REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO	
(2) OF INTEREST TO OTHER JUDGES:YES	
(3) REVISED: YES	
	25/02/2021
.....	.....
SIGNATURE	DATE

CASE NO: 347/2021

In the matter between:

SONAE ARAUCO SA (PTY) LTD Applicant

and

LT MANUFACTURING CC Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] The Respondent occupies a commercial immovable property ('the property") owned by the Applicant in terms of a written agreement ("the agreement") concluded between the two parties. The Applicant has terminated the agreement in terms of Clause 8.2, which entitles it to furnish a 90-day period notice to the Respondent of its intention to cancel the agreement. Upon the expiry of the 90-day notice period, the Respondent refused to vacate the premises. This prompted the

Applicant to approach this Court on urgent basis seeking the immediate ejectment of the Respondent. The essence of the final relief sought by the Applicant is that:

1.1 The Respondent be ejected from the property forthwith;

1.2 In the event of the Respondent refusing to vacate the property, the sheriff of the court be authorised to evict the Respondent;

1.3 To the extent necessary, declaring:

1.3.1 the agreement concluded between the parties granting the Respondent a right of occupation to the property to be validly terminated and;

1.3.2 declaring the Respondent to be in unlawful occupation of the property;

1.3.3 The Respondent is and is ordered to pay the costs of this application on the scale as between attorney and client.

FACTUAL MATRIX

[2] On 15 January 2019, at Woodmead, the parties hereto concluded a written agreement in terms of which the Respondent would manufacture bearers/stickers ("stickers") and sell them to the Applicant. Some of the salient terms of the agreement are that:

2.1 The agreement would commence and become effective on 1 January 2019 and would endure for a period of two years, unless terminated in terms of the agreement;

2.2 Either party could terminate the agreement at any time without giving cause by giving the other party at least 90 calendar days prior notice designating the termination date;

2.3 Should the agreement not specifically be renewed after the expiration of the two-year term, the agreement would continue indefinitely and may be cancelled by either party on 90 calendar day notice to the other party;

2.4 The parties would in their dealings with each other display good faith;

2.5 Any dispute (other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction) arising out of or pursuant to the agreement including but not limited to the termination or cancellation of the agreement, unless resolved between the parties, would be referred to such person as may be agreed upon between the parties, failing such agreement between the parties within two days after the occurrence of such dispute, to an attorney practicing at White River and nominated by the president of the Law Society of the Northern Provinces.

[3] On 30 October 2020, in terms of clause 8.2 of the agreement, the Applicant notified the Respondent of its intention to cancel the agreement by delivering a 90 calendar day notice. The notice specifically recorded that the termination date would be 31 January 2021. On 24 November 2020, the parties convened a meeting between the Applicant and Respondent. The general understanding at the meeting was that the agreement would come to an end on 31 January 2021 and that the Applicant would be under no obligation to negotiate a potential renewal of the agreement beyond the 31st of January 2021.

[4] On 28 January 2021, the Applicant received an email correspondence from the Respondent advising that the Board of Directors of the Respondent had resolved at a meeting held on 27 January 2021 that the termination of the agreement was unlawful. The e-mail continued to state that the Respondent would not vacate the property. It vowed that it would persist with its observance of the terms and conditions described in the agreement past 31 January 2021 until the parties can find a solution to the impasse.

ARGUMENTS

[5] The Respondent challenged the urgency of the application contending that the Applicant had known or should have known as early as 17 November 2020 that it was disputing the manner in which the cancellation clause had been invoked yet that it waited until 3 February 2021 to approach this Court on urgent basis. This, contends the Respondent, is in flagrant disregard of this Court's Practice Manual and is oblivious of the prejudice that other litigants may suffer if the application is given preference or the prejudice that the Respondent might suffer by the abridgment of the prescribed timeframes and early hearing.

[6] The Respondent also asserts that there exist genuine disputes of fact, which the Applicant ought to have known prior to launching this application. Where motion proceedings are not suitable ordinarily a litigant would proceed by way of action to ensure that the disputes of fact can be accommodated by oral evidence. The Respondent states that there is a dispute on whether the agreement was cancelled properly and on whether the Applicant acted in good faith as envisaged in Clause 9 of the agreement.

