IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:23/013897

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 13/11/2024

Signature

In the matter between:

NEDILE LODGE (PTY) LTD **FIRST APPLICANT**

WONDERBOOM HANGAR OWNWERS ASSOCIATION **SECOND APPLICANT**

And

CITY OF TSHWANE METROPOLITIAN MUNICIPALITY **RESPONDENT**

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and all be uploaded on Caselines. The date for hand down is deemed to be 13 November 2024

JUDGEMENT

SCHEEPERS AJ

1. The applicant seeks relief in the form of a declarator and, in particular, seeks a declaration of rights pertaining to annexure "FA6", the agreement between the first applicant and the respondent , as well as regarding lease agreements concluded between members of the second applicant and the respondent on

terms substantially the same as those contained in annexure “FA6”, and subsequent renewals of those leases on the same terms and conditions and seeks an order, framed as set out below:

1.1 that under circumstances where lessee has exercised an option to renew the lease in terms of clause 29 thereof, “on the same terms and conditions”, the renewed lease includes clause 29 and affords to the lessee an option to the renew the lease for a further period or periods “on the same terms and conditions”, which would include clause 29 thereof.

1.2 that should the respondent or any lessee call for the redetermination of the rent payable for the lease premises, in terms of clause 5 of the lease agreement, the market -related rental to be determined, determined without having regard to the nature or value of any improvements or structures which the lessee erected on the leased premises.

1.3 that if a lessee has erected structures (including but not limited to steel shed hanger structures, and the metal cladding of such structures, and electrical infrastructure) with the intention that the structures would not accede to the immovable property of the lease plan, and such structures are by their nature, capable of being removed from the land, the structures remain the property of the lessee and have not acceded to the immovable property of the leased land owned by the respondent;

1.4 that the lessee who have erected structures failing within the ambit of those structures, provided that they do so without causing any material damage to the immoveable property which constitutes the leased land.

2 The Municipality in opposition denied the validity of the lease agreement, not only by claiming that the lease agreement had been cancelled, but also alleging the invalidity of the agreement based on con-compliance with the legislative framework, and sought relief in re-convention in that regard.

3 Prior to dealing with the defences raised it is necessary to deal with the relief sought by the Applicants and in particular, the declarators sought by the Applicants.

4 Mr Maritz referred me to the judgment in **CORDIANT TRADING CC v DAIMLER CHRYSLER FINANCIAL SERVICES (PTY) LTD 2005 (6) SA 205 (SCA)** and in particular paragraph 18 thereof:

"[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

5 This approach was subsequently confirmed in **PASIYA AND OTHERS v LITHEMBA GOLD MINING (PTY) LTD AND OTHERS 2024 (4) SA 118 (SCA)** at paragraph 46:

"*[46] The question is whether the High Court erred in its application of the test for declaratory relief. In terms of s 21(1)(c) of the Superior Courts Act 10 of 2013, a High Court may, in its discretion, and at the instance of any interested person, enquire into and determine any existing, future or contingent obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. The applicant who seeks declaratory relief must satisfy the court that he or she is a person interested in an 'existing, future or contingent right or obligation' and then, if satisfied on that point, the court must decide whether the case is a proper one for the exercise of the discretion conferred on it. The question must be examined in two stages*."

6 Mr Maritz SC eloquently argued that issuing a declarator on all the prayers regard would avoid duplication and future disputes, but I indicated by my reluctance regarding prayers 1.3 and 1.4 having regard that, absent a real dispute on the right to remove or not, relating to the structures, the relief is academic in nature and not relating to a real and active dispute between the parties .

7 In considering the first leg of the enquiry to be undertaken , there can be no doubt that the first applicant has an existing right in as far as the lease and its renewal is concerned. It has a contingent and / or future right regarding the renewal of its lease. In addition , it also has a future right, to have any dispute raised pertaining to the rental to be paid decided in terms of the provisions of the lease agreement, as provided for in clause 5.3 and 5.8.

8 I am accordingly satisfied that ,at the very least the First Applicant, cleared the first hurdle of the enquiry that I am duty-bound to undertake.

9 In order to exercise my discretion pertaining to the granting of a declarator , and dealing with the second leg, I will do so considering the nature of the dispute between the parties and the facts relied upon by both the applicants and the Respondent in doing so.

