



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

Case No: **11999/2018**

Before the Hon. Ms Acting Justice Slingers

Hearing: 6 May 2019

Judgment Delivered: 28 May 2019

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

(Registration Number: 1929/011817.07)

and

DAVID JORGE PAIVA DAS NEVES

Respondent

Trading as **Burgundy Fisheries**

JUDGMENT

SLINGERS AJ

BACKGROUND

- [1] During the latter part of 2009, the parties entered into a written lease agreement. The lease agreement was for a two-year period and commenced on 1 January 2010 and terminated on 31 December 2011.
- [2] The lease agreement was subsequently renewed on two further occasions. On each occasion the agreement was renewed for a period of two years.
- [3] Thereafter, during June and July 2016, the parties signed another lease agreement. This lease agreement ("**the agreement**") was also for a two-year period with the commencement date being 1 July 2016 and the expiry date being 30 June 2018.
- [4] The agreement was signed by the applicant on 20 July 2016 and by the respondent on 21 June 2016 and included the following provisions:
- 4.1 the applicant was identified as the landlord and the respondent as the tenant;
 - 4.2 the commencement date was defined as 1 July 2016;
 - 4.3 the expiry date was defined as 30 June 2018;
 - 4.4 the Consumer Protection Act ("**CPA**") determined that the term of the agreement may not exceed 24 months calculated from the date on which the respondent signed the agreement (21 June 2016);
 - 4.5 the agreement would commence on the commencement date and would continue until the expiry date;

4.6 the definition of the expiry date ensured that the duration of the agreement would not exceed the 24 months prescribed by the CPA;

4.7 the applicant would inform the respondent in writing between 80 and 40 business days before the expiry of the agreement:

4.7.1 that it is about to expire; and

4.7.2 what material changes would be applicable to the agreement if it was to be renewed or may otherwise continue beyond the expiry date;

4.8 the Magistrate's Court would have jurisdiction for all claims which arise from the agreement, if so chosen by the applicant;

4.9 all notices, consents or other communications in terms of the agreement must be in writing and addressed to the applicant at 11 Union Avenue, Pinelands; and

4.10 all notices, consents other communications in terms of the agreement will be deemed to have been received by the other party on the 7th day after posting and on the day if delivered by hand.

[5] During 2018 the respondent received correspondence, dated 11 April 2018, advising him that the agreement was due to expire and that the applicant had elected not to renew same (in other words to terminate the agreement on the expiry date).

THE APPLICATION

[6] In this application the applicant seeks an order:

- 6.1 confirming the expiry of the agreement on 30 June 2018;
- 6.2 an order evicting the respondent and all those who occupy by, through or under him from the premises situated at shop 6, 1 Burgundy Drive, Burgundy Estate, Bellville (“**the premises**”) and directing the respondent to give the applicant undisturbed possession of the premises within 3 calendar days or as soon as possible, from date of granting the order;
- 6.3 authorising and ordering the Sheriff of the above Honourable Court and/or his deputy, and/or the South African Police Services to assist the applicant to give effect to the order in paragraph 6.2 above; and
- 6.4 ordering the respondent to pay the costs of the application.

[7] In opposing the application the respondent put forward the following *in limine* arguments:

- 7.1 the deponent’s lack of authority to depose to the founding affidavit;
- 7.2 the applicant’s lack of *locus standi* to seek the respondent’s eviction;
- 7.3 the lack of jurisdiction of this court to entertain the application; and
- 7.4 the applicant’s non-compliance with paragraphs 40, 1.2(c) and (d) of the lease agreement. The applicant delivered the notice of termination of the agreement to and had the Notice of Motion served at the premises instead of having it delivered to and served at the

respondent's contractually chosen *domicilium* of 11 Union Avenue, Pinelands.

- [8] The respondent also alleged that the application was vexatious, frivolous and vague.
- [9] During the hearing of the matter Mr Sharuh, for the respondent, argued that section 14 of CPA did not allow the landlord the right to elect whether or not to terminate or to renew the fixed term contract on the expiry thereof. This right was bestowed solely upon the respondent. Further, there was no need to give notice of a non-renewal / termination of the agreement as it would automatically continue on a month - to - month basis.
- [10] He further argued that the applicant could only cancel the agreement if the respondent was in breach thereof and failed to remedy the breach after being given notice to do so. In the absence of a breach on the part of the respondent the applicant could not cancel or terminate the lease agreement, notwithstanding the expiry of the fixed period.
- [11] However, after the agreement continued on a month – to - month basis, the applicant could then terminate it by giving the respondent sufficient notice of such termination.

