THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 8418/2018

In the matter between

PACIFIC PARAMOUNT PROPERTIES (PTY) LTD	**APPLICANT**

and

MICHAEL ADRIAN BURCHELL t/a TOP WASH	**1st RESPONDENT**
TERENCE MICHAEL ANTONY BURCHELL t/a TOP WASH	**2nd RESPONDENT**

Coram: Rogers J

Heard: 13 September 2018

Delivered: 19 September 2018

ORDER

The order of the court is as follows:

(a) The respondents and any occupiers holding through them shall, by 30 September 2018, vacate the premises known as 2A Rontree Avenue, Bakhoven, Western Cape, failing which they may be evicted by the sheriff.

(b) The respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

JUDGMENT

Rogers J

[1] This is an application by Pacific Paramount Properties (Pty) Ltd (Pacific) for the eviction of the respondents from commercial premises in Camps Bay. The respondents in partnership operate at the premises a car washing business called Top Wash. Pacific is the registered owner of the property on which the premises are located.

[2] Although other points were raised in the papers, the argument before me was confined to: (i) whether, by virtue of a cession contained in a mortgage bond, Pacific lacked standing to sue for eviction; (ii) if it retains standing, whether the lease agreement between the parties has terminated by the effluxion of time.

[3] When Pacific took transfer of the property in December 2013, a mortgage bond was registered in favour of Nedbank Ltd for R20 million. Clause 8 of the bond reads:

'8. The Mortgagor hereby cedes, transfers and assigns to the Mortgagee all the Mortgagor's rights, title and interest in and to all rentals and other revenues of whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Mortgagee at any time in terms of this bond, with the express right in favour of the Mortgagee irrevocably and *in rem suam* –

8.1 to institute proceedings against all lessees for the recovery of unpaid rentals and/or eviction from the mortgaged property;

8.2 to let the mortgaged property or any part thereof, to cancel or renew and enter into leases in such manner as the Mortgagee decides, to evict any trespassers or other person from the mortgaged property;

8.3 to collect on behalf of the Mortgagor any monies payable in respect of the alienation by the Mortgagor of the mortgaged property or any portion thereof,

provided, however, that the cession, transfer, assignment and authorities and powers specified above shall not be acted upon by the Mortgagee without the consent of the Mortgagor unless the Mortgagor has failed to comply with any terms or condition of this bond or any loan, facility or other indebtedness secured hereby, or has otherwise committed a breach thereof…'.

[4] The language of this clause is very similar to the cession considered in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd.* In that case it was held that the proviso did not suspend the operation of the cession. Although *Picardi* has been criticised (Susan Scott *Scott on Cession* 2018 pp 488-495), it is binding on me. Such differences of language as exist between the two clauses do not justify a different conclusion.

[5] In *Picardi*, however, the question related to the right of the cedent to institute proceedings to recover rent. The unsuspended cession of the personal right to claim rent meant that the cedent lacked locus standi. The court was not concerned with that part of the clause which authorised the cessionary to evict unlawful occupants. There may be a distinction between the right to evict and the right to sue for rent. The latter is a personal right which may be ceded. The

former, when it is based (as here) on ownership rather than on the assertion of a contractual right to redelivery, is an incident of ownership.

[6] In the present case (as in *Picardi*) the cessionary has the irrevocable right in rem suam to evict unlawful occupants. This is the language of mandate rather than cession (for the distinction, see Scott pp 66-71). The proviso strengthens this distinction by mentioning not only 'cession, transfer [and] assignment' but also 'authorities and powers'. If the right to seek eviction is an irrevocable authority rather than a right acquired by cession (cf *Natal Bank Ltd v Natorp & Registrar of Deeds* 1908 TS 1016 at 1023; *Ward v Barrett NO & another* 1962 (4) SA 732 (N) at 737D-H), the mandatee would arguably not be entitled to institute eviction proceedings in its own name; instead, the mandatee would act on the authority by causing such proceedings to be instituted in the name of the mandator (cf *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd & another* 1978 (1) SA 671 (A) at 680D-F; *Myburgh v Walters NO* 2001 (2) SA 127 (C) at 130C-E).

