

SOMETIMES PRUDENT TO AWAKEN SLEEPING DOGS

Sontsele v 140 Main Street Properties CC and Another (328/2019) [2020] ZASCA 85 (6 July 2020)

A 10 year lease agreement included an option to renew, subject to agreement regarding adjusted rental. At the end of the initial lease period and after indicating that it wanted to exercise the option to renew the lease, the tenant stayed on in the premises for a further 12 months, increasing the rental payment by its own doing in accordance with what it estimated was a market-related adjustment. Could the landlord then come and argue that the lease had lapsed after the initial period as there was no agreement on the rental amount?

The Judgment can be viewed [here](#).

FACTS

In June 2004 Mr Sontsele (the landlord) entered into a notarial lease agreement with Kokstad Properties CC (the tenant). The following provisions of the agreement are relevant to this matter:

- a. The lease shall commence on 1 July 2004 and shall terminate on 31st of May 2014;
- b. The tenant shall have an option to renew the agreement for two further periods of nine (9) years and eleven (11) months each, such renewal periods being subject to:
 - i. the option in respect of each renewal shall be exercised by the tenant by giving the landlord written notice at least six (6) months before the expiry of the initial lease or of a successive renewal period, whatever the case may be;
 - ii. the same terms and conditions shall apply to all renewal periods, save that the rental consideration will be determined by agreement between the parties based on the prevailing market rentals applicable to the property;
 - iii. 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 Estate Agents Board.

On 8 August 2013 the tenant wrote to Sontsele giving notice that it was exercising its right to renew the lease for the first renewal period, commencing 1 June 2014 and expiring on the 30 April 2024. The notice was silent as to the rental for the renewal period. Although no rental had been fixed between the parties, the tenant remained in occupation of the property after 31 May 2014. According to the tenant, '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 Sontsele from 1 June 2014 onwards. On 1 June 2015 the tenant 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.

These rentals did not meet with Sontsele's approval and, when further negotiations between the parties failed to yield fruit, Sontsele's attorney wrote to the tenant and stated that since there was no agreement on the amount of rental in respect of the new lease period, and no referral to a person appointed by the Estate Agents Board, the option was not validly exercised. Sontsele accordingly terminated the month-to-month lease that had come into existence and sought an order obliging the tenants to vacate.

In response, the tenant's attorneys stated that it sought an indication from the landlord as to the amount of rental and annual escalation that would be acceptable and, failing agreement in respect thereof, that the Estate Agents Affairs Board should be approached for appointment of a person to make a recommendation regarding the rental amount.

The dispute could not be resolved and Sontsele approached the Eastern Cape Division of the High Court, Mthatha for an order: (i) confirming the termination and cancellation of the notarial agreement of lease, effective 31 May 2014; (ii) declaring that the notarial agreement of lease was not renewed for a further period of 9 years and eleven months; (iii) declaring the month-to-month tenancy agreement that came about with effect from 1 June 2014, cancelled; and (iv) directing the tenant to vacate the premises.

The application was dismissed and Sontsele appealed to a full bench.

HELD

- In terms of the agreement, the option to renew was to be exercised by the tenant by giving the landlord notice in writing 'at least six months before the expiry of the initial lease period'. 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 . . .'. The first event, the giving of at least six months' notice did occur in due time in this case. 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. As agreement upon rent is an essential element of a lease, until such agreement had been reached no lease was concluded.
- In the present matter, the giving of notice could not bring a contract into existence as the rental amount still had to be agreed upon. The true effect of the option in the present agreement was that the due exercise by the tenant of the 'option' was nothing more than a notice to the landlord that he (the tenant) wished to renew and desired to negotiate. The parties are then in the position of negotiators, although neither was 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. This was however not necessary to be decided upon in this matter.)
- The failure of the parties to reach agreement on the rental to be paid was not the end of the road for the tenant as he had the option to request the Estate Agents Affairs Board to appoint a third party, as provided for in the lease agreement. However, the tenant did not invoke this provision upfront; only *after* the termination of the agreement by effluxion of time did the tenant suggest that the Board be approached. But, at that stage, the agreement had terminated and that clause did not survive the agreement. It was therefore no longer open to the tenant to rely on that provision.

CONCLUSION

It followed that the appeal had to succeed.