties centered on the interpretation of the letter recording the extension of the lease. ACSA's version of the meaning of the phrase 'month on month' in the letter quoted was that the lease was a monthly tenancy, terminable on one month's notice. Accordingly, said ACSA in the founding affidavit, it's termination of the monthly tenancy by giving six weeks' notice, was 'reasonable'. The extension agreement, it said, 'was specific in terms of the duration thereof and . . . there was no ambiguity or uncertainty on the expiry thereof'. The lease had been terminated and Exclusive was bound to vacate the premises.

[7] Exclusive put up a very different version. In its answering affidavit, Mr B Trisk, its chief executive officer, pointed out that the eviction application was brought as a matter or urgency, and Exclusive had been given very little time (one day) to file its answer: it had in fact done so in four days. Trisk pointed out that the application should not be viewed in isolation because there was a dispute pending between it and ACSA about the award of the tender to Amger. He attached the papers in the review application, which had been brought shortly before, and asserted that:

'Exclusive Books contends that, until the review and a valid tender process has been finalized, Exclusive Books is entitled to continue in occupation. It currently occupies in terms of a lease *terminable on reasonable notice which, in the circumstances, means reasonable notice upon a valid tender process being finalized.* [My emphasis.]

The applicant [ACSA] is aware of Exclusive Books' defence and contentions, yet resorted inappropriately to these motion proceedings.'

The dispute about the duration of the lease was thus immediately apparent. Trisk attached correspondence between the parties and their attorneys to demonstrate the differences between them, none of which was adverted to in the founding affidavit.

[8] The defence raised by Exclusive was that the tender in respect of the premises was awarded not to it but to Amger in a process that it alleged was tainted by illegality and fell to be reviewed and set aside. Trisk set out three bases for the review. These were: (a) ACSA had indicated that Exclusive had failed to comply with certain requirements of the request for proposals (the RFP), when in fact ACSA had had a discretion and had failed to put its mind to the reasons for the failure, which had been set out in detail in the bid documents: this amounted to a breach of s 3 read with ss 6(2)*(c)*, *(d) (e)* or *(f)* of the PAJA; (b) ACSA had misread parts of the bid

documents in respect of rental requirements and had thus again been in breach of the sections referred to in (b); (c) ACSA had given important information about the premises and their use to Amger but had not advised Exclusive of the same information. This was a further breach of various provisions of the PAJA.

[9] The founding affidavit in the review application, attached to Trisk's answering affidavit in the eviction application, was of course considerably more detailed. But the essence of the defence based on the unlawfulness of the tender award was clearly set out, and not merely contained in the attachment, as ACSA attempted to argue.

[10] Trisk continued:

'At all material times . . . the parties contemplated that the respondent's tenancy would not be terminated before the conclusion of a valid and lawful tender process and the lawful and valid award of a tender for occupation of the shop. This is particularly so since the parties contemplated that Exclusive Books may be the successful tenderer so there would be no sense in it being required to vacate only later to return. Conversely, Exclusive Books would not itself give notice of termination or vacate the premises prior to the tender process being finalized as there would be no substitute until a new tenant was secured and the premises could not stand vacant until then.

To the extent, therefore, that the lease was terminable on notice, such notice would in the particular circumstances have to be reasonable. The reasonableness of such notice would depend on all the circumstances, including but not limited to the question whether a valid and lawful tender process in respect of the shop had run its course, culminating in the valid award of a tender to a tenant (which could be Exclusive Books).'

[11] He concluded, after pointing out that ACSA had failed to respond to Exclusive's Uniform Rule 53 request for the record in the review application, at the time of deposing to the answering affidavit in the eviction application, that the review application should be determined first. If it succeeded, a new award would have to be made before ACSA could give reasonable notice to Exclusive to vacate the premises.

[12] In its reply, ACSA did not controvert any of the defences raised by Exclusive. It did not deal with Exclusive's version. It did not claim that the review was spurious. Instead, it raised a new argument – that the extension of the lease was invalid for

want of compliance with s 217 of the Constitution which requires that when an organ of state, which ACSA is, contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Since the extension agreement did not follow a fair and open tender process, it was invalid, the contention went. ACSA did not pursue this proposition in arguing the appeal and I need say no more about it. (The court a quo found that there were exceptions to the general requirement in s 217 and that the extension agreement was such an exception and was valid. I need make no finding in this regard.)

