

SOUTH AFRICA / JUDGMENT

## Friedshelf 1612 (Pty) Ltd v McConnell (2343/2018) [2018] ZAECHGC 119 (20 November 2018) [2018] ZAECHGC 119

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering

CASE / FILE NUMBER

2343/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 2343/2018

Date heard: 15 November 2018

Date delivered: 20 November 2018

In the matter between

FRIEDSHELF 1612 (PTY) LTD

Applicant

Vs

MARK MCCONNELL

Respondent

JUDGMENT

PICKERING J:

[1] Applicant, Friedshelf 1612 (Pty) Ltd, is the owner of erven 3739, 3740 and 3741 which together make up the property situated at the corner of Somerset and High Streets in Grahamstown, being 38 Somerset Street. The original historic building has been refurbished and converted into various sections which are leased to various business tenants.

During August 2015 applicant, represented by Mr. Nicolas George Poole and respondent, Mr. Mark McConnell, concluded a written agreement of lease in respect of part of the property, being the original lounge and dining room thereof.

[2] Applicant now seeks an order to the following effect:

*“1. That it is declared that the agreement of lease, Annexure “B” to the Applicant’s founding affidavit, has not been renewed.*

2. That the Respondent is ordered to vacate the Applicant’s premises at 38

Somerset Street, Grahamstown, within twenty-four hours of service of a copy of this order upon him.

3. That in the event that the Respondent does not vacate the Applicant’s premises in accordance with the terms of this Order the Sheriff is directed to evict the Respondent from the Applicant’s premises at 38 Somerset Street, Grahamstown.”

[3] Applicant seeks also an order that respondent pay the costs of this application. The relief sought is opposed by respondent.

[4] The duration of the lease was, in terms of clause 4 of the agreement, for a period of three years commencing on 1 August 2015 to 31 July 2018. Respondent was further granted an option to renew the lease on

certain terms and conditions but, “subject to a rental agreed between the parties prior to renewal, but not less than an escalation of the rental at the time of 8% per annum.”

[5] At issue in this application is whether respondent effectively renewed the lease

agreement in accordance with the provisions thereof, it being applicant’s contention that there was in fact no effective

renewal thereof and that respondent therefore has no contractual right in the form of a renewed lease to occupy the premises, whereas

respondent contends that the lease has in fact been effectively renewed.

[6] The dispute between the parties arises out of their conflicting interpretations as to what was required in order for respondent effectively to renew the lease. Before turning to deal with the relevant clauses of the lease agreement it is necessary to have regard to the background of the matter.

[7] It is common cause that the lease is a commercial lease in that respondent’s use of the property was for the conduct of a business trading under the name and style of Handmade Coffees. As well as selling coffee respondent also sold “a few carefully chosen food offerings.” According to respondent problems arose when, during February 2016, a bakery tenant moved into the premises. Applicant then insisted that respondent should not compete with the bakery and made it clear that he did not want respondent to sell products

that directly competed with the business of the other tenants in the building.

[8] Respondent alleges that during November 2017 he was approached by Mr. Simon Roberts on behalf of applicant who advised him that respondent could help him “exit the lease early” and that he could leave during December

2017. Respondent replied that he had no intention of doing so. Roberts further informed respondent that if he did not vacate the premises applicant would sell coffee in opposition to him from the same building. According to respondent it became clear that applicant was threatening him in order to force him to vacate the premises. He details certain further alleged conduct of applicant which according to him made it clear that applicant was not amenable to an extension of the lease agreement as provided for therein. Applicant denies that any threat was made to

respondent as alleged.

[9] The clauses of the agreement relevant to the renewal thereof provide at follows:

*“Clause 4*

The Lessor hereby grants to the Lessee an option to renew this agreement of lease, upon the same terms and conditions contained in

this agreement and subject to a rental to be agreed between the parties prior to the renewal, but not less than an escalation of the rental at the time, of 8% per annum, as stipulated in Clause 18 hereunder.

Clause 18

18.1 The Lessee shall have the right to renew this lease upon the same terms and subject to the conditions set out below.

18.2 The period for which this lease may be so renewed is 3 (three) years, commencing from 1 August 2018.

18.3 All the terms of this lease shall continue to apply during the renewal period, save that:

18.3.1 the rent shall be agreed by the parties for the renewal period but shall increase by at least the escalation rate in 5.3 above;

18.3.2 there shall be no further right of renewal unless agreed to expressly by both parties in writing;

18.4 The right of renewal shall be exercised by notice in writing from the Lessee to the Lessor given and received

not later than six months prior to the date on which the renewal period is to commence and shall lapse if not so exercised.

