

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/53855

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

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B.C. WANLESS

30 MAY 2023

In the matter between:

SALESTALK 598 (PTY) LTD

Applicant

and

GIANT EAGLE TRADING CC

Respondent

Neutral Citation: *Salestalk 598 (Pty) Ltd v Giant Eagle Trading CC* (Case No: 2021/53855) [2023] ZAGPJHC 599 (17 May 2023).

JUDGMENT

WANLESS AJ

Introduction

[1] In this matter Salestalk 598 (Pty) Ltd (*"the Applicant"*) seeks an order:

- 1.1 evicting Giant Eagle Trading CC (*"the Respondent"*) from the commercial premises situated at Erf 1504 Johannesburg Township and Erf 1510

Johannesburg Township, situated at 5 King George Street, Johannesburg (*"the Property"*);

1.2 directing the Respondent to pay the costs of the application on the attorney and own client scale.

[2] The Respondent occupies only Shop 6 of the Property. This has been conceded by the Applicant in reply and the Applicant indicated that it would seek an order evicting the Respondent only from the aforesaid Shop 6 (*"the premises"*).

Facts

[3] It is common cause that the Respondent took occupation of the premises pursuant to a lease agreement (*"the agreement"*) entered into between itself, as lessee, and Alizay Properties 16 (Pty) Ltd (*"Alizay"*), as lessor, on 29 June 2010.

[4] It is further common cause that the applicant is the successor in title of Alizay, having purchased the property from Alizay on 30 June 2010.

[5] In terms of the agreement:

5.1 The lease would commence on 1 July 2010 and would expire on 30 June 2020;

5.2 The Respondent would have the right to renew the lease for a further period of seven years, provided that it gave the Applicant notice, in writing, of its intention to so exercise its option at least two calendar months prior to the expiry of the initial period (clause 2 of the agreement).

The dispute between the parties

[6] The Respondent alleges that it exercised the option to renew and denies that the agreement has lapsed by effluxion of time whilst the Applicant denies that the Respondent exercised its option to renew the agreement in terms of the agreement.

[7] Clause 2 of the agreement states that:

"2.1 This lease agreement shall commence on 1 July 2010 ("the commencement date") and shall endure until 30 June 2020 ("the initial period").

2.2 The tenant shall have the right to renew this lease for a further period of 7 (seven) years, provided that it gives the Landlord notice in writing

of its intention to so exercise its option, at least 2 (two) calendar months prior to the expiry of the initial period ..."
(emphasis added).

- [8] The Respondent alleges that it exercised its option by means of sending a WhatsApp message on 28 April 2020 at 19h12 to Sam Krisno Saha ("Saha") a director of the Applicant on cellphone number 082 962 7081 as well as by sending an email to Saha's email address at Sahajhb@yahoo.com on 29 April 2020 at 17h03.
- [9] The Applicant contends that the notice given by the Respondent to exercise its option to extend the agreement is not valid because it does not comply with the provisions of clause 17 of the agreement. Clause 17 of the agreement reads as follows:

"17 Domicilium Citandi et Executandi

17.1 *the parties hereto respectively choose domicilia citandi et executandi at their respective addresses as set out in the preamble hereto for the delivery of all notices and services of all processes arising out of this agreement.*

17.2 *any notice delivered by one party to the other at the addressee's domicilia (sic) citandi et executandi shall be deemed to have been received by the addressee on the date of the delivery."*

- [10] In the premises, it is necessary for this Court to decide (a) whether notice was given and received and (b) whether that notice constitutes proper notice in terms of the agreement extending the lease. If the answer is in the affirmative the application must be dismissed. If not the Respondent must be evicted from the premises.

The law

- [11] In the matter of *Judson Timber Co (Pty) Ltd v Ronnie Bass and Co (Pty) Ltd & Another*¹ Margo, J dealing with a *domicilium citandi* clause in a lease, held² the following:

"The purpose of choosing a *domicilium citandi*, for the giving of a prescribed notice under a contract, is the same as it is for the service of process, namely to relieve the party giving the notice from the burden of proving receipt. See the cases referred to in *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984(3) SA 834(W) at 847G.

¹ 1985 (4) SA 531(W).

² At 538A-C.

The *Domicilium Citandi* clause is therefore one for the benefit of the party giving the notice and, in the absence of indications to the contrary in the contract, such party is entitled to adopt the more burdensome process of giving direct notice to the other party and of proving that it was received.

There is no indication in clause 5(j) of the lease that notice to the first respondent could be given only at the *domicilium citandi* and that direct notice, even if received by the first Respondent, would not suffice."³

- [12] Applicant's Counsel relied heavily on the decision of *Cohen & Another v Lench & Another*⁴ as authority for the proposition that where an agreement contains a *domicilium citandi* clause that in order to be valid, a notice in terms of that agreement must be served at the chosen *domicilium* to be effective and nowhere else. Regrettably for the applicant, this decision by the Supreme Court of Appeal ("the SCA") is not authority for such a principle in our law. In that matter the party who had to prove proper service relied upon service at the chosen *domicilium* but had not, as a matter of *fact*, properly served the document thereat. Consequently, it could not be said that the document would come to the attention of the other party and that effective service had taken place. The matter is, in the premises, also distinguishable to the present matter on the facts.

