

## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2025-028819

|                                                                                                                                                                                        |                                                         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------|
| (1)                                                                                                                                                                                    | REPORTABLE: <del>YES</del> / <u>NO</u>                  |
| (2)                                                                                                                                                                                    | OF INTEREST TO OTHER JUDGES: <del>YES</del> / <u>NO</u> |
| (3)                                                                                                                                                                                    | REVISED.                                                |
| <div style="text-align: center;"> <br/>             _____<br/>             SIGNATURE           </div> |                                                         |
| DATE<br><u>27 March 2025</u>                                                                                                                                                           |                                                         |

In the matter between:

CTI COLDSTORE (PTY) LTD

Applicant

And

CHILLEWENI COLD STORAGE (PTY) LTD

Respondent

*This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The Order is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of this Order is deemed to be 27 March 2025.*

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**JUDGMENT**


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## Introduction

- [1] On 14 March 2024, the applicant, CTI Coldstore (Pty) Ltd ("**CTI**"), and the respondent, Chilleweni Cold Storage (Pty) Ltd ("**Chilleweni**"), entered into a written sublease agreement ("**the agreement**") under which CTI would lease a commercial property from Chilleweni.
- [2] The agreement commenced on 1 April 2024 for a fixed period of one year and automatically terminates on 31 March 2025. It does not provide for the right (or option) to renew but offers a right of first refusal in favour of CTI, which will be addressed later in this judgment.
- [3] In this urgent application, CTI seeks a *mandamus* requiring Chilleweni to "*honour the right of first refusal*" clause in the agreement.<sup>1</sup> CTI states this will extend the current lease period until September 2025.<sup>2</sup>
- [4] Chilleweni opposes the relief sought. Its main argument is that it does not intend to re-lease the premises; therefore, the right of first refusal was not triggered. It plans to use the premises for its cold storage business starting 1 April 2025.
- [5] In its counterapplication, Chilleweni seeks an order declaring that the agreement will terminate on 31 March 2025. Additionally, it seeks an order for CTI to vacate the premises on or before 31 March 2025, failing which, the sheriff may evict CTI from the leased premises.

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<sup>1</sup> This is a reference to clause 2.6(a)-(e) of the agreement.

<sup>2</sup> At the hearing of the matter CTI abandoned the relief in Part 1 of the notice of motion.

[6] Clause 2.6 of the agreement governs the “*Right of First Refusal*” and is quoted in relevant part:

- “(a) *Notwithstanding any other provisions of this Agreement, the Lessee shall have the Right of First Refusal to lease the Premises after the Termination Date if the Lessor intends to re-lease the Premises or any other phase or portion of the premises. [my emphasis]*
- (b) *Not less than 60 days prior to the Termination Date, the Lessor shall present the Lessee with a proposed new lease agreement (**New Lease Agreement**). This renewal shall extend the lease term for an additional fixed period of at least five years. Other than the duration of the New Lease Agreement, the remaining provisions of the New Lease Agreement will be determined by the Lessor, reflecting the reasonable market conditions and circumstances prevailing at the time of renewal.*
- (c) *The Lessee shall have 30 days from the date of receipt of the New Lease Agreement to agree to its terms by signing it.”*

#### **The effect of clause 2.6 of the agreement**

[7] Clause 2.6 is a typical right of first refusal recognized in our law. In its simplest form, if Chilleweni intends to re-lease the premises, it must give CTI preference in concluding a new lease agreement over other prospective lessees<sup>3</sup> (on terms determined by Chilleweni). Chilleweni cannot be compelled to re-lease the premises, as the decision remains entirely with it.

[8] The wording of clause 2.6 is clear and unambiguous and does not require anything by way of extensive or restrictive interpretation.

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<sup>3</sup> *Soteriou v Retco Poyntons (Pty) Ltd* 1985(2) SA 922 AD.



[9] Clause 2.6 does not require Chilleweni to enter into a new lease agreement with CTI; it only necessitates that Chilleweni provide CTI with a new lease agreement **if** it intends to re-lease the premises. In such a case, the new lease agreement must be presented to CTI no less than 60 days before 31 March 2023. Chilleweni will determine the terms of the new lease agreement.

[10] The parties entered into the agreement willingly. Freedom of contract is a constitutional principle. CTI does not argue that any term of the agreement violates public policy or constitutional values. CTI seeks to enforce clause 2.6 of the agreement.

[11] In **Barkhuizen**<sup>4</sup> the Constitutional Court held:

*"[15] I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgment. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of the parties' relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control."*

[12] Courts must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. In **Endumeni**,<sup>5</sup> the Court held:

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<sup>4</sup> **Barkhuizen v Napier** 2007(5) SA 323 CC

<sup>5</sup> **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 SCA

[18] ... In a contractual context it is to make a contract for the parties other than the one they in fact made. 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.

