Republic of South Africa

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

Case number: 19432/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 18 November 2020
Judgment: 7 December 2020

In the matter between:

MAGIC VENDING (PTY) LTD Applicant

and

NZEBA TAMBWE First Respondent

ALL OCCUPANTS OF THE PROPERTY SITUATE AT […], WYNBERG, WESTERN CAPE PROVINCE Second Respondent

CITY OF CAPE TOWN MUNICIPALITY Third Respondent

JUDGMENT
(Delivered by email to the parties and release to SAFLII.

The judgment shall be deemed to have been handed down at 10h00 on 7 December 2020.)

BINNS-WARD J:

[1] The applicant has applied in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') for the eviction from the premises at […], Langley Road, Wynberg, of the first respondent and all other occupants holding under her. The first respondent has been in occupation of the premises for many years, originally in terms of an oral agreement and more recently, since 2014, in terms of a written lease that, according to its tenor, operated on 'a month to month basis'. She currently lives there with her three minor children. The current proceedings were instituted consequent upon the applicant's cancellation of the lease.

[2] There appears to be some dispute about the precise amount involved, but it is common ground that the first respondent fell very deeply into arrears in respect of the payment of the rent. The applicant alleges that the first respondent failed to purge her breach of the lease after having been sent notice to do so, and that the lease was consequently cancelled. The first respondent disputes the validity of the cancellation and, on that basis, denies that she is an 'unlawful occupier' within the meaning of that term defined in s 1 of the PIE Act.

[3] Clause 14 of the lease agreement regulated the basis on which the contract could be cancelled in the event of the lessee failing to pay the rent when it fell due. It provided as follows insofar as relevant:

> CANCELLATION
> Should the LESSEE failed to pay any rent on or before due date, or commit a breach of any of the other terms of this lease, ..., the LESSOR shall have the right forthwith and without any further notice to the LESSEE,

14.1 to cancel this lease and to eject or have ejected from the PROPERTY the LESSEE or any other person occupying the property ...

ALTERNATIVELY

14.2 ... .

Should the Consumer Protection Act No. 68 of 2008 apply to this lease, the lessor shall have the right to act in case of a breach of the lease by the lessee as stipulated above in as far as such terms are consistent with the Act, or otherwise, if the Act applies and should the LESSEE fail to pay any rent on its due date, or commit a breach of any of the other terms of this lease, or ...., the LESSOR shall have the right to cancel this lease and to eject or have ejected from the PROPERTY the LESSEE or any other person occupying the PROPERTY, after having given the LESSEE due notice in terms of section 14(2)(b)(ii) of Act 68 of 2008 and to claim such amounts from the LESSEE as provided for in section 14(3) of the said Act.

[4] The Consumer Protection Act does apply to the lease. In terms of s 6(1) thereof, the statute applies to *services* that are supplied in terms of a transaction to which the Act applies unless the transaction is one exempted from the Act by subsections (2), (3) or (4). '*Service*' is defined in s 1 of the Act to include '*access to or use of any premises or other property in terms of a rental*'. '*Rental*' is defined as '*an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act*'. The lease agreement is not a lease within the meaning of the National Credit Act and the agreement is not one that is exempted from the Consumer Protection Act in terms of s 6(2), (3) or (4) of that Act.

[5] Section 14(2)(b)(ii) of the Consumer Protection Act applies, according to its tenor, only to *fixed term* consumer agreements and arguably also to month-to-month agreements that have

automatically come into being, by virtue of s 14(2)(d), upon the expiry of a fixed term agreement. It is evident from s 14(2)(d), which distinguishes a fixed term agreement from a month-to-month agreement, that the month-to-month lease in place in the current matter was not a fixed term agreement within the meaning of the Act. That was indeed the conclusion reached by a two-judge bench of this court in *Makah v Magic Vending (Pty) Ltd* [2017] ZAWCHC 142 (16 May 2017), 2018 (3) SA 241 (WCC). The court in *Makah* was also concerned with a lease agreement containing a cancellation provision apparently in precisely the same terms as clause 14 of the agreement in the current case. Salie-Hlophe J (Henney J concurring) held that s 14(2)(b)(ii) was of no application and, by implication, that the lessor was therefore entitled to enforce the *lex commissoria*, or 'forfeiture clause' as it is commonly called in the context of a lease agreement. I am bound by the *ratio decidendi* in *Makah*, with which I in any event respectfully agree.

