THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 593/16

In the matter between:

ABRAHAM JOHANNES VAN HUYSSTEEN N O **FIRST APPELLANT**

MARIUS ROELOF VAN HUYSSTEEN N O **SECOND APPELLANT**

and

MILLA INVESTMENT AND HOLDING COMPANY (PTY) LTD **RESPONDENT**

Neutral citation: *Van Huyssteen N.O. and another v Milla Investment and Holding Company* (593/16) [2017] ZASCA 84 (2 June 2017)

Coram: Navsa, Cachalia, Majiedt, Swain and Mathopo JJA

Heard: 22 May 2017

Delivered: 2 June 2017

Summary: Contract: Lease: divergent factual versions on terms: doctrine of quasi-mutual assent wrongly applied by the high court: appeal upheld.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Bozalek J, sitting as court of first instance):

1 The appeal is upheld with costs.
2 The order of the high court is set aside and substituted with the following: 'The action is dismissed with costs'.

JUDGMENT

Majiedt JA (Navsa, Cachalia, Swain and Mathopo JJA concurring):

[1] This appeal, with leave of the Western Cape Division of the High Court, Cape Town (Bozalek J sitting as court of first instance), (the high court), concerns a claim by the respondent, Milla Investments and Holdings Company (Pty) Ltd (Milla) for rental allegedly underpaid by the Sport City Trust (the Trust) in respect of premises in the Cape Gate Lifestyle Centre, a shopping centre in Brackenfell, Cape Town (the shopping centre). The first and second appellants are trustees for the time being of the trust. The high court granted judgment in favour of Milla and ordered payment in the sum of R1 283 328.49, together with interest *a* tempore morae. The first appellant, Mr Abraham Johannes van Huyssteen (Mr van Huyssteen), at all relevant times, represented the Trust.

[2] Milla sued as a cessionary, the claim having been ceded to it by Attfund Limited (Attfund), the present owner of the shopping centre. Attfund

purchased the shopping centre from its original developer, Cape Gate Lifestyle (Pty) Ltd (Cape Gate) on 2 February 2006. In terms of the purchase agreement Cape Gate had guaranteed to Attfund the rental in respect of the shopping centre for a period of a year, which was later extended to two years, leading to a total exposure on its part of R2.2 million.

[3] The claim referred to in para 1, which is the subject of this appeal, was in respect of shop LL01 (the premises), where the Trust had conducted business as Tekkie Town, part of a national chain which sells mostly sports shoes. There are presently some 300 Tekkie Town outlets in the country. The Tekkie Town business which was established during September 2005, was purchased by the Trust from Mr van Huyssteen in late 2005 or early 2006.

[4] On 18 August 2005, prior to the Trust being established, Mr van Huyssteen had entered into a written lease agreement with Cape Gate (the 2005 lease). In terms thereof, Mr van Huyssteen, then the owner of and trading as Tekkie Town, rented shop 17 located in phase 1 of the shopping centre, from Cape Gate from 1 November 2004 for a period of three years, with an option to extend the lease for a further two years.

[5] Shop 17 was 300 square metres in extent and the basic rental was R65.00 per square metre (escalating at 9 percent per annum). To that was added additional operating costs, rates and taxes payable at R15.50 per square metre (with an annual escalation of 12 percent). During discussions between Mr Jaco Odendaal (Mr Odendaal), the majority shareholder of Cape Gate, and Mr van Huyssteen, it was agreed that Tekkie Town would move from shop 17 to the premises located in a further development of the shopping centre, known as phase 2. The premises in the new location in phase 2 was considerably larger than shop 17, namely 1398 square metres.

[6] In consequence, on 5 May 2006, Mr Odendaal had sent to Mr van Huyssteen, by fax, an offer to lease in which most of the essentials in respect of a contemplated lease were completed in typescript. Because the Trust had

purchased the Tekkie Town business, all new lease agreements reflected the Trust as the tenant.

