

SOUTH AFRICA / JUDGMENT

Clicks Retailers (Pty) Ltd v Killarney Mall Properties (22362/2015) [2015] ZAGPPHC 841 (11 December 2015) [2015] ZAGPPHC 841

COURT

North Gauteng High Court, Pretoria

BEFORE

H J de Vos

CASE / FILE NUMBER

22362/2015

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.: 22362/2015

11/12/2015

REPORTABLE

OF INTEREST TO OTHER

JUDGES

In the matter between:

CLICKS RETAILERS (PTY)

LTD Applicant

and

KILLARNEY MALL

PROPERTIES Respondent

JUDGMENT

DE VOS J:

[1] This is an application for an order declaring that the agreement of lease concluded between the respondent and initially New Clicks South Africa (Pty) Ltd trading as Clicks, has been renewed, and accordingly the applicant is entitled to occupy the premises for a further period of five years commencing 01 April 2015. The original lease agreement, in terms whereof the respondent, Killarney Mall Properties, lets to the tenant a premises in the said building complex, is attached to the applicant's founding affidavit as Annexure GL1. The commencement date of this agreement was 01 April 2005 and in terms of Clause 4.1 of the contract shall continue for an initial period of 10 years ("the Initial Period").

[2] Clause 4.2 of the lease agreement attached to the papers as Annexure GL1 provides for the right of the applicant to renew the agreement. This Clause 4.2 reads as follows:

"Should the Tenant have diligently honoured its obligations hereunder, throughout the Initial Period, it shall have the right to renew this Lease for a further period of 5 (five) years, commencing immediately after the expiry of the initial period. ("the Option").

Clause 4.2.1 of the agreement sets out the manner as to how the option must be exercised and reads as follows:

"Should the Tenant desire to exercise the Option, it shall give written notice to the Landlord to that effect, not less than 6 (six) calendar months before the expiry of the Initial Period, failing which the Option shall lapse and shall be of no force and effect".

Clause 4.3 of the agreement sets out the terms and conditions that will apply during the option period:

"Save that the Tenant shall have no further option rights, the Tenant's tenancy during the Option Period referred to in Clauses 4.2 above shall be governed by the terms and conditions contained in this Lease".

The rental agreement also refers to various other obligations of the parties, which are not relevant for purposes of this judgement.

[3] It is common cause that the Initial Period of ten years from the commencement date expired on 31 March 2015. Accordingly, absent a valid exercise of the option, the lease would have expired by effluxion of time and applicant's right to occupy the leased premises would have terminated on 31 March 2015.

- [4] According to the applicant the option was exercised in accordance with Clause 4.2 of the lease agreement by the applicant's holding company, Clicks Group Limited, in writing on 13 June 2014 who advised the managing agents of the respondent, City Property Administration (Pty) Ltd ("CPA"), of their desire to renew the lease for a further period. Same letter is attached to the founding affidavit as Annexure GL3 and reads as follows:

"REQUEST FOR RENEWAL PROPOSAL: AGREEMENT OF LEASE BETWEEN KILLARNEY MALL INVESTMENTS (Pty) Ltd, AND NEW CLICKS SOUTH AFRICA (PTY) LTD, T/A CLICKS KILLARNEY, IN RESPECT OF SHOP U49, RIVERIA ROAD, KILLARNEY MALL.

Our records indicate that the existing agreement of lease for the CLICKS premises in Killarney expires on 31 MAR 2015 [sic]. As required in terms of the renewal option, we advise that it is our desire to renew the lease for a further period.

Kindly forward a rental proposal to [...].co.za for our consideration.

Please note that all negotiations will be subject to final approval by our board.