18.5 If the right of renewal is duly exercised, this lease shall be renewed automatically and without the need for any further act of the parties.”

[10] On 18 January 2018 respondent, alive to the fact that the option to renew the lease had to be exercised on or before 31 January, addressed the following email to Mr. Poole:

*“In terms of Clause 18 of our lease agreement, and the fact that the period stipulated in 18.4 is approaching, I would hereby like to exercise my right to renew for the full three years stipulated in clause 18.2”*

[11] On 22 January Mr. Poole replied to this email as follows:

*“I am travelling extensively at present. We are now required to negotiate the new rent in terms of 18.3.1 which still has to be agreed. I am unable to meet until the end of this week, but you may submit your proposal by email.”*

[12] Respondent replied hereto on 23 January 2018:

*“Thanks for your response. My proposal would be that we continue as before with the 8% escalation.”*

[13] On 24 January 2018 Mr. Poole replied:

*“It has become clear over the three years of your current lease that the area under your lease is the flagship area for the building and therefore commands a premium rental. In addition the landlord has to take into consideration the opportunity costs of renting out this space in light of its other options. Therefore the landlord is expecting a significant increase in the rental you previously paid in order to agree a new lease with you and your offer below is not accepted.*

In addition I must point out that the outside area will no longer be available to you free of charge. A rental must be agreed for that too.

Lastly I also need to inform you that the storeroom you rent from month to month is required by the landlord from the end of this month due the building alterations being carried out. Please can you return it in a cleared state by 4 February (you will not be charged for the four days of February – those will be supplied free for you to clear your contents.)”

[14] The respondent replied to this email on 25 January as follows:

*“Thanks for that response. I will give your points due consideration. What is your rental proposal?”*

[15] Mr. Poole did not reply to this email. On 1 February 2018, however, Mr. Poole sent a further email to respondent, namely:

*“I have not heard back from you in response to my email below. I presume then you are not intending to make a revised offer for the rental and therefore I confirm that your tenancy at 38 Somerset will come to end at the end of July.”*

[16] This email was replied to on the same day by respondent in the following terms:

*“As noted in 18.4 of my lease, I have exercised my intention and right to renew this lease as evidenced in my email to you dated 18 January 2018. In response to your not being forthcoming with an expected rental amount and your insistence that I make a rental offer, I have taken advice and am requesting information regarding premium rentals in the area. I am awaiting feedback on this request and will revert to you as soon as I receive this information.”*

[17] The following day, 2 February, Mr. Poole replied as follows:

*“I think there is a misunderstanding on your behalf. The facts are:*

1. In order to exercise an option all terms have to be agreed. The rental was not agreed in terms of your existing agreement and therefore had to be agreed by the parties at the time i.e. an agreement to agree.
2. That has still not been done and a notice period for doing so has now expired (31 January)
3. Therefore that option is no longer available.
4. The landlord is not offering you a new tenancy after 31 July 2018, so there is no point in making an offer.”

[18] According to applicant nothing further was heard from respondent until on 16 June, 2018, respondent

put up a notice in the premises stating:

*“We have got Bad News and Good News.*

The Bad News:

We are being forced to vacate these premises ...

BUT

There is Good News too:

We aren't leaving Grahamstown!

We are moving to new, even better premises!

Not only that, but we recently started roasting our coffee right here in Grahamstown! The coffee is only going to get Fresher!

Keep an eye out for The Spiral.”

[19] According to respondent he displayed the notice to draw attention to what he terms applicant's

male fide conduct in unilaterally terminating a validly renewed lease agreement. It is common cause that respondent then put up another notice in which he stated “we are unable to agree terms on our lease renewal, so we’re moving out of this space.” Applicant contends that the said notices were an indication of respondent’s intention to abandon his right of

renewal of the lease. Respondent denies that he ever had such intention and reiterates that he wished to draw attention to the fact that applicant “forced” him to leave the premises. He states that the notices cannot be construed as an acceptance by him of the fact that no renewed lease had been validly concluded. In the view I take of the matter nothing turns on this.

[20] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph [18] the following was stated at paragraph 18 with regard to the interpretation of contracts:

*“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. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision

itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[21] In *KPMG Chartered Accountants v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at paragraph [39][ the Court stated as follows at paragraph 39

*“First, the integration (or parole evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by Trial Courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 € SA 927 (A) at 943 B. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the Court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (Ed) Phipson on Evidence 16 Ed 205 (para 33- 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp*

[1985] ZASCA 132, 1985 Burrell Patent cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualize the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 at 455 B – C).”

