IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 11500/2011

In the matter between**:**

THUTHABANTU PROPERTIES C C APPLICANT

and

SUMMIT WAREHOUSING (PTY) LTD. RESPONDENT

JUDGMENT Delivered on 04 June 2012

SWAIN J

[1] The applicant seeks an order confirming the cancellation of a sub-lease, concluded with the respondent in respect of premises situated in Durban, KwaZulu-Natal, as well as an order evicting the respondent from these premises. The respondent in turn, by way of a counter-application, seeks a referral of the dispute to arbitration and a stay of the present proceedings, pending the outcome of the arbitration proceedings.

[2] It is common cause between the parties that:

[2.1] The respondent is an incorporated company and at the time of the conclusion of the sub-lease Guqula Holdings (Pty) Ltd., held all the issued shares in the respondent.

[2.2] The shares in the respondent were transferred to one Kevin Atkins, as the sole shareholder.

[2.3] The transfer of the shares in the respondent constituted a breach of the provisions of Clause 22 of the sub-lease, which provides as follows:

"The Lessee shall not have the right to cede, delegate, assign, sublet, dispose of, or in any way hypothecate this Lease Agreement or the Property or any portion thereof, without the prior written consent of the Lessor, which should not be unreasonably withheld. Should the Lessee be a company, the transfer of any of its present issued shares, unissued share capital or any future increased share capital, which results in a change in the effective control of the Lessee, shall be deemed to be a cession by the Lessee of its rights under this Lease Agreement. In the case of a close corporation any change in the effective control of the corporation shall likewise be deemed to be such a cession".

The applicant's prior written consent to the transfer of the shares, was not obtained.

[2.4] The applicant as a consequence of the respondent's breach of the provisions of Clause 22, gave notice to the respondent in terms of Clause 28.1.2 to remedy the breach within seven days, failing which the applicant would cancel the lease. Clause 28.1.2 reads as follows:

"commit any other breach in any term of this Lease Agreement, whether such breach goes to the root of this Lease Agreement or not, and fail to remedy that breach within a period of 7 (seven) days after the giving of written notice to that effect by the Lessor".

[2.5] The response of the respondent was to request the applicant "to consent to the transfer of the issued shares to Kevin Mark Atkins. Bearing in mind that such consent cannot be unreasonably withheld, there should be no reason why the consent is not granted".

[2.6] The applicant's response by way of a letter dated 24 November 2011, was to cancel the lease on the ground that the respondent had "failed to remedy the breaches requested" in terms of the provisions of Clause 28.1.5, which affords to the applicant the right

"To cancel this Lease Agreement on written notice thereof to the Lessee and claim immediate re-possession of the premises".

[3] Mr. Shepstone, who appeared for the respondent (applicant in the counter-application), submits that because the applicant did not address the respondent's request for permission for the transfer of the shares, and summarily cancelled the sub-lease, a dispute has arisen between the parties, as to the validity of the cancellation of the sub-lease, within the meaning of that term as contained in Clause 31.1, which reads as follows:

"Should any dispute arise between the parties in connection with –

- the implementation of this Lease Agreement;

- the interpretation or application of the provisions of this Lease Agreement;

- the parties' respective rights and obligations in terms of or arising out of this Lease or its breach or termination;

- the rectification, termination or cancellation, whether in whole or in part of this Lease Agreement;

- any documents furnished by the parties pursuant to the provisions of this Lease Agreement,

or which relates in any way to any matter affecting the interests of the parties in terms of this Lease Agreement, that dispute shall, unless resolved between the parties to the dispute, be referred to and be determined by arbitration in terms of this clause".

[4] From the counter-application it appears that the respondent contends that there are also disputes between the parties, as to the cleanliness of the leased premises and whether this arises from the acts or omissions of the applicant, the rental payments and whether the state of the premises has deprived the respondent of the use thereof and to what extent. Mr. Shepstone however properly conceded that if I was satisfied that a resolution of the dispute as to the transfer of the shares in the respondent, determined the validity of the cancellation of the agreement in favour of the applicant, it would not be necessary to consider these remaining disputes.

