

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Application for Summary Judgment

Case No: HC-MD-CIV-ACT-CON-2018/01431

In the matter between:

ROUCO AUTO MANUFACTURERS (PTY) LTD

PLAINTIFF

and

YETI MANUFACTURERS (PTY) LTD

1ST DEFENDANT

DIETER GUNTHER WITULSKI

2ND DEFENDANT

ERNST RUDOLF WITULSKI

3RD DEFENDANT

QUINTON EVERT VAN ROOYEN

4TH DEFENDANT

Neutral citation: *Rouco Auto Manufacturers (Pty) Ltd v Yeti Panel Manufacturers (Pty) Ltd* (HC-MD-CIV-ACT-CON-2018-01431) [2020] NAHCMD 288 (15 July 2020)

CORAM: NDAUENDAPO

Heard: 12 June 2020

Delivered: 15 July 2020

Flynote: Civil procedure - Rule 63 - Stated case - landlord and tenant - lease - Validity of - Clause providing for option to renew - Clause silent on rent and period - Essential in agreement that rent and period be fixed and determinable - Such not the case where option is silent - Option to renew lease void for vagueness - Option accordingly invalid.

Summary: This case comes before me as a stated case in terms of rule 63 of the rules of this court. It concerns the validity of an option in a lease agreement. Incidental to that, is the amount of stamp duties to be paid depending on the lease period. The plaintiff's case is that the amount of stamp duties payable is N\$ 47,544, calculated for a 6 year period which includes the initial three year period and a possible three year renewal period. The defendant's case is that the amount of stamp duties payable is N\$ 12,909, calculated for the agreed initial three years period of the rental only and not for any possible renewal periods. The parties agreed that in terms of clause 5.1 of the lease agreement, the lease period is described as follows: 'This lease shall commence on 20th January 2017 and the lease shall endure for a fixed period of 3 years from that date with the option to renew.'

Is that option to renew enforceable or invalid for vagueness?

Counsel for the plaintiff argued that the option is enforceable because although the period and the rent payable are not stated, the same period and the same rent amounts that were paid apply to the renewal agreement. Counsel for the defendant argued that the option to renew is unenforceable as it is capable of more than one meaning and the rent payable is vague.

Held that the amount of rent payable is either the amounts as paid in the previous first, second and third year in the previous lease agreement or is the amount to be paid in the fourth, fifth and sixth year with the annual increase in rent as per the lease agreement sought to be renewed?

Held, that the option to renew is capable of more than one meaning as to the amount of rent payable and the lease period.

Held further that the option to renew is void and invalid for vagueness.

ORDER

- (a) The option to renew the lease agreement is void and invalid for vagueness.
- (b) In terms of section 22(2) of the Stamp Duties Act 15 of 1993, the stamp duties must be calculated in respect of the fixed period only (i.e. .three years).
- (c) The stamp duties calculated in respect of the fixed period(i.e. three years) and on the rental amounts set out in clause seven of the agreement are N\$12,909 00
- (d) The plaintiff's claim (claim1) is dismissed with costs, such costs to include costs consequent upon the employment of one instructing and one instructed counsel.
- (e) The matter is postponed to 20 August 2020 at 14h00 for case management.

JUDGMENT

NDAUENDAPO, J

Introduction and background

[1] This matter comes before me as a stated case in terms of Rule 63 of the Rules of this Court. The matter concerns the validity of an option to renew in a lease agreement. On 16 January 2017, the plaintiff and first defendant entered into a written lease agreement. The plaintiff let to first defendant who leased erf 4898, in Walvisbay. In terms of the lease agreement the first defendant became obligated to stamp and bear the stamp duties payable on the contract of lease and the deed of suretyship and to indemnify the plaintiff in respect of any obligation incurred in terms of the provisions of the Stamp Duties Act 15 of 1993 in relation to the execution of the contract of lease and deed of suretyship. The first defendant failed to pay the stamp duties. The plaintiff paid the prescribed stamp duties on the lease agreement

in the amount of N\$ 47,544. The plaintiff then, instituted an action to claim the amount of N\$47,544 from first defendant and fourth defendant who bound himself as surety? The 'First and fourth defendants pleaded that the amount payable in terms of the Stamp Duties Act 15 of 1993 amounted to N\$12,960.00 and that first defendant paid that amount to plaintiff on 24 January 2017.