Kind regards

Nicolette Horstons"

- [5] A dispute arose between the parties as to whether this letter constitutes a proper exercise of the option envisaged in Clause 4.2.1 of the lease agreement. The dispute in this application further relates to whether the applicant, qua tenant, has properly exercised its right to renew the agreement "for the further period of 5 (five) years, commencing immediately after the expiry of the Initial Period". The respondent disagrees that the applicant has validly exercised the option as contained in Clause 4 of the lease agreement. Accordingly, the applicant is seeking a declaratory order that the option was indeed duly exercised contained in Clause 4.2 of the agreement; whereas the respondent in a counter-application seeks an order confirming the termination of the lease and the eviction of the applicant from the leased premises.
- [6] It is the applicant's contention that the letter dated 13 June 2014 manifests a clear, unambiguous and unequivocal exercise of the option contained in Clause 4.2 of the agreement of lease. It is pointed out that Clause 4.2.1 specifically makes provision that should the tenant desire to exercise the option, notice must be given. In the said letter dated 13 June 2014 the applicant expressly advised that it is their "desire to renew the lease for a further period". The respondent seeks to contend otherwise. This contention is apparently premised upon the heading of the letter dated 13 June 2014, which commences with the words "REQUEST FOR RENEWAL PROPOSAL: AGREEMENT OF LEASE . . .", and the final two paragraphs thereof which refer to a request for a "rental proposal" and concludes with a reference to the fact that "all negotiations will be subject to final approval" by the applicant's board. Respondent's contention is that the applicant clearly failed to exercise the option and certainly not in the manner required by the lease agreement. On the contrary, the applicant sought to renegotiate the terms of a renewal period and (rather than exercising the option)

simply requested the respondent to provide a renewal proposal. Respondent further contends that reference to "all negotiations will be subject to final approval by our board" is a clear indication that the applicant intended to renegotiate the terms of the agreement whereas Clause 4.3 specifically provides that "the tenancy during the option period referred to in Clause 4.2 above shall be governed by the terms and conditions contained in this lease". The original lease agreement makes no provision for the renegotiation of the terms of the contract as the tenant's tenancy during the Option Period shall be governed by the terms and conditions contained in the existing lease.

- [7] Applicant's counsel contended that the reference to a rental proposal in the letter of the 13th June 2014 was a reference to an existing dispute between the parties which involves what is described as the "turnover rental dispute". The backdrop to this dispute is the following. The commencement date of the agreement between applicant and respondent was stipulated as being 1 April 2005 (vide Clause 4.1 as read with Clause 1.1). In July 2005, Clicks was granted a license to operate a pharmacy, and it was only during August 2005 that Clicks introduced the pharmacy to the leased premises, being shop number U49, Killarney Mall ("the leased premises"). Pharmacy operations are, however, subject to regulations promulgated in terms of the Medicines and Related Substances Act, No. 101 of 1965, which puts medicine gross profit margins under pressure. In terms of Annexure B to the agreement, which regulates turnover rental, net turnover was defined as being the net selling price "of all goods sold by the tenant and/or any licensee, concessionaire, or sub-tenant of the tenant from the leased premises, and shall include any charges for services performed at the leased premises by the tenant".
- [8] It is common cause that even before the applicant exercised the option, there was an on-going dispute between the parties regarding the rental amount payable by the applicant in respect of its pharmaceutical operations. The respondent's version is that the applicant sought to have the lease agreement amended to exclude pharmacy turnover as part of the rental turnover as included in the original agreement during the Option Period. The respondent further contends that Clause 5 of the original agreement specifically stipulates that rental "for each and every following year including the option period, shall be a sum equivalent to 7% (seven per cent) more than the aggregate monthly rental payable for the preceding year". There was consequently no need to negotiate rentals for the option period had Clicks intended to exercise the option. It is further contended that had the option provision required agreement as to rentals, then it would cease to be an option and operate as a pactum de contrahendi
- an unenforceable agreement to negotiate. The letter of 13th June 2014 is merely a request for a renewal proposal. In the letter, Clicks called upon Killarney Mall to kindly forward a rental proposal for consideration, such proposal (and all relevant subsequent negotiations related thereto) being subject to the approval of its board of directors. The respondent contends that this is inconsistent with a "desire to renew the lease". In toto, it is submitted that the attempt by the applicant to negotiate the option terms in a renewal proposal was incompatible with

an exercise of the option, which having not been validly exercised, has lapsed.

