IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2020/28545

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

…….
L.J. DU BRUYN **7 MAY 2021**

In the matter between:

AIRPORT INN AND SUITES (PTY) LIMITED Applicant

(Registration number 2012/208882/07)

and

JACOBUS JOHANNES STEPHANUS STRYDOM Respondent

(Identity number [….])

JUDGMENT

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[1] This is an opposed application. The Applicant seeks a monetary judgment, an eviction order and ancillary relief against the Respondent.

[2] The Applicant launched this application on an urgent basis on 30 September 2020 and enrolled it for hearing on 13 October 2020. Having heard argument, Francis J struck the matter from the roll with costs for lack of urgency on 14 October 2020. The application came before me after the Applicant set it down for hearing on the ordinary opposed roll.

The relief sought by the Applicant

[3] The relief relating to urgency not having been granted, the remaining relief sought by the Applicant is set out as follows in its notice of motion:

> "2. The Respondent to pay the sum of R17,196.60 (Seventeen Thousand One Hundred and Ninety Six Rand Sixty Cents) to the Applicant;
>
> 3. Interest on the aforesaid sum of R17,196.60 at the rate of 7.75% per annum, *a tempore morae*.
>
> 4. The Respondent and all those claiming occupation under or through him are forthwith evicted from the premises situated at Restaurant and Bar, Airport Inn and Suites … ('the Premises');
>
> 5. The Sheriff of the area within which the premises is situated, is authorised to evict the Respondent and all persons holding occupation under him and further remove all equipment and furniture of the Respondent situate in the premises;
>
> 6. The Sheriff is authorised to approach the South African Police Service for assistance and support in performing its duties in relation to paragraphs 4 and 5 above;
>
> 7. The Respondent to pay the costs of this application on attorney-and client scale, including the costs of the Sheriff and storage;"

The facts and the parties' main contentions thereon

[4] It is convenient to start by setting out the relevant facts and the parties' main contentions thereon.

[5] The Applicant and the Respondent concluded a written commercial lease agreement (the agreement) on 30 January 2020. In terms of the agreement, the Respondent leased a restaurant and bar (the restaurant and bar) from the Applicant. The Respondent operates the restaurant and bar under the trading name 'Wings Restaurant and Pub'. The premises where the restaurant and bar are situated is a three storey apartment

block with self-catering facilities, operated by the Applicant under the trading name 'Airport Inn and Suites'. The agreement was for a fixed term of twelve months that commenced on 24 September 2019 and expired on 23 September 2020. The relevant clauses of the agreement read:

> "**RENEWAL OF LEASE**
>
> 2. It is agreed between the parties herein that [the Respondent] will have an option to renew this lease for a period of an additional 12 ('twelve') months, which renewal shall not be unreasonably withheld/refused by [the Applicant].
>
> …
>
> **RENTAL DURING THE RENTAL PERIOD**
>
> 5. The rental payable by [the Respondent] shall be in the sum total of R10,500.00 (Ten Thousand Five Hundred Rand) per month, including VAT, made up as follows:
>
> 5.1 Restaurant: R2,500.00 (Two Thousand Five Hundred Rand) per month, including VAT; and
>
> 5.2 Bar: R8,000.00 (Eight Thousand Rand) per month, including VAT
>
> …
>
> **[THE RESPONDENT'S] RIGHTS AND OBLIGATIONS**
>
> 9. [The Respondent] shall:
>
> …
>
> **The Restaurant and Bar**
>
> …
>
> 9.14 To work in concert with [the Applicant], as and when necessary, in arranging, *inter alia*, special meals, events, functions, and workshops, which permission shall not unreasonably be withheld.
>
> …
>
> **APPLICABLE LAW AND JURISDICTION**
>
> …
>
> 22. Either of the parties to this agreement shall be entitled at its option to institute legal proceedings which may arise out of or in connection with this agreement in any Magistrates' Court having jurisdiction, notwithstanding the fact that the claim or value of the matter in dispute might exceed the jurisdiction of such Magistrates Court in respect of the case or action."

[6] During about December 2019 there was an incident (the December 2019 incident) at Airport Inn and Suites.

