IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 70923/2015

DATE: 15/12/2016

IN THE MATTER BETWEE N:

WONDERPARK HANDELAARS CC **Applicant**

And

KANONKOP STAINLESS (PTY) LIMITED **1ST Respondent**

ENGEN PETROLEUM LIMITED **2nd Respondent**

JUDGMENT

KOLLAPEN J:

1. The applicant seeks the following relief as against the first respondent in these proceedings:
    i. That it be declared that the Respondent's reliance on clause 19.4 of the agreement of lease between the parties is unconstitutional and not countenanced by the Court
    ii. That it be declared that the said agreement of lease has been duly extended to 30 June 2025.
    iii. That the Respondent be ordered to pay the costs of the application.

2. The first respondent opposes the relief sought and has launched a counter- application in which it seeks the following relief:
    i. That the lease agreement concluded between the applicant and the respondent on 5 August 2005 for the property known as [...] S. Street Kanonkop, Erf [...],

Middelburg Ext 4, Registration Division JS, Province of Mpumalanga be declared to have been terminated on 31 July 2015.

ii. That the applicant and all persons holding under it, be declared to be in unlawful occupation of [...] S. Street Kanonkop, Erf [...], Middelburg Ext 4, Registration Division JS, Province of Mpumalanga.

iii. That the applicant and all persons holding under it, be evicted from the property known as [...] S. Street Kanonkop, Erf [...], Middelburg Ext 4, Registration Division JS, Province of Mpumalanga.

iv. That the applicant be directed to vacate the aforesaid property within 30 days from the Honourable Court granting an order in terms of this counter-application, failing which, the sheriff of the area within which the property is situated be authorised to evict the applicant and all persons holding under it.

3. The following factual background serves as the background to the determination of the relief sought:

3.1. The Kanonkop Service Station was developed primarily by the second respondent ('Engen') in 1983, after an operating lease had been entered into between Mobil Oil South Africa (Pty) Limited, as Engen was then known, and the present shareholders of the first respondent, the deponent to the affidavits on behalf of the first respondent, Isak Andries Mey, his father-in-law, F Gomes, and his brother-in-law, P P Lindenbaum, trading in partnership at the time.

3.2. The first respondent was registered in 1994, and it is common cause that the first respondent is the owner of the Kanonkop Service Station.

3.3. After 21 years of trading, the Kanonkop Service Station was leased in 2004 to an entity known as Martiq 307 CC, who on-sold the business of the service station to the applicant.

3.4. A lease agreement was entered into between the first respondent, represented by Mr Mey in his capacity as a director of the first respondent as lessor, and the applicant, represented at the time by a certain Du Plooy and Erasmus. Relevant terms of the lease agreement were:

3.4.1. The Kanonkop Service Station wa. leased by the first respondent to the applicant, represented at the time by a certain Du Plooy and Erasmus

3.4.2. Clause 5 dealt with the duration of the lease and stipulated:

5 DURATION

This lease shall come into operation notwithstanding the date of signature hereof on r 1 September 2005 and shall subsist for 9 years and 11 months from that date.

3.4.3. Clauses 6 to 18 dealt with the standard terms oflease agreements of immovable property relating to rent, insurance, the duties of the parties, maintenance and alterations to the premises, indemnities and default by the applicant as lessee.

3.4.4. Section 19 dealt under the heading *'OPTION OF RENEWAL'* with the lessee's right to renew the lease, and stipulated:

19.1. The Lessee shall have the right to renew this lease upon the terms and subject to the conditions set out below.

19.2. The period for which this lease may be so renewed is 9 (nine) years and 11 (eleven) months, commencing immediately following the date of expiry of the initial term of this lease.

19.3. All the terms of this lease shall continue to apply during the renewal period.

19.4. The right of renewal shall be exercised by notice in writing from the Lessee to the Lessor given and received not later than 6 (six) months prior to the date on which the renewal period is to commence, and shall lapse if not so exercised.

19.5. If the right of renewal is duly exercised, this lease shall be renewed automatically and without the need for any further act of the parties.

19.6. The lessee may not however, exercise the right of renewal while in breach or default of any of the terms of this lease.

4. It is common cause that the applicant did not give the written notice to the first respondent as was contemplated in clause 19.4 of the lease agreement as a result of which the first respondent took the stance that the lease having not been renewed, lapsed upon the expiration of the original term.

5. The second respondent, Engen Petroleum Limited, played a key role in the running of the service station and the lease agreement provided that the lessee (the applicant) would only purchase oil products, petrol and diesel from Engen. Thus while the agreement provided for the use of the premises for the sale of petrol and other petroleum products, its operations were inextricably linked to Engen as supplier of such products.

