



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 250/2022

In the matter between:

DANIEL NEL PRETORIUS

APPELLANT

and

AGRICULTURAL RESEARCH COUNCIL

RESPONDENT

Neutral citation: *Pretorius v Agricultural Research Council* (Case no 250/22)
[2023] ZASCA 76 (29 May 2023)

Coram: SCHIPPERS, CARELSE, MABINDLA-BOQWANA,
GOOSEN and MOLEFE JJA

Heard: 18 May 2023

Delivered: 29 May 2023

Summary: Law of contract – lease of farm – agreement allowing renewal provided lessee not in default of its terms – purported renewal by lessee whilst in default of obligations – invalid – counterclaim for lost profits arising from sublease – unsustainable as purported renewal of agreement of no force or effect – lessee issuing cheque for arrear rental – payment stopped – claim on dishonoured cheque upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Schippers JA (Carelse, Mabindla-Boqwana, Goosen and Molefe JJA concurring)

[1] This is an appeal against an order of the Gauteng Division of the High Court, Pretoria (the high court), directing the appellant, Mr Daniel Nel Pretorius (the defendant), to pay the sum of R439 300.92 together with interest and costs to the respondent, the Agricultural Research Council (the plaintiff), in respect of arrear amounts owing under a lease agreement. The high court (Louw J) also dismissed the defendant's counterclaim for payment of R4 860 000 for lost profits, with costs. The appeal is with its leave.

[2] The basic facts are largely common ground and can be briefly stated. On 1 August 2001 the parties concluded a written lease agreement in terms of which the plaintiff let a farm known as Plot 103, Kameeldrift, Pretoria (the property), to the defendant for a period of nine years and 11 months, which commenced on 1 August 2001, terminating on 30 June 2011 (the initial agreement).

[3] The initial agreement contained the following terms. The defendant would be invoiced for rental (R350 per hectare per year with an annual escalation of 10% on the ground only) during March of every year, ending on 31 March. The rental invoice had to be paid by no later than 31 May of each year. The defendant was given an option to renew the lease, subject to the express condition that the right of renewal could not be exercised while he was in breach or default of any of the terms of the agreement.

[4] At first the rental was paid annually in accordance with the terms of the initial agreement. However, that changed when the defendant made arrangements with the plaintiff to make frequent payments during the course of the year, instead of paying an annual amount. The defendant fell into arrears with his payment obligations and on 13 October 2009, the outstanding balance owed to the plaintiff was R206 219.43. Consequently, the defendant signed an acknowledgement of debt (AOD) on 2 November 2009, in terms of which he admitted that he was indebted to the plaintiff in respect of municipal services to the property in the sum of R206 219.43. The defendant paid this amount in instalments to the plaintiff.

[5] Subsequently, the defendant again fell into arrears with his payment obligations under the initial agreement. On 15 October 2010 he signed a second AOD in terms of which he acknowledged his indebtedness to the plaintiff in the amount of R203 043.95, in respect of municipal charges (the second AOD). The defendant undertook to pay this amount by way of a minimum monthly instalment of R20 000 and to settle the outstanding balance by 31 March 2011. The first monthly instalment was payable by 25 November 2010 and each subsequent instalment had to be paid on or before the 25th day of each succeeding month, until the arrears and interest were paid.

[6] On 25 November 2010, whilst in arrears with his obligations under the initial agreement, the defendant purported to exercise the option to renew that agreement in writing. The plaintiff therefore contended that the purported renewal was of no force and effect, and that the initial agreement came to an end by the effluxion of time on 30 June 2011.

[7] After 30 June 2011, the defendant continued to occupy the property. The plaintiff's case was that this occupation was in terms of a month-to-month agreement. The defendant denied this. He claimed that the initial agreement had been renewed and that he was entitled to occupy the property until 31 May 2021.

[8] On 28 March 2014 the plaintiff's attorneys informed the defendant that the plaintiff had cancelled the lease agreement, gave him notice to vacate the property by 30 July 2014, and demanded payment of arrear amounts arising from his lease of the property in the sum of R439 300.92. The defendant's response to the termination notice was that it was a repudiation of the agreement, which was not accepted, and he tendered payment of the arrears. On 20 June 2014 the defendant issued the plaintiff with a cheque for the arrears in the sum of R439 300.92. When the plaintiff presented the cheque for payment, it was dishonoured – the defendant had stopped payment.

