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

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

DATE: 3 AUGUST 2021

SIGNATURE OF ACTING JUDGE: _____

Case number: 20/41712

In the matter between:

STAND 59 CHAMDOR PROPERTIES (PTY) LTD Applicant

and

DE HEUS (PTY) LTD Respondent

JUDGMENT

SLON AJ

1. The applicant seeks in this application payment by the respondent of the sum of R2 680 046.39 with interest calculated at the prime rate[1] from 25 October 2019 to date of payment, and costs on the scale as between attorney and client.

2. The claim arises from the provisions of a written lease, concluded between the applicant, as landlord, and the respondent, as tenant, in respect of certain industrial premises situate in Roodepoort Gauteng. The lease commenced on 1 January 2014 and terminated by effluxion of time on 31 December 2018.

3. In terms of the lease, the respondent was obliged monthly to pay, either to the applicant or to the local authority direct (but nothing seems to turn on this), the cost of electricity consumed on the premises, in addition to other amounts which are not germane to this matter.

4. The lease provided in this regard that:

> '7.5 If there is any dispute as to the Tenant's liability for the payment of any of such items referred to in this clause [including, at clause 7.1.1, 'the cost of all electricity, including but not limited to the electricity maximum demand charges consumed by [the Tenant] on the Leased Premises'] or to the amount and extent of such liability, the Landlord's auditors shall determine the quantum, nature and extent of the Tenant's liability.
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> 7.6 The Tenant shall then be obliged to pay the amounts so established to the Landlord.'

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[1] The 'prime' rate defined at clause 1.3.7 of the lease is 'the publicly quoted basic rate of interest at which the Standard Bank of South Africa Limited will lend funds on overdraft'.

5. After the termination of the lease, a dispute arose between the parties as to the amount, if any, payable by the respondent to the applicant for the former's consumption of electricity while in occupation of the premises during the currency of the lease.

6. In terms of clause 7.5 of the lease, the matter was referred for determination to the applicant's auditors, Madhi Meyer Stein Chartered Accountants Inc ('MMS'). The latter presented a report concluding that the amount payable by the respondent was the sum now claimed by the applicant herein.

7. The respondent disputes that that amount is owing.

8. The applicant, ably represented by Mr Iles, makes out a simple case: that a dispute as to the quantum of the liability in respect of the electricity consumption arose, that the quantum was then determined by MMS in terms of the lease, and, accordingly, that amount is payable to it by the respondent under clause 7.6 of the lease.

9. The respondent, ably represented by Mr Saks, raises the following defences:

   9.1. The dispute resolution provision contained in clause 7.5 of the lease terminated with the expiry of the lease itself, and, accordingly:

      9.1.1. any purported determination by MMS under the lease is of no force or effect;

      9.1.2. the applicant is therefore obliged to prosecute its claim in the ordinary manner by instituting action should it so wish.

9.2. If, however, it is found that clause 7.5 survived the expiry of the lease, the respondent disputes the correctness of the purported determination by MMS, and is at this stage entitled to avoid the effect thereof on the grounds that:

9.2.1. the determination by MMS was not in fact any determination at all by MMS since it relied upon the report of a company by the name of Energi Concepts (Pty) Ltd ('Energi') whose business it is to investigate the correctness of charges made by the local authority for electricity consumption; the latter, argues the respondent, usurped the agreed function of MMS which merely 'rubber-stamped' Energi's report;

9.2.2. there are several material errors in the calculations of MMS such that prior payments by the respondents were not taken into account and that a portion of the debt had become prescribed.

9.3. In any event, the disputes of fact are so far-reaching that the matter is incapable of resolution on motion and ought to be referred to trial.

10. The determination of this application, if indeed it can be determined on the papers, must, in my view, depend in the first instance on whether or not the contention by the respondent that the clauses in question did not survive the expiry of the lease is correct, and if they did, in the second instance, on the meaning and effect to be attributed to clauses 7.5 and 7.6 of the lease. The intended meaning and effect of those clauses must be determined primarily within the four corners of the lease as a whole.