[22] In Roazar CC vs The Falls Supermarket CC [2017] ZASCA 166 the matter was put thus at paragraph [9]:

*“[9] These clauses must be interpreted by having regard to the language used in the light of the ordinary rules of grammar and syntax; in the context of each other and the agreement as a whole, and their apparent purpose so as to give them a commercially sensible meaning. If more than one meaning is possible each possibility must be weighed*

in the light of all these factors. The process is objective and not subjective.”

[23] Both clauses 4 and 18 require to be read together inasmuch as both deal with the requirements for an effective renewal of the lease agreement.

[24] In his answering affidavit respondent alludes to what he contends was the intention of the parties, namely, that “if the offer of renewal was accepted then the rental would be escalated by 8% as per the previous years, save in the event of the parties negotiating further and agreeing a higher rental.” Of course, as appears from the authorities cited above, the expression of opinion by respondent as to the meaning of the contract and as to what the intention of the parties was when concluding the contract is irrelevant and inadmissible.

[25] Mr. Smuts S.C., who appeared for respondent, submitted that it was plain from the emails to which I have referred above that while respondent was invited to and did make proposals regarding rental the applicant made no such proposals and simply rejected what was proposed by respondent. Mr. Smuts submitted that the approach of applicant was to seek to obstruct the respondent’s attempts to renew the lease by in effect refusing to negotiate the determination of a new rental in good faith. He submitted that whilst such an approach may have passed muster prior to 1994 it must fail in the present constitutional dispensation. In this regard he relied on the obiter dictum of Moseneke DCJ in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) where at paragraph [72] the learned Judge expressed himself as follows:

*“[72] Were a court to entertain Everfresh’s argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements*

seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that

our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.”

[26] Whilst disavowing that his submissions were in any way an attempt to develop the common law in accordance with the *Everfresh* dictum he submitted that the lease agreement had nevertheless to be construed in the light thereof. In developing his argument he stressed the wording of clause 18.3 and, in particular, the provisions in clause 18.3.1 that “the rent shall be agreed” and in 18.4 affording respondent “the right of renewal.” He submitted that it was clear from respondent’s email of 18 January 2018 to Mr. Poole that respondent, on that date, exercised his right of renewal. His further submission, if I understood him correctly, was that because applicant had thereafter in bad faith refused to negotiate a new rental, thereby thwarting respondent’s attempts to negotiate in good faith and to exercise his rights in terms of the lease agreement, the lease must be regarded as having been renewed on the terms set out in respondent’s email of 23 January 2018, namely, what Mr. Smuts termed “the bottom line rental” of an 8% escalation, subject to the parties thereafter negotiating an agreed rental.

[27] I cannot agree with these submissions which seem to me, with respect, to be no more than an

ingenious attempt to import a duty to negotiate in good faith through the back door in circumstances where no such duty exists having regard to the contents of the emails exchanged between the parties, the clear wording of the agreement, and the fact that the agreement does not contain a so-called deadlock-breaking mechanism.

[28] As was submitted by Mr. Paterson S.C., who appeared for the applicant, the argument concerning

applicant’s alleged obstructionist conduct was not advanced in respondent’s answering affidavit, the only complaint therein being that applicant had failed to make a counter-offer to the proposal of an 8% escalation. I agree with Mr. Paterson that the inference that applicant adopted the deliberate strategem of obstruction is not an inference that can properly be drawn from the papers. In this regard, as appears from the emails, applicant, in response to respondent’s email of 23 January, on 24 January declined respondent’s offer and advised him that a significantly higher rental was to be expected. No further offer was made in response to this by respondent within the requisite period and, in my view, it was not in the circumstances incumbent on applicant itself to propose what such increased rental should be. In these circumstances applicant’s conduct cannot in my view be categorized as *mala fide*.

[29] Even were I to be wrong in coming to this conclusion Mr. Smuts’ argument, in my view, faces an insuperable hurdle inasmuch as the agreement contains no deadlock-breaking mechanism in the event of the parties not being

able to agree on a new rental. This fact serves to distinguish the matter completely from that of *Sontsele v 140 Main Road Kokstad Property CC and Another*, unreported case no 14467/2016, ECD, Mthatha, relied on by Mr. Smuts, in which matter the lease agreement contained a clause referring the dispute to arbitration in the event of an agreement not being concluded between the parties.

