NOT REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 48640/2010

DATE: 2011-02-22

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: YES/NO OF INTEREST TO OTHER JUDGES: YES/NO REVISED	
_____ DATE	_____ SIGNATURE

In the matter between:

MARBLE GOLD 156 (PTY) LTD Applicant

and

SEVEN DAYS TRADING 13 (PTY) LTD .Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This is an application for the eviction of the respondent's company from the property mentioned in the notice of motion. It is common cause between the parties that a lease agreement was concluded wherein the applicant as lessor leased the aforesaid property to the respondent as lessee for a period of 24 months.

[2] The commencement date of the lease was 1 December 2006 which meant that the 24 months would have lapsed by 30 November 2008. In

Clause 47 of the lease an option to renew the lease is recorded in the following terms:

> "47.1 Provided that the tenant shall have fulfilled all the terms and conditions of this agreement he shall be entitled to renew same for a further period of 5 (five) years at rentals as negotiated and agreed to by the parties.
>
> 47.2 The tenant shall be obliged to give the landlord 6 (six) months written notice prior to the termination of this agreement of his intention to renew same under the provision of this clause. In the event of a renewal the tenant shall pay all costs in connection therewith including the stamp duty."

[3] It is common cause that the respondent exercised the option to renew timeously. The question to be answered in this case is whether the parties negotiated and/or agreed rentals for the renewal period. Since the expiry of the original lease on 30 November 2008, the respondent remained in occupation of the property up to the present time.

[4] Much correspondence passed between the parties. The respondent raised a dispute as to whether or not it had overpaid the applicant in respect of the municipal rates etc. Be that as it may, the applicant, driven as a last resort to settle the matter, wrote a letter dated 25 July 2010.

[5] In paragraph 8 and 9 thereof it is stated that the applicant attached all copies of accounts presented to and paid by the applicant for various rates and charges to the municipality. It further stated that the applicant was willing to waive any or all municipal charges claimed previously. It attached a schedule headed SUMMARY FROM JUNE 2010 TO JUNE 2011, indicating what amounts are due and what amounts have been waived.

[6] The letter further states that as of June 2010 an amount of R638 215.77 was due and owing. As a gesture of goodwill, the applicant offered as a settlement that the respondent should pay an amount of

R550 000 in full and final settlement of all arrear payments. In conclusion in paragraph 16 the following was stated:

> "Failing which it is our instruction to then immediately withdraw the action in the Magistrate's Court and tender your wasted costs to your clients for eviction from the premises and recovery for the full outstanding amount in the High Court."

[7] No response or reply to this letter was forthcoming from the respondent. It must therefore be accepted as a fact that the parties' alleged negotiation of rentals did not result in an agreed rental for any further period beyond the original term of the lease.

[8] Counsel for the respondent submitted that the applicant has no right to evict the respondent, because the respondent made certain payments which were accepted by the applicant, thus denying the applicant the right to evict the respondent. In my view there might have been some basis for such an argument in the absence of the expressed notification contained in the letter of 25 July 2010. That letter clearly evinces an attitude on behalf of the applicant that it no longer wanted the respondent to be in occupation of the premises and that it would seek the respondent's eviction unless the respondent accepted the terms contained in such letter.

[9] Because the respondent did not accept such terms, I am of the view that the applicant is therefore entitled to move for an eviction against the respondent. The applicant is not seeking payment of any arrear amounts. It is seeking an eviction order in order. Once evicted from the property, applicant wishes to rent out the property to somebody with whom they can agree on rentals.

[10] It would be a travesty of justice if the respondent is permitted to retain possession of the property while continually arguing about the rental. Any rights of occupation which the respondent may have had emanated from the provisions of Clause 47 of the original agreement.

Clause 47 does not contemplate a right entitling the respondent to remain in occupation of the property indeterminently while it endlessly negotiates for some or other increased rental for the future.

[11] The clause must as of necessity mean that If the parties cannot conclude within a reasonable period an agreed rental, the lease became inchoate and unenforceable. In such circumstances the applicant would be entitled to evict the respondent as the latter has no legally enforceable title to insist on occupation of the premises. There is no basis upon which the respondent can contend that the parties agreed to allow the respondent to remain in occupation of the premises for an undetermined period of time.

[12] The respondent's continued occupation of the premises occurred as a result of it exercising the option in terms of clause 47. That clause, on a proper construction, can only mean that continued occupation would be lawful while the parties are *bona fide* engaged in negotiating an agreed rental for a new lease period of 5 years subsequent to the termination of the orinal lease. If after the lapse of a reasonable period no rental was agreed to, the respondent's rights of occupation terminated.

[13] In such instance, there was a duty upon the respondent to vacate the premises. All rental accepted by the applicant for the continued occupation was based upon the understanding that the subsequent occupation was permitted only in terms of Clause 47 and in terms of no other contractual right.

[14] It was also not occupying the premises after the lapse of the original lease in terms of the common law principle that a monthly tenancy occurs where the tenant remains in occupation while paying rentals which are accepted by the lessor without demure. That principle does not apply in the present. The respondent does not allege or rely upon a monthly tenancy in its answering affidavits.

[15] The letter of 25 July 2010 in my view is a clear notice to respondent to vacate the property in the absebce of the partiesagreeing to a new rental. The tenor of this letter expressly excludes any possibility of a monthly tenancy coming into operation upon a failure to agree such new rental. Respondent's failure to reply or reject the terms of this letter is, in my opinion fatal to the respondent's case.

[16] The respondent may feel that it has a claim for the return of money which it may have overpaid. The respondent is in no way prevented from instituting action to reclaim such money which it allegedly overpaid. However, that does not entitle respondent to continued occupation of the premises.

[17] For the aforesaid reasons I am of the view that the application should succeed. I make an order in terms of paragraphs 1, 2 (as amended) and 3 of the draft order marked "X" which I dated and initialled. Paragraph 2 of the draft order is amended to read: "That the eviction order in terms of this notice of motion can be carried out immediately if the respondent/defendant does not vacate the aforesaid premises by 15 April 2011."

THUS DONE AND SIGNED AT JOHANNESBURG THIS DAY OF JUNE 2011.

C.J.CLAASSEN
JUDGE OF THE HIGH COURT