



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG**

CASE NO: 10870/2022

Heard on: 21/08/2023

Judgment: 9/11/2023

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

DATE

SIGNATURE

IN THE MATTER BETWEEN:

SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND

APPLICANT

AND

SOS MEDIA PRODUCTIONS PROPRIETARY

RESPONDENT

LIMITED T/A THE BLACK DOOR

JUDGMENT

STRIJDOM AJ

INTRODUCTION

1. In this matter the applicant seeks relief in the following terms:
 - 1.1 The respondent to be ejected from the premises situated at Lower Ground Floor, Sala House, Fredman Drive, Sandton;
 - 1.2 That the respondent be ordered and directed to vacate and deliver all keys and/or security devices of the premises to the applicant;
 - 1.3 That the respondent be ordered and directed to pay the costs of this application.

FACTUAL BACKGROUND

2. On 4 May 2018, the applicant and the respondent entered into a written definite fixed term commercial lease agreement ('the agreement') in terms of which the applicant let to the respondent the premises, for a period of three years.¹
3. In terms of clause 9.3 of the agreement the premises were let and utilised by the respondent for purpose of conducting a lounge business and to prepare and serve food, play music; dance of patrons and serve alcoholic and non-alcoholic beverages.

¹ Caselines: 001-17 Annexure FA3; Lease agreement.

4. In terms of clause 6 and 7 of the schedule to the agreement:
 - 4.1 The applicant let the premises to the respondent for a period of three years, commencing on 1st of March 2019;
 - 4.2 The lease period was set to expire on 28 February 2022;
 - 4.3 Respondent was entitled to exercise the option to renew the lease on or before 31 August 2021.
5. In accordance with clause 3.2 as read with Schedule 7 of the agreement, the respondent became both bound and entitled to exercise the option to renew the agreement on or before 31 August 2021. If the respondent failed to exercise the option within the time stipulated, the agreement shall terminate on the 28th of February 2022.
6. It is alleged by the applicant that the respondent failed to exercise the option to renew the agreement as aforesaid and consequently, the agreement terminate on the 28th of February 2022.

THE SALIENT FACTS

7. Condonation was granted to the respondent for the late filing of his answering affidavit.
8. On 4 March 2022 the applicant appointed Prince Mudau and Associates Attorneys to act on behalf of the applicant in this matter. The applicant through its attorneys wrote to the attorneys of the respondent and reiterated the stance of the applicant that it could no longer accommodate the business of the respondent on its premises and that the agreement terminated already on 28 February 2022.²

² Caselines: FA 001-9 para 22.

9. The applicant informed the respondent that it should stop its business and vacate the premises immediately, failing which the applicant would be obliged to initiate these proceedings and seek appropriate relief.³
10. On the 5th of March 2022 the attorney of the respondent wrote to the attorneys of the applicant and insisted that there was an arbitrable dispute between the parties and it was entitled to continue to occupy the premises after the termination of the agreement in accordance with clause 44 of the agreement.⁴

THE RESPONENT'S CASE

11. The respondent opposes the relief sought by the applicant on the following grounds:
 - 11.1 The respondent is in lawful occupation of the property;
 - 11.2 The respondent has validly exercised its option to renew the agreement;
 - 11.3 The respondent has declared a dispute in terms of the prescripts of the agreement against the applicant's refusal to renew the lease notwithstanding the valid exercise of the option to renew;
 - 11.4 The dispute duly declared by the respondent is liable to be referred for arbitration in accordance with the agreement;
 - 11.5 The dispute resolution mechanism survives the termination or cancellation of the agreement which termination is disputed.

APPLICATION TO STRIKE OUT MATTER IN THE APPLICANT'S REPLYING AFFIDAVIT

³ Caselines: FA; 001-9 para 23

⁴ Caselines: FA; 001-9 para 24.

12. The application to strike out matter in the applicant's replying affidavit was not seriously contested by the applicant. However, I am of the view that the following paragraphs and or annexures must be struck on the basis that it is either irrelevant, impermissible, argumentative or inadmissible hearsay:

12.1 para 37 to 39;

12.2 para 34 to 36;

12.3 Annexure 'RA3';

12.4 Para 11'

12.5 Para 14.

THE RESPONDENT'S POINT IN LIMINE – ARBBITRATION

13. It was argued by the respondent that section 6(2) of the Arbitration Act allows the court to stay proceedings upon an application in terms of section 6(1):

'If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.'

14. In **Crompton**⁵, the Constitutional Court stated that:

'If a party institutes proceedings in a court despite an (arbitration agreement), the other party has two options:

- (i) It may apply for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965; or

⁵ Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels 2022 (1) SA 317 (CC)

- (ii) It may in a special plea (which is in the nature of a dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration.’
15. The applicant contends that the respondent has waived its right to invoke a stay of the proceedings pending a final determination of the arbitration proceedings.⁶
16. It is trite that the onus of satisfying the court that the matter should not be referred to arbitration and instead heard by the High Court is on the party who instituted the legal proceedings. The discretion to refuse arbitration should be exercised judicially, and only when a strong case has been made out.
17. Clause 40.2 of the lease agreement provides for the arbitration of any dispute or difference arising between the applicant and the respondent in respect of the agreement to be referred for arbitration where the dispute was not referred for mediation.
18. The disputes of fact raised by the respondent are that:
- 18.1 Whether the respondent validly delivered a notice to renew the agreement;
- 18.2 Whether the option to renew was validly exercised;
- 18.3 Whether, notwithstanding the delivery of the notice to renew the agreement, the applicant validly terminated the agreement;
- 18.4 Whether, notwithstanding the delivery of the notice to renew in accordance with the agreement, the applicant was entitled to refuse the renewal of the agreement.

⁶ Caselines: HOA: 009-7 para 16

19. The applicant argued that there is no arbitrable dispute between the parties and there was no attempt by the respondent to notify the applicant of the dispute during the subsistence of the agreement.
20. The applicant contends that a notice delivered to Mr Malinga, its duly authorised agent and property manager does not constitute the effective delivery of the notice to renew.
21. Mr Malinga was the property manager for the applicant and was designated by the applicant to be the contact person between the parties and the notice, exercising the option to renew, was delivered to him.⁷
22. The applicant and the respondent acted in accordance with clause 4.4 of the lease agreement from 28 February 2022. The applicant does not dispute the occupation of the property beyond 28 February 2022, nor does it dispute that invoices were issued to the respondent beyond this date. The applicant has also not proffered any evidence on the termination of month-to-month lease.
23. The respondent has, in its answering affidavit, raised a preliminary point *in limine* for referral to arbitration and prayed for a stay of the application pending the finalisation of the arbitration.⁸
24. I am of the view that there are substantial factual disputes between the parties and that the applicant failed to discharge its onus of showing a 'very strong case' against the referral of the dispute to arbitration.

⁷ AA: Caselines 004-9 para 24 to 25 and Annexure 'AA4'; Caselines; 004-79 at para 15

⁸ Caselines: 004-4; AA para 8 to 004-5 at para 14.

25. I concluded that the respondent's application to stay the proceedings, pending the determination of the disputes between the parties by arbitration, was properly brought.

26. In the result the following order is made:

(1) The application to strike out the matter is granted with costs;

(2) The application for the stay of this matter is granted, pending the referral and finalisation of the arbitration, with costs.

**STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG**

Appearances:

For the Applicant:

Adv TJ Makgate

Instructed by:

Prince Mudau and Associates

For the Respondent:

Adv MC Malatji

Instructed by:

R Baloyi Inc.