

WHICHEVER IS NOT APPLICABLE
REPORTED: YES/NO.
OF INTEREST TO OTHER JUDGES: YES/NO.
REVISED.
22/6/10
DATE
SIGNATURE



25/6/2010
REPORTABLE

/bh

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 26533/2008

IN THE MATTER OF:

PROC CORP 160 (PTY) LTD (CONVERTED FROM A CC) APPLICANT

AND

INTERACTIVE TRADING 626 (PTY) LTD

RESPONDENT

JUDGMENT

PRELLER, J

The applicant applies for an order evicting the respondent from their restaurant conducting on premises belonging to the applicant.

During 2003 the applicant and respondent signed a lease agreement which commenced on 1 May 2003 and expired on 30 April 2008. In terms of

the agreement the respondent (tenant) is granted an option to extend the lease for another period of five years provided that at least six months before the expiry of the lease the tenant informs the landlord of its intention to exercise the option.

The following background will to some extent explain the conduct of the parties: the director of the respondent was in the process of completing a new development to which it was intended that the respondent would move its operation after the expiry of the lease agreement. This development was objected to and delayed by one Koukoudis who also had an interest in the applicant. The respondent obviously wished to extend its occupation of the applicant's property until the respondent could be accommodated in the proposed new development. The respondent annexed *inter alia* the following documents to its opposing affidavit:

- a copy of the application in terms of section 32 of the Magistrate's Court Act brought by the applicant against the respondent;
- a copy of an application in this court between the local authority and a company in which the director of the respondent had an

interest and which apparently concerns the proposed new development;

- a copy of the papers in the pending dispute in the magistrate's court between the present parties concerning rentals and other amounts payable;
- copies of the papers that served before the planning committee of the local authority relating to the said new development;
- copy of a counter-application in this court in the dispute between the local authority and the company attempting to effect the new development;

These papers comprised more than 1100 pages.

Not surprisingly the applicant brought an application at the commencement of argument for the annexures to be struck out as well as certain portions of the answering affidavit in which the annexures were explained.

If I understand the legal position correctly such an application should not be granted unless the party bringing the application would be prejudiced in the absence of the order sought.

Apart from the obvious inconvenience caused to me to have to handle such a bulky court file, the inconvenience to the applicant is illustrated by the history of the hearing of this application.

The matter was originally set down as an urgent application for hearing on 17 June 2008. Because the papers were in excess of 500 pages and in terms of the practice directive the parties had to approach the Deputy Judge President for the date of hearing. The date so allocated was 22 June 2008 when it was struck off the roll due to lack of urgency. The applicant then enrolled the matter for hearing on 24 November 2008 without following the necessary procedure. On behalf of the respondent it was submitted that due to *inter alia* the proposed application for striking out the argument in the case would take longer than a day to complete. For that reason, so the argument went, the matter had to be set down in the so-called third court which is the court for hearing opposed applications that will take longer than the normal.

It is apparent from the foregoing going that the mere inclusion of the annexures referred to above delayed the hearing of the matter at least from June until November. That in itself is in my view sufficient prejudice to the applicant and I accordingly ordered that the annexures referred to be struck out with costs.

Clause 44 of the lease agreement between the parties is headed "holding over". Clause 44.1 reads:

"If the tenant should after expiration or earlier termination of this lease agreement remain in occupation of the lease premises, then: -"

Sub-paragraphs 1.1 and 1.2 then provide that the amount of the monthly rental and the operating costs will immediately be increased by 12% and 14% respectively. That is following four sub-paragraphs:

"44.1.3 the other terms and conditions of this lease agreement shall
mutatis mutandis remain applicable to the tenant save that

the lease agreement **shall be deemed to have been entered into for a month at a time** (sic) only (emphasis added);

44.1.4 the tenant shall continue to pay the increased rental and all other amounts due to the landlord in terms of this lease agreement on due date;

44.1.5 the landlord shall be entitled to recover and accept the payments referred to in 44.1.1 and;

44.1.6 the recovery and acceptance by the landlord of payments referred to in 44.1.3 (sic) shall be without prejudice and shall not in any manner effect the landlord's rights."

Two further sub-paragraphs under the same heading read as follows:

"44.2 Payments made to the landlord in respect of clause 44.1 above shall be regarded as amounts paid by the tenant on account of loss and/or damage sustained by the landlord as a result of the holding over by the tenant of the premises.

44.3 Unless otherwise stated by the landlord or its agents, acceptance of any rental or payments shall in no way whether (sic) prejudice or operate as a waiver, rescission or abandonment on any termination of right of termination.”

I may mention in passing that revenue stamps to the value of R11 665 have been fixed to the agreement. The costs of the document must therefore have been substantial. One would expect that in the circumstances the draftsman of the agreement would have paid a little more attention to what he was doing.

It is apparent from the correspondence, the respondent's answering affidavit and also the argument submitted to me at the hearing that the respondent's attitude is that upon the expiry of the lease agreement a new "month to month tenancy" was entered into and which should then be terminated with notice in terms of the contract. The respondent also relies on clause 39.2 of the contract in terms of which notices have to be addressed to the respondent's chosen domicile.

The only provision in the agreement that deals with notice is clause 3.5 thereof. This provision deals with the eventuality that the tenant may have taken occupation of the premises after making an offer to rent and which offer was not accepted by the landlord and subsequently rejected. The clause provides that in that event a tenant shall nevertheless be bound by the terms of the lease save that its occupation shall be deemed to be a monthly tenancy terminable on one months' written notice. That is clearly a situation different from the one that arose in the present case after expiry of the lease.

Likewise the requirement in clause 39.2 that all notices should be addressed to the chosen *domicilium* is not applicable simply because the situation that arose after the expiry of the lease is a *sui generis* one and no notice to terminate the occupation is required.

The applicant may also have misconceived its rights in terms of the said clause since it also purported to terminate the respondent's occupation.

The simple fact of the matter is that clause 44 deals with the situation where the respondent unlawfully continues to occupy the premises after expiry of the lease. The object of the clause is merely to create a formula for the easy

calculation of the landlord's damage in the event of the tenant unlawfully continuing in occupation after the expiry of the lease. Despite the clumsy **wording** of clause 44.1.3 quoted above the intention is clearly enough that the provisions of the lease agreement shall remain applicable **as if** the lease agreement had been one entered into on a month by month basis, and not that a new monthly tenancy had come into operation. It is further confirmed by the **wording** of the sub-clauses 1.5 and 1.6 quoted above and in addition clauses 44.2 and 44.3 make it abundantly clear that the lease agreement remains expired and that no new agreement came into existence.

In the circumstances it is clear that the respondent's occupation remains unlawful and that the applicant is entitled to an order for its eviction.

As far as the costs are concerned the applicant applied in prayer 4 for a punitive cost order. In my view the respondent clearly abused the legal process and its interpretation that a new lease had come into force is disingenuous. In my view a punitive cost order will accordingly be appropriate. It should also be noted at this stage that in prayer 3 the word "empower" is incorrect and should be "directed" and that in prayer 3.3 the word "deemed" should be omitted. I make an order in terms of prayers 2 and 3 of the Notice of Motion and that the

respondent be ordered to pay the costs of the application on the scale as between attorney and client.



F G PRELLER
JUDGE OF THE HIGH COURT

Applicant's counsel: J Van den Berg (Head drawn by CP Wesley)

Instructed by: Welgemoed Attorneys

Respondent's counsel: M Snyman

Instructed by: Geldenhuys, Botha Inc