

SOUTH AFRICA / JUDGMENT

Sutherland v Smith (81018/2017)

[2019] ZAGPPHC 1076 (18 August 2019)

[2019] ZAGPPHC 1076**COURT**

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

81018/2017

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Source record**IN THE HIGH COURT OF SOUTH
AFRICA****GAUJENG DIVISION PRETORIA****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case

Number: 81018/2017

In

the matter between:

SUTHERLAND,

S. H.

APPLICANT

And

SMITH,

L.L.

RESPONDENT

JUDGMENT

NEUKIRCHER J

1. The essence of the present application is the following: the applicant seeks a declaratory order that:

1.1 a lease agreement and option to purchase were duly renewed;

1.2 he had timeously exercised the option to purchase alternatively that he is entitled to do so;

1.3 effect be given to 1.2 by transferring the property.

BACKGROUND

2. The facts giving rise to the present dispute are the following:

2.1 on 31 March 2013 the parties entered into a written agreement in terms of which:

2.1.1 the applicant would lease a property from the respondent known as 301 West Street, Pretoria North;

2.1.2 the lease was for a period of 2 years commencing 1 March 2013 and ending on 28 February 2015 with an option to renew the lease for a further period of a year;

2.1.3 the agreement also contained an option to purchase the property for R575 000,00.

2.2 the relevant terms of the agreement are^[1]:

"3 VERHUUR VAN EIENDOM MET DIE OPSIE OM TE KOOP"

3.1 ...

3.2 Na verstryking van die periode bedoel in paragraaf 4 infra moet die Huurder (Koper) sy opsie om te koop uitoefen binne 90 dae na datum van verstryking vir die huur termyn soos bedoel in paragraaf 4 infra; ..

4. HUURTERMYN

4.1 ,...

4.2 Die VERHUURDER verleen aan die HUURDER 'n opsie om by verstryking van die huurtermyn die termyn vir 'n periode van EEN jaar te verlang onderworpe aan dieselfde bepalings as wat in hierdie ooreenkomsvervat is.

4.3 Indien die HUURDER hierdie opsie wil uitoefen moet hy die VERHUURDER ten minste 3 (drie) kalendermaande voor die verstryking van die huurtermyn skriftelik kennis gee van sy voorneme om die termyn te verleng. Indien die HUURDER versuim om die opsie binne die voormelde periode uit te oefen sal die opsie verval.

4.4 Indien die HUURDER by die verstryking van die huurtermyn met die uitdruklike of stilswyende toestemming van die VERHUURDER op die EIENDOM aanbly, word die partye in die afwesigheid van 'n verdere skriftelike huurkontrak ge - ag, 'n periodieke huurkontrak aan te gaan het anderhewig aan dieselfde bepaling as wat in hierdie kontrak vervat is, behalwe dat enigeen van die partye minstens een maand skriftelik kennis moet gee van sy voorneme om die huurtermyn te beeindig."

2.3 On 12 December 2014[2] the applicant exercised his option to extend the lease for a further 12 months in terms of clauses 4.2 and 4.3 of the agreement. This communication was sent to the leasing agent;

2.4 On 15 January 2015 the following response was received from the leasing agent:

".. .Het met Leon bevestig dat dit in ordie is dat julle kan voortgaan om die eiendom nog te kan huur teen die vasgestelde eskalasie van 8.5" .

2.5 the applicant then informed respondent that he intended to exercise his option to purchase the property[3];

2.6 in July 2015 the respondent threatened to evict the applicant on the basis that no lease agreement existed between the parties.

3. It does not appear to be in dispute that:

3.1 the applicant exercised his option to renew the lease outside (i.e. falling short) of the 90 - day period prescribed by paragraph 4.3 of the agreement;

3.2 the applicant rental was paid and he was not in arrears;

3.3 the applicant had effected improvements on the property[4];

3.4 Paragraph 11.2 of the agreement provides,

"11 2 Enige veranderinge wat permanente aanhegtings is, word die eiendom van die VERHUURDER E3n die HUURDER sal nie geregtig op die koste verbonde daaraan van die VERHUURDER te vorder nie."

