



**HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 18020/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
04/10/24	[REDACTED]
DATE	SIGNATURE

In the application between:

ALDO GIOVANNI CHIODAROLI N.O

DORA ELKE BANTZ N.O

MARK- COLIN LAHNER N.O

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

And

YEBOPROP 7 INVESTMENT (PTY) LTD

And

E10 PETROLEUM SA (PROPRIETARY) LTD

E10 PETROLEUM AFRICA (PROPRIETARY) LTD

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

BAQWA J:

Introduction

1. The applicant herein seeks an order for the commercial eviction of the respondent from commercial premises situated at Portion 101, Doornrandjes, Pretoria, Gauteng.
2. The respondent conducts the business of a petrol station and a convenience store from the premises.

The facts

3. On May 2016, at Pretoria, the applicants (the Trust) represented by the first applicant and the respondent represented by Asgharali Ismail entered into agreement of lease (the commercial lease agreement).
4. In term of the agreement the respondent leased from the Trust, the leased premises for a period of 5 (five) years commencing on 1 May 2016 and set to terminate on 30 April 2021 at a base monthly rental of R65 000.00 (Sixty-five Thousand Rands) including VAT per month, utility charges of R19 288.00 (Nineteen Thousand Two Hundred and Eighty-Eight Rands) excluding VAT- which was to be adjusted in accordance with Eskom tariff increases, together with a proportionate contribution to rates of R812.70 (Eight Hundred- and Twelve Rand and Seventy Cents) excluding VAT per month, which amount would be adjusted in accordance with any rate charges.

5. The respondent took occupation of the property in accordance with the commercial lease agreement and has been conducting the business of a petrol station and convenience store from the premises for the past 7 years.
6. According to the applicants the respondent has repeatedly breached the terms of the commercial lease agreement through:

6.1 Repeated late payment of rentals, rate and utility charges between September 2016 and January 2018

6.1 Repeated non-payments of rentals, rates and utility charges from May 2019 to date of application

6.3 Failing to re-instate the deposit after same was applied to arrear rentals

6.4 Failing to keep the property clean and tidy

6.5 Failing to avoid the accumulation of refuse in or about the property

6.6 Interfering with the electrical installation serving the property

6.7 Failing to keep the toilet facilities on the property clean and sanitary

6.8 Failing to provide security on the property from inception of the commercial lease agreement to date

6.9 Failing to ensure that the service station and convenience store are open for business over the period of January 2020 to March 2021

6.10 Failing to ensure that lawns and gardens of the property are maintained in a tidy and aesthetically pleasing condition

6.11 Failing to paint and maintain all structures and surface of the property

6.12 Failing to maintain the condition of the property and equipment in good order and condition

6.13 Failing to promptly repair and make good all damages occurring to or on the property

Admissions by respondent

7. The respondent has admitted the following breaches in its answering affidavits

7.1 Late payment of rentals from 2016 to 2018

7.2 Non-payment of rentals from 2018- 2019

7.3 failure to reinstate the deposit

7.4 Failure to ensure that lawn and gardens of the property are maintained in a tidy and aesthetically pleasing condition

8. The respondent has raised a defence which can be summarised as follows, firstly it was not in breach of the commercial lease- agreement and there was a valid renewal of the lease. Secondly applicant's application is fatally flawed as it failed to deliver a notice calling on the respondent to rectify its breach.

9. The respondent's further defence is that it did not have beneficiary occupation of the property for a period of about 22 months but still continued to make payments in accordance with the lease. It alleges therefore that these payments constitute overpayments and that in the circumstances it is not indebted to the applicant.
10. In substantiation of the lack of beneficial occupation, the respondent alleges that it was deprived of same for approximately 22 months of which a month was a virtual shutdown due to a provincial road on which the property is located being completely closed and diverted for road construction. According to the respondent this alleged closure was tantamount to vis major foreshadowed in the lease agreement. The respondent contends that it is entitled to a credit for the period during which it did not trade and tenders' payment of any rental due to the applicant once the alleged credit are advanced to the respondent. It is common cause, and it was confirmed by the respondent's counsel that it has not made any rental payments since February 2020 and that it has occupied the property free of charge.
11. The locus classicus regarding the interpretation of contracts and documents such as statutes is case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ in which the following was said; "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of*