SECTION 14(2)(c): NON-RENEWAL OF THE AGREEMENT

- [12] In determining whether or not the applicant is entitled to the relief it seeks, I deal firstly with the argument that section 14(2)(c) of the CPA only endows the respondent with the election of whether or not to terminate or renew the agreement on the expiry thereof.

[13] In interpreting section 14 of the CPA, the court is directed by section 2(1) thereof to interpret it in such a manner that would give effect to the objectives set out in section 3(1).

[14] Section 3 reads as follows:

“(1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by-

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;*
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers-*
 - (i) who are low-income persons or persons comprising low-income communities;*
 - (ii) who live in remote, isolated or low-density population areas or communities;*
 - (iii) who are minors, seniors or other similarly vulnerable consumers; or*
 - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;*
- (c) promoting fair business practices;*
- (d) protecting consumers from-*
 - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and*
 - (ii) deceptive, misleading, unfair or fraudulent conduct;*

- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;*
 - (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;*
 - (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and*
 - (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.*
- (2) To better ensure the realisation of the purposes of this Act, and the enjoyment of the consumer rights recognised or conferred by this Act, the Commission, in addition to its responsibilities set out elsewhere in this Act, is responsible to-*
- (a) take reasonable and practical measures to promote the purposes of this Act and to protect and advance the interests of all consumers, and in particular those consumers contemplated in subsection (1) (b);*
 - (b) monitor and report each year to the Minister on the following matters:*
 - (i) The availability of goods and services to persons contemplated in subsection (1) (b), including price and market conditions, conduct and trends affecting their consumer rights;*
 - (ii) access to the supply of goods and services by small businesses and persons contemplated in subsection (1) (b); and*
 - (iii) any other matter relating to the supply of goods and services; and*
 - (c) conduct research and propose policies to the Minister in relation to any matter affecting the supply of goods and services, including proposals for legislative, regulatory or policy initiatives that would improve the realisation and full enjoyment of their consumer rights by persons contemplated in subsection (1) (b)."*

[15] As seen from section 3, the CPA is aimed at, *inter alia*, promoting fair business practices, protecting consumers against unconscionable, unfair, unreasonable, unjust and improper business practices and establishing a legal framework to achieve and maintain a fair consumer market which is efficient, sustainable and accessible.

[16] This legislative protection of consumers should not be interpreted as entitling nor as enabling consumers to themselves engage in unfair business practices or to act unscrupulously.¹ If consumers are allowed or enabled to act in an unscrupulous manner or to engage in unfair business practices, then it will undermine the establishment and/or sustainability of a fair consumer market. Further, the objectives of the CPA will more easily be attained if both consumers and suppliers act in a manner which would facilitate and support the objectives of the CPA and not to engage in any activity which would undermine or weaken them.

[17] It is within this context that section 14(2) of the CPA and regulation 5(1) thereto should be interpreted. I set out section 14(2) of the CPA and regulation 5(1) below.

[18] Section 14(2) reads as follows:

“If a consumer agreement is for a fixed term-

(a) that term must not exceed the maximum period, if any, prescribed in terms of section (4) with respect to that category of consumer agreement;

¹ Delport H *Problematic aspects of the Consumer Protection Act 28 of 2008 in relation to property transactions: linked transactions, fixed-term contracts and unsigned sale agreements* 2014 *Obiter* 60-80, at page 75

- (b) despite any provision of the consumer agreement to the contrary-*
- (i) the consumer may cancel the agreement-*
 - (aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a); or*
 - (bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); or*
 - (ii) 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 rectified the failure within that time;*
- (c) of not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of-*
- (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and*
 - (ii) the options available to the consumer in terms of paragraph (d); and*
- (d) on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month – to- month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (c), unless the consumer expressly-*
- (i) directs the supplier to terminate the agreement on the expiry date; or*
 - (ii) agrees to a renewal of the agreement for a fixed term.”*

[19] Regulation 5(1) reads as follows:

- “(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;*

(b) unless differently provided for by regulation in respect of a specific type of agreement, type of consumer, sector or industry; or

as provided for in an industry code contemplated in section 82 of the Act in respect of a specific type of agreement, type of consumer, sector or industry.”

