**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE DIVISION – GRAHAMSTOWN**

Case No: 1154/2018

Date Heard: 8/11/18

Date Delivered: 14/02/19

NOT REPORTABLE

In the matter between:

**ROLJINI VELLOO** Applicant

and

**JANESH RAMA** Respondent

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**JUDGMENT**

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**MAKAULA J:**

*A. Introduction*:

[1] The applicant brought an application for the eviction of the respondent from her property being portion of Erf 13165 known as Erf 22883. "The Velloo Central Complex, Braelyn, East London".

*B. Background:*

[2] The applicant and the respondent entered into a lease agreement commencing on 1 June 2014 due to expire on 31 May 2017.

[3] The respondent neither vacated the premises on 31 May 2017 nor exercised the right to renew the lease agreement in writing.

[4] The respondent contends that on 19 May 2017 the parties subsequently entered into an oral Lease Agreement which would endure for a period of five years. The applicant was duly represented by his son, Avershinn Velloo (Avershinn), so contends the respondent. The applicant denies that there is an oral Lease Agreement between them. She contends that she merely sent her son on a "fact finding" mission to persuade the respondent to vacate the premises.

[5] Various correspondence was exchanged between the parties duly represented by their respective attorneys. Once there was no agreement reached, the current application was launched by the applicant. The respondent remains in occupation of the property.

*C. <u>The written Lease Agreement</u>:*

[6] The salient provisions of the written Lease Agreement are the following:

> "2. **COMMENCEMENT DATE AND DURATION**
>
> The Lease shall endure for a period of **THREE years** from the commencement date being the **1st June 2014** (hereinafter referred to as "the initial period").
>
> 3. **OPTION TO RENEW**
>
> The Lessees shall have the option to renew this Agreement of Lease for a further period of **THREE years.** The rental will have an annual escalation rate of 10%**.** The Lessee shall notify the Lessor in writing of his intention to

exercise this option, not later than **TWO (2) MONTHS** before the expiry of the initial period.

8. **NOTICES**

All notices required to be given by either party to the other shall be deemed to have been validly given if and when posted by prepaid registered post, addressed to:-

8.1 The Lessor at: - Shop 1, Velloo Central Complex, East London

8.2 The Lessee at: - Shop 4, Velloo Central Complex. East London

In which event it shall be deemed to have been brought to the attention of the addressee on the third day following the date of posting thereof.

9. **SCHEDULE OF CONDITIONS**

The Lessee by its signature hereto acknowledges that it *(sic)* has fully acquainted itself *(sic)* with the contents and import thereof and binds itself *(sic)* to each and every term and condition set out in the **Schedule and General Conditions** annexed hereto marked "A".

[7] The relevant clauses of Annexure "A" are the following:

"15. **VARIATION**

The terms and/or conditions of this lease shall not be capable of being waived and/or varied unless such waiver or variation is reduced to writing and signed by both the lessor and the Lessee. (My underlining).

17. **ENTIRE AGREEMENT**

The Lessee acknowledges that this document including all documents annexed hereto or to which it is annexed, sets out the entire agreement between the Lessor and the Lessee and neither the Lessor (nor its agents or servants) have given any warranties or made any statements or representations of any nature whatsoever which are not recorded in this lease". (My underlining).

*D. Dispute between the Parties:*

[8] The applicant contends that the provisions of the written Lease Agreement are explicit and spell out the manner in which the renewal of the lease was to be effected. The applicant avers that the contentions by the respondent that the terms of the written Lease Agreement have been orally negotiated in May 2017 are totally false and unenforceable.

[9] In an effort to assist the respondent, the applicant through her attorneys considered certain proposals by the respondent. But she realised that such proposals were not acceptable to her and instructed her attorneys to reject the proposals in writing hence the letter dated 8 June 2017 referred to in the papers. The letter and subsequent correspondence advised the respondent to vacate the premises on 15 June 2017. In spite thereof, negotiations continued. The applicant

states that in October 2017 she tendered an offer for a one year lease but the respondent insisted on a five year lease. The plaintiff did not agree on that hence this application.

[10] The respondent is opposing the application on the basis that, both parties entered into an oral agreement on 19 May 2017. The applicant was duly represented by her son Avershinn as aforesaid. The term of the oral agreement is that the lease shall endure for a period of five years starting from 1 June 2017. The respondent denies that they are in unlawful occupation of the property. In support of their contention, the respondent relies extensively on the correspondence and a recorded meeting held between the parties especially with Averhsinn.