[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges* NO and another, namely 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. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.' [my emphasis]

[13] In **Brisley**<sup>6</sup> the Constitutional Court continued:

[56] There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause.

[57] The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight

<sup>6</sup> **Brisley v Drotsky** 2002 (4) SA 1 SCA



*that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.”*

[14] *Pacta sunt servanda*<sup>7</sup> is still alive and well. Its application must be moderated by the constitutional values of equality and dignity. There is no indication that clause 2.6 contradicts these values.

[15] Applying the above principles, the matter before the Court concerns a commercial contract voluntarily entered into by business entities regarding commercial property. It is reasonable to accept that the purpose of clause 2.6 was to terminate occupation by 31 March 2025 if Chilleweni did not wish to re-lease the premises. There is no reason to refrain from enforcing the terms of the agreement.

[16] The right of first refusal has not come into effect because Chilleweni will use the premises and does not intend to lease it to anyone else. The answering affidavit makes this clear.

[17] In its founding affidavit, CTI asserted that Chilleweni was planning for a third party to occupy the premises and that an agreement would be finalized with this third party. However, no evidence supports these claims beyond CTI's assertion. According to the principles established in ***Plascon Evans***<sup>8</sup>, the respondent's version- that it will use the premises and does not intend to lease it- must prevail. There is no reason to reject Chilleweni's version.

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<sup>7</sup> Meaning that agreements must be kept.

<sup>8</sup> ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 A.

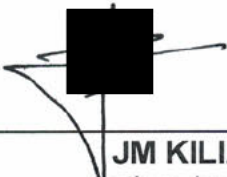
- [18] The relief sought by CTI is not competent. This Court cannot compel Chilleweni to enter into a new lease agreement with CTI. The 60-day time limit in 2.6(a) has long since passed. It is for Chilleweni, and not this Court, to determine the terms of a new lease agreement, assuming that the right of first refusal was enforceable.
- [19] Counsel for CTI argued that it is entitled to the relief sought because it would promote simple justice between the parties. Furthermore, since representatives of Chilleweni allegedly made fraudulent misrepresentations to CTI and created expectations of a future five-year lease that would be concluded, CTI should be allowed to maintain tenancy until September 2025; otherwise, it will suffer harm.
- [20] Fraud is not easily inferred. Moreover, CTI's conduct does not indicate that it was improperly induced to agree. It signed the agreement, took possession of the premises as stipulated, paid the monthly rent, and now seeks to enforce compliance with the agreement. However, for the reasons stated above, this Court does not need to make any findings regarding the alleged misrepresentations.
- [21] Consequently, CTI failed to establish a case for the relief sought. In contrast, Chilleweni made a case for the declaratory relief sought in its counter-application.
- [22] Counsel for CTI argued that this Court cannot order CTI's eviction now, as doing so would be premature. CTI is not currently unlawfully occupying the premises.
- [23] However, if CTI does not vacate the premises after the agreement terminates at 24:00 on 31 March 2025, it will unlawfully occupy the premises. There is no good reason not to grant all the prayers as set out in the counterapplication.

[24] The following order is issued:

- 24.1. The application is dismissed, with costs, including costs arising from the engagement of two counsel, at Scale C.
- 24.2. It is declared that the Storage Sublease Agreement entered into between the respondent, as sublessor, and the applicant, as sublessee, on 14 March 2024 in respect of the "Premises" as defined therein, namely, Phase 2 of Erf 161 City Deep Extension 1 Township, Registration Division IR, Province of Gauteng, measuring 1,8321 hectares and Portion 3 of Erf 48 City Deep Extension 1 Township, Registration Division IR, Province of Gauteng, measuring 264 square metres, both held by Deed of Transfer T59795/1994 as depicted in annexure 1 to the Storage Sublease Agreement, will terminate at 24:00 on 31 March 2025.
- 24.3. The applicant is ordered to vacate the premises referred to in paragraph 24.2 above on or before 24:00 on 31 March 2025.
- 24.4. In the event of the applicant failing to comply with prayer 24.3 above, the sheriff, or his lawful deputy, of this Court for the area within which the premises is situated is hereby authorised to evict the applicant and all persons holding under it from the premises referred to in paragraph 24.2 above, and to take such lawful steps as may be required to effect such eviction, including engaging the assistance of the South African Police Service.



24.5. The applicant shall pay the costs of the counter application, including the cost consequent upon the employment of two counsel, on Scale C.



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**JM KILIAN**  
Acting Judge  
High Court of South Africa  
Gauteng Division, Johannesburg

For the Applicant:  
Adv K Howard

For the Respondent:  
Adv P Rood SC with Adv J Brewer

Date of hearing: 25 March 2025

Date of Judgment: 26 March 2025