11. The agreement to refer any dispute about the 'quantum, nature and extent' of the respondent's liability for the electricity costs to MMS was, in my view of the probabilities, not intended to be an arbitration clause. Neither party contends to the contrary. The mere nomenclature which contracting parties may attach to such a clause is not definitive of its nature[2], even though there is none here; and nor are there any procedural or other prescriptions in the lease as to the manner in which this clause is to be implemented, although this, too, is not a sole determinative factor. I agree with the submissions of both parties that the most probable inference from the terms of the lease (or lack thereof) is that the parties intended this question to be determined by the nominated referee in a summary and speedy procedure.

12. A referee in that position acts in effect as an expert. It is his or her duty, in the words of Boruchowitz J (speaking for the Full Court of the then Witwatersrand Local Division and referring to an expert valuer, a distinction on which nothing turns for present purposes) –

> 'to hear and determine a dispute but to decide the questions submitted to him by the exercise of his judgment and skill without a judicial inquiry. He does not exercise a quasi-judicial function. The valuer is not required to hear or receive submissions from either party. All that is required is that he exercise an honest judgment, the *arbitrium boni viri*. .... An expert, unlike an arbitrator, is not bound to receive submissions from either party ... The material upon which an expert generally bases his decision is described by Ronald Bernstein in his work *Handbook of Arbitration Practice* 2nd ed (1993) at 2.4.1 in the following terms:
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> > 'Where a dispute is resolved by a third person acting as an expert, the primary material on which he acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of "evidence") put before him by either

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[2] ***Perdikis v Jamieson*** 2002 (6) SA 356 (W) at para [5]

party. An arbitrator on the other hand, acts primarily on material put before him by the parties."[3]

13. It goes without saying that the very purpose of such a clause is to divest a Court from exercising that power: the parties have elected to place the dispute in that hands of another party in the place of the Court for reasons best known to themselves and to be bound thereby, whether the decision be right or wrong.[4]

14. For this reason, I do not agree with Mr Saks that a Court has the power to determine the dispute, if of course it is found that the dispute resolution clauses survive the determination of the lease. Even, therefore, if the applicant's claim for payment is denied in this application, it would not, upon the aforegoing finding, be open to me to disregard the terms of the lease by referring the matter to trial, or, for that matter, to evidence for the determination of any more discreet question of the true quantum of the applicant's claim, if any.

15. Merely because the agreement containing such a clause may not prescribe procedural other provisions for the manner in which the expert is to proceed, does not mean that the expert is obliged to act in a vacuum, albeit that the procedure in this matter was obviously intended to be informal, it being up to the referee himself or

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[3] ***Perdikis v Jamieson*** (*ibid: supra*)

[4] 'Unlike an arbitrator, a valuer does not perform a quasi-judicial function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it.' ***Lufuno Maphaphuli & Associates (Pty) Ltd v Andrews*** 2008 (2) SA 448 (SCA) at 455 para [22]

herself to determine the procedure to be adopted. Again, I understand both parties to be *ad idem* in this regard.

16. I find persuasive the view expressed in an Australian case of ***Triano Pty Limited v Triden Contractors Limited***[5] which, in my view, is consonant with our law, and in which it was held by Cole J that –

> '*If the parties have not by their deed agreed the procedures to be followed upon an expert determination*, that is not a void the Court can fill. There is no reason to imply a term that the Court will determine procedures. *It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed.*'[6]

17. In the absence of agreement as to such procedures, in my view, therefore, they are matters within the purview of the expert's function and task, and are to be decided upon by him or her, with or without such submissions as he or she may deem necessary or desirable to call for from the parties as to this question.

18. Firstly, then, I turn to consider the question of whether or not clauses 7.5 and 7.6 survived the expiry of the lease.

