NOT REPORTABLE
SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 33005/2010
DATE: 28/09/2010

In the matter between:-

KILLARNEY MALL PROPERTIES (PTY) LTD **Applicant**

And

MEDITERRANEAN KITCHEN CC t/a
ANAT AND BURGERS BAR" **Respondent**

J U D G M E N T

MATHOPO, J:

[1] The applicant the owner of Killarney Mall, a shopping centre in Johannesburg, seek an order on urgent basis evicting the respondent from certain commercial premises being shops and a storeroom owned by the applicant. The respondent opposes the application on the basis that it has a valid and binding lease with the applicant. On 22nd September 2010 after hearing argument I granted the application and indicated that my reasons would follow later. These are my reasons:

[2] It is common cause that the respondent occupied the premises in terms of a written lease agreement concluded on or about the 23rd

September 2005, which lease expired by effluxion of time on the 31st October 2008.

[3] The applicant contends that the lessee failed to renew the lease agreement in terms of clause 9 of the lease agreement. The relevant provisions of the said clause around which a major dispute between the parties revolves read as follows:

"9.1 If the Lessee wishes to renew this lease for the renewal period, it shall give written notice to the Lessor not later than 3 (three) months prior to the expiry date. Should such notice not be given by that date, the Lessee shall be deemed to have no intention of renewing this lease.

9.2 The Lessee shall not be entitled to renew this lease for the renewal period if the Lessee:-

9.2.1 Has on more than one occasion breached a provision of his lease, in respect of which a notice of breach has been given by the Lessor in terms of clause 32;or

9.2.2 Is in breach of this lease at the time the notice referred to in clause 9.1 is given

9.3 The terms and conditions of this lease applicable during the renewal period shall be such terms and conditions as will have been agreed upon in writing between the Lessor and Lessee not later than 2 (two) months prior to the expiry date.

9.4 Notwithstanding anything to the contrary herein contained, unless all the terms and conditions of an agreement of lease pertaining to the renewal period are agreed upon in writing between the Lessor and the Lessee not later than 2 (two) months prior to the expiry date:

9.4.1 this lease will not have been renewed at all; and

9.4.2 this lease shall terminate on the expiry date

[4] The respondent alleges that not less than three (3) months before the expiry of the lease notified the applicant in writing that it intended to renew the lease for a further period of three (3) years.

[5] The respondent contends that as a result of the renewal of the lease it is entitled to remain in the premises until the 31st October 2011. In essence the respondent states that it renewed the lease by signing a copy thereof and handed it to the applicant and further states that despite diligent search it is unable to locate a copy of this letter or the renewed lease.

[6] The applicant contends that the respondent's reliance on written offer dated 28 November 2008, as constituting evidence of renewal of the lease is misplaced because this offer was not accepted by the landlord because the written offer was expressed to "remain open" for acceptance by the lessor in writing within 60 (Sixty) days of receipt of the signed letter. As it is common cause between the parties that the landlord did not accept it, the applicant submits that no valid agreement came into existence and urged upon me to reject the respondent's argument as fallacious.

[7] It is the applicant's case that a written lease agreement was prepared and submitted to the respondent by various officials in the employ of City Property Administration, who are the applicant's managing agents and whose responsibilities include *inter alia*, letting and hiring portions of the property which are suitable for letting. The respondent did not sign any agreements with the result that its continued tenancy of the leased premises was on a month to month basis.

[8] It was submitted on behalf of the applicant that failure or refusal by the respondent to sign the lease unequivocally meant that the offer of lease was declined by the respondent with the result, that absent any renewal of the lease agreement, the relationship between the parties was one of a tacit monthly lease agreement on the same terms as the written lease agreement. In support of its argument, the applicant relied on the decision of **Pareto Ltd & Others v Mythos Leather Manufacturing (Pty) Ltd 2000(3) SA 999(W).**

[9] It was further submitted on behalf of the applicant that even if the respondent allegedly gave a written notice of renewal (which is denied) no valid lease agreement came into existence because the respondent was hit by the provisions of clauses 9.3 and 9.4 of the lease agreement.

[10] Mr Hollander for the applicant submitted that the respondent's argument that it misplaced the letter accompanying the lease agreement is a ruse and urged upon me not to give the respondent a "new lease of life" in circumstances where the odds were heavily stacked against it. He submitted that on proper reading of the provisions of clauses (dealing with renewal), absent any compliance as in the instant case, no lease agreement came into existence and on this ground alone, he urged me to dismiss the respondent's case.