[7] On this basis, it may be that the eviction proceedings were rightly instituted in Pacific's name. If the respondents considered that the attorneys who caused the application to be instituted lacked authority (because Nedbank had not authorised the proceedings), they could have invoked rule 7 (*Ganes v Telecon Namibia Limited* 2004 (3) SA 615 (SCA); *Unlawful Occupiers School Site v City of Johannesburg 2005* (4) SA 199 (SCA) paras 14 to 16).

[8] In any event, Pacific has in its replying papers attached a re-cession agreement executed on 20 August 2018. Clauses 1.1 to 1.3 are recordals referring to the mortgage bond, clause 8 thereof and the 'Ceded Claims' in relation to the lease between Pacific and the respondents. Clauses 1.4, 1.5 and 2 read:

'1.4 The Lessor wishes to institute action against the defaulting Lessee for the eviction of the Lessee as a result of the expiration of the lease agreement and the arrears due and owing to the Lessee to the Lessor.

1.5 Nedbank hereby agrees to re-cede the Ceded Claims in respect of the defaulting Lessee/s retrospectively with effect from 20th of October 2017.

2. CESSION

Nedbank hereby re-cedes, transfers, and assigns all of its right, title and interest in and to the Ceded Claims to the Lessor, who hereby accepts cession thereof.'

[9] Mr Bhamjee, who appeared for the respondents, submitted, with reference to clause 1.4, that the re-cession was executed with a view to prospective litigation, not proceedings already instituted. He also handed up, without objection, a summons issued by Pacific against the present respondents on 31 August 2018 in which Pacific claims outstanding rent and charges of R295 960.28 as well as the respondents' eviction from the premises. He argued that this new action was the prospective proceedings which the re-cession had in mind.

[10] I disagree. Clause 1.4 is a recordal. It may well be that Pacific intended to institute further proceedings, as it subsequently did by way of the action. It does not follow that the operative clauses of the re-cession are limited by this recordal. Clause 1.5 read with clause 2, which together are the operative parts of the re-cession, are not restricted in the way Mr Bhamjee argues. The fact that the re-cession was made retrospective to 20 October 2017 confirms, I think, that the re-cession was intended to legitimise past as well as future proceedings.

[11] Even if Nedbank was unaware of the present proceedings, the fact is that it has re-ceded to Pacific the claims against the respondents without restriction. The question I must thus decide is whether, assuming Pacific lacked locus standi prior to the re-cession, the position can be regularised by way of the re-cession. Mr Berthold, who appeared for Pacific, referred me to the decision of Lamont J in *Pangbourne Properties Ltd & another v Your Life (Pty) Ltd & another* [2013] 4 All SA 719 (GSJ) paras 32-38, where the learned judge held that in special and

unusual circumstances the court may allow a litigant who lacked locus standi when launching proceedings to cure this by way of a re-cession.

[12] In my view such circumstances exist here. Pacific instituted the proceedings in good faith as the owner of the property and as the entity which concluded the lease with the respondents. Clause 8 of the mortgage bond was in all probability overlooked. The effect of clause 8, insofar as eviction proceedings are concerned, is by no means clear. To insist that Pacific start again, now armed with the re-cession, will – apart from wasting costs – have the effect (subject to my finding on the second issue) that the respondents can remain in occupation for several further months without having a right to do so. This would not be just.

[13] I thus reject the respondents' challenge to Pacific's locus standi.

[14] Turning to the second issue, the respondents have not denied that they signed the lease attached to the founding affidavit. In the schedule to the lease its period is stated to be 12 months but its commencement and termination dates are stated to be 1 March 2016 and 28 February 2018 respectively, which is a period of 24 months. Pacific has treated the lease as having a 24-month period and as having terminated with the effluxion of time on 28 February 2018.