10 The only facts pertaining to the commencement of the dispute came from the Applicants' papers. The undisputed precursor for the dispute came about when the respondent's Airport Manager , Mr Madhava indicated the respondent's intention to cancel the existing lease agreement for hangars at the airport and respondent's intention to take possession of the hangars then occupied by the first applicant and its members. The basis for the intended cancellation disclosed by Mr Madhava , being that the new rentals respondent intended to enter into, would be based on a fair market value. The allegations in this regard in the founding affidavit and particularly in paragraph 33 thereof were admitted in the answering affidavit deposed to by Mr Madhava at paragraph 24.

11 The answering affidavit is indicative of the intention by the Respondent, not to renew the agreement and the attempt at instituting a counter-application seeking to have the agreements cancelled or declared cancelled and in addition thereto , for the agreement to be declared an invalid agreement sets out the wide net of defences thrown out by the Respondent in opposition to the relief sought by the applicants.

12 The version of the Respondent ,creates at the very least , an active dispute pertaining to the right of the Applicants to renew the contract. I believe it goes further than that, the Respondent also claims the right to charge market related rent which would necessitate a finding on the process to establish the rental amount, as provided for in terms of the agreement

13 This counter-application raised a dispute pertaining to the agreement in place between the parties and necessitates the Court to pronounce not only on the interpretation of the agreement, but also on the validity and alleged cancellation of the agreement(s).

14 The Respondent chose a double barrel defence against the relief sought by the applicants. On the hand it claims that the agreement(s) were cancelled due to breach, but on the other hand it claims that the agreements lack statutory compliance and as such are invalid.

15 The defence relied upon by the Respondent is that it elected to have cancelled the lease agreement due to the breach for the failure by the Applicant to have building plans approved. This is set out in the answering affidavit at paragraphs 11 and 13.

16 The alleged cancellation and / or right to cancel was not supported by any factual averments and is seemingly relied upon without any reference to clause 9.1.9 of the lease agreement, read with clause 20.

17 The Respondent has simply not made out a case that it was entitled to cancellation of the lease and the right to cancel, and cancellation was not proven.

18 Respondent was compelled to act in terms of the cancellation clause, notify the Applicant of the alleged breach, afford the time to remedy the breach and , only then it could , exercise its election to cancel the agreement.

19 This defence raised by the Respondent, very much like the invalidity defence, is not in any way supported by facts. I have no evidence to find that the agreement has been lawfully terminated by the Respondent . Accordingly, the defence of valid cancellation of the agreement cannot succeed.

20 The defences raised are concerning. As pointed out by Mr Maritz SC on behalf of the applicants, the Respondent continued to act in terms of the contract, invoice in terms thereof for a period of at least 19 years since the original resolution by Council to enter into the agreement. Almost 8 years have passed since the First Applicant's renewal of its agreement with no issue raised pertaining to invalidity of the lease.

21 The chronology of events clearly reflects that when the agreement was entered into after the promulgation of the Municipal Systems Act [1] and the Municipal Finance

Management Act [2] and the Regulations promulgated in terms of the Municipal Finance Management Act[3]. The Supply Chaim Management Policy referred to by the Respondent ,Annexure COT3 is an amended policy and on face value, resolved to by the Council on the 24th of February 2011. The Municipal Asset Transfer Regulation was , according to the respondent, promulgated in 2008. Respondent itself alleged in its version that it *"…. Are applicable to all Lease Agreements concluded after such promulgation[4]".*

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[1] 1/3/2001
[2] 1/7/2004
[3] 1/7/2005
[4] Answering affidavit paragraph at 1.24

22 Should this have been a real concern that the contract and all its terms are invalid for want of legislative compliance, one would have expected the Respondent to have approached the court for review of the decision to authorise the standard terms and conditions rental as well as all the agreements it entered into on such terms and conditions, as well as each renewal of those contracts.

23 There is no indication whatsoever, either in the form of an internal investigation, or by way of Council Resolution that this was what Council resolved to do.

24 Considering that the attack against the "decision" is a decision of the Respondent itself, it would fall within the category of so-called "self-review" applications. Such a review would be in terms of the provisions of Section 172 of the Constitution. With such reviews, the provisions of Section 172(1)(b) of the Constitution are appliable as was set out in numerous reported judgments.

25 The mere fact that an alleged ground of invalidity is found, does not entitle such an applicant to an order of invalidity purely based on the invalidity. Several factors impact on such a decision including but not limited to the delay between the decision sought to be reviewed, and the time when the application to review the decision is brought.

26 There is no acceptable explanation furnished for the delay, whether than be from the initial resolution to accept the standard terms and conditions for leases at Wonderboom Airport or any subsequent renewal of the leases. The absence of an explanation for the delay is inexplicable.

