**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Case No.: 2605/2021
Date heard: 17 March 2022
Date delivered: 31 May 2022

In the matter between:

**COEGA DEVELOPMENT CORPORATION (PTY) LTD** Applicant

and

**MM ENGINEERING SERVICES (PTY) LTD** Respondent

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**JUDGMENT**

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**ZIETSMAN AJ:**

[1] The question that comes to mind in this matter is, how many opportunities should one be given?

[2] The Applicant, Coega Development Corporation (Pty) Ltd ("CDC"), is a public entity that is wholly owned by the Eastern Cape Provincial Government, mandated to develop and operate the 9003 hectare Coega Special Economic Zone (SEZ) in terms of the SEZ Act 16 of 2014. The Respondent is MM Engineering Services (Pty) Ltd, with its chosen address in Johannesburg.

[3] During or about October 2016 the parties entered into a written lease agreement in respect of Zone 6 for the purposes of the Respondent manufacturing gas cylinders for the local and export markets.

[4] The Applicant seeks an order for the eviction of the Respondent from the leased premises within the SEZ, pursuant to the breach of the lease agreement, by the Respondent, and consequent cancellation thereof.

**Background**

[5] On 10 October 2018 and 31 October 2019 respectively, the parties concluded certain addenda to the lease agreement. Except for amending the location of the leased premises, from Zone 6 to Zone 3, and the commencement and expiration dates, the addenda did not alter the terms of the lease agreement in a manner material to this application. The lease agreement and addenda thereto will collectively be referred to as "the Agreement".

[6] The material terms of the Agreement for purposes of this application are the following:

6.1. the leased premises would be located at Zone 3, within the Coega SEZ;

6.2. the lease would commence on 1 October 2019 and terminate on 30 September 2034;

6.3. the Respondent would pay the Applicant a security deposit, which would be refunded to the Respondent within thirty days from date of termination of the Agreement;

6.4. the Respondent would be liable for interest on all rental due and payable by it to the Applicant at the default interest rate, from the due date to date of payment;

6.5. the Respondent warranted that, as at date of signature of the Agreement, it was in a position to pay the rental amount and any other amounts payable from time to time, and that it was not aware of any matter which would result in it being unable to pay such amounts;

6.6. in the case of a breach by either party, the aggrieved party shall deliver to the defaulting party a notice specifying the default event(s) and demand that the specified default be rectified within fourteen days of delivery of the said notice; in the event that the defaulting party commits any breach of its obligations in terms of the Agreement and fails to remedy that breach within fourteen days (or such longer period as the aggrieved party issuing the notice may advise, if it is not capable of being remedied within the fourteen days) of the written notice requiring that it be remedied;

6.7. the aggrieved party shall have the right, in addition to any other remedies provided for in the Agreement, to cancel the Agreement, upon written notice to the other party, in the event of either party committing a breach of the terms of this Agreement which is incapable of being remedied;

6.8. should the Applicant cancel the Agreement and the Respondent dispute the Applicant's right to do so, and remain in occupation of the leased premises pending the determination of that dispute, then the Respondent shall continue to pay, on due date, all monies due by it in terms of the Agreement; the Applicant shall be entitled to recover and accept those payments and the acceptance by the Applicant of those payments shall be without prejudice and not constitute an acceptance of the Respondent holding over in this manner;

6.9. the Respondent shall pay the Applicant a security deposit for all the Respondent's obligation in terms of the agreement, and the Applicant may use the security deposit to pay or offset all outstanding amounts which the Respondent is liable for under the Agreement. Whenever, during the period of the Agreement, the security deposit is so applied in whole or part, the Respondent shall, on demand, reinstate the security deposit to its original amount.

[7] The Applicant discharged its obligations in terms of the Agreement by procuring the construction of the premises and made it available for occupation by the Respondent on 1 February 2018. The Respondent took occupation of the leased premises on 1 October 2019. Thus, although the Agreement was entered into during October 2016,

the Respondent only took occupation in 2019. As already mentioned above, the commencement and expiration dates were, by agreement, amended (by way of the addenda).

