In the High Court of South Africa

KwaZulu-Natal Local Division, Durban

Case No : 1140/2013

In the matter between :

Quintas Properties (Pty) Ltd Applicant

and

Lusitania Food Products (Pty) Ltd Respondent

Judgment

Lopes J

[1] In this application the applicant seeks the eviction of the respondent from commercial premises situated at Bayhead in the port of Durban ('the premises'). The application is opposed. In addition the respondent has brought an application for the adjournment of the application, alternatively the suspension of any eviction order which may be granted pursuant to the main application.

[2] The facts leading up to the application for eviction may be summarised as follows :

(a) in 1997 a lease agreement ('the main agreement') was concluded between Transnet Ltd and the applicant, Quintas Properties CC (which was later converted into Quintas Properties (Pty) Ltd), in terms of which Transnet agreed to lease the premises to the applicant;

(b) the lease was for the period from the 1st February 1996 to the 31st January 2013;

(c) on the 24th May 2004 the applicant and the respondent concluded a sub-lease of the premises. In terms of the sub-lease :

(i) the sub-lease would endure from the 1st March 2004 for three years to the 28th February 2007;

(ii) the obligations of the applicant in the main lease were made applicable in each and every respect to the respondent in the sub-lease;

(iii) the sub-lease was at all times dependent on the main lease, and in the event that the main lease was terminated for any reason whatsoever, the sub-lease would likewise terminate and the respondent would have no claim against the applicant arising from such termination for any reason whatsoever;

(d) on the 28th February 2007 (the date of termination of the sub-lease) the applicant and the respondent agreed to the extension of the sub-lease on a month to month basis ('i.e. subject to one month's notice by either party') and

the rest of the provisions of the sub-lease, save for rent and the duration of the sub-lease, were to apply;

(e) the respondent continued in occupation of the premises, and on the 20th December 2012 the applicant addressed the respondent in writing complaining of the non-payment of rental for the month of December 2012, and giving the respondent notice in accordance with the sub-lease to remedy its breach. In addition the applicant gave the respondent one month's notice of the termination of the lease, to take effect from the 31st January 2013 by which date the respondent was required to have vacated the premises. (Although the letter refers to one month's 'cancellation of the lease' it is clear that what was intended was a termination of the sub-lease on one month's notice);

(f) on the 28th January 2013 the applicant again addressed the respondent in writing recording that they had failed to remedy their breach of the non-payment of rental within the time allowed and recorded the applicant's election to cancel the sub-lease. The letter also contained the following paragraph :

'Further to our negotiations of a possible continued relationship between the parties and with a view to thus entering into a new agreement of lease, we propose settlement of the arrears outstanding in an amount of R531 236,66, which shall be payable immediately and a revised rental amount, effective 1 February 2013, in the amount of R88 035,88 per month. This offer is made without prejudice to any of our herein contained rights or those as expressed in the aforesaid letter.

Kindly indicate your acceptance of the offer herein contained, by close of business on the 30th January 2013, failing which, we once again refer you to the letter addressed to you dated 20

December 2012, and again record that the date as set out therein on which you will be required to vacate the leased premises is 31 January 2013.'

(g) on the 29th January 2013 the respondent wrote to the applicant in the following terms :

'… I confirm that we accept the increased rental of R88 035,88 effective 1 February 2013. We do, however, contest the amount of R531 236 as this is contrary to our previous correspondence and undertakings …'

(h) no further correspondence was exchanged between the parties until this application for eviction of the respondent from the premises was served on the respondent during October 2013. In this application the applicant relies upon the following grounds :

(i) the fact that on the 31st January 2013 the main agreement between Transnet and the applicant terminated, and accordingly the sub-lease automatically terminated;

(ii) the applicant's letter of the 20th December 2012 giving the respondent one calendar month's notice to vacate the premises;

(iii) the fact that the respondent continued to occupy the premises in breach of the agreement between the parties and the termination of the sub-lease;

(i) in its opposition to the application for eviction, the respondent maintains that a new monthly lease agreement had been concluded with an agreed monthly rental with effect from the 1st February 2013. In addition the respondent claimed the existence of an improvement lien which it intended to exercise until its costs in the sum of R197 432,24 were paid by the applicant;

(j) in the alternative the respondent submitted that there was good reason for the suspension of any eviction order;

(k) in its replying affidavit the applicant contended that the respondent had refused to agree to pay the proposed arrear rental amount stipulated in the offer made by the applicant in the letter of the 28th January 2013. The respondent had, instead, merely accepted the increased rental with effect from the 1st February 2013 as contained in its letter of the 29th January 2013. The applicant maintained that in those circumstances there could be no question of a renewed agreement having been concluded and that the applicant had sought to negotiate a settlement of the matter which had essentially been rejected by the respondent, and no agreement had been concluded.