[7] Upon receipt of the faxed offer to lease, Mr van Huyssteen effected certain changes in manuscript. For present purposes the most important of these was a change in the escalation rate from 9 percent to 8 percent as far as the basic rental and operating costs were concerned, 'other costs' were qualified by the addition of the words 'this included in ops [operation] costs'. The provision for payment of a deposit equal to one month's gross rental was deleted and, lastly, a further special condition was added that there would be 'no escalation after year one'. In manuscript, Mr van Huyssteen wrote that the offer was to remain open until noon on 22 May 2006. Mr van Huyssteen signed the offer to lease, incorporating the manuscript changes (the amended offer) on behalf of the Trust on 15 May 2006 and returned it to Cape Gate's letting agents, Lynx Properties Limited (Lynx), on that date.

[8] The amended offer did not, however, reach Mr Odendaal who, as Cape Gate director, was the sole person responsible for negotiating and concluding lease agreements on its behalf. The amended offer was thus never countersigned on behalf of Cape Gate to signal its acceptance.

[9] Nonetheless, the Trust was given beneficial occupation of the leased premises on 3 July 2006 and Tekkie Town's business operations commenced there on 1 August 2006. From that date until 3 October 2007, Attfund as successor in title to Cape Gate, and lessor, sent monthly invoices to the Trust, based on the 2005 lease's basic rental, operating costs and rates and taxes, describing the leased unit as 'shop 17'.

[10] Attfund advised the Trust on 3 October 2007 that it should have paid higher rental in respect of the considerably larger leased premises. This was disputed by the Trust. On 27 May 2008 Attfund and the Trust reached a new agreement in respect of the premises, agreeing that it would be reduced to roughly half its prior size, and would now be numbered shop LL01A and the Trust would, from April 2008, become the lessee.

[11] In essence the claim ceded to Milla by Attfund is the difference between what the Trust had in fact paid as rental in respect of the leased premises and what Cape Gate alleges it should have paid. Milla relied for its claim on the lease as contemplated in the amended offer. The appellants, on the other hand, contended that the terms of the 2005 lease agreement in respect of shop 17 had, by virtue of an oral agreement between Mr Odendaal on behalf of Cape Gate and Mr van Huyssteen on behalf of the Trust, transplanted to the new premises and that the lease in respect of the leased premises would be on identical terms, notwithstanding that the property was now four times its original size. This, according to Mr van Huyssteen, was because Mr Odendaal had prevaricated in relation to a new lease, had not followed up on the offer he had despatched to the Trust, and was holding out for better terms from prospective other tenants which had not materialised, so he was desperate for a tenant. This, of course, was vehemently denied by Mr Odendaal.

[12] In summary, the parties' respective positions were as follows: in its claim Milla placed reliance on a tacit acceptance of the amended offer and, in the alternative, that the parties' conduct had resulted in a tacit lease agreement coming into existence, on the terms contained in the amended offer. The Trust, on the other hand, relied on an oral agreement of lease, in material parts based on the terms of the 2005 lease. In addition to the main differences regarding the identity of the tenant and the rental payable, an additional difference between the two involved the question as to who had the responsibility for the upgrading of the lighting and the installation of the carpets. This difference gained importance during the trial because in terms of the amended offer to lease the lessor would assume responsibility for the upgrading of the lighting and make a contribution towards the cost of the carpets.

[13] The high court rejected the appellants' reliance on an oral agreement encompassing the terms of the 2005 lease. In upholding the claim, the high court held that the lease agreement in respect of the leased premises was

governed by the terms of the amended offer by virtue of the doctrine of quasi-mutual assent. Its reasoning was as follows: it made favourable credibility findings in respect of Milla's witnesses, particularly of Mr Odendaal, and adverse credibility findings against the Trust's witnesses, particularly of Mr van Huyssteen. The high court found that the carpeting issue was a neutral factor and that with regard to the upgraded lighting, Milla's version was ultimately more probable. It found that on an overall assessment of the evidence, the probabilities and the objective facts, the Trust had failed to prove the oral agreement it relied upon, and it consequently rejected that defence. Lastly, in respect of upholding the claim, the high court applied the so-called 'battle of the forms' and found that the lease was governed by the amended offer.

