

SOUTH AFRICA / JUDGMENT

Ekurhuleni Metropolitan Municipality v Great Cormorant Investments 75 (Pty) Limited (23073/2022) [2025] ZAGPJHC 177 (25 February 2025) [2025] ZAGPJHC 177

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dlamini

CASE / FILE NUMBER

23073/2022

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
JOHANNESBURG

(1) REPORTABLE:

NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3) REVISED:

NO

25 February 2025

CASE

NO: 23073/2022

In the matter between:

EKURHULENI
METROPOLITAN MUNICIPALITY
PLAINTIFF
and
GREAT
CORMORANT INVESTMENTS 75 (PTY) LIMITED
DEFENDANT

Coram: Dlamini J
Date
of hearing: 03 February 2025

Delivered: 25 February 2025 – This judgment was handed down electronically by circulation to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on 25 February 2025.

JUDGMENT

DLAMINI J

INTRODUCTION

- [1] This is a special plea of prescription application brought by the defendant against the plaintiff's Particulars of Claim. The plaintiff, the Ekurhuleni Metropolitan Municipality (“EMM”), issued summons claiming payment of R 12 103 547.16 against the defendant, Great Cormorant Investments (“Cormorant”). This company develops and leases commercial and industrial property. The claim is based on the defendant's alleged breach of the lease agreement entered into between the parties.
- [2] After entering an appearance to defend, Cormorant also raised a special plea of prescription, in which the defendant insisted that a substantial portion of the plaintiff's claim, in respect of which prescription commenced running in 2016, has become prescribed in terms the Prescription Act (“the Act”). The special plea is opposed by the plaintiff on the basis that the debt became only due when the arbitration award was handed down on 18 September 2020.
- [3] To resolve this issue, the parties agreed that the defendant's special plea of prescription be separated and dealt with by way of the stated case and argument. The nature of the dispute, the background, the common cause facts, and the parties' contentions of the disputed issues were then duly summarised in the document marked Special Plea-Prescription Stated Case. This then brings this matter for consideration before this court.

AMENDMENT

- [4] At the hearing, the defendant applied for certain amendments to its special plea in terms of Rule 28 (10) of the Uniform Rules of Court. The plaintiff did not oppose the application, and in the interest of justice, the court granted the amendment.

BACKGROUND FACTS

- [5] The facts underlying the dispute are largely common cause. I mentioned here that I will touch on those facts that this court deems relevant to the determination of the dispute before me.

- [6] EMM is the registered owner of the property situated at 74 Van Riebeck Road, Edenvale (“the property”).
- [7] The plaintiff and Checkers South Africa Ltd, in 1983, concluded a notarial deed of lease in respect of the property for a period of 30 years, which was registered on 9 November 1983.
- [8] During, December 1984, Checkers SA was substituted by Sanlam in the 1983 lease. In the proceeding years, various other leases in respect of additional properties were concluded.
- [9] In October 2001, Sanlam sold all of its rights and obligations as lessee in terms of the leases as a going concern to the defendant.
- [10] On 20 November 2014, the defendant, by letter, exercised its option to extend the lease for an additional 20 years and insisted that the renewal be registered against the title deed. Simultaneously, the defendant also sought confirmation that an annual rental of R54 870.12 would be payable for the ensuing years.
- [11] When the plaintiff failed to respond to the aforementioned letter, the defendant filed an application in the high court seeking an order compelling the plaintiff to secure the registration of the lease renewal.
- [12] Amid this application, a dispute arose between the parties regarding the method of determining the rental for the renewal period. In February 2016, the parties agreed to refer the determination of this issue to arbitration.
- [13] The parties duly agreed on the nature of the dispute, and the arbitrator was then called upon to interpret clause 3 of the 1983 lease to determine whether the EMM was entitled to set the rental amount payable and escalation applicable to the renewal period as of June 2016.
- [14] In the arbitration, EMM submitted that clause 3.3 of the lease afforded the plaintiff absolute discretion to determine or fix a base rental for the renewal period, whereas the defendant contended that the rental payable immediately prior to the expiration of the initial thirty-year period would continue to apply for the renewal period subject to an increase of 10%.
- [15] The parties further agreed that pending arbitration, the plaintiff’s internal systems and processes regarding the matter would run parallel with the arbitration.
- [16] Pending arbitration and in accordance with the above clause, the plaintiff passed a resolution on 23 June 2016 determining that the market-related monthly rental would be R70 000.00 per month, escalating by 10% per annum, and subject to review every five years.
- [17] Conversely, the defendant continued to pay rent to the plaintiff at the rental rate applicable for the 30th year of the initial lease, with a 10% increase until October 2018.

