

SOUTH AFRICA / JUDGMENT

Tower Property Fund (Pty) Ltd v Liguria Ristorante (Pty) Limited (Reasons) (2025/004067) [2025] ZAWCHC 101 (10 March 2025) [2025] ZAWCHC 101

COURT

Western Cape High Court, Cape Town

BEFORE

N Mangcu-Lockwood

CASE / FILE NUMBER

2025/004067

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FLYNOTES: EVICTION – Commercial premises – Non-renewal of lease – No agreement concluded by date of expiry of lease – Landlord seeking urgent eviction of tenant – Premises required by new occupant – Tenant asserting it had option to renew – Lack of deadlock-breaking mechanism in the event parties could not reach agreement before expiry of lease – No final agreement between parties as to terms of any renewed agreement, including rental amount – Matter declared urgent and eviction ordered.

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 2025-004067

In the matter between:

TOWER PROPERTY FUND (PTY) LTD

Applicant

and

LIGURIA RISTORANTE (PTY) LIMITED

Respondent

REASONS

FOR ORDER

ELECTRONICALLY ISSUED ON: 10 MARCH 2025

MANGCU-LOCKWOOD J

A.

INTRODUCTION

- [1] I hereby provide reasons for an order I granted whilst on urgent duty on 31 January 2025, in which the respondent was evicted from commercial premises owned by the applicant. The respondent was a tenant, operating a restaurant business from the premises in terms of a written lease agreement between the parties, for the period from 1 May 2021 to 30 April 2024 ("the lease agreement").
- [2] These proceedings were launched on about 16 January 2025, and sought immediate eviction of the respondent from the premises. The main ground for urgency was that, after the applicant had given various notices of eviction to the respondent - the validity of which were disputed and rejected - it had concluded a written agreement with a new tenant, the Curry Club Collective (Pty) Limited ("the Curry Club"), on 7 October 2024, in terms of which the applicant was to provide vacant occupation on 1 February 2025.
- [3] It is not in dispute that on 14 January 2025, the Curry Club notified the applicant that, although it was due to vacate its then premises on 30 April 2025, that building was due for demolition, and it required occupation of the property in question in these proceedings by no later than 1 February 2025 as previously agreed, to commence fitting out the premises, for commencement of the new lease on 1 May

2025. The Curry Club also stated as follows:

"Should you be unable to make the premises available by this date we will have no option but to cancel the lease and seek alternative premises. This would place us in a very difficult and urgent situation of having to find suitable premises within a very short space of time and would lead to us suffering significant damages including, potentially, loss of income and reputational harm, which damages we would look to you to cover."

- [4] I am of the view that, in the circumstances of this case, the merits of which are discussed below, the applicant has made out a case for urgency as contemplated in Rule 6(12). It is, by now, trite that commercial urgency may found urgency in terms of the Rule, depending on the circumstances of a particular case.[1]
- [5] It was not disputed that the applicant would not have been able to obtain substantial redress in the normal course, since the earliest that the matter could be heard on the opposed roll was during August 2025. By that time the applicant will undoubtedly have lost the Curry Club as a tenant. In cases similar to the present, the court has taken into consideration the fact that, by the time this application would be heard in the ordinary course the applicant would have lost its new tenant.[2]

[6] Moreover, the respondent in this matter had ample notice of the impending eviction. In June 2024, it was first informed that the lease would not be renewed. On 1 October 2024, the applicant informed the respondent that the lease, which had expired in April 2024, had been operating on a month-to-month tenancy, and was being cancelled,

and the respondent was requested to vacate the premises at the end of January 2025. On 2 October 2024, the respondent rejected the applicant's cancellation of the lease and the notice period. In light of that rejection, the applicant withdrew its notice of 1 October 2024, and on 6 November 2024, cancelled the month-to-month lease agreement, insofar as it was necessary to do so, and advised the respondent to vacate the premises by no later than 31 December 2024. The respondent refused to do so, and these proceedings were launched on 16 January 2025.

[7] Thus, the respondent has been aware since, at the latest, June 2024, that its lease was tenuous and would likely not be renewed. By October 2024, it was more than clear that the applicant wanted it to vacate the premises. I was satisfied that this matter was sufficiently urgent to be enrolled and be heard as an urgent application.

