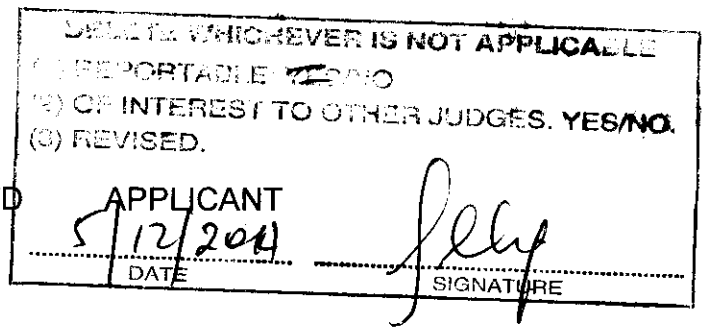
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 64068/2013

In the matter between:



FOUR ARROWS 68 INVESTMENTS (PTY) LTD APPLICANT

and

5/12/2014

ROYALE ENERGY LIMITED RESPONDENT

JUDGMENT

TLHAPI J

[1] In this application the applicant seeks the following orders:

"(b) That the Respondent be evicted from Portion 92 (a portion of Portion 58) of the Farm Sterkloop. Registration Division L.S., Limpopo Province ("the property");

(c) That the Respondent forthwith commence with the rehabilitation of the pollution to the property, caused by the Respondent's business activities conducted from the property being the storage, marketing and

sales of petroleum products, and to complete said rehabilitation and to obtain an environmental impact assessment within a period of six months from date of this order;

(d) That, in order to give effect to prayer (c) above, the Respondent's employees and/or contractors be granted the required access to the property, subject thereto that said access does not interfere with the Applicant's occupation of the property;

(e) That, in the event of the Respondent neglecting and/or refusing and/or failing to vacate the property within a period of seven (7) days from date of this order, the Sherriff be authorised and ordered to evict the Respondent from the property;"

The application was opposed.

[2] The salient facts of this matter are as follows:

[3] Mr Suliman Omar Tayob ('Tayob') a director of the applicant deposed to the founding affidavit. It was common cause that an oral lease was entered into between the applicant and the respondent over the property owned by the applicant. The respondent conducted business thereon in the storage, marketing and sales of petroleum products. At termination of the lease the respondent was obliged to rehabilitate the property and to obtain an environmental impact assessment report within six months of termination of the lease. According to Tayob the lease terminated on 30 June 2013 and that the respondent persisted in its occupation of the property despite demands for them to vacate the said property.

[3] Prior to such termination on 30 May 2013 the respondent had communicated

its wish to extend the lease on the same terms and conditions. A letter of intent was given to the applicants for its acceptance of the respondent's intent to develop a service station on the property as indicated in a Viva letter of intent. On 3 June 2013 the applicant called for an offer of the suggested lease for consideration and informed the respondent that the proposed development of the service station in the viva letter had not been accepted. Tayob indicated that the applicant had itself or through its affiliated entities considered conducting a petroleum retail operation as an alternative to letting the property. The applicant made a follow up thereafter on the arrear rentals and on the lease offer and emails were exchanged.

An email dated 11 June 2003 communicated the respondent's offer. According to Tayob the respondent was informed via Mr Kruger at a meeting of 28 June 2013 that the applicant had decided not to extend the lease and reiterated applicant's intention to pursue the opportunity of a retail filling station on the property. On 5 July 2013 the respondent requested an extension of the lease for a minimum of six months and this period was not accepted by the applicant. In an email of the 6 July 2008 Tayob confirmed discussions with Mr Kruger at the meeting of the 28th. The applicant was amenable to extending the lease for a period of one month only and expected the respondent to vacate the property by the end of July 2013. The rental for July was escalated by 10%.

[4] Further emails were sent by the respondent which included the letter of intent and a further proposition that the lease be extended for a further 30 days for the respondent to consider its position. According to Tayob the lease was extended to August 2013, because the parties failed to meet during July month. Nothing came of the negotiations regarding the acquisition by the applicant of respondent's equipment. An email was addressed to the respondent on 4 September 2013

recording the applicant's position, the gist being that the lease agreement had expired at the end of June 2013 and that the respondent was expected to vacate the property by the end of September 2013.

