



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

In the matter between

[REPORTABLE]

Case No: A325/2016

ERIC MONGOSO MAKAH

Appellant

And

MAGIC VENDING (PTY) LTD

Respondent

Case No: A326/2016

IDRIS KWETE NGOLO

Appellant

and

MAGIC VENDING (PTY) LTD

Respondent

JUDGMENT DELIVERED ON 16 MAY 2017

SALIE-HLOPHE, J:

[1] These are the consolidated appeals against the orders handed down by the Goodwood Magistrate's Court on 28 April 2016 in respect of two eviction applications brought by the respondent respectively against Eric Magoso Makah and Idros Ngolo Kwete. Both appellants are tenants in separate units of an apartment named Kimberly Heights, Goodwood. The matters were consolidated in that the facts and issues present in both matters and which fall to be determined on appeal are substantially the same. The respondent, Magic Vending (Pty) Ltd applied for the eviction of the appellants from the respective units.

[2] It is common cause that the appellants were in breach of their obligations to pay rental amounts to the respondent, the consequence of which applications for their eviction from the properties were granted by the court a quo. The evictions of the appellants were granted in terms Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (Act 19 of 1998) (hereinafter "PIE").

BACKGROUND:

[3] The appellants entered into month-to-month lease agreements ("the agreements") with the Respondent, in respect of units K214 and K310 of the aforesaid apartment block. Both agreements were concluded on 1 July 2013, for a monthly rental in the sum of R4 950,00. The appellants breached the lease

agreements when they failed to pay their respective monthly rentals. Clause 14 of the lease agreement stated that in the event of breach on the part of the appellants, the respondent was entitled to immediately cancel the agreements. However, the respondent entered into settlement agreements with both appellants providing the appellants an opportunity to liquidate the arrear rental amounts, which were due and payable to the respondent. It also recorded that a failure to timeously meet their obligations under the lease agreement would result in cancellation thereof. When the appellants did not comply with the terms of the settlement agreements and the lease agreements, the appellant cancelled same and demanded their vacation.¹ Proceedings in terms of PIE were instituted, the respondents were legally represented and the matters were opposed.

[4] The notices of appeal set out a multiplicity of grounds on appeal. However, the crux of this appeal is whether the lease agreements were validly cancelled which, if so, would render the respondents' occupation of the respective properties unlawful.

[5] The agreements state that the duration thereof would be on a month-to-month basis, in other words not a fixed term. Section 14(2) of the Consumer Protection Act, No 68 of 2008 (hereinafter the "CPA") is prefaced by the phrase: *"If a consumer agreement is for a fixed term"*.

[6] The CPA spells out the rights of consumers and responsibilities of suppliers of goods or services. It focuses on consumer protection by aiming to *"promote a fair,*

¹ Record page 33 in respect of A325/2016 and page 34 in respect of A325/2016. Letters of cancellation were dated 26 August 2015 and 12 March 2015

accessible and sustainable marketplace for consumer products and services and, for that purpose, to establish national norms and standards relating to consumer protection”. It is the result of the Department of Trade and Industry’s intention to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities.

[7] The CPA acknowledges the reality of many South African consumers: high levels of poverty, illiteracy and others forms of social and economic inequality, protection for vulnerable consumers stemming from a limited ability to read and comprehend, language impediments, vision and language impairment etc. The need to fulfil the rights of historically disadvantaged persons and to promote their full participation of consumers is evident from the content of the Act.²

[8] The CPA also states where there is conflict in legislation relating to a particular issue in a consumer contract an attempt must be made to reconcile the conflicting provisions, failing which that provision which provides the most protection to the consumer applies.³

[9] Section 14(2)(b)(ii) reads:

“the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time;”

² Preamble of the Act

³ Section 2(9)