[2] The parties have agreed on the submission of a stated case in terms of rule 63 of the rules of this Court for adjudication herein. Rule 63(1) provides:

'The parties to a dispute may, after institution of proceedings, agree on a written statement of facts in the form of a special case for adjudication by the managing judge. '

[3] The case is stated as follows:

'The parties agreed that the main issue for determination in this stated case is the amount of stamp duties payable on the lease agreement, and in this regard, the parties agreed that this issue can be determined on the agreed facts stated in paragraph 1 and an interpretation of the lease agreement and application of the Stamp duties Act 15 of 1993.'

[4] The plaintiff's case is that the amount of stamp duties payable is N\$47 544 calculated for a 6 years period which includes the agreed initial 3 year period and a possible 3 year renewal period; and as such calculated on N\$8/100 of the rental amount, as follows:

- (a) For year 1 it is N\$6 240 (N\$65,000 times 12 equals N\$780,000 times 8/1000);
- (b) For year 2 it is N\$6,912 (N\$72,000 times 12 equals N\$864,000 times 8/1000);
- (c) For year 3 it is N\$7,564 (N\$79,000 times 12 equals N\$948,000 times 8/1000);
- (d) For year 4 it is N\$6,240 (N\$65,000 times 12 equals N\$780,000 times 8/1000);
- (e) For year 5 it is N\$6,912 (N\$72,000 times 12 equals N\$864,000 times 8/1000);
- (f) For year 6 it is N\$7,584 (N\$79,000 times 12 equals N\$948,000 times 8/1000);

[5] The first and fourth defendants ("defendants") case is that the amount of stamp duties payable is N\$12,909, calculated for the agreed initial 3 year period of

the rental only and not for any possible renewal periods; and as such calculated on N\$5/1000 of the rental amount, as follows:

- (a) For year 1 it is N\$3 900 (N\$65,000 times 12 equals N\$780,000 times 5/1000);
- (b) For year 2 it is N\$4,290 (N\$71,500 times 12 equals N\$858,000 times 5/1000);
- (c) For year 3 it is N\$4,719 (N\$78,650 times 12 equals N\$943,800 times 5/1000);

[6] The stated case is set out hereinafter: 'The parties agree that the plaintiff and the first defendant entered into the written agreement, attached hereto as "A", which lease agreement is not a long-term lease, and that it had not been registered by either party.'

[7] The parties agree that in terms of clause 19.3 of the lease agreement the first defendant is responsible for the payment of whatever stamp duties are found to be payable on the lease agreement and must reimburse the plaintiff for the stamp duties due:

'19.3 The lessee shall be responsible to stamp and bear the stamp duties payable on this contract of lease and the deed of suretyship and indemnifies the Lessor in respect of any obligations incurred in terms of the provision of the Stamp Duties Act in relation to the execution of this contract of lease and deed of suretyship.'

[8] The parties agree that the first defendant has paid to the plaintiff an amount of N\$12,909 in respect of the stamp duties (for a 3 year period) and that the plaintiff has paid an amount of N\$47,544 in stamp duties (for a 6 year period) to the Receiver of Revenue.

[9] The parties agree that in terms of clause 5.1 of the lease agreement, the lease period is described as follows:

'This lease shall commence on 20th January 2017 and the lease shall ensure for a fixed period of 3 (three) years from that date with the option to renew.'

[10] The first issue that has to be determined is whether clause 5.1 amounts to an enforceable option to renew the lease and in this regard the first defendant contends

(and the plaintiff disagrees) that the option to renew is void for vagueness, as amongst others, it does not expressly state who may exercise the option and what the terms of the extended lease agreement will be.

[11] In the event that it is found that the option to renew is void for vagueness, then the parties agree that:

10.1 in terms of section 22(2) (a) of the Act, the stamp duties must be calculated in respect of the fixed period only (i.e. 3 years).

10.2 the stamp duties calculated in respect of the fixed period (i.e. 3 years) and on the rental amounts set out in clause 7 of the agreement, the stamp duties are N\$12,909; and

10.3 the plaintiff's claim must be dismissed.'

[12] In the event that it is found that the option to renew is valid then the second issue must be determined which is who may exercise the option and in this regard:

11.1 the first defendant contends (and the plaintiff disagrees) that the option to renew could only be exercised by the first defendant lessee; and

11.2 the plaintiff contends (and the first defendant disagrees) that the option to renew could also be exercised by the plaintiff as lessor.

