REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12/28298

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

22 October 2012
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DATE

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SIGNATURE

In the matter between:

METCASH TRADING AFRICA Applicant

and

CLOTHING CITY TRADING PLASTICS (PTY) LIMITED t/a CRAZY PLASTICS Respondent

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J U D G M E N T

KATHREE-SETILOANE, J:

[1] This is an application for the ejectment of the respondent from retail premises. The applicant, Metcash Trading Africa, was the anchor tenant of a specific area of retail space in a commercial building situated in Boksburg, from which it conducted a retail trading store. The agreement of lease

commenced on 24 October 2002 and was to end on 31 October 2017. The premises occupied by the applicant, in terms of its lease, constituted only one of many retail trading stores operated by it, as a commercial retailer, from outlets located throughout the Republic of South Africa.

[2] In August 2010, the applicant decided to sub-let a smaller portion of the premises forming the subject matter of its own main head lease, to the respondent. An agreement of sub-lease was concluded between the applicant as sub-lessor and the respondent as sub-lessee ("the agreement of sub-lease"). The agreement of sub-lease made specific reference to the main head lease entered into between the applicant and its landlord. It recorded in clause 1.2 thereof that the *"sub-leased premises"* constituted a portion of the *"leased premises"*. The portion of the retail space occupied by the respondent is a much smaller portion of the entire leased premises that formed the subject matter of the main agreement of lease.

[3] The applicant contends that any right or entitlement that the respondent acquired to occupy a smaller section of the premises, derived purely and exclusively from the applicants right and entitlement as anchor tenant of the owner of the property, to occupy the larger leased premises. The applicant was, indeed, referred to in the main head lease as the *"anchor tenant"* of the entire building.

[4] There is much substance in the applicant's submission that the sub-lease derived its existence from the main head lease. Significantly, in this

regard, the agreement of sub-lease contained, *inter alia,* the following terms and conditions:

4.1. A recognition by the respondent as sub-tenant that it was aware of all of the terms and conditions of the main lease.

4.2. Save to the extent that the terms and conditions of the main lease were inconsistent with any of the provisions of the sub-lease, in which event such latter provisions would apply as between the applicant and the respondent, such terms and conditions were *mutatis mutandis* incorporated in and will be deemed to be terms and conditions of the sub-lease.

4.3. Furthermore, all references in the main lease to the lessor would be taken to mean the sub-lessor, and all references to the lessee would be taken to mean the sub-lessee.

4.4. *"Should the anchor tenant* [i.e. the applicant as sub-landlord] *cease trading for whatever reason, the sub-lease agreement will be cancelled.* The SUB-LESSEE will have no claim of any nature against the SUB-LESSOR". This was titled a "SPECIAL CONDITION" of the sub-lease.

[5] The respondent took occupation of the sub-leased premises on 1 November 2010, and it remains in occupation of the premises. However, in March 2012, the applicant sold the business that it conducted from the leased premises, in terms of the main head lease. This business, which was conducted under the name "East Rand Metro Hyper", was sold by way of a written agreement dated 29 March 2012. The respondent does not deny these

allegations.

[6] By virtue of the written agreement in terms of which the applicant sold its business, it was necessary for a fresh agreement of lease to be concluded between the owner of the building and the purchaser of the business being Zenth Park Trading (Pty) Ltd ("Zenth"). It was also necessary that the written main agreement of lease between the applicant and its landlord be cancelled.

[7] In consequence, the landlord of the building, Investec Property, confirmed, on 26 June 2012, that the main agreement of lease terminated on 31 May 2012. The applicant, however, ceased trading from the leased premises on 15 April 2012. Thereafter, Zenth took occupation of the main leased premises and started conducting business for its own account. This is not disputed by the respondent.

[8] Ordinarily, one would have expected that these circumstances would, in terms of clause 11 of the agreement of sub-lease between the applicant and the respondent, result in the agreement of sub-lease between the applicant and the respondent terminating. The respondent, however, submits that this is not the case. It contends that because the applicant ceased trading from the leased premises, but did not cease trading elsewhere, clause 11 never became operative.

[9] The question for determination is, accordingly, whether the phrase:

"should the anchor tenant cease trading for whatever reason..." as used in clause 11 of the agreement of sub-lease, relates to the applicant ceasing to trade from the leased premises, or whether it relates to it ceasing to trade from all its many other retail outlets stores throughout the country. This, therefore, calls for a proper interpretation of the wording of clause 11 of the agreement of sub-lease to be determined.

