



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 2101/2022

HELD AT MBABANE

In the matter between:

TIN CAN HOLDINGS (PTY) LTD

Applicant

And

PSI ESWATINI

Respondent

Neutral Citation: *Tin Can Holdings (Pty) Ltd vs PSI Eswatini (2101/2022)*
[2023] SZHC 11 (03/02/2023)

Coram: **J. M. MAVUSO J**

Heard: 16th December, 2022.

Delivered: 03rd February, 2023.

SUMMARY: *Civil matter, lease agreement – Automatic renewal of written lease agreement – Application of pacta sunt servanda principle – Application granted – Respondent to pay costs.*

JUDGMENT

J.M. MAVUSO - J

FACTUAL BACKGROUND

[1] In this matter, the parties agree that:

- (i) Applicant (Tin Can Holdings (Pty) Ltd entered into a lease agreement with Respondent (PSI Eswatini) for the rental of premises described as, 1st Floor Mezzanine, at Mbhilibhi House.

- (ii) The monthly rental agreed upon by the parties for the occupation of the premises, was fixed at E76, 656. 50 (Seventy Six Thousand Six Hundred and Fifty Six Emalangeneni and Fifty cents).

CONDITIONS OF LEASE

- [2] (i) A copy of the Lease Agreement is **marked annexure “AG1”** it is found, at page 112 of the Book of Pleadings prepared by Henwood and Company.

(ii) Clause 3 of the Lease Agreement pertains to the commencement and duration thereof.

(iii) (a) Clause 3.1 of the Lease Agreement states as follows:

“the lease of premises shall be deemed to have commenced on the date referred to in clause 2.1.1 of the Schedule of Information (“the commencement date”) notwithstanding the date of signature thereof.”

In terms of clause 2.1.1 of the Schedule of Information (found at page 113 of the Book of Pleadings, filed in this matter, the commencement date of the Lease was the 1st October 2021.

(b) Clause 3.2 of the Lease records that it:

“...shall continue for the period referred to in clause 2.1.2 of the Schedule of Information (“the initial period”)

The period referred to in clause 2.1.2, as the initial period is from the 1st October 2021 to 30 September 2023.

- (c) The Court may here add, that clause 2.2 of the Schedule of Information states, that the renewal period shall be, one year. In order to clarify the foregoing, clause 2.2.1 provides for the specific period for the duration of the renewal period, as being from the 1st October 2022 to 30th September 2023.
- (d) Clause 3.3 of the conditions of the Lease Agreement states as follows:

“Subject to the Lessee having fulfilled all of the Lease conditions during the Initial Period, the Lessee shall be entitled to exercise an option to extend the Lease Agreement for the period referred to in clause 2.2 of the Schedule of Information upon exactly the same terms and conditions as contained in the Lease Agreement save that there will be no further option to renew. Should the Lessee not wish to exercise the aforesaid option it shall do so by giving notice in writing to the Lessor not later than 90 (ninety) days before the expiry of the Initial Period. Should the Lessee fail to give such

***notice, it will be accepted that the Lease will run for the
Renewal Period.”***

ISSUES FOR DETERMINATION BY COURT

[3] The issues for determination by the Court, in this matter, are as follows:

- 3.1 Whether the purported termination of the Lease Agreement between the parties, by the Respondent, on the 19th August 2022, was in accordance with the condition of Lease, as set out in clause 3.3 above.
- 3.2 In the event, the termination does not accord with clause 3.3 (*supra*), the question is whether or not the Lessee can be held to the terms and conditions of the Lease as agreed to, between the parties.
- 3.3 The third and last question for determination, pertains to the removal of improvements from the leased property, by Respondent. An

answer to the foregoing will depend on the lawfulness or otherwise of the termination of the Lease Agreement.

THE LAW ON INTERPRETATION OF CONTRACTUAL AGREEMENTS

[4] According to the *pacta sunt servanda*, common law principle all contractual agreements, as a general rule must be honoured.

- (i) In the case of **Berkuizen vs Napier 2007 (5) SA 323 CC**. Ngcobo J, commenting on the application of the principle of *pacta sunt servanda*, at paragraph 5 of his Judgment observed that:

“The application of the principle of (sic) pacta sunt servanda is therefore subject to constitutional control.”

