

SOUTH AFRICA / JUDGMENT

Milga Properties (Pty) Ltd v Kerja (Pty) Ltd (04947/2024) [2025] ZAGPPHC 340 (25 March 2025) [2025] ZAGPPHC 340

COURT

North Gauteng High Court, Pretoria

BEFORE

Maier-Frawley

CASE / FILE NUMBER

04947/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE

NO: 2024-049477

(1)

Reportable: No

(2)

Of interest to other Judges: No

(3)

Revised :

25/03/2025

In the matter between:

MILGA
PROPERTIES (PTY) LTD
Applicant
and
KERJA
(PTY)
LTD
First Defendant

JUDGMENT

MAIER-FRAWLEY J:

1. In this application, which is opposed, the applicant seeks the eviction of the respondent from an immovable property comprising of four separate erven, which property is utilized as commercial premises (the main application). It is common cause that the respondent has been conducting its business from the property for the past five and a half years.
2. The respondent instituted a counter-application for an order declaring that “the Applicant/ Respondent is allowed to / may validly exercise its option to purchase the property as set out in Clause 2 and Clause 43 of the Agreement dated 3 July 2019 for an amount of R3 100 000.00.” (the counterclaim)
3. The respondent previously occupied the property in terms of a written lease concluded between the parties. The lease was for an initial period of five years, commencing on 1 July 2019 and terminating by effluxion of time (unless renewed) on 30 June 2024. The lease was however cancelled by the applicant in April 2024.
4. The lease provided for payment by the respondent of: (i) monthly rental (cl 2) and (ii) municipal rates and use of utilities, as levied by the municipality (cl 5) and (iii) payment of the Landlord’s short term insurance premiums (cl 6) and (iv) interest levied on monies due but unpaid by the lessee (cl 8).
5. In terms of clause 9, the property was let for the sole purpose of conducting the business of manufacturing therefrom. The lease contains certain standard type of clauses that one would expect to find in a commercial agreement, namely, a breach clause (cl 27); a whole agreement clause (cl 34); a non-waiver clause (cl 35); a non-variation clause (cl 36); and a certificate clause (cl 39).
6. In terms of clause 41, the respondent would be liable to pay costs on the attorney and client scale in respect of the Lessor’s enforcement of its rights under the lease. In terms of clause 38, the Lessor was entitled in its sole and absolute discretion to appropriate any amounts received from the Lessee towards payment of any cause of debt or amount owing by the Lessee to the Lessor whatsoever.
7. Clause 2 provides as follows:

“At the end of the 5 year period the Lessee will have an(sic) first option (pre-emptive right) to purchase the property for a selling price of R3.1 million, subject thereto that the Lessee did not fail in his commitments in terms of the lease.” (emphasis added)

8. In terms of clause 43, “Should the Lessee wish to exercise its option to purchase the Property at a price of R3.1m at the end of the term of the lease and the Lessor fails or refuses to give effect thereto, then and in that event the Lessee will be entitled to reclaim all amounts proven to have been expended on improvement of the Property.” No claim in respect of improvements has been brought in these proceedings.

Factual matrix

9. Facts which are common cause or not disputed or unrefuted, are the following.
10. During 2021, the respondent began to fall behind in its payment obligations under the lease. A breach letter was sent to the respondent, calling on it to remedy its breach within 7 days, as envisaged in cl 27 of the lease. The respondent failed to remedy its default. Summons was then issued against it in the Magistrates Court for payment of arrear rental and ancillary charges due and owing under the lease, which proceedings culminated in the grant of an order in favour of the applicant on 18 July 2022 for payment by the respondent of the sum of R979,348. 84, together with ancillary relief.
11. The parties thereafter sought to settle the dispute relating to the respondent’s outstanding payments under the lease.
12. In a letter dated 2 August 2022, the respondent made an offer to pay certain outstanding amounts to the applicant, including certain

additional monthly amounts, on condition that the lease agreement would continue and that the respondent would be entitled to purchase

the property for the amount of R3.1 million, excluding any outstanding rent and electricity or insurance charges that may be outstanding, subject to the respondent providing acceptable guarantees for payment of the total outstanding amount within 18 months from acceptance of the offer.[1]

