

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 04863/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE

SIGNATURE

In the matter between:

**SILVERBIRD PROPERTY DEVELOPMENT CC
T/A SIGNET TERRACE SHOPPING CENTRE**

Applicant

and

**KHANS TYRES AND EXHAUST CC T/A
SUPER WHEEL & TYRE**

Respondent

JUDGMENT

PJ DU PLESSIS AJ

In this opposed motion application the request is for a commercial eviction of a long term tenant (Respondent) who unilaterally extended his lease on the expiry date. This despite having been given notice by the Applicant that his lease and the extension afforded in their lease agreement is cancelled due to major renovations.

- [1] The Applicant submitted from the onset that the Respondent had a right to renew the lease. He however stated that against that right, is his to terminate the lease if certain provisions are met, which he did meet on the facts, therefore the lease was lawfully cancelled on the extension date, bringing the matter to an end.
- [2] If the court were however to disagree with the Applicants lawful cancellation the renewal clause, 4, has a proviso the Respondent didn't comply with. This is that there must be written consensus between the parties three months prior to the expiry date of the lease or the agreement will terminate on the expiry date. This wasn't complied with so he remains in unlawful occupation since 31 August 2023 and should be evicted.
- [3] The Responded retorted that the addendum agreement of lease to clause 4 already contains the consensus as it holds in point 11 "The option to renew being available at the end of the term" and ends off the addendum with "Please note, all other clauses remain the same as the previous lease agreement"
- [4] There are fourteen listed terms in this addendum which include, mention of the parties and the property, their operating times, basic monthly rental for the next three years, the annual compounded escalation rate of 10%, the current agreement expiry date and a few others. The addendum before court is the addendum signed in October 2020 valid 1 November 2020 to 31 October 2023.
- [5] The Responded submits the Applicant never gave notice in terms of the agreement to cancel the lease, only saying he is not renewing it. As proof of this contention the court was referred to "FA 6" to the founding affidavit, a letter from the Applicants attorney to Respondents attorney dated 16 March 2023 which states in par 5 "Our client did not cancel the lease agreement instead they made a polite decision to advise your client, well in advance, that they would not be in a position to renew the lease agreement in October 2023, this is due to the fact that our client will be renovating the premises"
- [6] The parties therefore at the same time wished to exercise their available options / rights which are in conflict with each other. The court is called upon to resolve this deadlock.

- [7] A recent not too dissimilar case marked, reportable, was decided by Lucas J van Tonder AJ, in the matter of *Municipal Employees Pension Fund v Aspara and another*.¹
- [8] It is my finding that if there is ambiguity in a lease agreement, on which condition / “right” (cancellation or extension) should prevail, the termination clause if enacted fairly and correctly, in compliance within the provisions of the signed lease, should prevail. Such a view will always break the deadlock in matters where lease agreements are not specific whether cancellation or extension must prevail.
- [9] If the lessee therefore in accordance with the lease agreements provisions exercises his right of renewal, the lessor should generally accept the renewal unless terminating it for valid reasons specified in the lease.²
- [10] The entering into a contract of lease is a risk each party is willing to engage in and they do so voluntarily, signing up for conditions that may hurt later due to “venturing onto the unpredictable ocean of commercial reality”. Legal certainty is given to such an Agreement as parties must keep their word (*pacta sunt servanda*) agreed on, and cannot retrospectively assign blame for risks they willingly engaged in.³

BACKGROUND

- [11] The Applicant is the owner of the Signet Terrace Shopping Centre in Lenasia. The Respondent is the owner of Super Wheel and Tyre, leasing and doing business there since 2008. The lease has been renewed for a three year period

¹ (2023/009050) [2024] ZAGPJHC 530 (31 May 2024)

² *MEPF v ASPARA* Par 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.”

³ *MEPF v ASPARA* Par 33

at a time on the same terms and conditions with is a 10% rental escalation annually.

[12] The Applicant admits the Respondent to be good tenant especially when it comes to rental payment, which he has even complied with since his unilateral action of lease extension in October 2023. This action of the Respondent, the Applicant says, caused unlawful occupation since 1 November 2023 of the commercial property premises and he must be evicted forthwith.