[14] The high court can in my view not be faulted in its finding that the Trust had failed to prove the oral agreement. While the high court's credibility finding in respect of Mr Odendaal's testimony is somewhat generous, there is no warrant for interference on its credibility findings on appeal.[1] It assessed the following probabilities and objective facts as militating against an oral lease:

(a) The oral agreement was never reduced to writing. Mr van Huyssteen was quite frank about his distrust of landlords generally and, in the present instance, he had on his version been treated abominably by Mr Odendaal. No acknowledgment of receipt of the amended offer to lease, nor any response thereto was forthcoming. It was left to Mr van Huyssteen to make enquiries, as a result of which he was told by an unnamed Cape Gate employee that another tenant had secured the premises (which turned out to be incorrect). It beggars belief that a businessman as astute as Mr van Huyssteen would not in these circumstances have reduced the oral agreement to writing.

(b) The oral agreement contained terms unbelievably favourable to Tekkie Town – it would occupy premises more than four times the size of shop 17 at the same aggregate rental for a period of 15 months, until 31 October 2007.

[1] See: *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

(c) It is unfathomable how Mr Odendaal, also an astute businessman, could have failed to have the oral agreement recorded in writing. On Mr van Huyssteen's version the oral agreement was a product of tough negotiations and hard bargaining. There was no justification (nor was any suggested during argument) for departing from a standard procedure adopted in the case of the 185 other tenants.
(d) There was no evidence led at all (save for that of Mr van Huyssteen) of the proposed occupation of the leased premises by another tenant. Mr Visser, who was centrally involved in getting the leased premises ready for Tekkie Town's occupation, made no mention of this at all.
(e) Exact Africa, who took over the administration of all Tekkie Town leases in the early part of 2007, was not made aware of this remarkably favourable lease agreement.

[15] Having rejected the Trust's defence of an oral agreement, the high court found that, based on the doctrine of quasi-mutual assent, more particularly the 'battle of the forms', the amended offer governed the terms of the lease agreement. The central question in this appeal is whether the high court correctly applied the doctrine. Before answering that question, it is necessary to consider first, the argument advanced on behalf of the Trust that there was no intention to contract (*animus contrahendi*) in this matter. Given the outcome in this appeal, this contention can be dealt with very briefly.

[16] The argument in essence was that, since both Mr Odendaal and Mr van Huyssteen had laboured under the belief that they had already concluded an agreement (albeit on different terms), neither party had the requisite intention to conclude an agreement. Reliance was placed on *Rand Trading*[2] and on *Landmark Real Estate*[3]. In rejecting this argument, the high court correctly distinguished those two cases on the facts. There the parties had actually concluded an agreement and were ad idem on the terms and the contracting parties. In *Rand Trading,* however, the lease agreement was invalid and the court held that 'the mere fact. . . that both parties erroneously

[2] *Rand Trading Co Ltd v Lewkewitsch* 1908 TS 108.
[3] *Landmark Real Estate (Pty) Ltd v Brand* 1992 (3) SA 983 (W).

assumed that there was a contract in existence at that date altogether precludes us [the court] from now inferring a new contract.'[4] In *Landmark Real Estate*, the court held that, since the parties had assumed that there was a contract of sale in existence and had the same view of who the contracting parties were, it precluded an implied contract with different parties coming into existence. I turn next to a discussion of the doctrine of quasi-mutual assent.

[17] In this court, Milla's counsel readily conceded that the first pleaded basis for the claim, namely tacit acceptance of the amended offer to lease, did not bear scrutiny. It is well established that the failure to accept an offer within the time stipulated in the offer, results in that offer lapsing.[5] This is the case here. As could be expected, counsel supported the high court's findings in Milla's favour on the second, alternative basis as pleaded. In its finding that a contract of lease had arisen tacitly, through conduct, the high court observed that '[t]he problem facing [Milla] is that there was no explicit meeting of minds on the terms of any lease agreement . . .' It continued: 'This apparent failure of the minds of the parties to meet is met, however, by the application of the doctrine of quasi-mutual assent'. Bozalek J referred with approval to *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic* 2001 (3) SA 1028 (D) in support of his finding that the present case falls within the 'battle of the forms' principle. In that regard, Bozalek J found that, on the facts, Cape Gate had sent the original offer to lease to the Trust, based on the in-principle agreement. It contained the landlords 'printed conditions'. Mr van Huyssteen, on behalf of the Trust, had effected certain manuscript changes and had transmitted its own 'printed conditions' in the form of the amended offer to Cape Gate. This amended offer had been sent in the appropriate manner for it to be drawn to the attention of a reasonable person in the position of the landlord, Cape Gate. In the high court's assessment of the facts, the critical factor was Cape Gate's actions after receiving the amended offer, namely its giving beneficial occupation on 3 July 2006 and enabling Tekkie Town to start trading from the leased premises from 1 August 2006. This, held the high court, 'gave the [T]rust reason to understand that [C]ape

