

SOUTH AFRICA / JUDGMENT

Clicks Retailers (Pty) Ltd v Killarney Mall Properties (Pty) Ltd (A255/16) [2017] ZAGPPHC 626 (22 September 2017) [2017] ZAGPPHC 626

COURT

North Gauteng High Court, Pretoria

BEFORE

S P Mothle, J Raulinga, S S Maakane

CASE / FILE NUMBER

A255/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

APPEAL

CASE NUMBER: A255/16

In

the matter between:

CLICKS
RETAILERS (PTY)
LTD Appellant
And
KILLARNEY
MALL PROPERTIES (PTY)
LTD Respondent

JUDGMENT

MOTHLE J (with Roulinga J and Maakane AJ concurring)

INTRODUCTION

1. The nub of the issue in this appeal is the interpretation of the letter in which the Appellant purports to exercise an option extending a lease agreement with the Respondent.

2. The Appellant brought an application for a declaration to the effect that it had validly exercised the option to extend the lease. The Respondent, in turn, brought a counter application for an order confirming that the underlying agreement of the lease had terminated and directing that the Appellant be evicted from occupation of the property being Shop No. U49 Killarney Mall, 54
- 4th Street and Rivonia Road, Killarney, Johannesburg.
3. The matter came before the High Court with the Honourable De Vos J presiding. The Learned Judge dismissed the Appellant's application with costs and upheld the Respondent's counter application with costs. With leave of the High Court, Appellant now appeals against the decision of the High Court to the Full Court of the Gauteng Division.

BACKGROUND

4. Respondent is the owner of a mall situated in Killarney, Johannesburg. During or about March 2005, Appellant and Respondent entered into an agreement of lease in terms of which the Respondent leased certain premises in the Killarney Mall to the Appellant. The lease commenced on 1 April 2005 for a period of 10 years ("the initial period"). Clause 4.2 of the lease agreement provides Appellant an option to extend the lease. It read as follows :

"4.2 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 years, commencing immediately after the expiry of the initial period."

5. The said clause further provides under paragraph 4.2.1 thus:

"Should the tenant desire to exercise the option, it shall give written notice to the landlord to that effect, not less than 6 calendar months before the expiry of the initial period, failing which the options shall lapse and shall be of no force and effect."

6. And further, clause 4.3 determines the terms and conditions applicable to the option as follows:

"Save that the tenant shall have no further option rights, the tenant's tenancy during the option period referred to in clause 4.2 above shall be governed by the terms and conditions contained in this lease."

7. It is common cause between the parties that the initial period of the lease expired on 31 March 2015. This is the termination date of the lease, after a period of 10 years.
8. Some eight months prior to the termination date, in particular on 13 June 2014, Appellant wrote to the Respondent a letter intending to exercise the option, which letter reads thus:

"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, RIVIERA ROAD, KILLARNEY MALL."

Our records indicate that the existing agreement of /ease for the Clicks premises in Ki/Jamey 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 nh20@clicks.co.za for our consideration.

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

Kind regards Nicolette Horstons"

9. A dispute arose between the Appellant and Respondent as to whether the letter quoted above, constituted a proper exercise of the option envisaged in clause 4 of the lease agreement. Appellant contends that it is a proper exercise of the option while the Respondent interprets the letter as a conditional acceptance in that it depends on the outcome of negotiations which still have to be approved by Appellant's board.
10. The High Court in dismissing the application for declaration that the letter is the correct exercise of an option, held amongst others that the letter quoted above, properly interpreted, communicates a desire by the Appellant to renew the lease on terms to be negotiated between the parties. The Court went on to describe the Appellant's contentions as being opportunistic and contrived in that the letter clearly invites negotiations and not an unequivocal exercise of the option.
11. Appellant's counsel argued before the Full Court that a proper approach to interpreting the content of the letter is to read only the first paragraph after the heading which, according to Appellant, demonstrates an unequivocal intention to exercise the "renewal option".
12. However, Appellant's counsel concedes that clause 4.2 in the agreement is in essence an offer to the Appellant, should it so wish, to exercise an option to extend the lease for a further period of 5 years. It is further conceded that by Appellant notifying its election to do so, the Appellant will be accepting that offer. Therefore the principles of offer and acceptance are applicable in

