

SOUTH AFRICA / JUDGMENT

Bartie N.O. and Others v Fraaikem Pharmacy (Pty) Ltd (A236/2021) [2022] ZAWCHC 157 (17 August 2022) [2022] ZAWCHC 157

COURT

Western Cape High Court, Cape Town

BEFORE

Mangcu-Lockwood, J M Hlophe, M Samela

CASE / FILE NUMBER

A236/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No.:A236/2021

In

the matter between:

EDWARD
EDWIN BARTIE
N.O.
First Appellant
SUZAAN
MEYER
N.O.
Second Appellant
EDUARD
DAVID RAS
N.O.
Third Appellant
(in
their capacities as Trustees of
Edza
Claud Trust IT T. 469(K)
and
FRAAIKEM
PHARMACY (PTY)
LTD
Respondent

JUDGMENT

DELIVERED ELECTRONICALLY ON 17 AUGUST 2022

MANGCU-LOCKWOOD, J

A.

INTRODUCTION

[1] This is an appeal, with leave of the Supreme Court of Appeal (SCA), against the judgment of Papier, J in which he dismissed the appellants’

(“the Trust”) application for eviction of the respondent (“Fraaikem”) from the Trust’s business premises.

[2] The Trust had entered into a lease agreement with an entity called Fraaiuitsig Medies CC (“Fraaiuitsig”) for the latter to conduct a pharmaceutical business in its business premises. The lease agreement was effective from 1 June 2014 to 31 May 2019, after which Fraaiuitsig would have the right to renew the lease for a further five years after giving six months’ written notice.

[3] It is common cause that sometime in 2017 Fraaiuitsig informed the Trust of its intention to sell the pharmacy as a going concern to one Erika Bossert, although the full details of that communication were not part of the court a quo’s proceedings. The written response of the Trust, dated on 25 August 2017, was as follows:

“Ons neem kennis van u skrywe van 26 Julie 2017. One verwys u na paragraaf 6 van die kontrak. Ons gee toestemming dat u die besigheid mag verkoop aan Erika Bossert. Die kontrak bly egter van krag tot 31 Mei 2019, waarna u onthef sal word van u kontraktuele verpligtinge. Vir die tydperk tot 31 Mei 2019 kan u die besigheid onderverhuur aan gemelde Erika Bossert.”

[4] Clause 6 of the lease agreement provided as follows:

“SUB-LETTING, CESSION AND CHANGE IN OWNERSHIP/ MEMBERSHIP/ SHAREHOLDING/ DIRECTORSHIP

6.1 The lessee shall not:

6.1.1 cede, assign, mortgage, pledge or in any manner deal or purport to deal with any of its rights or obligations under this Lease;

6.1.2 sub-let the premises or any portion thereof; or

6.1.3 place anyone else, whether as licensee, agent, occupier, custodia (sic) or otherwise in occupation of the premises or any part thereof on any terms whatsoever for any reason whatsoever without the Lessor’s prior written consent.

6.2 No change in the ownership, membership, shareholding or directorship of the Lessee shall take place without the written consent of the Lessor, which consent shall not be unreasonably withheld.”

- [5] The business of Fraaiuitsig was sold with effect from 1 August 2017, not to Erika Bossert, but to an unnamed “company to be established”, which, in the end was Fraaikem. Fraaikem was incorporated on 15 August 2017, and Erika Bossert was one of its directors. After the business sale, the Trust sent the monthly rental invoices directly to Fraaikem, and received rental payment directly from Fraaikem.
- [6] On 3 December 2018 Fraaikem sent e-mail correspondence to the Trust informing it of its intention to renew the lease agreement, and requesting that the renewed lease should be between it (Fraaikem) and the Trust.
- [7] The Trust responded on 23 May 2019, per its financial assistant Ms Marissa Botha, stating: “Ek wil graag die nuwe huurkontrak opstel. Kan ek asb vra vir afskrifte jul company registrasie papiere en ID’s van direkteure?” After the requested details were provided by Fraaikem, Ms Botha forwarded an email on 27 May 2019 attaching what she referred to as a “hernuwingskontrak” for Fraaikem’s “aandag en ondertekening”. The lease agreement attached to Ms Botha’s e-mail of 27 May 2019 stated that it was between the Trust and Fraaikem, and was to commence on 1 June 2019.
- [8] On 28 June 2019 the Trust addressed a letter to Fraaiuitsig and Fraaikem, giving Fraaikem notice to vacate the premises by 31 July 2019 on the basis that the option to renew the lease agreement was not exercised by Fraaiuitsig as required by the original lease, and that Fraaikem was occupying the premises without any lease agreement. On that same date, Fraaikem attempted to deliver a signed copy of the lease

agreement of 27 May 2019, which the Trust refused to accept.