[7] The Respondent argues that the Applicant has failed to act in good faith in its dealings with it. It asserts that the idea that parties to a contract should behave honestly and fairly in their dealings with one another is a cornerstone of our South African Law of contract. In that regard, I was referred to the Constitutional Court case of **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd**[1] where it was held that good faith is a matter of considerable importance in our contract law and the extent to which are courts enforce the good faith requirement in contract law is a matter of considerable public and Constitutional importance.

[8] The Constitutional Court continued to hold that the question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our constitution insists that good faith

[1] **2012** (**1**) **SA 256** (**CC**)

requirements are enforceable should be determined sooner rather than later. Many people into contact daily and every contract has the potential not to be performed in good faith the shop at five in contract touches the lives of many ordinary people in the country.

[9] Lastly, the Respondent maintains that the dispute process was not followed alternatively, the contract was not properly cancelled. In this regard, I was directed to Clause 10 of the agreement, which provides for the appointment of a referee in the event of disputes. Here the Respondent asserts that the Applicant has been aware that the Respondent disputed the manner in which the Applicant invoked the cancellation clause yet it failed to embark on the procedure described in Clause 10 of the agreement to have such disputes resolved in consequence of the Applicant's failure to refer the dispute, the Respondent cannot be held to be in breach of the agreement.

[10] The Applicant, on the other hand argues that the respondent's alleged contravention of the good faith provision in Clause 9 of the agreement does not provide the Respondent with a valid legal right to remain in occupation of the property. The defence cannot be demonstrated in circumstances where the agreement does not provide for an obligation on the Applicant to negotiate a renewal of the agreement. The Applicant concludes that to the extent that the Respondent submits that one exists, it is void for vagueness and unenforceable. The court was referred to **Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC[2].**

[11] To the extent that the Respondent contends that Clause 8.2 of the agreement does not have a right to exist in the agreement, the Applicant states that it is untenable. Moreover, and in any event, the Respondent has not sought rectification. As such, clause 8.2 exists in the agreement and its meaning is clear and unambiguous. Had the Respondent wanted to refer this matter to the arbitrator, it would have done so shortly after receipt of the 90 calendar day notice terminating the

[2] **2020 (2) SA 419 (SCA) at para 17**

agreement. The Applicant concludes that its termination of the agreement in terms of Clause 8.2 is therefore valid.

[12] It is settled that *pacta sunt sevanda* is part of our law. Ordinarily, parties should be bound by terms and conditions of agreements to which they bind themselves. To bring this closer to home, the Respondent cannot wish away the provisions of Clause 8.2 whose provisions are clear. The Respondent was or should have been conscious of the import of the contents of Clause 8.2. In the absence of any invalidity, the clause must be respected, says the Applicant.

[13] Turning to urgency of the matter, the Applicant is persistent that the urgency of the application is founded on commercial urgency. Tersely, after it had given the termination notice to the Respondent, the Applicant alleges that it entered into another agreement with Novo Manufacturing (Pty) Ltd to replace the Respondent. The Respondent's refusal to vacate the property not only exposes it to massive financial loss but also puts it in a precarious situation for liability for loss of profit by Novo manufacturing (Pty) Ltd. The application is for that reason commercially urgent.

ISSUES

[14] From the facts and arguments of the parties, I am expected to decide on:

14.1 The urgency of the matter;

14.2 Failure to observe the provisions of Clause 10 dealing with arbitration;

14.3 Breach of Clause 9 of the agreement, good faith clause;

14.4 Existence of bona fide disputes of fact.

RELEVANT PROVISIONS OF THE AGREEMENT

[15] To a great extent the outcome of this judgment depends on the interpretation and context of some of the provisions of the agreement. For that reason, Paragraphs

2.2, 2.3, 2.4 and 2.5 *supra* dealing with cancellation of the agreement without cause, the indefinite continuance of the agreement if not renewed after two years until terminated by either party by giving 90-day calendar notice, good faith and referral to a referee respectively are significant. The corresponding numbers in the agreement are Clauses 8.2, 8.3, 9 and 10.