[10] As has been pointed out, the applicant is a well known commercial retailer, which conducts retail operations at many outlets through the Republic of South Africa, only one of which that was previously conducted at the leased premises, pursuant to the main head lease between the owner of the property and the applicant as anchor tenant. It was, in that capacity, that the applicant sub-let a portion of the leased premises, at the building in question in Boksburg, to the respondent as its sub-tenant. Hence, any right of entitlement that the respondent acquired to occupy a smaller section of the main leased premises derived purely and exclusively from the applicant's right and entitlement as tenant, of the owner, to occupy the larger leased premises. There was, therefore, no contractual *nexus* between the owner of the property (as the applicant's former landlord) and the respondent, as the applicant's sub-tenant. There can, similarly, be no contractual *nexus* as between Zenth, the applicant's successor in title as anchor tenant of the owner, on the other hand, and the respondent, on the other.

[11] It is a trite principle that commercial agreements have to be interpreted in a commercially sensible manner. In *Ekurhuleni Metropolitan Municipality v*

Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA) at 501 the Supreme Court of Appeal stated thus (at para 13):

" The principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear. It is the principle upon which Bekker NO was decided, and, more recently, Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another was based on the same logic. The principle requires a court to construe a contract in a context – within the factual matrix in which the parties operated. In this regard see KPMG Chatered Accountants (SA) v Securefin Ltd and Another [2009 (4) SA 399 (SCA) at para 39]."

[13] The commercial context in this matter is that the respondent, as stated previously, could and did only derive its title to occupy its premises from the applicant, as anchor tenant. This is so because the only contractual nexus which bound the respondent was that between it and the applicant as its sub-landlord. Once the main lease between the owner of the building and the applicant came to an end, there would be no basis upon which the respondent's occupation of the sub-leased premises could continue, unless it concluded a fresh contract with the new anchor tenant or perhaps with the landlord. It is obviously for this reason, in my view, that there were so many references in the agreement of sub-lease to the main agreement of lease, and its terms were specifically incorporated therein.

[14] There could therefore, in my view, be no commercially sensible reason for the applicant to be bound by the agreement of sub-lease between itself and the respondent, after it vacated the main leased premises, but still continued to operate many retail outlets from other premises in the country. This is so because after termination of the sub-tenancy, the applicant could not conceivably have any further interest in any commercial relationship with the respondent, as a sub-tenant in respect of the sub-leased premises. Nor could the respondent, as the applicant's former sub-tenant, have any interest in having any further commercial relationship with the applicant.

[15] The existence of the applicant's trading activities in the many other trading premises could not conceivably be relevant, at all, to the respondent's sub-tenancy of the portion of the leased premises occupied by it in terms of the agreement of sub-lease. The respondent, in my view, had no conceivable interest, in relation to its right to occupy the sub-leased premises, in the many other retail trading options of the applicant. It would be absurd to suggest otherwise.

[16] Moreover, it would be quite absurd to assume that clause 11 of the agreement of sub-lease would only become operative once the applicant, as a large commercial retailer in South Africa, stopped all of its trading operations throughout the country, and its businesses in this country. It is more likely that it would continue trading, from its many other outlets throughout the country, for many more years to come. The interpretation, contented for by the

respondent, would render clause 11 of the agreement of the sub-lease completely nugatory and unworkable.

[17] Once the applicant ceased trading from the main leased premises as anchor tenant of the landlord, it could hardly be involved in the commercial relationship between its successor (as anchor tenant, being Zenth) and the respondent, as its former sub-tenant, or the owner/landlord. As alluded to earlier, the applicant does not conduct business in the field of letting of properties. It is a commercial retailer which conducts business, as such, from outlets throughout the Republic of South Africa and elsewhere.

[18] Clause 7.5 of the sub-lease renders it clear that the agreement of sublease cannot have continued existence after termination of the main head lease between the owner/ landlord, and the applicant as anchor tenant. The main head lease a nd the sub-lease are comparable to Siamese t wins — inextricably joined at the hip and the brain. When the main head lease was terminated by reason of its cancellation, so too did the sub-lease terminate. I am, accordingly, of the view that the respondent's interpretation, of clause 11 of the agreement of sub-lease, as meaning that the sub-lease will only terminate after the applicant has ceased trading from all its many outs throughout the country is without substance. It also lacks commercial viability as the sub-lease, which derives its existence from the main head lease, ceases to exist after termination of the main head lease between the owner / landlord and the applicant as anchor tenant.

