

SOUTH AFRICA / JUDGMENT

Biprops 46 (Pty) Ltd v D S Van Huyssteen (Pty) Ltd (3685/2018) [2019] ZAMPMHC 14 (14 June 2019)

[2019] ZAMPMHC 14

COURT

Middelburg High Court, Mpumalanga

BEFORE

HF Brauckmann

CASE / FILE NUMBER

3685/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA

DIVISION, MIDDELBURG

(LOCAL
SEAT)

CASE

NO: 3685/2018

In

the matter between:

BIPROPS
46 (PTY)
LTD APPLICANT
and
D
S VAN HUYSSTEEN (PTY)
LTD RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This is an application in terms whereof the applicant seeks the eviction of the respondent from Shop C5, Secunda Village Shopping

Centre, corner Vaalrivier and Nelson Mandela Road, Secunda Extension 8, Mpumalanga (“the premises”), that the respondent occupies in terms of a written lease agreement concluded between the parties during 2012. The lease agreement endured for a period of 5 years which commenced on 1 December 2012 and terminated on 30 November 2017.[1] The applicant contends that the written lease agreement expired, and became a month to month lease agreement, which lease agreement could be terminated with one month’s notice. Although the applicant concedes that one Mr. Van Buuren discussed occupancy and the terms of the lease agreement of the premises with Mr. Christodoulou (the applicant’s director) the applicant states that Van Buuren negotiated on behalf of Alpha Pharm and not the respondent. This in itself created a factual dispute.

[2] The applicant alleges that the renewal of the lease agreement, as contended by the respondent, did not take place as the respondent

failed to comply with clause 11 (“the renewal clause”) of the lease agreement.

[3] The respondent’s case is that, being represented by Mr. Van Buuren, an employee of the Alpha Pharm franchisor, it entered into a lease agreement which lease agreement is a continuation, alternatively renewal as provided for in clause 11 of the lease

agreement.[2]

[4] Van Buuren informed the applicant’s representative that he was negotiating on behalf of the respondent and subsequent to the discussions the respondent’s Mr Van Buuren exchanged various emails with Christodoulou (applicant’s representative),

discussing the terms of the rental agreement. The terms of the rental agreement, according to the respondent, was confirmed by Christodoulou, on behalf of the applicant, when the applicant reduced the monthly rental, instructed an architect to prepare drawings to change the rental premises in accordance to the negotiated renewed lease agreement and eventually sent a lease agreement to the respondent’s premises for signature.

[5] The versions and facts presented by the parties to this application is mutually destructive.

THE DISPUTE/S

[6] The dispute in this matter is crisp.

[7] In terms of the deed of lease[3] and more specifically the renewal clause thereof the respondent was afforded a right to renew the lease agreement. The right that was afforded to the respondent was not an “option” as defined in law, but simply a right of renewal. Clause 11 reads as follows:[4]

“11. OPTION

11.1. The LESSEE has the option to lease the LEASED PREMISES for a further 5 (Five) years which further term is calculated from the date of expiration of the leased term of this agreement, provided that:

11.1.1. The LESSEE has met all his obligation in term of this agreement promptly and properly.

11.1.2. The LESSEE has given written notice at least 6 (Six) months before the expiration of the LEASE term in the LESSOR of his intention to extend the LEASE Term in terms of this clause.

11.1.3. The LESSOR and LESSEE have at least 6 (Six) months prior to the expiration of this agreement. Agreed in writing de novo on rent, escalation of rent, as well as the terms and conditions of the intended contract. Failing which this agreement will expire on the termination date and the option will lapse and be of no force and effect whatsoever. Should agreement not be reached then an independent arbitrator shall be appointed who will make such determination that will be binding upon both parties.”

[8] This court is called upon to decide whether:

[8.1] The respondent earned the right to renew the lease agreement by meeting all his obligations and terms in terms of the lease agreement and if so,

[8.2] Whether the emails by Van Buuren, marked as Annexures “AA2” and “AA3”[5] constitutes a notice in terms of clause 11.1.2 of the lease agreement.