[10] The argument for the appellants are that though the lease agreements in *casu* were on a month-to-month basis, this court ought nonetheless to find that the 20 business day cancellation period is applicable and mandatory since the respondent had couched the leases in the form of a monthly lease to circumvent the 20 day termination requirement as prescribed in Section 14(2)(a)(ii).⁴ ⁵ In support of this argument Mr. Langenhoven referenced to Section 51 of the CPA which prescribes that a term in a consumer agreement which has the effect of circumventing the purposes of the CPA is void.⁶ So the argument followed that the provision in the lease allowing for immediate cancellation in the event of breach is invalid, the consequence of which is for this court to find that the 20 day business day cancellation period had to be complied with by the respondent. Further to that and in light of the absence of such notice to the respondents, the appellants were therefore not in unlawful occupation and eviction could not be brought in terms of PIE.

[11] An agreement which imposes a month-to-month residential lease is a consumer agreement falling within the ambit of the Act. However, the point of departure is that cancellation in terms of Section 14(2)(b)(ii) is only applicable to fixed term contracts. It would be disproportionate to invoke a 20 business day notice to cancel a monthly lease. The period of such notice does in fact amount to a calendar month. It is also important to note that the appellants were asylum seekers whom were seeking refugee status. Their future in South Africa was unknown and

⁴ Section 14 is headed: Expiry and renewal of fixed-term agreements

⁵ Section 14(2) reads: "If a consumer agreement is for a fixed term-"

⁶ Explanatory Memorandum on the Objects of the Consumer Protection Bill 2008 at page 80

resort to residence on the basis of an indefinite stay was convenient and suitable to them taking into account their personal circumstances and needs.

[12] In this appeal, the appellants persist that their eviction was unlawful because they were not unlawful occupiers as required in terms of the PIE Act. They persist that their occupation were on the basis of lease agreements that had unlawfully been terminated – in their view – contrary to the notice provisions in section 14(2)(b)(ii) of the CPA. The appellants contend that the terms of the lease agreement are in conflict with the statutorily mandated notice periods in terms of section CPA, that the respondent is therefore obliged to afford them with at least 20 business days' notice of any alleged breach before cancelling the lease agreements.

[13] In my view it is apparent from the reading of Section 14 of the CPA that a 20 day business day notice prevails in all contracts of a fixed period. The wording of Section 14(2) clearly singles out fixed term contracts as being the category of contract being applicable to the provisions thereof. The word “if” induces a condition or supposition that it only applies to a certain type of contract in relation to its period. The lease agreements before this court are in my view none other than for an indefinite period as opposed to a fixed term. The distinction drawn in the CPA is further illustrated in Section 14(4) which provides *inter alia* that the Minister may, by notice in the Gazette, prescribe the maximum duration for fixed-term consumer agreements, generally, or for specified categories of such agreements. Consumer Protection Act Regulation, Government Gazette, 1 April 2011 (No. 34180) specifies at regulation 5(1):

“For purposes of section 14(4)(a) of the Act, the maximum period of a fixed-term consumer agreement is 24 months from the date of signature by the consumer –

(a) Unless such longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consumer;...”

[14] To read into the CPA that this 20 day notice requirement to a monthly and indefinite lease, would be to offer protection in circumstances not envisaged by the Act. There would be no basis to excise Clause 14 (the cancellation clause) from the contract. The provisions of Section 14(2)(b)(ii) are not applicable to these lease agreements and accordingly the respondent was not required to provide the appellants with 20 business days’ notice to remedy their breach of the agreement. The respondent’s right to cancel the respective agreements in terms of the contract accrued as soon as the appellants breached their respective leases. However, as it happened the parties entered into settlement agreements in an attempt to afford the respective appellants a reasonable opportunity to remedy their breaches. After conclusion of the settlement agreements, both appellants failed to pay up their arrear rental and in addition thereto further breached the material terms of the respective lease agreements. It was at this stage when the respondent elected to cancel the appellants’ respective leases.

[15] Clause 14 of the lease agreements reads as follows:

“CANCELLATION:

Should the Lessee fail to pay any rent on its due date, or commit a breach of any other terms of this lease, or should the lessee surrender his estate or should his estate be sequestered, provisionally or otherwise, the lessor shall have the right forthwith and without any further notice to the lessee.”

