

SOUTH AFRICA / JUDGMENT

Durban University of Technology v Tritron Trailer and Engineering CC (13086/17)

[2018] ZAKZDHC 63 (30 November 2018)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

Lopes

CASE / FILE NUMBER

13086/17

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No: 13086/17

In the matter between:

Durban University of Technology

Applicant

and

Tritron Trailer and Engineering CC Respondent

Judgment

Lopes J:

[1] The applicant, the Durban University of Technology ('DUT') seeks an order declaring that the purported termination of a rental agreement ('the agreement') which it concluded with Tritron Trailer and Engineering CC ('Tritron') is invalid and of no force or effect. The order also seeks relief compelling Tritron to abide by the terms of the agreement and afford DUT occupation of the leased premises ('the premises'). An undertaking not to enforce the purported termination was given by Tritron pending this hearing.

[2]. The facts of the matter may be summarised as follows:

- (a) On the 20th of December 2016 at Durban the parties concluded the agreement, which was in writing.

- (b) The agreement provided that triton would provide premises to accommodate a maximum of 245 students during the academic years 2017,2018 and 2019
- (c) The period during which the students would occupy the premises during an academic year was limited to term periods set out in DUT's academic calendar.
- (d) During any time out of the term periods of the academic calendar, Tritron would have the right to lease the premises to other persons.
- (e) On the 30th of August 2017, and purporting to act in terms of paragraph 31 of the agreement, Tritron notified DUT that they were cancelling the agreement. It is common cause from the papers that the word 'cancel' was intended to be a termination (ie - it did not relate to a breach).
- (f) DUT protested at the purported termination and demanded its withdrawal. The parties attempted to negotiate a possible continuation of the lease, but on the 31st of October 2017 Tritron's attorneys notified DUT that it would not withdraw the notice of termination.
- (g) On the 17th of November 2017 DUT brought an urgent applicant pursuant to which the undertaking referred to above, was granted.
- [3] DUT submits that the lease agreement was to endure for a minimum initial period until the 30th of November 2019, during which time the parties could not unilaterally terminate the agreement.
- [4] The relevant portions of the agreement are as follows:

(a) Paragraph 3:

‘3 DURATION

3.1 This Agreement shall endure for a minimum of 28.5 (TWENTY-EIGHT AND A HALF) non-consecutive months as detailed hereunder subject to renewal by DUT.

FIRST YEAR-2017

3.1.1 01 February 2017 to 23 June 2017

3.1.2 17 July 2017 to 30 November 2017

SECOND YEAR 2018

3.1.3 01 February 2018 to 22 June 2018

3.1.4 16 July 2018 to 30 November 2018

THIRD YEAR 2019

3.1.5 01 February 2019 to 21 June 2019

3.1.6 15 July 2019 to 30 November 2019

3.2 In addition to the period referred to in 3.1, the initial period shall also include any term provided within the official OUT 2017, 2018 and 2019 academic calendars which are not covered by the period referred to in 3.1, provided that OUT shall notify the LESSOR in writing of the exact duration of such additional period... '.

(b) Paragraph 5:

'5. ACCOMMODATION CHARGES

5.1 DUT shall pay the LESSOR an ACCOMMODATION CHARGE of R1 795.64 per month per student for the lease period. In the subsequent years of the lease the accommodation charges shall be increased by the CPI rate as taken in September of the previous year as stipulated by Statistics South Africa....'

(c) Paragraph 31:

'31. TERMINATION

31.1 Notwithstanding the provisions of Paragraph 12 hereof relating to Breach, either party shall be entitled to terminate this agreement for the following academic year, provided three (3) months written notice is given to the other party on or before 31 August of the current year.'

[5]· Mr Boulle,· who appeared for DUT, submitted that properly- construed, the agreement provided for a minimum initial period of 28.5 months for the academic years 2017, 2018 and 2019, whereafter the agreement may be cancelled on three months' notice as provided for in paragraph

31. He submits that accordingly the only

issue to be decided is whether the right to cancel the agreement on three months' notice arises only after the expiry of the three year initial period, or whether that termination could be exercised at any time during the initial three years.