The decision of the court a quo

[13] Dodson AJ considered that the case ACSA made out in its founding affidavit was based on its interpretation of the contract. That was, as I have said, that it was entitled to give one month's notice to terminate the lease. He found, against ACSA, that the extension agreement included a tacit term that neither party was entitled to terminate the lease on notice 'until completion of a valid and lawful tender process to identify a new tenant'. He considered also that Exclusive was entitled to challenge the lawfulness of the tender process by way of a collateral challenge, which he considered to have been mounted successfully on the grounds set out in Trisk's answering affidavit, as amplified by the affidavit in the attached review application. The court considered in detail the nature of the breaches of the provisions of the PAJA alleged by Exclusive and concluded that the tender had been made unlawfully, and that ACSA was thus not entitled to terminate.

Issues on appeal

[14] ACSA appeals against all these findings. It argues that the tacit term is contrary to the express terms of the extension agreement (on its version a monthly tenancy terminable on a month's notice), and that the challenges to the lawfulness of the tender award, being made only in an attachment to the answering affidavit, cannot be sustained. I consider that it is not necessary to consider whether there was a tacit term at all. Whether the lease was terminable on a month's notice, or on reasonable notice, which is dependent on the circumstances, depends on the interpretation of the lease extension itself. And since ACSA did not deal at all with the challenges raised by Exclusive to the tender award, they fall to be considered on Exclusive's version alone.

The nature of the lease

[15] The original lease was for a fixed period of five years. It was extended on a 'month on month' basis because of particular circumstances, obviously known to both parties at the time. The reason for the extension was that ACSA had failed to start a tender process timeously, and by mid-August 2013 had but a couple of weeks before it was faced with empty premises at the end of August. The extension letter written to Exclusive on 15 August by ACSA refers to previous negotiations regarding the extension of the lease agreement that would expire within two weeks. It also stated that, notwithstanding the extension, all other terms of the agreement would remain in force. It was clearly anticipated that Exclusive would remain in occupation until the bid process was finalized.

[16] ACSA argues, however, that the lease was a monthly tenancy (month on month), terminable on a month's notice. This meant that either party could give a month's notice to terminate at any time, whether or not the tender process was concluded. Exclusive could thus vacate the premises, leaving ACSA without a key tenant, or ACSA could terminate the lease despite not having a tenant to replace Exclusive.

[17] Exclusive, on the other hand, argues that the lease is one of indefinite duration, terminable on reasonable notice, and whether that notice is reasonable depends entirely upon the factual context. The fact that rental is payable monthly does not mean that the lease is a monthly lease only: it is no more than an indication that the lease may be terminated on a month's notice. Thus the lease became of indefinite duration, terminable on reasonable notice. 'Month on month' meant no more than that the duration was no longer for a fixed term, as the lease was in the first place. In *Wille's Principles of South Africa Law*,[3] the author writes that the duration of the lease is for the period that the parties have agreed expressly or impliedly.

'An express agreement may provide that the lease shall endure for a definite time, short or long; or until a certain event takes place (which is bound to occur); or the duration may be at the will of the lessor, or of the lessee; lastly, the lease may be periodic, ie the lease continues from week to week, month to month, or year to year (according to the period

[3] *Wille's Principles of South African Law* 9 ed (2007) General editor: Francois du Bois p 908.

expressly or impliedly agreed upon) until it is terminated by reasonable notice given by either party.' (Footnotes omitted.)

[18] Similarly, *Cooper Landlord & Tenant*[4] states:

'A periodic lease continues until it is terminated by notice given by either party. In the absence of agreement to the contrary, notice must be given a reasonable time before the date on which a party decides to terminate the lease. The period of such notice must be such that the lessor has a reasonable opportunity of letting his premises or the lessee of finding other premises. A day's notice is considered reasonable in the case of a daily lease; a week's notice in the case of a weekly lease; and a month's notice in the case of a monthly lease; but there is no fixed ratio between the period of the lease and the notice period.'

[19] In *Tiopaizi v Bulawayo Municipality*[5] De Villiers JA stated:

'Where the parties have not agreed upon a definite time, the law requires reasonable notice to be given by the one to the other . . . . What constitutes such reasonable time is nowhere laid down . . . . *Grotius*, eg, states that in the case of a house the notice should be at a convenient time so that the lessor may have an opportunity of letting his house, and the lessee of providing himself with another house.'