13. The respondent’s proposals were not accepted by the applicant. Instead, the applicant made a counter-offer which was contained in a letter dated 5 August 2022.[2] In terms of its counter offer, the applicant sought payment of various amounts, which were to be paid by the respondent on set

dates, including additional amounts that would be payable as from 1 September 2022. Inter alia, the applicant required payment of an amount of R300,000.00 by 8 August 2022 and a further amount of R300, 000.00 was payable

from the trust account of the respondent’s attorneys, for which amount a guarantee had to be issued by the respondent’s

attorneys, to be available on 30 September 2022. The letter further, inter alia, recorded the following:

“Subject to Kerja making these payments, Milga will not execute their court order dated 18 July 2022 and will hold same in abeyance.

Further subject to Kerja making full and regular payments Kerja will be entitled to exercise the option to purchase the properties that forms the subject of the lease agreement after 18 months of regular payments, further subject thereto, that:

- all payments due to Milga is (sic) paid up to date prior to date of transfer;
 - guarantees are provided for the full purchase price;
 - All costs related to the transfer of the properties are paid for in advance.” (emphasis added)
14. In a letter dated 10 August 2022, the respondent accepted the applicant’s counter-offer on condition that the applicant confirmed ‘by return e-mail that the capital purchase price of the property will be the amount of R3 100 000.00 excluding any outstanding rent and municipality charges at that stage and payable within 18 months from date of this letter.’ The applicant confirmed same in an email transmitted to the respondent on 11 August 2022, wherein it recorded that ‘the capital purchase price of R3 100 000 for the sale of the properties exclude (sic) all arrears and will be payable within 18 months from 10 August 2022’, and further advised that payment of R300,000.00 was awaited as well as the guarantee for a further

R300,000.00.

15. And so, a settlement agreement came into being between the parties in relation to the respondent’s arrears under the lease. [3]
16. Save for paying the first amount of R300,000.00, as required under the settlement agreement, none of the other payment terms set out in the applicant’s letter of 5 August 2022 were met by the respondent. In consequence, the conditions attached to the option to purchase the property in the said letter, were not met.
17. In the answering affidavit, the respondent unequivocally admitted being in arrears, both in terms of the lease and subsequent settlement

agreement,[4] however, baldly alleging that it was making payment towards the arrears. The respondent failed to provide proof of any further payments allegedly made by it in its papers.

18. Pursuant to the respondent’s breach of the settlement agreement, on 8 January 2024 the applicant’s attorneys sent a letter to the respondent wherein it recorded various breaches by the respondent of the terms of the settlement agreement. It further informed the respondent that as the respondent had reneged on the settlement agreement, the judgment obtained in the applicant’s

favour had been executed on 13 July 2023, however, only assets to the value of R66,700,00 could be attached with which to satisfy the judgment debt of R979,348.84 (excluding interest). The respondent was reminded that “The pre-emptive right granted to Kerja in the lease agreement

was further specifically made subject to Kerja making full and regular payments for 18 months [a reference to the settlement agreement] which... Kerja did not do.' The letter concluded with the applicant informing the respondent that by reason of its breaches, the respondent had repudiated the settlement agreement, which repudiation it accepted, alternatively, that the settlement agreement was cancelled.

19. On 4 April 2024, a breach notice, as envisaged in cl 27 of the lease agreement, was sent by the applicant's attorneys to the respondent wherein it listed the respondent's various breaches of the lease agreement, including the respondent's failure to pay the outstanding judgment debt (the capital amount which, together with accrued interest, exceeded R1.2 million at that point). Demand for payment of all amounts then owing was made, with the applicant affording the respondent a period of 7 days within which to rectify its breach.
20. The respondent failed to rectify its various breaches. Instead, on 11 April 2024 it made a new settlement offer, inter alia, in relation to payment of the arrears then owing by it, together with an offer to purchase the property.[5] Significantly, the said offer did not include provision for payment of the judgment debt.
21. Needless to say, the said offer was not accepted by the applicant. The respondent was informed thereof in a letter addressed by the applicant's attorneys to the respondent's attorneys, dated 27 May 2024, wherein it was recorded that 'since your client made the unacceptable offer on 11 April 2022, no payments were made at all.'
22. The breach notice was followed by a notice of cancellation of the lease agreement in a letter sent by the applicant's attorneys to the respondent. It was recorded therein that 'Notwithstanding demand, Kerja failed to remedy all the breaches set out in the aforementioned letter of demand. That being the factual position, Milga now relies on the provisions of clause 27 of the lease agreement, which now entitles Milga to forthwith and without notice cancel the lease and to resume possession of the leased Property. In the premises, the lease agreement is now cancelled with immediate effect as envisaged in clause 27 of the Lease Agreement.'