[19] It follows that the respondent's interpretation of clause 11 of the agreement of sub-lease is commercially absurd. It makes no commercial sense, and is extremely opportunistic and flawed. It is, moreover, commercially unworkable and repugnant to the entire scheme of the agreement of sub-lease.

[20] The respondents contends that the applicant should have approached this Court by way of motion, because of factual disputes. The respondent attempts to raise a whole series of factual issues, none of which, in my view, are relevant to a determination of this application. There are no factual disputes, whatsoever, in this matter. It will, in any event, not be permissible to lead evidence of the intention of the parties as to the meaning of clause 11 of the agreement of sub-lease. All that may be relevant is background evidence, all of which is before the Court, and none of which is traversed or disputed by the respondent. Accordingly, a referral of this application to evidence will be a useless and nugatory exercise. There will be no admissible evidence that can be led.

[22] The interpretation of a contract is a question of law and not fact. In *Bruwer v Nova Risk Partners Ltd* 2011 (1) SA 234 (GSJ) at para 26, this court stated as follows (at para 26):

"The interpretation of a contract is a question of law. Consequently it is for the court to construe the contract between the parties according to the applicable

legal principles, and in this way the views of technical experts and/or witnesses for either party are not conclusive".

[23] The respondent, furthermore, contends, *in limine,* that the applicant lacks *locus standi* to institute these proceedings, as the only persons who may sue for the ejectment of a person from premises are the owner and person currently in lawful occupation of the premises. Relying upon the principle established in *Reddy v Decro Investments CC t/a Cars for Africa and Others* 2004 (1) SA 618 (D) 624, that *"a lessee under an ordinary lease (not a long lease) who is not in possession has no right in rem and cannot sue for the ejectment of a trespasser"*, the respondent contends that the appropriate entity to bring proceedings for the ejectment of the sub-lessee is the owner of the premises and not the sub-lessor.

[24] I am of the view that there is no substance in this contention. In *Boompret Investment v Paardekraal Concession Store* 1990 (1) SA 347 (A) at 351, Van Heerden JA stated thus:

" Counsel for the respondent submitted that the appeal must fail even if there was proof of the conclusion of the January and May 1986 agreements, and even if Cronje's rights under the deed of transfer lapsed at his death. In particular it was contended that the sublease had terminated before the application was launched; that in terms of the sublease the lessee was obliged 'to hand the premises over to the lessor on the termination of his

tenancy…', and that when sued for ejectment after the termination of a lease a tenant may not dispute the title of his lessor. In support of the latter proposition counsel relied upon the decision of Hughes v Anglia and Co *1912 EDL 242;* Hillock and Another v Hilsage Investments (Pty) Ltd *1975 (1) SA 508 (A) at 516, and* Ebrahim v Pretoria Stadsraad 1980 (4) SA 10 (T).

It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property. See Loxton v Le Hanie *(1905) 22 SC 577;* Kala Singh v Germiston Municipality *1912 TPD 155 at 159-60 and* Ebrahim (supra *at 14).*"

It is clear therefore that the applicant as sub-lessor has the necessary *locus standi* to seek the ejectment of the respondent as sub-lessee, despite the fact that the main head lease has been cancelled, and that it is not in possession or occupation of the property. The cases referred to by the respondent, including *Reddy v Decro Investments* (above); *Buchholtz v Buchholtz* 1980 (3) 424 (W) at 425 *Jadwat and Moola v Seedat* 1956 (4) SA 273 (N) at 276; are distinguishable from Boompret Investment. These cases concern the ejectment of tresspassers and not a sub-lessee, with whom the sub-lessor has a contractual relationship.

[25] There is, in my view, no defence to this application, and the respondents point *in limine* must also fail. So too must the respondent's

attempt to delay the resolution of this matter by contending that there are factual disputes.

[26] In the result, I make the following order:

(1) The agreement of sub-lease between the applicant and the respondent in respect of the premises occupied by the respondent at East Rand Metro Hyper Building, 265 North Rand Road, Boksburg, East Rand ("the premises") is cancelled.

(2) The respondent and all persons claiming occupation through or under the respondent are ordered to vacate the premises forthwith.

(3) Should the respondent. and all those claiming occupation through or under the respondent, fail to vacate the premises forthwith upon the service of this order, the Sheriff is authorised and empowered to evict the respondent and all those persons claiming occupation of the premises through or under the respondent.

(4) The respondent is ordered to pay the costs of this application.

F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG

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Date of Hearing:	10 October 2012
Date of Judgment:	22 October 2012