LEGAL FRAMEWORK

[16] In the case of **Graham v Ripley**[3] the court stated the following:

> *"Where an owner of property sues for ejectment his real cause of action is simply the fact that he is owner, and therefore prima facie entitled to possession. Consequently, an allegation in his declaration or summons that he has granted defendant a lease which is terminated is merely a convenient way of anticipating defendant's plea that he is in possession by virtue of a lease, and is not strictly necessary to the cause of action."*

The approach in Graham *supra* has been approved as the position in our law and has been followed in many subsequent cases. To mention a few, **KRUGERSDORP TOWN COUNCIL v FORTUIN**[4] **and CHETTY v NAIDOO**[5]

[17] From the cases *supra, the principle that has crystalised is that the* legal position Where an applicant alleges that the claim for ejectment is founded on ownership and that the respondent's right of occupation has legitimately come to an end, the onus at that point shifts to the respondent to justify continued occupation. Any addition to the main allegation of ownership such as that the that the agreement has been terminated has been held to be mere surplussage and not attracting onus to an applicant.

[18] Insofar as the Respondent alleges contravention of the good faith clause, Clause

[3] **1931 TPD 476**
[4] **1965 (2) SA 335 (T)**
[5] **[1974] 3 All SA 304 (A)**

9, it could be instructive to refer to the case of **Shepherd Real Estate Investment (Pty) Ltd *supra* where the following was said at Paragraph 17:**

> ***"****The proper approach in an enquiry such as the present depends upon the construction of the particular agreement. Accordingly, it becomes necessary to analyse the relevant paragraph to decide whether its proper characterisation is merely an agreement to agree or whether it contained legally enforceable obligations. This was not a case where an external arbitrator was nominated to resolve certain outstanding differences. An arbitrator would have been ill-equipped to fill in the blanks or resolve the questions that the parties could not. An arbitrator certainly could not give effect to arrangements that the parties themselves had not concluded and then require the party, who is resisting, to continue with the ongoing relationship. Nor, for that matter could the arbitrator simply invoke certain vague, ill-defined objective standards. But, there is a further insurmountable difficulty in the path of the respondent in this case. It is this: the arbitration clause did not survive the agreement. Thus, once the agreement terminated by effluxion of time, the respondent could no longer invoke the arbitration clause."*

[19] Regarding recognition and confirmation of *pacta sunt sevanda* in our law, the Applicant has referred this Court to the following paragraphs in the Constitutional Court case of **Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and others[6]:**

> *"[83] The first is the principle that '(p)public policy demands that contracts freely and consciously entered into must be honoured'. This court has emphasised that the principle of pacta sunt servanda gives effect to the 'central constitutional values of freedom and*

[6] **2020 (9) BCLR 1098 (CC)**

dignity'. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. Pacta sunt servanda is thus not a relic of our preconstitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.

[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperiled if courts denude the principle of pacta sunt servanda."

EVALUATION

URGENCY

[20] I have had regard to the arguments raised by the Respondent on urgency in

particular, that the Applicant should have known as early as 17 November 2020 that it was contesting the cancellation. The Respondent then takes a giant leap and argues that the urgency is as such, self-created. This is argued in circumstances where the Respondent had not yet referred the matter to the referee as per the contents of Clause 10 of the agreement. Why should the Applicant have begun to panic at that stage? An alarm was raised when the Respondent made it clear that it would not be vacating the property at the end of January 2021 and that was on 28 January 2021. I cannot accept that the urgency was self-created where the Applicant launched this application on 3 February 2021.

[21] Besides, the commercial urgency claimed by the Applicant has been recognised by the Respondent itself. It acknowledges that if the company stay inactive, as is presently, the Applicant will lose approximately R500 000.00 per day. The amount is self-evidently, By any standard, huge. If that is the amount that the Applicant is losing per day, I shudder to imagine how many parties that depend on it are incurring losses. Those other parties have the right of recourse to the Applicant. The commercial urgency is therefore palpable. These were the reasons this Court held that the matter was sufficiently urgent warranting immediate hearing by this Court.

FAILURE TO OBSERVE THE PROVISIONS OF CLAUSE 10 OF THE AGREEMENT (PARA 2.15 *SUPRA*)

[22] The Respondent has completely failed to refer the matter to a referee as contemplated in Clause 10 of the agreement. It was notified as per Clause 8.2 as early as 30 October 2020 that the Applicant would be terminating the agreement at the end of the 2-year term. Additionally, it was again made clear to it that renewal of the agreement was not on the cards at all. Faced with this categorical and distinctive attitude of the Applicant, the Respondent laid dormant and awoke almost when the 90-day notice period had expired.