[6] The first respondent's attorney argued that clause 14 of the lease, presumably by virtue of the fact that it provided for the summary cancellation of the contract if the lessee fell into default, offended against s 51(1)(a) of the Consumer Protection Act, which provides that a supplier must not make a transaction or agreement subject to any term or condition if '*its general purpose is to defeat purposes and policy of this Act*'. The purposes and policy of the Act are set forth in Part B of chapter I of the Act. I am unable to find that anything in clause 14 might properly be characterised as directed at defeating any of the purposes and policy of the Act.

[7] I also do not consider that the *lex commissoria* is unfair within the meaning of s 48 of the Act. The contextual indications of what the legislature contemplated by a term that might be 'unfair' suggest that it would be one that was exploitative of the consumer. Such a term might, for example, involve an unreasonable waiver by the consumer of any rights that he or she would

ordinarily have in the context of concluding a contract of the given nature, or the imposition of an obligation that it would be blatantly unreasonable for a supplier to purport to impose.

[8] Forfeiture clauses are, and historically have been, common features of lease agreements. There is nothing lacking in good faith about their incorporation in such agreements. Had it been the legislative intention to override the rich body of jurisprudence that has held them to be enforceable according to their tenor and that the courts have no equitable jurisdiction to relieve a debtor from the effect of them,[1] I would have expected the statute to provide as much unequivocally. I do not consider that the provisions of the Consumer Protection Act should be construed so as to purport to invest in the courts a power to refuse to enforce contractual terms on the basis that their enforcement would, in the judge's subjective view, be unfair, unreasonable or unduly harsh; they should rather be construed as, in certain respects, codifying the established principle that courts will refuse to enforce contractual provisions that are so unfair, unreasonable or unjust that it would be contrary to public policy to give effect to them.[2] Public policy is, of course, by its very nature informed by constitutional values and precepts.

[9] In my judgment there is nothing unconscionable about a term directed at incentivising punctilious compliance by a consumer with his or her contractual obligations. I appreciate that some recent judgments, notably the Constitutional Court's judgment in *Botha v Rich* 2014 (4) SA 124 (CC), 2014 (7) BCLR 741 (CC), have introduced the concept of proportionality into the assessment of the enforceability of contractual rights of cancellation (although the Court's remarks in this connection were more recently, in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (17 June 2020); 2020 (5) SA 247

[1] See GB Bradfield, *Christie's Law of Contract in South Africa* 7 ed (LexisNexis) at 599, para 13.2.3.

[2] Cf. *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (17 June 2020); 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 80.

(CC); 2020 (9) BCLR 1098 (CC) at para 55-56, characterised as *obiter dicta*).[3] But the equitable considerations that weighed heavily with the court in *Botha v Rich* differ *toto caelo* from the features of the current matter. It is not as if the first respondent was only a week or two in arrears when the applicant elected to cancel the contract. She was literally years in arrears with the payment of her rent, and she has not made any tender to purge her default; indeed, it is clear that it would be beyond her financial means to do so.

[10] In *Botha v Rich*, the cancellation of the contract of purchase of land in instalments was considered unconscionable because the purchaser had at the time of the cancellation already acquired a right to take transfer of the property in terms of the applicable legislation by virtue of having paid about three quarters of the total purchase price. The purchaser also tendered payment of the outstanding purchase price. The court was heavily influenced in its decision by what it considered to be the objects of the legislation.[4] Cancellation by the seller in the circumstances would negate the purchaser's statutory right and undermine the objects of the statute. It is therefore notable, when considering the current case, that the Rental Housing Act 50 of 1999, which has amongst its stated objects the '*facilitation of sound relations between tenants and landlords and for* [that] *purpose*' the laying down of '*general requirements relating to*

[3] The judgment was widely criticised by commentators for creating undesirable legal uncertainty about the nature and enforceability of contractual rights and obligations; see e.g. *Christie's Law of Contract in South Africa* supra, at 23, Dale Hutchinson, '*From bona fides to ubuntu: The quest for fairness in the South African law of contract*', 2019 *Acta Juridica* 99 and Malcolm Wallis, '*Commercial certainty and constitutionalism: Are they compatible?*' (2016) 133 SALJ 545. In his article, '*Rereading Botha v Rich*' (2020) 137 SALJ 1, Leo Boonzaier refers to a 'clamour to condemn *Botha v Rich*'. The Constitutional Court's recent judgment in *Beadica* supra manifests a conscious endeavour to defuse the critical response to *Botha v Rich*. The majority judgment in *Beadica* affirmed (in para 58) that the Court's judgment in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) remains 'the leading authority in our law on the role of equity in contract, as part of public policy considerations'. *Barkhuizen* laid down a two-fold test: (1) is the impugned contractual provision contrary to public policy (in which case it will not be enforced) and (2) if it is not, would its enforcement in the peculiar circumstances of the case be contrary to public policy?