Discussion

23. The applicant's case is disarmingly simple. It amounts to this: by virtue of the respondent's admitted breach of the lease agreement, its subsequent breach of the settlement agreement, the cancellation of both the lease and settlement agreements in consequence of the respondent's failure to remedy its default, despite demand, the option to purchase the property was no longer available to be exercised by the respondent. But even if it were, the condition under which it would be available, had not met. The option to purchase was subject to the respondent meeting its financial commitments (payment obligations) under the lease agreement, which, as is indisputable, it did not do.
24. The respondent's refusal to vacate the property and its opposition to the relief sought is, on the other hand, somewhat opaque.

25. On the one hand it admits having fallen in arrears under the lease and later settlement agreement, yet baldly denies the applicant's entitlement to cancel either in consequence of its default.
26. The respondent's non-compliance with the terms of the lease agreement in breach of its payment obligations permits of no dispute.

The respondent obtained a conditional pre-emptive right in terms of cl 2 of the lease agreement, [6] the condition being that it did not fail in its commitments in terms of the lease. In other words, such a right was conditional upon it fulfilling its payment obligations under the lease. Leaving aside all other breaches committed by it, the judgment obtained by the applicant against the respondent itself evidences the respondent's failure to fulfil its financial obligations under the lease.

27. The respondent admitted being in arrears with its payment obligations under the settlement agreement.[7] Nothing has been put up in the answering affidavit to evidence that the respondent complied with the payment conditions attached to its right to purchase of the property in the settlement agreement.[8] Had the respondent complied with the said conditions, it surely would have provided proof thereof in the answering affidavit. It did not. In fact, the respondent could never seriously have believed that it had retained the right to purchase the property, despite the non-fulfilment of the conditions attached thereto. The fact that the respondent sought thereafter to enter into a new settlement agreement with the applicant, aimed, inter alia, at paying the undisputed arrears it owed and its retention of the right to purchase the property at a fixed price, despite its default,

itself evidences that it appreciated that it had failed to meet the conditions attaching to the right to the purchase of the property under the settlement agreement.

28. In order to overcome these difficulties, the respondent relied in its answering affidavit on an oral agreement reached between the parties' legal representatives on 5 December 2023, which was subsequently recorded in an email, annexure 'AA14' to the answering affidavit. The email records, in relevant part, that:

- (i) The parties' legal representatives would arrange to hold settlement discussions for the parties to obtain clarity on the balance of the outstanding amounts due to the Applicant;
- (ii) The respondent may still be entitled to purchase the property subject to a settlement being reached between the parties and agreement being reached on the conditions that would attach to the sale of the property.

The last paragraph of the email recorded that the parties differed in their interpretation of the option clause.[9]

29. It is clear from the contents of 'AA14' to the answering affidavit, read contextually, that the representatives agreed to arrange for settlement discussions to be held between the parties at a future date and that the respondent could possibly still be entitled to purchase the property, subject to the settlement discussions between the parties culminating in the conclusion of a settlement agreement, including agreement on the conditions that would attach to a sale of the property.