6.1 The Applicant contends that one of the Respondent's employees, Ms Nosihle Octavia Mabaso (Mabaso), was found drunk at Airport Inn and Suites. The Applicant further contends that Mabaso's conduct was disruptive and generally detracted from the peace and pleasantness of Airport Inn and Suites. In support

of its contentions, the Applicant relies on an email that the Respondent addressed to the Applicant's building manager, Mr Kenny Subramoney (Subramoney), on 10 December 2019. According to the Applicant, the email confirmed 'Mabaso's drunken incident'. It reads:

> "Good morning Kenny
>
> Subsequent to our meeting last week Friday night, herewith my suggestions:
>
> I do believe that the time that has lapsed has allowed everyone to reconsider the situation and behavior. In this regard I know for a fact that [Mabaso] has done so and now understand the consequences to her actions.
>
> I visited the AA branch yesterday and made arrangements for [Mabaso] (and me) to attend 2 meetings per week, 1 on Mondays and 1 on Fridays. Unfortunately we are dealing with a disease and I (and [Mabaso]) see this as crucial for any chance of recovery. In addition to this, I have met with our Pastor at Hope and Restoration Church and was promised the church's support in terms of weekly counselling sessions.
>
> [Mabaso] is not doing well at the moment and feels like the world has turned it's back on her and that she is being alienated from a job, her children and the basic human rights that everyone have.
>
> I will ensure that we attend sessions, that she is not allowed to use alcohol on the premises and that we all live and work together in harmony and peace, as I promised to Bradleigh last week.
>
> We need to play our part in getting her reconciled with her children. Even the children are uncertain and doesn't understand why they are not allowed to be with their mother. As you know, this is the time of the year for family and I am of the opinion that now is the time to act."

6.2 The Respondent denies that Mabaso was drunk during the December 2019 incident. He asserts that Subramoney incorrectly assumed Mabaso to have been drunk. According to the Respondent, Mabaso was not drunk, but angry. He states that Mabaso 'verbally defended herself against unfair treatment by' Subramoney. Mabaso filed a confirmatory affidavit.

[7] On 2 May 2020, there was a further incident (the May 2020 incident) at Airport Inn and Suites.

7.1 The Applicant contends that Mabaso was found inebriated and lying on the ground at Airport Inn and Suites on 2 May 2020. In this regard, the Applicant relies on a photograph attached to the founding affidavit. The Applicant alleges that the photograph was taken by its 'security company'.

7.2 The Respondent asserts that the photograph attached to the founding affidavit is unclear and shows 'someone who might look like' Mabaso. He contends that the Applicant 'jumps to assumptions of inebriation'.

[8] On 7 August 2020, the Respondent launched an urgent application (the magistrate's court urgent application) against the Applicant in the Kempton Park magistrate's court.

8.1 The magistrate's court urgent application was set down for hearing on 13 August 2020. It was, however, removed from the roll by agreement between the parties. It has not been enrolled since then.

8.2 It appears from the notice of motion in the magistrate's court urgent application that the Respondent seeks the following relief against the Applicant:

> "3. That this Honourable Court will grant an order to compel the Respondent to disclose the details in the form of documentary evidence of a catering contract that was awarded and commenced on the 30th of July 2020, to an unknown catering company, in relation to a group of 53 mine workers and in relation to a group of 12 security staff from Fidelity Guards in as far as:
>
> 3.1 What efforts were made to involve WINGS RESTAURANT AND PUB in the catering process?
>
> 3.2 Date and time of request for a quote from the current catering entity?
>
> 3.3 Date and time of quote received from the current catering entity?
>
> 3.4 Who obtained the quote from the catering company?
>
> 3.5 The quote details?
>
> 3.6 Who accepted the quote and awarded the quote to the catering company?
>
> 3.7 What are the payment terms on both these contracts?
>
> 3.8 What procedures were put in place at AIRPORT INN AND SUITES as well as the catering company in terms of the Disaster Management Act?
>
> 4. That this Honourable Court will grant an order to compel the Respondent to declare and disclose the COVID 19 status of a group of 53 mine workers that has been residing at AIRPORT INN AND SUITES since the 30th of July 2020.
>
> 5. That this Honourable Court will grant an order that in the instance where AIRPORT INN AND SUITES have been certified as a quarantine facility by the Department of Health (Gauteng), that the required certification be displayed in the reception area of AIRPORT INN AND SUITES in clear view of the other guests, staff and permanent residents.
>
> 6. Costs against the Respondent in this matter, only if opposed;"

8.3 The Applicant contends in respect of the magistrate's court urgent application that it is not obliged in terms of clause 9.14 of the agreement to obtain catering services from the Respondent. The Applicant also contends that it is authorised to accommodate essential workers, such as mineworkers. In conclusion, it is contended that the magistrate's court urgent application is frivolous, vexatious and amounts to an abuse of court process.