[20] In *Wasmuth v Jacobs*,[6] a full court held (per Levy J):

'[W]here there is a lease with no terminal point, that is, a periodic or open-ended lease, eg a week to week or month to month lease, the common law imposes a legal duty on the lessor to give reasonable notice to terminate the lease.'

The interpretation of the extension of the lease

[21] In this matter, whether the notice given by ACSA to Exclusive was reasonable in the circumstances must depend on the interpretation of the extension agreement having regard to the factual matrix.[7] In addition, a commercial contract must be interpreted so as to favour a commercially sensible construction.[8]

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[4] W E *Cooper The South African Law of Landlord & Tenant* 2 ed pp 65-66.
[5] *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325-326.
[6] *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 637B-C.
[7] *Novartis (SA) (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) [2015] ZASCA 111 is the most recent case that expresses this by-now trite principle: see paras 27-31, and the cases cited there.
[8] Ibid paras 30 and 31; *Ekhurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) [2009] ZASCA 154 para 13 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] ZASCA 13 para 18.

[22] In Exclusive's answering affidavit it was alleged that the parties contemplated that the lease would continue until the conclusion of the tender process. If that were not so, and the lease could be terminated by either party on a month's notice, the results would be distinctly contrary to the commercial realities of which the parties were aware. It would mean that, if Exclusive were ultimately the successful bidder, it might be required to vacate on a month's notice, only to return to the same premises after the award of the bid. Both parties knew that Exclusive might be the successful bidder: they could not possibly have intended that either of them could terminate, Exclusive leaving the premises vacant, only to return with all its stock and re-employed staff a short while later. Implicitly, the tender process had to be a valid one such that the successful bidder would have no obstacles in the path of occupying the premises as soon as possible after the bid award was made.

[23] This interpretation was not in any way controverted by ACSA in its reply. It did not show that the interpretation of the lease for which Exclusive contended was untenable and implausible. And ACSA did not show that its interpretation – that the lease was a monthly tenancy terminable on one month's notice – was correct such that it proved that the reason for the continued occupation by Exclusive was unlawful. It was required to show that the purported termination of the lease on one month's notice was lawful.

[24] It is trite that when claiming eviction an owner must aver and prove its ownership[9] and that the occupier is in possession. If the owner alleges more than is necessary to vindicate its property, as ACSA did by alleging that the lease had been terminated on one month's notice, it must show that the termination was lawful. In *Myaka v Havemann*[10] Davis AJA settled some uncertainty in this regard by approving statements of Hathorn JP in *Karim v Baccus*[11] and Greenberg J in *Boshoff v Union Government*,[12] that once an owner has admitted to parting with possession by virtue of an agreement such as a lease, or a sale on instalments, he is bound by

[9] ACSA did not aver that it was the owner of the premises, but since Exclusive did not rely on its failure, there is no need to determine whether this alone was sufficient to deprive ACSA of its right to vindicate. A lessor who is not the owner (a sublessor, for example) but who alleges termination of a lease, must show its right to claim eviction.
[10] *Myaka v Havemann* 1948 (3) SA 457 (A) at 465.
[11] *Karim v Baccus* 1946 NPD 721 at 726.
[12] *Boshoff v Union Government* 1932 TPD 345.

the admission, and bears the onus of proving that the reason for the possession has come to an end. The owner must prove lawful termination.

[25] The incidence of the onus was discussed in depth by Jansen JA in *Chetty v Naidoo,*[13] which confirmed the correctness of the approach in *Myaka*. He said:

'It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some other right enforceable against the owner (eg a right of retention or a contractual right). An 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 . . . But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as "unlawful" or "against his will") other considerations then come into play.

If he concedes in his particulars of claim that the defendant has an existing right to hold (eg, by conceding a lease or hire-purchase agreement), without also alleging that it has been terminated . . . his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.'