THE DEFENCE

4. The respondent's defence to this suit is that the applicant failed to exercise the option to renew the lease within the 3 months' period provided for in paragraph 4.3 of the agreement. The consequence is, according to respondent, that the fixed lease term lapsed on 1 December 2014.

5. However, the parties entered into a new lease agreement[5], on a month - to - month basis commencing on 1 March 2015 and terminating on 28 February 2018. The rental was subject to a 8.5 % rental increase.

6. The respondent also alleges that the failure to extend the rental agreement timeously, meant that the option to purchase lapsed. It alleges, in addition, that the new agreement being oral, did not contain the option to purchase, the non variation clause in the written agreement having mooted this option[6].
7. The last defence raised is that there is a dispute of fact on these papers which is irresolvable in application proceedings, concerning whether or not applicant exercised his option to purchase. The respondent alleges that applicant was notified as far back as 24 November 2015 that the time for exercising the option had expired. It was submitted, therefore, that action proceedings should have been issued and that this application should be dismissed.
8. The respondent also asks for rectification of the agreement and specifically that It was the intention of the parties that clause 3 of the agreement Is only applicable to the termination date referred to in clause 4.1 and not to those set out in clauses 4.2 and 4.3.

9 Unsurprisingly the applicant:

9.1 denies the conclusion of the oral lease agreement;

9.2 denies the dispute of fact;

9.3 denies the necessity for rectification or the allegations on which this is based.

THE AGREEMENT: THE EXTENSION OF THE LEASE PERIOD

10. In my view this Is the central issue that must be determined: if it is found that the agreement was validly extended by applicant that will put pay to any further argument on this issue[7].
11. It is common cause between the parties that the applicant was required to notify the respondent 3 months prior to the termination of the lease term of his intention to exercise the option to extend the lease. This is specifically provided for in clause 4 of the agreement which bears the heading "HUURTERMYN".
12. It is common cause that the lease would terminate on 28 February 2015 and that the applicant notified respondent's agent on 12 December 2014 of his intention to extend the lease

13.

3 calendar months means that applicant should have notified the respondent on or before 30 November 2014 (the new lease commencing on 1 March 2015 the notification then to take place on or before 1 December 2014) - it did not.

14. Mr Greeff also sought to rely on the provisions of clause 3 of the agreement in his argument that, irrespective of the fact that the applicant's notification was communicated late, the respondent nonetheless condoned it and the agreement was therefore extended on the same terms and conditions which include the option to purchase.

15. If Mr Greeff is correct in his submissions then on the facts, the option to purchase was timeously exercised.

INTERPRETATION OF CONTRACTS

16. The "golden rule" of interpretation of contracts is that the language in a document be given its grammatical and ordinary meaning unless that would result in some absurdity, some repugnancy or inconsistency with the rest of the instrument[8].

17. In *Coopers & Lybrand and others*[9], Joubert JA stated:

"The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to, have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, ...
- (2) to the background circumstances which explain the genesis and purpose of the contract ie. to matters probably present to the minds of the parties when they contracted . . ;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions . . "

18. In *Roazar CC v The Falls Supermarket CC*[10] the following was stated:

"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."

19. It is also clear that the heading of a clause may be used in the Interpretation of a contract in certain circumstances.

"It seems to me common sense that where a heading conflicts with the body of a contract, it must be that body of the contract which prevails because the parties' intention is more likely to appear from the provisions they have spelt out than from an abbreviation they have chosen to identify the effect of those provisions; but that where the heading and the detailed provisions can be read together that should be done[11] (my emphasis)

20. Given the above, it is clear that a heading may be used in interpreting a contract. In the case to hand clause 3s heading is "Die opsie om te koop" and clause 4s heading is "Huurtermyn". Given their ordinary, every-day, grammatical meaning:

20.1 there is nothing inconsistent or ambiguous in the provisions of clause 3 - it is clear that, if he wishes to exercise the option to purchase, the applicant has 90 days "...na datum van verstryking van die huurtermyn soos bedoel in paragraaf 4 infra";

