IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 12229/2012
Reportable: Yes
Of interest to other judges: Yes
Revised: Yes
25/11/2015

In the matter between:

NTSWAKI JOYCE MOKONE Plaintiff

and

TASSOS PROPERTIES CC First Defendant

BLUE CANYON PROPERTIES 125 CC Second Defendant

JUDGEMENT

DE VOS J:

[1] The plaintiff in this matter, Ntswaki Joyce Mokone, seeks an order declaring the sale of an immovable property described as "remaining extent of Erf […], Boksburg Township, Registration Division I.R., The Province of Gauteng, measuring 891 (eight

hundred and ninety one) square metres" and entered into between the first defendant, Tassos Properties CC, and the second defendant, Blue Canyon Properties 125 CC, to be invalid. Both defendants oppose the said application.

[2] When the matter was called, the parties agreed that the question of law relevant to this judgement be separated from all the other disputes related to this case in terms of Rules

[3] The question of law to be determined relates to whether the plaintiffs alleged tight of pre-emption as per clause 6 of the lease agreement between the parties was – in law – capable of being extended/renewed based on the facts recorded on the particulars of claim.

[4] The facts of the matter as recorded in the particulars of claim gave rise 10 the question of law as mentioned above and can be summarised as follows. Three tease. agreements have been en info between the plaintiff, there and then acting personally. and the first defendant. then duly represented by Anastasion Emmanuel Nichas, in respect of a premise situated at 119 Commissioner Street. The initial written lease agreement was entered into on 01 March 2004 and terminated on 28 February 2005. The second agreement stretched over the period 01 March 2005 until 02 May 2008 in terms of an oral agreement between the plaintiff and the first defendant, essentially “on the same terms and conditions as contained in the original written lease agreement. The final agreement stretched from the period 03 May 2006 to 31 May 2014 at a monthly rental amount of R5500, based on an endorsement made on the first page of the original written lease agreement which was “31/5/06 Extend till 31/5/14 Monthly rent R5500.” The original written lease agreement upon wh1ch the endorsement was made is attached to the particulars of claim as Annexure A.

[5] The pre-emptive clause relating to the question of law to be decided is set out in clause 6 of Annexure A which reads as follows:

"The Tenant shall have the first right of refusal to purchase the leased when the Landlord which [sic] to sell the leased premises. The purchase price will be negotiated when the Landlord which [sic] to sell the leased premises".

It is not in dispute that the first defendant sold the said property in 2009 to the second defendant and that the said property was transferred to the name of the second defendant on 01 March 2010.

[6] It is the plaintiff's contention that, she had the right of first refusal in terms of clause 6 of the lease agreement, and that this right continued to exist subsequent to the expiry of the initial lease period and throughout the second and third agreements of lease. It is contented that the meeting of the minds between the plaintiff and the first defendant is manifested in their words and deeds The plaintiff alleges that the parties agreed to extend the lease agreement on the terms and conditions as they appear in the initial lease agreement.

[7] Counsel for the plaintiff, Mr Dzimba, held that the principle of the English raw seems to be clear in the sense that when a tease is renewed. all the terms are renewed that are incident to the relation of landlord and tenant Terms that are collateral to and independent of such relationship, are not renewed unless the parties make it clear that this is part of their intention, either through the use of language or in circumstances, such as in this case, where the parties meant to renew the lease document in its totality and not just the lease of the premises. Mr Dzimba argued that the the parties endorsed the lease document in such a manner as to include the heading reading "agreement of lease" to the endorsement, thus reading "Agreement of Lease extended tull 31/5/2014 monthly rent R5500", and therefore agreeing to renew the entire agreement including all its terms and conditions. The endorsement specifically made on the first page of the written lease agreement, thus indicates the intention of both parties to the lease to extend all the terms and conditions contained in the lease agreement. In conclusion, the plaintiff's right of first refusal to purchase the leased premises is included within the terms and conditions or the lease agreement.

[8] On the other hand, the defendants' counsel, Mr Pretorius, submits that an option to purchase in a lease is collateral to the relation of landlord and tenant It is the defendants' case that in principle there is no difference between an option to purchase and a right of pre-emption, and therefore a right of pre-emption in a lease is not incident to the relation of landlord and tenant, i.e. it is collateral. When a lease is renewed *simpliciter,* all the terms are renewed that are incident to the relation of landlord and tenant. Terms that are collateral to and independent of such a relationship are not renewed unless the parties make it specifically clear that this was their intention upon renewing the tease. It is further contended that the exercise of a simple renewal of lease does not make a right or pre-emption a term of the new lease due to its being collateral. Where there is in existence an agreement containing a lease and matters that are not incident to the relationship of landlord and tenant and if agreement is reached simply *'to renew the lease',* then any reasonable person would understand that only the lease of the premises and nothing more was to be renewed, and if he wished to extend any of her portion of the agreement would feel it Incumbent upon him to stipulate expressly that this should happen The defendants hold that if the reletting is express, the question relating to which of the terms of the expired lease form part of the new contract is a question of interpretation:

[9] According to the defendants, the English rule, which is accepted as part of the South African law, is stated in Halsbury *Laws* of *England* 2nd ed., vol. 20, para. 69 as follows:

> *"A lease may confer on this lessee an option to purchase the interest of the lessor in "the demised premises. This usually takes the form of a covenant by the lessor that if the lessee within a specified period shall give the lessor notice in writing of* a *strength of his desire to purchase the fee simple, or ether interest of the lessor in the premises, the lessor will, on payment of a specified purchase price, and of arrears of rent, convey the demised premises to the lessee. Such an option is collateral to, independent of and not incident to the relation of landlord and tenant. It is not therefore one of the terms which will be incorporated in the terms of* a *yearly tenancy crested by the tenant holding over after the*

expiration of the original lease;·and when the parties agree that the lease shall be *extended, unless it be clearly shown that it was their intention that the option to purchase should continue throughout the extended period, it will not be deemed to be one of the terms of the extended tenancy "*

[10] While the starting point remains the words of the document, the process of interpretation does not stop at "a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context provided by reading the particular provision/s in right of the document as a whole, including the circumstances attendant upon its coming into existence. In the decision **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18**,WALLIS JA dealt with the proper evaluation of documents:

"The present state of the law can be expressed as *follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors The process is objective, not subjective."*

[11] In order to interpret ·the words contained in the endorsement on the lease agreement, the following reported cases are relevant. In Sherwood v Tucker 1924 (2) Ch. 440 the extension of a lease (which was, as in the present matter, enforced by an endorsement on the original lease agreement) was found not to cover an option to purchase contained in the original lease agreement. The endorsement on the lease agreement as to the extension of the lease was in the following terms.

"We, the undersigned, hereby agree that this lease be extended for three years expiring December 21, 1923."

In holding that the endorsement related to the lease only and not also to the option to purchase, POLLOCK. WARRINGTON & SARGANT LJJ concurring the following·

"What the words which have been used in this case mean-"we agree that this lease be extended", are words apt to cover the option as *well as the extension of the demise? I think they do not cover the option*. *There is a clear distinction between two things. The first is the demise of the premises by the landlord to the tenant, and although it is to be found in an agreement, or in a lease signed and executed by the parties, still the option is a separate and independent contract whereby a chance is given to the tenant, under the conditions to purchase the freehold of the premises which are demised to him..."*

SARGANT LJ laid stress on the use of the word *"extended".* He quoted the endorsement and said;

"What does that mean? *Does it mean that the term is to be extended or that the contract is to be extended with all its incidents? I think the word "extension" is not really strictly applicable, properly used, with regard to the document. You cannot extend the document. You cannot extend the actual lease. It is a word properly applicable to the extension of the term of years granted by the lease, though I incline to think that a very slight alteration of the terms here might have produced a different result. If the parties had agreed that house should be taken for a further term of three years upon all the terms upon which it was taken under this contract the result might very likely have been different But on the whole I cannot find in this document anything more than an extension, and an extension is prima facie applicable to the term granted, and does not necessarily involve the further grant of an option of purchase which is not itself one of the incidents of a tenancy*

strictly speaking."

[12] In Batchelor v Murphy 1926 A.C. 63 the court concluded that the new lease did contain an option to purchase the property. This was an instance where a new lease was granted to a new lessee in regard to the unexpired term of the lease granted to the previous lessee. The previous lease contained an option to purchase the property and the operative part of a memorandum, which was the document requiring interpretation, stated that

> *"…execute a new lease for the unexpired term of eight years and six months from the sixth of October last on the same terms and conditions in all respects as the lease of 17 October, 1913"*

The court found that the wording of the memorandum meant that the entire document, and not only the lease, was agreed to and that the option to purchase, although a collateral right, was included in the original lease and was in substance transferred

[13] In **Webb v Hipkin 1944 AD 95** the renewal in question dealt with an option of renewal which was signed by the two parties and read as follows:

> *RENEWAL OF LEASE*
>
> We *the undersigned*
>
> *SOPHIE CATHERINE WEBB*
>
> *and*
>
> *GEOFFREY HIPKIN*
>
> *do hereby agree to a renewal of the aforementioned lease for a further period of Three (3)* years *from 1st September, 1941, under the same terms and conditions as aforewritten."*

The lessor contended that the option had expired on 1 September 1941 and that the renewal of the lease did not extend the option beyond that date The court was called upon to interpret the clause. FEETHAM JA referred to what was stated in **Halsbury,**

Laws *of England* supra under the heading *Landlord and Tenant* as well as to **Webb v Hipkin** and **Sherwood v Tucker** supra. The court held that on the words used in the agreement to renew -in particular *"under the same terms and conditions* as *aforewritten"* - it was sufficiently clear that the parties intended that this clause also should be renewed.

