

LEASE RENEWAL: LANDLORD'S CONDUCT SPEAKS VOLUMES

Bartie N.O. and Others v Fraaikem Pharmacy (Pty) Ltd (A236/2021) [2022] ZAWCHC 157 (17 August 2022)

Against the backdrop of a messy lease renewal, the Court here found that the lease had in fact been renewed, despite the absence of a signed agreement and the tenant's late notification of its intention to exercise an option to renew. This because the conduct of the landlord was such as to imply that the agreement was in place and that it waived non-compliance with the notice period regarding the option to renew.

For landlords and tenants the judgment is a valuable reminder that failing conscientious paperwork, uncertainty arises and your conduct may, objectively viewed, signify that you have agreed to contract terms, despite a subjective intention to the contrary.

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

FACTS

The Edza Claud Trust ('the Trust') had entered into a lease agreement with Fraaiuitsig Medies CC ('Fraaiuitsig') from where it would conduct a pharmaceutical business. The lease was effective from 1 June 2014 to 31 May 2019, and contained a clause granting Fraaiuitsig a right to renew for a further five years upon six months' written notice.

During 2017, Fraaiuitsig informed the Trust of its intention to sell the pharmacy as a going concern to Ms Bossert. The Trust, referring to clause 6 of the lease, gave consent for the sale. It confirmed that the lease will remain extant until 31 May 2019, whereafter Fraaiuitsig will be released from its obligations under the lease and that until such time, Fraaiuitsig could sublease to Ms Bossert.

Clause 6 of the lease read as follows:

"SUB-LETTING, CESSION AND CHANGE IN OWNERSHIP/ MEMBERSHIP/ SHAREHOLDING/ DIRECTORSHIP

- 6.1 *The lessee shall not:*
- 6.1.1 *cede, assign, mortgage, pledge ... any of its rights or obligations under this Lease;*
 - 6.1.2 *sub-let the premises or any portion thereof; or*
 - 6.1.3 *place anyone else, whether as licensee, agent, occupier ... in occupation of the premises ... without the Lessor's prior written consent.*
- 6.2 *No change in the ownership, membership, shareholding or directorship of the Lessee shall take place without the written consent of the Lessor, which consent shall not be unreasonably withheld."*

Fraaiuitsig sold its business on 1 August 2017, not to Ms Bossert, but to a 'company to be established', which in the end was Fraaikem. Fraaikem was incorporated on 15 August 2017 and Ms Bossert was a director. After the sale, the Trust sent the monthly rental invoices directly to Fraaikem and received payment from Fraaikem.

On 3 December 2018 Fraaikem sent an e-mail to the Trust informing it of its intention to renew the lease agreement, and requesting that the renewed lease should be between Fraaikem and the Trust (and constituting a counter offer by Fraaikem). This was 3 days into the 6 month notice period.

More than 5 months later, on 23 May 2019, the Trust responded and asked for certain documents of the directors and of the company for purposes of drafting a new lease. These were supplied and the Trust thereafter sent a new lease to Fraaikem for signature. The new lease stated that it was between the Trust and Fraaikem and was to commence on 1 June 2019 as per the counter offer suggested by Fraaikem.

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On 28 June 2019, before Fraaikem had returned the signed lease to the Trust, the Trust sent an eviction notice to Fraaikem on the basis that the option to renew the lease agreement was not exercised by Fraaiuitsig as required by the original lease, and that Fraaikem was occupying the premises without any lease agreement. On that same date, Fraaikem attempted to deliver a signed copy of the lease agreement, dated 27 May 2019, which the Trust refused to accept.

Subsequent negotiations failed and the Trust approached the High Court Cape Town (‘the court *a quo*’) for an eviction order.

Proceedings in the court a quo

The Trust argued that its lease agreement with Fraaiuitsig could not in law have been renewed by Fraaikem because Fraaikem was not a party to the original lease. In any event, it went on, there was no timeous notice given for the renewal of the lease agreement since the purported renewal by Fraaikem was out of time by some 3 days, which is common cause.