[11] I agree with Mr Hollander, that no evidence was submitted by the respondent that it signed the lease agreement and handed it back to the landlord. The suggestion that it misplaced the lease together with the letter of renewal is in my view a belated attempt to obtain a "new lease of life" (continued tenancy) in circumstances where on the objective facts, it is untenable to do so. I find that the respondent has not established the alleged renewal or written lease agreement. I am fortified in my view by the evidence of Ms Norton and Ms Lowe to the effect that on numerous occasions they both called at the offices of the respondent for a signed written agreement to no avail. Mr Smit for the

respondent, alive to this difficulty sought refuge in another alternative defence for the respondent's resistance to this application by alleging that a lease agreement came into existence by the conduct of the landlord as evidenced in documents styled NC6 (unsigned written lease agreement) and NC8 (Tenant transaction history).

[12] The respondent main contention is that it signed the lease agreement and handed it back to the applicant and argued that failure to produce a copy of the signed agreement should not be construed against it. In support of its argument regarding a signed lease in NC6, the respondent states that according to the tenant transaction NC8 which is uplifted for NC6 a lease agreement came into existence. In essence so the argument goes, the tenant transaction is an indication that the landlord accepted NC6 as a binding agreement notwithstanding the provisions of clause 45.

[13] This submission was rejected by the applicant on the basis that it is not the respondent's case that the landlord agreed or conveyed any intention to be bound by that document (NC6). Furthermore the respondent in the answering affidavit never stated that it consider itself bound by NC6 and thus entitled to remain in the premises. Mr Hollander rightly submitted that this argument is negated by the respondent *ipse dixit* in the answering affidavit when he said "I do not know why the landlord never signed the lease". Again in support of its argument, the applicant relied on the provisions of clause 45 of the lease agreement which states that *"the lease agreement is binding only when signed by the lessor"* (my emphasis). The landlord having not signed, no agreement came into existence.

[14] Another reason why I find the respondent's version untenable is that after the applicant had terminated by notice the monthly lease one would have naturally expected the respondent to raise the hue and cry immediately assert that it has a valid lease agreement to continue in the premises instead of engaging in fruitless negotiations with the

applicant designed to perpetuate its unlawful occupation. In my view, the lease having been validly cancelled, there was no basis for the respondent to remain in the premises. It is belated attempt in signing the lease agreement only on the 12th July 2010, i.e. after termination of the lease, is an attempt to lock the stable after the horse has bolted.

[15] I agree with the applicant that the respondent's alternative defence has no merit and falls to be rejected. Another reason why I am of the view that this defence has no substance is because it was not the respondent's pleaded case and it only emerged in their counsel's heads of argument and address in court. Clearly this was an after-thought.

[16] Finally it was submitted that even if the respondent renewed the lease on time (which is denied) the applicant is entitled to cancel the lease agreement on account of several breaches relating to non payment of the rental and other amounts on time. In addition, the respondent signed an acknowledgement of debt on the 21 November 2009 and at Killarney to repay the outstanding sum of R122 336.02 in respect of arrear rentals and other amounts. In my view as a result of this admission and because of the irregular payments the applicant was entitled to cancel the lease agreement. It is common cause that the rental portion of R122 336.02 owing as at 31st July 2010 was not paid by the 1st July 2010 and on the authority of **Win Twice Properties (Pty) Ltd v Binos & Another 2004(4) SA 436 (W).** The cancellation of the lease was accordingly proper.

[17] I therefore conclude that the respondent did not renew the lease agreement and that the applicant on the 28th May 2010 by letter gave the respondent notice to vacate the premises by the 30th June 2010. In my view the tacit lease agreement having been validly cancelled, the respondent is obliged to vacate the premises.

[18] Another corollary issue relates to the respondent's counter application of spoliation. This application was devoid of any merit Counsel for the respondent also conceded correctly in my view that if I find for the applicant it is not necessary for me to deal with the counter-application.

In the result I therefore make the following order:

1. The respondent and any person or entity claiming the title or under the respondent be immediately evicted on 22 September 2010 from the premises situated at Shops No.7 & 8 Killarney Mall together with Storeroom No. 28C at 60 Riviera, Killarney, Johannesburg;

2. The Sheriff for the district of Sandton or his lawful Deputy be authorised and directed to take such steps as are required in order to give effect to the order in terms of 1 above.

3. The respondent to pay the costs of suit, on the attorney and own client scale.

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RS MATHOPO

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	Adv. Hollander
Instructed by :		TWB-TIGENDHAFT WAPNICK BANCHETTI & PARTNERS
For the Respondent	:	Adv. Smit
Instructed by	:	J I AFRIAT ATTORNEYS
Date of hearing	:	22 September 2010
Date of Judgment	:	28 September 2010