[13] The Respondent claims he invoked his renewal right therefore he may still lawfully lease the premises until 31 October 2026. He however seem to have acquired a new location for his business and has indicated he is willing to vacate the premises by 31 October 2025.

ANALYSIS

[14] The court will now on the evidence, interpret and adjudicate the lease conditions applicable. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ the Supreme Court of Appeal on the interpretation of contracts said that it is an objective process to give a sensible meaning to the purpose of the document. Important is the context within the provision and the reason for its existence. The language, grammar and syntax used must be considered to determine the apparent purpose for the parties involved. If more than one meaning is possible the objective sensible one should prevail.

[15] The termination clause in this matter is found in the lease agreement under point 23 RE-BUILDING: Apparent from this provision is that the Lessor (Applicant) may give 6 (six) months written notice of agreement termination, **or any renewal thereof**, if the premises or building is going to be demolished; or if reconstruction / redevelopment / renovation, of a substantial and major nature is taking place.

[16] The renewal of the lease is dealt with under point 4 of the lease agreement titled RENEWAL PERIOD. Apparent from this provision is that the Lessee

⁴ 2012 (4) SA 593 (SCA).

(Respondent) has an entitlement to renew the Agreement by giving 6 (six) months written notice prior to the expiry date of 31 October 2023, therefore on or before 30 April 2023. The proviso being that “*written agreement* is reached and signed by or on behalf of the parties *at least 3 (three) calender months prior to the expiry date* (31 October 2023, therefore on or before 31 July 2023), failing such consensus this Agreement will terminate on the expiry date.”

[17] There is also for consideration the ADENDUM referred to in par [4] supra on which the Respondent is heavily reliant.

[18] The common cause facts of the parties are

18.1 That the Applicant is the owner of the commercial premises and therefore PIE⁵ and ESTA⁶ does not apply.

18.2 The Respondents passed and present occupation and the terms and conditions of the 2013 lease Agreement and 2020 addendum thereto.

18.3 They further admit the original 2013 lease agreement is lost, but identical to the one provided to the court.

18.4 All the communications they had with each other and their attorneys provided to the court.

[19] The factual chronology of the parties are that on 24 February 2023 the Applicant, via Whatsapp communication informed the Respondent that the lease Agreement will not be renewed due to intended extensive renovations. The Respondents reply to this was to ask for an extension of time for relocation.

[20] On 2 March 2023 on a Signet Terrace letter head is indicated in writing par 2: “You are hereby notified that your lease agreement will not be renewed, you are

⁵ Act 19 of 1998

⁶ Act 62 of 1997

therefore required to vacate the premises on the 31st of October 2023” Notably the reason “intended extensive renovations” is omitted.

[21] On 9 March the Respondent through his attorney in a letter to the Applicant replied that Applicant is “bound to the terms and conditions of the lease agreement ... inter alia, the option to renew the lease ...) also that Respondent “... does not accept your (Applicants) purported cancellation of the lease agreement ... ”

[22] This started a “To and From” by the attorneys and their correspondence content I will not deal with except where necessary. The important aspect however is that in a letter by the Respondents attorney to the Applicants attorney dated 24 April 2023 is written: “2.1 our client wishes to exercise its right of renewal, this is based on past renewals”

[23] Although the Applicant never expressly mentioned the reason for the non-renewal as per par 20 supra, in his attorneys letter of 25 April 2023 par 3 and 4 the reason (renovation) for it is made very clear.

[24] It is therefore my finding that both parties Applicant and Respondent gave their respective written notices (non-renewal and renewal) timeously in terms of the lease agreement. The submissions of the Respondent in par 5 supra is therefore rejected.

[25] The question now is, if the provisions to these conditions on the express terms of the lease agreement were met by both Applicant and Respondent.

[26] Attached to the founding affidavit is “FA 15” which details extensive demolishing and building which to my mind satisfies and proves the Applicants compliance with his proviso to terminate or cancel renewal of the agreement. This is what he is entitled to do - he has complied with it and therefore this should be the end of the matter as Adv Lubbe submitted.

[27] I agree, but continue to provide context for my finding and clarify misapprehensions many legal representatives have regarding obligations willingly agreed to and wanting to then attack in litigation these agreed to

obligations under the guise of good faith (fairness and Ubuntu). Using it as a basis to challenge enforcement of contractual terms by one party stating it to be contrary to public policy, to the extreme that a right to renewal can be forced upon the Applicant. This needs to be corrected.