30. Yet in par 17.2 of the answering affidavit, the respondent alleged, in material contradistinction to what was actually recorded in annexure 'AA14', that:

"On 5 December 2023 the parties through their legal representatives, at court, entered into an agreement on behalf of the Applicant and Respondent which superseded any prior agreement. The effect thereof being that despite any default by the Respondent, the agreement would survive and the Respondent's option to purchase would so survive, notwithstanding the failure of the Lessee in its commitments in terms of the lease. A copy of the email confirming the agreement is attached hereto as Annexure "AA14"." (emphasis added)

31. No such agreement 'which superseded all other agreements' was in fact concluded or shown to exist on the papers.

32. The respondent also relied on an oral agreement - parallel to the written lease agreement - that was allegedly concluded between its representative and a shareholder of the Applicant (since deceased). The sum total of what was pleaded, is the following:

- "The intention of the parties was that the Respondent purchase the premises in question, but as a result of the unavailability of the municipal plans for the premises, since the Respondent would not be able to obtain financing for the purchase, that the Applicant would finance the transaction;

- The Applicant would finance the transaction by spreading the sale of the premises over a period of lease of 5 years, whereby the Respondent would be able to acquire the premises at an agreed price of R3.1 million through an option to purchase, thus the Applicant would lower its exposure to possible Capital Gains Taxes;

- It was at all times common cause that the Respondent would not enter into the Lease Agreement only and that the intended sale of the premises was crucial therein, and that transactions similar in nature was (sic) concluded in the local suburb where municipal plans were missing for premises, and where associated entities to the Respondent previously purchased 4 separate premises on similar terms."

33. As pointed out in the replying affidavit, the alleged shareholder, not being a director of the applicant, would not have had the authority to conclude the agreement on behalf of the applicant. In any event, the respondent did not allege that the shareholder in question had the authority to bind the applicant. Apart from the fact that such oral agreement is in material contradistinction to the conditional pre-emptive option provided for in clause 2 of the lease, and offends against the whole agreement clause and the non-variation clause

forming part of the lease,[10] it is, in my view, also inherently improbable. It begs the question: why would the applicant need to ‘finance the transaction’

(i.e., the sale of the property) by spreading the sale over a period of five years? Why the need for a pre-emptive right, conditional upon the respondent meeting its financial obligations to the applicant, in circumstances where the applicant was ‘financing the transaction’? The oral agreement is pleaded in vague terms. The respondent does not state when this agreement was concluded. This becomes particularly significant in the light of the whole agreement clause in the lease agreement.

34. Lastly, mention should be made of a non-joinder point raised by the respondent in the answering affidavit, which it continued to pursue at the hearing of the matter. The respondent submitted that the deceased shareholder (mentioned above) is a necessary party who ought to have been joined to the proceedings, through joinder of the executrix of the deceased estate in his stead. The respondent reasons that any order granted in favour of the applicant would prejudicially affect the deceased estate. The respondent avers that the applicant owes the deceased shareholder a considerable amount of money and that the deponent to the applicant’s papers intends to sell the property. Why the eviction of the respondent from property that is owned by the applicant, irrespective

of whether the applicant may be indebted to the deceased estate in question, will prejudicially affect the deceased estate, is entirely unknown. Counsel for the respondent could not proffer an answer to this question at the hearing of the matter. The non-joinder point is, in my view, a non-starter, lacking merit.

35. For the reasons provided, I conclude that the lease agreement and settlement agreement were validly cancelled pursuant to the respondent’s failure to purge its default or to demonstrate in its papers that it had done so. For that reason, it can no longer avail itself of the option to purchase the property. Even had the lease remained extant, the respondent’s failure to meet its financial obligations under the lease precluded it from exercising the option. Irrespective of whether or not the lease was validly cancelled, the lease has in any event expired by effluxion of time. The respondent has no legal right to remain on the applicant’s property. It follows that the main application must succeed and that the counter-application falls to be dismissed with costs.

36. As earlier mentioned, the lease made provision for attorney and client costs. Such an order would in any event have been appropriate. The respondent failed to comply with paragraph 7 of the Revised Consolidated Practice Directive 1 of 2023 (as amended on 12 June 2024). This resulted in unnecessary time being wasted in having to scroll through a large volume of pages in order to locate any annexure referred to in the answering affidavit, resulting in the inefficient use of judicial resources, inconvenience to the court and opposing litigant and the wastage of time at the hearing of the matter.