[11] The involvement of Avershinn in the lease negotiations according to the respondent started in early July 2016 about renovations which needed to be effected on the building. The applicant advised him that she was no longer dealing with matters relating to the lease but her Avershinn was. Nothing came of the renovations. He was shocked when Avershinn gave him the letter dated 4 April 2017 advising that the lease expires on 31 May 2017. He engaged Avershinn on the issue and on 19 May 2017, in the presence of respondent's silent partner Desi Naidoo, an agreement that the respondent would carry out the renovations and certain improvements on the property. The lease would continue and the rent would escalate as before. The period agreed upon was five years with an option of renewal. Pursuant to the oral agreement, Avershinn asked the respondent to meet with him at his attorney's office on 29 May 2017 in order for them to sign a new Lease Agreement. Unfortunately, the meeting was cancelled because Avershinn

advised him that he was involved in an accident. The respondent was surprised to receive a letter dated 8 June 2017 from applicant's attorneys, the contents of which partially read:

> "We wish to advise that client has now instructed us to communicate his final decision to you. After seriously considering the matter, our client has decided not to accept your proposal. We are instructed that whilst client had various meetings with you concerning the improvements to the building and after thorough investigation, our client feels that you do not have the correct dynamics to operate the proposed business to its full potential.
>
> Our client has accordingly, had to consider the matter on business grounds and has decided that you will have to vacate the premises and remove your assets by no later than 15h00 on 15th June 2017".

[12] The correspondence from the respondent's attorneys dated 30 June 2017 and 11 July 2017 states that a new lease agreement had been concluded. Paragraph 2, 3 and part of paragraph 4 of the letter dated 30 June 2017 read:

> "Our clients contend that your client entered into an agreement with them, in terms whereof the Lease was extended for a period of five (5) years with an option to renew thereafter.
>
> Our instructions are that on 19 May 2017, your client met with our client and Desi Naidoo at the leased premises and confirmed that our client would have an extension of a five (5) year lease together with a first option to renew, and

that our client would carry out the improvements set out in our client's proposal to your client dated 12 April 2017.

It was understood that the same terms and conditions of the previous Lease would apply in the rental escalating in the normal manner at 10% per annum. . ."

[13] On 19 May 2017 the parties agreed that the respondent shall carry out the improvements as reflected in their letter dated 12 April 2017, so argued the respondent. The respondent understood that the same terms applicable to the previous Lease Agreement would apply to the new lease. The respondent states that he does not accept the repudiation of the new oral Lease Agreement contained in the letter dated 8 June 2017.

*E. Argument:*

[14] Mr Cole, in a nutshell, argued that the terms and conditions of the written Lease Agreement are binding and instructive as to the relationship between the parties. The oral Lease Agreement relied upon by the respondent was allegedly entered into during the subsistence of the written Lease Agreement and therefore the written terms must prevail, so he argued. Mr Cole relied in this regard on the provisions of clauses 3 and 15 of the written Lease Agreement.

[15] Ms Stretch, for the respondent, argued that the applicant expressly held out to the respondent that Avershinn had full authority or ostensible authority to negotiate and conclude a new agreement in respect of the premises. The oral Lease

Agreement is a new agreement and not a renewal of the written lease, so she argued. She submitted that I have to find that the applicant is estopped from changing to say that Avershinn had no requisite authority to conclude a new Lease Agreement on her behalf. The respondent submits further that Avershinn had authority or ostensible authority to bind the applicant and that is bolstered by the following factors:

- in the meeting of 11 July 2017 the applicant admitted that she allowed Avershinn to take over the business. The applicant said "handle it and sort it out";

- the admission made, that the applicant and Avershinn signed a Lease Agreement with Barry Francis;

- the express instruction to the respondent to engage with Avershinn in regard to all aspects of the leased premises.

- the shaking of hands by Avershinn and the respondent after they met and concluded their discussions at the premises;

[16] Ms Stretch referred me to various decisions.[1] In respect of estoppel, Ms Stretch relied on the matter of *Monzali v Smith*[2] and various other authorities which state the requisites to establishing agency by estoppel. I shall not deal with them in

[1] *Blower v Van Noorden* 1909 TS 890 at page 900 – 901; *Schachat Cullum (Pty) Ltd and Another v McLearie* 1998 JOL 1727 (W) at page 15.
[2] 1929 AD 382 TP 384 – 386.

regard to this judgment. Suffice to state that I have considered those decisions but found them to be inapplicable herein.

