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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: A55/2018

In the matter between:

Jenette Nosipho Jeremiah

Appellant

And

**Communicare, a non-profit company
(REG NO: 1929/01590/08)**

First Respondent

The City of Cape Town

Second Respondent

JUDGMENT DELIVERED ON 21 AUGUST 2018

BAARTMAN, J

[1] On 22 August 2017, the magistrate at Cape Town evicted the appellant, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (**PIE**), from the

premises situated at [...] S road, off Koeberg, Brooklyn (**the property**). This is an appeal against that order. I deal with the grounds of appeal to the extent necessary below.

- [2] It was common cause that Communicare, a non-profit company, (**the first respondent**) was the registered owner of the property. Pursuant to a written lease, the appellant has occupied the property since 6 April 2011. In December 2016, the appellant defaulted on her rental payment which was due on the first of the month. The first letter of demand, sent by registered post, was dated 8 December 2016. Nonetheless, the appellant also defaulted in respect of the next payment, due 1 January 2017. In similar correspondence, dated 9 January 2017, the first respondent demanded that the appellant remedy the breach by 16 January 2017. She neglected to do so. In correspondence, dated 23 January 2017, also sent by registered post, the first respondent cancelled the lease agreement and demanded that the appellant vacate the property immediately.
- [3] The appellant admitted that she had breached the lease agreement by failing to meet her obligations in respect of the December and January rental payments. However, she alleged that she had approached the first respondent before the December payment was due and had attempted to make arrangements to settle 'the outstanding amount the following year'. The appellant alleged that she had been advised to return in January 2017. Apparently, the staff who could assist her were not available over the festive season. She duly returned in January and arranged to settle the rental arrears. Pursuant to that arrangement, she settled the arrears on 5 February and in March. The appellant alleges that she did not receive the registered post referred to above. The PIE notice came as a shock as she had honoured the arrangements to settle the arrears. The grounds of appeal flow from this version.

- [4] Clause 28 of the lease provides the following in the event that the tenant defaults:

‘28.1 In the event that the Tenant –

28.1.1 fails to pay any amount payable in terms of this Lease on due date; ...and fails to remedy such breach within 7 days of receipt of written notice calling upon the Tenant to do so,

Then and in such event the Landlord shall be entitled to end this Lease without prejudice to any rights of the Landlord and to sue for and recover any payment or moneys due, ...’

- [5] The appellant took several points *in limine*, I deal with them to the extent necessary below:

Failure to comply with clause 29 of the lease agreement

- [6] Clause 29 of the lease agreement provides as follows:

‘29.1 The Parties select as their respective domicilia citandi et executandi for purposes of giving or sending any notice provided for or required under this Lease...

29.2 All notices to be given in terms of this Lease will be given in writing and will –

29.2.1 be delivered by hand or sent by telefax;

29.2.2 if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a business day will be presumed to have been received on the following business day; and

29.2.3 if sent by telefax during business hours, be presumed to have been received on the date of successful

transmission of the telefax. Any telefax sent after business hours or on a day which is not a business day will be presumed to have been received on the following business day.

29.3 *Notwithstanding the above, any notice given in writing, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause 29.'*

- [7] The notices relevant to these proceedings were sent by registered mail. It follows that clause 29.3 finds application. In terms of that clause, proof that the notice was 'actually received' is required. The court *a quo* found:

'The burden of proof that the respondent has not received any of the letters of demand sent by registered post rests on her. It is sufficient for the applicant to have sent the letters of demand via registered post and to have attached the registered proof of postage. There is no reason to believe that the respondent did not receive these letters of demand and no reasons are forwarded as to why she would not have received same.'

- [8] It is not apparent on what basis the court *a quo* required the appellant to prove that she did not receive the notices. It is a basic principle of our law that he who alleges must prove. On that basis, in the circumstances of this matter, the first respondent has the burden to show that the appellant actually received the notices. The court *a quo*, without any justification, shifted a negative burden of proof to the appellant. The court erred. It should have enquired whether the first respondent met its burden of proof in terms of clause 29.3, i.e. whether the appellant 'actually' received the notices.