[16] The lease agreement therefore does not contain a contractually agreed procedure for termination. It is trite that in the absence of such a procedure, a guilty party (the party who caused the breach of contract) must be given notice of cancellation in a clear and unequivocal manner. This notice, takes effect from the time it is communicated to the other party, with communication by a third party being sufficient. The notices to cancel the agreements were delivered to the appellants on 12 March 2015 and 27 January 2016 (in respect of first appellant) and 26 August 2015 and 27 January 2016 (in respect of second appellant). I am satisfied that the content thereof clearly and unequivocally notified the appellants that they are in unlawful occupation of the premises which they occupied. Needless to say, the settlement agreements were not separate consumer agreements. The appellants also sought to establish that a tacit agreement had been concluded between the parties which regulate further the contractual obligations upon the parties. The test as to whether a tacit term forms part of a contract is what the innocent bystander may say in regard to the situation. The officious or innocent bystander is neither naïve nor foolish. She takes into account the facts.⁷ The appellants submitted, in the alternative, should this court find that the lease agreements were validly cancelled by the respondent, that the respondent's subsequent actions in entering into a verbal

⁷ *Airports Company v Airport Bookshops* 2017 (3) SA 125 (SCA) at page 144, paragraph 53

settlement agreement which regulates various issues, constitutes a revival/renewal of the lease agreements. Consequently, the agreements had thus not been cancelled by the respondent. Reliance is also placed on the fact that respondent demanded and accepted rental payments from the appellants which were submitted to be an act of renewing and/or reviving the lease agreement. On these papers I do not find what the terms of such alleged tacit contract would have been nor that they had successfully shown the existence of any tacit lease agreement had come into existence with the sequence of events which culminated with the agreement concluded in an attempt to bring the appellants up to date with amounts which had been in arrears at time of cancellation. The innocent bystander would not in these circumstances come to a reasonable conclusion that a tacit lease had come into existence and which required to be cancelled independently. Accordingly the existence of a tacit agreement of lease is rejected.

[17] The respondent is the owner of the property. The appellant has no lawful title to remain in occupation of the property. He is an unlawful occupier as envisaged in the PIE Act. The applicant in a very faint manner and with unimpressive timidity attempted to invoke the rights in section 26 of the Constitution, contending that he is entitled to continue his occupation of the respondent's property until a lawful notice is given to him to vacate the property. It seems to me that the respondent would be entitled to claim that it has been deprived of its property in the most arbitrary manner by the appellants who have put up untenable legal contentions that have no substance at all. The appellants contend, without any basis that their entitlement to remain in the respondent's property is in terms of the CPA. The attitude of the appellants towards the rights of the respondent is very concerning and if condoned,

would not only undermine the entire edifice on which our law of property is constructed but the also the purpose of legislation enacted to protect consumers, tenants and unlawful occupiers. The appellants are not entitled to remain in occupation of the properties since the basis of their occupation no longer exist.

[18] For the reasons set out above and in light of the aforesaid conclusions, I do not see it necessary to deal with the other arguments advanced by counsel and in the result I would propose that both appeals be dismissed with costs. Wherefore I propose an order as follows:

- “(i) The appeal under case number A325/16 is hereby dismissed with costs;*
- (ii) The appeal under case number A326/16 is hereby dismissed with costs.”*

SALIE-HLOPHE, J

I agree and it is so ordered:

HENNEY, J

Coram : **HENNEY, J et SALIE-HLOPHE, J**

Judgment by : **SALIE-HLOPHE, J**

For the Appellant : **Mr J Langenhoven (right of appearance)**

Instructed by : **LANGENHOVEN ATTORNEYS**

For the Respondent : **ADV. ROSS WYNNE**

Instructed by : **REEVA ALVES ATTORNEYS c/o MOWZER TALIEP
ATTORNEYS**

Date of Hearing : **17 FEBRUARY 2017**

Judgment delivered on : **16 MAY 2017**