[30] In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) Jafta J dealt with certain authorities concerning the duty of parties to negotiate in good faith. See, inter alia, *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* [1992] ZASCA 195; 1993 (1) SA 768 (A); *Southern Port Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) and *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA). The learned Judge stated at paragraph [97] that “currently the position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus.”

At paragraph [100] the learned Judge stated that whether an agreement to negotiate in good faith is enforceable where there is no

deadlock-breaking mechanism “remains a grey area of our law.”

[31] In the *Firechem Free State* matter, supra, Schutz JA stated unequivocally at paragraph [35] that “[a]n agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree.” See too: Kerr: *Law of Sale and Lease* 4th Ed by Graham Glover at 68.

[32] In *Roazar CC v The Falls Supermarket CC* supra Tshiqi JA, after reference, inter alia, to *Makate v Vodacom Ltd*, supra, had occasion to deal with the issue of a renewal of a lease in respect of which the lease agreement had no deadlock-breaking mechanism. The learned Judge dealt at length with the abovementioned obiter dictum in *Everfresh*. As pointed out by her a “development of the common law in order to compel parties to negotiate in good faith even in circumstances where there are no deadlock-breaking mechanisms is not without complications.” The learned Judge referred further to an article written by Lewis JA in “The uneven journey to uncertainty in contract (2013) 76 THRHR 80” in which the learned Judge highlighted some of the fundamental difficulties that a High Court would have to deal with if asked to determine whether a party had negotiated in good faith.

[33] At paragraph [23] Tshiqi JA stated that it was clear that the parties had consciously bound themselves to a contract that provided that each party could terminate it on one months’ notice in the event that there was no agreement on the renewal terms. At paragraph [24] she stated as follows:

*“[i]t would be against public policy for a court to coerce a lessor to conclude an agreement with a tenant whom it does not want to have as a tenant any longer. In instances of breach, there are adequate legal remedies available. It is difficult to conceive how a court, in a purely business transaction, can rely on ‘ubuntu’ to import a term that was not intended by the parties, to deny the other party the right to rely on the terms of the contract to terminate it.”*

[34] Even assuming that applicant refused to negotiate a renewed rental in good faith it is clear, having regard to the above mentioned authorities emanating from the Supreme Court of Appeal, by which authorities I am bound, that in the absence of a deadlock-breaking mechanism in the agreement there was no duty on applicant to do so.

[35] It is so, as was stressed by Mr. Smuts, that the respondent had a right to renew the lease but, in my view, the clear and commercially sensible meaning of clauses 4 and 18 is that such right was contingent upon agreement being reached by the parties upon the rental before the cut-off date of 1 February 2018, such rental to be not less than the existing rental escalated by 8%. Properly construed, the clauses cannot be interpreted as meaning that, absent agreement upon a rental, such rental would automatically be determined by default as being the existing rental escalated by 8% in accordance with respondent’s email of 23 January. Such an interpretation is, in my view, contrived and irreconcilable with the express terms of the written agreement of lease and would render the provisions requiring agreement as to the new rental superfluous.

[36] Had the clauses provided for the renewal of the lease at a rental to be agreed upon by the parties but not exceeding the maximum escalation of 8%, then respondent could have effectively renewed the lease by agreeing to pay the maximum rental provided for. See for instance *Raner and Bernstein v Armitage* 1919 WLD 58 at 61. That, however, is a very different proposition from the present provisions. I accordingly agree with the submissions of Mr. Paterson that no agreement as to the rental to be paid in the renewal period had been reached between the parties in accordance with clauses 4 and 18 and that in the absence of such agreement the lease was not effectively renewed. The application must accordingly succeed.

[37] As set out above applicant seeks an order that respondent vacate the premises within 24 hours of service of a copy of the order for eviction upon him. In my view this period is clearly too short. Mr. Smuts suggested that respondent would be in a position to vacate the premises within three weeks of any order to do so. In my view therefore respondent should be afforded a period until 10 December 2018 to vacate the premises. Accordingly the following order will issue:

1. It is declared that the agreement of lease, Annexure B to the applicant’s founding affidavit, has not been renewed.
2. The respondent is ordered to vacate the applicant’s premises at 38 Somerset Street, Grahamstown, on or before 10 December 2018.

3. In the event that respondent has not vacated the applicant's premises in accordance with the terms of this order the Sheriff is directed to evict the respondent from the applicant's premises at 38 Somerset Street, Grahamstown.
4. The respondent is ordered to pay the costs of this application.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Paterson S.C.

Instructed by: De Jager and Lordan

Appearing on behalf of Respondent: Adv. Smuts S.C.

Instructed by Wheeldon, Rushmere and Cole, Mr. Brody

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