ISSUES FOR

DETERMINATION

- [18] The nub of the issue between the parties at this stage concerns the date on which EMM alleges its claim arose against Cormorant.
- [19] Two interrelated issues stand for determination in this matter;
- [20] The date the debt becomes due and, as such, the date on which prescription commenced running. At this stage, the issue concerns the date on which EMM alleges its claim arose against the defendant. The question is whether the plaintiff's claim arose and fell due on 23 June 2016 or November 2013, which dates Cormorant contends were dates upon which the plaintiff knew the identity of the defendant and the facts upon which the debt is alleged to have arisen and the facts upon which it has arisen, by exercise of reasonable care, or 18 September 2020 being the date of the arbitration award as contended by the plaintiff.
- [21] Whether the running of prescription was interrupted by the arbitration process and whether the debt claimed by the plaintiff was the object of a dispute subject to arbitration.

The Date The Debt Became Due

- [22] The issue for consideration is whether the three-year period of prescription of the debt commenced running on either November 2013 or 23 June 2016, as claimed by the defendant, or 18 September 2020, as contended by the plaintiff.
- [23] In argument, EMM contends that although it admits that the resolution was passed “in principle” on 23 June 2016, setting the rental at R70 000.00 per month, the interpretation of the clause and its entitlement to recover this rental was still subject to determination. As a result, the plaintiff's argument goes, the amount of the rental remained uncertain and was not due until the method of calculating the rental was determined by the arbitrator.
- [24] The plaintiff submits that in raising the various invoices, it was aware of the fact that it was not entitled to recover these amounts until such time as the arbitration was finalized and until the mechanism for determining how the rental is to be calculated had been decided.
- [25] Finally, the plaintiff insists that in raising the invoices, it appreciated that although it had fixed the rental, the interpretation of the clause and its entitlement to recover this rental was still subject to determination. As such, the determination of the rental remained uncertain and was not due until the arbitrator determined the mechanism and method of calculating the rental.
- [26] Cormorant argues that when the plaintiff fixed the rental on 23 June 2016, the plaintiff had all the relevant facts as envisaged in section 12 (3) of the Act. These include, for instance, the identity of the defendant, the lease agreement, and the rental fixed by the plaintiff. In support hereof, the defendant insists that the following must be taken into account: the fact that the plaintiff passed a resolution on 23 June 2016 and fixed the rental, the plaintiff implemented the resolution. The plaintiff invoiced the defendant. The plaintiff regarded the rental charged as outstanding and in arrears. The plaintiff charged interest. Finally,

the plaintiff demanded payment from the defendant and threatened with litigation in respect of the alleged outstanding amounts owed to the plaintiff by the defendant.

[27] According to the defendant, once the plaintiff passed a resolution fixing the rental terms of the lease on 23 June 2016, all the facts required to be proved by the plaintiff to support its claim existed. Being so, the debt became due, and prescription commenced running.

[28] To answer this question, it must, in my view, first be determined whether the plaintiff was aware of the entire set of facts required to be its cause of action. In this case, the matter involves the determination of rights arising from a lease agreement. The parties to a lease agreement must agree on several essential elements. For instance, they must agree on the thing to be leased, the duration of the lease, and finally, the rental payable in for the leased property.

[29] It appears to me, and it appears to be common cause, that there existed a dispute and there was no agreement between the parties regarding the method of calculating and determination of the rental. It was for this reason that the parties referred the matter to arbitration.

[30] It is apposite at this stage to examine the specific terms of the arbitration. The terms of the arbitration were formulated by the parties as follows;

“The parties agree that the essence of the dispute between them is the interpretation of the relevant clauses of the 1983 notarial lease (read with addendums and further lease agreements in relation thereto) with specific reference to the contractual interpretation of the manner in which the rental amount and the rental escalation should be determined for the extended 20 year period.” My underlying.