27 Considering the undisputed development that has since taken place on the leased properties, and the Respondent's apparent claim of entitlement to the fruits of the development undertaken, is not adequately addressed at all. Respondent offers no solution or compensation for the development that was undertaken. It bluntly ignores reality and does not even address the issue of what a just and equitable remedy should be , should the invalidity relief sought, be granted.

28 I agree with Mr Maritz SC that the delay in seeking the relief is grossly unreasonable.

29 In **BUFFALO CITY METROPOLITAN MUNICIPALITY v ASLA CONSTRUCTION (PTY) LTD 2019 (4) SA 331 (CC)** at paragraphs 52-53:

[52] The second principle relating to delay under legality is that the first step in the Khumalo test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. 40 Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. 41 But, as was held in Gijima, where there is no explanation for the delay, the delay will necessarily be unreasonable. 42

[53] Even if the unreasonableness of the delay has been established, it cannot be 'evaluated in a vacuum' and the next leg of the test is whether the delay ought to be overlooked. 43 This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. 44 There must however be a basis for a court to exercise its discretion to overlook the delay. 45 That basis must be gleaned from the facts made available or objectively available factors. 46

30 Firstly, absent from the facts deposed to in support of the invalidity relief is an explanation for the delay in seeking the relief. The facts deposed to most definitely do not address when Respondent realized the illegality and why it only realized it at the time. I have no qualms in finding the delay unreasonable.

31 Despite the unreasonable delay, I proceeded to consider whether any basis existed to overlook the delay and had regard to the allegations of invalidity.

32 The allegations made were in general bold sweeping statements , specifically when the resolution leading to the initial resolution by Council to accept the

standard terms and conditions for the lease agreement at the Wonderboom Airport is considered.

33 The resolution clearly reflects a public participation process, consideration of the market value of the land as well as a clear intention not to generate market related rental from the property, *inter alia* as motivation for developers to be willing to engage in long-term leases.

34 The Respondent , in seeking to review the decision to enter into the leases, did not bother to provide a record relating to the leases and only annexed a selection of annexures. It did not address the issue of the absence of retrospectivity in amendments to legislation or policies and seemingly left it to the Court to perform that function.

35 Based on the lack of clear indication of statutory non-compliance at the time of the decision on the standard terms and conditions, there are no factors that could be found to excuse the delay.

36 Mr Rip SC, on behalf of the Respondent, at the hearing of the application did not point at any clear non-compliance with the legislative framework that would render the decision and / or agreements invalid.

37 I accordingly find that the relief sought in reconvention based on both the alleged cancellation and the invalidity review must be dismissed with costs.

38 The primary issue remaining is the interpretation of the renewal clause as contained in the signed agreement between the applicant and the respondent.

39 Annexure “FA 6’, the lease agreement between the Respondent and the First Applicant contains the following clauses relating to the term and duration of the lease agreement

1.2.10 “the lease.” Means the period for which this lease subsists, including any period for which it is renewed.

Duration

This lease shall come into operation on the date specified in annexure A and shall subsist until the date specified in Annexure A. Info duration is specified in annexure A the lease shall endure for a period of nine years and 11 months from date of signature, or date of fulfilment of the suspensive conditions, or until terminated in terms of this agreement. If subject to the approval of the loan, it will come into operation on the effective date. If subject to the approval of loan it will be so indicated in Annexure A

.Option of renewal.

The lessee shall have the right to renew this lease with six months' notice before the expiration of the lease for a further nine years and 11 months on the same terms and conditions.

The right of renewal shall be exercised by notice in writing from the lessee to the less sore given and received not later than at least six months prior to the date on which the renewal period is to commence and shall lab lapse if not so exercised.

If the right of renewal is duly exercised, this lease shall be renewed automatically and without the need for any further act of the parties.

The lessee may not, however, exercise the right of renewal while in breach or default of any term of this lease.

