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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 2023/009050

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

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Lucas J van Tonder AJ

31 MAY 2024

In the matter between: -

MUNICIPAL EMPLOYEES PENSION FUND

APPLICANT

And

**ASPARA TECH AND PROJECTS (PTY) LTD t/a
GADGET SOLUTIONS**

1st RESPONDENT

**UNKNOWN OCCUPIERS ASSOCIATED WITH ASPARA
TECH & PROJECTS (PTY) LTD t/a GADGET SOLUTIONS 2nd RESPONDENT**

Coram: Lucas J van Tonder AJ

Heard: **15 November 2023**

Delivered: **31 May 2024**

Summary:

Contract – Termination of commercial lease agreement.

Right of renewal – unambiguous entitlement not to extend lease – failure to enforce renewal in accordance with contract.

Prior negotiation of agreement – good faith – Ubuntu – fairness in contractual dealings – *caveat subscriptor* and *pacta sunt servanda*.

Failure to prove non-binding nature of contract terms.

Introduction:

[1] This opposed motion involves an attempt by the First Respondent (“Aspara”), as tenant, to escape the consequences of the termination of a commercial lease agreement that expired after six years.

[2] Aspara relies *inter alia* on the “*principles of lawfulness, fairness and Ubuntu*” to circumvent the termination and to enforce renewal of the lease.

[3] The Applicant is the Municipal Employees Pension Fund (“the Pension Fund”). It is the owner of a shopping complex in B[...] S[...], K[...] P[...], since 5 October 2010 (“the premises”).

[4] On 24 November 2016 the Pension Fund concluded the written commercial lease agreement with Aspara for the rental of a unit in the premises for a period of three years.

[5] The original lease agreement made provision for renewal of the lease for a second period of three years.

[6] An addendum was signed by the parties to extend the lease to 30 November 2022. The addendum was subject to the option for Aspara to renew the lease by giving notice three month prior to 30 November 2022.

Contentions by the Pension Fund

[7] Ordinarily, if Aspara adhered to its obligations and enforced its right to renewal, the Pension Fund would probably have had no option but to comply.

[8] The Pension Fund contends that the lease expired on 30 November 2022 due to the absence of any notice to renew.

[9] It is undisputed that Aspara failed to give such notice timeously or at all.

[10] The Pension Fund seeks ejectment of Aspara from the rental unit.

[11] Aspara now contends that any attempt by the Pension Fund to eject it is unlawful.

[12] The termination is undisputed, save for the ancillary defences raised by Aspara about the right to renewal, despite the failure to comply with the terms for such renewal.

[13] For the ejectment of Aspara from the premises, the Pension Fund relies on clause 12 of the lease agreement which obliges Aspara as the tenant to return the leased premises to the Pension Fund upon expiration of the lease agreement.

[14] On 28 November 2022 the Pension Fund, through its attorneys, reminded Aspara in writing about the expiry of the lease agreement on 30 November 2022, that the Pension Fund had no intention to renew the lease, and that Aspara should vacate the premises.

[15] The Pension Fund contends that, from 1 December 2022 onwards, Aspara has been in unlawful occupation of the premises.

[16] During argument of the matter in mid-November 2023, Aspara tendered to vacate the premises towards the end of January 2024. The Pension Fund was unwilling to accept the tender.

Contentions by Aspara

[17] Mr Kashif Nadeem deposed to the answering affidavit as sole director and only shareholder of Aspara. He admitted that 30 November 2022 was the last date of the lease term. Mr Nadeem also alleges that other parts of the premises are occupied through separate lease agreements.

[18] Mr Nadeem contends that the notice from the Pension Fund to vacate was based on untruthful and unlawful conduct of the Pension Fund.

[19] Regardless of a string of ancillary allegations about the motives of the Pension Fund, it is, as already mentioned, undisputed on the papers that Aspara did not, in strict compliance with the lease agreement, attempt to renew the lease agreement and that Aspara continues to occupy the premises without a lease agreement or the Pension Fund's consent after 30 November 2022.

[20] As a last resort, Aspara relies on public policy, *Ubuntu*, good faith, and fairness as being key concepts in the South African constitutional democracy. These were raised as a basis to challenge whether the contractual terms or enforcement thereof is contrary to public policy, to the extreme that a right to renewal can be forced upon the Pension Fund.

[21] For this approach, Aspara essentially relies on the decision in *Beadica 231 and Others v Trustees for the time being of the Oregon Trust and Others* ("*Beadica*").¹

[22] Aspara's argument boils down to the contention that the Pension Fund made renewal of the lease impossible and should be forced to negotiate a renewal.

[23] The complaint of Aspara does not specifically relate to a challenge to the reasonableness of the terms of the contract, but focusses on the extra-contractual conduct of the Pension Fund in relation thereto – in particular on whether the conduct of the Pension Fund scuppered the prospects of a negotiated renewal.