**The material facts**

[8] The facts, which are largely common cause, can be summarised as follows.

[9] The Respondent failed to pay rental for the months of December 2019, January 2020 and February 2020. As a result of such failure, on 20 February 2020, the Applicant delivered a notice to the Respondent. The Applicant forewarned the Respondent that it would call up the guarantee (referred to in the Agreement as the "security deposit") on 21 February 2020, and placed the Respondent on terms to reinstate the guarantee equivalent to three months' rental, in the amount of R2 160 358.02, within seven days.

[10] Instead of remedying the breach, the Respondent addressed a letter to the Applicant, on 21 February 2020, requesting an indulgence from the Applicant to settle the outstanding rental. Whilst acknowledging and accepting its "responsibility for paying rental on time", as per the Agreement, the Respondent requested the Applicant to defer the rental until the Respondent was able to secure funds, without disclosing when that would occur.

[11] On 10 March 2020 the Applicant addressed another letter to the Respondent, informing the Respondent that, due to its default, the Applicant had called up the guarantee, on 3 March 2020, and that the Respondent must reinstate the guarantee by no later than 17 March 2020.

[12] On 8 June 2020 the Respondent forwarded a copy of a letter from the National Empowerment Fund, dated 8 June 2020, to the Applicant. The heading of the letter reads "Application for R50 000 000.00 new venture finance from [the Respondent]". The letter merely states that the National Empowerment Fund could provide funding. However, such funding would be subject to a number of conditions, as more fully set out in the letter, but irrelevant for purposes of this application.

[13] On 15 September 2020 the Respondent addressed another letter to the Applicant regarding the outstanding rental and security deposit. According to the Respondent, it was "formulating a comprehensive reply to [the Applicant's] demand and will let [the Applicant] have the same in due course". They were also securing funding, including funding for the arrear rental, and their reply was "expected to include supporting documentation evidencing this fact". Again, without indicating any time frame for the aforementioned.

[14] Due to the continued failure to settle the arrear rental, the Applicant delivered another notice to the Respondent, on 20 October 2020, placing it on terms to remedy the breach. The arrear rental had by then escalated to R3 850 035.01, excluding VAT.

[15] The Respondent addressed another letter to the Applicant, dated 3 November 2020. It set out the background to the establishment of its gas cylinder manufacturing plant at the Applicant's premises and the challenges which it faced along the way. The Respondent, quite strangely I might add, suggested that it was of the view that the rental could be utilised to finalise some of the outstanding work which the project needed. Whilst apologising to the Applicant for the inconvenience caused, the Respondent admitted that, due to all the delays, it unfortunately did not budget for the payment of rental on the approved IDC[1] funding. Therefore, any cash payment made towards rental would affect the progress of the project. It undertook, once operations commenced, to meet all its obligations to the Applicant and proposed to make payment arrangements in respect of the arrear rental over a period of thirty six months.

[16] Shortly thereafter, on 23 November 2020, the Respondent proposed to settle the outstanding rental and security deposit within twenty four months, instead of thirty six months, as was suggested in its letter of 26 October 2020, and that it "remains obligated to honouring all rental payments to Coega".

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[1] The Industrial Development Corporation (IDC) of South Africa Limited was established in 1940 through an Act of Parliament (Industrial Development Corporation Act, 22 of 1940) and is fully owned by the South African Government. Their "mandate is to maximise [their] development impact through job-rich industrialisation, while contributing to an inclusive economy by, among others, funding black-owned and empowered companies, black industrialists, women, and youth-owned and empowered enterprises". https://www.idc.co.za/about-us/

[17] On 30 November 2020 the Applicant addressed yet another letter to the Respondent, wherein it set out three options in terms whereof the outstanding rental and security deposit could be liquidated.

[18] There was no response forthcoming from the Respondent. It continued to be in breach of the Agreement.

[19] On 15 March 2021 the Applicant delivered a notice, demanding that the Respondent must pay the arrear rental. From the statement attached to this letter, it appears that for the period 28 February 2020 to 31 October 2020 no payments were received.

