

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
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Case No.: 2019/27944

In the matter between:

PARETO LIMITED
(REGISTRATION NO: 1998/000118/06)

Applicant

and

CREDONAMIX CC t/a PORTOBELLO
(REGISTRATION NO: 2009/214709/23)

Respondent

JUDGMENT

Gilbert AJ

1. The applicant is a lessor who seeks an order confirming the cancellation of a lease agreement, alternatively cancelling a lease agreement concluded with the respondent in respect of commercial retail premises in Cresta Shopping Centre, together with an ejectment order.

2. The case made out by the applicant as lessor is straightforward: a written lease agreement was concluded during May 2016; the respondent took and remains in occupation of the premises; notwithstanding demand the respondent failed to make payment of rentals and other amounts due in terms of the lease agreement; as a result the applicant cancelled the lease agreement on 22 July 2019.
3. The respondent does not dispute any of these facts. The respondent resists the eviction by asserting in paragraph 19 of its answering affidavit that *“the applicant unilaterally and in gross breach of the agreement changed the tenant mix to such an extent that the patronage number of the respondent drastically changed for the worse”*.
4. The respondent further continues that as a result thereof the applicant *“through its conduct made it totally impossible for respondent to meet its commitment to the applicant”* (paragraph 35 of the answering affidavit), and that the lease agreement was rendered *“null and void”* (paragraph 36 of the answering affidavit). It is therefore common cause as matters now stand that there is no extant lease.
5. The respondent asserts that *“the applicant is obliged to enter into a new lease agreement whereby the terms are such that (i) it is in line with the present and existing tenant mix; (ii) takes cognisance of the dramatic decrease in turnover of the respondent due to such tenant mix”* (paragraph 37 of the answering affidavit). The respondent counterclaims

for relief against the applicant in these terms, directed at obliging the applicant to negotiate the terms of a lease.

6. The respondent's case is predicated upon it establishing that the applicant had acted in breach of the lease agreement in changing the tenant mix. During argument I asked the respondent's attorney which obligation or clause in the lease agreement the applicant had breached. I was directed to clause 29.1 of the lease agreement, which on the respondent's attorney's interpretation precluded the lessor from changing the tenant mix without the consent of the respondent as the tenant. Clause 29.1 provides for an entitlement on the part of the applicant as lessor to terminate the lease or any renewal thereof in certain circumstances, one of which is if it wishes to effect a change in the tenant mix. This clause does not impose any obligation upon the applicant to obtain the consent of the respondent before doing so.

7. Also apposite is clause 13.2 of the lease agreement:

"The landlord does not warrant that any other premises in the complex will not be let for any other purposes as stipulated in clause 1.5 to any person, or that any other tenant in the complex will not compete with any of the businesses of the tenant."

8. No right of exclusivity is conferred on the respondent.
9. The respondent further submitted that the manner in which the marketing fund provided for in clause 1.23 of the agreement was

utilised, as well as the manner in which the applicant went about advertising and promoting the shopping centre negatively impacted upon the respondent's patronage. But there is no positive obligation in the lease agreement that precludes the applicant from acting in the manner that the respondent alleged that it did.

10. The respondent also contended that it had attempted "*to limit its damages*" and that the applicant had refused to engage constructively with it in relation to its complaints. Again, there is nothing indicated in the lease agreement that places any positive obligation on the applicant in this regard.
11. In the circumstances, no case has been made out that the applicant as lessor breached the lease agreement.
12. Absent a breach of the agreement, the respondent's opposition fails.
13. It is further common cause, albeit for different reasons, that there is no extant lease and so no basis upon which the respondent can remain in occupation of the premises.
14. It is therefore unnecessary to consider the further issues that may otherwise have arisen had the breach been established, such as how such breach may have excused the respondent from having to pay arrear rentals and other charges which as at March 2019 were already R474,820.00 when demand was made and which had escalated to R875,642.83 as at date of the launch of the proceedings on 8 July 2019.

Or how such a breach, if established, would have resulted in the agreement being “*null and void*” and would have obliged the applicant as lessor to renegotiate the terms of the lease on the basis as sought by the respondent.

15. In the circumstances, the application by the applicant succeeds and the respondent’s counter-application is dismissed.

16. The following order is made:

16.1. It is confirmed that the lease agreement between the applicant and the respondent was validly cancelled on 22 July 2019;

16.2. The respondent and all those occupying the premises by, through or under the respondent are ejected from the premises situated at Shop L50, Cresta Shopping Centre, Cnr Beyers Naude and Weltevreden Road, Cresta Extension 4, Johannesburg;

16.3. In the event that the respondent and those occupying the premises by, through or under the respondent do not vacate the premises within 5 (five) court days of the date of this order, the Sheriff is authorised and directed to eject the respondent and all those occupying the premises by, through or under the respondent;

- 16.4. The Sheriff is authorised to approach the South African Police Service for any assistance that may be required and the South African Police Service is directed to render such assistance or support that may be required to effect the ejectment;
- 16.5. The respondent is to pay the costs of the application;
- 16.6. The respondent's counter-application dated 23 September 2019 is dismissed with costs.

Gilbert AJ

Date of hearing:	4 August 2020
Date of judgment:	6 August 2020
For the Applicant:	Advocate V Obonah (Ms)
Instructed by:	Pule Inc.
For the Respondent:	Mr N Bouwer (Attorney)
Instructed by:	Bouwer Malherbe Attorneys