If this lease does not endure at least for the full term for which it is in the initially contracted, the right of renewal shall lapse, and any notice of exercise thereof given prior to such lapsing shall be null and void

40 The lease agreement was signed and stamped on behalf of the Respondent on 30 June 2006, and subsequently signed on behalf of the Applicant on 2 August 2006,

41 Annexure “A” was signed on the same dates and stamped by the municipality on that date. Annexure “FA6” contains a clear reference to a council resolution approving the letting and hiring of the properties at the Wonderboom Airport. A copy of the resolution is furthermore annexed thereto and sets out the history of problems with the old leases and the need to find standard conditions for new leases coming low and clear the duration of this agreement is, 9 years and 11 months, if not specified otherwise below,

42 The common cause facts on the papers regarding the renewal of the agreement on the same terms are as follows:

42.1 Annexure “FA6” , together with annexure “A” thereon reflects the written agreement between the parties;

42.2 One renewal of the contract had already taken place.

42.3 The dispute was raised in terms of the letter on behalf of the Applicants dated 12 September 2022.

43 There is however a dispute whether the members of the second applicant have similar contracts in existence.

44 That is of little importance to consider the interpretation of clause 29 and the inclusion or further applicability and inclusion of clause 29 for all subsequent renewals.

DOES CLAUSE 29 REMAIN APPLICABLE TO EVERY SUBSEQUENT RENEWAL?

45 Having regard to the relief sought in prayer 1.1 I am called upon to interpret clause 29, and in particular, whether the renewal clause is incorporated into the agreement post renewal. That based on the initial renewal providing for a renewal “on the same terms and conditions”.

46 It is at the outset necessary to consider what is included in the contract in order to be able to compare it to existing precedent pertaining to renewal and the incorporation of terms in the subsequently renewed contract.

47 Clause 29 is clear and unequivocal in that it provides that the first applicant has the right to renew this lease six with six months' notice before the expiration of the lease for a further nine years and 11 months on the *same terms and conditions.*

48 What is common cause is that on the papers is that the lessee (first applicant) exercised its right of renewal, and on the uncontested argument advanced by Mr Maritz SC on behalf of the applicants, the applicable date to the commencement of the agreement renders the current renewal in effect until 31 October 2026.

49 This in turn would then provide for a further renewal that may be exercised at least six months before the expiration of this renewed lease agreement's lease term.

50 For the determination of the current dispute, the municipality alleges that it was lawfully entitled to cancel the agreement, and it disputes the right to continued renewals not only based upon the illegality of the renewals but also based on the interpretation of the agreement.

51 Considering the terms applicable to the renewal it is apposite point out that there are no additional terms to be agreed upon between the parties in the event of a renewal.

52 The essence of the clause is that once notification has taken place, that the contract is renewed on the same terms and conditions.

53 Mr Maritz SC, argued that this would have as its effect that clause 29, providing for renewals forms part and parcel of the renewed agreement and is once again available for the applicant ,as the lessee, six months before the next expiry.

54 I raised the issue with Mr Maritz SC during argument in Court as to whether the contract would then continue in perpetuity , Mr Maritz SC argued that the Common Law would be applicable and the maximum term of a lease agreement would then be 99 years.

55 Absent a statutory bar which was not pointed out to me, that indeed seems to be the Common Law position. There does not appear any lack of clarity regarding the term of any subsequent renewal which would lead to an interpretation that the subsequent lease is only for a reasonable time and terminable on reasonable notice.

56 When considering the applicable law on renewal and the incorporation of terms of the initial agreement, it is important to consider whether a specific clause survive or not survive its incorporation, I considered the decision by the then Appellate Division in *Webb v Hipkin 1944 A.D. 95*.

57 In Webb the dispute revolved around the inclusion of an option to purchase in any subsequent renewal of the lease. Argument was advanced that the option to purchase, being a collateral issue to the lease agreement, was not incorporated in the event of a renewal and not enforceable against the party. Here the appellate division, as it then was, dealt with the meaning of renew and found as follows:

"… The renewal according to my construction of the agreement, as already given, is a renewal of all the terms of the document "for a further period of three years from the first September 1941". The terms renewed include the terms of clause 15 and 16. The mention of the date "first September 1941" in those clauses is therefore no more of an obstacle to the effect being renewed for a further period of three years from 1 September 1941, then the dates mentioned in clause 1 of the lease are an obstacle to the tenancy itself being renewed for the same period."

58 I also considered the decision in *Brink v Premier of the Free State and another (2009) 3 ALL SA 304 (SCA)* where the issue of a renewal found application and where to "golden rule of interpretation" was still applied (*prior to Endumeni).*

59 Here the option to renew provided not only for the same conditions, but importantly included the use of the word "or" "new conditions or "a combination of A and B"

60 Here The court found that the use of and/or had to be read both disjunctively as well as conjunctively. It then emphasised the existence of a qualifier, which provided for an additional agreement and therefore required agreement and not a unilateral act.