- [9] Thereafter, the parties engaged in correspondence, some of which involved unsuccessful negotiations of a 12-month lease agreement, after which the Trust approached the court a quo for the eviction relief.

B. PROCEEDINGS IN THE COURT A QUO

- [10] In essence, the Trust’s argument in the court a quo and on appeal, is that its lease agreement with Fraaiuitsig could not in law have been renewed by Fraaikem because Fraaikem was not a party to the original lease agreement. In any event, says the Trust, there was no timeous notice given for the renewal of the lease agreement since the purported renewal by Fraaikem was out of time by some 3 days, which is common cause.
- [11] On the other hand, Fraaikem argued, and continues to argue on appeal that the original lease agreement was ceded, assigned and/or delegated to it by Fraaiuitsig, and that the Trust impliedly or tacitly consented to this through its conduct. In this regard Fraaikem relies firstly on the fact that after the business sale of Fraaiuitsig, all future rental invoices were

sent by the Trust to Fraaikem and not to Fraaiuitsig; secondly, that all rental payments were made directly to the Trust by Fraaikem, which payments the Trust accepted; and thirdly, it relies on the 'hernuwingskontrak' provided by the Trust on 27 May 2019. In addition, Fraaikem argues that the original lease agreement was renewed by it and the Trust; alternatively, that Fraaikem and the Trust entered into a new lease agreement on 27 May 2019.

[12] The court a quo held that the Trust, by its conduct, tacitly and impliedly waived its right to rely on the late renewal of the lease concluded with

Fraaiuitsig, by accepting Fraaikem's late exercise of the option to renew the original lease agreement, and by sending the renewal contract to Fraaikem for signature.

[13] The court a quo held further that, when the Trust sent the renewal contract to Fraaikem for signature in May 2019, it accepted Fraaikem's counter-offer; the lease agreement was assigned to Fraaikem; Fraaikem substituted Fraaiuitsig as lessee; and a valid lease agreement was extended with Fraaikem.

C. THE APPEAL

[14] As I have already indicated, the appellant's case on appeal is the same as its case before the court a quo. In fact, apart from a general refrain that the learned judge misdirected himself in making his findings in the court a quo, no ground for appeal is disclosed.

[15] The main basis for the court a quo's decision is the Appellate Division case of *South African Railways & Harbours (SAR & H) v National Bank of SA Ltd*[1] which held as follows:

"The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."[2]

[16] The court a quo applied this dictum to interpret the Trust's conduct of sending the hernuwingskontrak to Fraaikem on 27 May 2019 as waiver of its right to rely on late renewal of the lease, and acceptance of Fraaikem's late exercise of an option to renew.

[17] What is stated in *SAR&H v National Bank* remains good law, and has over the years become a helpful guide in resolving conflicts on the existence or otherwise of a contract.[3] In terms of the doctrine of quasi-mutual assent, a party cannot escape from an apparent agreement merely because his or her subjective

intention differed from the apparent agreement, and an objective approach is adopted to determine whether there was consensus between

parties.[4]

[18] In applying the doctrine to the facts of this case, the decisive question is this: Did the Trust lead Faaikem, as a reasonable party, to believe that its declared intention, as embodied in the hernuwingskontrak, represented its actual intention?[5] To answer this question, a three-fold enquiry is necessary[6], namely, firstly, was there a misrepresentation as to the Trust's intention; secondly, who made that representation; and thirdly, was Faaikem misled thereby? The last question postulates two possibilities: Was Faaikem actually misled and would a reasonable person have been misled?

[19] As to the first question in the enquiry, the Trust has provided no explanation for the circumstances surrounding the forwarding of the hernuwingskontrak to Faaikem, and no case is made that the email of 27 May 2019 constituted a misrepresentation of any sort. In fact, no mention whatsoever of its correspondence of May 2019 was made in the founding papers. Only in the replying affidavit, once Faaikem raised the hernuwingskontrak and placed reliance on it, was the Trust constrained to admit its existence and that it was indeed sent by its duly authorized employee tasked with administrative duties, including the administration of various contracts held by it.