The Learned Judge further observed that the principle was not:

“...a sacred cow that should trump all other considerations.....constitutional values of equality and

dignity may, however prove to be decisive when the issue of the parties relative bargaining positions is an issue.”

CONTENTIONS OF THE PARTIES

- [5] (i) Applicants argue that the interpretation of the ordinary meaning of the words employed in clause 3.3 is straightforward and does not require additional tools of interpretation to give meaning there to. They argue that if no notice of non-renewal is given, then by operation of law the option to renew is exercised. They contend that the ordinary wording of clause 3.3 of the Lease Agreement, is simple, concise and straightforward to understand.
- (ii) In terms of the lease agreement, Applicant contends that the last date, upon which Respondent should have served it, with its notice of non-renewal of the Lease (giving it 90 (ninety) days written notice) was the 30th of June 2022 as the lease was scheduled to expire on the 30th September 2022 (in terms of article 2.1.2 of the schedule of information attached to the Lease Agreement).

(iii) Respondent having failed to give his written notification on or before the 30th June 2022, Applicant contends that the Lease was in terms of clause 3.3 of the Lease Agreement automatically renewed for further period of one year.

(iv) In its Founding Affidavit, Applicant at paragraph 14 thereof, states that:

“Following that meeting, and on the 19th August 2022 I received a letter from the Respondent purporting to terminate the Lease Agreement. A copy of that letter is annexed hereto marked “AG2”. In response thereto, Respondent at paragraph 7.5 of its Answering Affidavit, states as follows:

“The contents of paragraph 14 are noted save to add that such notice augments our understanding and interpretation of clause 3.3 of the Lease Agreement.”

Certainly, this is no answer to Applicant's allegation that they received written notification of Respondent's intention not to renew, well out of time.

- [6] Still on the issue of filing, Respondent's notification of its intention not to renew the Lease, Respondent, at paragraph 3.2 of its Heads of Argument contends that it:

"....eventually gave 90 (ninety) days' notice but from the 19th August 2022, about 40 days later than 1st July 2022. It can be unfair and unjust to penalize the Respondent for giving notice late but still within the same lease agreement."

Respondent further contends that the Court must take into account that it did not just leave the Applicant to hang and dry but, gave the full 90 (ninety) days' notice and religiously paid all rental due.

- [7] At paragraph 3.3 of Respondent's Heads of Argument, Respondent implores the Court not to allow Applicant to take a shrewd business approach of

oppressively forcing a non-affording tenant to continue occupying its premises for another period of twelve months. Doing so, by the Honourable Court will be tantamount to forcing the two parties to contract.

[8] Further, at paragraph 4.9.1.1, Respondent contends that Applicant has already concluded a new lease agreement with an unnamed tenant and their Landlord – tenant relationship is due to commence on the 1st February 2022. In support of this argument, Respondent has attached a letter from Applicant’s attorneys dated the 18th October 2022 attached to the Founding Affidavit. Paragraph 2 of this letter states as follows:

“We are instructed to advise that our client has now secured a tenant who shall take occupation of the premises as from the 1st February 2023. In that respect our client is prepared to release your client from its obligations in terms of the lease effective from 1st February 2023 on the basis that your client pays the entire rental up to and including 31st January 2023 and that this be done within a period of no more than seven business days from the date of this letter.”

Respondent's perception of the above letter is seemingly restricted to the fact that another tenant, is available to take over the lease as from the 1st February 2023. Respondent seems oblivious to the fact that, should in the final analysis, this Court find that the Lease Agreement between the parties, was automatically renewed, for a further period of a year. Without the olive branch extended by Applicant, its liability will be more extensive.

[9] In prayer 4 of its Notice of Motion, dated the 9th November 2022, Applicant seeks an order that:

“the Respondent is ordered to comply specifically with its obligations as set out in the Lease Agreement entered into between the parties dated 2 October 2021 and attached to the affidavit of Anthony Geldard marked “AG1”.