19. It has been authoritatively held that an arbitration clause survives the termination of the agreement in which it appears, save in circumstances more fully referred to below. In ***Atteridgeville Town Council v Livanos***[7] such a clause was classified as

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[5] (1992) 8 BCL 305

[6] at 307; my emphasis

[7] 1992 (1) SA 296 (A) at 303I-306C

a 'secondary obligation' which is not *ipso facto* terminated with the primary obligations under the agreement.

20. Mr Saks submits, firstly, that that case is distinguishable in one respect and, secondly, submits that this matter falls into a species of exception referred to therein.

21. His argument is that:

21.1. it is not an arbitration clause under scrutiny in this case and that it is therefore distinguishable from the ***Atteridgeville Town Council*** case;

21.2. even if it is not, it falls within the purview of a dictum by Smalberger JA in that judgment as follows:[8]

> 'Where a contract is dissolved or cancelled by mutual consent, any submission to arbitration contained in the contract must, generally speaking, also be taken to have been dissolved or cancelled. ... This is in keeping with the principle enunciated in ***Heyman and Another v Darwins Ltd*** [1942] 1 All ER 337 (HL) at 346A (per Lord MacMillan):
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> > 'It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement.'
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> The reason for this is that mutual agreement to cancel a contract (or consensual cancellation) is a contract whereby another contract is terminated ... This brings to an end the rights and obligations of both parties to the earlier contract, and there is no longer any debt or right of action in existence. Neither is left with any claim against the other arising from the earlier contract ...'.

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[8] At 304H

22. As to the first basis, I can no reason in law or logic why the type of an alternative dispute resolution clause, whether, that is, it is an arbitration clause or one referring a dispute to an expert referee, makes any difference. The *nature* of the procedure to be adopted for the purposes of alternative dispute resolution, excluding by agreement the auspices of an ordinary Court, can surely make no difference to the principle enunciated in the ***Atteridgville Town Council*** case. I accordingly reject that contention.

23. As to the second basis, I find that the lease in this matter expired simply by the effluxion of time. Toward the end of the lease period, the respondent gave notice that it would not exercise an election to renew the lease in accordance with a provision of the lease to that effect. I leave aside the debate concerning the mostly factual question of whether a renewal of a lease, some of the terms of which may require further negotiation, would constitute an entirely fresh agreement, or merely the continuation of an existing agreement. The submission by Mr Saks, however, that the respondent's notice of non-renewal, if I may call it that, comprised a consensual termination of the lease, and as such falls to be dealt with at law according to the *dictum* of Smalberger JA quoted above, seems to me on any basis misconceived and cannot seriously be entertained for all its apparent ingenuity.

24. In any event, the further finding of Smalberger JA, then relying on venerable authority, puts paid to this argument:[9]

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[9] At 305C-F (my emphasis)

The present matter is in principle on all fours with the case of ***Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others*** 1943 AD 393, where it was held that repudiation of a contract does not destroy the efficacy of an arbitration clause in such contract. In this regard the remarks of Tindall JA at 401 are apposite, where he said:

> 'But the heads of argument of Mr De Villiers, who appeared for Scrivens in this Court, make the point that the company repudiated the contract in toto and was therefore not entitled to avail itself of the arbitration clause, the claim and the counterclaim going to the root of the contract. The fallacy underlying this contention is the assumption that a repudiation of a contract (in the sense of a refusal to continue performance under it) by one party puts the whole contract out of existence. It is true that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of repudiation, but the repudiation does not destroy the efficacy of the arbitration clause. *The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end.* ***If, for example, this contract had come to an end on a date stipulated for its termination, I do not think that it could have been contended successfully that the arbitration clause was no longer operative.'***

25. Lastly, the invitation from the respondent on 7 February 2019 (dealt with further below) that the applicant should act by referring the dispute to the referee suggests that it understood that clauses 7.5 and 7.6 survived the termination of the lease, regardless of how that termination was brought about. That is not, of course, definitive since, as a matter of law, evidence of the parties' understanding of an agreement is not relevant to the objective construction of its meaning; but their conduct in performing it may indeed be relevant in some circumstances.[10]

26. I find, accordingly, that clauses 7.5 and 7.6 survived the expiry of the lease.

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[10] ***Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others*** – unreported (470/2020) [2021] ZASCA 99 (9 July 2021); at para [54]

27. The next question for determination is whether or not the respondent's objections to the MMS determination are such that it is entitled at this stage to avoid the effect of thereof.