[15] In the block in the schedule headed 'Option to renew' the letters 'N/A' have been typed. Clause 40.2 provides that no renewal of the lease or exercise of any option shall be valid unless reduced to writing and signed by both parties. The respondents have not alleged the conclusion of a renewal agreement.

[16] Mr Bhamjee submitted that there was nevertheless a dispute of fact as to whether the written lease annexed to the founding papers is the true agreement between the parties. Mr Michael Burchell, the respondents' deponent, alleges that when the lease was concluded he told Pacific's representative, Mr Matthew, that

the respondents would be comfortable with a two-year lease coupled with an option to renew for a further two years, as this would allow them to recoup their investment. He says Mr Matthew told him that it was Pacific's habit to renew lease agreements and that 'there was no real concern with getting an extension or a renewal'.

[17] Mr Burchell carries on to say that they were anxious to start operating their business and thus signed the agreement attached to the founding affidavit (this was about a week before they opened). He continues:

'I also vaguely recall that another agreement was signed by us after this, but I am not sure of the date. At this point I do pause to mention that I recall that on one of the agreements signed by the second respondent and I, I remember scratching out the "N/A" where the option to renew is recorded and replacing same with a "YES" or "Y" which was initialled by the second respondent and I. I was never finished with copies of each document signed by me. I may have been remiss when I signed the agreement [attached to the founding affidavit] and may have failed to scratch the 'N/A" out in the block for option to renew and replacing it with a "Yes" or "Y".'

[18] To add to the confusion, Pacific wrote to the respondents on 24 April 2017 to say that their lease had expired on 28 February 2017; that the lease was currently running on a month to month basis; and that Pacific was willing to offer a 'one year lease at renewal due to the redevelopment of the property'. Mr Burchell says that on receipt of this letter he telephoned Pacific and spoke to a Ms Fraser to query the termination date. She told him that she had the lease in front of her and that it definitely terminated on 28 February 2017.

[19] In the replying affidavit, Pacific's deponent describes as 'absolute nonsense' the assertion that there was a version of the lease containing a two-year renewal option. He says that when the lease was concluded it was Pacific's intention to rehabilitate and upgrade the premises. It was for this reason that a

'very low rental' (R10 000 in the first year, R10 800 in the second) was acceptable. Following the redevelopment of the property, this would be well below a market rent. Indeed, Pacific is now asking a rent of R35 000 per month though the respondents claim that this is a reflection of the goodwill attaching to their business. There is a general denial of the paragraph containing Mr Burchell's allegation of his discussion with Ms Fraser.

[20] In my view, the answering affidavit is not sufficient to raise a genuine dispute of fact regarding the terms of the contract between the parties. The only signed version of the lease of which there is evidence is the one attached to the founding affidavit. It is common ground that the respondents signed it. The lease begins with an 'Important Note', asking the lessee to read and consider the document and its annexures carefully as it constitutes a binding agreement. Annexure F to the lease is a certificate signed by the respondents confirming that they read and understood the terms of the agreement.

[21] If, as they admit, they signed this version, it is unclear under what circumstances they would later have come to sign another version. Although the respondents signed the lease on 22 February 2016, it was only countersigned on behalf of Pacific on 14 April 2016. This is inconsistent with the notion that there existed, in the intervening period, a different and updated version of the document. It is not in dispute that Pacific intended to upgrade the property and did so during the currency of the lease. This would inevitably have affected the rent.

[22] When during April 2017 the respondents sold their business to Camps Bay Classics (Pty) Ltd, represented by one Patel, the sale agreement did not suggest that the respondents had a lease which could be extended to the end of February 2020. The suspensive condition in the sale agreement was the conclusion of a

lease between Pacific and the purchaser of a lease agreement for a period of 12 months ending 30 April 2018. The condition failed and the sale fell through.

[23] If the respondents believed that there was an agreement conferring on them an option to renew the lease for two years, one would have expected them to have written to Pacific before the end of February 2018 exercising the option. The fact that they did not do so is inconsistent with a belief on their part that there was such a lease.