B. THE

FACTS

[8] It is common cause that the parties entered into a written lease agreement, for the period commencing on 1 May 2021 and expiring on 30 April 2024. Item 6 of the schedule to the lease states as follows:

“Section 6 the Lease Period: 3 (THREE) Years from the commencement date with optional 3 years”

[9] On 11 January 2024, the property management and administration company acting on behalf of the applicant in this matter (RDC), per Ms. Manganye, addressed an email to the respondent, noting that the

lease was due to expire on 30 April 2024, and requested certain itemised FICA documents in order to “start with the renewal process”. On 20 January 2024, Mr Brenna of the respondent provided the requested documents, and on 22 January 2024, Ms Manganye promised to “review and revert”.

[10] After some silence, Mr Brenna requested transmission of the necessary forms for conclusion of the lease renewal, on 16 February

2024. It was only on 3 June 2024, that Ms Karin Retief ("Ms Retief") of RDC, addressed a letter as follows:

“The purpose of this letter is to inform you that your lease for the property will not be renewed.

Your lease expired on 30 April 2024 and the Landlord has agreed that you will be able to trade on a month-to-month basis on the same fixed rental charges as per your expired lease - excluding the increases in Rates, Refuse, CID as per council increases in July of each year, until further notice

Your premises has been advertised on our vacancy schedule and we would appreciate your co-operation with regards to allowing brokers and prospective tenants viewing times..."

[11] The respondent did not accept the notice of non-renewal and responded on the same date pointing to the above correspondence between the parties in which he had provided requested documents and information,

and stating that "we would like to exercise our option (as per the lease agreement) to extend our lease agreement", and again requesting all necessary documentation needed for extending the lease.

[12] On 4 June 2024, the applicant (via its property administrators) stated as follows in an email to Mr Brenna:

"You will appreciate that, notwithstanding a process may have been started, no agreement with the Landlord has been reached and, of course, it is an express requirement of the Lease that any agreement needs to be reduced to writing and counter-signed by both parties in order to be binding.

This has not been done and your lease remains on a month to month basis.

We maintain that you never had a 'real' option as there are no terms specifying its mechanics and, in the event that you did, it was not exercised timeously and has thus expired..."

[13] There was also reference to the tired physical state of the restaurant, with which the applicant was not happy, but which is not central to the issue before me. In his response of 17 June 2024, Mr Brenna stated as follows, amongst other things:

"...Firstly, I acknowledge your statement regarding the necessity for any agreement to be documented and counter-signed by both parties to be binding. However, as per Clause 37.1 of our lease agreement under "Special Conditions, " it is my understanding that the lease terms would continue until a renewal agreement is reached. This clause appears to indicate that the lease does not automatically revert to a month-to-month basis unless explicitly agreed upon by both parties. Regarding the option for an additional three-year term, I would like to clarify that the lease does indeed provide for an optional extension. Although you mentioned that there are no specific terms outlining the mechanics of this option, the intention behind Clause 37.1 seems to be to prevent the lease from defaulting to a month-to-month arrangement while renewal terms are being negotiated..."

[14] Clause 37.1 of the lease agreement stated as follows:

"Should the tenant and Landlord not reach agreement on renewal terms prior to the expiry of the lease term and the Tenant remains in occupation. The rental will escalate by 10% until such time as a formal renewal is concluded."

[15] On 18 June 2024 Mr Brenna sent further communication stating as follows:

"Please confirm your opinion of what is market- related so that I don't waste a possible 3 years putting together a renewal proposal based on what I consider to be market related. Considering the fact that I am already at plus minus R 168 per sq, are you suggesting an extra R 7 per sq as per your current market related deals or do you suggest I go a lot higher?"

[16] On 19 June 2024, Mr Katz of the applicant's property management company, who is also the deponent to the applicant's affidavits, stated as follows in an email to Mr Brenna:

"We have tested the market and received 2 offers at rates that range from R195 - R220/sqm (including the outside seating areas). Your rental is below market as a result of having been negotiated during covid and if you're interested in renewing your proposal should be at a market related rental and include provisions to do further upgrades. Please advise asap if you'll be putting forward a proposal? Alternatively if you want us to put forward a proposal."

[17] On the same day, Mr Brenna responded by email stating as follows: "Please could you put forward a proposal for me to look at and consider and get advice on."

[18] On 1 October 2024, the applicant stated as follows in an email:

"As you know your lease has expired, not been renewed and remains on a month to month.

Please accept this email as 4 months' notice of cancellation of your lease with your last day being 31 January 2025.