Findings

- [13] As set out earlier in this judgment the Respondent relies on the sending of a WhatsApp message and an email to exercise its option to renew the agreement.
- [14] On the application papers before this Court it must be accepted that:
- 14.1 On 28 April 2020 at 19h12 the Respondent sent a WhatsApp message to the cellular telephone of Saha;
 - 14.2 On 29 April 2020 at 17h03 the Respondent sent an email (from an iPhone) to Saha;
 - 14.3 Saha is a director of the Applicant;
 - 14.4 The contact details of Saha as set out above are correct;
 - 14.5 There is a bald denial (in reply) by the Applicant that both the WhatsApp message and the email were received by Saha and the Applicant relies on the fact that the notice to renew was not delivered at the *domicilium* address. The

³ Emphasis added.

⁴ 2007 (6) SA 132 (SCA) at paragraph [36].

Applicant's replying affidavit is deposed to by one Jose Alberto Mendes ("*Mendes*") and no confirmatory affidavit by Saha was placed before this Court. In the premises, the denial by Mendes that the WhatsApp message and the email came to Sasha's attention constitutes hearsay evidence;

14.6 The WhatsApp message and the email are identical and read as follows:

"Good day sir.

I refer to the lease arrangement between giant eagle trading cc and alizay properties 16 (pty) Ltd and in terms of paragraph 2.2 I on behalf of giant eagle trading cc hereby exercise the option to renew the lease for a future period of 7 years.

Kindly acknowledge receipt here of "thanks

[15] It was never disputed by the Applicant that the form of giving notice by way of a WhatsApp message was not proper and did not constitute proper written notice as provided for in terms of the agreement. In fact, the form of notice by way of a WhatsApp message was not raised by either party during the course of argument before this Court. In the premises, it is not necessary for this Court to decide whether the transmission of the notice to exercise the option to extend the agreement by way of WhatsApp message complied with the provisions of the agreement that such be "*in writing*". Suffice it to say, in this modern day, where emails have long been held to be valid means of communication, it is not surprising that electronic messages have attained the same level of acceptance. This is indeed so, where it is accepted practice in this Division that in applications for substituted service, summonses and notices are sent to potential defendants or respondents via SMS's and WhatsApp messages.

Onus

[16] This was another issue which neither party dealt with either in their Heads of Argument or during the course of argument before this Court (despite this Court raising same). Perhaps (to give Counsel credit) this was due to the fact that same was fairly self-evident. Nevertheless, in the opinion of this Court, the incidence of the onus in this matter is fundamental to deciding the merits thereof.

[17] The Applicant seeks the eviction of the Respondent from the premises based on the fact that, on the Applicant's version, the agreement has expired by the effluxion of time. In opposition thereto the Respondent relies, in support of its right to continue to occupy the premises, upon the fact that it has exercised its option in terms of the

agreement to extend the period of occupation in terms thereof. By doing so the Respondent has attracted the onus of proof.⁵

[18] During the course of the argument the Applicant contended that there was no genuine dispute of fact on the application papers before this Court. On behalf of the Respondent it was submitted, in the alternative and in the event of this Court not accepting the version as put forward on behalf of the Respondent, that there was a genuine dispute of fact in respect of whether the Respondent had given notice to the Applicant to extend the agreement. Neither party asked for the matter to be referred for oral evidence. The Respondent asked for the application to be dismissed.

Conclusion

[19] The importance of the foregoing is that:

19.1 If there is a genuine dispute of fact this Court may refer the matter to oral evidence or to trial;

19.2 the onus is upon the Respondent to prove, on a balance of probabilities, that it complied with the provisions of clause 2.2 of the agreement.

[20] The bald denial of the Applicant that Saha received either the WhatsApp message or the email from the Respondent, without any evidence whatsoever from Saha himself and no explanation as to why such evidence has not been placed before this Court, is highly prejudicial to the Applicant's case when weighing up the probabilities in this matter. On the other hand and taking into account all of the factors which this Court must accept and as set out earlier in this judgment⁶ there is nothing improbable whatsoever about the version of the Respondent. Moreover, it is clear therefrom that no genuine or *bona fide* dispute of fact exists pertaining to the issue as to whether or not the Respondent sent the WhatsApp message and email exercising its option to extend the agreement and that it came to the attention of Saha the director of the Applicant. The Applicant relied solely on the (incorrect) proposition that the Respondent was restricted by the agreement to giving notice at the Applicant's *domicilium* address and not by any other means.

[21] In the premises, it is clear therefrom that the Respondent has complied materially with the provisions of clause 2.2 of the agreement, thereby exercising the right of the Respondent to extend the agreement. Following thereon, the Respondent has discharged the onus incumbent upon it to prove, on a balance of probabilities, its right to occupy the premises and the application must be dismissed.

Costs

⁵ Chetty v Naidoo 1974 (3) SA 13 (AD).

⁶ Paragraph [14] *ibid*.

[22] It is trite that costs fall within the general discretion of the Court and that unless exceptional or unusual circumstances exist, costs normally follow the result. No such facts or circumstances have been brought to the attention of this Court. In the premises, the Applicant should be ordered to pay the costs of the application.

Order

[23] This Court makes the following order:

1. The application is dismissed.
2. The Applicant is to pay the costs.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 18 January 2023
Ex Tempore: 17 May 2023
Transcript: 30 May 2023

Appearances

For Applicant: M Rodrigues
Instructed by: Farinha Ducie Christofi Attorneys

For Respondent: K Lavine
Instructed by: Sadlers Attorneys