[26] ACSA alleged a lease and a termination. It was therefore incumbent on it to prove valid termination. It did not even try. It did not deny Exclusive's allegations and evidence in its answering affidavit that the tender process was unlawful and thus the termination was unlawful. Instead it relied on a new defence – that the lease upon which it had relied in its founding papers was invalid, an argument, as I have said, not pursued on appeal. Accordingly, the court must rely on Exclusive's version, which is entirely plausible and credible and makes complete commercial sense of the extension agreement. I consider that the parties intended that Exclusive would remain in occupation from month to month (and not for a further five years) until a lawful tender process was completed and either Exclusive or a new lessee was awarded the bid. That is what Exclusive said was contemplated, and ACSA did not

[13] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C-H.

contest that in replying to the affidavits. Nor did it attempt to show that Exclusive's interpretation was in any way implausible or not credible.

[27] During the hearing of the appeal two spectres flowing from this interpretation of the extension agreement were raised in argument. One was that it was improbable that the parties had contemplated that the lease would endure until a valid tender process was concluded, because Exclusive would then have the benefit of occupation for what might be a lengthy period, until all processes had been exhausted. The suggestion was that there might be no provision for increase of the rental to take into account the ravages of inflation in the event that the lease endured for a long period. That seems to me to be unlikely, given that the terms of the original lease would probably have made provision for increases in rental, and remained applicable, as the extension agreement expressly said. But the court does not know what the provisions were because ACSA has not told us. It could easily have raised that in response to Exclusive's defence.

[28] Secondly, it was suggested that if we recognized Exclusive's claim to remain in occupation until the tender process is validly concluded, we would be giving licence to every lessee, dissatisfied with the outcome of a tender process for the lease of premises, and who wished to remain in occupation, to claim that the tender process was invalid. The answer to that is that a lessor who seeks eviction of a tenant from premises after it has awarded a tender to another must show that the termination was valid in the circumstances. ACSA could have done just that by showing that Exclusive's attempt to review and set aside the tender was fanciful or without warrant or just a dilatory tactic. Instead, it virtually ignored the application for review, which was instituted before it sought eviction. That spectre must also go back into the shadows. In all the circumstances, I consider that ACSA has not proved that it had a right to terminate the lease with Exclusive on one month's notice.

[29] The appeal is dismissed with the costs of two counsel.

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C H Lewis

Judge of Appeal

Willis JA (Dissenting)

[30] I have read the judgment prepared by Lewis JA. I regret that I cannot agree with her that the appeal should be dismissed. My reasons follow.

The failure of ACSA to allege that it is the owner of the premises

[31] As I understand the law, there is no need for a lessor to allege that it is the owner of the premises where eviction is sought by the lessor relying on the terms of a lease agreement that had been concluded between the parties, more especially where – as in this case – there is no dispute about who is lessor and who is lessee and that the right to occupy derives from the lease in question.[14] The circumstances of this case are completely different from those in *Myaka v Havemann*,[15] *Karim v Baccus*,[16] and *Boshoff v Union Government*,[17] upon which Lewis JA relies. I therefore consider that what Lewis JA has said in paras 24 and 25, concerning the need for an owner to allege and prove its ownership, is irrelevant for the purposes of deciding this matter. I accept, however, that ACSA bears the onus to prove lawful termination of the lease.

The written agreement of lease between the parties

[32] Lewis JA has set out the relevant portions of the written agreement between the parties, upon which this case depends, which takes the form of a letter addressed by ACSA to Exclusive, to which Exclusive appended its agreement on 30 July 2013. In order to facilitate the reader's understanding of the flow of my reasoning concerning the critical issues in this case, I shall repeat the vital parts of the agreement. They read as follows:

'Dear Sir/Madam,

AGREEMENT OF LEASE BETWEEN AIRPORTS COMPANY SOUTH AFRICA – OR TAMBO INTERNATIONAL AIRPORT AND AIRPORT BOOKSHOP (PTY) LTD T/A EXCLUSIVE, DATED 01 SEPTEMBER 208 INRESPECT OF SHOP DFE 02: INTERNATIONAL DEPARTURES AIRSIDE

[14] See for example *Boompret Investments (Pty) Ltd & another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) at 351G-I.
[15] *Myaka v Havemann* 1948 (3) SA 457 (A) at 465.
[16] *Karim v Baccus* 1946 NPD 721 at 726.
[17] *Boshoff v Union Government* 1932 TPD 345.

We refer to previous negotiations regarding the extension of the above mentioned lease agreement that expires on 31 August 2013.
The said lease agreement is, notwithstanding anything to the contrary contained in the relevant agreement, hereby renewed on month on month at the minimum monthly rental of R585 761.70 excluding VAT.