*F. Analysis:*

[17] The provisions of clause 17 of the written Lease Agreement are couched in peremptory terms and are binding on both parties equally. Clause 17 provides that "no waiver nor variation of the terms of the agreement between the parties shall be effected unless they are recorded and signed by both parties". In *SA Sentrale Ko-Op Graanmaatskappy BPK v Shifren en Andere*[3] a stipulation or condition in a written contract provided that "any variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect". The court held that the contract could not be altered verbally. The principle was confirmed by the Full Court in *Brisley v Drotsky*[4]. Cameron JA, as he then was, agreeing with the majority judgment.

That which is covered by Cameron JA has not been pleaded to be so in this matter. I therefore would not delve into it.

[18] It is common cause that a non-variation clause might not prevent a party from relying on estoppel, but effect will be given to a clause which acts as a glossary of future conduct by stating that conduct which might otherwise be interpreted as a waiver of rights is not to be so interpreted. However, Hathorn J, in *Sotiriadis v Patel,* referring to such a clause, said the following:

[3] 1964(4) 760 (A). Headnote thereof.
[4] 2002(4) SA 1 SCA at 34 E-G.

"It is a notice by the lessor and an acknowledgement by the lessee that conducts on the part of the lessor which might otherwise give rise to an estoppel may not be taken by the lessee to be such conduct. If a prudent lessee has been given such a notice in advance and wishes to ensure the continued operation of the lease, he knows that he must comply strictly with his obligations and that if he does not do so he is running the risk of having the lease cancelled without further notice. He is not, or should not be, taken by surprise if strict compliance with the lease is insisted upon. Nor is there bad faith on the part of the lessor if, having so given notice, he relies upon a breach and cancels the contract".[5]

[19] I find this dictum to be applicable in *casu.* Clause 15 of the Lease Agreement spells out the manner in which the waiver and/or variation shall occur. As it is couched, it gives notice to either party of how in future the waiver and variation shall occur. The learned author RH Christie[6] rounds the provision of a variation clause as follows:

> "A non-variation clause will effectively prevent waiver in the general sense of an informal agreement to vary or cancel the contract, but it will not prevent one party waiving a provision of the contract that is entirely for his benefit or waiving the right to pursue his remedy for a breach that has already occurred. The reason is that waiver in this sense does not amount to a variation of the contract but is either a *pactum de non petendo* that can stand alongside it or a unilateral act that does not require the consent of the other party. The parties

[5] The Law of Contract in South Africa by RH Christie 5th ED at page 449.
[6] *ibid* page 449.

may also waive a non-variation clause by simply not relying on it even when litigation ensues. Unlike illegality, the existence of such a clause is not a point that could be raised by the court *mero motu".*

[20] In *casu*, clause 17 is categorical in recording that the lessee acknowledges that the Lease Agreement "sets out the entire agreement between the Lessor and the Lessee and neither the Lessor (nor its agents or servants) have given any warranties or made any statements or represent actions of any nature which are not recorded in this agreement". Clause 17 read with clause 3 in peremptory terms stipulate that:

". . . (t)he lessee shall notify the lessor in writing of his intention to exercise this option, not later than **TWO (2) MONTHS** before the expiry of the initial period".

The two months' notice is even written in bold in the written agreement.

[21] I need not go further in analysing the submissions by the respondent. The defence of estoppel is not applicable in this instance. The oral agreement alleged by the respondent cannot be a valid agreement in the light of the peremptory provisions of clauses 15 and 17 of the written lease agreement. The non-variation agreement is valid and binding on the respondent and the defence of estoppel is not available to him[7].

[22] The application stands to be upheld.

[7] Kerr's Law of Sale and Lease, 4th Edition, Graham Clover page 444.

[23] Consequently, the following order shall issue.

1. The application is upheld with costs.

2. The respondent is ordered to vacate the premises on or before 31 March 2019.

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**M MAKAULA**
**Judge of the High Court**

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| For Applicant: | Adv SH Cole |
| | Grahamstown |
| Instructed by: | Neville Borman & Botha |
| | Grahamstown |
| For Respondent: | Adv Strecht |
| Instructed by | Netteltons Attorneys |
| | Grahamstown |
| Date Heard: | 8 November 2018 |
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