[5] On 18 September 2013 the applicant was informed by letter from the respondent's attorneys that a lease was in place, that the respondent had paid for the drafting thereof and that the respondent had for three months paid rentals on the escalated amount. The applicant averred that the letter was false and not a reflection of the facts as already communicated to the respondent. The applicant contended that although the lease was initially negotiated, it was never signed. The applicant therefore debited the respondent's account with the fee for legal costs incurred. The payment of the arrear rental and interest thereon were later settled and a portion of the legal costs were written off.

The applicant further contended that it was entitled to add 10% escalation for the period the respondent remained in occupation after the lease terminated in June 2013 and that the respondent was causing it to suffer damages due to such unlawful occupation, the damages being estimated in the rental amount plus 10% escalation for the period of unlawful occupation. The applicant's attorneys responded by restating the applicant's position and by making further demand that the respondent vacate the property. It was denied by the applicant that a response marked '*without prejudice*' that followed contained any '*bona fide*' settlement except that it recorded that the respondent was willing to renegotiate an increased rental for the following six months. The said letter no longer maintained as before that a lease agreement was in place. In a letter of the 4 October 2013 the respondent was informed that it would not be allowed to further full occupation of the property and that only limited access to the property was required for purposes of relocating or for rehabilitating

the property or for obtaining an environmental assessment report.

[6] Mr Stephan Nothnagel ('Nothnagel') a director of the respondent averred that there was a dispute of fact relating to the true nature of the relationship between the applicant and respondent. He contended that the applicant had failed to deal with the lease agreement concluded during 2009 and misled the court about its supposition that there was a five year oral agreement which ended in June 2013. In view of the apparent dispute of fact the applicant had failed to make out a case for the relief sought, and that the application ought to be dismissed with costs.

[7] The respondent contended that the applicant had failed in the founding affidavit to set out the terms of the oral agreement. Nothnagel averred that the lease was in place and that the applicant had no right to claim possession of the property when it did. The respondent had been in occupation of the property since 2003, that is prior to the applicant purchasing the property.

The oral, written and unsigned lease agreement was to run from 1 August 2009 for the duration of 10 years and the said agreement was annexed as SN3 to the answering affidavit. The respondent took occupation of the property during October 2009. The agreement was not signed by the parties due to a number of reasons and an error on their part. The parties had however agreed to continue with the lease on the same basis at a monthly rental of R70 000.00 per month at 10% escalation on the anniversary of the commencement date and from the invoices annexed to the papers was proof that the applicant gave effect to these terms of the rental up to August 2013, as evidenced by the annexed invoices and annexure "F15" to the founding affidavit.

[8] Nothnagel contended that a letter dated the 26 August 2009 from the applicant's attorney Mr Marius Botha was confirmation that the lease related first, to the property which the respondent had been occupying since 2003 and secondly to the potential of the development of a retail venture by the respondent and the possibility of relocating certain buildings on the property for such development. Annexure 'SN' being plans from the applicant indicating potential relocations to accommodate the wholesale and intended retail venture were attached. He averred that after receipt of the final draft from Mr Botha there were further discussions relating to duration of the lease. On 14 September 2009 an email sent on behalf of the respondent by one Elani Geringer with regard to the new lease requested a period of five years, with an option of a further five years and a notice period of three months. Emails were exchanged in which the applicant was not agreeable to the period and Nothnagel averred that he then accepted the terms of the agreement at the agreed rental with escalation and for the duration of 10 years. Apart from a few problems the relationship was a healthy one with the parties continuing to exploring the creation of a service station. According to the respondent there was agreement that the property needed to be rehabilitated and according to the opinion their experts the process would take at least six months hence the a discussion of a six month termination period.

[9] Nothnagel contended that the extension referred to in the email of 30 May 2013 from Qwie Kruger was not about the extension of the lease ending June 2013 but concerned the extension of the ten year period of which half had almost expired coupled with the development of the service station. The intention was that the retail component would run for ten years, and that the bulk depot lease which would be positioned behind and alongside the retail component should run for an equivalent period being the remaining five years of the current lease with an option to extend

the lease for a further five years. It was contended that from a marketing and environmental point of view it was necessary to engage such long term planning due to the huge infrastructure costs to be incurred. Letters of intent had been put forward during 2008, 2009 and the latest dated 8 July 2013 all showing an intention to create a Viva service station.

[10] Nothnagel conceded that during discussions and in consultation with the respondent the applicant had been considering conducting a Viva retail operation from the property but that this was not as an alternative to letting by the respondent but in addition to the services of the respondent on the property, which is why the applicant itself caused the plans to be prepared.

[11] Tayob in reply contended that the applicant did not anticipate that the responded would attempt to create a dispute of fact from the historical background of the negotiations between the parties.