8.4 The Respondent contends that he had no option but to launch the magistrate's court urgent application to limit his financial damages and to protect himself, and others, against the risk of being infected by the Coronavirus. The Respondent asserts that he only launched the magistrate's court urgent application after numerous verbal and written requests by him to the Applicant for information had remained unanswered.

[9] On 17 August 2020, the attorneys for the Applicant, KWA Attorneys (KWA), sent a notice to the Respondent. The Applicant refers to it as a 'notice to vacate' (the notice to vacate).

9.1 The notice to vacate reads as follows in relevant part:

> "2. What is set out hereunder is not an exhaustive synopsis of all relevant events. Our failure to deal with any issues may not be construed as a waiver thereof. Our client's right to deal more fully therewith at a later stage and in the appropriate forum is reserved.
>
> 3. We refer you to the commercial lease between you and our client signed on 30 January 2020, in terms of which your lease for the Restaurant and Bar ('the Premises') terminates on 23 September 2020. Please note that, given the material break down in relationship between the parties caused, *inter alia*, by:
>
> 3.1 An irreconcilable difference in interpretation and understanding of the terms of the lease agreement;
>
> 3.2 Your subsequent launching of a frivolous and unfounded Urgent Application against our client in the Kempton Park Magistrate's Court (Case Number: …); and
>
> 3.3 Your failure and/or refusal to settle your residential rental arrears in respect of Unit … at Airport Inn and Suites, which arrears currently stand at R39,900.00 (Thirty Nine Thousand Nine Hundred Rand) since May 2020;
>
> our client has elected <u>not</u> to renew your commercial lease.
>
> 4. In the circumstances, our client demands that you vacate the Premises on or before 23 September 2020, and accordingly hereby gives you notice to vacate same.
>
> 5. Should you fail to vacate the Restaurant and Bar on or before 23 September 2020, our client reserves the right to take legal steps against

you, including, but not limited to, applying for your eviction. In pursuing such legal recourse, our client will seek an appropriate costs order against you."

9.2 The Respondent replied to the notice to vacate by email on 12 September 2020. His email reads as follows in relevant part:

"3. In terms of the current commercial lease agreement ('the lease agreement') between ourselves, I have the option to extend/renew same for another 12 (twelve) months, and your client shall not be entitled to refuse such extension/renewal unreasonably.

4. I hereby elect to exercise my option to extend/renew the commercial lease agreement between ourselves, and as a consequence shall not vacate the premises as you demand in your letter under reply, as I am entitled to.

5. In as much as your letter under reply constitutes a refusal of the election of me to renew the commercial lease agreement between ourselves, such a refusal is indeed unreasonable and therefore unlawful, contrary to the terms of the lease agreement, for the reasons set out below.

6. First, there is no rational contractual connotation and/or notion in contractual law in South Africa to the effect that if, between parties to an agreement, which if they differ on the interpretation of the agreement between them, the terms of such agreement can be disregarded.

7 Pactum sum servanda est.

8. …

9. Second, there is no rational or legal connotation between our current litigation and the terms of the commercial lease agreement your letter under reply refers to. There is no indication or reference in the written commercial lease agreement, to which the respective parties are bound, which suggests same.

10. Third, I again firmly deny that I am indebted to your client in the amount claimed or any amount for the residential lease mentioned in your letter under reply. In addition I pause to mention that I have been paying and is seemingly still held liable for the electricity charges of equipment, office and bathrooms at AIRPORT INN AND SUITES, in direct contravention of the commercial lease agreement.

11. Regardless, there is no rational or legal connection between the residential lease agreement and the commercial lease agreement with your client.

…

13. Therefore I shall not vacate the leased premises as is demanded in your letter under reply.

14. Your demands in your letter under reply are irrational and unlawful. I therefore consider the commercial lease agreement to be renewed.

…

> 18. The current lease agreement between me and your clients shall be accordingly enforced by me."

9.3 On 14 September 2020, KWA addressed a further email to the Respondent. Paragraph 3 thereof reads:

> "Our client will not be renewing the lease and you are accordingly expected to vacate the Premises on or before the termination date, namely, Wednesday, 23 September 2020."