[14] In the present matter and as far as the interpretation of the extended agreement is concerned, the plaintiff cannot rely on a tacit term to the effect that the extension was on "*the same terms and conditions as contained in the written lease",* since reliance on such a term has not been pleaded as part of the common cause facts; and a tacit term cannot be inferred where it is contrary to the express language of an agreement. The express words to be interpreted in light of the facts mentioned above are *"Extended till 31/5/2014 monthly Rent R5 500"* and must be interpreted objectively. It is significant that the words endorsed on 3 May 2006 on the initial agreement are similar to the words used in **Sherwood v Tucker** supra.

[15] Having regard to the rules of interpretation, the question to be answered it this: Can be said that when the endorsement *"Extended WI 31/5/2014 monthly Rent R5500"* was made, the parties intended for the right of pre-emption to be transferred as well? Objectively such a finding cannot be made for the following reasons:

15.1. From a reading of the final written lease itself, at best for the plaintiff, the intention of the parties could only have been that the right of pre-emption was to endure for a maximum period of two years only. The two year period had already expired when the endorsement took place on 03 May 2006. The parties could not have contemplated that 1he right of pre-emption would endure: for a further eight years (from 2006 until 2014).after the initial one year lease period and possibly another year in terms of the option to renew, had expired. To echo the words of TREDGOLD CJ in **Levy v Banket Holdings (Private) Ltd 1956 (3) &A 558 (FC) at 564F**:

"… a reasonable person would understand that the lease and nothing

more was to be renewed, and would feel it incumbent upon him, if he wished to extend any other portion of the agreement to stipulate expressly that this should happen";

15.2. Specific wording, such as *"on the same terms and conditions as the initial written lease"* were not expressly endorsed on the document and cannot be inferred for the reason set out above;

15.3. **Sherwood v Tucker** supra is almost directly on point with the matter in question. Batchelor v Murphy and Webb v Hipkin supra are clearly distinguishable on the basis that the wording of the clauses under scrutiny there specifically included the express words *"the same terms and conditions" or* something similar thereto. In this matter there are no such words and as referred to above, such-words cannot be inferred;

15.4. Following the reasoning of WARRINGTON W in **Sherwood v Tucker** supra a tenant who sets up a contention that the endorsed document extending the lease has continued the right of pre-emption, has to show that there is by necessary implication an agreement to continue the right of pre-emption in the terms of the endorsement

Prima facie, those documents which extend the lease ought to be held to extend the relation of landlord and tenant, and the arson who seeks to give to them any further meaning than that must find in the document extending the lease either something expressed … or something which by necessary implication has that effect."

No such finding can be made on the present facts before the court,

15.5. If the right of pre-emption was to continuance for a further period (after the initial one year period as per the original printed terms of the lease and possibly a further one year renewal in terms of the oral agreement), one would have expected clear words to have been used for that purpose. Such a clear intention is glaringly absent from the words used;

15.6. In my view, the word *"extended"* is appropriate to the continuance of the period of the lease *and* not the continuance of the right of pre-emption especially if one has regard to the fact that the fight of pre-emption is collateral to the

relation of landlord and tenant and terms that are collateral to and independent of such relationship are not renewed when a lease is renewed *simpliciter,* unless the parties it clear that they intended this;

15.7. In the absence of a clear intention that the right or pre-emption should continue throughout the extended period, it will not be deemed to be one of the terms of the extended tenancy.

[16] In conclusion it is held that only the period of the lease was extended (and was capable of being extended/renewed) and not also the right of pre-emption which is not in itself one of the incidents of a lease, even though the night of pre-emption appears in the document upon which the endorsement was made. Therefore, the purported extension of the initial written lease did not result in the right of pre-emption becoming a term of the extended new lease. The plaintiff's action can therefore not succeed on the question of law and must therefore be dismissed with costs.

I therefore make the following order:

1. The alleged right of pre-emption in terms of clause 6 of the lease agreement was not extended/renewed when the original lease agreement was endorsed with the words "Extend till 31/5/2015 monthly rent·R5500 and the application is dismissed
2. The rest of the prayers are postponed sine die.
3. Plaintiff is ordered to pay the costs of the application.

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DE VOS J

JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT

Date of hearing: 20 November 2015

Date of judgement:	24 November 2015
For the plaintiff:	Adv. QM Dzimba
Instructed by:	Ndzondo Kunene Mosea Inc
For the defendants:	Adv.WG Pretorius
Instructed by:	Brooks & Braatvedt Inc.