[31] For reasons that are unclear, the arbitration agreement was signed in February 2016, but the matter was only heard on 2 August 2020. After analysing evidence and hearing the parties, the Arbitrator concluded that “It is declared that in terms of clause 3.4 of the notarial lease agreement K558/1983, the Ekurhuleni Metropolitan Municipality

has the exclusive entitlement to fix the rental for the renewal period of 20 years for which provision is made in clause 2.1 of the lease agreement. The award was published on 18 September 20220.

[32] It is trite that in interpreting the terms of the arbitration, a sensible meaning is to be preferred to one that leads to insensible

or unbusinesslike results or undermines the apparent purpose of the document. This process, it should be emphasised, entails a

simultaneous consideration of having regard to the context, the document as a whole, and the circumstances attendant upon its coming

into existence.[1]

- [33] In my view, a sensible and businesslike interpretations of the terms of the arbitration are clear and uncontroversial. The terms of the referrals simply meant that the final determination of whether the plaintiff was entitled to set the rental amount rested with the decision of the Arbitrator. Meaning that whatever the plaintiff charged as rental was an interim amount pending the publication of the Arbitrator's award.
- [34] The defendant's interpretation is insensible as it clearly defeats the very purpose for which the parties referred the matter to arbitration in the first place. There existed a dispute between the parties regarding the method of calculating rental. It is on this basis that the parties resolved and, by agreement, decided to refer the matter to arbitration. Therefore, this means that until the arbitrator had handed down the award, there was no agreement on the amount of rental.
- [35] In my view, the date of the award clearly marks the date when prescription began to run. This is because it is the date the arbitrator handed down the award that the rental became certain and fixed between the parties. Summons were issued and served on the defendant on 7 July 2022, which is well within the three-year period prescribed by the Act. Therefore, the conclusion is that the summons were validly issued and served on Cormorant within the three years as prescribed by the Act.
- [36] Also, Cormorant's submission that the applicant fixed the rental when the EMM passed its resolution on 23 June 2016 is meritless. This is simply because the resolution was passed as the result of the parties agreeing that, pending the final award, the plaintiff's internal processes would be applicable. This is also evidenced by the fact that despite the plaintiff notifying the defendant of the resolution, Cormorant not only refused to abide by the resolution, but the defendant continued to pay rent in amounts that it believed it ought to have been charged by the plaintiff.
- [37] This should, in my view, be the end of this inquiry. However, for the sake of completeness, I will address the rest of the issues raised for determination.

Suspension of Running of Prescription

- [38] The issue raised in this regard is whether the referral of the dispute to arbitration suspended the running of prescription.
- [39] EMM submits that both parties understood that there was a dispute regarding how the rental over the method could be calculated. As a result, by agreement, the parties referred the matter to arbitration, and until the arbitrator resolved the issue, the amount of rental remained uncertain.

- [40] The defendant asserted that the arbitration process did not interrupt or delay the running of the prescription. According to the defendant, the arbitration process did not delay the running of prescription because it was not a step taken by the plaintiff to recover the debt, which would have excused the plaintiff from having to institute legal proceedings to interrupt the running of prescription.
- [41] I have already made a finding that the determination of the rental was dependent on the handing down of the award. It follows, therefore, as it must that the arbitration process suspended the running of prescription. Put differently, prescriptions only began to run on 18 September 2020, the day the award was handed down.

Finality of the Award

- [42] The parties agreed in the arbitration agreement that the award would be final and binding if either party failed to notify the other of a review of the award within 10 days of the Arbitrator's decision. Cormorant never challenged the award. Absent review, the award became final.
- [43] In all the circumstances mentioned above, I am not persuaded that the defendant has discharged the onus that rested on its shoulders to prove that the plaintiff's claim has prescribed. Therefore, the application must fail.

- [44] I make the following order

ORDER

1. The defendant's application of special plea of prescription is dismissed with costs.

J DLAMINI

Judge of the High Court

Gauteng Division, Johannesburg

For the Plaintiffs: Adv. P V Ternent

Email:

trisht@counsel.co.za

Instructed by: Wright Rose-Innes Inc.

Email:

graemec@wri.co.za

For the first Defendant: Adv. J Pretorius

Email:

pretorius@maisels.co.za

Instructed by: Sim Attorneys Inc.

Email:

lucia@simattorneys.co.za

[1] See Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13 ; 2012 (4) SA 593 (SCA).

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