At paragraph 5.1 of its Heads of Argument, Respondent contends that the above prayer is for specific performance, directing Respondent to continue

occupying Applicant's property and to continue paying rentals therefor. At paragraph 5.2.1.1.1 he states as follows:

“In the present case, the Applicant is not ready to carry out its own obligation to have the Respondent continue occupying the premises because it has already concluded a new lease with a third party tenant and that lease commences on the 1st February 2023. Therefore, an order for specific performance is incompetent in this case and the Court is requested to refuse to exercise its discretion to grant specific performance.”

- [10] (i) Clause 3.3 of the Lease Agreement is fully set out in paragraph 2(iv)
(d)

of this Judgement and there is no need to have it repeated here. The clause grants Respondent, an option to renew the lease. If the Respondent is not desirous of renewing the lease he is legally obliged to give, Applicant a notice in writing, giving not less than 90 (ninety) days before the expiry of the initial period. Article 2.1.2 of the schedule of information attached to the Lease Agreement between the

parties, defines the Initial Period as one year and goes on to state that the duration of the Initial Period was from the 1st October 2021 to the 30th September 2023.

(ii) *In casu*, Respondent, in order to allow Applicant, the 90 (ninety) days' notice it required, should have given it notice not to renew the lease not later than the 1st July 2022. It proceeded to give its written notice on the 19th August 2022, thus giving Applicant a less period of time than the 90 (ninety) days agreed upon by the parties.

(iii) Apart from requiring the above written notice, the parties agreed that:

“Should the Lessee fail to give such notice, it will be accepted that the lease will run for the Renewal Period.”

Article 2.2 of the Schedule of Information attached to the Lease Agreement **annexure “AG1”** defines the Renewal Period, as one

year. In Article 2.2.1 the “Renewal Period” is set out as beginning on the 1st October 2022 to the 30th September, 2023.

COURT’S FINDINGS

[11] (i) The Court finds that, Respondent, by filing its written notice of renewal

on the 19th August 2022, (as per its admission in paragraph 1.4 of its Heads of Argument giving 41 days’ notice before the expiry of the lease on the 30th September 2022 amounts to a violation of clause 3.3 of the Lease Agreement, agreed to between the parties, as the clause required that a notice of non-renewal be given not less than 90 (ninety) days before the end of the lease, which in this case was the 30th September 2022.

(ii) The Court further finds that Respondent having failed to give Applicant, 90 (ninety) days written notice of its intention not to renew the Lease Agreement, (using the language of clause 3.3 of the Agreement) led to it;

“being accepted that the lease will run for the Renewal Period.”

Put differently, the failure by Respondent to give a 90 (ninety) days written notice of its intention not to renew the lease, led to it being automatically renewed.

(iii)The argument raised by Respondent that:

(a) It waited for its donors to confirm funding before determining whether or not, to continue occupying the leased premises for another 12 (twelve) months (see paragraph 1.6 of Respondent’s Heads of Argument).

(b) It lost its major donor (see paragraph 1.7 of Heads of Argument).

(c) Applicant wants to force a non-affording tenant to continue staying in premises in which it cannot afford to pay monthly rental for amounts to specific performance, where there is clearly an impossibility of performance by the tenant.

(d) It will be placed in an invidious position and soon as the interim order is confirmed, Applicant will be back in Court for an order for perfection of the Landlord's hypothec.

(e) Applicant has found another tenant to occupy the premises effective from the 1st February 2023 and that, Respondent cannot be held at ransom and be made to forcefully stay in the premises simply because the Applicant decided to enter into a new lease with a new tenant.

Is vile, and of little value, if any, regard being had to the fact that, Respondent failed and or neglected to give Applicant the required 90 (ninety) days written notice of its intention not to renew the Lease Agreement.

(iv) Lastly the Court, finds that in the circumstances of this case it made business sense for Applicant to mitigate its loss by securing a prospective tenant to occupy the premises at a future date, especially if the Court found that it was automatically renewed and the Respondent was for some reason or the other, unable to take occupation.

COURT ORDER

[12] Accordingly, the Court orders as follows:

- (i) The *rule nisi* issued by this Court on the 9th November 2022 is hereby confirmed.

- (ii) Respondent is ordered to pay costs on the ordinary scale.

J. M. MAVUSO
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: HENWOOD & COMPANY ATTORNEYS

For the Respondent: S M SIMELANE & CO. ATTORNEYS