

## AN AGREEMENT TO AGREE ON THE RENTAL AMOUNT IF THE LEASE IS TO BE RENEWED: VERY PROBLEMATIC

Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC (1318/2018) [2019] ZASCA 178 (2 December 2019)

*The reason why an agreement to negotiate, like an agreement to agree, is generally unenforceable is simply because it lacks the necessary certainty. It can be salvaged in certain circumstances where there is an agreed method how to resolve a deadlock that may arise. This judgment is a case in point.*

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

### FACTS

Shepherd Industrial Commercial Real Estate CC (Shepherd) and Roux Le Roux Motors CC (the CC) concluded a lease agreement in November 2007, in terms of which Shepherd let a commercial property to the CC. The lease was to endure for an initial term of five years, with a renewal period of 5 years. The rental at commencement in December 2007 was R18,000 per month, escalating at 8% per year over the initial term.

Clause 6 of the lease agreement, headed 'Renewal Period', provided:

*"The Tenant shall have the option to renew this Lease of the Premises for a further period as set out in the Terms of Lease subject to the following:*

*6.1 The strict adherence & compliance to all terms and conditions of this agreement by the Tenant ...;*

*6.3 The Tenant requesting such renewal in writing from the Landlord no later than 6 (Six) months prior to the expiry of the lease period...*

*Such first renewal period shall be on terms and conditions in compliance with this agreement and the rental payable by the Tenant to the Landlord during the option period shall be increased on each anniversary of the commencement date by 8% of the monthly rental, which was payable during the year proceeding the option period.*

*Such renewal for the second lease renewal period, shall be on terms and conditions in compliance with the Landlord's then standard letting policy, except that there shall be no right of further renewal and that the rental and costs shall be mutually agreed upon in writing between the Landlord and the Tenant when the right of renewal is exercised...* (Our emphasis.)

The CC validly exercised the option during the initial term and the lease was extended for a further 5 years, terminating in November 2017. When the CC tried to renew the agreement for a second five year period, Shepherd indicated that it was amenable to the proposed renewal at a rental amount of R150,000 per month. This amount was unacceptable to the CC which argued that an 8% yearly increase (as before) was reasonable. The parties could not reach agreement on this aspect and Shepherd also refused to go to arbitration (as provided for in clause 34 of the lease agreement).

Shepherd thereafter proceeded to bring an application in the High Court for the ejection of the CC. This was unsuccessful and Shepherd appealed to the Supreme Court of Appeal. Here Shepherd argued, amongst other things, that the option for renewal was void for vagueness as the rental amount for the further extension was not determined

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or determinable; and in the alternative, that the agreement must be rectified to include that the parties agreed on a reasonable escalation of the rental.

## HELD

### **Agreement to agree**

- It is an established principle of our law that an agreement to agree is generally void unless it contains a deadlock-breaking mechanism. In the present context, this means that the invalidity of an option to renew a lease agreement that required the parties to agree on the rental amount payable during the contemplated renewal period could be cured, if there was a requisite deadlock breaking mechanism in the option.
- The proper approach in this enquiry would be to consider the construction of the agreement. The arbitration clause in this agreement could not serve as deadlock breaking mechanism, as it did not nominate an external arbitrator to resolve outstanding differences. In any event, an arbitrator would have been ill-equipped to fill in the blanks or resolve the questions that the parties could not. An arbitrator certainly could not give effect to arrangements that the parties themselves had not concluded and then require the party, who is resisting, to continue with the ongoing relationship. Nor, for that matter could the arbitrator simply invoke certain vague standards referred to in the renewal clause in this agreement.
- In addition, the arbitration clause did not survive the agreement. Thus, once the agreement terminated by effluxion of time, the CC could no longer invoke the arbitration clause.
- The agreement was thus incomplete and constituted an unenforceable agreement to agree.

### **Rectification**

- A party is entitled to rectification of a written agreement which, through common mistake, incorrectly records the agreement which the parties intended to express in the written agreement. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement. Here, on the CC's own version, there was no common mistake.
- Further, if the CC's contention was accepted, it would result not in rectification, but the creation of a new contract for the parties.
- Moreover, the CC relied on the renewal clause in support of its main defence. But, relying on the provision for the purposes of its main defence and seeking to escape it for the purposes of its alternative defence is mutually incompatible. 'No person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'.
- The CC was therefore not entitled to rely on the rectification defence.

## CONCLUSION

The appeal was upheld.