This letter will form an integral part of the above lease agreement but does not waive, extend or change any of the terms and conditions of the lease agreement, except as herein stated.

Please sign this copy and return it to us, in order that we have the records amended.' (Emphases added.)

[33] I shall refer to the lease agreement that expired on 31 August 2013 as the 'background document'. In my opinion, the following features of the agreement, concluded between the parties in July 2013, clearly stand out:

(a) It was *ad hoc* in character;[18]
(b) It was the result of negotiations between the parties;
(c) It was concluded between experienced persons of business, dealing with each other as equals;
(d) It would operate on a month to month basis;
(e) It makes no reference to any tender invited by ACSA;
(f) Other than as stated therein, it does not waive, extend or change any of the terms and conditions of the lease that was to expire on 31 August 2013;
(g) The risk for ACSA and Exclusive was mutual: either party could find itself inconvenienced, at short notice, by the non-renewal of the lease.

The interpretation of the written agreement between the parties

[34] It is trite that contracts must not only be construed according to the ordinary grammatical meaning of the words used therein, but also regard must be had to context.[19] In my view the plain, ordinary and grammatical meaning of the words

[18] See *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 169B.
[19] See for example *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* [2008] ZASCA 70; 2008 (5) SA 1 (SCA) paras 15 to 19; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* [2008] ZASCA 94; 2008 (6) SA 654 (SCA) para 23; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39; *Ekurhuleni Metropolitan Municiplality v Germiston Municipal Retirement Fund* [2009] ZASCA 154;

(even if the phrase 'renewed on month on month' was not entirely felicitous) permits no regard being had for the tender that is at issue in this case. A plain reading of the contract indicates that, once the time period of the background document had expired, Exclusive had no right to occupy the premises, unless there was a renewal. As there was no renewal beyond 31 July 2014, there was thereafter no right existing for Exclusive to remain in occupation thereof.

[35] The absence of a renewal served a dual function: it not only brings the lease to an end but also serves as a notice to vacate. The agreement does not permit any room for holding over on the lease while issues imprecise as to the time upon which Exclusive was to vacate are left open either for negotiation between the parties or, failing their reaching an agreement, for a court to determine.

[36] Moreover, in my respectful opinion, an interpretation to this effect, in the highly competitive environment of vending in the international departures lounge at the busiest airport in Africa, is not only absurd but could also never, even remotely, have been within the contemplation of the parties.[20]

[37] As Lewis JA observed in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, context or the factual matrix is ever-important in the interpretation of contracts.[21] Provided rental payments are not disproportionate to turnover, shop-keeping at a busy international airport lounge is a paradise for traders. There is a captive market of thousands of affluent customers with time and money to spare. Both ACSA and Exclusive would have been aware of this commercial reality at the airport: it is highly desirable to be a tenanted shopkeeper at an airport such as this and ACSA would have found no difficulty in finding one. That ACSA would not have wanted to lose time would not only have been a matter of critical importance to it but would have been a fact of which Exclusive would have been fully aware.

2010 (2) SA 498 (SCA) para 13; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 19 and *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 21.

[20] OR Tambo International Airport currently has over 19 million passengers a year. See for example www.southafrica.info/travel/advice/airports.htm#.V-TG-97cs (Accessed 23 September 2016).

[21] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 24.

[38] A booksellers' position in such a market is especially advantageous. The market consists of travellers who are keen to acquire reading material with which to relieve the tedium of the long-haul flights that await them. Exclusive's disappointment as an unsuccessful tenderer is readily understandable. Its disappointment cannot, however, be conjured into a right to stave off ACSA's prima facie right to decide for itself whom it wishes to have as its tenants and another tenant's prima facie right to take occupation of the premises in question. The legal processes available for the review of tenders by 'organs of state' may inhibit freedom of contract but they do not tear it to shreds.

[39] Even when context is taken into account, no reading of the agreement that makes the respective obligations of the parties conditional upon the tender is justified. In context, the agreement, unadulterated by any 'constructive' interpretation, makes eminently good commercial sense: ACSA would have a tenant paying rental and Exclusive would be able to continue trading (presumably profitably in view of its long tenancy and reluctance to let go of it) on an interim basis, until such time as there was greater clarity and certainty for the parties. As experienced persons of business, neither ACSA nor Exclusive could have intended so commercially foolish an agreement as to hock themselves to a condition that could tether their effective operations.

