IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 82043/2017

DATE: 2019-10-24

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 13/12/19
SIGNATURE

In the matter between

GJ RAUBENHEIMER (PTY) LTD	**Applicant**
and	
ELONEI FILLING STATION	**First Respondent**
ENGEN PETROLEUM LIMITED	**Second Respondent**
THE MINISTER OF ENERGY (NATIONAL GOVERNMENT)	**Third Respondent**
THE CONTROLLER OF PETROLEUM PRODUCTS	**Fourth Respondent**

JUDGMENT ON THE APPLICATION FOR LEAVE TO APPEAL AGAINST THE EVICTION ORDER ISSUED AGAINST THE FIRST RESPONDENT AND THE DISMISSAL OF THE FIRST RESPONDENT'S CLAIMS AGAINST THE APPLICANT

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1. The First Respondent applies for leave to appeal against the order evicting it from the premises it presently occupies and upon which it conducts a fuel filling station; and the dismissal of its applications for declaratory orders against the Applicant.
2. Shorn of the verbose verbiage the application is launched upon the basis that the Court failed to accept that the First Respondent had successfully extended the lease agreement concluded between it and the Applicant, and that the Court failed in ruling that the First Respondent had no liquid claim against the Applicant that could be enforced in motion proceedings.
3. As far as the first issue is concerned it is common cause that, unless the First Respondent is successful in its contention that it duly extended the lease agreement, the agreement has expired by effluxion of time.
4. It is also common cause that the written lease agreement provides for a specific manner in which the lease must be extended, namely a *bona fide* negotiation process to determine the new rental payable over the extended five years. Should the parties be unable to agree upon the new rental, the President of the Institute of Estate Agents must determine the appropriate market related rental.
5. It is common cause that the parties could not agree upon a new rental because the Applicant refused to enter into any negotiations, maintaining that the lease agreement had already been cancelled.
6. In order to succeed in a claim that the rental had been properly renewed the First Respondent should have approached the President of the Institute of Estate Agents with the request to determine the appropriate rental. The First Respondent failed to do so for reasons that have not been explained but

instructed an outside agent whose report is vigorously in dispute and does not comply with the renewal process determined in the written rental agreement.

7. The failure to comply with the express terms of the rental agreement is fatal for any contention that the agreement has been duly extended, as the unanimous decision of the Supreme Court of Appeal has underlined in its recent decision in a case that has remarkable parallels with the present dispute, *Trustees for the time being of Oregon Trust v BEADICA 231 CC and Others* 2019 (4) SA 517 (SCA), in which Lewis JA said *inter alia*:

> *'[39] There is nothing inherently offensive in the renewal clauses in the leases. The leases would have terminated had the lessees not been given the option to renew them. The only limitation on that right was that it had to be exercised in a particular manner and by a particular date. The requirement of six months' notice is eminently reasonable, given that the lessees and Oregon Trust would have to agree on the rental to be paid, or appoint an expert to determine the future rental of all the premises. And in the absence of agreement, Oregon Trust would have to find new tenants. It was open to the lessees to renew timeously and by giving proper notice. The leases may not have been between Oregon Trust and sophisticated business people (as the lessees suggested and Davis J found), but the representatives of the lessees had all operated franchises, and had previously been store or regional managers. They were not ignorant individuals. They may not have fully appreciated the niceties of the law, but they knew that they had to give notice – they attempted to do so after the notice period had elapsed.*
>
> *[40] In Barkhuizen[1], the Constitutional Court had to determine whether the failure by an insured to comply with a time limitation clause in the insurance contract should non-suit him. In considering whether the time limitation was enforceable, Ngcobo J, for the majority, said (para 85):*
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> > *[W]ithout facts establishing why the applicant did not comply with the clause, I am unable to say that the enforcement of the clause would be unfair or unjust to the applicant. For all we know, he may have neglected to comply with the clause in circumstances where he could have*

[1] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

complied with it. And to allow him to avoid its consequence in these circumstances would be contrary to the doctrine of pacta sunt servanda. This would indeed be unfair to the respondent.'

[41] That is equally true in this matter. The lessees have not disclosed why they did not give notice of their intention to renew the leases by 31 January 2016. If they had advanced reasons why they did not comply, we would be better able to assess whether enforcement of the renewal clauses was, in the circumstances, unconscionable.

[42] Oregon Trust argues that the effect of the orders of the high court (to permit the lessees to occupy the premises for a further period of five years) was that new contracts were made for the parties by the court. That is in my view correct, and we should not endorse the approach. No consideration of public policy permits the making of contracts for parties by a court.'

8. It must therefore be clear that there is no room for the argument that a higher court would come to a different conclusion on the eviction issue than that reached by this Court.

9. Turning to the refusal to grant the declaratory orders there is no doubt that the First Respondent's alleged entitlement to any payment is subject to a dispute of fact that is irresoluble on paper, quite apart from the consideration that allegations of fraud are rarely decided in motion proceedings. This fact alone would render the prospects of a successful appeal unlikely.

10. In addition, nothing has been said concerning the alleged liquidity of the claim to be pursued by the enrichment action, in this case the *condictio indebiti*, that would detract from the analysis of this claim in the principal judgment. The suggestion that the First Respondent's executive director would have been ignorant of the implications of the RAS system appears to be far-fetched. The First Respondent and its legal team failed to analyse the elements of an enrichment action and did not even deal with the question whether the Applicant was enriched and the First Respondent was impoverished and what the potential difference between the two might have been, if any; and whether the First Respondent was blameworthy in having failed to realize the import of agreements voluntarily concluded in respect of the RAS distribution system.

11. Liquidity is said to arise in the notice of appeal as a result of invoices rendered. An invoice does not render any claim liquid or otherwise.

12. The problems identified in the principal judgment with the First Respondent's claim have not been sufficiently adequately addressed to justify the conclusion that another court would come to a different conclusion.

The application for leave to appeal is dismissed with costs

Signed at Pretoria on this 13th day of December 2019.

E BERTELSMANN

Judge of the High Court.