

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: A5051/2020

COURT A QUO CASE NO: 13866/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

URBAN DYNAMICS (GAUTENG) INC

APPELLANT

And

BLW PROPERTIES (PTY) LIMITED

RESPONDENT

FULL COURT APPEAL - JUDGMENT

WRIGHT J

1. The appellant, Urban Dynamics has for some years been in the business of, among other things, consultancy, property development and project management. It has partnered with others in developing housing for less well-off persons. In particular, a development known as Devland was part of Urban's business. Ultimately, that project or its conclusion had the consequence that a number of persons were disappointed by failed expectations. Housing and jobs were less than what had been hoped for.

2. The respondent, BLW owns commercial property and rents out office space. BLW had rented office space to Urban for many years. At about the time of the realisation by the less well-off persons that their hopes would be dashed, the parties agreed that Urban would relocate to different premises owned by BLW. They signed a written lease. Urban moved to the new office premises on the fourth floor of the new building.
3. The lease was for four years, starting on 1 September 2017 and due to end on 31 August 2022. Urban vacated the premises on 4 February 2022, well after the launch of the present appeal. Both Mr Mundell SC for Urban and Mr Subel SC for BLW insisted that the appeal was not moot. Of importance, they submitted would be a finding by this appeal bench on the validity or otherwise of the cancellation by BLW of the lease in relation to the damages action by BLW referred to below.
4. Over and above rent, Urban agreed to pay, regarding security costs set out in the beginning of the contract *“any additional costs, charges and expenses which the Landlord may incur in securing the site (or any part thereof)...against any of the security risks not provided for in the Operating Costs as at the Commencement Date.”*
5. Under *“Special Terms 2 “*, *“The Tenant shall be liable for any additional costs, charges and expenses which the Landlord may incur in securing the Site (or any part thereof), the Building or the External Common Areas (or any part thereof), as the case may be, against any of the security risks not provided for in the Operating Costs (for instance riots and protest) as at the Commencement Date.”*

6. Under clause 1.1.6 the “*Premises*” were defined as “*the area let in terms of the lease as described in the Main Schedule and as depicted on Annexure 2B hereto, together with any areas in respect of which the Tenant has exclusive use.*”
7. Under clause 5.1 “*The Premises shall be used solely for the purpose as set out in the Main Schedule and all business incidental and ancillary thereto and for no other purpose whatsoever...*”
8. Under clause 11.5.1 “*the Tenant shall at all times use and control the Premises in such a manner that the use thereof in no way interferes with or affects the rights and privileges of any other Tenants in the Building Office Park or causes any disturbance, nuisance or annoyance to any person.*”
9. Under clause 15 “*The common areas...shall at all times be subject to the exclusive control of the Landlord...*”
10. The disappointed persons, apparently blaming Urban for their unhappy situation started protesting at the new building. The protests increased in number and intensity. The entrance to the building was damaged and at least one person was injured. BLW hired extra security guards. Other tenants in the building relayed their unhappiness to BLW.
11. BLW purported to cancel the lease by letter dated 25 March 2019 and when Urban did not vacate BLW issued an application for the eviction of Urban. The application was successful before Makume J.
12. Before us now is an appeal against the order of my learned brother and with his leave.
13. In short, BLW says that it was entitled to cancel the lease because Urban used and controlled the premises in breach of the agreement by allowing the

protesters to disrupt the building and its tenants. Urban says that not only were the protesters acting unlawfully and uninvited by Urban but were doing so in the face of attempts by Urban to alleviate a tense situation.

14. There is no doubt that it was the presence of Urban in the building that caused the protesters to go to the building and disrupt it. Mr Mundell correctly conceded this.

15. In my view, the word “*use*” in clause 5.1 must be read against the purpose of the lease and occupation by Urban, namely as office premises. To describe the conduct of the protesters as “*use*” by Urban would be to stretch the intended meaning of the word beyond sensible common sense as intended by the parties when they contracted.

16. The words “*use and control*” as contained in clause 11.5.1 cannot be read so as to impose a contractual duty on Urban to control the protesters as suggested by BLW. I say so for five reasons:

16.1 The quoted words relate only to “*Premises*” as defined in clause 1.1.6 which definition limits the area to the particular space rented by Urban, that is any area over which Urban has exclusive use, excluding common areas.

16.2 Why else would Urban have agreed to pay for additional security under the heading “*Security*” in the beginning of the contract? The answer can only be because the security would be provided by BLW so that Urban would not need to provide it.

16.3 The same question and answer apply to Special Term 2.

16.4 Under clause 15, the common areas are subject to the exclusive control of BLW. It was clearly not the intention of the parties that Urban would

control or be obliged to control any space other than its own specific, exclusive use space.

16.5 When contracting, the parties were alive to the possibility of “*riots and protest*.” That is why they provided for such eventuality in Special Term

2. The parties could have inserted a clause reading “*the mere presence of Urban in the premises becomes a breach by Urban if its presence causes riots or protest*”. There is no such clause.

