# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**Not reportable**
Case No: 328/2019

In the matter between:

**MLUNGISI NDODANA SONTSELE** **APPELLANT**

and

**140 MAIN STREET PROPERTIES CC** **FIRST RESPONDENT**

**NEDBANK LIMITED** **SECOND RESPONDENT**

**Neutral citation:** *Mlungisi Ndodana Sontsele v 140 Main Street Properties CC and Another* (328/2019) [2020] ZASCA 85 (6 July 2020)

**Coram:** PONNAN, MBHA, MOKGOHLOA and PLASKET JJA and LEDWABA AJA

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 7 July 2020.

**Summary:** Lease – option to renew – failure by parties to reach agreement on rental or by lessee to invoke clause providing for rental to be fixed by third party - effect of - agreement lapsing by effluxion of time.

## ORDER

**On appeal from:** Eastern Cape Division of the High Court, Mthatha (Lowe J, sitting as court of first instance):

(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court below is set aside and replaced by:

'(i) The application succeeds with costs.

(ii) It is declared that the notarial agreement of lease entered into between the parties on 29 June 2004 terminated by effluxion of time on 31 May 2014.

(iii) The first respondent is ordered to vacate the property described as Erf 83, Flagstaff within two (2) months from the date of the granting of the order.'

## JUDGMENT

## Ponnan JA (Mbha, Mokgohloa and Plasket JJA and Ledwaba AJA concurring):

[1] This appeal concerns an option to renew in a notarial agreement of lease (the agreement) that provides:

'The lease shall commence on 1 July 2004 and shall terminate on 31st of May 2014;

2.2 The [lessee] shall have an option to renew this agreement of lease for two further periods of nine (9) years and eleven (11) months each, such renewal periods being subject to:

2.2.1 the option in respect of each renewal shall be exercised by the [lessee] by giving the [lessor] notice in writing at least six (6) months before the expiry of the initial lease or of the expiry date of each successive renewal period, whatever the case may be;

2.2.2 the same terms and conditions of [the agreement] shall apply to all renewal periods thereof save that the rental consideration will be determined by agreement between the parties based on the prevailing market rental's applicable to the property;

2.2.3 in the event of the parties not being able to agree on the commencement rental for any of the option periods, such rental will be determined by a suitably qualified person appointed by the President of the Cape of Good Hope Estate Agents Board.'

[2] The agreement was concluded on 29 June 2004 between the appellant, Mr Mlungisi Ndoda Sontsele (the lessor), as the registered owner of Erf 83, Flagstaff (the property), together with his mother, who at the time held usufructuary rights over the property, and the first respondent, 140 Main Street, Kokstad Properties CC (the tenant).

[3] On 8 August 2013 the lessee wrote to the lessor: '. . . in terms of clause 2.2.1 of [the agreement], the lessee hereby gives notice to the [lessor] that it exercises its right to renew the lease for the first renewal period of nine years and 11 months, commencing 1 June 2014 and expiring on the 30 April 2024'. The notice was silent as to the commencement rental for the renewal period. And, although no rental had been fixed between the parties, the tenant remained in occupation of the property after 31 May 2014. According to the lessee, 'it applied an approximately 20% increase to the rental amount paid in the last month of the first rental period (being May 2014) and paid this amount (being R14 000) to [the lessor] on 1 June 2014'. On 1 June 2015 the lessee applied what it described as 'an annual market related inflationary escalation factor of 8% to the aforementioned amount of R14 000', thereby arriving at a monthly rental of R15 120.