[9] The plaintiff then sued the defendant in the high court for payment of arrear rental in the amount of R502 707.84, founded on an alleged month-to-month lease agreement; alternatively, for payment of R439 300.92 based on the dishonoured cheque. The defendant brought a counterclaim for payment of R4 860 000 for lost profits, allegedly arising from an oral agreement which he had entered into on 2 July 2012, to sublease the property to a third party until 31 May 2021. The plaintiff raised a special plea of prescription to the defendant's counterclaim,

namely that it was served more than three years after the date on which the claim arose.

[10] The high court decided the issue of prescription *in limine*, on the assumption that the defendant had exercised his right to renew the lease in accordance with the terms of the initial agreement. The plea of prescription was upheld. The court found that prescription began to run on 28 March 2014, ie the date on which the plaintiff allegedly repudiated the agreement, and that a period of more than three years had elapsed before the defendant's counterclaim was served on the plaintiff on 6 July 2017. Consequently, the counterclaim was dismissed with costs. The high court dismissed the plaintiff's claim for arrear rental based on a month-to-month agreement. The alternative claim for payment of R439 300.92, founded on the dishonoured cheque, succeeded.

[11] The main issue on appeal is the validity of the defendant's purported renewal of the initial agreement on 25 November 2010. As already stated, he was precluded from exercising the option to renew the lease if he was in breach or default of any of its terms. When the defendant ostensibly exercised that right, he was in arrears with his payment obligations under the initial agreement. He signed the second AOD in which he accepted that he owed the plaintiff R203 043.95, being arrears in respect of municipal charges.

[12] Counsel for the defendant however argued that the option was validly exercised, because he 'was not in breach of the second AOD'. That AOD, so it was argued, 'was a *pactum non petendo* in the form of a waiver of the plaintiff's right to cancel the agreement', and 'an alteration of the defendant's payment obligations', which 'constituted an amendment of the initial agreement'. Then it was submitted that the AOD was 'not merely a concession by the plaintiff to the defendant, but a waiver that was contractual in form'.

[13] The argument is misconceived. First, a defence of waiver must be pleaded, which the defendant failed to do.¹ What is more, the party relying on the waiver of a contractual right bears the onus to allege and prove that the other party had full knowledge of that right when it allegedly abandoned it.² Clear proof of a waiver is required: it must be shown that the party alleged to have waived not only acted with full knowledge of its rights, but that its conduct is irreconcilable with the continued existence of such rights, or with the intention of enforcing them.³ The defendant neither alleged nor proved that the plaintiff had waived any right under the initial agreement.

[14] Secondly, the argument that the second AOD amended the initial agreement is directly at odds with clause 24.1 of the agreement. It provided:

‘24 **Non-waiver**

24.1 Neither party shall be regarded as having waived, or be precluded in any way from exercising, any right under or arising from this lease by reason of such party having at any time granted any extension of time for, or having shown any indulgence to, the other party with reference to any payment or performance hereunder, or having failed to enforce, or delayed in the enforcement of, any right of action against the other party.’

[15] Thus, the initial agreement was not altered in any way by the execution of the second AOD, which was nothing more than an indulgence granted to the defendant. In any event, the agreement contained a non-variation clause, designed to prevent informal or oral variations without a written agreement between the parties, and which eliminates any disagreement about whether any amendment to the initial agreement was concluded. Clause 23.1 provided that the lease ‘constitutes the entire agreement between the parties’. Clause 23.3 stated:

¹ *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO, and Another* [1965] 4 All SA 285 (A); 1965 (4) SA 373 (A) at 381B-C.

² *Feinstein v Niggli and Another* [1981] 2 All SA 92 (A); 1981 (2) SA 684 (A) at 698F; *Borstlap v Spangenberg en Andere* [1974] 4 All SA 25 (A); 1974 (3) SA 695 (A) at 704E-H.

³ *Borstlap* fn 2 at 704E-H; *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (A); 2000 (4) SA 38 (SCA) para 19.

‘No variation or consensual cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by both parties.’

A clause such as this, described as ‘the doctrine that contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject-matter of a contract, which they may alter only by again resorting to writing’,⁴ remains enforceable.⁵

[16] The second AOD was the clearest admission by the defendant: (i) that he was in default of his obligations under the initial agreement; (ii) as to how the default arose; and (iii) of the steps taken to cure the default. The high court thus correctly found that the defendant was in default of his obligations under the initial agreement when he purported to exercise the option to extend the lease.