You will be required to attend to the reinstatement of the shop ahead of this date and we will arrange an out inspection to confirm what is required in due course."

[19] Mr Brenna rejected the cancellation, stating as follows:

"As you are aware, the original lease agreement, signed, includes a clause explicitly providing me with the option to renew for a further 3- year term upon the expiration of the initial lease period in April 2024. In accordance with this clause, I formally notified you of my intention to exercise this renewal option in January 2024, which was well within the timeline prescribed by the lease.

Despite this, you failed to respond or acknowledge my notice, which, under common legal principles, constitutes tacit acceptance of the extension, especially given that I have continued to occupy the premises and pay rent in full and on time.

...

Your failure to respond to my notice of intent to extend the lease does not negate the legal enforceability of that notice. By continuing to accept rent from me, you have confirmed the extension of the lease. The current lease, extended under the option to renew clause, is still in force, and I consider the 4-month notice to vacate both legally unfounded and invalid.

I hereby request that you withdraw your notice and cease any further actions that may violate the terms of the lease, including marketing the property. Should you continue to pursue this course of action, I reserve the right to take legal action to protect my interests."

[20] On 7 October 2024 the applicant concluded a lease agreement in respect of the premises with the Curry Club, in terms of which the latter was to take occupation on 1 February 2025.

[21] In a further email dated 8 October 2024, Mr Brenna stated that, by failing to respond to his notice of intention to extend the lease, the applicant had tacitly accepted its extension. He also disputed the notion that the respondent's tenancy was on a month-to-month basis; and stated that he had declined the applicant's

reference to a "market-related offer", and that it was in any event irrelevant.

[22] On 6 November 2024 the applicant noted that its notice and terms conveyed on 1 October 2024 had not been accepted by the respondent, and withdrew them. It continued as follows:

"...As you occupy the leased premises on a month-to-month basis, letter serves as a formal calendar month's notice to you of the cancellation of your lease. As such, you are to vacate the leased premises by no later than 31 December 2024.

Should you fail to vacate the premises, as you are legally obliged to do, our attorneys will be instructed to proceed with eviction proceedings without delay or further notice to you..."

[23] In further communication dated 26 November 2024, the respondent was notified to vacate the leased premises by no later than 31 December 2024, failing which eviction proceedings would be launched with a request for a punitive costs order. The respondent refused to vacate the premises.

C. RESPONDENT'S CASE

[24] The respondent disputes the authority of Mr Katz, the applicant's deponent, to depose to the affidavits, stating that his affidavit is without a resolution from RDC to do so, and that he, in any event, does not have personal knowledge of the facts of this case.

[25] Regarding the merits of the case, the respondent states that at the time that the lease was negotiated, the applicant was represented by the then asset manager Mr Bruce Rogersen. This was during COVID-19, when restaurant businesses were impacted by the lockdown regulations which limited their operating hours. It was on the basis of those considerations that, according to the respondent, Rogersen recommended that instead of concluding the standard 5-year commercial

agreement, the parties should rather conclude a 3-year agreement with a secured option for the tenant to renew for a further 3 years. The respondent accepted the 3-year lease agreement on the basis of the said negotiations and representations. The intention for both parties was that, once the initial 3-year period expired, the respondent could exercise its option to renew, and the renewal would be for a further 3 years. The respondent attached a confirmatory affidavit of Rogersen to support this version.

[26] The respondent also points to the fact that page 2 of the lease, in which the said option to renew is mentioned - clause 6 of the agreement-, is specifically and separately initialled by both the applicant and the respondent, unlike the rest of the lease, to highlight its significance. It is in this regard that the respondent disputes the personal knowledge of the applicant's deponent, Mr Katz.

[27] The respondent also points to clause 37.1 of the lease agreement, and argues that this clause guarantees the tenant's option to renew. At the same time, it provides for a rental increase pursuant to the expiry of the lease agreement, which remains in place until the terms of the renewal have been finalised. The respondent further

argues that "renewal terms" in terms of this clause refers to "agreement conclusively on the amount of rent to be paid and whether or not there would be a further option to renew once the initial 3-year period expired".

[28] The respondent points to the chronology of events and states that it exercised its right to renew timeously and prior to the expiry of the lease period. It also states that unless there was a breach of the terms of the lease agreement, which there was not, its right to renew is protected and guaranteed in terms of the lease agreement itself as well as the Consumer Protection Act.