- [9] The dictionary meaning of ‘actually’ is: ‘as the truth or facts of a situation. As a matter of fact; even.’¹ In order to meet that burden, the first respondent annexed ‘the registered proof of postage’. In the circumstances of this matter, the first respondent in so doing proved no more than that the notices were sent. I can conceive of no reason, and none was proffered, for the first respondent’s inability to have provided proof of actual receipt. The track and trace reports were not annexed and the reason for that the failure does not appear from the record. In the circumstances of this matter, in the absence of proof that the registered posts were dispatched to the correct post office, there are not even facts on which a court can find on a balance of probabilities that the notices reached the appellant.²
- [10] The first respondent’s counsel submitted that it had to proceed by way of registered post to meet the requirements set in the Magistrate’s Court Rules. However, that cannot relieve the first respondent of its burden in terms of the lease nor shift the burden to the appellant. I also do not consider it onerous if the first respondent, in these circumstances, sent the same notice via telefax obviating the need for actual proof of receipt.
- [11] In the circumstances of this matter, the first respondent has failed to show that the appellant actually received the notices. The first respondent would only have been able to terminate the lease on account of the admitted breach after a properly served notice was not complied with, within 7 days of receipt. There is nothing to gainsay the appellant’s assertion that she did not receive the notices. It follows that the appellant was not placed *in mora* and that the eviction proceedings were prematurely initiated.

¹ Concise Oxford English Dictionary.

² *Baliso v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 292 and *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1.

Agreement in respect of the arrears

- [12] Even if I am wrong, the first respondent has failed to deal with the appellant's allegation that she made arrangements to settle her arrears and complied with the arrangements which were satisfactory to ward off the institution of eviction proceedings. The appellant said the following about the arrangement to settle her outstanding arrears:

'...I again approached the [first respondent's] rental office during mid to end January 2017, to make arrangements for settling my arrears. I was told I can make payment on the arrears and did so as soon as I was financially able.

I then, in terms of this arrangement, made my first rental arrears payment on 5 February...

I was shocked, when...I was served with an eviction notice and a summons...'

- [13] The response to these allegations was a terse denial. Nevertheless, it found favour with the trial court which held:

'... There is no proof that the [first respondent] or any of its representatives entered into any further agreements with the [appellant]. In order for any further agreement to be valid, it would have had to be reduced to writing.

The Court does not accept that the [first respondent] had extended the period of the lease agreement with the [appellant]. The mere fact that the [appellant] alleges that arrangements were made with her to pay arrear rental does not mean it included an extension of the lease...'

- [14] The court *a quo* was prepared, it seems, to accept the appellant's version that she had approached the first respondent as alleged. In the absence of a version from the first respondent as to the outcome of those negotiations, it is not clear on what basis the trial court

rejected the appellant's version of the negotiations. It follows that the appellant's version that she had an arrangement, which she honoured and which should have warded off eviction proceedings, stands to be accepted. Nothing prevented the first respondent from not exercising its option to cancel the contract which appears to have been the appellant's understanding of the settlement arrangements. It follows that she would have been shocked when she received the PIE application. It follows that also on this basis, the eviction proceedings were prematurely instituted.

The CPA finds application

[15] In addition, the appellant submitted that section 14(2) of the Consumer Protection Act, 68 of 2008 (**the CPA**) finds application to the lease agreement. As indicated above, the lease may be terminated upon failure to remedy a breach within 7 days of demand. That notice period, so the submission went, fell foul of the CPA because instead of 7 days it should have been 20 business days as prescribed in the section in section 14(2)(b) (ii) that provides:

'(2) If a consumer agreement is for a fixed term –

...(ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer rectified the failure within that time.'

[16] The court *a quo* held:

'The Court is in agreement with the [respondent] when it argues that the [CPA] will only find application if the lease is for a fixed period. This Court does not have the jurisdiction to extend the provisions of the Act to a lease which is not for a fixed period.'

[17] Challenged by the Makah decision³, the appellant sought – persuasively – to distinguish this matter from the Makah judgement. In Makah, the court held:

‘[11] An agreement which imposes a month-to-month residential lease is a consumer agreement falling within the ambit of the Act. However, the point of departure is that cancellation in terms of Section 14(2)(b)(ii) is only applicable to fixed-term contracts. It would be disproportionate to invoke a 20-business day notice to cancel a monthly lease...

[14] To read into the CPA that this 20-day notice requirement applies to a monthly and indefinite lease, would be to offer protection in circumstances not envisaged by the Act....’

[18] I accept that the lease relevant to these proceedings is an indefinite lease which is intended to provide the appellant with secure accommodation. Hence clause 3 provides as follows:

‘3.1 This Lease will start ...endure indefinitely.

