

SOUTH AFRICA / JUDGMENT

Venter and Another v Els and Another (3639/2024) [2024] ZAWCHC 83; 2024 (4) SA 305 (WCC) (18 March 2024)

[2024] ZAWCHC 83

COURT

Western Cape High Court, Cape Town

BEFORE

Slingers

CASE / FILE NUMBER

3639/2024

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Policy

FLYNOTES:

PROPERTY – Lease – Consumer Protection Act –
Owners
moving to Australia and selling property – Three-months
notice period – Tenant contending that lease was
fixed-term
agreement subject to CPA and early termination prohibited –
Lease not entered into during owners’
ordinary course of
business – Owners do not lease out property on continual
basis nor to derive an income – CPA
not applying to lease
agreement – Three-months notice validly cancels lease
agreement – Tenant directed to vacate
– Consumer
Protection Act 68 of 2008, s 14.
THE
REPUBLIC OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case.

No.:3639/2024
Hearing
on 8 March 2024
Judgement
on 18 March 2024
In

the matter between:

DANIEL
WOUTER VENTER
First Applicant
MELANIE
CHRISTINA
VENTER
Second Applicant
and
JOHANN
ELS
AND
ALL THOSE HOLDING TITLE UNDER
First Respondent
STELLENBOSCH
MUNICIPALITY
Second Respondent
This

judgment was handed down electronically by email circulation to the parties' legal representatives' email addresses.

JUDGMENT

SLINGERS J

Introduction

- [1] This application was instituted on or about 21 February 2024 and was enrolled for hearing on the urgent roll of 29 February 2024. On 29 February 2024 the application was postponed to 8 March 2024 together with a timetable setting out the further conduct of the matter.
- [2] In this application the court is primarily required to determine whether it was correctly brought as an urgent application in accordance with the provisions of Rule 6(12) and whether the provisions of section 14(2)(b) of the Consumer Protection Act, Act 68 of 2008 ('the CPA') overrides an early cancellation clause contained in a written lease agreement concluded between the applicants and the first respondent.
- [3] The facts are mostly common cause and there are no material factual disputes which require resolution. I set out the common cause facts below.

Facts

- [4] The first applicant is a software engineer and the second applicant is a civil engineer. The first respondent is the group chief economist of Old Mutual Limited.[1]
- [5] The applicants were the registered owners of immovable property described as Erf 5[...], 1[...] G[...] Street, W[...] V[...], D[...] Z[...] W[...] G[...] E[...], S[...] ('the property').
- [6] During 2018 the applicants moved to Australia but as they were not sure if this move was permanent, they agreed to lease out their property. During September 2020 the applicants and the respondent concluded a written lease agreement in terms whereof the respondent would lease the property from 1 December 2020 to 31 December 2023.
- [7] During February 2023, the respondent approached the first applicant to renew the lease beyond 31 December 2023. At this stage the applicants had determined that their move to Australia was permanent and had resolved to sell the property. This was conveyed to the respondent. The applicants were reluctant to conclude a further lease agreement in respect of the property in light of their decision to sell same. They informed the respondent that any lease agreement would be subject to a three
- (3) month notice period. Although the respondent was desirous of a four (4) month notice period, he accepted 3 months. This position was recorded in clause 29.2 of the lease agreement which states:
- 'The Landlord shall be entitled to terminate this Agreement on 3 (three) months written notice to the Tenant before termination date.'
- [8] The monthly rental payable in terms of the lease agreement is R32 400.
- [9] In furtherance of the applicants' intention to sell the property, it was duly marketed during the last week of October 2023.

Thereafter, the applicants concluded a sale agreement in terms whereof the property was sold. As the sale agreement made

provision for the applicants to give the purchasers vacant occupation on 1 April 2024, the applicants gave the respondent notice to vacate in accordance with clause 29.2 of the lease agreement.

- [10] In WhatsApp communication between the first applicant and the respondent dated 21 December 2023, the respondent expresses the sentiment that he hoped that they could have discussed the matter to arrive at a mutually beneficial arrangement. In further communication on 22 December 2023, the respondent references the principle of 'huur gaat voor koop' and states that the contract is between himself and the owner of the property whether it be the first applicant or the new owners.

The respondent also concedes that it was not necessary for the new owners to give him notice and that the first applicant was entitled

to do so.

[11] On 28 January 2024 the applicants received a letter from the respondent's attorney wherein they are advised that the lease

they concluded is a fixed term agreement subject to the CPA and that section 14 thereof prohibits the early termination of the lease agreement. On 2 February, the applicants responded via the attorney who attended to the transfer of their property and who specialized in conveyancing. This response records that the parties had agreed on the 3 months-notice period.

[12] On 7 February 2024 the respondent replied to the letter of 2 February 2024 and reaffirmed his position as set out in the letter of 24 January 2024. At this stage, the applicants were advised to consult a law firm with the appropriate litigation experience.