[9] The respondent’s case is simple. The respondent states that it currently occupies the premises in terms of:

“The respondent’s current right of occupation is as a consequence of the exercise of its renewal option in terms of clause 11 of the written lease agreement.”[6]

[10] Should the court find that the respondent did not comply with the requirements of clause 11.1.1 it is the end of the case for

respondent and the court will not have to decide whether proper notice was provided. Should the court however find in favour of the applicant and find that the respondent did not comply with its obligations in terms of the agreement promptly and properly, this court has to decide whether proper notice was given in terms of clause 11.1.2 and whether the intention of paragraph 11.1.3 was that the parties must conclude a written agreement at least six months prior to the termination of the agreement in respect of the rent, escalation of rent as well as the terms and conditions of the intended contract.

THE LAW

- [11] I think it is common cause that the “option” contained in clause 11 is not a proper option. The option does not comply with the requirements for a valid option at all. To be a true option to renew, the clause must contain the essential elements of a lease so that if the lessee exercises the option a lease is concluded. [7]
- [12] Having regard to clause 11, it is clear that the clause does not comply with the said requirements.
- [13] An option to renew is an offer to renew coupled with an offer to keep the main offer open, subject to the terms and conditions of the written document. This is also known as pactum de contrahendo and is concluded when the offer to keep the main offer open is accepted by the grantee.[8] It is simply an agreement to make a contract in the future. It is a promise to contract, but not a contract.[9]
- [14] Should the respondent wish to exercise his right to renew, such must be communicated to the applicant and the existence of a contract is subject to the normal law regulating offer and acceptance. The offer by the offeree must be made timeously and in terms of clause 11 of the agreement and the acceptance of the lessor’s offer or the lessee’s offer must be unequivocal.[10]
- [15] In terms of clause 11.1.1 of the agreement, the lessee may exercise the option to renew if he has met all his obligations in terms of the agreement promptly and properly. The applicant contends that the onus proving the fulfilment of a condition entitling the applicant to exercise an option whether to renew or to purchase is on the respondent.[11] In *O K Bazaars (1929) Ltd. v. Cash-IN CC* it was stated by the Appellate Division, as they were known that:
- “The issue here is not whether the appellant forfeited or lost a right to renewal. The simple question is whether the appellant ever acquired it. It was for the appellant, as the party claiming something from the respondent, to satisfy the court that it was entitled to what it claimed. The first proviso stipulated satisfaction of a prerequisite. In this connection the appellant was unaided by any presumption in his favour, and in my opinion, he was clearly saddled with an onus of establishing that the prerequisite to the exercise of the option had been satisfied.”*
- [16] I pause to mention that both the *O K Bazaars* and *Naicker* judgments were appeals to the relevant courts after trials in action proceedings in the courts a quo and can therefore not be applied in motion proceedings. The applicant’s contention that the respondent is saddled with an onus is simply not correct. In *National Directors of Public Prosecution v. Zuma (Mbeki & Another Intervening)*
- [12] the court stated:
- “[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final*

order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

"[27] The court below imposed an onus on the NDPP to prove a negative. This appears from the finding that it 'was not convinced that [Mr Zuma] was incorrect' in relation to political meddling (para 216). It reasoned that the question whether there had been political meddling fell within the peculiar knowledge of the NDPP and was difficult for Mr. Zuma to prove; and so, it held, less evidence would suffice to establish a prima facie case (para 168 -169). This rule of evidence, namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case, applies to trials. In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies." [my own emphasis]

- [17] A court should not attempt to evaluate the competing versions of either side as it is inadvisable and unnecessary as it is not about which version is more probable, but whether that of the applicant is so far-fetched or improbable that it can be rejected without evidence. [13]
- [18] An applicant must make out his case in his founding papers. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in replying affidavit. It has always been the practice of the courts in South Africa to strike out matters in replying affidavits which should have appeared in petitions of founding affidavit, including facts to establish locus standi or the jurisdiction of the courts.[14]