[40] That a contract must be interpreted so as to give it a commercially sensible meaning, appears to be now well-established.[22] A sensible reading of the agreement between the parties is that the parties intended that the tender would be irrelevant to their respective obligations in terms of the actual agreement itself: either party could terminate the lease upon one month's notice for whatever reason or motive it liked. The outcome of the tender may have been relevant as to whether the parties entered into a new contract of lease but that is another matter entirely.

The other issues that need to be considered

[41] As a plain reading of the contract is commercially sensible and does not, in my opinion, make the occupation of the premises contingent upon a consideration of

[22] See for example *Natal Joint Municipal Pension Fund v Endumeni Municipality* (supra) para 13 and *North–East Finance (Pty) Ltd v Standard Bank of SA Ltd* (supra) para 25.

the 'reasonableness' of the notice to vacate the premises, the issue seems to me to be irrelevant. Even if it were relevant, however, I disagree with Lewis JA that ACSA has failed on the question of the reasonableness of its notice to Exclusive. I shall now deal with this and the other issues that were raised in argument before us.

The reasonableness of the notice to vacate the premises

[42] On 23 June 2014 ACSA gave Excusive Books notice to vacate the premises by 31 July 2014. After further prompting by ACSA, Exclusive responded on 15 July 2014 by saying that it had not been given 'reasonable notice'. It went on to say 'reasonableness would be influenced by all circumstances, including a new tenant for the premises concluding an agreement consequent upon a valid tender process' and that the termination of the lease 'cannot possibly be implemented until such time that our client's [review] application has been dealt with by the court.'

[43] On 17 July 2014, ACSA responded by email contending that the notice period was reasonable 'for the type of business' that Exclusive conducted. ACSA pertinently refers to this in its founding affidavit.

[44] In its answering affidavit, Exclusive disputes the reasonableness of the notice, contending that reasonableness 'would depend on all the circumstances, including but not limited to the question of whether a valid and lawful tender process in respect of the shop had run its course'. The circumstances have, however, been specified: the contract was renewed on a 'month on month' basis.

[45] In a judgment that has stood the test of time for more than ninety years, this court made it clear in *Tiopazi v Bulawayo Municipality*[23] that in respect of the lease of a house from month to month, reasonable notice to vacate would be one month, unless there is an agreement to the contrary.[24] There is no conceivable reason why the common law principle should be different in respect of commercial premises.[25] There is no agreement to the contrary. Indeed, the agreement between the parties

[23] *Tiopaizi v Bulawayo Municipality* 1923 AD 317.
[24] At 320.
[25] See eg *Union Wine and Spirit Corporation Ltd v Ferreira* 1948 (2) SA 647 (O).

appears to be in full harmony with this principle. Exclusive was given more than one month to vacate. It therefore was given reasonable notice.

[46] Lewis JA has relied on the judgment of De Villiers JA in *Tiopazi* to put a different gloss on the common law. His was one of three separate judgments, each concurring in the same conclusion. De Villiers JA went on to say:

'From the various cases decided in our courts it may now be taken as settled that in the absence of agreement or custom to the contrary, a monthly contract of letting and hiring for an indefinite period requires a month's notice, to expire, in all cases except in the case of domestic or menial servants, at the end of the month.'[26]

In the passage upon which Lewis JA relies, De Villiers JA was outlining the history of the law and not setting out the law as it stood in South Africa in 1922. The situation with regard to 'domestic or menial servants' has, of course, changed much to their advantage under our constitutional dispensation. No reason presents itself to me as to why the common law should change insofar as commercial tenants are concerned.

[47] In any event, I do not understand Lewis JA's reliance on the passage which she has quoted from *Tiopazi* to have the consequence that a shopkeeper is entitled to 'hold over' on a lease until it has found a suitable, alternative store. Not even a residential tenant is entitled to a 'room with a view' before she must vacate.

[48] Even if it were to be accepted that the facts of a particular case may disturb the normative principle established in *Tiopazi*, this court has set its face against averments in answering affidavits that are vague, bald and sketchy.[27] It has also said that where facts are peculiarly within the knowledge of a respondent, the respondent can be expected to set these out in the answering affidavit.[28] Other than to raise the defence of a review of the tender (which, as I have already indicated, is

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[26] At 326.