[20] Section 14(2)(a) of the CPA, read with regulation 5(1) thereto prescribes that the maximum duration for a fixed term contract is 24 months. This period may only be extended if the extension thereof was expressly agreed to with the tenant (the respondent in this case) and the landlord (the applicant in this case) could show a demonstrable financial benefit to the customer.²

[21] If it is accepted that section 14(2)(c) of the CPA only allows the tenant, and not the landlord, the election of whether or not to terminate the lease agreement on the expiry thereof, then it has to be accepted that the agreement would continue pass the legislatively prescribed period of 24 months in those instances where the lease agreement automatically continues on a month- to month- basis.

[22] This would render section 14(2)(a) read with regulation 5(1) meaningless and would be contradictory to fixing the maximum period for fixed term contracts.

[23] Not only would such an interpretation result in an irrational situation where landlords are statutorily forced to continue with leases at the demand of tenants,³it would also enable tenants to act unscrupulously.

² I have not set out the provisions of regulation 5(1)(b) and (c) as they are not relevant to this matter. The CPA uses the terms *supplier* and *customer*. In light of the facts of this case, I have used the terms *landlord* and *tenant* in this judgment.

³ G Laubscher “*The Impact of Section 14 of the Consumer Protection Act on fixed term lease agreements*” at page 157 [Dissertation submitted in fulfillment of the requirements for the degree of *Magister Legum* at the Potchefstroom Campus of the North-West University, 2016 (Supervisor-Prof SPLR de la Harpe)]

- [24] This interpretation would be illogical and contrary to sound business practices as it would compel the landlord to continue with the lease agreement on a month- to- month basis as it cannot terminate it on the expiry date, only then to be allowed to terminate the lease agreement after it is automatically converted into a month-to- month agreement.
- [25] If landlords are statutorily compelled to continue with fixed term contracts pass the expiry date it may result in increased hesitancy and /or refusal to enter into contracts of this nature. Alternatively, it may result in landlords insisting on detrimental and prejudicial material changes to the lease agreement which would apply after renewal simply as a means of forcing the tenant to terminate it.
- [26] Neither position would serve the objectives set out in section 3 of the CPA, nor would it enhance the protection of consumers. On the contrary, such an interpretation would undermine and/or be contrary to the objectives of section 3, more particularly, those set out in section 3(1)(a), (c) and (f).
- [27] Further, the wording of section 14(2)(c) does not favour the argument that landlords are prevented from exercising the election of whether or not to terminate a fixed term agreement on expiry thereof. Section 14(2)(c)(i) states that the landlord must give the tenant notice of any material changes that would apply **if** the agreement is to be renewed or may otherwise continue beyond the expiry date **and** the options available to the consumer.

[28] The word **if** can be used interchangeably with the word **provided**.⁴ By replacing the word **if** with the word **provided** in section 14(2)(c)(i), it becomes clear that the notice pertaining to material changes would only be applicable in those circumstances when the lease agreement is being renewed or will otherwise continue pass the expiry date. It follows that section 14(2)(c)(i) does not postulate the automatic renewal of the lease agreement. For completeness, I set out section 14(2)(c)(i) with the word **provided** instead of the word **if** below:

“(c)of not more than 80, nor less than 40, business days before the expiry date if the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of-

*(i)any material changes that would apply provided the agreement is to be renewed or may otherwise continue beyond the expiry date; and
(ii)the options available to the consumer in terms of paragraph (d);
and...”*

[29] The use of the word **if** in section 14(2)(c)(i) shows that the landlord has an election to either renew or terminate the lease agreement on the expiry thereof. Only in the event that the landlord elects to renew the lease agreement, then it has to comply with the provisions of section 14(2)(c)(i) and (ii). In the event that it elects not to renew the agreement, then no obligation exists in terms of section 14(2)(c)(i) and (ii).

[30] Section 14(2)(c)(i) and (ii) reflects the consumer’s right to elect whether or not to renew the lease agreement.