[13] On 10 February 2024 the first applicant contacted the respondent in an attempt to resolve the matter but he was unwilling to do so as they had different views pertaining to the issue.

[14] On 14 February 2024 the applicants' legal representative, in an attempt to avoid litigation, again wrote to the respondent's

legal representative and demanded that he agree to vacate the property. The respondent's legal representative responded

on 15 February 2024 and it became clear that the respondent would not vacate the property. On 16 February 2024 the applicants

instructed their attorney to brief counsel to seek urgent relief. A further attempt to resolve the matter was made on 19 February 2024 when the applicants again caused correspondence to be sent to the respondent. On 20 February 2024 it became clear that the dispute would not be resolved without judicial intervention.

Urgency

[15] The applicants aver that the matter is urgent as they are contractually obligated to give the purchasers of the property vacant occupation by 1 April 2024, which is six (6) weeks away. Both the applicants and the purchasers would suffer irreparable prejudice and material inconvenience if they are unable to do so. As a consequence of the looming date of 1 April 2024, they would not be able to obtain adequate redress if the application was heard in the ordinary course.

[16] The purchasers have in turn sold their own property and cannot continue to reside in their current home. It is implied that they may have to rent accommodation from 1 April 2024 if they are unable to take occupation of the property.

- [17] The respondent disputes that the application is urgent, alternatively that if it is urgent that it suffers from self-created urgency.
- [18] The respondent argues that by 21 December 2023 the applicants knew what his position was. This is based on his reference to the principle of 'huur gaat voor koop'. However, it is clear from a reading of the exchange of correspondence that this principle was also referenced in respect of who could give the respondent notice, with him conceding that the applicants were entitled to do so. Therefore, it cannot be said that he had already conveyed his intention not to accept the 3-month notice by 21 December 2023.
- [19] Furthermore, the applicants provided a cogent explanation for the period between the time of ascertaining the respondent's intention not to accept the 3-month notice and the bringing of the application. As held in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*[2] a delay in bringing the application is not in itself a reason for refusing to regard the matter as urgent. A court is obliged to consider the circumstances and the explanation provided. The crucial question that must be answered is whether the applicant would be afforded substantial redress if the matter was heard in the ordinary course.
- [20] In *Stock and Another v Minister of Housing and Others*[3] this court held that an applicant cannot be held to have been dilatory in bringing the application if he/she first sought compliance from the respondent before resorting to litigation.
- [21] After considering the circumstances, the undisputed facts and the explanation provided, I am of the view that the applicants would not be afforded substantial redress if the matter was to be heard in the ordinary course and that it cannot be said that they were dilatory in instituting the application. Therefore, the applicants' non-compliance with the time periods, service, forms, and procedures prescribed by the Uniform Rules of court are condoned and the application will be entertained in terms of Rule 6(12).

The Consumer Protection Act

- [23] As its preamble informs, the CPA was enacted to inter alia promote a fair, accessible, and sustainable marketplace for consumer products and services, to prohibit certain unfair marketing and business practices and to promote responsible consumer behaviour.
- [24] Section 2(1) of the CPA prescribes that it must be interpreted in a manner that gives effect to the purposes set out in section 3.
- [25] Section 3 provides that:
- '(1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by-
- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-

(i) who are low-income persons or persons comprising low-income communities;

(ii) who live in remote, isolated or low-density population areas or communities;

(iii) who are minors, seniors or other similarly vulnerable consumers; or

whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation

is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced,

published or presented;

(c) promoting fair business practices;

protecting consumers from-

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;

(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

(g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions;

and

(h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.'

[26] Section 4(3) provides that if any provision, read in its context, can reasonably be construed as having more than one meaning then the meaning which best promotes the spirit and purposes of the CPA and which will best improve the realization and enjoyment of consumer rights generally, and in particular by the persons contemplated in section 3(1)(b) is to be preferred.

[27] The CPA defines a 'consumer' as 'in respect of any particular goods or services, means-

(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3);

(c) ...

(d) ..

[28] A consumer agreement is defined as an agreement between a supplier and a consumer other than a franchise agreement and business is defined as the continual marketing of any goods or services. Supplier is defined as a person who markets any goods or services.

[29] Supply when used as a verb is defined as 'in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration.'^[4]

[30] Business is defined as the continual marketing of any goods or services.

[31] It is clear from section 3 that the CPA is aimed at, inter alia, promoting fair business practices, protecting consumers against unconscionable, unfair, unreasonable, unjust, and improper business practices, and establishing a legal framework to achieve and maintain a fair consumer market which is efficient, sustainable, and accessible.