[27] See for example *Rhoode v De Kock* [2012] ZASCA 179; 2013 (3) SA 123 (SCA) para 16. For more as to the normative principle, see for example, *A.M. Paruk v Hayne & Co.* (1906) 27 NLR 380; *Fulton v Nunn* 1904 TS 123; *Pemberton NO v Kessell* 1905 TS 174; *Sitterding v Hermon Piquetberg Lime Co Ltd* 1921 CPD 439; Grotius *Inleiding* 3.19.8; Van der Keessel *Praelectiones* 3.19.8 and Van Leeuwen *Commentaries on the Roman-Dutch Law* .4.21.6.

[28] See for example *Wright v Wright & another* [2014] ZASCA 126; 2015 (1) SA 262 (SCA) para 16; *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

unmeritorious), Exclusive has contended the absence of reasonable notice to vacate in terms that are so vague, bald and sketchy that they cannot, in any event, pass muster.

[49] Prior to the *ad hoc* agreement having been concluded in mid-August 2013, Exclusive would have known that it would have had to vacate the premises on or before 31 August 2013. No facts present themselves to suggest that commercial realities (to adopt a phrase used by Lewis JA) – or any other relevant factor – had changed to the extent that the six week period of notice actually given to Exclusive to vacate was not reasonable, in the circumstances.

[50] After all, fittings in a shop ordinarily accede to the property owned.[29] They are not owned by the lessee.[30] If Exclusive has a right to remove fittings, for example, it would be for it to say so.[31] It did not. How difficult can it be to remove books, magazines, periodicals and newspapers (the stock-in-trade of a bookseller) from a store within a month? Were there other factors, which might have affected the reasonableness of the notice to vacate, these would have been peculiarly within the knowledge of Exclusive and ought to have been set out by it. Its failure to do so must count against it.

[51] In summary, I disagree with Lewis JA on the question of 'reasonable notice' for the following reasons:

(a) The agreement between the parties is not silent on the question of notice. It provided, by necessary implication, in the circumstances of this particular case, for an advance warning of one month before exclusive knew that it had to vacate the premises.

(b) Exclusive could have been under no misapprehension that it was entitled to 'hold over' until it received 'reasonable notice'.

(c) Even if 'reasonable notice' was required, one month's notice, as given, was 'reasonable' at common law.

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[29] See for example *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 at 565; *Van Wezel v Van Wezel's Trustee* 1924 AD 409 at 418.

[30] Ibid.

[31] See for example *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) at 281A-G.

(d) Even if the common law is regarded as being merely normative, rather than prescriptive and Exclusive consider one month's notice not to be reasonable, it must set out, in cogent terms, why this is so. It has failed to do this.

The tacit term found by the court a quo to have been part of the agreement between the parties

[52] I am doubtful, in the light of the above whether the question of there being a tacit term as contended for, needs to be considered. Nevertheless, in view of the fact that this is a dissenting judgment, I shall deal with it, for the sake of completeness. As mentioned by Lewis JA, the high court found that the agreement contained a tacit term, formulated as follows:

'Neither party may terminate this agreement until completion of a lawful tender process.'

[53] The classic test as to whether a tacit term forms part of a contract is that of what the 'officious' or 'innocent' ' bystander' may say in regard to the situation.[32] The officious or innocent bystander is neither naïve nor foolish. She takes into account the facts.[33] The facts are that neither ACSA nor Exclusive is a commercial 'babe in the woods'. For either of them to have agreed to a term that was onerous for itself would not be like taking candy from a baby. A review of a tender may, conceivably travel from the High Court to this one and then on to the Constitutional Court. The process will be time-consuming, expensive and with risk. For a right to evict a tenant to be rendered, by agreement, contingent on the outcome of such a review is hardly likely for any reasonably astute commercial operator. In the absence of any clear indication to the contrary, it is safe to assume that ACSA is far from being un-astute. Even if there had been an expectation or perhaps an intention that the lease between the parties would be renewed on an extended basis, this would not

[32] See for example *Sentinel Mining Industry Retirement Fund & another v Waz Props (Pty) Ltd & another* [2012] ZASCA 124; 2013 (3) SA 132 (SCA) para 15; *City of Cape Town (CMC Administration) v Bourbon-Leftley & another NNO* [2005] ZASCA 75; 2006 (3) SA 488 (SCA) para 19; *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA) para 23.

