

SUMMARY OF THE JUDGMENT

LEASE WORDING: AGREEING TO AGREE TO RENEW ON NEW TERMS: ENFORCEABLE?

Violetshelf Investments (Pty) Ltd v Chetty (24858/18) [2019] ZAGPJHC 1 (28 January 2019)

This judgment deals with the scenario where a tenant is granted an option to renew a lease “provided that the parties agree in writing to the rental, conditions and provisions” of the new lease. Such a provision, if a court were to enforce it, would be to coerce a landlord to conclude an agreement with a tenant with whom it perhaps no longer wants to have as a tenant. In our law it is unenforceable, unless a way out is provided for. The judgment illustrates how.

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

FACTS

Violetshelf Investments (Pty) Ltd (Violetshelf) is the owner of an immovable property on which the Noordwyk Shopping Centre in Midrand stands. One of the shops had been let to one Mr Chetty under consecutive agreements of lease since 2002. The last agreement was concluded in April 2013 and provided, amongst other things, for a 5 year lease period running from 1 June 2013 and expiring on 31 May 2018.

Clause 1.5 of the lease contained an option, in favour of Mr Chetty, to lease the premises for a further period. It stated: “1.5 The Lessor is prepared to let the leased premises to the Lessee for a further period after the expiry date of this lease, provided that the parties agree in writing to the rental, conditions and provisions of the proposed lease at least 3 (three) months before such expiry date. If the Lessee wishes to extend the lease as aforesaid, he must notify the Lessor of his intention to do so in writing at least 3 (three) months before the expiry date of this lease, failing which it shall be deemed that he does not wish to renew the lease.”

Mr Chetty did not notify Violetshelf of his intention to extend the lease timeously and, in April 2018, the managing agent of the shopping centre notified Mr Chetty that the lease would expire at the end of May and that he had to vacate the premises. Mr Chetty's subsequent attempts to convince Violetshelf to nevertheless extend the lease for a further period after its expiration were to no avail. Violetshelf, for reasons that were not relevant to the present matter, did not want to have Mr Chetty as a tenant any longer.

Mr Chetty did not vacate and Violetshelf approached the Court seeking an order for the eviction of Mr Chetty from the premises.

Mr Chetty raised the doctrine of estoppel by representation (meaning a defence based on the fact that one person made a representation to another, intending the other to reasonably rely on it, and out of fairness, it should be upheld) as a defence. In this regard he alleged that Violetshelf, through its conduct, made representations which, according to him, he reasonably believed to mean that the lease agreement would be renewed on its expiration without him having to exercise the option in accordance with clause 1.5. He argued that the series of lease agreements concluded with him during the past 18 years were on the basis of Violetshelf's agents offering to conclude further lease agreements without holding him to a term that required him to indicate his intention to renew the lease agreement three months prior to its expiry. He argued that it became customary that Violetshelf would remind him that the lease is about to expire and enquire if he wanted to renew the lease as they were still happy to have him as a tenant. Also, he stated that during 2017 he undertook renovations and improvements to the premises that amounted to just over R220,000, to which Violetshelf consented. This, he said, should have made it clear to Violetshelf that he intended to enjoy the benefits of the refurbishments for at least another 5 years.

HELD:

- It is unnecessary to consider Mr Chetty's defence of estoppel by representation. Even if it is assumed that Violetshelf is precluded, i.e. estopped from relying on Mr Chetty's failure to have exercised the option to extend the lease timeously and in accordance with clause 1.5 of the lease agreement, the offer to extend the lease, on acceptance, would not have brought about a renewal of the lease. This was because the option to extend the lease - subject to the parties reaching agreement in writing on 'the rental, conditions and provisions of the proposed lease' - is not definite and complete and will not on acceptance effect a renewal or extension of the lease. The words in the former phrase essentially create an "agreement to agree".
- In our law, *an agreement to negotiate in good faith* (an agreement to agree) is enforceable only if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus; an example would be where a clause in a lease agreement states that if the parties were unable to agree on any of the terms of the yet to be negotiated lease, the dispute would be referred to an arbitrator whose decision would be final and binding.
- The general rule (i.e. that an agreement that the parties will negotiate to conclude another agreement is not enforceable) exists because of the absolute discretion vested in the parties to agree or disagree. In fact, it is considered to be "against public policy for a court to coerce a lessor to conclude an agreement with a tenant

with whom it does not want to have as a tenant any longer. In instances of breach, there are adequate legal remedies available. It is difficult to conceive how a court, in a purely business transaction, can rely on 'ubuntu' to import a term that was not intended by the parties, to deny the other party the right to rely on the terms of the contract to terminate it."

- In the present matter, the option given to Mr Chetty in clause 1.5 of the lease agreement to extend the lease for a further period 'provided that the parties agree in writing to the rental, conditions and provisions of the proposed lease' has no deadlock-breaking mechanism and is, therefore, unenforceable.

Violetshelf was not obliged to extend or renew the lease. The agreement of lease had expired by effluxion of time on 31 May 2018 and there was accordingly a valid termination of Mr Chetty's right to possess the premises.

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