[29] The respondent states that the applicant's conduct has caused reputational harm and operational disruption to its business, as customers and business associates are aware of the ongoing dispute. If evicted, the respondent stands to suffer financial prejudice in light of the significant investments it has made to maintain the premises, which include infrastructural upgrades, equipment purchases, and compliance with all safety and regulatory standards.

D. DISCUSSION

[30] To the extent that the authority of the applicant's deponent remains disputed, the correct mechanism is provided in Rule 7 of the Uniform Rules of Court, and the respondent failed to follow this mechanism despite invitation or challenge to do so, with no explanation.

[31] A deponent otherwise does not require a formal resolution or specific authorisation to depose to an affidavit, provided they have personal knowledge of the facts of the matter. Even on the respondent's own version, it is evident that the applicant's deponent, Katz, corresponded and directly with Mr Brenna of the respondent regarding the lease, the purported renewal and the premises. Accordingly, the respondent's allegation regarding the lack of authority of Katz is without merit.

[32] Turning to the renewal of the lease, I have already indicated that the parties agree that the lease agreement was for the period commencing on 1 May 2021 and expiring on 30 April 2024. Clause 2.1 of the lease agreement states as follows: "The Lease shall be for the period stated in section 6 of the Schedule." In turn, section 6 of the Schedule provides as follows: "the lease period: 3 (THREE) Years From the Commencement Date, with optional 3 years."

[33] Clause 37.1 provides as follows:

"Should the tenant and Landlord not reach agreement on renewal terms prior to the expiry of the Lease term and the tenant remains in occupation. The rental will escalate by 10% until such time as a formal renewal is concluded."

[34] It is clear that no agreement had been concluded between the parties by the date of expiry of the lease. Although the respondent had submitted information as requested by the applicant, no agreement had been reached. One obvious term of a renewed agreement would have been an agreed rental amount. There is no doubt that a rental amount is a material term of any lease agreement, and in the absence of consensus between the parties on that issue, there can be no question of a renewed lease agreement being in place.[3] Another difficulty for the respondent is that the lease agreement contains a non-variation clause, which precludes any amendment or variation save what is contained in writing and signed on behalf of both parties. No such written agreement exists.

[35] That no rental amount was agreed between the parties before expiry of the lease is borne out by the fact that, as at June 2024, they were exchanging and negotiating possible rental prices. The negotiation of

a market-related rental was necessitated by the fact that the previous rental amount had been negotiated during COVID. But, it was not only the rental amount that the applicant raised in the correspondence. One example that appears in the communication of 4 and 17 June 2024 is that there was discussion regarding the attractiveness of the respondent, in respect of which the parties

would have had to reach a conclusion going forward.

[36] As already adverted, the respondent relies on clause 37.1, stating that its effect was to guarantee the existence of a renewal, with a transitional 10% rental escalation until agreement regarding the new

terms.

[37] Such an interpretation assumes many things. For one, it assumes a good faith agreement on both sides, and specifically that an end to the negotiations was imminent or would ensue. But there was no timeframe set in the expired lease regarding how long such negotiations might take. There is also no requirement that the parties must agree to the renewal terms prior to the expiration of the lease. The expired lease agreement also did not contain any general or overarching deadlock breaking mechanism in the event that the parties could not reach agreement before expiry of lease.

[38] I am in agreement with the applicant that, in the absence of a recorded obligation to negotiate in good faith or a deadlock-breaking mechanism regulating the renewal terms, what the parties agreed to in clause 37.1 of the lease agreement is an agreement to agree. This is the fundamental reason why the call to aide of the erstwhile property

manager, Mr Rogersen, does not assist the respondent. The other reason is that the facts demonstrate clearly that the parties did not in fact conclude a renewal agreement before expiry of the lease.

[39] Neither party could point me to judicial pronouncement to the effect that an agreement to agree clause, including a duty to negotiate in good faith, is enforceable in the absence of a deadlock breaking mechanism. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[4] and *Makate v Vodacom Ltd*[5] the Constitutional Court considered the possibility of importing an obligation to negotiate in good faith into the law relating to an invalid pactum de contrahendo. Pointing to the SCA judgment of *Southernport Developments(Pty) Ltd v Transnet Ltd* [6], the Constitutional Court in *Makate* held[7] that an agreement to negotiate in good faith had been expanded to the extent that it could be held to be a valid term of an agreement, but only in the presence of a deadlock breaking mechanism. Apart from these matters, the parties could not point to any authority which does not require a deadlock breaking mechanism where an agreement to negotiate in good faith is sought to be enforced.