17. On one occasion, the protesters, having broken through glass doors at the lobby made their way to Urban’s fourth floor exclusive use area. In my view, this does not help BLW. The conduct of the protesters was not use, control or failure to control by Urban. The protesters could not have reached the fourth floor unless they had first breached security at the perimeter and lobby of the building, which security had to be provided by BLW.

18. In my view, the appeal is unanswerable. The purported cancellation by BLW was bad in law.

19. Urban seeks the reinstatement of the appeal. The order of Makume J against Urban led to an application by Urban for leave to appeal. Makume J granted Urban leave to appeal on 31 August 2020. Urban’s attorney took steps to set the appeal in motion. By 18 December 2020, Urban’s attorney had delivered the record of appeal, Urban’s practice note, heads of argument and list of authorities.

20. The appeal lapsed on 18 December 2020 by which date Urban’s attorney had not put up Urban’s security for the costs of the appeal nor provided a power of attorney by Urban nor applied for a date for the appeal.

21. On 22 February 2021, the opposing attorneys agreed that a figure of R100 000 was sufficient as security for costs. Urban did not then put up security for costs.
22. On 12 March 2021, heads of argument were filed for BLW after an extension of time had been granted to BLW by Urban's attorney.
23. From 18 December 2020 and for the next ten months, until November 2021 Urban's attorney took no steps to prosecute the appeal. It is necessary to examine this inactivity.
24. Given the request by BLW's attorney for an extension of time to file BLW's heads of argument, the granting of the extension by Urban's attorney and the filing of BLW's heads of argument on 12 March 2021 it is not necessary to dwell on the period between 18 December 2020 and 12 March 2021. As at 12 March 2021 both sides appear to have been of the view that the appeal was on track.
25. On 18 March 2020, BLW had instituted action against Urban and its directors claiming R92 000 000 for damages allegedly caused by breaches of the lease by Urban and its directors in allegedly allowing the protests to occur and thus causing BLW's other tenants to cancel their leases or not renew them.
26. After Urban had been granted leave to appeal, BLW did not prosecute its action for R92 000 000. Nor did its attorney seek a writ to execute the judgment of Makume J despite Urban's appeal having lapsed on 18 December 2020. Nor did BLW's attorney suggest that the appeal had lapsed. Urban stayed in occupation and paid, at least until October 2021 the full rental which BLW accepted. There appears to have been a tacitly agreed lull in hostilities from 12 March 2021.

27. On 9 November 2021 hostilities resumed. BLW's attorney wrote to Urban's attorney demanding payment for occupation by Urban for October and November 2021. On 16 November 2021, Urban's attorney wrote to BLW's attorneys alleging continuous repudiation of the lease by BLW and purporting to cancel the lease. Reference was made to a counter claim to be brought by Urban in the damages action brought by BLW.
28. On 22 November 2021, BLW's attorney wrote to Urban's attorney purporting to cancel the lease for a second time and for the first time alleging that Urban *"appears to have abandoned their appeal"*. In this letter, BLW's attorney, referring to the damages action instituted by his client states *"our client will be resuming proceedings... with immediate effect."* There cannot be a resumption unless it is preceded by a pause. In my view, the apparent tacit agreement by both sides to do nothing came about because it suited both sides.
29. On 25 November 2021, Urban's attorney replied, stating that Urban had not abandoned its appeal. By 1 December 2021, Urban had put up security for costs. By 18 January 2022, the Registrar of this court had provided a date for the appeal. This implies that a power of attorney had by then been filed by Urban's attorney.
30. On these facts it cannot be held that Urban waived its appeal. In my view, it has put up a sufficient case for re-instatement. BLW is not prejudiced by re-instatement. Mr Mundell for Urban sensibly tendered the costs of BLW in the re-instatement application.

31. BLW seeks condonation for the late filing of its Practice Note, List of Authorities and Chronology. This is not even a storm in a teacup and there is no prejudice to Urban.
32. For the sake of clarity, the only finding I make on cancellation or purported cancellation relates to the purported cancellation by BLW's attorney dated 25 March 2019. No finding is made on the cancellation or purported cancellation by BLW's attorney dated 22 November 2021 or on the cancellation or purported cancellation by Urban's attorney dated 16 November 2021.

ORDER

1. The appeal is reinstated.
2. The appellant is to pay the costs of the respondent in the re-instatement application.
3. The respondent's condonation application regarding its Practice Note is granted.
4. Each party is to pay its own costs in the respondent's condonation application.
5. The appeal is upheld with costs, including those of senior counsel.
6. The order of the court below is set aside and replaced with one reading "*The application is dismissed with costs, including those of senior counsel.*"

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

I agree

S Mia

Judge of the High Court

Gauteng Division, Johannesburg

I agree

L Wepener

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 16 August 2023

DELIVERED : 18 August 2023

APPEARANCES :

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