[4] *Rand Trading Co v Lewkewitsch*, supra, at 115.
[5] *Laws v Rutherford* 1924 AD 261 at 262.

[G]ate was contracting on the [T]rust's conditions'. The high court noted further that Milla had 'come to court. . . on the basis of the terms as amended by the [T]rust which are more favourable to the [T]rust rather than on the landlord's terms as contained in the [original] unsigned offer to lease. This is, of course, appropriate inasmuch as the Court must consider the situation from the [Trust's] lessee's / defendants' perspective, i.e the party that "fired the last shot"'.

[18] By reference to Christie[6] the high court stated that there are three requirements to be met for the last shot to win the battle of the forms:
(a) First the one party (often the seller, but here the lessor) must present its 'printed conditions' (here the terms as per the original offer to lease) in such a way as to draw them to the attention of a reasonable person in the position of the buyer (here the lessee);
(b) Second, the buyer (lessee) must then present its 'printed conditions' (the amended offer) in the same manner;
(c) Third, the seller's (lessor's) action after receiving the buyer's (lessee's) conditions must give the buyer (lessee) reasonably to understand that the seller (lessor) is contracting on the buyer's (lessee's) conditions.

[19] The so-called "battle of the forms" is not a mechanical rule to be applied regardless of the facts. Its requirements are simply an application of the doctrine of quasi-mutual assent to the situation where the terms upon which parties are prepared to contract with each other are exchanged, without being read. The author of the last document exchanged i.e. "the last shot fired" is entitled to contend on the basis of quasi-mutual assent, that subsequent performance by the other party reasonably entitled it to assume that the other party had either read and assented to its terms, or was prepared to be bound without reading them. That this is so is especially apparent from the third requirement above. Since the high court resorted to an application of the doctrine of quasi-mutual assent what is required is a consideration of this doctrine.

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[6] G B Bradfield: *Christie's Law of Contract in South Africa* 7ed (2016) at 63.

[20] The doctrine of quasi-mutual assent, also sometimes referred to as the (direct) 'reliance theory', is firmly entrenched in our law.[7] The doctrine is best summed up in the well-known dictum of Blackburn J in *Smith v Hughes* as follows:

"I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v Cooke. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'.[8]

[21] Hutchison et al point out that the principle was received into South African law as an objective, corrective mechanism where contractual parties were not in agreement and describe it in the following terms:

'In contrast to estoppel, the doctrine of quasi-mutual assent or (direct) reliance theory is a basis for an actual rather than a fictitious contract. From a South African perspective, the doctrine argues that for contractual liability to arise in the absence of consensus requires a reasonable belief on the part of one party (the contract asserter) induced by the other party (the contract denier) that the latter had agreed to the contract in question.'[9]

[22] In *Sonap*[10] this court, in dealing with the law relating to unilateral mistake, confirmed that as a general rule, the law concerns itself with the external manifestations and not the workings of the minds of the parties to a contract. In the case of alleged dissensus, the law has regard to other considerations. In such cases, resort must be had to the reliance theory in

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[7] For a detailed list of cases where the doctrine was applied, see: *Christie* at 12, fn 95.
[8] *Smith v Hughes* (1871) LR 6 QB 597 at 607.
[9] D Hutchison et al, *The Law of Contract in South Africa,* 2ed (2012) at 95.
[10] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) (Ltd) v Pappadogianis* 1992 (3) SA 234 (A).

order to determine whether a contract has come into being. This court stated as follows:

'. . .(T)he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?. . ., To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly who made that representation; and thirdly, was the other party misled thereby?. . . The last question postulates two possibilities: Was he actually misled and would a reasonably man have been misled?. . . .'[11]

[23] From the foregoing the following conclusions may be drawn:

(a) The doctrine of quasi-mutual assent constitutes an application of the reliance theory in cases of dissent.