20.2 given the enabling provisions of clause 4, it is clear that it is only if the option to extend the lease is exercised that the option to purchase set out in clause 3 is relevant[12];

20.3 it is clear, given the heading of clause 4, it pertains to the 1 month extension of the initial lease. There is nothing in the ordinary, every day meaning of the wording of clause 4 that gives rise to a meaning other than that if the applicant wishes to exercise his option to extend the written lease (on the same terms and conditions) he must do so n ... ten minste 3 (drie) maande voor die verstryking vir die huurtermyn."

20.4 the "huurtermyn" is clearly the initial lease term which ended on 28 February 2015 - there is, in my view, no other interpretation that would make sense when the agreement is read as a whole.

21. Furthermore, clause 3's - time period cannot be used in the interpretation of clause 4.
22. Thus, given that the initial lease term ended on 28 February 2015, and 28 February being the last day of that particular month in 2015, at best for applicant he would have had to notify the applicant on or before 30 November 2014 of his intention to extend the lease - he failed to do so.
23. Once he failed to do so, his option to extend his lease lapsed. This is abundantly clear from the last sentence of paragraph 4.3 which states

"Indien die HUURDER versuim om die opsie binne die voormelde periode uit te oefen sal die opsie verval."

24. Clause 4.4 is also very clear in its intent: in the event that the applicant remained on in the property after the lease ended, with the express/ tacit permission of respondent, a periodic lease agreement would (ensue) " onderhewig aan dieselfde bepaling as wat in hierdie kontrak vervat is..."

DID THE OPTION TO RENEW LAPSE?

25. Mr Greeff argued that, whatever the situation on 30 November 2015, the email of the respondent's agent on 15 January 2015 was an extension of the initial period. Mr Schoeman argued that it simply constituted an express permission that applicant could remain in the property and that the month - to - month lease was in place (as per clause 4.3)

26. The present issue is not dissimilar to that in which Davis J found himself in *Beadica 231 CC & Others v Oregan Unit Trust & others*[13] where the relevant clause read: The lessee shall have the right to extend the lease period by a further period as set out in section 13 of the Schedule [a further period of five years] on the same terms and conditions as set out herein, save as to rental, provided that the lessee gives the lessor written notice of its [sic] exercising the option of renewal at least six months prior to the termination date.”
27. In setting aside Davis J's order that the "...sanction was disproportionate because the contracts signed maximised the interests of both parties and this meant that they intended ensuring that the franchise agreements be underpinned by the lease agreements[14]", Lewis ADP stated:

"The notion that a sanction for breach, or failure to comply with the terms of a contract, agreed on by the parties is disproportionate and therefore unenforceable, is entirely alien to South African contract law. And to recognise it would be to undermine the principle of legality[15]. That does not mean that a sanction that is contrary to public policy, or that is unconscionable in the circumstances, is to be enforced. The question is really one that centres on public policy - the legal convictions of the community, rooted now in the Constitution..."

28. She concluded[16] that.

"... there are no considerations of public policy that render the renewal clause of the lease unenforceable. The demand for compliance with their terms was not unconscionable. The leases terminated on 31 July 2016 through effluxion of time. When the lessee brought their urgent application on 1 August 2016 the lease had expired. There was no basis on which to resuscitate them."

29. In the present matter it is common cause that the applicant only exercised its option to renew the lease 14 days after the option to renew had lapsed. The failure to exercise the option timeously is not explained and the court is left to conclude that the fault lies squarely at the door of the applicant. There are no issues of public policy to be considered which would impact on the issue of renewal, nor was this raised or argued. In any event, none exist: the agreement is clear in its terms and "compliance with its terms is not unconscionable"[17].
30. Thus I find that, by not exercising the option to renew timeously, the lease terminated on 28 February 2015.

A NEW MONTH-TO-MONTH LEASE?

31. The agreement also specifically provides that, once the agreement terminates, the applicant may remain on in the property with the express/ tacit consent of the respondent on a "perloedieke huurkontrak"..