9.4 The Respondent replied to KWA's last email on 21 September 2020. He wrote, *inter alia*, as follows:

> "Your clients' refusal to renew the said lease agreement in accordance with the terms thereof, as I have stated in my previous correspondence, is unreasonable and constitutes a breach of the lease agreement.
>
> I do not accept your clients' breach of our agreement, and hereby inform you that I choose to enforce same, as I am entitled to do by virtue of the agreement between your client and me.
>
> …
>
> I shall remain in occupancy of the leased premises.
>
> …
>
> In the meantime, I deny that I am liable for payment of the rental claimed on Invoice no. 25267 in the amount of R17,196.60 which was transmitted to me electronically today, or at all."

[10] On 1 September 2020, the Applicant concluded a written commercial lease agreement (the Raciti agreement) with Mr Antonio Raciti (Raciti). In terms of the Raciti agreement, Raciti would have leased the restaurant and bar from the Applicant. The Raciti agreement would have been for a fixed term that would, initially, have commenced on 28 September 2020 and expired on 30 April 2021. When the Respondent failed to vacate the restaurant and bar, the Applicant agreed with Raciti on 29 September 2020 that the fixed term of the Raciti agreement would only commence on 1 November 2020.

[11] The Respondent is also a residential lessee at Airport Inn and Suites. The Applicant alleges that the Respondent was in arrears in respect of his residential rent in the amount of R49 875 as at 1 September 2020. The Respondent admits that he is in arrears in respect of his residential rent. He denies, however, that the amount of his arrears is what the Applicant alleges it to be.

[12] On 17 September 2020, KWA sent the Applicant's invoice 25267 (the invoice) to the Respondent for commercial rent under the agreement.

12.1 I reproduce a portion of the invoice:

Qty	Description	Unit Price	TOTAL
1	Rent June Restaurant pro-rata from 26 June 2020 to 30 June 2020 (5 days)	R83.30	R416.50
1	Rent July Restaurant	R2 500.00	R2 500.00
1	Rent August Bar for period 18 August 2020 – 31 August 2020 (14 days)	R266.60	R3 732.40
1	Rent August Restaurant	R2 500.00	R2 500.00
1	Rent September Bar 01 September 2020 – 23 September 2020 (23 days)	R266.60	R6 131.80
1	Rent September Restaurant – 01 Sept 2020 – 23 Sept 2020 (23 days)	R83.30	R1 915.90
		SubTotal	R17 196.60 Vat Incl.
		TOTAL	R17 196.60

12.2 The Applicant contends that the amount of R17 196,60 is due, owing and payable to it by the Respondent. In relation to the invoice, the Applicant states that, in light of the national lockdown, it provided the Respondent with rent relief during the times when restaurants and bars were not allowed to operate. The relevant part of the founding affidavit reads:

> "The Applicant only charged the Respondent pro-rata figures for the periods when Restaurants and Bars were permitted to operate during the lockdown. The effect of this is that, instead of incurring rental expenses the sum of R63,000.00 (Sixty Three Thousand Rand) for the period of April 2020 to September 2020, the Respondent is only indebted to the Applicant in the mere sum of R17,196.60 (Seventeen Thousand One Hundred and Ninety Six Rand and Sixty Cents)."

12.3 The Respondent denies that he is indebted to the Applicant for commercial rent under the agreement. He states that the Applicant 'created' the commercial rent arrears as part of a stratagem to evict him and to bolster this application. Along the same lines, the Respondent contends that the Applicant 'raised' the invoice to find a reason not to consent to the renewal of the agreement. The Respondent also states that he had been paying electricity charges for twelve months that should not have been for his account.

<u>The Respondent's points *in limine*</u>

[13] In his answering affidavit, the Respondent quotes various provisions of the Consumer Protection Act 68 of 2008 (the CPA) under headings that, purportedly, relate to points *in limine*. The Respondent makes allegations below each quotation from the CPA. However, those allegations do not relate to the quoted provisions and do not constitute points *in limine*. The only contention of the Respondent that is clear from his purported points *in limine* is that the CPA applies to the agreement.

The applicability of the Consumer Protection Act 68 of 2008

[14] In order to determine whether or not the CPA finds application in this case, it is necessary to consider whether the Applicant, the Respondent and the agreement fall within the scope of the CPA.