6. That being the case Engen initiated discussions with the applicant and the first respondent in 2012 with regard to the creation of a new leasing regime as well as the upgrading of the service station. Engen proposed that the applicant sign a lease agreement and operation of service station document which would terminate on the

31st of December 2013 with an option to renew for a period of 5 years from 1 January 2014. The applicant was not amenable to this suggestion and indicated as much to Engen. The first respondent also took issue with the stance of Engen and in a letter dated the 19th of October 2012 its attorneys indicated that the first respondent sought a long-term relationship between itself, the applicant and Engen.

7. What is clear from the aforegoing is that in 2012, the parties were committed to what has been described as a 'long term relationship'. Discussions with regard to the upgrading of the service station and the parties' respective financial contribution to this process continued and the stance of Engen with regard to the terms and conditions of a lease agreement and operation of service station did not change. By November 2012 it persisted in its view that it proposed a lease agreement that would expire in December 2013 with an option to renew for 5 years from 1 January 2014.

8. It appears that nothing of substance transpired from late 2012 to about July/August 2014 except for a meeting that was held between the applicant and representatives from Engen when Engen had made available architect's plans for the upgrading of the service station.

9. The parties (the applicant, first respondent and Engen) met in August 2014 and the discussions held centred around the upgrade, the time that the service station would be rendered inoperative, as well as the financial impacts of closure.

10. It appears the discussions did not revisit the stance of Engen with regard to the lease regime it had proposed (the December 2013 expiry with a 5 year renewal afterwards).

11. The applicant contends that this meeting was conducted on the 'common understanding ...9 years plus 11 months' and further contends that during this period the respondent brought the applicant under the impression that the lease 'would obviously be extended for a further period of 9 years and 11 months' and is therefore precluded by virtue thereof from relying on the provision of clause 19.4 of the lease agreement. The applicant argues that the first respondent was required to act in good faith and its conduct evidenced bad faith and opportunism.

12. In opposing the relief sought the first respondent's stance is that the parties should be held to the terms of the contract they entered into and in particular that the formalities they agreed upon with regard to the renewal of the lease were arrived at by consensus and are accordingly binding on them.

13. In addition the first respondent's stance is that the lease periods were not a matter that

fell within the exclusive contractual preserve of the applicant and first respondent but that Engen (even though not a party to the lease between the applicant the first respondent) was nevertheless an important player whose attitude would be important in the kind of, and the duration of, the future relationship between the applicant and the first respondent.

14. It is on this basis *inter alia* that the first respondent contends that given that Engen was only willing to conclude a lease for 5 years from 1 January 2014, that the suggestion by the applicant that there was a common understanding that the lease would be renewed for 9 years and 11 months is misplaced and at odds with the facts (in particular the stance of Engen).

The law

15. As I understand it the applicant does not suggest that clause 19.4 is objectionable or constitutionally unsound. Its complaint rather is that the manner in which it has been operationalised and in particular the first respondent's reliance on it, is unconstitutional.

16. In this regard our Courts have indeed distinguished between situations where a contract or term may be innocuous but its effect in particular circumstances may offend the public interest. (See ***Nyandeni Local Municipality v Hlazo*** **2010 (4) SA 261 (ECM)** where the Court stated the following at 2771:

> *'Although the principle that contracts which offend public policy are unenforceable dates back to time immemorial, the concept of 'public policy' is today rooted in our Constitution and the fundamental values it enshrines. These values not only include human dignity, equality and fairness, but also the substantive right to fairly resolve justifiable disputes (s 34). This also recognised by the Supreme Court of Appeal.'*

The court added at 278F to 278H:

> *'Our courts have over many years developed guidelines to determine whether or not a contract offends public policy. The constitutional imperatives and the determination of public policy, with reference to the constitutional values and norms, have not, I believe, imperilled those guidelines. I will refer only to those I believe are relevant to this case.*
>
> *First it must be determined whether the contract or term challenged is per se contrary to public policy; or whether it is its operation in the prevailing circumstances and facts of the case which renders it contrary to public policy.*

A contract, or a term thereof, may very often appear innocuous, but its effect in particular circumstances may very well offend public interest.
The test in a contract said to be contrary to public policy per se is often, but not always, to determine its tendency at the time the contract is concluded, rather than the time of its proved results."

17. In this regard our courts while in broad terms recognising the principle of contractual freedom and the consequences that ordinarily go with it, have also cautioned against what is termed the excesses of contractual freedom.

18. In ***BRISLEY v DROTSKY*** **2002 (4) SA 1 (SCA)** the Court remarked (at 36A) that 'the Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.'

19. Finally in ***EVERFRESH MARKET VIRGINIA (PTY) LTD v SHOPRITE CHECKERS (PTY) LTD*** **2012 (1) SA 256 (CC)** the court in the same vein referred to the need for the development of a new constitutional contractual order:

'Indeed it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of Ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of Ubuntu. It emphasizes the communal nature of our society and 'carries in it the ideas of humaneness, social justice and fairness ' and envelopes the 'key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'. '

20. Arising from the above I must therefore conclude that notwithstanding the fact that the parties may well have concluded a contract whose terms are neither constitutionally objectionable nor contrary to public policy, it may still be open to the Court to conclude that the operation of a term or its reliance in this case having regard to the facts and circumstances, renders it contrary to public policy.