⁴ Dictionary of Legal Words and Phrases, 2nd edition by R D Claasen, vol 2 at 1-4

- [31] The lease agreement would only continue on a month-to-month basis in those circumstances where the landlord elected to renew the agreement and when and/or if the tenant failed to exercise his/her election set out in section 14(2)(d)(i) and(ii).
- [32] The objectives set out in section 3(1)(a), (c), (d), (e) and (f) of the CPA would be given effect to by an interpretation of section 14(2)(c) which allows both the landlord and the tenant the right to either terminate or to renew the lease agreement on expiry thereof. Had the CPA only allowed the tenant this right, it would have hampered and/or skewed fair business transactions, with landlords becoming reluctant and/or refusing to enter into fixed term contracts in circumstances where they would be forced remain in such agreements in perpetuity, only being able to cancel such agreements where the customer breached the agreement and failed to remedy same when called upon to do so.
- [33] Section 14(2)(c) makes it peremptory for the supplier to give the customer notice, of no less than 40 business days and not more than 80 business days, of the impending expiry date of the fixed term contract in writing or any other recordable form.⁵
- [34] This notice has to **include** a notice of any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and the options available to the consumer in such a case. The use of the word **including** in section 14(2)(c) of the CPA does not connote a limitation but rather an extension of the circumstances under which the

⁵ The use of the word “*must*” in section 14(2)(c) makes the giving of notice peremptory.

landlord must give the tenant notice of the impending expiry of the lease agreement.

[35] The meaning of the word **including** can also be extracted from the context of the statute in which it is used.⁶ As the CPA is aimed at the promotion and advancement of the social and economic welfare of consumers by *inter alia* improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour, the use of the word **including** in section 14(2)(c) has to be interpreted in such a manner as to ensure that the consumers are furnished with sufficient and timeous notice that would allow them to make informed and responsible decisions pertaining to the termination and/or renewal and/or their further conduct pertaining to the lease agreement.

[36] Therefore, section 14(2)(c) obliges landlords to give tenants notice of the impending expiry of the lease agreement, irrespective of whether or not the lease agreement is going to be terminated or renewed (with or without the material changes) on the expiry thereof.

NON COMPLIANCE WITH CLAUSES 40; 1.2 (C) AND (D) OF THE AGREEMENT

[37] On 11 April 2018, the applicant caused a notice to be hand-delivered to the respondent at the premises. This notice read as follows:

“Dear David

It is recorded that the Agreement of Lease between yourself and Shoprite Checkers (Pty) Ltd is due expire on 30 June 2018.

⁶ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 (1) SA 406 (CC)

This notice serves to advise you of our decision to not renew this Agreement of Lease. The account remains in arrears and the housekeeping is poor. Your last day of occupation is 30 June 2018.

Please ensure that the premises is reinstated to its original state including, but not limited to screeded floor, painted white walls and an electrical certificate of compliance by 3 June 2018.”

[38] The founding affidavit states that:

“On 11 April 2018, I ... hand delivered a Notice of Termination of the Lease Agreement to the Respondent, and informed the Respondent that the Applicant do not wish to renew the Lease Agreement...”⁷

[39] In his answering affidavit, the respondent states that he received the correspondence during or about 30 May or early May 2018 at the business premises⁸. The respondent also denied that he received the notice on 11 April 2018 and stated that he received it on 30 May 2018.⁹

[40] However, the respondent does not state how the notice was brought to his attention or from whom he received it.

[41] In the circumstances I find that the respondent’s denial that he received the notice of 11 April 2018 on 30 May 2018 to be untenable and/or not genuine and accordingly accept that the notice was received on 11 April 2018, when it was averred to have been hand-delivered to him.¹⁰

⁷ Paragraph 11 of the founding affidavit.

⁸ Paragraph 18 of the answering affidavit.

⁹ Paragraph 77 of the answering affidavit

¹⁰ *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

In accordance with the terms of the lease agreement, it is accepted that the notice was received on the day of the hand-delivery thereof.

- [42] However, it is common course that this notice was delivered to the premises whereas the agreement makes provision for all notices to be delivered to 11 Union Avenue, Pinelands.
- [43] There is no allegation by the respondent that he suffered any prejudice as a result of the notice being hand delivered to him at the premises instead of being delivered to his address of 11 Union Avenue, Pinelands. When the notice was hand delivered to the respondent, it was pertinently brought to his attention. Therefore, the objective of the notice was fulfilled and the respondent suffered no prejudice.¹¹
- [44] Furthermore, the fact that a *domicilium citandi et executandi* has been contractually chosen is not prohibitive of effective service through one of the other methods prescribed by the Uniform Rules of Court. Personal service is provided for in Uniform Rule 4(1)(a)(i).
- [45] Similarly, Uniform Rule 4(1)(a)(iii) provides for service by leaving a copy of the document at the place of residence or business of the person. Service of the Notice of Motion and Founding Affidavit was effected in accordance with Uniform Rule 4(1)(a)(iii) when it was left with a shop assistant at the premises.
- [46] Therefore, there is no merit to the argument that the application is defective because the notice of 11 April 2018 was not delivered to the contractually chosen address of 11 Union Avenue, Pinelands but was instead hand delivered to the respondent at the business address.¹²