¹ (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

[24] The approach disregards the fundamental dividing line between an unambiguous obligation willingly agreed to, as opposed to whether the obligation itself offends some principle of good faith, assuming the clarity of the obligation.

[25] Further judicial considerations might well be unnecessary in the face of such misconception.

[26] Mr van der Westhuizen for Aspara, however, made a valiant attempt to distinguish the principles in the majority judgement of *Beadica* with an emphasis on the minority judgements therein, concluding that “*enforcement of the related contractual terms is contrary to public policy, such that a this (sic) Honourable Court may, and in fact should, refuse to enforce the terms of agreement insofar as it relates to termination and renewal.*”

The legal position since Beadica

[27] Since *Beadica*, the SCA in *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd*,² (“*Capitec Bank Holdings*”) clarified the approach to be adopted for reliance on principles such as those raised by Aspara:

“[65]...*Good faith is not an abstract, self-standing duty that may be imposed upon a party as a matter of the law of contract so as to determine the terms upon which the parties to a contract will be taken to have agreed.*”

“[67] *That we take parties to a contract to act in good faith is a norm of trust that informs many rules of the law of contract. It is also a norm that may be relevant as to how we interpret what the parties agreed. It is not a norm that can be utilised to decide what the parties should be taken to have agreed and how they should act, in the interests of justice or fairness... Whatever view is taken of Capitec Holdings' volte-face, it does not permit a court to impose an agreement that the parties did not make — whether in the cause of good faith or justice or any other abstract principle or virtue.*”

“[69] *The judge's views on business ethics cannot signify to impute a duty that Capitec Holdings grant consent to a sale that the court considers a desirable*

² [2021] ZASCA 99; [2021] 3 All SA 647; 2022 (1) SA 100 (SCA).

outcome. Capitec Holdings enjoyed a contractual right to retain Coral as an empowerment shareholder. That was the bargain that Coral and Ash Brook had struck. That the world might be a better place if Coral were permitted to sell the sale shares without a repurchase obligation, and thereby reimburse the Fund, is a judgment of no relevance to the contractual rights and duties of the parties.”

[28] The SCA concluded that what was sought in reality, as in this instance, was that the party with a clear and unambiguous right (the landlord), carefully negotiated and signed off, should waive it for the benefit of the party (the tenant) who agreed thereto to its consensual prejudice, thus reversing the benefit-prejudice ratio expressly agreed to. Such approach challenges every feature of contractual jurisprudence.

[29] Froneman J, in the dissenting part of *Beadica*, alluded to proportionate exchange or adjustment. It is impossible to see how, despite the clear terms of the rights or obligations in question, a court could venture to adjust the “*balance*” for the parties in what the court deems to be proportionate, despite and in spite of the contractual apportionment consented to. If, however, interpretation of the contract required the determination of an implied or tacit term, then the precise and accurate formulation of such implied or tacit term would align the boundaries of right/obligation “*proportionment*”. The well-established guardrails for limited reliance on implied or tacit terms would similarly restrict the court’s interference, if only based on the equitable principle embedded in the innocent bystander test.

More on the contractual principles and minority views:

[30] If Aspara’s approach were to be upheld it would open the floodgates of contractual litigation, allowing each contract to be subjected to the *ex post facto* evaluation of past, current and future commercial circumstances, changed positions or whims, after the parties have freely entered into a commercial commitment with the implicit risks embedded in all contractual arrangements. Such litigants would then expect from the court *a quo* to adjudicate in a subjective manner on the “*fairness*” of commercial outcomes or the applicability of standard terms, as opposed

to the objective-, commercial- and binding nature of what had freely been committed to.

[31] If such discretionary views of the court *a quo*, expressed in a judgment, does not find favour with one of the parties, the disputed fairness would gamble the slots of an extended appeal process, until a final discretionary view is obtained from the Constitutional Court.

[32] Due to the unique features of each individual commercial engagement, any judgment in the litigious sequence would hardly result in a firm precedent to assist other contractual parties that seek to invoke the same underlying principle of “*public policy*” or fairness or good faith to a kaleidoscope of different subsequent facts engrained in each contractual setting.

[33] The jurisprudential pillars supporting *pacta sunt servanda* are founded, amongst others, upon the societal benefits of legal certainty, as opposed to opportunistic retrospective blame for the outcome of the risks that each contracting party had been willing to engage with before venturing onto the unpredictable ocean of commercial reality.