- [9] The respondent further submits that Clicks is now making a voice face and seeks to explain away the clear and unambiguous language of its renewal proposal by opportunistically seizing upon what it describes as the "turnover rental dispute". In support of this contention, Clicks relies upon a single telephone conversation between its representative, Ms Lida-Mari Vlok ("Vlok"), and Ms Marisa Brunke ("Brunke") of CPA. This telephone conversation is referred to in Annexure GL6 to the founding affidavit, being an email message from CPA, dated 11h June 2014, confirming receipt of the renewal proposal. The relevant extract from this email is paragraph 2 thereof, which reads as follows:

"To clarify, Brunke and Vlok had a telephone conference on the 6th June 2014. As I understood from their discussions, Vlok confirmed that Clicks will be sending the landlord a renewal proposal, taking into consideration all the matters/issues which were discussed during their telephone conference".

The respondent contends that what was discussed during this telephone conference is a renewal proposal which is independent of the turnover rental dispute. It is further argued that if the applicant had exercised the option there would be no reason to call for a "renewal proposal".

- [10] In the replying affidavit the applicant states that it agrees that during the course of the telephone conversation of 5th June 2014, Vlok sought to find a way to resolve the turnover rental dispute. However, it is disputed that there was any attempt to negotiate renewal rentals as Vlok was mindful that in terms of Clause 3 of the agreement, the renewal rental had been predetermined. The applicant's counsel contends that there is a dispute as to what was actually discussed during this telephone conversation and in particular whether Vlok sought to negotiate renewal rentals with Brunke. It is contended that it is not necessary to decide what was actually discussed on the 5th June 2014, nor to consider what subsequently passed between the parties, including the purported reliance by the respondents on Annexure AA6, which contains a letter written by David Janks, Head of the Clicks Group Ltd Legal Counsel, addressed to Marisa Brunke, dated 4th March 2015. This letter was sent in a reply to the respondent's purported notice of termination. It merely reiterates that the applicant disagrees that there has been no valid exercise of, or even an attempt to validly exercise, the option. The applicant therefore contends that the court must merely look to the contents of the letter dated 13 June 2014 and that there is no room for reference to what otherwise may have passed between the parties by way of negotiations both prior and subsequent to the 13th June 2014, nor indeed to what the applicant's representatives may have contended in Annexure AA6. Applicant contends that it is clear from the email dated 11h June 2014 that it was accepted that the applicant exercised the option as set out in the first paragraph of the said Annexure. It is further contended that the subsequent paragraphs contained in Annexure GL3 do not render the actual exercise of the option conditional nor subject to further negotiations and agreements.

[11] The applicant contends that it is the function of the court as a matter of law to interpret the construction of Annexure GL3 and that there is accordingly no room in that procedure for reference to what otherwise may have passed between the parties by way of negotiations both prior to or subsequent to the 13th June 2014. According to this argument I must also ignore what applicants representative may have contended in Annexure AA6. For this decision the applicant's counsel relies on *Robinson v Federal Supply and Coal Storage Company of South Africa Ltd* 1908 EDC 357 and specifically 365 where it reads:

"The principle referred to in *Bellamy v Debenham* (45 Ch. DIV. 481) is no doubt as applicable in our Jaw as in the English Law, namely, that when a contract is contained in letters, the whole correspondence should be looked at, and if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of the offer and acceptance contained all the terms agreed upon between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation".