[4] In *Beadica* supra, at para 49, the Court stated that *Botha v Rich* '*principally concerned the interpretation and application of section 27*' of the Alienation of Land Act.

leases', does not contain anything to suggest that forfeiture clauses should be regarded as contrary to public policy or constitutionally incompatible.

[11] Mr Langenhoven, who represented the first respondent, argued that the fact that the rented premises are the first respondent's home was a factor that rendered the forfeiture clause unconscionably unfair. This was to suggest that the foreseeable consequences of any cancellation upon invocation of the forfeiture clause were such as to render it unfair in some sort of undefined constitutional sense. I am not persuaded by the argument. The invocation of the forfeiture clause to cancel the contract does not result in the lessee's summary eviction from the premises. If she stays on as an unlawful occupier after the cancellation of the lease, as she has done, any ensuing eviction falls to be regulated in terms of the PIE Act. That statute is expressly directed at promoting the right against arbitrary eviction from one's home that is enshrined in s 26(3) of the Constitution. A court seized of an eviction application in terms of the PIE Act is required to consider all the relevant circumstances and make an order that is just and equitable. Which brings us full circle. These proceedings are brought in terms of the PIE Act. The first respondent has not succeeded in discharging the onus of establishing that the enforcement of the forfeiture clause would be contrary to public policy.

[12] The first respondent also contended that the contract was not effectively cancelled because she did not receive notice of the cancellation. It would appear that a notice to remedy the breach was sent to the lessee in August 2019 by registered post, but the item was directed to an incorrect address and in any event addressed not to the first respondent, but instead to one Eddie Gina (the lease records that the first respondent's husband is called Eddie). A subsequent letter of cancellation directed to the correct address, but once again with the intended recipient given as Eddie Gina, was not collected from the post office. I accept that neither of these letters

came to the attention of the first respondent. That is of no moment, however, because the papers that were served on her instituting these proceedings operated as effective notice of the termination of the contract; cf. *Middelburgse Stadraad v Trans-Natal Steenkool Korporasie Bpk* 1987 (2) SA 244 (T) at 249, [1987] 3 All SA 14 (T) at 18, and *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) at 462.

[13] The first respondent also contended that any notice of cancellation was required to give her a calendar month's notice of the termination of the contract. She sought to rely on s 5(5) of the Rental Housing Act and the judgment of this court in *Luanga v Perthpark Properties (Pty) Ltd* [2018] ZAWCHC 169 (20 September 2018), 2019 (3) SA 214 (WCC) in this regard.

[14] Section 5(5) of the Rental Housing Act provides:

> If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month written notice must be given of the intention by either party to terminate the lease.

It is plain that the provision is applicable to the termination of a periodic lease that is deemed to have come into being when the lessee remains on in the property with the express or tacit consent of the lessor after the expiration of a pre-existing fixed term lease. It is not applicable in a situation in which a lease containing a forfeiture clause is terminated by the landlord by reason of the lessee's failure to pay the rent. The judgment in *Luanga*, which held that the one month's notice referred to in s 5(5) denoted one *calendar* month's notice, also has no bearing on a landlord's right to terminate a lease on account of a material breach of contract by the lessee.

[15] The City of Cape Town has indicated that it is able to provide the first respondent and her dependent children with emergency accommodation if they are required to vacate the leased

premises. Mr Langenhoven stated from the bar that the local authority's offer of accommodation would be acceptable to the first respondent. In the circumstances it seems to me that it would be just and equitable were the first respondent and those holding under her required to vacate the property on or before 18 January 2021.

[16] The following order will issue:

1. The first respondent and all those occupying the property under her are directed to vacate the premises at […], Wynberg, Cape Town, on or before Monday, 18 January 2021.

2. In the event of non-compliance with the provisions of paragraph 1 of this order, the Sheriff is authorised to evict the first respondent and all those occupying the property under her from the premises and to remove from the property the personal effects and possessions of all persons so evicted and to store the said personal effects and belongings, and, if necessary, to enlist the assistance of the South African Police Service for that purpose.

3. The first respondent is ordered to pay the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**Nicola van Zyl**
Applicant's attorneys	**Biccari Bollo Mariano Inc.** **Cape Town**
First respondent's attorney:	**G.M. Langenhoven** **Langenhoven Attorneys** **Wynberg, W. Cape**