3.2 Either Party may end this Lease by giving 1 (one) month’s written notice to that effect to the other.’

[19] The lease provides for incapacity as follows:

‘20.2 In the event that the Tenant is no longer able to care for himself adequately, ...the Landlord may, in its sole discretion, elect to cancel this Lease on 2 (two) month’s written notice to the Tenant...’

[20] I accept, considering the above allowance, 1 month for choice cancellation and 2 months for incapacity cancellation; a mere 7 days, therefore, to remedy a breach that may result in cancellation, in the

³ *Makah v Magic Vending (Pty) Ltd* 2018 (3) SA 241 (WCC) – at paras 11 and 14.

circumstances of this matter, offends public policy.⁴ This must be so considering that homelessness might follow cancellation of the lease and the appellant falls within the low-income group. There is a distinct financial benefit for the consumer built into this indefinite lease – low cost and secure housing – which is lost within 7 days if the consumer fails to remedy the breach. The protection the lease affords both parties to the lease for voluntary cancellations and incapacity is lost to the defaulting tenant without any obvious reason. This is against the spirit of the CPA, which has as its purpose, among others, eradicating the difficulty that low-income communities experience in their economic life.⁵

- [21] Regulation 5(1) of the Consumer Protection Act Regulation, Government Gazette, 1 April 2011 (No. 34180) provides:

‘For purposes of section 14(4)(a) of the Act, the maximum period of a fixed-term consumer agreement is 24 months from the date of signature by the consumer –

(a) unless such longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consumer...’

- [22] The indefinite lease, in the circumstances of this matter, is for a longer period – 7 years to date. The benefit to the consumer is obvious. A high premium is placed, for obvious reasons, on secure and affordable housing for the lower income group. The rent payable in this matter was R1 821.14 per month when the appellant fell into arrears. The property, in Brooklyn in the Western Cape, is close to transport, schools and the mainstream business environment. The ‘Income Target’ is described as follows in the lease:

⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 29 -30.

⁵ The Consumer Protection Act, 68 of 2008, Chapter 1, Part B section 3.

'21.1.1 The Landlord has based the Rental on the concept of an Economic Cost Recovery policy and formal obligations which it owes to various governmental bodies which determines to whom it may let its premises; and

21.1.2 The Landlord cannot, in terms of public regulation, let the Premises to a Tenant whose combined monthly household income exceeds the amount of R7 500...which amount will be adjusted in line with future adjustments applied by the Department of Human Settlements to respond to inflation...'

[23] The first respondent is a private non-profit organisation that provides accommodation in the normal course of business. It follows that the provisions of the CPA find application in this instance. The protections envisaged in the CPA are those afforded to the landlord and tenant in the lease's cancellation clauses referred to above. Denying that protection to the tenant in the event of a material breach seems contradictory, is against the spirit of the CPA and offends the values of the Constitution.⁶ This is so because the rights to dignity and housing are compromised for no apparent reason. The situation, in these circumstances, can be remedied with few, if any, consequences to the first respondent.

[24] Conversely, it may have life altering or even life-threatening consequences, i.e. homelessness, for persons in the position of the appellant. The appellant described her position when entering into the lease as follows:

'2.2 ...I was in dire need of accommodation and had my minor daughter residing with me. I had been forced to leave my boyfriend at the time who was physically abusive and threatened to kill me.

⁶ The Constitution, Act 108 of 1996.

2.3 I was earning a limited salary of about R3 000 per month at the time and was receiving no maintenance from the biological father of my child.

2.4 The [first respondent] ...indicated that we qualified for social housing assistance through their organisation.'

[25] In these circumstances, the secure tenancy granted to the appellant is more than the 24 months referred to in Regulation 5(1) and exactly the circumstances in which the CPA envisaged protection. I accept that this contract is distinguishable from the one dealt with in *Makah* and is one that has '*a demonstrable financial benefit to the consumer...*' I am persuaded that this contract is one envisaged in Regulation 5(1)(a) above. It follows that the 7-day notice period is unenforceable for non-compliance with the CPA; in addition, it offends the values of the Constitution and public policy.⁷ Instead, 20 business days' notice should have been given to the appellant. Also, on this ground, the appeal must succeed.

Conclusion

[26] I, for the reasons stated above, make the following order with which Parker J concurred:

- (a) The appeal succeeds with costs.
- (b) The order of the court *a quo* is set aside and replaced with:

'The application is dismissed with costs.'

⁷Barkhuizen above at para 29: 'What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.'

BAARTMAN J

I concur.

PARKER J