Therefore, applicant's counsel contends that the first paragraph of Annexure GL3 constitutes in substance, the exercise of the option and the two subsequent paragraphs thereof does not undermine that exercise. It is contended that the first paragraph of Annexure GL3 is unequivocal, unambiguous and a clear exercise of the option, and that a reasonable person would have read it as such. It is contended that the request for a rental proposal in the second paragraph of Annexure GL 3 and the further reference to all negotiations being subject to final approval by the applicant's board in the last paragraph thereof, cannot and do not undermine the fact of the exercise of the option. The complete contract arrived at pursuant to the first paragraph cannot be affected by any subsequent attempted negotiations or indeed a reference thereto. Therefore, and so the argument goes, the subsequent paragraphs thereof do not render the actual exercise of the option conditional, nor indeed subject to further negotiations and agreements. In conclusion it is argued that a binding and valid exercise of the option occurred; see in this regard *Van Aardt v Galway* 2012(2) SA 312 (SCA) at 30.

[12] Applicant's counsel submits that even in the event of the failure of further negotiations regarding the lease, it will have no effect on the exercise of the option because Clause 4.3 of the lease provides for a default situation namely, that during the option period, the tenancy "shall be governed by the terms and conditions contained in the lease". Clause 4.2 of the agreement affords applicant the right to renew the lease for a further period of five years should it "have diligently honoured its obligations hereunder" .

[13] The respondent contends that the applicant has not diligently honoured its obligations in terms of the lease agreement. Mr Bell on behalf of the respondent deposed of an affidavit stating that "unless the turnover rental dispute is resolved in Clicks's favour, it cannot be contended by Clicks that it has diligently honoured its obligation in terms of the agreement". Applicant contends there is no merit in this submission. Applicant relies on Annexure GL6, a tax invoice and statement for the month March 2015. This statement was prepared City Property, the renting agent of the respondent. This statement reflects inter alia a credit in the amount of R450 991,22 in respect of rent turnover, ultimately indicating a

credit due to the applicant in the amount of R330 882,77. This very amount referred to in this paragraph was the amount involved in the rental turnover dispute between the parties. The respondent therefore on its own version, conceded the rental turnover dispute in favour of the applicant. The only logical inference to be drawn from the above is that the applicant diligently honoured its obligations in terms of the agreement. On the other hand even if one were to assume that the turnover rental dispute was unresolved at the time of cancellation of the agreement, it is clear that the parties have at all times attempted in a bona fide way to resolve this dispute and further, to the knowledge of the respondent, the applicant was able to pay whatever disputed rental it may in due course be found liable to pay. In conclusion it is submitted that the applicant duly exercised the option referred to above and an order is sought dismissing the counter-application with costs and declaring the applicant to have duly exercised its option, extending the agreement of lease in writing on the 13th June 2014 in terms of Annexure GL3.

- [14] Respondent's contention is that the applicant clearly failed to exercise the option and certainly not as required by the lease. On the contrary, the applicant sought to renegotiate the terms for renewal period and (rather than actually exercising the option), simply requested respondent to provide the renewal proposal. The applicant relies exclusively for the alleged exercise of the option on the letter dated 13 June 2014 Annexure GL3 to the founding affidavit. Annexure GL3 is required to be interpreted. In order to determine whether an option was exercised the ordinary rules relating to the acceptance of an offer must be applied. See in this regard *SA Yster en Staal Industriële Korporasie Bpk v Koschade* 1983 (4) SA 837 (T) en *Ficksburg Transport ! Edms) Bpk v Rautenbach* 1986 (2) SA 88 (O). The exercise of an option must also comply with any formalities prescribed in an option for its exercise. The judicial nature of an option is described in *The Law of Contract in South Africa* RH Christie 5th Edition (2011) 56 - 57 as follows:

"To understand the true nature of an option it is best to analyse it in two parts - an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) binding the offerer to keep that offer open for a certain period. On this analysis it is easy to see that the offerer is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it, or by expressly or impliedly repudiating it, he will be liable for damages

for breach of contract".

- [15] Although the option is in itself a bilateral agreement, it contains an offer that is open to acceptance by the option holder. The acceptance must take place in accordance with the rules of acceptance and in accordance with the agreement. See *Du Plessis N.O. v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) 15.