[3] There were a number of allegations and counter-allegations regarding peripheral issues in the application. Suffice it to say that by the time the matter was argued before me, it was common cause between the parties that :

(a) the main lease between Transnet Ltd and the applicant was as per the document annexed to the applicant's founding affidavit;

(b) the sub-lease of the premises by the applicant to the respondent was concluded with the consent of Transnet Ltd;

(c) the obligations of the applicant in the main lease were transferred to the respondent in terms of the sub-lease;

(d) on the 31st January 2013 the main lease between the applicant and Transnet Ltd terminated automatically;

(e) this had the consequence that on the same day the sub-lease between the applicant and the respondent terminated automatically;

(f) from the 1st February 2013 to date (and with the possible exception of the month of November 2013, which I will deal with later in this judgment) the respondent paid the monthly rental of R88 035,88 plus VAT per month to the applicant;

(g) no correspondence was exchanged between the parties between the 1st February 2013 and the launch of this application, in relation to the continued occupation of the premises by the respondent, and nothing was conveyed to the respondent to indicate that the applicant had accepted those monthly payments on any other basis than that they were rental payments.

[4] In my view this application may be decided on one point only – i.e. whether a new agreement came into conclusion between the parties with effect from the 1st February 2013. In the event that such an agreement came into being there is no need for me to deal with the adjournment of the application, the lien or the suspension of any order of eviction.

[5] Mr *van Reenen,* who appeared on behalf of the applicant, submitted that in its answering affidavits, the respondent relied upon the exchange of correspondence in order to found its claim that the sub-lease had been renewed on a month to month

basis. It did not claim that there has been a tacit relocation of the month to month lease agreement.He submitted that the letter of the respondent dated the 29th January 2013 constituted a counter-proposal and invited a response which had not been forthcoming.

[6] He further submitted that the subsequent circumstances in which the respondent was allowed by the applicant to stay on in the premises until this application was launched some nine months later, and that the applicant accepted the exact amount which had been proposed as rental, were not factors which I could take into account because a tacit acceptance of the contract was not alleged by the respondent.

[7] Mr *Marais* SC who appeared for the respondent submitted that I should consider the renewal of the agreement in the light of the parties' conduct and that an holistic view of their relationship was required to be taken in order to determine whether a renewal of the sub-lease had been concluded. He pointed to the payments in the exact amount of the rental, and the fact that no letters were exchanged as unequivocal indications that the parties had both accepted that the sub-lease had been renewed on a month to month basis. Mr *Marais* submitted that the applicant could not now raise the automatic termination of the lease by Transnet Ltd and the subsequent automatic cancellation of the sub-lease, because the applicant had by virtue of the letters and its conduct concluded a renewed sub-lease.

[8] With regard to the possibility of the non-payment of rent in November of 2013, I appear to be faced with a suggestion by the applicant that that amount had not been paid and an averment by the respondent that it had been paid. The answer to this appeared to be an accounting exercise, to be resolved upon a determination of the accounting records of the two parties. As neither of them had resolved this issue, and as both parties seemed uncertain as to the true position, I make no finding on this aspect. I do not believe, in any event, that it makes a difference to the outcome of this application.

[9] In a similar vein in *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others* 2002 (1) SA 822 (SCA) a franchise agreement had expired and the franchiser and franchisee had continued to do business as they had previously done during the subsistence of the agreement. Almost a year after the expiry of their initial agreement, when they had in the interim continued to conduct business as before, the franchiser sought to terminate the relationship. In this regard Harms JA stated at paragraph 4 of the judgment :

'After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease) between the appellant and Sirad (*Shell South Africa (Pty) Ltd v Bezuidenhout and Others* 1978 (3) SA 981 (N) at 984 B – E). A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement (*Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O) at 139 D – E; *Shell* at 985 B – C). The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court

has regard to the external manifestations and not the subjective workings of minds (*Fiat SA* at 138 H – 139 D).'

[10] Mr *van Reenen* may be correct in his suggestion that the letter of the 29th January 2013 addressed by the respondent to the applicant constituted a counter-proposal. If it did, then the applicant, by its conduct in accepting the exact rental proposed in its letter for approximately nine months after the 1st February 2013, and without giving any indication to the respondent that it did not accept the counter-proposal, and in allowing the respondent to occupy the premises without demur, agreed to the conclusion of a contract which the parties clearly intended would be on the same time period as before – i.e. on a month to month basis. No other reasonable explanation for the conduct of the parties has been submitted, and I can conceive of no other explanation than that they both believed the month to month contract had been renewed.

[11] In view of my findings above, it is not necessary for me to express a view as to whether it would be appropriate to suspend the operation of any eviction order to which the applicant may become entitled. It is also not necessary to deal with application for an adjournment or the alleged lien exercised by the respondent.

[12] I accordingly make the following order :

1. The application for an adjournment is dismissed. The costs of the preparation of affidavits in the application for an adjournment are to be paid by the respondent.

2. The main application is dismissed with costs, such costs to include those consequent upon the employment of senior counsel.

Date of hearing : 27th May 2014

Date of judgment : 4th June 2014

Counsel for the Applicant : D van Reenen (instructed by Strauss Daly Attorneys)

Counsel for the Respondent : J Marais SC (instructed by Johan Oberholzer & Co)