¹ [2012] 2 ALL SA 262 SCA.

the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.” “The inevitable point of departure is the language of the provision itself,” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. All this is consistent with the “emerging trend in statutory construction.” It clearly adopts as the proper approach to the interpretation of documents..... that from the outset one considers the context and the language together with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.”

12. Clause 14 of the commercial lease agreement states as follows;

14. 1 The lessee shall (save as provided in clause (12.6) have no claim for damages against the lessor and may not withhold or delay any payment due to the lessor and may not withhold or delay any payment due to the lessor by reason directly or indirectly of:

14.1.1 a breach by the lessor of any of its obligations under this lease occasioned due to any event of vis major or any other cause beyond the reasonable control of

the lessor.

14.1.5 any interruption of or interference with the enjoyment or beneficial occupation of the premises, unless proven by the lessee to have been occasioned by the lessor or its employees and /or agent."

13. The respondent has committed numerous non-payment breaches as enumerated in paragraph 6 above and he has not made any payments since February 2020. These breaches are in flagrant breach of clause 14 of the commercial lease agreement and more importantly, they are not disputed by the respondent.

14. The respondent relies heavily on clause 16 of the commercial lease agreement and more particularly on clause 16.3.2 which provide as follows:

"The lessee shall not be liable for any rent for so long as it is deprived of beneficial occupation of the premises."

15. Clause 16 should however be read and understood contextually in its entirety and not be quoted selectively as the respondent purports to do. It provides as follows:

"16 Damage to or Destructions of premises"

16.1 Should the premises be destroyed or damaged to an extent which prevents the lessee from having beneficial occupation of the premises.....the lessor shall be entitled within 30 days after written notification of such destruction or damage, to determine whether or not this lease shall be cancelled, and shall notify the lessee of its decision in writing within such period.

Should the lessor not notify the lessee of its decision within such period, then it shall be deemed to have elected to cancel this lease.

16.3 Should the lessor elect not to cancel this lease, then;

16.3.1 The lessor shall re-instate, at its cost, the premises as quickly as possible in the circumstances;

16.3.2 The lessee shall not be liable for any rent for so long as it is deprived of beneficial occupation of the premises;

16. The heading or title of clause 16, namely, "Damage to or destruction" clearly indicates the circumstances to which the clause applies. In the present case there has never been an allegation of damage or destruction of the property by the respondent or any other person. The applicability of the clause does therefore not arise. Secondly the applicant has never received any notification of damage or destruction of the property. This would therefore not mean the respondent did not follow the procedure prescribed in the clause and can therefore not claim protection in terms thereof.

17. Further, to escape liability in terms of 16.3.2 respondent would have to render evidence that the property was destroyed or damaged to the extent that such damage prevented beneficial occupation of the premises and that the applicant received notice of such destruction and determined that the lease would not be cancelled by reason thereof and notified the respondent in writing of such decision.

Such evidence has not been forthcoming from the respondent.

18. Clause 14 provides that the respondent may not withhold or delay payment due to the applicant by means of breach by the applicant due to an event of vis major or any other cause beyond the reasonable control of the applicant or any interruption of, or interference with enjoyment or beneficial occupation of the premises.
19. There is no ambiguity in the language of the commercial lease agreement and it would seem that the respondent's claim to a right to withhold any rental due in terms of the agreement is not sustainable.

Estoppel

20. The respondent has become so brazen and defiant in his breach of the commercial agreement as not only to admit the several breaches committed as stated above but also to claim that the applicants are now estopped from raising the question of rental paid post the first day of each month.