61 Based on the contents of the agreement *in casu*, no "qualifier" exist, and clear provision is made for unilateral action to be taken by the lessee in order to ensure renewal of the lease, without the need for cooperation or any additional agreement pertaining to the right to renew.

62 In the event of a dispute pertaining to the rental amount payable in terms of the lease , a specific dispute resolution procedure was included and is not indicative of a restriction on the right to renew, but for a process to be followed in the event of any dispute pertaining to the amount of renal payable in terms of the lease, including the process to be utilised for valuation.

63 Applying the principles as set out in Endumeni[5], and subsequently followed in the decision in Auckland Park[6], I consider considered the normal grammatical meaning as well as the context in order to afford an interpretation to the renewal clause contained in clause 29

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[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13)*

[6] *University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 (CC)*

64 From the context of the agreement, it appears clearly that the municipality was interested in developing the Wonderboom Airport and sought to standardise its future standard lease conditions, in order to promote affordable rentals to prospective developers, who in turn would fund the development of new industry on the land where the Wonderboom Airport is situated.

65 Applying the principles of Endumeni, and contextualising it with reference to the pre-resolution leases at the Airport, and considering the record of decision as reflected by the resolution, it is clear that the terms of the contract provided for a unilateral act of renewal, that did not necessitate the cooperation of the municipality and contained a separate dispute resolution process for any collateral issues that may arise between the parties.

66 I therefore find that the renewal clause forms part of the renewed terms and conditions of the lease agreement post renewal.

67 In as far as the relief in prayer 1.2 is concerned, there cannot be any dispute that the process is prescribed in the agreement between the parties. The Municipality is bound to raise any dispute regarding the quantum of the rental amount in terms of the agreement. The relief sought in that regard should follow.

68 When exercising my discretion pertaining to the issues raised as being in dispute between the parties. I believe that the issue of the renewal is dealt with above, and the resolution of disputes pertaining to the amount of market -related rent that has to be paid, are the only issues in favour of which I should exercise my discretion to grant declaratory relief.

69 The issues pertaining to the structures erected on the property and whether it belongs to the developer or to the municipality ought to be decided when those disputes arise, either at the termination of the lease agreement or in the event of any changes and or removals taking place. For the court to decide at this stage would be premature and, insufficient facts pertaining to the structures itself served before me, in order to exercise my discretion.

70 I therefore decline to issue a declarator on the relief as set out in prayers 1.3 and 1.4 of the notice of motion

71 There is another issue that needs to be dealt with. The applicants, and in particular the second applicant on behalf of its members, seek declaratory relief pertaining to their members' agreements with the respondents, in as far as it relates to the same terms and conditions applicable to their agreements.

72 I have not been privy to the contracts entered into between the second applicant's members and the municipality and any renewals of such contracts. I cannot pronounce on the individual contracts of the members absent consideration thereof. This judgement relates to the standard terms and conditions of the respondent's lease agreements, and in as far as those conditions are the same as the conditions in annexure "FA6", it does not necessitate an individual declarator, but will be covered by the declarator, pertaining to first applicant's agreement.

73 In as far as costs are concerned, no punitive costs were sought against the respondent by the applicants. If this was sought, having regard to the defences raised other than the interpretation issue, the court would have considered granting a punitive cost order against the respondent.

THE FOLLOWING ORDER IS MADE:

1. It is declared that the option exercised by the first respondent to renew the lease in terms of clause 29 of the lease agreement *"on the same terms and conditions"*, affords to the First Applicant an option to renew the lease for a further period or periods *"on the same terms and conditions"*, which would include clause 29 thereof;

2. It is declared that should the respondent or the First Applicant call for a redetermination of the rent payable for the lease premises, in terms of clause 5 of the lease agreement, the market-related rental to be determined

falls to be determined without having any regard to the nature or value of any improvements or structures which the lessee erected on the leased premises;

3. The Respondent is ordered to pay the costs on party and party scale of the Applicant, including the costs of senior counsel on Tariff C on a party and party scale, the counter application by the Respondent is dismissed with costs, including the costs of senior counsel , where so employed, on tariff C on a party and party scale.

G J SCEEPERS
Acting Judge of the High Court
Gauteng Division; Pretoria

Appearances:

For the Applicant:	**Adv. NGD Maritz SC**
Instructed by:	**MacRobert Attorneys**
For the Respondent:	**1st Respondent in person**
	M Rip SC
	Mahumani Incorporated
Date Heard:	**24 August 2024**
Date Judgement delivered:	**13 November 2024**