Analysis

21. What then falls to be determined is not whether clause 19.4 passes the muster of constitutionality viewed through the prism of public policy but rather whether the

respondent's reliance on it in concluding that the option to renew was not exercised, thus bringing the lease to an end, is an exercise in bad faith, precluding it from relying on its provisions.

22. In this context it is clear and hardly in dispute that the parties had embarked on negotiations that were underpinned by a mutual desire to achieve a 'long term relationship'.

23. However the nature of the form of this relationship was not articulated but if one has regard to the undisputed facts then clearly it was not contemplated that this long term relationship would be left entirely within the preserve of the applicant and the first respondent. If indeed that was the case the discussions with Engen and the mutual concern of the parties with regard to the terms of the lease as proposed by Engen would hardly have been elevated to a significant feature as it was in the deliberations and discussions between the applicant, first respondent and Engen as well as in the correspondence exchanged between these entities.

24. If the renewal of the lease for 9 years and 11 months was the common understanding between the parties, it would mean that the stance of Engen was an irrelevant consideration in this process. The facts however compellingly prove that the views of Engen and the ability of the parties to convince Engen to commit to a longer period than it was willing to do, would be a very significant factor in how the relationship between the applicant and first respondent would unfold and in particular what the lease period would be.

25. Under those circumstances it is then difficult to accept the applicant's assertions that the parties had a common understanding that the lease would be renewed for 9 years and 11 months. The only understanding that was common in my view was the parties' commitment to a 'long term relationship'. That in my view represents the high water mark of what both the applicant and the first respondent intimated to Engen in the later part of 2012.

26. It would in my view require a significant leap to then suggest that a long term relationship would be in the form of the renewal of the lease for 9 years and 11 months. As indicated the stance of Engen was, to the knowledge of the parties, a pivotal feature of what the long term relationship would look like and by the end of 2014 the stance of Engen had not shifted in putting forward a lease that would expire at best in December 2019.

27. That being the case it can hardly then be permissible to suggest that on the facts a renewal of 9 years and 11 months was what the parties shared as a common understanding. If that was the case there would have been no need for the extensive involvement of Engen in the discussion around a lease and a simple written exercise of the option to renew would have sufficed.

28. The Court has to act with restraint in not making a contract for the parties which they have not reached consensus on. My conclusion is accordingly that for the reasons given it cannot be said that there was a common understanding that the lease would be renewed for 9 years and 11 months. At best there may have been a common understanding that the lease would continue beyond its expiry date (July 2015) for a further period whose term would be dependent on what the parties were able to agree on with Engen.

29. To that extent and in the absence of the written exercise of the option to n:new and in the absence of a common understanding to renew the lease for 9 years and 11 months, it can hardly be said that the reliance by the first respondent on clause 19.4 is unconscionable, opportunistic or contrary to public policy. In this regard and for the sake of completeness, the first respondent commenced the operation of the Kanonkop Service Station in 1983 and ran and built the business for some 21 years before it concluded the lease with Martiq 307 CC, and then the applicant. Thus the goodwill that the business has developed has occurred through the endeavours of both the applicant and the first respondent and it would be an over-simplification of matters to characterise the conduct of the first respondent as seeking to 'reap what it has not sown'.

30. In all the circumstances and for the reasons given, the application must fail and it must follow that the counter-application must be upheld.

ORDER

31. I make the following order:

I. The application is dismissed with costs, including the costs of senior counsel.

II. The lease agreement concluded between the applicant and the respondent on 5 August 2005 for the property known as [...] S. Street Kanonkop, Erf [...], Middelburg Ext 4, Registration Division JS, Province of Mpumalanga is declared to have been terminated on 31 July 2015.

III. The applicant and all persons holding under it, is declared to be in unlawful occupation of [...] S. Street Kanonkop, Erf [...], Middelburg Ext 4, Registration Division JS, Province of Mpumalanga.

IV. The applicant and all persons holding under it, are hereby evicted from the property known as [...] S. Street Kanonkop, Erf [...], Middelburg Ext 4, Registration Division JS, Province of Mpumalanga.

V. The applicant is directed to vacate the aforesaid property within 30 days from the Honourable Court granting an order in terms of this counter-application, failing which, the sheriff of the area within which the property is situated is authorised to evict the applicant and all persons holding under it.

VI. The applicant is to pay the costs of the counter-application including the costs of senior counsel.

N KOLLAPEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARD ON: 31 October 2016 & 14 November 2016

APPEARANCES

FOR THE APPLICANT: Adv. J P VORSTER SC
INSTRUCTED BY: Van Zyl le Roux Inc. (ref.: A van Velden/AD/MAT72785)

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FOR THE 1ST RESPONDENT: Adv. J P VORSTER SC
INSTRUCTED BY: Christo Coetzee Attorneys (C Coetzee/wr/SK0010)