Renewal of the Commercial Lease

21. The respondent claims that the commercial lease had been renewed between itself and the applicants.

Clause 4 of the agreement provides:

Duration

4.1 This lease shall become effective on the commencement date and shall

subsist for the lease period, subject to the remainder of this clause.

4.2 On the express condition that the lessee has not breached the lease during the initial lease period, the lessee shall have the option to renew the lease on the same terms and conditions for a further period of 5 (five) years after the expiry of the initial lease period...

1.1.2 "commencement date" the 1st of May 2016;

1.1.5 "Lease period" means a period of 5 years from the commencement date, as well as the period for which the lease is renewed subsequently,"

22. It is abundantly clear from the evidence tendered by the applicant that the respondent had breached the lease agreement during the initial lease period. That fact is put beyond any doubt by the respondent's own admissions.

23. It is equally evident that despite the respondent's contention that it had breached the agreement on a number of occasions and that it continues to do so from 20 February 2020 to date. It still contends that it validly renewed the commercial lease agreement on 29 October 2020. It is self-evident that when this contention is examined against the contents of clause 4.2 of the commercial lease agreement, it is factually and legally not sustainable.

24. A similar matter was adjudicated by the Appellate Division in *OK Bazaars (1929) Ltd v Cash-in CC*² which concerned a lessee's right to renewal where the lessee was in breach of the terms of a commercial lease agreement. The renewal clause

² [1994] 3 ALL SA 570 (AD).

in dispute stated:

"3 Right of Renewal

3.1 Provided the lessee shall have faithfully carried out the terms and conditions of this lease and provided the lessee is in no way in default hereunder at the expiration of the lease, then the lessee shall have the right of renewing this lease for a further period of nine years and 11 months upon the same conditions and at the same rental as herein set out save that there shall be no further right of renewal.

3.2 In the event of the lessee desiring to exercise the right of renewal aforementioned, written intention to exercise such option must be given to the lessor not less than six months before the date of expiry of this lease, failing which such before the date of expiry of this lease, failing which such right of renewal shall cease."

25. The court in (OK Bazaars) interpreted the provision of clause 3 in the following manner:

- i. *"Notice must have been given in terms of clause 3.2;*
- ii. *The lessee must in no way be in default under the lease at its expiration; and*
- iii. *As at that that date the lessee must have faithfully carried out the terms and conditions of the lease."*

26. The appellate division referred to the court a quo's is interpretation with approval

where Hoexter AJ said (at p575)

“For the reasons which follow I consider that Scott J correctly construed the meaning of clause 3. In construing clause 3 as he did, the trial judge relied upon the decision of a Natal Full Court in Seaborn v Smith.³ In that case a lessor applied for the ejectment of his lessee under a written lease and there fell to be interpreted clause 11 of the lease which stated (at 34 IG);

“The lessee observing all the terms and covenants of this lease shall have the right after the expiration of the term hereof to renew this lease for a further period of three years....., provided she gave written notice of her intention three months before the expiry of the original terms of the lease. From time to time the lessee had failed to pay rent an due date. Before the expiration of the original lease, the lessee wrote stating that she intended to exercise of the original lease. The lessor replied by letter that such option to renew had been forfeited through the lessee’s failure to pay rent timeously. After this letter by the lessor the lessee again paid her rental late; and she did not vacate at the end of the lease.”

In the court of the first instance the learned judge held that as the lessee could exercise her right of renewal provided that at the date of giving such notice she had paid her rent to date, and that she had remedied any previous breaches. This decision was reversed on appeal. The full court ruled that the right of renewal could not come into existence until the end of the lease, and therefore that the lessee’s performance should be examined until the end of the lease. Assuming in favour of the lessee that the lessor had previously waved payment

³ 1955 (4) SA 339 (N).

of rent, the full court proceeded to hold that the lessee's late payment after the lessor's aforementioned letter was a breach and that the lessee had therefore forfeited the right to renewal.