[32] The CPA has to be interpreted purposively, with the focus on the broad policy, purpose and spirit of the Act. Any interpretation of the CPA must give effect to the objectives it strives to achieve. As seem from the preamble and section 3, the CPA seeks to prescribe certain standards and norms to promote the fair and responsible treatment of consumers in their business dealings in the marketplace. It does not seek to destroy, distort or hamper sound business practices. Furthermore:

'The promotion of fairness does not require that consumers be protected to the extreme, or that consumers be given the right in all instances to escape from the consequences of their business transactions simply because they changed their minds. The Act seeks to protect consumers against exploitation, unfair treatment an unscrupulous business practices, not to empower consumers to act deceitfully or to exploit suppliers. ... A balance must be struck between the legitimate expectations of consumers on the one hand, and that of suppliers on the other. What is required is a sensible interpretation of the Act, not an interpretation skewed towards consumers without properly evaluating the notion of fairness.'^[5]

[33] Delport argues that:

'... section 14 is not directed at fixed-term agreements where the period of the agreement is open for negotiation between the parties and the consumer enjoys the freedom to determine the duration to suit his needs. The section is aimed at fixed-term agreements offered to consumers on a take -it – or – leave -it basis, where the supplier unilaterally determines the period and customers have no choice but to accept the fixed term offered to them. This is typically the case on health-club contracts and mobile-telephone agreements. It is fair in these situations to allow the consumer to cancel the agreement early, subject to the payment of a reasonable penalty,

since the consumer is from the outset locked into the fixed-term dictated by the supplier, without having any bargaining power. This would explain why the fixed-term agreements are limited to two years and why the onus is on the supplier to show a “demonstrable financial benefit” to the consumer if the term is to exceed two years. However, bringing lease agreements and sole mandates under section 14 would not in any way promote the purposes of the Act but would in certain circumstances actually prejudice the consumer.’[6]

- [34] On the facts of this case, it cannot be said that the bargaining power was skewed in favour of the applicants or that the respondent was forced to agree to the fixed term on a take-it-or-leave-it basis. The undisputed facts show that it was the respondent who requested the lease renewal for a period of 3 years and that he was at all material times informed that the applicants intended to sell the property.
- [35] If section 14 does apply to fixed term lease agreements, it will only apply to the parties’ lease agreement if it was concluded in the ordinary course of the applicants’ business.[7] This follows from the definition of the term consumer in the CPA and from the definition of business which requires an element of continuity.
- [36] The CPA does not define the term ordinary course of business. In *Amalgamated Banks of South Africa Bpk v De Goede en ‘n ander*[8] the court interpreted the phrase as it appeared in the Matrimonial Property Act, Act 88 of 1984 and held that it was irrelevant whether the person in question conducted such transactions regularly. Rather the issue was whether the impugned act was conducted in the ordinary course of his business. On this approach, a single, isolated activity could in the proper circumstances constitute an act that was committed in the ordinary course of business.[9]
- [37] Within the context of income tax law, a rental transaction would be in the ordinary course of business if the rental income was the product of a bona fide investment with the purpose of earning an income from that investment. Income tax would be payable on the profit made and any rental loss would be deducted from the rental income for the purposes of income tax. Where a lease is concluded by an individual who, aside from his/her own property has another property which he/she leases to generate an income, the lease would have been concluded in the ordinary course of business and would be subject to the provisions of the CPA, even if this was not the supplier’s (lessor’s) main or only business.[10]
- [38] The concept of in the ordinary course of business was considered by the National Consumer Tribunal in *Doyle v Killeen and others*. [11] The Tribunal held that the legislature could not have intended for the CPA to apply to persons selling goods in once-off transactions which were distinct from the selling of goods as a continual enterprise. This conclusion was based on section 3, the definition of transaction and the various references in the Act to suppliers, course of business, business and market.

[39] The Tribunal went on to hold that an objective evaluation is required when considering the concept of ordinary course of business and that all the relevant factors would have to be considered when determining if the transaction was concluded within the ordinary

course of business. Relevant factors would include:

- (i) whether the person has a registered business;
- (ii) the nature of the business the person engages in;
- (iii) the nature of the goods normally sold by the person;
- (iv) the frequency with which the goods are sold by the person; and
- (v) whether the person advertises or markets his goods on an ongoing or frequent basis.

[40] Lease agreements concluded by lessors who do not let in the ordinary course of their business are not subject to the CPA. A once off lease or sale agreement falls foul of the definition of business. It is uncertain at what stage the repeated letting of a home by the homeowner would constitute the continual marketing of the property.

In such circumstances, each case would have to be evaluated within its own factual matrix and circumstances.[12]

[41] Griffiths v Janse van Rensburgh and Another NNO[13] held that an objective test should be applied in determining whether a transaction was concluded in the ordinary course of business.[14]

[42] I cannot fault the reasoning of the Tribunal and agree that an objective evaluation of all the facts and circumstances is necessary

to determine if a transaction was concluded in the supplier's ordinary course of business.