37. Accordingly, as regards the main application and the counter-application, an order is granted in terms of the draft annexed to this judgment, marked “X”.

AVRILLE MAIER-FRAWLEY

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 26 February 2025

Judgment delivered 25 March 2025

This judgment was handed down electronically by circulation to the parties’ legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 25 March 2025.

APPEARANCES:

Counsel for Applicant/Plaintiff: Adv M Joubert

Instructed by:

Ronel Hill Attorneys

Counsel for Defendants: Adv W Coetzee

Instructed by:

Arnoud van den Bout Attorneys

- [1] The letter was addressed by the respondent’s then attorneys to the applicant’s attorneys.
- [2] The letter was addressed by the applicant’s attorneys to the respondent’s then attorneys.
- [3] Although, having regard to the non-variation clause in the lease, the settlement proposals were not reduced to writing in an addendum to the lease agreement, signed by the parties, the applicant accepts the legal position that so long as the parties or their

representatives can be identified from the communication, this would meet the requirements of a signature and the agreement being reduced to writing. See in this regard: *Spring Forest Trading v Wilberry* (725/13) [2014] ZASCA 178 (21 November 2014), the court there having recognized that the Electronic Communications and Transactions Act 25 of 2002 gives legal recognition to transactions concluded electronically by email.

- [4] Par 4.17 of the answering affidavit. Further acknowledgments by the respondent of its default and of the arrears owing by it appears

from the content of letters transmitted by the respondent’s attorneys to the applicant’s attorneys in annexures at ‘AA7’ to the answering affidavit and ‘FA12’ to the Founding affidavit.

- [5] The offer contained certain conditions and was said to be in full and final settlement of all claims between the parties. The offer was made in a letter, annexure 'AA7' to the answering affidavit.
- [6] The nature of the right in cl 2 of the lease was common cause between the parties. Both parties contended in their papers that the right afforded to the respondent in cl 2 of the lease was a pre-emptive right (See par 4.15 of the answering affidavit and par 30 of the replying affidavit). This was also apparent from the express wording of the clause. As pointed out by the Constitutional Court in *Mokone v Tassos Properties CC and Another* 2017
- (5) SA 456 (CC), a right of pre-emption gives the pre-emptor no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is completed then, and not before, will he have a right to claim transfer of land. In casu, the respondent obtained a preferent conditional right to purchase which affording it (the grantee) the right to purchase upon the fulfilment of the condition. A right of pre-emption does not compel the grantor to sell. It only requires him to give the grantee preference in the event that he does sell, and thus prevents him from selling to a third party during the existence of the right.
- [7] The settlement agreement is referred to in paras 12-15 of this judgment.
- [8] The conditions are referred to in par 13 of this judgment.
- [9] The respondent captured the essence of the In par 19.3 of the answering affidavit, in reference to the email of 5 December 2023, the respondent alleged that the oral agreement was:“(i)That the parties would hold settlement discussions to obtain clarity on the balance of outstanding amounts due to the Applicant; and (ii) That the Respondent still be allowed on bona fide basis to purchase the properties, subject to the settlement to be agreed between the parties and the terms of a, (sic) to be concluded, agreement of sale for the premises (sic).”
- [10] Under the heading 'GENERAL' (above par 34 of the lease) the parties acknowledged and agreed, inter alia, that: "this lease constitutes the entire contract between them and that no provisions, terms, conditions, stipulations, warranties or representations of whatsoever nature, whether express or implied have been made by any of the parties or on their behalf except as are recorded herein. (cl 34) no alteration, variation, amendment or purported consensual cancellation of this lease or any addition thereto or deletion therefrom shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties hereto.” (cl 36)
- [10] Under the heading 'GENERAL' (above par 34 of the lease) the parties acknowledged and agreed, inter alia, that:

"this lease constitutes the entire contract between them and that no provisions, terms, conditions, stipulations, warranties or representations of whatsoever nature, whether express or implied have been made by any of the parties or on their behalf except as are recorded herein. (cl 34)

no alteration, variation, amendment or purported consensual cancellation of this lease or any addition thereto or deletion therefrom shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties hereto." (cl 36)

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