DISCUSSION

- [19] It is common cause that the initial lease agreement was entered into and what the terms and conditions thereof were. What is however in dispute is, as stated above, whether the respondent acquired the right to exercise the right of renewal in clause 11 of the lease agreement and whether it was properly executed.
- [20] The applicant alleges that the respondent did not comply with the terms of the lease agreement and more specifically it is stated by the applicant that:
- "The respondent has frequently failed and continues to fail to adhere to the trading hours stipulated in the lease and this factor, together with the fact that the respondent has failed to notify the applicant of its intention to renew the lease or to negotiate a new lease lead the applicant to look for another tenant."*[15]
- [21] In its answering affidavit the respondent refers the court to the lease agreement, and more specifically clause 35 thereof.[16] The paragraph deals with the trading hours and business hours and is titled "Continuous Trade". The respondent's case is simple and refers the court

to the inscription on the agreement on page 41 next to the words “Continuous Trade” which reads “to be negotiated”. It is clear that no consensus ad idem was reached in respect of the trading hours and the applicant can therefore not rely on the non-compliance with the said term as it was clearly still to be negotiated amongst the parties to the lease agreement.

[22] The respondent alleges in its answering affidavit that it had paid its rental when it was due and never paid late.[17]

[23] This is met by the applicant in its replying affidavit with a denial. For the first time, in the applicant’s replying

affidavit, it is stated that the payments by the respondent was not made timeously, and the applicant annexes “Annexure CC1” to its replying affidavit being “Accounts Receivable Transactions Biprops 46 (Pty) Ltd”. There is however no evidence as to who the author of this document is and this clearly constitutes new evidence that is contained in the replying affidavit. The court will ignore this evidence.

[24] In the result, this court finds that the respondent had “the right to exercise its right for renewal”.

[25] At worst for the applicant, a real factual dispute exists which this court cannot resolve on the affidavits before it.

[26] For that reason alone this application stands to be dismissed with costs. I have dealt with the law as it stands above. The applicant relies on the O K Bazaar’s judgment for the non-compliance with the terms and conditions of the agreement and states that the respondent had an onus to prove its compliance with the terms of the agreement. Whether it is a positive or a negative onus, in applications it is not about the onus, but about, as stated in the Zuma judgment, common cause facts and the resolution of legal issues based thereon. The question of onus does not arise, as we are not involved in trial proceedings.

[27] Based upon the aforementioned and the fact that the dispute of fact that arose was to be anticipated by the applicant, this application should be dismissed with costs.

[28] Even if I am wrong in my contention as aforementioned, the applicant denies that the applicant complied with clause 11.1.2 in that no notice was given by the respondent of its intention to renew the lease.

[29] Having regard to the emails sent by Van Buuren to Christodoulou, the emails viewed collectively, confirm the following:

[29.1] A discussion between Mr. Van Buuren and Mr Christodoulou;

[29.2] That the rental rate will be reduced to R 160.00 per square metres;

[29.3] That the term of the agreement would be five years with an option to renew for a further five year period;