[20] On 19 March 2021 the Applicant received a letter from the Respondent's attorney of record, however it was a mere repetition of the Respondent's previous requests for an opportunity to engage and secure funding to complete its project. In addition, the Respondent placed on record that the rental and ancillary charges for the months of February to October 2020 accrued during the Nationwide Lockdown (as a consequence of the Covid-19 pandemic), and referred to clause 27 of the Agreement (force majeure). However, the Respondent would have had to give notice, in terms of clause 27, that it will be prevented or delayed in the performance of any of its obligations in terms of the Agreement.

[21] It is necessary to mention that, in terms the provisions of clause 39 of the Agreement, "…no indulgence, leniency or extension of time which a party ('the grantor') may grant or show to the other will in any way prejudice the grantor, or prejudice the grantor from exercising any of his rights in the future".

[22] In a final effort to accommodate the Respondent, the Applicant addressed another letter to the Respondent, on 3 May 2021, requesting it to submit a proposed plan within seven days from receipt of the letter, and that such plan should not exceed six months, commencing on 1 May 2021. However, this was to no avail.

[23] On 31 May 2021 the Applicant placed on record that despite numerous requests for payment, including the notice dated 15 March 2021, the Respondent has continuously failed, refused and/or neglected to pay the outstanding amount. The total, as at 31

May 2021, amounted to R7 060 147.65, including VAT. Consequently, the Applicant terminated the Agreement and warned that the arrear rental must be settled with immediate effect and the Respondent should vacate the premises by no later than close of business on 4 June 2021.

[24] On 11 June 2021 the Applicant, again, confirmed that it was terminating the Agreement due to the Respondent's continued failure to pay the outstanding amount and demanded that the Respondent vacate the premises by no later than close of business on 30 June 2021.

[25] Subsequently, and on 28 June 2021, the Respondent's attorneys of record replied, advising that the Respondent had, in principle, secured an investor to provide the necessary capital for the project. They requested that the demand to vacate the premises by 30 June 2021 be suspended for a period of thirty days, after which "the successful implementation of this transaction will result in full payment to [the Applicant] of all outstanding amounts due and payable in terms of the lease agreement".

[26] According to the Applicant, as at the date of deposing to the founding affidavit, on 31 August 2021, there had been no positive action taken by the Respondent to pay the outstanding amount due to the Applicant. The Respondent also failed to vacate the premises.

**The Respondent's grounds of opposition**

[27] The Respondent's opposition to the application for eviction is twofold.

[28] Firstly, that the purported termination of the agreement is "defective" and the billing has been disputed since 2019. With regard to the billing, on the Respondent's own version, this was already resolved in June 2020. There is, therefore, no need to deal with this any further. With regard to the termination, the Respondent contended that the two letters, dated 31 May and 11 June 2021, demonstrate "the obvious flaw in the purported termination" and that neither of the two letters comply with the provisions

of the Agreement. In essence, the Respondent disputed the Applicant's entitlement to terminate the Agreement and the manner of termination.

[29] Secondly, the Respondent contended that the Applicant ought to have referred "the dispute" for alternative dispute resolution in terms of the Agreement.

[30] With regard to the termination, counsel for the Respondent submitted that by issuing a further notice of termination the Applicant abandoned its reliance on the first notice of termination. There is no merit whatsoever in this argument and it was not seriously persisted with (correctly so).

[31] With regard to referring the matter for alternative dispute resolution, it is necessary to quote clause 28.2 of the Agreement, which reads as follows:

> "28.2 Should any disagreement arise between [the parties] arising out of or concerning this agreement or its termination, either party <u>may</u> give notice to the other to resolve such disagreement. Where such disagreement is not resolved within ten days of receipt of such notice it shall be deemed to be a dispute". (My own underlying)

[32] In other words, either party may give notice to the other to resolve a disagreement.

[33] No such notice was given on behalf of the Respondent. When prompted, counsel for the Respondent did not persist with the argument in this regard.

[34] In addition to the aforementioned, it was readily conceded by counsel for the Respondent (again, correctly so) that by referring the matter for alternative dispute resolution would in any event not excuse the Respondent from paying rental.