[13] The first defendant (lessee) and not by the plaintiff (lessor), then the parties agree that:

12.1 the first defendant did not exercise the option to renew and will not do so;

12.2 as such, and in terms of section 22(2) (a) of the Act, the stamp duties must be calculated in respect of the fixed period only (i.e. 3 years) and amounts to N\$12,909 which has been paid by the first defendant; and

12.3 The plaintiff's claim must be dismissed.

[14] In the event that it is found that the option to renew could be exercised by the plaintiff lessor as well, then the third issue must be determined which is how the option to renew may be exercised and in this regard: 14.1. the first defendant contends (and the plaintiff disagrees) that the option to renew can only be exercised in writing by giving written notice to renew, as provided for in clause 01.4 of the agreement.

‘Any notice to be given by the one party to the other shall be sent by prepaid registered post, or delivered by hand to such other at his *domicilium citandi et executandi* and such notice shall be deemed to have been served 7 (seven) days after posting thereof, or in the case of delivery by hand upon the date that the other party signs an acknowledgment of receipt.’

[15] The plaintiff contends (and the first defendant disagrees) that the notice requirement referred to in clause 10.4 does not pertain to the option to renew and that by virtue of the wording of the non-variation clause contained in clause 22 of the lease agreement it is clear that the parties did not intend to require the exercising of the option to renew to occur in writing.

‘22. NO VARIATION

22.1. No addition to, variation of, or agreed cancellation of this Agreement, shall be of any force or effect unless in writing and signed by or on behalf of the parties.

22.2. This agreement shall be binding on the parties hereto and their respective successors and assigns. Neither party may or shall have the power to cede or assign this agreement without the prior written consent of the other parties.’

In the event that it is found that the option to renew may only be exercised in writing then, the fourth issue must be determined which is the effect of section 23(3) of the Act, and in this regard:

‘ 15.1. the first defendant contends (and the plaintiff disagrees) that in terms of section 22(3) of the Act, the stamp duties must be calculated in respect of the fixed period only;

15.2. the plaintiff contends (and the first defendant disagrees) that the stamp duties must be calculated in respect of the fixed period and the possible renewal period.

In the event that it is found that the option to renew can be exercised orally then the fifth issue must be decided which is what the effect of section 23(8) of the Act, and in this regard:

16.1. the parties agree that in terms of section 22(2) (c) (i) – (ii) stamp duty had to initially be paid on the original period and the possible renewal period, i.e. 6 years;

16.2. the first defendant contends (and the plaintiff disagrees) that in terms of section 22(8) of the Act, the plaintiff can apply for a refund of the overpaid stamp duties, and for that reason, has no claim against the first defendant;

16.3. plaintiff contends (and first defendant disagrees) that section 22(8) does not make it non-suited to claim the stamp duties from the first defendant, notwithstanding that it may (which is not conceded) reclaim any overpayment and plaintiff contends that it is immaterial since it has exercised the option to renew the agreement.

The parties agree that the determination of the above legal issues will resolve plaintiff's claim one.'

Plaintiff's submissions

[16] The plaintiff submits that if the parties did not specify specifically who may exercise the option as they in fact did not, it follows automatically that each party has the option to renew the contract.

[17] The plaintiff contends further that the language of the option contract is not ambiguous and even if it is it should be rendered the one interpretation which makes it valid and not another one that makes it invalid since the court will place the construction upon it which upholds the contract rather than one which makes it void.

[18] The plaintiff submits further that if the parties did not specify the rental and terms, it follows that the rental and terms applicable in the contract itself will apply. In other words, the rental will again be what was provided for the first, second and third years as well as the other terms except if the consumer price index exceeds 10% per annum as provided for in the clause 7.2.

[19] Counsel referred this court to the matter of *In Namibia Minerals Corporation*¹ where the court held that it is only where the contract is not capable of any effective meaning in circumstances that it would be too vague to be enforced.

[20] In the event that it is found that the option to renew is valid then the second issue must be determined, which is who may exercise the option and in this regard:

- (a) the first defendant contends (and the plaintiff disagrees) that the option to renew could only be exercised by the first defendant lessee; and
- (b) as said, the plaintiff could also be exercised by the plaintiff as lessor.

Submissions by first and fourth defendants

[21] Counsel contends that the option to renew is void for vagueness, as amongst others, it does not expressly state who may exercise the option and what the terms of the extended lease agreement will be.

[22] Counsel further argued that:

‘An option is a legal concept which comprises a contract between two parties, the option grantor and the option holder, to keep open and offer to contract (the substantive offer) made by the grantor of the holder. The contract which thus entrenches the substantive offer is called the option contract. Acceptance of the substantive offer (the exercising of the option) brings about the substantive contract envisaged by the arrangement, and is governed by the ordinary principles regarding acceptance. The option agreement is distinct from the substantive contract, and the view that the option contract amounts to the substantive contract qualified by a suspensive condition has been rejected’.