[16] The acceptance of the offer must be clear and unequivocal or unambiguous. Respondent relies on the case of *Boerne v Harris* 1949 (1) SA 793 (A) where the acceptance of an offer was done by way of a written letter, written by the lessee's attorneys to the lessor, exercising the option. At 801 GREENBERG JA said the following:

"It seems to me that a letter, in order to be effective as an exercise of the right of renewal, must unequivocally convey to the recipient, using ordinary reason and knowledge, that it is intended to be such an exercise. It must leave no room for doubt. The recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of the fetter. Thus if the appellant had chosen to write a fetter in Chinese, or to convey his acceptance in the form of a cross-word puzzle, except possibly one that he who runs may read, I think that the respondent would have been entitled to refuse to attempt to translate, or solve the puzzle contained in, the fetter and to disregard it ... And in considering how a reasonable person would have construed the fetter, the court must not require respondent to invoke the assistance of legal advisers, any more than, in the hypothetical case I have mentioned, she would have to enlist the aid of a Chinese interpreter or an expert in cross-word puzzles. I leave out of consideration the case where the recipient, to the knowledge of the sender of the letter, is equipped with the necessary knowledge of or ability".

[17] The majority of the court supported GREENBERG JA and held that the lessee's attorney's letter was too ambiguous to amount to a valid acceptance of their offer. This decision has been approved and applied without question on a number of occasions in the Appellate Division and in the various Provincial Divisions. See for example *Kahn v Raatz* 1976

(4) SA 543 (A) and *Men's Fair (Pty) Ltd v Bible Society of SA* 1976 (4) SA 12 (T) at 18. In *Nichols v Stanley* 1962 (2) PH A29 (N), JAMES J said:

"In considering how a reasonable man would have construed the letter . . . The reasonable man only has doubts when it is reasonable to do so, and the offerer must therefore be bound unless his doubt about the meaning of the acceptance is a reasonable doubt".

[18] Respondent submits that Annexure GL3 must be read as a whole in order to ascertain whether it constitutes a clear, unequivocal and unambiguous exercise of the option. It is contended that Annexure GL3 cannot, on any reading, be regarded as unequivocally conveying to the recipient that the applicant intended exercising the option in accordance with the provisions of the lease. On the contrary, Annexure GL3 left open the opportunity for negotiation and was conditional upon "final approval" by the applicant's board.

[19] In the decision *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at paragraph 18, WALLIS JA dealt with the proper evaluation of documents:

"The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the

language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective".

[20] It is argued that the subject heading contained in Annexure GL3 makes plain at the outset that it constitutes a "REQUEST FOR RENEWAL PROPOSAL". This is consistent with the paragraph reading "kindly forward a rental proposal to [...]@clicks.co. za". The concluding paragraph of Annexure GL3 also makes plain that further negotiations are contemplated. In addition, any rental proposal is subject to approval by the applicant's board. The reference in Clause 4.2.1 to the tenant desiring to exercise the option must give effect to the further requirement that written notice be given of the exercise of the option. Clause 4.2.1 cannot be interpreted as meaning that mere expression of a desire would suffice. What is required is an unequivocal, unconditional and clear exercise of the option on the terms set out in the lease. There is no room for renegotiating the rental for the renewal period. Annexure GL3 makes plain that it is a request for a renewal proposal. Had the respondent on the other hand sought to hold the applicant to an exercise of the option, the applicant would have clearly been entitled to contest that it had exercised the option.

[21] Respondent also referred to the judgement by NICHOLLS J in the matter of JG Rabin Port Elizabeth Props and laid down the following rules:

"It is only the intention as expressed in a written communication that must be considered. This must be expressed in such a manner that the reasonable person in the shoes of the lessor would understand it as an unequivocal acceptance of the offer. The court must be satisfied that the party communicating this intention must be making an unconditional offer of acceptance and not a counter-offer. Whether the word "intention" constitutes an actual exercise of the option or a notification to the lessor of a future objective is entirely dependent on the context in which the intention is relayed to the lessor".