[17] This finding has four consequences. The first is that on 2 July 2012, the defendant could not have entered into any sublease of the property until 31 May 2021, for the simple reason that he had no right to do so: the main lease had not been extended. The second is that the foundation of the defendant’s counterclaim has been destroyed. The third is that the issue of prescription does not arise, and no more need be said about it. And the fourth is that the cheque which the defendant issued to the plaintiff for payment of arrear amounts, could never have been subject to the condition he purportedly imposed – that the plaintiff should honour the terms of the initial agreement, which had expired on 30 June 2011 and was not validly renewed.

[18] What remains is the plaintiff’s alternative claim for payment of R439 300.92, based on the dishonoured cheque. The defence that the cheque was issued subject to the condition that the plaintiff honours the terms of the lease

⁴ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) para 89 per Cameron JA; *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A-B.

⁵ G B Bradfield *Christie’s Law of Contract in South Africa* 7 ed (2016) at 518.

agreement, and that it should not persist with its cancellation of the defendant's lease and vacation of the property on 30 July 2014, falls away. The defendant's counsel, relying on *Saambou-Nasionale Bouvereniging*,⁶ submitted that the claim based on the dishonoured cheque could not succeed because there was no underlying agreement that justified its issue.

[19] The submission however is unsustainable on the evidence and the law. As in the case of waiver, the defendant did not plead that there was no reasonable cause to issue the cheque. On the contrary, he testified that as at 28 March 2014, his account with the plaintiff was in debit in the sum of R439 300.92. He said that he 'was in arrears in an amount of R439 000 in terms of the extended lease agreement', and that he had never denied that he owed the plaintiff money.

[20] The defendant's reliance on *Saambou-Nasionale Bouvereniging* is misplaced. It is authority for the proposition that reasonable cause for the issue of a cheque exists where the drawer and the payee agree as to what the proceeds of the cheque are to be used for. By this agreement the bond between the negotiable instrument contract and the underlying relationship is established.⁷ That is the case here: the parties agreed that the cheque for R439 300.92 was in settlement of the defendant's indebtedness arising from his lease of the property. It matters not that the plaintiff did not establish that his continued occupation was in terms of a month-to-month lease: the fact is that the defendant continued to lease the property after the initial agreement had come to an end, and he became indebted to the plaintiff in the amount of R439 300.92 under that lease.

[21] The plaintiff established the requisites for its claim on the cheque in the sum of R439 300.92. A cheque is a bill payable on demand, which can be

⁶ *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A).

⁷ *Saambou-Nasionale Bouvereniging* fn 6 at 992G-H.

presented for payment on any date within a reasonable time after its issue.⁸ The plaintiff was the legal holder of the cheque signed by the defendant as drawer, as a result of which he incurred personal liability on the cheque.⁹ It was presented for payment but dishonoured by non-payment. Notice of dishonour is dispensed with because the defendant countermanded payment.¹⁰

[22] In the result, the appeal is dismissed with costs, including the costs of two counsel.

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⁸ *Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 (4) SA 141 (A) at 152E. Section 43(2)(b) of the Bills of Exchange Act 34 of 1964 provides:

‘A bill is duly presented for payment if it is presented in accordance with the following rules, namely-

...

(b) if the bill is payable on demand, presentment must, subject to the provisions of this Act, be made within a reasonable time, within the meaning of subsection (3), after its issue, in order to render the drawer liable, and within such a reasonable time after its endorsement, in order to render the indorser liable.’

⁹ *Marshall and Another v Bull Quip (Pty) Ltd* [1983] 1 All SA 96 (A); 1983 (1) SA 23 (A) at 28A.

¹⁰ *Braz v Afonso and Another* [1997] 4 All SA 428 (SCA); 1998 (1) SA 573 (SCA) at 579I-580C.

Appearances:

For appellant: A B Rossouw SC and A P J Bouver

Instructed by: MacRobert Attorneys, Pretoria
Honey Attorneys, Bloemfontein

For respondent: B L Manentsa and Z Ngakane

Instructed by: Adams & Adams, Pretoria
Phatshoane Henney Attorneys, Bloemfontein