- [29.4] That the rent would escalate at a rate of 7% per annum;
- [29.5] That the layout of the rental premises would be changed to accommodate a doctor's consulting room inside the pharmacy.
- [30] Further discussions were also held referring to the signage that has to be approved by Christodoulou, amongst others.
- [31] I am of the opinion that Annexures "AA2" and "AA3" are a clear indication that respondent, within the period of six months, as provided for in clause 11.1.2 of the lease agreement notified applicant of its intention to renew the lease agreement. If one accepts that on the applicant's own version, subsequent to the said mails, he had drafted a contract and had it delivered to the respondent's premises for signature, one begs the question why does the applicant still contend that the emails by Van Buuren does not comply with the notice clause 11.1.2 of the agreement.
- [32] To insist that the notice must strictly comply with the requirements as set out by the applicant in its Heads of Argument, is being unduly formalistic. It is the substance of the notice, and not the form thereof, that is important.
- [33] It is clear that the respondent, at all material times intended to renew the lease agreement.
- [34] Even if I am wrong on this score, the court asks itself why the applicant, after the email exchange, sent a lease agreement to the respondent for signature. Further, why does the applicant fail to disclose the contents of the said lease agreement which, according to the applicant and the respondent's affidavits falls squarely within the knowledge of the applicant and not of the respondent. It would have been easy for the applicant to disclose the contents of the said lease agreement and to indicate to this court that no consensus ad idem was reached, as provided for in clause 11.1.3 of the agreement.
- [35] If one accepts that the following was agreed upon as appears from Annexures "AA2" to "AA3":
- [35.1] The rent;
- [35.2] The escalation of the rent;
- [35.3] The terms and conditions of the intended agreement;
- an agreement came into being.
- [36] Clause 11.1.3 does not require a written agreement that is signed by both parties, only that the terms must be in writing. However it is clear that after the exchange of the emails by Van Buuren, acting on behalf of the respondent and Christodoulou, acting on behalf of the applicant, a lease agreement was drafted by Christodoulou and delivered to the respondent's premises.

One can only assume that it would contain the terms and the conditions agreed upon between Van Buuren and the applicant.

[37] The mails exchanged between the parties is written instrument.[18]

[38] As the written agreement has to be interpreted sensibly and in a business-like manner, the respondent submits that the emails

exchanged between Van Buuren and Christodoulou clearly constitutes a written notice in terms of Clause 11 of the agreement, of the respondent's intention to renew the lease agreement for a further period of 5 years on terms to be agreed, as appears from Annexures "AA2" and "AA3".

[39] Whether the terms of the agreement was finally negotiated and agreed upon, is a further factual dispute that this court cannot resolve on the papers.

[40] All this should have been foreseen by the applicant when it launched an application instead of an action for the eviction of the respondent from the premises.

[41] I therefore make the following order:

[41.1] The application is dismissed with costs, including the costs of employing Senior Counsel.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPELLANT: Advocate GT Avakomides

INSTRUCTED BY: Streicher-De Swart Attorneys

REPRESENTATIVE FOR THE RESPONDENT: Advocate J Voster

INSTRUCTED BY: Schoeman & Esterhuizen Attorneys

DATE OF HEARING: 28 MAY 2019

DATE OF JUDGMENT: 14 JUNE 2019

[1] Bundle, Page 19, clause 3.1

[2] Bundle, Page 127, paragraphs 9 and 10

[3] Bundle, Page 17, Annexure B

[4] Bundle, Page 23

[5] Bundle, Pages 148 and 146

[6] Bundle, Page 136, Paragraph 35

[7] South African Reserve Bank v. Photo Craft 1969 (1) SA 610 (C) 612 – 613; and Soteriou

- v. Redco Poyntons 1985 (2) SA 922 (A) 913 G
- [8] Biloden Properties v. Willson 1946 (NPD) 736 at 744
- [9] Van Zyl v. Government of Republic of South Africa 2003 (SA) 294 (SCA) at paragraph 75
- [10] Boerne
- v. Harris 1949
- (1) SA 7393 (A)
- [11] Naicker
- v. Pensil 1967
- (1) SA 1998 (N) at 200 B- C; and O K Bazaars (1929) Ltd. v. Cash-IN CC [1993] ZASCA 204; 1994
- (2) SA 347 AD at page 361 G
- [12] 2009 (2) SA 279 (SCA) paragraphs [26] and [27]
- [13] National Scrap Metal (Cape Town) Pty (Ltd) & Another v. Murray & Roberts Ltd. 2015 (5) SA 300 (SCA)
- [14] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at pages 368 and 369
- [15] Bundle, Page 12, Paragraph 9
- [16] Bundle, Page 41
- [17] Bundle, Page 133, Paragraph 123
- [18] Section 12 of Electronic Communication and Transaction Act 25 of 2002

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Prepared on 9 October 2026 · Esheria