[22] I do not agree with the applicant's argument. It is clear that there was no need for renegotiation of the contract once the option has been exercised. Furthermore there was no further need for the Clicks board's approval if the option was exercised. The only credible explanation is to be found in the heading of the letter dated 13th June 2014 which makes it clear that it was merely a "REQUEST FOR RENEWAL PROPOSAL".

[23] Having regard to the background of the case and the contents of Annexure GL3, it does not constitute a clear option to renew the existing lease. This is so because the letter does not constitute an unequivocal exercise of the option of renewal. On a detailed interpretation of the letter, the following appears:

23.1. The heading of the letter starts off with the wording "request for renewal proposal". This clearly indicates that what the applicant had in mind was a new proposal for a further lease agreement. This finding is confirmed in Annexure GL5, where it is specifically stated that Vick confirmed that

"Clicks will be sending the landlord a renewal proposal".

23.2. The words in the first paragraph reading "it is our desire to renew the lease for a further period" may be similar to the wording contained in Clause 4.2.1 of the lease agreement, but fall short of the requirement to state clearly that the applicant accepts the offer as contained in the lease agreement as well as the terms and conditions of the existing lease agreement to be applicable during the Option Period.

23.3. The second paragraph dealing with a request for a rental proposal for our consideration clearly qualifies the contents of paragraph 1 of Annexure GL3. If it was the applicant's clear intention to accept the offer contained in the lease agreement, there was no need for a further rental proposal. The existing lease agreement would merely continue for the next five years i.e. the option period. There was also no need to consider a new rental proposal as such a new proposal was not envisaged by the existing lease agreement. The second paragraph detracts from the unequivocal exercise of the option. It contains an indication that further terms would have to be inserted or could be inserted or may be inserted in the new proposal.

23.4. The third paragraph referring to the fact that all negotiations will be subject to the final approval of the applicant's board confirms that what the applicant had in mind was a new rental proposal, the terms of which still to be negotiated and which would be subject to the final approval of the board of the Clicks Group Ltd.

23.5. A reasonable man reading the contents of Annexure GL3 will merely conclude that the letter contains a desire by the applicant to renew the existing lease for a further period on such conditions as to be negotiated between the parties and which would be subject to the approval of the board of the Clicks Group.

23.6. Having regard to the intention of the applicant, it cannot be inferred from the contents of Annexure GL3 that the contents of the letter contained a clear intention to be bound by the terms and conditions of the existing lease agreement for the ensuing option period.

[24] I have also considered the surrounding circumstances present at the time when Annexure GL3 was written. It is common cause that on the same date as when this letter was written and sent to City Property the latter forwarded the same letter to the respondent. On the 17th July 2014, Mientjie Nortje sent an email to the applicant, attached to the founding affidavit as Annexure GL5, stating the following:

"With reference to your below email, and attached renewal notice of which we take note. To clarify, our manager Marisa Brunke, and Lida-Mari, had a telephone

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conference on the 6th June

2014. As I understood from their discussions, Lida-Mari confirmed that Clicks will be sending the landlord a renewal proposal, taking into consideration all the matters/issues which was discussed during their telephone conference.

Kindly consult with your Lida-Mari in this regard and get back to us".

This email was addressed to "Jaco" and "Nicolette". It appears that Jaco Vijoën is the property manager of Clicks, the applicant. The importance of this letter is clearly that the applicant would make a renewal proposal to the respondent. Although GL3 in the second paragraph gives the impression that it was expected from the respondent to prepare a rental proposal for the applicant's consideration, it becomes clear from both letters that what the parties had in mind was a new proposal for a further rental period. A new proposal does not amount to a final unequivocal acceptance of the offer but indicates that other steps were required that still had to be negotiated before consensus could be reached on all the issues. If a further document was necessary to renew the lease it cannot be an unequivocal acceptance of the offer contained in the existing lease. It is clear that both the applicant and the respondent anticipated a subsequent document had to be drawn up. It presupposes further negotiations between the parties. In those circumstances it is unconceivable that there has been a valid exercise of the option and an unambiguous acceptance of the offer. Neither the construction of the letter nor the subsequent communications between the parties are supportive of such a finding.