[43] On the undisputed facts of this case, it cannot be said that the lease was entered into during the applicants' ordinary course of business. They do not lease out their property on a continual basis nor to derive an income. The applicants are engineers who leased out their primary residence on a temporary basis while they determined if their move to Australia was permanent or not. The lease enabled the applicants to maintain the residential home pending a final decision on their future. In the circumstances, it cannot be said that the lease of the property was done on a continual basis or in the applicants' ordinary course of business.

[44] In the circumstances, I am of the view that the CPA does not apply to the lease agreement.

[45] If the CPA were to apply to the lease agreement, section 14(2)(b) should not be read as providing the only circumstances in which the lease may be terminated. Such an interpretation does not necessarily promote the objectives and spirit of the CPA nor is it consistent with a literal interpretation of the provisions of the CPA.

[46] Section 14(2)(b) should rather be seen as factoring in extra protections for the consumer by nullifying contractual terms which are contrary to the provisions of section 14(2)(b)(i) and which bind a consumer to a fixed term contract without allowing the consumer to terminate the agreement upon the expiry of the fixed date, without penalty or charge or at any other time by giving the supplier 20 business days written notice or in other recorded manner and form.

[47] If a fixed term agreement could only be cancelled by the consumer and supplier in accordance with the provisions of section 14(2)(b) it would go beyond protecting the consumer against unconscionable, unfair, unjust, or otherwise improper trade practices unfair and would potentially be unfair to the suppliers and could be seen as encouraging irresponsible consumer behaviour. If section

14(2)(b) is interpreted simply as identifying potential contractual clauses which would be no force and effect as it would be nullified

by section 14(2)(b) it would achieve the purpose of protecting the consumer while at the same time promoting a sustainable and

accessible marketplace for consumer products and services.

[48] The applicants also sought an eviction order if the respondent, and all those holding title under him, fail to vacate the property on or before 31 March 2024. However, at this stage the respondent is not in illegal occupation and there is no basis on which this court can evict him.

[49] Therefore, I make the following orders:

(i) the applicants' non-compliance with the time periods, service, forms, and procedures prescribed by the Rules of Court is condoned

and the application is heard as an urgent application in terms of Rule 6(12);

(ii) section 29(2) of the lease agreement concluded between the applicants and the respondent is found to be valid and binding on the respondent;

(iii) the 3 months' written notice given to the respondent in terms of clause 29(2) of the lease agreement on 21 December 2023 validly

cancels the lease agreement with effect on 31 March 2024;

(iv) the respondent and all those holding title under him are directed to vacate the property on or before 31 March 2024;

(v) the costs of this application, including the costs of 29 February 2024 shall be for the account of the respondent on an attorney and own client scale.

Slingers J

18.3.2024

[1] The second respondent did not participate in these proceedings. Henceforth any reference to ‘the respondent’ should be understood as referencing the first respondent.

[2] 2011 JDR 1832 (GSJ). See also *Dladla and Others v Ethekekwini Municipality* (2799/2023)

[2023] ZAKZDHC 15 (4 April 2023)

[3][3] 2007

(2) SA 9 (C)

[4] I do not include the definition under part (b) as it is not relevant to the current proceedings.

[5] Henk Delport *Problematic Aspects of the Consumer Protection Act 28 of 2008 In Relation to Property Transactions: Linked Transactions, Fixed-Term Contracts and Unsigned Sale Agreements* *Obiter* 2014 at pages 68-69

[6] Henk Delport *Problematic Aspects of the Consumer Protection Act 28 of 2008 In Relation to Property Transactions: Linked Transactions, Fixed-Term Contracts and Unsigned Sale Agreements* *Obiter* 2014 at pages 78

[7] MW Steenkamp *The Impact of the Consumer Protection Act 68 of 2008 and Related Legislation on Typical Lease Agreements*. Submitted in fulfillment of the requirement for the degree of Magister Legum in the Faculty of Law, University of Pretoria, December 2012

[8] 1997

(4) SA 66 (SCA)

[9] T Naudé *The Consumer’s Right to Safe, Good Quality Good and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008* (2011) 23 SA Merc LJ 336-351 at page 337

[10] T Naudé *The Consumer’s Right to Safe, Good Quality Good and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer*

Protection Act 68 of 2008 (2011) 23 SA Merc LJ 336-351 at page 338

[11] (NCT/12984/2014/75(1)(b))

[2014] ZANCT 43 (25 September 2014)

[12] Henk Delport *Problematic Aspects of the Consumer Protection Act 28 of 2008 In Relation to Property Transactions: Linked Transactions, Fixed-Term Contracts and Unsigned Sale Agreements* *Obiter* 2014 60-80

[13] 2016

(3) SA 389 (SCA) at para [11]

[14] The definition of ordinary course of business was addressed within the context of insolvency law.

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