28. I revert briefly to the facts.

29. On 29 January 2019 the applicant's attorneys made demand upon the respondent for payment of an amount of R7 178 573.65 in respect of electricity consumed on the premises on the strength of an invoice in that amount from the City of Johannesburg.

30. On 7 February 2019, the respondent's attorneys replied to that letter in which they:

30.1. stated that the respondent was satisfied that it owed no further monies as regard any of the utility costs to the applicant;

30.2. invited the applicant to invoke the dispute resolution mechanism of clause 7.5 of the agreement in order to obtain a determination by the applicant's auditors;

30.3. stated, in addition, that they had advised their client that 'it would not be bound to accept such determination, and [it] therefore reserves the right to deal with the auditors' determination in the appropriate manner and forum should it be necessary to do so.'

31. On 26 February 2019 the applicant's attorneys advised the respondent's attorneys that they would accede to that invitation.

32. At no time did either of the parties enter into any discussions, either *inter se* or with the referee, about any procedure to be adopted to enable or assist MMS in making

its determination; save that the applicant at some stage procured the Energi report which was then made available to MMS.

33. It would appear that, primarily on the strength of that report, MMS reached its determination which led to the quantification of the amount claimed in this application.

34. The respondent points to several alleged inaccuracies and inconsistencies in the MMS determination of varying degrees of significance and effect. It points, among other things, to a disclaimer by MMS that to 'rebill' the electricity account would be a task beyond its capabilities, and contends on that basis that MMS itself did not in effect make the determination as required by the lease; and that the report was consequently so wrong and to such a degree wide of the mark that, on a proper computation of the account, it is the applicant which is in fact liable to the respondent for monies over-paid by the latter.

35. It is noteworthy that the respondent did not, when it invited the applicant to resort to clause 7.5 of the lease, suggest any means by which the parties should be heard by MMS prior to its conclusion of the determination. It did not submit any documents to MMS to support its case, much less call for consent to make submissions or to hold a hearing.

36. This fact bears pertinently on one of the questions posed by the respondent at paragraph 7.5.1 of the parties' joint practice note as one for determination in this application. It evidences that the respondent appears a little belatedly to have become more conscious of the consequences of its conduct at a time prior to the finalization of the dispute by MMS. The question is this: 'Was the respondent entitled

to be afforded the opportunity of making representations to the expert before they finalized their determination of the quantum?'

37. In my view, there is no reason why a party to such a clause, represented, as here, by attorneys who ought to have been aware of the legal position, and who were certainly *au fait* with the facts of the matter, and therefore of the consequences of the clause in both respects, should not at the first opportunity, *before* the determination be made, and regardless of any view of the expert as to the procedure to be adopted, have sought to make itself heard as to the manner in which it desired that the determination should proceed and, where necessary, to have reached agreement with the referee and its opposing party in that regard.

38. The crucial point is that there is nothing in the lease to suggest that such an approach would have been contrary to the intention of the parties as expressed therein, silent as it may be in that regard. There is no evidence before me that either of those parties refused, or would have refused, any request from the respondent that it be permitted to make submissions.

39. The question posed by the respondent, quoted above, accordingly prompts the further question: what, then, if it wished to make representations, did the respondent do about it?

40. It did nothing. It remained supine. The inference on the facts before me seems clear: the respondent accepted that the determination may indeed be arrived at without the referee's necessarily having to entertain the submissions or documents of either party as to what was already then the vexed question of the quantum, if any, outstanding in favour of the applicant.