[15] The CPA defines 'person' as including a juristic person. 'Supplier' is defined as a person who markets any goods or services. The CPA further defines 'service' as including the provision of use of any premises or other property in terms of a rental. Having regard to these definitions, I am satisfied that the Applicant, for purposes of this application, is a supplier as contemplated in the CPA.

[16] Section (*b*) of the definition for 'consumer' in the CPA provides, *inter alia*, that a consumer, in respect of any particular goods or services, means a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business. In order to determine whether a person to whom this definition relates is a consumer as contemplated in the CPA, it must be established (i) whether or not a transaction had been entered into, (ii) whether or not the person with whom the transaction had been entered into was a supplier, and (iii) whether or not the transaction had been entered into in the ordinary course of the supplier's business. It has already been established that the Applicant, for purposes of this application, is a supplier as contemplated in the CPA. It remains to be established whether or not the agreement constitutes a transaction as contemplated in the CPA and, if it does, whether or not the transaction was entered into in the ordinary course of the Applicant's business as contemplated in the CPA.

[17] 'Transaction' is defined in the CPA as meaning, *inter alia*, in respect of a person acting in the ordinary course of business, an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration. The phrase 'in the ordinary course of business' appears in the definitions of both 'consumer' and 'transaction' in the CPA. The meaning of this

phrase is determinative of the meanings of 'consumer' and 'transaction'. Thus, it is necessary to establish the meaning of the phrase 'in the ordinary course of business'.

[18] In *Amalgamated Banks of South Africa Limited v De Goede and Another* [1997] 2 All SA 427 (A), the Appellate Division considered whether the two respondents in that case had acted in the ordinary course of their business when binding themselves as sureties.[1] The *De Goede* case was decided in the context of the provisions of sections 15(2)(*h*) and (6) of the Matrimonial Property Act 88 of 1984. With reference to *AA Mutual Insurance Association Ltd v Biddulph and Another* 1976 (1) SA 725 (A) at 738D–739F, the Appellate Division held that a single isolated activity may, in appropriate circumstances, be deemed as 'business'.[2] It was held in *Biddulph*'s case that –

> "'business' should be given a wide rather than a narrow meaning. Precisely how wide is difficult to say and unnecessary and inadvisable to determine here. Each case must be decided on its own particular facts. …
>
> … I think that even a single, isolated activity, enterprise, or pursuit of serious importance that occupies a person's time, energy, or resources would also, in appropriate circumstances, be included within the meaning of 'business' …"[3]

[19] In establishing the meaning of the phrase 'in the ordinary course of business' in *De Goede*'s case, the Appellate Division referred with approval to *Hendriks NO v Swanepoel* 1962 (4) SA 338 (A) at 345B, *Joosab v Ensor NO* 1966 (1) SA 319 (A) at 326D–E and *Ensor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) at 824H–825A.[4] In *Joosab*'s case and in the context of section 34(1) of the Insolvency Act 24 of 1936, the Appellate Division set out the test for determining whether a transaction was 'in the ordinary course of business'. It was held that the test is an objective one, namely whether, having regard to the terms of the transaction and the circumstances under which it was entered into, the transaction was one which would normally have been entered into by solvent business people.[5] This objective test under the Insolvency Act 24 of 1936 must be adjusted for purposes of applying it to the CPA. Reference should not be made to *solvent* business people, but merely business people.[6]

[20] The test for determining whether a transaction was 'in the ordinary course of business' in order to establish whether a person is a consumer as contemplated in the CPA, is an objective one, namely whether, having regard to the terms of the transaction and the

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1 *Amalgamated Banks of South Africa Limited v De Goede and Another* [1997] 2 All SA 427 (A) at 433*b*.
2 *De Goede supra* at 434*h*.
3 *AA Mutual Insurance Association Ltd v Biddulph and Another* 1976 (1) SA 725 (A) at 738H–739C.
4 *De Goede supra* at 434*i*–435*c*.
5 *Joosab v Ensor NO* 1966 (1) SA 319 (A) at 326D–F.
6 Compare *De Goede supra* at 435*b*–*c*.

circumstances under which it was entered into, the transaction was one which would normally have been entered into by business people. Similarly, the test for determining whether an agreement for the supply of any goods or services in exchange for consideration constitutes a transaction as contemplated in the CPA, is an objective one, namely whether, having regard to the terms of the agreement and the circumstances under which it was concluded, the agreement was one which would normally have been concluded by business people.