(b) The doctrine enables the 'contract asserter' to contend that the 'contract denier' misled him or her into the reasonable belief that the contractor denier had actually assented to the contractual terms in question.

[24] With regard to the question whether quasi-mutual assent may be invoked against a party to whom no fault can be attributed, Christie observes as follows, with reference to *George v Fairmead*[12]:

'It remains as important as ever for a plaintiff to prove that the conduct that induces the plaintiff's belief is attributable to the defendant'.[13]

As Christie[14] demonstrates, the application of the doctrine is not without its pitfalls, and this case is no exception. When these principles are applied to the facts of this case, it is clear that there can be no basis for the finding by the court a quo that simply on the basis that the Trust "fired the last shot" in terms of the amended offer, both parties were objectively bound by those terms. In the present case, the Trust was the contract denier asserting an oral contract at odds with the contract sought to be enforced by Milla. The objective facts are that the amended counter-offer was subject to a very short

[11] Ibid at 239I -240A (references omitted).
[12] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).
[13] Christie, op cit at 34.
[14] Christie, op cit at 32 – 35.

period for acceptance. The work on the new premises had not commenced on receipt of that counter-offer. As pointed out above, it was not seen by Cape Gate. The emails and documentary evidence presented in the high court clearly showed that Cape Gate commenced work, not on the basis of the amended counter-offer, but in terms of its original offer. Cape Gate took no steps to ascertain whether what had been accepted was the original offer or an amended counter-offer. Furthermore, the rental that was accepted by the landlord for a period of many months was not in accordance with either the offer or the counter-offer. In addition, neither the landlord (Attfund), nor its predecessor (Cape Gate), made any contribution towards the costs of the carpets as contemplated in the amended offer. In these circumstances I fail to see how the conduct of the contract denier, being the Trust, could have led Cape Gate to believe that the Trust was contracting on the amended counter-offer. That after all is the contract Milla sought to enforce. What Mila sought to do was to rely on Cape Gate's unreasonable conduct to support its assertion that the parties were bound by the terms of the counter-offer.

[25] In a cleverly constructed argument, counsel on behalf of Milla sought to persuade us that the matter should be viewed from the Trust's perspective, with the result that Cape Gate and subsequently Attfund should be bound by the counter-offer. For the reasons set out above this cannot be so. The high court misapplied the doctrine of quasi-mutual assent by reasoning in this manner and unjustifiably inverting the position. Its reliance on *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic* was misplaced, since those facts are distinguishable. In that case the defendant purchaser had in fact 'fired the last shot'. The Trust did not seek to be bound by the terms contained in the amended offer – Milla sought to do so. Milla cannot in law rely upon its predecessor in title, Cape Gate's, unreasonable conduct to bind the Trust to the terms of the amended offer in circumstances where the Trust does not seek to do so. It was in my view unreasonable for Cape Gate not to enquire whether its offer to the Trust had been accepted. Had it done so, the amended offer would have been discovered and, also, that the offer was only open until 22 May 2006. It was legally untenable to hold the Trust bound to its amended offer (when it did not itself wish to be so bound), on the

basis that on the objective facts the unreasonable conduct of Cape Gate must have misled the Trust into believing that Cape Gate was agreeable to the terms in the amended offer. To have done so, as the high court did, turned the doctrine of quasi-mutual assent on its head.

[26] For these reasons, both in fact and in law, the high court had erred in the manner it had applied the doctrine of quasi-mutual assent. A party who alleges a contract must prove its conclusion and the terms of that contract.[15] That is so even where the asserting party has to prove a negative.[16] In the present instance, Milla as plaintiff had failed to prove the contract it had asserted. In the premises the appeal must be upheld.

[27] I issue the following order:

1 The appeal is upheld with costs.
2 The order of the high court is set aside and substituted with the following: 'The action is dismissed with costs'.

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JUDGE OF APPEAL

[15] *Kriegler v Minitzer & another* 1949 (4) SA 821(A) at 826-827.
[16] *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 474A.

APPEARANCES

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