[34] Nothing prevents parties to a contract to invoke its own definitions and applicability of the principles of public policy, good faith or *Ubuntu*, provided they are accurately formulated beyond the risk of being held unenforceable for vagueness. Perhaps that is what Froneman J had in mind in the minority judgement in *Beadica* when he referred to the need to describe reasonably certain, practical and objective legal principles and rules to guide contracting parties.³ Obviously such guidance is best followed before putting hand to contractual paper. The general nature of the statement by Froneman J, however, remains theoretical if not idealistic. The same can be said about the remarks in the second dissenting judgement by Victor J which held that *Ubuntu* should be characterised as an objective adjudicating value to reach substantial fairness between contracting parties in order to achieve a constitutionally transformative result, which approach will not undermine the concept of certainty and

³ *Beadica* par 107.

contractual autonomy.⁴ Certainty should be found in the clear and ordinary meaning of what has been agreed to. If not clear, the trite rules of interpretation would render it certain. As a theory, the proposition by Victor J sounds well-reasoned. However, to achieve such objective, a clear understanding on the part of contracting parties, of the restricted scope of constitutional discretion is vital. It has repeatedly been held that a court cannot make a contract for the parties, if only due to the jurisprudential value of the contractual freedom, but also for the sake of legal certainty. It makes jurisprudential sense to place the duty of certainty on contractual parties prior to commitment, instead of leaving open a backdoor based on possible judicial sympathy down the line. To the extent that constitutional principles impact on interpretation, it normally stays far away from making contracts for the parties merely on what is regarded as fair, as opposed to what was intended, evident from transcribed meaning of the ordinary words, properly interpreted.

[35] If only to provide some colourful shade to the trite principle that parties make their own contract, not to be re-engineered by a judge, the words of Frank H Easterbrook in the foreword to *Reading Law: The Interpretation of Legal Texts* by the United States Justice Antonin Scalia and Bryan Garner is apposite:

“If the final decision-maker exercises significant discretion, then it rather than the legislature (or the executive) [contractual parties] is the real author of policy [right or obligation]... Democratic choice under the constitutional plan depends on interpretative methods that curtail judicial discretion.

Curtail does not mean “eliminate.” Interpretation is a human enterprise, which cannot be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules, such as those that this book covers in detail, and misuse of these rules by a crafty or wilful judge then can be exposed as an abuse of power. A more latitudinarian approach to interpretation, by contrast, makes it hard to see when the judge has succumbed to the Dark Side of Tenure – which, like the Dark Side of The Force in Star Wars, is marked by self-indulgence.”

⁴ *Beadica* par 214, 218, and 220.

[36] The approach of the SCA in *Capitec Bank Holdings*, when criticising the approach of the court *a quo*, warns by implication against indulging into “[t]he judge’s views on business ethics”.

[37] The dividing line between such opposing extremes (provoked by seeking to impose extraneous norms upon legal documents) relates to applying interpretational principles to establish meaning, as opposed to striking down or moderating or altering unambiguous terms. There is a difference between (i) determining through interpretation what had been agreed to by the parties and (ii) what should not be enforced despite it having been agreed to.

[38] If contract-related circumstances have changed, in a manner not expressly stipulated for in the contract, the tried and tested first aid principles applicable to implied or tacit terms provide sufficient legal certainty, so as to avoid the need to rely on malleable concepts such as “*reasonableness, fairness, ubuntu, public policy, and good faith*”.

[39] A term that provides an express option to a landlord as to whether to further extend the term of a lease can never be objectively unfair. If it were to be objectively unfair, it would impact on virtually every lease agreement that provides for terms of renewal. Regularity, however, should not even enter the debate. The “*licence*” to engage in contractual arrangements implies adherence to the rules of the road. The contractual handicaps of some cannot be imposed on others at the expense of legal certainty. Legal certainty is the touchstone of commercial endeavour and of a legal system that serves all participants evenly, as opposed to preferring some who contend for impediments after engaging in the benefit of contractual engagement in commerce. Commerce spans the entirety of private and corporate ventures. Absent a capable vehicle and astute driving skills, such roads are ventured upon at one’s own risk, instead of handicapping those who came better equipped for the precarious uncertainties of the commercial landscape. There is no legal basis for imposing handicaps against professionals playing the competitive course of commercial challenge by helping others onto the fairway.

[40] If a landlord, through conduct during the contract, indicates or finds reasons not to renew a lease, it is simply in line with his unambiguous entitlement not to extend the lease for any reason, however unfair, provided the ordinary wording stipulates that. The right is unconditional, and the test is not whether the right not to have to renew is exercised in an unconstitutional manner, but whether the right when it is acquired is enforceable. Within the boundaries of lawful conduct (i.e. absent a provable express, tacit or implied term to the contrary) the ordinary meaning should be enforced. The landlord owes no explanation for deciding not to renew, and his motive for not exercising the right to renew is irrelevant.

[41] In short, save for unlawful conduct, the landlord's motive or predetermined intention, not to renew the lease constitutes extra contractual conduct unrelated to or irrelevant for purposes of interpreting a contract or determining the fairness of what had been agreed to prior to such conduct.