Waiver

27. Whilst the appellate division seemed to have considered the issue of late payments to have been waived by lessor in favour of the lessee that issue ought to be treated differently in the present case as Clause 24 deals with the issue as follows:

"Non Waiver

No waiver of any of the terms and conditions of this Agreement will be binding for any purpose, unless expressed in writing and signed by the party giving the same, and any such waiver will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either party in exercising any right, power or privilege will operate as a waiver, nor will any single or partial exercise of any right, power or privilege or indulgence preclude any other or further exercise of any other right, power or privilege."

28. In the present case the issue of waiver is specifically excluded unless expressed in writing and signed by the author.
29. Consequently, the respondent's persistent late payment of rent amounts to a specific breach of the terms of the lease agreement with specific reference to clause 5 which provides that rental shall be paid monthly in advance by no later

than the first day of each and every month. The applicant's perceived acceptance of the respondent's late payment did not amount to a waiver or variation of the terms of the commercial lease agreement in so far as it concerned the respondent's obligation.

30. In the present case, therefore, the breach occurred long before the respondent addressed the purported letter of renewal and continued even after the applicant had written a letter to the respondent informing it that a renewal was not possible due to its breaches as provided for in the commercial lease agreement. The decision of the applicant is therefore squarely within the precedent set in the *OK Bazaar* case.

Absence of Breach Notice

31. Clause 4 which has been referred to and quoted earlier in this judgment affords the respondents no more than a conditional right to renew the lease upon its expiry by effluxion of time. In this case, there is no question of termination or cancellation of the lease which would necessitate a breach notice.
32. During his address at the hearing of this application, counsel for the respondent seemed to conflate cancellation with effluxion of time and referred to an earlier application which had been brought by the applicant but later withdrawn which seemed to have been brought as a cancellation application. That application has no relevance to the present proceedings.
33. In this application the applicants rely on the expiry of the lease due to the effluxion of time. They are therefore not required to deliver a breach notice in accordance

with clause 17 of the commercial lease agreement.

Referral to trial

34. The respondent also seeks that this matter be referred for trial and submits that there are disputes that cannot be resolved on paper. Upon suggesting to him by this court that the relationship between the parties is governed by a written lease agreement which fully addresses whatever points of disagreement there may be, he was hard pressed to provide a satisfactory response. Moreover, the respondent admits some of the breaches alleged by applicant which further dissipates any need for oral evidence in a trial.

Intervening Parties

35. The relationship between the intervening parties would seem to be that of business partners with the respondent in that they supply petroleum to it for purposes of trading as a petrol station.

36. Even though their interest seemed to be the underground petrol tanks and pipes, their existence was irrelevant to the resolution of the current application. They did not address any of the matters raised in the founding affidavit. Instead of addressing the court on those issues, they merely supported the respondent in praying for the dismissal of the application without advancing any valid reason for asking for such dismissal. The applicant had to make "application to compel" the applicants and the intervening parties to file heads of argument. He submits that

was because they were all intending to delay the hearing of the matter unduly in order to enhance their business interests:

37. The respondent has remained in occupation and possession of the property after the expiry of the lease and to add insult to injury they have not paid any rental since February 2020.

I find that the respondent's continued occupation is unlawful and severely prejudicial to the applicant.

38. In the result I make the following order:

1. The respondent is evicted from and is directed to vacate portion 101, Doornrandjes, Pretoria, Gauteng Province ("the property") within 30 days from the date of this order:
2. Should the respondent fail to comply with paragraph 1 above, the sheriff of the high court, or his lawful deputy, for the area within which the property is situated is authorised to evict the respondent from the property.
3. In the event of the respondent re-occupying the property after eviction referred to in paragraph 1 to 2 above, the sheriff of the high court, or his lawful deputy, for the area within which the property is situated, is authorised to re-evict the respondent from the property.
4. The respondent and intervening parties are ordered to pay costs of the application including costs of counsel on attorney and client scale, jointly and severally, one to pay the other to be absolved.



SELBY BAQWA J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

Date of Hearing:

13 August 2024

Judgment delivered:

04 October 2024 
~~September~~ 2024 

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