41. It goes even a little further. The statement by the respondent, at the stage that the invitation under clause 7.5 was issued to the applicant, that it did not consider itself bound by the determination once made, and then even without stating any reasons at all as to why that was so, cannot advance the respondent's case at this stage. If anything, this statement suggests (and one needs put it no higher) firstly, quite apart from anything else, a repudiation the provisions of clause 7.6 of the lease, and, secondly, a waiver by the respondent of any rights it may have had to participate, or at least to seek to participate, in one or another manner, at the crucial time *prior* to the determination having been handed down. In effect, having declined without any stated reason even to attempt to make itself heard prior to the determination, it purported to reserve its rights to object to the determination after it should be concluded and handed down. Repudiation and waiver aside, there can be little doubt that such an approach is inimical to the intention expressed by the parties in the lease as to the manner in which such a dispute should be determined.

42. That is so even if the respondent's attorneys' statement is capable of an interpretation that the respondent merely reserved its rights to bring the determination under a review of some sort, presumably in terms of rule 53 – for which, in any event, it hardly needed to reserve its rights in the first place. At all events, that is a step which the respondent has not taken either independently or in the form of a counter-application, and has not stated (thus far, at any rate) that it intends to take, and which may have led to a request to stay the determination of this application.

43. After the determination was made, the respondent then waxed vocal about its objections to the determination, first in a letter and then in more detail in its

answering affidavit in this application from which the complexity of its complaints appears in great detail. One rather wonders, in the light of this, how conceivably the respondent could have imagined in good faith that *any* determination acceptable to it could have been possible without any attempt by it to place information or documents before the expert prior to the determination's having been handed down. It is a case of too little (or perhaps, in these circumstances, too much) too late.

44. That said, it is true that some of the criticisms of the respondent directed at the MMS determination indeed give rise to considerable discomfort as to the correctness thereof. The respondent has not demonstrated on the papers before me, however, that MMS's alleged failings were of such a magnitude that it can be said not to have exercised in good faith 'an honest judgment, the *arbitrium boni viri*', or that its means of determination or the determination itself was such that the intention of the parties under the lease was thereby violated, with the result that the determination is of no force or effect. If there are any disputes of fact as to the correctness of the calculation of the amount awarded by the expert, those disputes, as I have said, are not for the Court to adjudicate. The respondent's predicament, as Mr Iles correctly points out, bears the hallmarks of what the then Appellate Division was concerned with in a slightly different factual context in ***Ocean Diners (Pty) Ltd v Golden Hill Construction CC***.[11]

45. MMS was entitled, in my view, and in accordance with the *dicta* quoted above, to rely on the Energi report and on any other evidence it believed to be relevant, rightly or

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[11] 1993 (3) SA 331 (A)

wrongly so, and this too in the face of the silence of the respondent as to any contribution it might have wished to make, or any assistance it might have rendered, to the efforts of the expert prior to the determination being handed down. If MMS arrived at the wrong result, that, in itself, and in the absence of a successful review of the determination, (which, as I have said, it has elected not to seek under the different constraints pertaining to such a review, which I need not adumbrate here but which are set out in the ***Ocean Diners*** case already mentioned), is not sufficient for me now to unsuit the applicant.

46. To do so would subvert the plain meaning and effect of clauses 7.5 and to substitute the Court as the arbiter of the dispute. The effect of clause 7.6 is, in my view, that the determination by MMS is final and binding, since no other reasonable meaning suggests itself in this regard, and Mr Saks suggested none other. This Court cannot now come to the rescue of the respondent thus belatedly and, as it were, through the back door.

47. The application must therefore succeed.

48. I am satisfied that the interest claimed and costs on the scale as between attorney and own client are provided for in the lease, and I see no reason to depart therefrom.

49. An order is granted in terms of prayers 1 and 2 of the Notice of Motion dated 3 December 2020, as encapsulated in paragraph 1 hereof.

B M SLON
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by Acting Judge Slon. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

HEARD ON:	2 August 2021
DECIDED AND HANDED DOWN ON:	3 August 2021

For the Applicant:	Mr K Iles
Instructed by:	Werksmans Attorneys
For the First Respondent:	Mr D J Saks
Instructed by:	Woodhead Bigby Inc