[20] By all accounts, the email sent by Ms Botha to Faaikem on 27 May 2019 evinced an intention to be bound by an agreement with Faaikem in the same terms suggested in Faaikem's email of 3 December 2018. The context for Faaikem's email of 3 December 2018 was clause 3.2 of the original lease which provides as follows: "The lessee shall have the right to renew this lease for the renewal period set out in item 6.2 of the Schedule[7] by written notice to the Landlord 6 (six) clear calendar months prior to the renewal period upon the same terms and conditions as contained herein, save as to rental and the rate of annual rental escalation for the renewal period and save that there shall be no further right of renewal." At clause 3.3 of the original lease the rate of rental in the renewal agreement was stated as the "then current market rental", and the rate of escalation of the annual rental during the renewal period was also set out. Further, it was stated that if the parties failed to reach agreement on either rate, the matter was to be referred to an independent valuer. Thus, the renewal provisions in the original lease constituted an offer. They contained all the essentialia of a lease agreement - an ascertained thing and a fixed or determinable rental[8] at which the lessee was to have use and enjoyment of the thing.[9]

[21] Faaikem's email of 3 December 2018 constituted a counter-offer to the renewal provisions of the original lease, because it sought to introduce new parties to the lease. On that construction, Ms Botha's email of 27 May 2019 constituted acceptance of Faaikem's counter-offer. And the

acceptance was clear and unambiguous,[10] giving effect to all the requests made by Faaikem in the email of 3 December 2018. There is no suggestion in the papers that this was not the intention of the Trust.

- [22] As regards the next part of the enquiry - whether it was reasonable of Fraaikem to rely on the presentation of the hernuwingskontrak by Ms Botha - the answer is similarly in favour of Fraaikem. The contract was not sent in vacuum. It was a response to Fraaikem's email of 3 December 2018 which expressly referred to item 6.2 of the Schedule to the lease agreement, the provision setting out the five-year renewal period.
- [23] Furthermore, the proximity of the date of receipt of the hernuwingskontrak to the expiry date of the original lease agreement was significant to both parties. Ms Marissa Botha and, by extension, the Trust will no doubt have been aware that the expiry of the original lease agreement was looming. In the context of a five-year commercial lease, this was the eleventh hour. The Trust had had since 3 December 2018 to consider its position. One must therefore infer that, for whatever reason, the Trust had reached a carefully considered decision to finally accept Fraaikem's counter-offer of renewal of a contract with it. I am fortified in that view by the fact that the hernuwingskontrak was preceded by an email, a few days earlier, headed 'hernuwing – huurkontrak', announcing that a new contract was to be prepared, and requesting information of the Fraaikem entity, including the details of its directors. This confirms that the lease agreement sent on 27 May 2019 was not an afterthought or offered on the spur of the moment.
- [24] For all these reasons, I am persuaded that it was reasonable of Fraaikem to rely on Ms Botha's presentation of the hernuwingskontrak, as an indication by the Trust of an intention to be bound to an agreement with it. The hernuwingskontrak of 27 May 2019 constituted acceptance of Fraaikem's counter-offer, thus giving rise to an enforceable contract between the parties.
- [25] As to the meaning to be given to the hernuwingskontrak - whether it was a renewal or a new contract - that is also to be inferred from the outward manifestation of the parties' conduct. The request of 3 December 2018 by Fraaikem was for renewal of a contract, for a five-year duration, and for the insertion of its name as a party to the renewal agreement. This is what it obtained from the Trust. There was no complaint received from the Trust that the email of 3 December 2018 was out of time, or that Fraaikem was not an original party to the original agreement and was, as a result, precluded from exercising an option to renew the lease.
- [26] I therefore agree with the court a quo that, by its conduct of sending the hernuwingskontrak, the Trust assigned the lease agreement to Fraaikem and substituted Fraaiuitsig

with Fraaikem, accepted Fraaikem's late exercise of an option to renew, and at the same time waived its right to rely on late renewal of the lease. Assignment of the original lease could only be effected in terms of clause 6 of the original lease agreement which required the consent of the Trust. That provision was for the exclusive benefit of the Trust as the owner of the premises

- to ensure that it was at all times aware of the occupants of its premises. As a result, the requirement for written consent could be waived by the Trust.[11]

[27] The same applies to the acceptance of the late renewal of the lease and the application of the non-variation clause of the lease agreement. They were similarly for the benefit of the Trust, and could, as a result be waived by it.[12] And it did waive these clauses through its conduct of sending the hernuwingskontrak in the circumstances discussed above. In this

regard it is also relevant that the clear terms of the written consent of the Trust, dated 25 August 2017, were that Fraaiuitsig,

the other party to the original lease agreement, was to be discharged from any obligations in terms of the original lease from 31 May 2019. The reason was that Fraaiuitsig had sold the pharmaceutical business to Fraaikem as a going concern. There was no expectation that Fraaiuitsig was to be involved in the further conduct of the business, or in the lease agreement beyond 31 May

2019. Accordingly, no purpose or business sense could be served by engaging Fraaiuitsig, if it still existed, regarding renewal or assignment of the original lease. In this respect, the argument made on behalf of the Trust, that the prior consent of Fraaiuitsig was necessary before Fraaikem's counter-offer could be accepted, is contrived. As I have said, these provisions were for all practical purposes for the benefit of the Trust and could be waived by it.