[42] The situation is different when based on principle, ambiguity should be resolved with reference to conduct. In this context the tenant seeks to have fairness of the terms determined with reference to conduct, as opposed to resolving disputed meaning.

[43] The tenant, with eyes wide open upon signature of the lease, agreed to the risk (of whatever nature) that the lease may not be extended, and therefore resolved itself to the reality of having to manage its commercial affairs accordingly. The inverse must be, that the lease would not have been entered into at all if the landlord had been informed that his reliance on a particular right or obligation would be dependent on how a string of courts ultimately label it in its ultimate discretion. Perhaps such a principle could assist with legal certainty: if the answer results in no agreement, then the attempt to escape liability or to enforce a right should be refused. A contractual party cannot be subjected to a retrospective discretionary constitutional result, which such a party would have had the right not to agree to if confronted with prior to signature.

[44] Once applied to the facts under consideration the answer is easy – if told that Aspara would rely on *Ubuntu* to extend the lease, despite its own non-compliance

with the renewal requirements, the Pension Fund would on simple logic or probability not have entered into the lease to begin with. Such reasoning might well be a species of the principle applicable to establishing implied or tacit terms, in particular the so-called officious bystander test.

[45] In the present matter Aspara did not even attempt to follow the agreed procedure to have the lease renewed. But even if it did, the Pension Fund had the right to say no or to change its mind in line with the sacrosanct tenets embedded through the rights of ownership, save to the extent that any subjective right had been granted to another, for example through the terms of a binding lease agreement. Any attempt to water down the sanctity of the right to ownership (by allocating use or title by contracting) through the elastic application of subjective fairness would corrode the very fibre of commercial endeavour, economic growth and stability.

[46] It is commercially conceivable that a landlord during the period of a current lease receives a better offer for the period after the termination date, which at an early stage makes it clear that the landlord would not have the intention of even considering an attempt at renewal. The landlord might prefer a different business tenant at a reduced rental or for any other consideration. Worse, or better still, the landlord might already have entered into a new lease commencing after the termination date on whatever terms.

[47] An extrapolation of Aspara's type of argument, if allowed to find rooting in litigation or by way of precedent, would give the argument legs that an outgoing tenant may refuse to vacate because the landlord entered into a new lease on more favourable terms with a new tenant.

[48] Discretionary intervention by the courts on such questions of "*fairness / unfairness*" has the risk of imposing restraint of trade or empowering the courts to become guardians of commercial conduct, despite voluntary commitment to the terms, which would undermine economic freedom, which in turn would constrict trade and industry at the fear of being regulated at the whim of the idiosyncratic views of judicial officers and at the expense of trade freedom, the latter being the lifeblood of growth and prosperity.

[49] In conclusion, Aspara has failed to put up a legal or factual basis to avoid eviction by relying on the “*reasonableness, fairness, ubuntu, public policy, and good faith*” in respect of the termination.

Costs:

[50] What remains is the question of costs. It is regrettable if not short-sighted of the Pension Fund not to have accepted the tender which had been made in court by Aspara to vacate the premises at the end of January 2024. A bird in hand is often worth three in the bush. The Pension Fund now runs the risk of possible leave to appeal and further protraction of unlawful occupation.

[51] The late stage at which the tender had been made has no bearing on a cost order, other than the need for a judgment, instead of a consent order. Ultimately costs should follow the result.

[52] By virtue of argument in this matter having been heard under the terms of an acting appointment, the realities and demands of professional practice impact on the pace at which a reasoned judgement could have been prepared and handed down, which no doubt added to the peril of the Pension Fund not accepting the tender in open court.

Order:

[53] Wherefore, the following order is made:

- a. The lease agreement entered into between the Applicant and the First Respondent on 24 November 2016 and its addendum entered into on 30 November 2019 are duly cancelled.
- b. The First Respondent and/or the Second Respondent are ordered to vacate the premises described as “*Gadget Solutions Shop 13B Bredell Square, Bredell, Kempton Park, situated at portion 464 (A portion of 5) of the farm Rietfontein No 31*” by no later than 30 June 2024.

- c. If the First Respondent fails to vacate by 30 June 2024, the sheriff of the area within which the premises is situated be authorised to eject the First Respondent and / or the Second Respondent and further remove all the movables capable of removal and any of the First Respondent and / or the Second Respondent's furniture temporarily or permanently affixed to the premises.
- d. The Respondents are ordered to pay the costs of the application to the Pension Fund, the one paying, the other to be absolved.

LUCAS J VAN TONDER AJ

Heard: 15 November 2023

Delivered: 31 May 2024

Appearances :

For Respondents: Adv. NC Nhlapho

Instructed by : Mpoyana Ledwaba Attorneys

For Respondents: Adv. H van der Westhuizen

Instructed by : Wentzel & Partners Attorneys