[24] In correspondence after February 2018 the respondents did not justify their occupation on the basis that they had exercised an option to renew. On the contrary, in a letter dated 29 April 2018 they stated that Pacific had at all times been 'willing to renew our lease for a further period of two years' until they began to challenge Pacific's billing for rates, water etc. And on 3 May 2018 they wrote that they were not in unlawful occupation because Pacific's representative had assured them (ie at the time the lease was concluded) that they would 'receive a renewal of the lease on similar/the same terms and conditions'. The respondents made no reference to an option, instead recording that they would be relying on several provisions of the Consumer Protection Act.

[25] It is also significant that in his affidavit opposing summary judgment in the Cape Town Magistrate's Court the respondents did not take issue with the version of the lease annexed to the particulars of claim. Although the magistrate refused summary judgment because of factual disputes regarding Pacific's accounting, he observed that, if eviction proceedings were to be instituted afresh, they would probably not be 'premature' because the lease 'has apparently now expired between the parties due to the effluxion of time'.

[26] Regarding Mr Burchell's alleged discussion with Ms Fraser, Pacific's denial in the replying affidavit is unsatisfactory. However, it is not apparent to me

how what Ms Fraser allegedly told Mr Burchell helps the respondents. One possibility, the most likely, I think, is that Ms Fraser relied on the fact that the schedule (mistakenly) specified a 12-month period for the lease. Alternatively, and if she was looking at a version of the schedule which specified a termination date of 28 February 2017, then it is possible that there was also, on that version of the schedule, a one-year renewal option. If so, and if the option was validly renewed, the lease would still have expired on 28 February 2018. It is certainly not plausible that there would have been a one-year lease but a two-year renewal. And if this other version of the lease did exist, it is stretching credulity to imagine that a third version (consistent with what Mr Burchell says) also existed.

[27] I have already mentioned that the absence of any notice from the respondents purporting to exercise the option is inconsistent with the existence of a lease conferring a right to renew. The absence of such notice is important for another reason. Even if there was a version of the lease conferring an option to renew for two years, the respondents would have needed to exercise it in order to extend the lease (*Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A) at 126C-F; Kerr *The Law of Sale and Lease* 3ed 457-8). They do not allege that they did so.

[28] Furthermore, the respondents have not alleged what the terms of the supposed option were. In particular, there is no allegation that the parties agreed what rent would be payable during the renewal period. If this was left to be negotiated, the option would be unenforceable (*South African Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (C); cf *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) para 6). This is particularly important here since it is not in dispute that the premises have been substantially redeveloped so that the rent payable for the renewal period would not necessarily bear any obvious relationship to the rent for the initial period.

[29] While genuine disputes of fact cannot properly be decided in motion proceedings on a balance of probability, the modern approach has become somewhat more robust lest claimants should be deprived of the benefit of the quicker and cheaper motion procedure through unmeritorious factual challenges (*Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paras 55-56). I do not think Mr Burchell's assertions, based on what he himself describes as a vague recollection, have sufficient substance to stand in the way of granting relief on motion. Perhaps he has in his own mind convinced himself that something he wanted and thought would be unproblematic (a negotiated two-year renewal) actually became a term of the lease but I am satisfied on the papers that this was not the case.

[30] Although the lease entitles the applicant to seek attorney and client costs, I retain a discretion. I am disinclined to order costs on a punitive scale. Mr Berthold emphasised that Pacific's claim was a reivindicatio, not a claim on the lease. The respondents may have grounds for thinking that Pacific has dealt with them harshly or unfairly (it has been unnecessary, for purposes of this judgment, to go into their reasons for so thinking).

[31] The following order is thus made:

(a) The respondents and any occupiers holding through them shall, by 30 September 2018, vacate the premises known as 2A Rontree Avenue, Bakhoven, Western Cape, failing which they may be evicted by the sheriff.

(b) The respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

O L Rogers J

APPEARANCES

For Applicant	P J Berthold Instructed by Mark Efstratiou Inc, c/o MacGregor Stanford Kruger Inc, Cape Town
For Respondents	Y Bhamjee Yusuf Bhamjee Attorneys