[28] The next question is whether Fraaikem's failure to furnish the Trust with a signed copy of the renewed contract before the

commencement date of 1 June 2019, or before the Trust had sent its notice of eviction, invalidated the contract. To determine this issue one must have regard to the terms of the agreement. On its terms, the operation of the hernuwingskontrak was not conditional upon any particular manner of acceptance. It did not contain a provision that signatures - whether by Fraaikem or the trustees of the Trust - were necessary in order to bring the new lease agreement into effect. It simply stated that the commencement date was to be 1 June 2019. As a result, the fact that the lease did not contain signatures cannot serve to invalidate the lease.[13]

[29] The Trust furthermore did not withdraw the hernuwingskontrak before the commencement date. In any event, given the short time period between the furnishing of the hernuwingskontrak and the commencement date of the new lease period, it would be unfair and against public policy, to discharge the Trust from its obligations in terms of the hernuwingskontrak on the basis that Fraaikem failed to sign the lease before 1 June 2019, in circumstances where there was no such requirement in the lease agreement. More so given that, by contrast, the Trust had been afforded some six months to consider its position.

[30] Moreover, nothing further was heard from the Trust until the correspondence of 28 June 2019, when it gave Fraaikem (and Fraaiuitsig) notice to vacate the premises by 31 July 2019 on, amongst other bases, an allegation that the option to renew the lease agreement was not exercised by Fraaiuitsig as required by the lease. This, despite its hernuwingskontrak of 27 May 2019, and without reference thereto. The attitude displayed by the Trust in its letter of 28 June 2019 and in these proceedings

evinces an intention to renege from the agreement that it had bound itself by only a month earlier. However, as the evidence shows, by then, Fraaikem had incurred costs and entered into arrangements to further their business at the premises for a further five years, on the basis of the hernuwingskontrak.

[31] In the circumstances, I propose to make the following order:

a. The appeal is dismissed, with costs.

N. MANGCU-LOCKWOOD

Judge of the High Court

I agree and it is so ordered.

J M HLOPHE

Judge President of the High Court

I agree.

M SAMELA

APPEARANCES:

For the appellant : Adv T Lotz

Instructed by : Mr D Goussard

Goussard Attorneys

For the respondent : Adv P MacKenzie

Instructed by : V Steyn

Rauch Gertenbach Inc.

[1] South African Railways & Harbours (SAR & H) v National Bank of SA Ltd 1924 AD 704 at 715 – 6.

- [2] The origins of the principle of quasi-mutual assent were stated as follows in *Smith v Hughes* (1871) LR 6 QB 597 607: “If, whatever a [person's] real intention may be, [s]he so conducts him [or herself] that a reasonable [person] would believe that [s]he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him [or her], the person thus conducting him [or herself] would be equally bound as if (s)he had intended to agree to the other party's terms.”
- [3] See *Bradfield Christie's Law of Contract in South Africa* 7ed 31 and authorities cited at ft 23.
- [4] See *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992
- (3) SA 324 (A) at 239F-240B and cases referred to. See also *Pillay & Another v Shaik & Others* 2009
- (4) SA 74 (SCA) paras 55-60; and see *Christie The Law of Contract in South Africa* 6th Ed at 10-12; 24-30.
- [5] *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* at 239I-240B. The origins of the principle of quasi-mutual assent were stated as follows in *Smith v Hughes* (1871) LR 6 QB 597 607: “If, whatever a [person's] real intention may be, [s]he so conducts him [or herself] that a reasonable [person] would believe that [s]he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him [or her], the person thus conducting him [or herself] would be equally bound as if (s)he had intended to agree to the other party's terms.”
- [6] *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* at 239I-240B. See also *Vincorp (Pty) Ltd v Trust Hungary ZRT* (061/2017)
- [2018] ZASCA 35 (27 March 2018) paras 7 - 8.
- [7] Item 6.2 of the Schedule provides for the duration of the renewal period, namely five years.
- [8] *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* [1992] ZASCA 195; 1993
- (1) SA 768 (A); *Southernport Developments (Pty) Ltd v Transnet Ltd* (440/03)
- [2004] ZASCA 94; [2005] 2 All SA 16 (SCA) (29 September 2004) para
8. See also *Borne v Harris*.
- [9] *Kessler v Krogmann* 1908 TS 290 at 297; *W E Cooper Landlord and Tenant* 2ed (94) at 3.
- [10] *Boerne v Harris* 1949
- (1) SA 793 (A) 799-800.
- [11] *RAF v Mothupi* 2000 3 All SA 181 (A) paras 15 - 17.
- [12] *Manna v Lotter* 2007 3 All SA 50 (C) para 26.
- [13] *Goldblatt v Freemantle* 1920 AD 123 at 128-129.

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