[23] When it did so, it laid the blame at the door of the Applicant for failure to refer the

matter to the referee. The point is that the Applicant had no reason to make the referral because insofar as it was concerned the termination was not contested. I note the Respondent's contention that the Applicant was aware *alternatively,* should have been aware that the Respondent disputed the cancellation as early as 17 November 2020. The Applicant never thought that the issue was disputed because it is common cause that both parties were mindful of the unambiguous provisions of Clauses 8.2 And 10. Clearly the party that first became conscious of the dispute was the Respondent following receipt of the termination notice. Strangely, it kept quiet until 28 January 2021.

[24] The purpose of giving a 90-day calendar notice is understandable and reasonable. The parties were prudent to imagine that where a dispute arises, they would want it possibly resolved prior to the expiry of the 90 calendar day period. If one of them, the Respondent in this instance, perceives a dispute and fails to refer it to the referee, it cannot turn around and pretend as though it did not 'make its own bed' when it has to lie on it. In the circumstances, the Applicant did not fail to comply with the requirements of Clause 10. In fact, it did not even have any obligation to act in terms thereof in light of the provisions of Clause 8.2.

BREACH OF THE GOOD FAITH CLAUSE

[25] It is evident from the case of Shepherd Real Estate *supra* that a court cannot adopt an indiscriminate attitude when dealing with this question. An appropriate approach ought to be one that scrutinizes the construction and manner in which the provisions of an agreement in each situation are communicated. The presence of Clause 8.2, in my opinion, present an insuperable obstacle for the Respondent. Once parties resolve that an agreement can be terminated for any reason whatsoever, it diminishes the utility of the good faith clause making it impossible to co-exist with Clause 8.2.

[26] Reference by the Respondent to the Constitutional Court case of Everfresh Market Virginia supra in the context of this case is fallacious. The good faith clause Is vain as a result of absence of the obligation to negotiate. How can parties be expected

to negotiate in good faith when the agreement can be terminated for any reason? This is paradoxical and simply means that the good faith clause is hollow in this agreement.

[27] Like in the Shepherd Real Estate case supra, here too the good faith clause does not survive the life of the agreement. The import of this is that the good faith clause cannot be invoked once the agreement lapses by the effluxion of time. To conclude then on the subject, while good faith is part of our contract law, its efficacy has been ousted in this case by the presence of Clause 8.2. Accordingly, its invocation by the Respondent is misguided and bereft of any merit and is rejected.

DISPUTES OF FACT

[28] I am completely staggered by the Respondent's claim that there are disputes of fact. How can this be when it is common cause that Clause 8.2 of the agreement is real and its contents unequivocal? If Clause 8.2 is reality, and disregarding the Respondent's spurious argument that it is not suppose to exist, how can it be reconciled with the contention that there are disputes of fact? From this allegation of disputes of fact, the Respondent leaps ahead and states that the Applicant should have foreseen that there would be disputes of fact. There is no genuine dispute of fact in this case and the matter can be decided on these papers without any reference of part of this case to oral evidence.

[29] In the result, I am constrained to make the following order:

1. The application is treated and determined as an urgent application in terms of uniform rule 6(12) of the uniform rules of Court, the usual forms, time limits and requirements for service as provided for in terms of such uniform rules of court are dispensed with;

2. The agreement concluded between the parties granting the Respondent a right of occupation is declared to have been validly terminated;

3. The Respondent is declared to be in unlawful occupation of the property;

4. The Respondent is ejected and directed to vacate the manufacturing plant, situated at the property described as Farm Dingwell 276, portion 3 and 13 and Farm Paarlklip, portions 4 and 5 situated at Heidelberg Road, Rocky Drift, White River, 1240 within 7 calendar days from date hereof;

5. In the event of the Respondent refusing to comply with the provisions of the preceding paragraph, the sheriff of the court is authorised and directed to evict the Respondent;

6. The Respondent is ordered to pay the costs of this application.

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B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 25 February 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv BR Edwards**
Instructed by:	**Shepston & Wylie Attorneys**
Counsel for the Respondent:	**Adv R Van Schalkwyn**
Instructed by:	**Chris Greyvenstein Attorneys**
Date of Hearing:	**16 February 2021**
Date of Judgment:	**25 February 2021**