[21] Applying these tests to the facts of this case, I am satisfied that the agreement constitutes a transaction as contemplated in the CPA for purposes of this application. I am also satisfied that the agreement, being a transaction, was entered into in the ordinary course of the Applicant's business as contemplated in the CPA. The agreement was, in my judgment, a transaction with the usual terms that business people would normally conclude in the circumstances of this case. That being so, all the requirements have been complied with for the Respondent, for purposes of this application, to be a consumer as contemplated in the CPA.

[22] Having regard to the above, it is clear that the Applicant, the Respondent and the agreement fall within the scope of the CPA. I am fortified in this finding by the definitions of 'consumer agreement' and 'agreement' in the CPA. 'Consumer agreement' is defined as an agreement between a supplier and a consumer other than a franchise agreement. 'Agreement' is defined as an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them. These definitions provide an accurate description of the relationship established between the Applicant and the Respondent through the agreement. As a result, the CPA finds application in this case.

<u>Applying the provisions of the CPA to the facts of this case</u>

[23] Sections 14(2)(*c*) and (*d*) of the CPA provide as follows:

> "If a consumer agreement is for a fixed term –
>
> …
>
> (*c*) … not more than 80, nor less than 40, business days before the expiry date of the fixed term of the consumer agreement, the supplier must notify the consumer in writing or any other recordable form, of the impending expiry date, including a notice of –
>
> (i) any material changes that would apply if the agreement is to be renewed or may otherwise continue beyond the expiry date; and

> (ii) the options available to the consumer in terms of paragraph (*d*); and
>
> (*d*) on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to any material changes of which the supplier has given notice, as contemplated in paragraph (*c*), unless the consumer expressly –
>
> (i) directs the supplier to terminate the agreement on the expiry date; or
>
> (ii) agrees to a renewal of the agreement for a further fixed term."

[24] The Applicant did not provide the Respondent with the notice contemplated in section 14(2)(*c*) of the CPA. Even if it was argued that the notice to vacate complied with the content requirements of section 14(2)(*c*) of the CPA, it was sent less than 40 business days before the expiry of the agreement.

[25] This leads to the question: Does a lessor's failure to comply with section 14(2)(*c*) of the CPA mean that the relevant fixed term lease agreement will be automatically continued on a month-to-month basis upon its expiry as provided for in section 14(2)(*d*) of the CPA? In my judgment, it does not. If this was the case, unscrupulous lessors would be able to negate whatever renewal options their lessees might enjoy in terms of the fixed term commercial lease agreements concluded between them. This would undermine and be contrary to the purposes of the CPA. The preamble to the CPA records that it is necessary to develop and employ innovative means to protect the interests of all consumers. It is also clear from its preamble that the CPA was enacted to promote and protect the economic interests of consumers. Section 2(1) of the CPA provides that the CPA must be interpreted in a manner that gives effect to the purposes set out in section 3 thereof. Section 3 of the CPA provides, *inter alia*, as follows:

> "The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by –
>
> (*a*) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, … sustainable and responsible for the benefit of consumers generally;
>
> …
>
> (*c*) promoting fair business practices;
>
> (*d*) protecting consumers from –
>
> (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
>
> (ii) deceptive, misleading, unfair or fraudulent conduct;"

[26] In these circumstances and by virtue of the provisions of clause 2 of the agreement, the Applicant's failure to comply with section 14(2)(*c*) of the CPA did not have the effect of the agreement automatically continuing on a month-to-month basis upon its expiry as

provided for in section 14(2)(*d*) of the CPA. The rights of the parties must be determined by having regard to clause 2 of the agreement.

Applying the provisions of clause 2 of the agreement to the facts of this case

[27] In terms of clause 2 of the agreement, the Respondent had an option to renew the agreement for a further period of twelve months, which renewal would not be unreasonably refused by the Applicant.

[28] The Respondent exercised his option to renew the agreement. The Applicant refused to consent to the renewal. The question is whether or not the Applicant was reasonable in its refusal.

Was the Applicant reasonable in refusing to consent to the renewal of the agreement?

[29] The determination of whether or not the Applicant was reasonable in refusing to consent to the renewal of the lease requires an evaluation of the reasons provided by the Applicant for its refusal.