[6] Mr Boulle submitted that:

- (a) In paragraph 3.1 the agreement specifically provides for a minimum initial period spread across the academic years' 2017 to 2019.
- (b) A cancellation on three months' notice at any time during this period would render the defined minimum initial period meaningless.
- (c) That interpretation is supported by paragraph 5.1 of the agreement which provides that DUT shall pay an accommodation charge of R1 795.64 per month per student for the duration of the agreement. The paragraph goes on to state 'in the subsequent years of the lease the accommodation charges shall be increased... '. The amount payable per student per year is fixed for the minimum initial period, and would thereafter escalate. It is common cause that the rental stated is applicable until the 30th of November 2019.

(d) The interpretation favoured by DUT is commercially sensible and would give business efficacy to the contract. The inclusion of a defined minimum initial period provided certainty to the parties, and that is why it was included in the agreement. In addition the minimum initial period and the termination provisions are to be read together, and the interpretation favoured by DUT would reconcile provisions which would otherwise stand in conflict with each other.

[7] Mr Boulle submitted that the agreement is 'ever-green' until terminated on notice. The provisions of paragraph 31 of the agreement are placed beyond the reach of paragraph 12. If the respondent's submission that the agreement could be terminated within the initial period is correct, the provisions of paragraph 31 should have read:

'Notwithstanding the provisions of paragraphs 3 and 12...'

But this was not done and no reference is made to paragraph 3.

Mr Boulle submitted that a court was not entitled to rewrite the terms of an agreement under the guise of construction. In this regard he referred to:

See: *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] 4 All ER 265 (CA) para 60.

Khula Enterprise Finance Ltd v Geldenhuys & another (745/11)

[2012] ZASCA 165 (21 November 2012).

[8] Mr Gunase, who appeared for Tritron, submitted that paragraph 31 is a stand-alone clause which deals only with paragraph 12. He submitted that the termination of the agreement and a breach go hand-in-hand and Tritron has an unreserved or unequivocal right to terminate the agreement at any time during its duration. Mr Gunase argued that the respondent was claiming a termination in terms of paragraph 31 and not alleging a breach.

[9] Mr Gunase further submitted that if paragraph 3.1 was meant to preclude a termination prior to the duration of the three year minimum period, it should have stated that that period was an absolute minimum. Paragraph 3.1 should be read with paragraph 12.

[10] I agree with the submission of Mr Boulle that the fact that R1 796.64 per month per student was payable for the duration of 2017, 2018 and 2019 academic years strengthened the argument that the parties

intended an initial three year minimum period to apply. There is no merit in the submission that, in that event, paragraph 31 should have been phrased differently. In my view Tritron has no answer to the proposition that its argument renders the provisions of paragraph 3.1 nugatory. In addition, as pointed out by Mr Boulle clause 31 has to be read within the context of the whole agreement.

[11] Mr Gunase also submitted that because OUT drafted the agreement, the contra proferentem rule is applicable, and any confusion in the interpretation of the agreement must be construed against DUT. On the facts of this matter I do not believe that that should be case. In my view the interpretation is sufficiently clear, and there is no need to invoke the rule which only applies when all other rules of interpretation have been exhausted, and the true intention of the parties still cannot be determined.

See: *Jonnes v Anglo-African Shipping Co*

(1936) Ltd 1972 (2) SA 827 (A) at 8358-F.

[12] There is no reason why costs should not follow the result, including those costs reserved on the 1th of November 2017.

[12] In those circumstances I make the following order:

(a) It is declared that:

(i) The respondent's purported cancellation of the agreement concluded between the parties on the 20th of December 2016, (a copy of which is annexed to the founding affidavit marked 'A') and which cancellation appears in a letter dated the 30th of August 2017 and confirmed in a letter dated the 31st October 2017, is invalid and of no force and effect.

(ii) The agreement remains valid and binding.

(iii) Either party to the agreement only has a right to terminate the agreement after expiry of the initial period of the lease, and in the case of a termination for the 2020 academic year, where notice is given prior to the 31st of August, 2019.

(b) The respondent is interdicted from acting upon, or giving effect to, its purported cancellation of the agreement.

(c) The respondent is directed to abide by the terms of the agreement and afford to the applicant occupation of the premises as provided for in the agreement.

(d) The respondent is directed to pay the costs of this application, including the costs of the hearing on the 1th of November 2017

Lopes J

Date of hearing: 22nd November 2018

Date of judgment: 30th November 2018

For the applicant: Adv A J Boule (instructed by NSG Attorneys).

For the respondent: Adv H Gunase (instructed by Krish Naidoo, Govender & Company)

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