[33] See for example *City of Cape Town (CMC Administration) v Boubon-Leftley & another NNO* (supra) para 19.

necessarily create a contractual term to this effect.[34] It is impossible to believe that such a term would have been agreed to by ACSA as a matter 'of course'.[35]

[54] In summary, as Brand JA observed in *City of Cape Town v Bourbon-Leftley*, a tacit term is not easily inferred by the courts, the reason being that the courts can neither make contracts for people nor supplement them because it may appear reasonable or convenient to do so.[36]

[55] Although it seems from the express terms of the agreement that both parties were equally at risk of the lease being terminated at a time when it would have been inconvenient, at best for Exclusive, if there was a tacit term, it would have been that the lease would continue until a replacement tenant had been found or a new long term lease had been entered into by ACSA – not that a valid tender process had been completed

[56] Accordingly, I conclude that the court below erred in finding the existence of a tacit term as it did.

The issue of the review of the tender

[57] In my opinion, for the reasons outlined above, the review of the tender is irrelevant to the issues at hand. In view of the fact that both the court below and Lewis JA have an opposite view, I shall add a few brief observations in this regard.

[58] I disagree that 'a lessor who seeks eviction of a tenant from premises after it has awarded a tender to another must show that the tender was valid in the circumstances'.[37] Even if one assumes that the award of the tender was relevant in the present case (and, in my opinion, it is not), the maxim *omnia praesumuntur rite*

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[34] See *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 169C-F.

[35] The 'of course' test set out by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605 has, as R H Christie observes in his *The Law of Contract in South Africa* 6 ed (2011) at 176, been a favourite of our courts. See, in this regard, *Botha v Coopers & Lybrand* 2002 (supra) para 23 and the authorities therein cited.

[36] *City of Cape Town (CMC Administration) v Boubon-Leftley & another NNO* (supra) para 19.

[37] Para 28 of Lewis JA's judgment.

esse acta donec probetur in contrarium would shift the onus or create a burden of rebuttal.[38]

[59] In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*, Jafta JA, delivering the unanimous judgment of this court, said:

'A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, *can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests* the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'[39] (Emphasis added.)

[60] It is self-evident that the reasons that we have a system of review of tenders by 'organs of state' are primarily to act as a safeguard against corruption and, in general, to prevent the wasteful use of public resources. The system of review of tenders was not established for disappointed tenderers to participate in commercial 'blood sports' or to act as 'spoilsports'.

[61] It appears that the review is based on ACSA's refusal to consider Exclusive's tender because it failed to provide a tax-clearance certificate, Exclusive's failure 'to comply with the rental-price specifications' and ACSA's allowing the successful bidder to become 'privy to sensitive information directly germane to the bid in respect of shop space' (what this 'sensitive information' might be was not disclosed), the fact that 'no reasonable person' could have decided to award the tender as it did and an absence of fairness, equitableness, competitiveness and transparency.

[62] Exclusive goes on to say that these grounds of review are 'neither complete nor exhaustive'. ACSA's answering affidavit, if any, in the review application is not before us. There is no need for ACSA to have ensured that this was done. The court

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[38] See *Phillips v SA Reserve Bank & others* [2012] ZASCA 38; 2013 (6) 450 (SCA) para 48; *Cape Coast Exploration Ltd v Scholtz & another* 1933 AD 56 at 76 and *Byers v Chinn & another* 1928 AD 322 at 332.

[39] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 23.

below considering the review application will, no doubt, carefully apply its mind to Exclusive's allegations in its founding affidavit together with those of ACSA, should it file an answering affidavit in the review application. For the purposes of this matter, however, these grounds are altogether too terse to be taken seriously.

[63] For these reasons, I think the appeal has to succeed. In my opinion, the correct order for this court would have been to uphold the appeal with costs including the costs of two counsel and to have replaced the order of the court below with one ejecting Exclusive from the premises at International Departures – Airside – OR Tambo International Airport and ordering Exclusive to pay the costs of the application, including the costs of two counsel.

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N P Willis

Judge of Appeal

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