29.1 The Applicant advanced three reasons in the notice to vacate. The first and second reasons both relate to the magistrate's court urgent application. The Applicant asserted that there was an irreconcilable difference in the interpretation and understanding of the terms of the agreement. This, it is to be recalled, led to the Respondent's launching of the magistrate's court urgent application, which the Applicant described in the notice to vacate as 'frivolous and unfounded'. The third reason advanced by the Applicant in the notice to vacate was the Respondent's residential rent arrears.

29.2 The Applicant advanced four reasons in this application. First, Mabaso's alleged drunken conduct. Second, the Respondent's launching of the magistrate's court urgent application. Third, the Respondent's alleged commercial rent arrears. Fourth, the Respondent's residential rent arrears.

[30] In *South African National Parks v MTO Forestry (Pty) Ltd and Another* (446/2017) [2018] ZASCA 59 (17 May 2018), Rogers AJA held as follows:

> "Commercial leases often contain terms that the tenant may only do certain things with the consent of the landlord and that the landlord's consent may not be unreasonably withheld. English, South African and other Commonwealth courts follow a broadly similar approach to such clauses."[7]

[31] In *1455202 Ontario Inc. v. Welbow Holdings Ltd. et al.* [2003] O.T.C. 396 (SC), the sole issue that the Superior Court of Justice of Ontario had to decide was whether the landlord had unreasonably withheld its consent to an assignment by the tenant of its lease.[8] The lease provided that the tenant would not, during the term of the lease or any renewals thereof, assign the lease in whole or in part to or in favour of any person without the prior written consent of the landlord, such consent not to be unreasonably withheld.[9] The court held that –

> "[i]n determining the reasonableness of a refusal to consent, it is the information available to – and the reasons given by – the Landlord at the time of the refusal – and not any additional, or different, facts or reasons provided subsequently to the court – that is material: …"[10]

[32] I am in respectful agreement with this *dictum*. The reasonableness of a lessor's refusal to consent should be determined with reference to the reasons advanced by the lessor at the time of refusal. Additional or different facts or reasons provided by a lessor to a court subsequently should not be taken into account when determining the reasonableness of the lessor's refusal to consent. There are, in my judgment, good grounds for a court to only concern itself with the reasons advanced by a lessor at the time of refusal. The reasons advanced by the lessor at the time of refusal can reasonably be expected to be the true reasons. The lessor's refusal to consent may impact negatively on the relationship between the parties. A deterioration of the relationship between the parties might cause a situation where the lessor conjures up additional reasons for refusing to consent. An unscrupulous lessor might even find ways to create additional reasons to refuse consent. A court's determination of the reasonableness of a lessor's refusal to consent solely on the basis of the reasons advanced by the lessor at the time of refusal, is also a matter of fairness to the lessee involved. It is not hard to imagine a situation where a lessee, having been refused consent for reasons advanced by the lessor at the time of refusal, cures the issues underlying those reasons only to be confronted with additional or different reasons advanced by the lessor in subsequent litigation.

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7 *South African National Parks v MTO Forestry (Pty) Ltd and Another* (446/2017) [2018] ZASCA 59 (17 May 2018) at paragraph [73].
8 *Ontario Inc. v. Welbow Holdings Ltd. et al.* [2003] O.T.C. 396 (SC) at paragraph [1].
9 *Welbow Holdings supra* at paragraph [6].
10 *Welbow Holdings supra* at paragraph [9].

[33] For these reasons, I shall determine the reasonableness of the Applicant's refusal to consent to the renewal of the agreement with reference only to the three reasons advanced in the notice to vacate.

[34] As stated, the first and second reasons advanced by the Applicant in the notice to vacate both relate to the magistrate's court urgent application. The Applicant asserted that there was an irreconcilable difference in the interpretation and understanding of the terms of the agreement. This irreconcilable difference was part of the reason why the Respondent launched the magistrate's court urgent application. The Applicant described that application as 'frivolous and unfounded' in the notice to vacate.

34.1 Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. On the Applicant's own version, there is a dispute between the parties regarding the interpretation and understanding of the terms of the agreement. There is also a dispute between the parties about whether or not Airport Inn and Suites is certified as a quarantine facility. In terms of section 34 of the Constitution, the Respondent has the right to have these disputes decided in a fair public hearing before a court.