[4] Those rentals did not meet with the lessor's approval and when further negotiations between the parties failed to yield fruit, the lessor's attorney wrote on 31 July 2015 to the lessee:

‘3.1 [D]uring or about October 2013, prior to the expiry of the initial period of the agreement, the [lessee] exercised its option to renew by furnishing a notice of renewal for a further period of 9 (nine) years and 11 (eleven) months. Such renewal notice was not accompanied by an offer of the rental to be payable to [the lessor] during the extended period of the lease, and [the lessor] anticipated that an offer would be forthcoming prior to the expiry of the agreement;

3.2 prior to the expiry of the initial term, namely 31 May 2014, no rental amount was fixed for the proposed extended lease in that:-

3.2.1 the parties did not agree any rental amount, and the agreement was not amended in any document signed by both parties and recording what rental would be payable during the extended lease; and

3.2.2 no referral was made for the determination of the rental by the Cape of Good Hope Estate Agents;

3.3 there was no extension of the agreement into a second term . . . on or before 31 May 2014, with the result that the agreement expired, on its own terms, on 31 May 2014.

4. In relation to the continued occupation of the property by [the lessee] from 1 June 2014 to date, we are advised by [the lessor] that:

4.1 the tenancy was on an oral basis, on a monthly basis with no fixed term commencing on the 1 June 2014;

4.2 for the whole period of the monthly tenancy, a non-agreed rental amount of R14 000 . . . was paid . . . save for June and July 2015 where the [lessee] paid a non-agreed amount of R15 120 . . . and

4.3 notwithstanding various discussions and attempts by the parties to reach a market related rental, no rental amount acceptable to our client was reached.

. . .

6. In the circumstances, [the lessor] has resolved to forthwith terminate the monthly tenancy arrangement by affording [the lessee] two months to vacate the property by no later than 12 noon on Wednesday, 30 September 2015, failing which [the lessor] shall take such legal steps as may be advised . . .’

[5] The response to that letter from the lessee's attorney on 6 August 2015 was:

'8.1 In an attempt to agree on the rental amount as contemplated in clause 2.2.2 of the agreement [the lessor] advises what rental amount he believes should have been payable for the period 1 June 2014 to 31 May 2015 and what annual escalation factor should apply for the remaining period of the first renewal period.

8.2 Should our respective clients not agree on the rental and escalation amounts as envisaged in paragraph 8.1 above by 21 August 2015, this matter must be referred to the person to be appointed by the President of the Cape of Good Hope Estate Agents Board as contemplated in clause 2.2.3 of the Agreement. . . .'

[6] Impasse having been reached, the lessor approached the Eastern Cape Division of the High Court, Mthatha on 22 April 2016 for the following relief:

'1. An order confirming the termination and cancellation of the notarial agreement of lease entered into between the parties on 29 June 2004 with the effective date of termination and cancellation being 31 May 2014.

2. An order declaring that the notarial agreement of lease entered into between the parties on 29 June 2004 was not renewed for a further period of 9 years and eleven months.

3. An order declaring the month to month tenancy agreement entered into between the parties with the effect from 1 June 2014 validly cancelled.

4. An order directing the First Respondent to vacate the property within two (2) months from the date of the granting of the order.

5. An order directing the First Respondent to pay the costs of the application on the scale of attorney and client.'

[7] The application failed before Lowe J in the high court, who dismissed it with costs. The learned judge held:

'In the result, I must inevitably conclude that on a proper interpretation of the lease agreement, the option was sufficiently exercised such as to bring into operation a peremptory obligation to attempt to reach agreement in good faith on the rental provisions applicable to the subsequent release., Both as to the initial sum thereof and in an appropriate escalation percentage for the remainder term of the lease

annually applied, even the 9 years 11 months. If this failed there was the father peremptory requirement that a third party determine the rental.'

The appeal is with the leave of this court.

[8] I regret I am unable to agree with Lowe J that the application ought to have failed. In terms of the agreement, the option to renew was to be exercised by the lessee by giving the lessor notice in writing 'at least six months before the expiry of the initial lease period' (clause 2.2.1). It was then stipulated that the same terms and conditions would apply to all renewal periods save that 'the rental consideration will be determined by agreement between the parties . . .' (clause 2.2.2). The first event, the giving of at least six months' notice did occur in due time in this case. There was thus compliance by the tenant with clause 2.2.1. But that was insufficient to bring a contract of lease into existence. The essentials of a contract of lease are that there must be an ascertained thing and a fixed rental at which the lessee is to have use and enjoyment of that thing (*Kessler v Krogmann* 1908 TS 290 at 297; W E Cooper *Landlord and Tenant* 2ed (1994) at 3). As agreement upon rent is an essential element of a lease, until such agreement has been reached no lease is concluded (W E Cooper at 346).