[40] In *Seale v Minister of Public Works*[8] the SCA stated as follows:

“The combined rationes decidendi of the decisions of this court in Firechem[9] and Sourthernport are therefore that an agreement to agree without a deadlock-breaking mechanism is not enforceable because it is dependent on the absolute discretion of the parties and/or because it is too vague and uncertain to be enforceable. We are bound by these decisions, of course, unless we determine that they were clearly wrong. The appellants did not advance such an argument. I am, in any event, by no means convinced that these decisions were wrong. With respect, I fail to see how a mere agreement to agree (in good faith) can be enforced without violation of the fundamental principle that a court may not make a contract for the parties.”

[41] The circumstances of the present case fall within the confines of the authorities discussed above. Upon their application, it is clear that clause 6, read with 37.1 of the lease agreement between the parties before me amounted to an agreement to agree, with no fixed terms of agreement. And since it had no deadlock-breaking mechanism, it is not

enforceable because it is too vague and uncertain to be enforceable.

[42] As the Supreme Court of Appeal cautioned in *Roazar CC v The Falls Supermarket CC*[10] there are difficulties in compelling parties to negotiate without there being a deadlock mechanism in place. Those difficulties are exhibited in the facts of this case. In effect, a court order to the effect that a renewed lease agreement exists between the parties would amount to the court imposing contractual obligations on the parties, which would be a violation of the fundamental principle that a court may not make a contract for the parties. There is, after all, no final agreement between the parties as to the terms of any renewed agreement, including the rental amount.

[43] As a result, the respondent has no demonstrable right to remain in occupation of the premises, and the applicant has established a right to the eviction relief it seeks.

E. ORDER

[44] In the circumstances, the following order is granted:

1. The matter is declared urgent in terms of Rule 6(12) of the Uniform Rules of Court.
2. The respondent and all persons holding by, through or under it, are evicted from the leased premises situate at Shop 08, Cape Quarter Square, 27 Somerset Road, Greenpoint, Cape Town (“the leased premises”) and shall vacate the leased premises on or before 7 February 2025.
3. Failing compliance with the order in paragraph 1 above, the Sheriff or his/her lawfully appointed deputy is authorized and directed to evict the respondent and all those occupying the leased premises by, through or under it, from the leased premises on or after 10 February 2025.
4. The respondent shall pay the costs of the application.

N. MANGCU-LOCKWOOD

Judge of the High Court

APPEARANCES

For the applicant : Adv J Bence

Instructed by : Harris Incorporated

For the respondent : Adv N Essa

Instructed by : E van Rensburg

- [1] See 20th Century Fox Film Corporation Black Films 1982 (3) 582 (W) at 586.
- [2] HI-Q Automotive (Pty) Ltd v Erga Invest CEZ Investment (Pty) Ltd v Wynberg Auto Body (Pty) Ltd (41475/2018)
- [2021] ZAGPJHC 499 (29 September 2021) paras 22 & 23ments (Pty) Ltd (2024- 011267) [2024] ZAGPJHC 1755 (21 February 2024) Elkam (Pty) Limited y; Ferej. Tariku Nure trading as Magnum General Trading, The Occupants of Shop I, Cumberland Court, 9 Pretoria Street, Hillbrow, Johannesburg; Silverbalde Investments 17 (Pty) Ltd v Bay Tower Properties 247 (Pty) Ltd and Others (2017/38318) [2017] ZAGPJHC 420 (30 November 2017); CEZ Investment (Pty) Ltd v Wynberg Auto Body (Pty) Ltd (41475/2018)
- [2021] ZAGPJHC 499 (29 September 2021) paras 22 & 23.
- [3] See Eden Crescent Share Block Ltd v Olive Marketing CC and Another 2023 (3) SA 476 (SCA).
- [4] Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) ("Everfresh").
- [5] Makate v Vodacom Ltd 2016
- (4) SA 121 (CC).
- [6] Southernport Developments (Pty) Ltd v Transnet Ltd [2004] ZASCA 94; 2005
- (2) SA 202 (SCA).
- [7] At paras 96 – 97.
- [8] Seale v Minister of Public Works 2020 JDR 2131 (SCA).
- [9] Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd [2000] ZASCA 28; 2000
- (4) SA 413 (SCA).
- [10] Roazar CC v The Falls Supermarket CC 2018
- (3) SA 76 (SCA).

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