[5] Mr. Shepstone however contended that because there was an existing dispute, between the parties as to the cancellation of the

agreement, I should nevertheless refer this dispute to arbitration and stay the present proceedings.

[6] It seems to me however that the merits of the dispute concerning the validity of the cancellation, on the ground that the shares in the respondent were transferred without the prior written consent of the applicant, should be determined first because if decided in favour of the applicant, this will be dispositive of any need to refer the matter to arbitration. If this dispute is readily capable of resolution on the papers before me, there can be no justification in referring its resolution to arbitration, with the consequent delay and payment of additional legal costs by the parties.

[7] In my view, the conduct of the respondent in transferring all of its shares to a new owner, without the prior written consent of the applicant, quite clearly evinced an unequivocal intention on the part of the respondent, not to perform its obligation in this regard. Such conduct constituted a repudiation by the respondent of its obligation, to obtain the written consent of the applicant, before the shares were transferred. Consequently in law, (aside from the requirement in the contract that the respondent be given seven days notice to rectify any breach, before the applicant would be entitled to cancel the agreement), the respondent's own repudiation placed it *in mora.* In this context, the notice which the applicant was obliged to give the respondent in terms of Clause 28.1.2 of the sub-lease, to rectify the breach within seven days, was nothing more than a procedural step,

which the applicant was obliged to comply with in terms of the sub-lease, before cancelling the agreement. The effect of the notice could never have been to afford to the respondent rights, which it never possessed in terms of the agreement, namely to obtain the written consent of the applicant, after the shares had already been transferred.

[8] In the result, I am satisfied that the applicant validly cancelled the sub-lease and there is accordingly no remaining dispute between the parties which should be referred to arbitration. The counter-application must accordingly fail.

[9] The applicant is entitled to an order evicting the respondent from the premises. Mr. Lotz S C, who appeared for the applicant, together with Mr. Pretorious, submitted that although the order prayed sought the eviction of the respondent within seven days of the grant of the order, it would be reasonable to afford the respondent a period until 30 June 2012, to vacate the premises. Mr. Shepstone submitted however that a period of two months would be required. When regard is had to the fact that the sub-lease was cancelled as long ago as 24 November 2011, and the application was opposed on what I regard as tenuous grounds, it would be reasonable if the respondent was obliged to vacate the premises by 30 June 2012. Mr. Lotz also asked for costs to be awarded on the attorney and client scale, as provided for in clause 28.4 of the sub-lease. When regard is had to the nature of the defence raised by the respondent, I

am satisfied that such an order is warranted.

I grant the following order

a) The cancellation of the sub-lease, concluded between the applicant and the respondent during July/August 2009 in respect of the premises known as Lot 1742 Wentworth, known as 401 Edwin Swales Drive, Durban, measuring 77,519 square metres ("the premises"), a copy of which is annexed to the founding affidavit of the applicant as annexure "B" is confirmed.

b) The respondent is ordered to vacate the premises by no later than 30 June 2012.

c) The Sheriff of this Court is ordered to execute the eviction in the event of the respondent failing to comply with paragraph (b) hereof.

d) The respondent is ordered to pay the costs of this application on a scale as between attorney and client.

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K. SWAIN J

Appearances /

Appearances:

For the Applicant	**:**	Mr. G.M.E. Lotz S C with Mr. C. Pretorious
Instructed by	**:**	Mason Incorporated Pietermaritzburg
For the Counter Applicant Respondent:	**:**	Mr. S. M. Shepstone
Instructed by	**:**	J H Nicholson Stiller & Geshen C/o Von Klemperers Attorneys Pietermaritzburg
Date of Hearing	**:**	31 May 2012
Date of Filing of Judgment	**:**	04 June 2012