[9] Indeed, as Broome J pointed out in *Biloden Properties v Wilson* 1946 NPD 736 at 744-5:

'. . .But in the present case the giving of notice under clause 11 does not bring a contract into existence, for all the terms, other than the period, have still to be arranged. And unless those terms are agreed upon there will be no contract at all. In my opinion the true effect of clause 11 is that the due exercise by the lessee of the so called option is nothing more than a notice to the lessor that he wishes to renew and desires to negotiate. The parties are then in the position of negotiators, but neither is obliged to agree to anything. It may be that some duty to act in good faith is cast upon the lessor, but the exact nature and extent of the duty, if it exists at all, are impossible to define. Nor is it necessary to do so. The important point for the purposes of this case is that, if my view of the effect of clause 11 is correct, it becomes apparent that the lessee's rights, whatever they may be, are not affected by the fact that no agreement was reached before the termination of the old lease. Seeing that the lessee cannot claim that the lease has been renewed until the terms of the new lease have been agreed, it does not seem to matter when agreement is reached, whether before or after the termination of the original

lease. The lessee has given due notice of his desire to negotiate; he must now show that agreement has been reached, expressly or by implication. . . .'

[10] The failure of the parties to reach agreement in terms of clause 2.2.2 on the rental to be paid, was not, without more, the end of the road for the lessee (contra *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SA) para 35). As it was put in *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA); [2005] 2 All SA 16 (SCA) para 7:

'Our law has . . . long accepted that principal parties to a contract may delegate to a third party the responsibility of fixing certain terms. Thus parties may validly agree that the price of an article sold may be fixed by a named third party (Grotius 3.14.23) and they may leave the determination of the rental in a lease agreement to a particular arbitrator (Voet 19.2.7).'

However, when the parties failed to reach agreement on the rental in accordance with clause 2.2.2, the lessee simply did not invoke clause 2.2.3. The first allusion on the part of the lessee to clause 2.2.3 was after the termination of the agreement by effluxion of time. But, at that stage, clause 2.2.3, which did not survive the agreement, could no longer avail the respondent. (*Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] ZASCA 178; 2020 (2) SA 419 (SCA) para17). This conclusion renders it unnecessary to consider whether or not properly construed the clause was capable of creating legally enforceable obligations. (See in that regard *Southernport Developments (Pty) Ltd v Transnet Ltd* and *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC)*. It follows that the appeal must succeed.

[11] In the result:

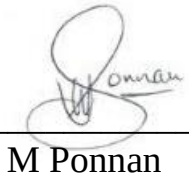
(a) The appeal is upheld with costs, including those of two counsel.

(b) The order of the court below is set aside and replaced by:

'(i) The application succeeds with costs.

(ii) It is declared that the notarial agreement of lease entered into between the parties on 29 June 2004 terminated by effluxion of time on 31 May 2014.

(iii) The first respondent is ordered to vacate the property described as Erf 83, Flagstaff within two (2) months from the date of the granting of the order.'



V M Ponnan
Judge of Appeal

Appearances

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|---|---|
| For appellant: | T Ngcukaitobi SC (with him M Meyer) |
| Instructed by: | Ledwaba Mazwai Attorneys, Pretoria<br>Kramer Weihmann Joubert, Bloemfontein |
| For first respondent: | AJ Troskie SC |
| Instructed by: | Hay & Scott Attorneys, Pietermaritzburg<br>Phatshoane Henney Attorneys, Bloemfontein |