this case. In this regard, the Court a quo correctly opines that: "The acceptance must be clear and unequivocal or unambiguous", and further with reference to the matter of *Du Plessis NO v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) 15, that "acceptance must take place in accordance with the rules of acceptance and in accordance with the agreement. "We agree with this view.

13. Reference is also made to the matter of *Boerne v Harris* 1949 (1) SA 793 (A). The facts of this case have a striking similarity to the case before this Court. It also had to do with a renewal of a lease and a purported extension thereof. The headnote of the case provides a summary of the issues as follows:

"A lease of an hotel, executed on 15th April 1942, and which was for five years, provided that "the lessee shall have the option to renew the lease upon the same terms and conditions for a further period of five years provided that he shall give the lessor notice in in writing at least six months prior to the expiration of the first period of five years of his intention so to renew the lease..."

14. In writing the purported letter of renewal, a mistake was made in regard to the date. In deciding whether the letter constituted a proper exercise of the option, the Appeal Court emphasised that. The acceptance of an offer "must be unequivocal, i.e. positive and unambiguous "
15. It is thus trite that acceptance of an offer which is conditional is not proper acceptance in terms of the law. Appellant's contention would have had merit if the letter stopped on paragraph 1. However, Appellant continues in the letter to call for a rental proposal from the Respondent, which should open up negotiations whose outcome will be subject to final approval by Appellant's board. The call for negotiations on the rental cannot be de-linked from the purported exercise of the option as Appellant contends. This would be contrary to the provisions of clause 4.3 which in essence spells out that the exercise of the option would be in the same terms as the lease for the initial period. Negotiations for new rental puts the exercise of the option at risk in that the outcome thereof might introduce a change in the terms and conditions of the initial period.
16. This Court is of the view that the proper approach to the interpretation of the letter purporting to extend the option, should be that stated in the matter of Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18. The Supreme Court of Appeal in that decision stated thus:

"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 light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and sin text; 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 light of all these factors. The process is objective, not subjective." (Our emphasis)

17. The SCA in Endumeni correctly formulates an approach in interpretation, which is premised on the fact that one has to have regard to the context of the document and that such document must be read as a whole. To isolate the first paragraph of the letter as Appellant contends would not be a proper construction of the document. Thus the submission by Appellant's counsel that the first paragraph of the letter must be read in isolation from the rest of the content is without merit.

18. It is further common cause that both parties were in a process of engaging on a revised rental of the initial agreement at the instance of Appellant. The Appellant was clearly dissatisfied with the rental even in the initial period. It is thus fair to accept that it sought to use the exercise of the option an opportunity to renegotiate the rental, the outcome of which would be subject to the approval of its board.
19. We agree with the reasoning of the High Court in dismissing the application by the Appellant. A proper reading of the letter which purports to exercise an option, even on the face of it, conveys a clear intent to do so conditionally. Further, the condition Appellant wishes to attach to the purported exercise of the option, constitutes a breach of the provisions of clause 4.3 of the agreement. We are thus of the view that this appeal must fail. The High Court was correct in dismissing the application and upholding the counter application with costs.
20. In the premises we make the following order:
1. The appeal against the decision of the High Court in dismissing Appellant's declaration application with costs and upholding Respondent's counter application with costs is dismissed.
 2. The decision of the High Court is upheld.
 3. Appellant is ordered to pay the costs of the appeal inclding of Respondent's two counsel.

S P MOTHLE

Judge of the High Court

Gauteng Division

Pretoria

I agree:

J RAULINGA

S S MAAKANE

Acting Judge of the High Court

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Prepared on 9 October 2026 · Esheria