[35] It is instructive to note that the Respondent, in its answering papers, referred to its "flawed and/or inaccurate approximation of the financial requirements as the reason for the funding for the project being depleted prior to the completion thereof, which resulted in [the Respondent's] inability to honour the rental payment as and when it became due".

[36] Without a doubt, the Respondent knew full well that it was not able to honour its rental obligations towards the Applicant, yet it persisted in opposing the Applicant's application for eviction.

**Legal framework and discussion**

[37] The principle *pacta sunt servanda* (agreements, freely and voluntarily concluded, must be honoured) is still one of the cornerstones of the law of contract.

[38] In *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*[2] the Constitutional Court held that:[3]

> "[83] The first is the principle that '(p)ublic policy demands that contracts freely and consciously entered into must be honoured'. This court has emphasised that the principle of *pacta sunt servanda* gives effect to the 'central constitutional values of freedom and dignity'. It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.
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> [84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.
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> [85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*."

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[2] 2020 (5) 247 (SCA) at paras [83] – [85].
[3] Footnotes omitted.

[39] And, as recently reaffirmed by Unterhalter AJA in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*:[4]

> "The principle that contracts freely and voluntarily entered into must be honoured remains central to the law of contract. This principle, often captured under the phrase freedom of contract, recognises that persons, through voluntary exchange, may freely take responsibility for the promises they make, and have their contracts enforced".

[40] The Respondent took occupation of the premises, on 1 October 2019, and failed to pay rental for the months of December 2019, and January and February 2020. The Applicant addressed six letters to the Respondent. The first, on 20 February 2020 (the last payment was received on 25 February 2020) and the sixth, on 3 May 2021.

[41] The Respondent, repeatedly, acknowledged its indebtedness to the Applicant, but requested various indulgences in that it required more time.

[42] The Applicant finally terminated the Agreement on 31 May 2021, and again confirmed it on 11 June 2021.

[43] The Agreement was duly cancelled. The Respondent's reliance on referral of an alleged "dispute" to arbitration, of which no notice was given, has no basis.

[44] Accordingly, the Respondent's opposition to the application, on both grounds, has no merit.

**Conclusion and costs**

[45] The Respondent provided no basis upon which it could legitimately oppose the application. The Applicant is entitled to the relief which it seeks.

[46] The Applicant seeks an order that the Respondent be ordered to vacate the premises within 15 days. The Respondent contended that it should be allowed 30 days.

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[4] 2022 (1) SA 100 (SCA) at para [63].

[47] It is trite that courts can exercise a discretion to stay or suspend the execution of an ejectment order.[5]

[48] I have taken the following into account. The period of time which has already lapsed from the date of termination; that the last payment was received on 25 February 2020; the "employees" referred to are employees employed by third parties (for security, cleaning and landscaping); and the fact that the Respondent's counsel confirmed that the Respondent is not trading. Therefore, I am of the view that 15 days are more than reasonable in the circumstances.

[49] There is no reason why costs should not follow the result.

[50] The following order is issued:

50.1. The Respondent, and all persons holding occupation through the Respondent, are ordered to vacate the property situated at Zone 3, within the Special Economic Zone ("the Premises") on or before 15 June 2022.

50.2. In the event that the Respondent, and all persons holding occupation through the Respondent, fail to vacate the Premises by 15 June 2022, the Sheriff of this Honourable Court, or his deputy, is authorised and ordered to give effect to paragraph 50.1 above, and to enlist the assistance of any person, including members of the South African Police Service, to assist him/her.

50.3. The Respondent is to pay the costs of the application.

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**T. Zietsman**

**ACTING JUDGE OF THE HIGH COURT**

Appearances:

[5] *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at para [21].

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| For the Applicant: | Adv. B L Boswell, instructed by Siya Cokile Attorneys Inc., Gqeberha |
| For the Respondent: | Adv. M Phukubje, instructed by Gavin Simpson Attorneys Inc., Johannesburg c/o Van Heerdens Attorneys, Gqeberha |