¹¹ *Investec Property Fund Limited v Viker X (Pty) Limited* 2016 JDR 0904 (GJ)

¹² Similarly, the application is not defective as it was served at the premises and not at the 11 Union Avenue, Pinelands.

JURISDICTION

[47] Paragraph 10.9 of the agreement states that the Magistrate's Court will have jurisdiction for all claims arising from the agreement, if so chosen by the applicant.

[48] It is clear from paragraph 10.9 that the applicant had an election whether or not to proceed in the Magistrate's Court. It clearly elected not to.

LOCUS STANDI

[49] The respondent challenged the *locus standi* of the applicant to bring the application. It argued that the Deeds Search showing the applicant to be the owner of the property situated at the premises was insufficient to establish the applicant's ownership of the leased property.

[50] Paragraph 6 of the founding affidavit reads as follows:

"The Applicant is the lawful owner of the immovable property known as:

ERF 161, DE GREDEL, WESTERN CAPE PROVINCE better known as ***SHOP 6, 1 BURGUNDY DRIVE, BURGUNDY ESTATE, WESTERN CAPE PROVINCE*** situated in De Grendel in extent of approximately 59.30 (fifty nine comma three zero) square metres together with the building thereof ('the Premises'). See annexed hereto marked as annexure "A" the Deed Search confirming the aforesaid."

[51] In response to paragraph 6 of the founding affidavit, the respondent stated:

*'I note the content hereof save to deny the accuracy of the extent as set out herein, in particular I deny that the extent of the shop is 59.30 square meters as alleged by the applicant and put the applicant to proof thereof.'*¹³

[52] Therefore, the respondent does not dispute the applicant's allegation that it is the owner of the leased property.

[53] The following is common cause:

- (i) the respondent concluded a lease agreement with the applicant;¹⁴
- (ii) the respondent paid rent to the applicant in respect of the leased property;¹⁵ and
- (iii) the respondent approached the applicant to renew the lease of the property.¹⁶

[54] In light of the above, I find that the applicant has sufficiently established its *locus standi* to bring this application.

[55] I have addressed the argument pertaining to the deponent's lack of authority to depose to the founding affidavit in my judgment on the application to strike and will not repeat it herein.

CONCLUSION

[56] In the circumstances I find that the applicant gave the respondent valid notice of its intention to terminate the lease agreement on 18 April 2018 and that the agreement expired on 30 June 2018.

¹³ Paragraph 69 of the answering affidavit

¹⁴ Paragraphs 8- 12 of the answering affidavit

¹⁵ paragraphs 13, 16.2, 23, 23.1, 24.2 and 24.3 of the answering affidavit.

¹⁶ paragraph 15 of the answering affidavit.

[57] Consequently, the respondent has been in unlawful occupation of shop 6, 1 Burgundy Drive, Burgundy Estate since 1 July 2018.

[58] Therefore, I make the following order:

58.1 it is confirmed that the lease agreement in respect of shop 6, 1 Burgundy Drive, Burgundy Estate expired on 30 June 2018;

58.2 the respondent, who has been in unlawful occupation of shop 6, 1 Burgundy Drive, Burgundy Estate since 1 July 2018, is directed to vacate the said premises and to give the applicant undisturbed possession thereof within 30 days of the granting of this order;

58.3 in the event that the respondent fails and/or refuses to vacate shop 6, 1 Burgundy Drive, Burgundy Estate as directed in paragraph 58.2 above, the Sheriff of the above Honourable Court and/or his deputy and/or the South African Police Services is authorised to assist the applicant in giving effect to the order in paragraph 58.2 above; and

58.4 the costs of the application shall be borne by the respondent.

SLINGERS AJ

Appearances:

For applicant: Mr M Van der Merwe

For respondent: Mr P Sharuh