34.2 Clause 22 of the agreement provides that either of the parties shall be entitled to institute legal proceedings which may arise out of or in connection with the agreement in any magistrate's court having jurisdiction. The dispute between the parties regarding the interpretation and understanding of the terms of the agreement clearly arose out of or in connection with the agreement. The Respondent acted within his contractual rights by launching the magistrate's court urgent application.

34.3 It is not for this court to decide whether or not the magistrate's court urgent application is frivolous, unfounded, vexatious or an abuse of court process. That application is not before this court. The magistrate hearing the magistrate's court urgent application should decide the Applicant's contentions that that application is frivolous, unfounded, vexatious or an abuse of court process.

34.4 In the circumstances, I find that the Applicant's refusal to consent to the renewal of the agreement on the basis of the Respondent's launching of the magistrate's court urgent application was unreasonable.

[35] It has already been stated that the third reason advanced by the Applicant in the notice to vacate was the Respondent's residential rent arrears.

35.1 With reference to a number of English, South African, Australian and Canadian cases, Rogers AJA held, *inter alia*, as follows in the case of *MTO Forestry*:

> "[73] … Stated as general propositions, the landlord may not refuse consent 'on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease' … .
>
> [74] … And in *Houlder Brothers*[11] Pollack MR said that the covenant could not be so interpreted as to entitle the landlord to rely on a reason 'which is independent of the relation between the lessor and lessee' … ."[12]

35.2 In the case of *Welbow Holdings*, the court held that –

> "a refusal will … be unreasonable if it was … wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: …"[13]

35.3 The Respondent's obligation to make payment of his residential rent is not reflected in the terms of the agreement. His residential rent arears is wholly unconnected with the commercial relationship between the parties under the agreement. This means that the Applicant refused consent on a ground which had nothing whatever to do with the relationship between it and the Respondent in regard to the subject matter of the agreement.

35.4 In the circumstances, I find that the Applicant's refusal to consent to the renewal of the agreement on the basis of the Respondent's residential rent arrears was unreasonable.

<u>The Applicant's claim for arrear commercial rent under the agreement</u>

[36] The Applicant claims arrear commercial rent under the agreement in the sum of R17 196,60. The sum is made up of the amounts set out in the invoice.

[37] The Applicant significantly asserts that it only charged the Respondent pro-rata rent for the periods when restaurants and bars were permitted to operate during the lockdown.

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11 Reference to authorities omitted.
12 *MTO Forestry supra* at paragraphs [73] and [74].
13 *Welbow Holdings supra* at paragraph [9].

That is why, for example, the rent in respect of the restaurant for June 2020 was only R416,50 instead of R2 500 as agreed in clause 2 of the agreement.

[38] I stated that the Applicant's assertion regarding pro-rata rent is significant. Its significance becomes apparent when one considers the following statement on 12 August 2020 in the Applicant's answering affidavit in the magistrate's court urgent application:

> "As can be seen from what is set out above the Respondent has tried to assist the Applicant where it could, for example, by not charging any rental to the Respondent *(sic)* over the last three months."

[39] The Applicant presents this court with two mutually destructive versions relating to the Respondent's alleged arrear commercial rent. On the one hand, the Applicant asserts that it did not charge the Respondent any rent during June 2020, July 2020 and August 2020. On the other hand, the Applicant asserts that it only charged the Respondent pro-rata rent for the periods when restaurants and bars were permitted to operate during the lockdown. Having regard to the contents of the invoice, the periods during which the Applicant would allegedly only have charged the Respondent pro-rata rent included June 2020, July 2020 and August 2020.

[40] In the circumstances, the Applicant has failed to make out a case for its claim relating to the Respondent's alleged arrear commercial rent under the agreement.

Conclusion

[41] The Applicant's refusal to consent to the renewal of the agreement was unreasonable. The effect of this finding is that the agreement was renewed for a period of twelve months that commenced on 24 September 2020 and shall expire on 23 September 2021.

[42] The Applicant was unable to prove its claim for arrear commercial rent under the agreement.

[43] In the result the following order is made:

1. The application is dismissed.

2. The Applicant is to pay the Respondent's costs.

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L.J. du Bruyn
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date heard:	8 February 2021
Judgment delivered:	7 May 2021
For the Applicant / Plaintiff:	S. Kabelo (Attorney) of KWA Attorneys
For the Respondent / Defendant:	The Respondent appeared in person