[28] The proviso that befalls the Respondent is that “written agreement is reached and signed by or on behalf of the parties at least 3 (three) calendar months prior to the expiry date, failing such consensus this Agreement will terminate on the expiry date.”

[29] The Respondent did repeatedly ask for mediation and even offered to leave the premises after two years, not the usual three years when he regarded the lease as renewed.

[30] There is mention in Respondents attorneys letter of 13 July 2023 that the Applicant is “determined to treat the dispute unilaterally as if the landlord has rights”. Also par 6 of the letter referring to the terms of Agreement par 4.1 that the Applicant must negotiate with them in “good faith” stating their availability in June 2023.

[31] This is clearly the attorney noting the proviso they have to comply with as mentioned in par 28 supra (signed written agreement 3 months prior the expiry date of the lease or it will terminate) and most probably realising as the Applicant has applied his right to cancel the lease and not extend due to major renovations, he will therefore never come to the table to mediate or “assist” the Respondent in a way that would prevent the right he invoked.

[32] These requests for mediation and “good faith” disregards the fundamental dividing line between an unambiguous obligation willingly agreed to, as opposed to whether the obligation offends their idea of good faith where the clarity of the obligation is evident. It does not relate to the reasonableness of the terms of the

contract agreed to, but rather an extra contractual conduct the Applicant can perform in enforcing his rights in the terms of the contract.⁷

[33] I accordingly find that the Applicant lawfully and in terms of the lease agreement cancelled the lease. The Respondents unilateral renewal of the lease based on the addendum and his subsequent occupation of the leased property is declared unlawful from 1 November 2023. Respondent is to vacate the premises failing which he stands to be evicted as per the order below.

[34] The Respondent did request due to the nature of his business which will require riggers and the like to vacate the premises, that if the court finds against him, he be afford at least 3 months to vacate the premises they have occupied for 17 years.

[35] The Applicant indicated that the respondent saddled this horse 16 months ago, actually 22 months if the notice period which was ignored is also calculated. Giving the Respondent another 3 months will take the matter to end of May 2025 which will defeat the purpose almost of the litigation as he offered to go by himself on 31 October 2025. He has been aware of the litigation and should have prepared for a negative outcome. The Applicant requested that he vacate immediately.

[36] The court aware of the parties past good relationship and the nature of the business equipment that must be vacated from the premises, is prepared to afford the Respondent time until 31 March 2025 to vacate, as per order below.

COSTS

[37] The lease agreement at point 33 indicates the Lessor (Applicant) “at his option” *may* bring any action or application arising from the lease agreement in the Magistrates Court with jurisdiction even if the amount exceeds the Magistrates Courts jurisdiction.

⁷ *MEPF v ASPARA* Par 23-24

- [38] There is however also in the lease agreement point 26.2 under the heading INTEREST AND LEGAL COSTS, which I initially thought only applied to outstanding lease payments, however the following sentence is appropriate and convinced me otherwise: "...The Lessee shall be liable for any costs and disbursements incurred by the Lessor in *enforcing any of its rights or the Lessees obligation* in terms of this lease on an attorney / own client scale ...)
- [39] The Respondent referred to a lot of case law indicating scale A of party and party cost should be awarded. The Applicant in their suggested order asked for scale B cost due to the annual lease of the Respondent being R720 000 per year. Both parties also referred to the Magistrates Court having jurisdiction as per the agreement.
- [40] Coming from the Magistrates Court, I am aware that there are many similar commercial evictions dealt with daily. Despite this truth it is clear to me that par 37 supra and the reference made therein affords the Applicant a discretion. The wording of the reference in par 38 supra however is clear on liability the lessee (Respondent) will incur. Having just emphasised in my judgment the fact that parties willingly agree to their obligations in terms of an agreements and are bound thereto the cost order will be made in accordance with their agreement.

Order

- [41] See "X" attached



**PJ DU PLESSIS AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of

the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 03 March 2025.

For the
Applicant: Adv. Jan Lubbe

instructed by: V Mohan Attorneys

For the
Respondent: Adv LCM Morland

instructed by: Aashia Saloojee
Attorneys & Conveyancers