[25] Even these negotiations were expressed to be subject to the approval of the applicant's board of directors. This is consistent with the expression of "our desire to renew the lease".

[26] Clause 5 of the lease stipulates that rental "for each and every following year including the option period shall be a sum equivalent to 7% (seven per cent) more than the aggregate monthly rental payable for the precedent year" . There was consequently no need to negotiate rentals for the Option Period had the applicant intended to exercise the option. Had the option provision indeed required agreement as to rentals it would have been an invalid pactum de contrahendi - an unenforceable agreement to negotiate.

[27] Significantly the very wording "renewal proposal" referred to in the email attached to the papers as Annexure GL5 is echoed in the balded subject line of the request for a renewal proposal itself (Annexure GL3) which reads "REQUEST FOR RENEWAL PROPOSAL". The clear and unambiguous language of the applicant's request for a renewal proposal in Annexure GL3 was opportunistically

seized by the applicant in its reply describing the contents of paragraphs 2 and 3 of Annexure GL3 as a reference to the "turnover rental dispute". In support of this contention the applicant relies upon a single telephone conversation between its representative, Ms Vlok, and Ms Brunke of the respondent's representative letting agent (CPA). This telephone conversation is referred to in Annexure GL5 referred to above and attached to the founding affidavit being an email message dated 17 June 2014 confirming receipt of the renewal proposal by CPA. I have already referred to

the contents of this email. This email, as said before, merely deals with a renewal proposal and has no reference to the turnover rental dispute. Annexure GL5 was sent four days after the renewal proposal request contained in Annexure GL3. If the applicant had exercised the option, there would be no reason to call for a renewal proposal four days later. Although Vlok only provided a confirmatory affidavit in reply, Vlok's affidavit does not gainsay the factual version advanced by respondent and more particularly by Brunke. Any further reference to the turnover rental dispute can be safely ignored. In my view there is no merit in the contrived version that the reference to the proposal was somehow related to the on-going turnover rental dispute.

[28] Applicant's reliance on the statement for the month of March 2015 indicating a credit in favour of the applicant of R450 991,22 does not take the matter any further. It is my impression that this amount was merely written off when it became clear that the option will not be renewed.

[29] In conclusion the applicant's communication regarding the acceptance of the option to renew was ambiguous and does not satisfy the requirements for a valid exercise of the option. It is common cause that the applicant is still occupying the leased premises notwithstanding the termination of the lease agreement. Applicant's occupation of the leased premises is therefore unlawful and the respondent is entitled to an eviction order.

Accordingly, I make the following order:

1. The applicant's application for a declaratory order is dismissed with costs.
2. The respondent's counter-application succeeds and it is confirmed that the agreement of lease entered into between the applicant and the respondent (Annexure GL1 to the applicant's founding affidavit) is terminated.
3. It is directed that the applicant or any person or entity claiming title through or under the applicant be evicted from the immovable property being shop number U49 Killarney Mall, 34 - 54 4th Street and Riviera Road, Killarney, Johannesburg (the leased premises).
4. The sheriff or his lawful deputy is authorised and directed to take such steps as are required in order to give effect to the order referred to in terms of prayer 3 above.
5. The sheriff or his lawful deputy is authorised to request any person, including members of the South African Police Service, to assist the sheriff or his lawful deputy in the eviction of the applicant from the leased premises and/or any person or entity occupying the leased premises through or under the applicant.
6. The applicant is ordered to pay the costs of this application including the cost of two counsels representing the respondent.

H J DE VOS

JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

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