Tayob averred that the original lease agreement was concluded on 7 July 2003 between M & M Inryteaters (Pty) Ltd ('M & M') as lessor and NPS Distributors (Pty) Ltd ('NPS') as lessee. The lease was to commence on 1 August 2003 for a period of five years with a right of renewal for a further five year period. With consent of M & M a sub-lease was concluded between NPS and the respondent which commenced on 18 April 2005 for the duration of the period and rental as stated in the lease agreement. The sub-lease would endure until July 2008 and with an option to renew until July 2013. The rental and escalation would be negotiated between the parties *de novo* upon the lease being extended. Applicant purchased the property from M & M and the transfer occurred on 22 February 2006. It was contended that applicant then substituted M & M and that the respondent remained on the property

as per sub-lease read with the original lease. It was tacitly accepted by the parties that the lease was extended from August 2008 and that the rent was accordingly increased.

[12] Tayob contended that negotiations proceeded for respondent's continued occupation of the premises and a draft lease was first sent to respondents by applicant's attorneys during November 2008 and another copy during July 2009. Furthermore that from the emails that were exchanged between Tayob and Nothnagel, during September 2009 there was clear indication that the parties were not *ad idem* and that the lease would only be binding once signed on behalf of both parties and that the *status quo* regarding the tacit lease remained until 2013. It was further contended that negotiations came to a standstill after 28 September 2009 and that the emails exchanged thereafter and during 2013 pertained to the oral lease in place which terminated on 30 June 2013.

DISPUTE OF FACT

[13] The respondent contended in the answering affidavit that the applicant had foreseen that disputes of fact would arise. It was argued on behalf of the respondent that in addition to the presence of disputes of fact the applicant had tried to make out a case to support the orders sort in the replying affidavit, that the application had to be dismissed on both these grounds. The disputes related to what constituted the actual agreement entered into between the parties. The respondent relied on an unsigned draft lease agreement which emanated from the applicant's attorneys 'SN3' and on an oral agreement based on this document, which allegedly commenced during October 2009. Reliance was further placed by the parties on several emails which were exchanged.

[14] In the founding affidavit the applicant did not identify any particular lease agreement relied upon except to mention that there was an oral lease agreement. It was only during reply where an explanation came forth that the application was premised on a tacit agreement between the parties to extend the lease beyond July 2008, which lease would terminate in June of 2013. 'R1' and 'R2' annexed to the replying affidavit were copies of the original lease and sub-lease concluded during 2003 and 2005 respectively. The original lease of 2003 did not require that any extension beyond July 2008 be reduced to writing but provided for a renegotiation of the rental over the extended period. It was argued for the applicant that there was no bona fide dispute of fact and that applicant had selectively referred to negotiations which were not relevant to the lease in operation.

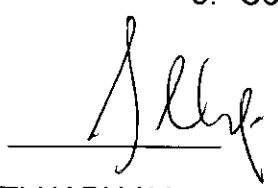
[15] It is evident from the papers that the respondent only came into the picture as lessee when it took occupation of the property during 2005 when the sublease was concluded and not 2003 as alluded to in the answering affidavit and, that the applicant became lessor during 2006 after it purchased the property. It is also common cause that the existing lease at purchase which was extended operated during the time that the Tayob and Nothnagel entered into negotiations regarding further operations on the premises. Having regard to the two versions it is not clear what the agreement between the parties entailed from August or October 2009 and what the importance or relevance of the letters of intent of 2008, 2009 and 2013 and the draft lease agreement which was not signed . It is therefore necessary in my view to have the issue determined by referring the parties to oral evidence to determine the agreement between them and to establish whether the applicant was entitled to the orders it seeks.

[16] In the result I give the following order:

The matter is referred to oral evidence for the following issues to be determined.

1. Was there a tacit agreement to extend the lease agreement for a further 5 years from July 2008 to June /July 2013; or
2. Was there a tacit lease agreement replacing the one in 1, above, which commenced during August 2009 and what periods were agreed to;
3. What problems and or errors according to the respondent prevailed that caused the alleged 2009 lease agreement not to be signed; was there a tacit agreement that such lease was operational between 2009 and August 2013; subject to a suspensive condition to extend?
4. What was the purpose of respondent requesting in July 2013 for an extension of the lease for a period of six months, and which lease agreement was being referred to;

5. Costs are reserved.



TLHAPI V.V

(JUDGE OF THE HIGH COURT)