

SOUTH AFRICA / JUDGMENT

Atlantis Property Holdings CC v Atlantis Excel Service Station CC (40742/2017) [2018] ZAGPJHC 120 (4 May 2018)

[2018] ZAGPJHC 120

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

40742/2017

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REPUBLIC OF
SOUTH AFRICA
IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

Case

Number: 40742/2017

4/5/2018

In the

matter between:

ATLANTIS
PROPERTY HOLDINGS
CC
Applicant
And
ATLANTIS EXCEL
SERVICE STATION CC
Respondent

JUDGMENT

- [1] This case involves the enforcement of a commercial lease agreement. The property in issue was rented for the purposes of conducting the business of a fuel filling station and convenience store.
- [2] For the most part, the terms of the lease are commonplace and uncontroversial. The duration of the lease is stated to be for an “initial period” of six months. After the initial period and provided that the lessee maintained payments of all amounts due and owing under the lease on due date, without incurring any penalties or interest in terms of the agreement the, lease would automatically be extended for a further period of 36 months which is termed the “renewal period”. The lease is currently within the 36 month renewal period.
- [3] The lease grants the tenant an option to renew the lease after the expiry of the renewal period on the same terms and conditions. The option is exercised by the tenant giving written notice to the landlord, three calendar months prior to the expiry of the lease. The landlord then has the right to refuse to renew the lease which refusal must be conveyed to the tenant within 7 days. In the event of the option not being exercised or granted, the lease will automatically terminate on the expiry date (i.e. the end of the renewal period) and the tenant will be obliged to vacate the premises without notice.
- [4] Thus simply put: once the period of automatic renewal is entered, the tenant has a period of three years to occupy the premises with a further option to renew provided the landlord agrees to such further renewal. Importantly, the extent of further renewal period is not defined.
- [5] Clause 22 of the lease is the contentious clause for the purposes of this application. It provides that the parties "expressly and irrevocably record" that the lease may be terminated by either party on 30 days' notice. The applicant contends that this clause constitutes an “escape” provision for both parties and that it operates during the full period of the lease. It has purported to exercise clause 22 by giving 30 days' notice and, such notice having run, it now seeks the eviction of the respondent. The respondent opposes the application for eviction on the basis inter alia that it contends that the meaning attributed to clause 22 by the applicant is untenable.
- [6] I am inclined to agree with the respondent. Reference to the lease as a whole reveals that such a meaning would have no sense within the context of the lease. The clause can only have a sensible meaning on the basis that it must be taken to refer to the time period after the prescribed initial and renewal periods have run their course and there has been an option to renew the lease exercised by the tenant and accepted by the landlord. Indeed it is a normal approach to written leases generally that, on expiry of their defined period they are allowed to run from month- to- month. If the 30 day cancellation provision had the effect that

it could be exercised at any stage, this would render the detailed commercial terms provided in relation to the initial and renewal

periods, meaningless.

- [7] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) at [26] Wallis JA stated as follows:

“in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language

used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical,

unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.” (Footnotes omitted).

- [8] To my mind, the plain meaning of the lease, read in context, is that it is no more and no less than the usual commercial arrangement which allows for an initial structure and thereafter allows the lease to run on a month-to-month basis if this is agreed per the exercise of the option. Indeed the applicant does not attempt to assert that there are special considerations which would accommodate such an extreme deviation from the norm.
- [9] This interpretation is fortified when reference is had to clause 5.13. This provides that, should the tenant vacate the premises “for any reason” within the lease period, it shall be liable for the rental payable for the full balance of the duration of the lease period until a suitable tenant has been found. This clause cannot mean that the tenant can simply be given 30 days to vacate the premises within the set periods and that the tenant would then be entitled to claim for the unexpired period of the lease. Such a clause would be so inherently inequitable as to be unenforceable for public policy. The lack of certainty which would be occasioned by such a term would also be contrary to all reason in a commercial context: why should a business concern make the necessary commitment of resources to the fitting out of the business at the premises and to the creation of goodwill there – if this can be brought to naught within a matter of weeks at the whim of the landlord?
- [10] Thus, the purported cancellation under clause 22 is invalid given that the lease is still within its 36 month renewal period.

- [11] Thus, I make the following order:

1. The application is dismissed.
2. The applicant is to pay the costs.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

Date of Hearing: 25 April 2018

Judgment

Delivered: 04 May 2018

APPEARANCES:

For the Applicant: Adv D Vetten Instructed by Edward S Classen & Associates.

For the Respondent: Adv S Ress Instructed by Naicker Ooni Wadia Inc.

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