Fraaikem submitted that the original lease agreement was ceded, assigned and/or delegated to it by Fraaiuitsig, and that the Trust impliedly or tacitly consented to this through its conduct.

The court *a quo* found in favour of Fraaikem and the Trust appealed to a full bench of the High Court.

HELD

- The main basis for the court *a quo*'s decision is the Appellate Division case of *South African Railways & Harbours (SAR & H) v National Bank of SA Ltd* which held as follows:
“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.”
- The court *a quo* applied this dictum to interpret the Trust’s conduct of sending the renewal agreement to Fraaikem on 27 May 2019, as waiver of its right to rely on late renewal of the lease, and acceptance of Fraaikem’s late exercise of an option to renew.
- What is stated in *SAR&H v National Bank* remains good law and, in terms of the doctrine of quasi-mutual assent, means that a party cannot escape from an apparent agreement merely because his or her subjective intention differed from the apparent agreement. An objective approach is adopted to determine whether there was consensus between parties.
- In applying the doctrine to the facts of this case, the decisive questions are: Did the Trust lead Fraaikem, as a reasonable party, to believe that its declared intention, as embodied in the renewal contract, represented its actual intention? To answer this question, a three-fold enquiry is necessary: Firstly, was there a misrepresentation as to the Trust’s intention; secondly, who made that representation; and thirdly, was Fraaikem misled thereby? The last question postulates two possibilities: Was Fraaikem actually misled and would a reasonable person have been misled?

Agreement came into existence

- On the facts one has to conclude that it was reasonable of Fraaikem to rely on the Trust’s presentation of the renewal contract as an indication of its intention to be bound to an agreement. The renewal contract of 27 May

2019 constituted acceptance of Fraaikem's counter offer, thus giving rise to an enforceable contract between the parties.

Late notification of renewal

- As to the meaning to be given to the renewal contract - whether it was a renewal or a new contract - that is also to be inferred from the outward manifestation of the parties' conduct. The request of 3 December 2018 by Fraaikem was for renewal of a contract, for a five-year duration, and for the insertion of its name as a party to the renewal agreement. This is the agreement it received from the Trust. There was no complaint received from the Trust that the email of 3 December 2018 was out of time, or that Fraaikem was not an original party to the original agreement and was, as a result, precluded from exercising an option to renew the lease.
- The court *a quo* was therefore correct to find that the Trust, by its conduct of sending the renewal contract, assigned the lease agreement to Fraaikem and substituted Fraaiuitsig with Fraaikem, accepted Fraaikem's late exercise of an option to renew, and at the same time waived its right to rely on late renewal of the lease.
- In addition:
 - Assignment of the original lease could only be effected in terms of clause 6 of the original lease which required the consent of the Trust. That provision was for the exclusive benefit of the Trust as the owner of the premises. As a result, the requirement for written consent could be waived by the Trust.
 - The same applies to the acceptance of the late renewal of the lease and the application of the non-variation clause of the lease agreement. They were similarly for the benefit of the Trust, and could, as a result be waived by it. And it did waive these clauses through its conduct of sending the renewal contract in the circumstances of this matter.

Signature

- The next question was whether Fraaikem's failure to furnish the Trust with a signed copy of the renewed contract before 1 June 2019, or before the Trust had sent its notice of eviction, invalidated the contract. To determine this issue one must have regard to the terms of the agreement. On its terms, the operation of the renewal contract was not conditional upon any particular manner of acceptance. It did not contain a provision that signatures were necessary in order to bring the new lease agreement into effect.
- As a result, the fact that the lease did not contain signatures cannot serve to invalidate the lease.
- The attitude displayed by the Trust in its letter of 28 June 2019 and in these proceedings evinces an intention to renege from the agreement that it had bound itself by only a month earlier. However, as the evidence shows, by then, Fraaikem had incurred costs and entered into arrangements to further their business at the premises for a further five years, on the basis of the renewal contract.

In the circumstances, the appeal is dismissed.