32. The letter of 15 January 2015 does no more than provide the express consent set out in paragraph 4.4 of the agreement. Although the terms and conditions are the same as provided in the written agreement, these do not include the option to purchase which lapsed when the written agreement terminated. Thus a new lease came into existence on 1 March 2015.
33. This, in my view, is a logical conclusion based on the wording of clause 3 - this provides for a 90-day notice period "na datum van verstryking van die huurtermyn soos bedoel in paragraaf 4 infra " The month - to - month lease has no fixed termination date. Termination takes place by giving one month's notice.
34. Given the fact that there is no fixed termination date in a month - to - month lease, a 90 - day notice period is illogical and legally unsustainable.
35. Thus, the interpretation contended for by applicant in respect of clause 3 cannot be upheld. It therefore follows that the "exercise of the option to purchase" on 11 April 2016 was invalid and the respondent was entitled to cancel the month - to - month lease on one month's notice, which it did on 24 November 2015.

CONCLUSION

36. Given the aforesaid, I find that
 - 36.1 no valid extension of the written lease agreement took place; and
 - 36.2 the option to purchase the property lapsed.

COSTS

37. Mr Schoeman argued that an attorney - client cost order is appropriate as the applicant was notified of the respondent's defence long before thus application was served and despite the clear issues of the dispute, applicant persisted with application proceedings instead of action proceedings.
38. Mr Greeff argues that respondent allowed the applicant to labour under the impression that the agreement had been timeously (or at least by consent) renewed before it notified applicant 10 months later of its stance. He also argued that it must be taken into account that the applicant had effected R450 000 improvements on the property thinking he would become the owner
39. I am of the view that there is no reason to deviate from the usual costs order that costs should follow the result. However, I am not persuaded that an attorney, client cost order is warranted: complex issues of Interpretation were ventilated and applicant was entitled to argue these.

Order

40. Thus the order I make is the following.

The application is dismissed with costs.

JUDGE OF THE HIGH COURT

Counsel for Applicant: Mr Greeff

Instructed by Jay Incorporated

Counsel for Respondent: Mr Schoeman

Instructed by Prinsloo Incorporated

Date of hearing: 21 August 2019

Date of judgment: 18 August 2019

[1] And these are what was relied on in the founding affidavit.

[2] i.e 2 months and 19 days prior to expiry of the fixed terms of the lease

[3] On 11 April 2016 through a letter written by his attorney

[4] He says worth R450 000 but this amount was disputed

[5] As a result of the applicant's email of 12 December 2014

[6] Clause 22.1 which reads: "Geen ooreenkoms strydia met die bepalings van hierdie huurkontrak is blndend op die partye ne tensy dit op dkr lf gestel is and onderteken is deur die partyc."

[7] Although the Issue of rectification will remain

[8] Brink v Premier, Free State and another 200!) (4) SA 420 (SCA) at paragraph (11)

[9]

[1995] ZASCA 64; 1995 (3) SA 761(A) at 768 A-E, Natal Joint Municipal Pen ion Fund v Endumeni Municipally 2012 (4) SA 593 (SCA)

[10] 2018 (3) SA 76 (SCA) at paragraph [9]

[11] Sentlnal Mining Industry Retirement Fund & another v Waz Props (Pty) Ltd & another 2013 (3) SA 132 (SCA) at paragraph (10)

[12] Of course, the option to purchase may be exercised at any point prior to this

[13] 2018 (1) SA 549 (WCC)

-
- [14] And thus a finding that "...the sanction which might follow a strict application of a formal rule Is in and of Itself Insufficient to justify the relief sought when the key intention of the parties can be clearly derived from, as in this case, the substance of the two agreements read together."
- [15] At paragraph [38] of Trustees for the Time Being of the Oregon Trust v Beadica 231 CC & others (74/2018) [2019] ZASCA 23 (28 March 2019); 2019 (4) SA 517 (SCA)
- [16] In paragraph (46)
- [17] Per Lewis ADP (supra)
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