[23] Counsel argued that:

‘An option to renew or extend the period of a lease, in our law, is a form of *pactum de contrahendo*, an agreement to make a contract in the future. An option has two components: an offer proposing the conclusion of a specific contract, and an agreement not to revoke the offer.’

¹ *Namibia Minerals Corporation Ltd v Bengguella Concessions Ltd* 1997(2)SA 548(A) 557D.

[24] So too the lease agreement signed between the parties is a substantive contract, and may be distinguished from the option agreement to renew the lease, even if found to subsist.

[25] Furthermore, an option contract:

‘Creates at least one obligation, in terms of which the holder of the option has the right that the option grantor shall keep the substantive offer open for acceptance (or shall not revoke the offer).’

[26] An option in a lease agreement relating to the renewal of the lease or the extension of the period of the lease is thus normally, though not invariably, an irrevocable option in favor of the lessee, not the lessor.

[27] The requirements of an option contract are those generally applicable to contracts, therefore:

‘The option agreement may also fail for lack of certainty where the substantive offer which it relates is ineffective. Definitions of the option in case law usually refer to a period of time for which the offer is to be kept open, but this has not held to be an essential requirement.’

[28] In *Wasmuth*² this view was confirmed when Levy J held that:

‘It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when accepted it will bind the offeror. ...Therefore, if an offer which is an essential element of any opinion is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted into a binding contract.’ (Emphasis added)

[29] On the foregoing, the words ‘with the option to renew’ contained in clause 5.1 could undoubtedly not be interpreted to be certain and definite.

² *Wasmuth v Jacobs* 1987(3) SA 629 at 633.

[30] The option, even should it be regarded to be one, nonetheless fails, as it is vague and capable of more than one meaning. The first defendant would thus not be capable of accepting the same and converting it into a binding contract. That is, not only does the option not refer to a period of time for which it is to be held open, but nowhere in the lease agreement are the terms relevant to the “renewed period” of the lease, *inter alia* the rental, addressed at all.

[31] The only inference that would therefore be drawn is that the stipulation is void for vagueness.

[32] In light of the conclusion I came to, it is not necessary to consider the other submissions.

Discussion

[33] The crucial issue for determination is whether clause 5.1 of the lease agreement is enforceable, and if so, by whom? Clause 5.1 states:

‘This lease shall commence on 20th January 2017 and the lease shall endure for a fixed period of 3 (Three) years from that date with the option to renew’ (My emphasis)

The learned author Joubert, in his book, *The General principles of the law of contract*³

Opines that:

‘The accepted view of the option is that it has two components, namely an offer (called here substantive offer) which proposes the conclusion of a particular contract, as well as an agreement not to revoke the offer, usually during a stated time. The logical inferences to be drawn from this are (i) that the substantive offer must satisfy all the requirements for a good offer of the type of contract proposed, (ii) that there must be an offer not to revoke the substantive offer, (iii) the offer not to revoke must first be accepted. All the normal rules of offer and acceptance are applicable... The other advantage is that the one party is bound while the other party is given the option or choice or election to exercise the option and so create a substantive offer without being bound to do so.’ (P53-54)

³ General Principles of the law of Contract: Joubert 1987 at53-54.

[34] The phrase ‘with option to renew’ in clause 5.1 of the lease agreement raises many questions: (a) by when must the option be exercised, and by whom? (b) What are the terms of the new lease agreement? (c) What is the rental payable? In *Wasmuth*⁴ Levy J held that:

‘It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when accepted it will bind the offeror. ...Therefore, if an offer which is an essential element of any option is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted into a binding contract.’ (Emphasis added).

[35] In *Hattingh*⁵, a provision in a lease, which provided that the lessee had the right and option to purchase certain premises at such price as the parties may agree upon, was held to be of no force or effect until a price had been agreed upon. In *South African Reserve Bank*⁶ the court held that:

‘An agreement which purported to give the tenant an option “at a rental to be mutually agreed upon”, in fact did not give the tenant a valid “and subsisting option” which he could exercise.’

‘It has also been held that a ‘reasonable’ price or rental contained in an option does not constitute a fixed or determinable rental or price and that such a term would be too vague to be enforceable.’⁷ In *Trook*⁸ The court said:

“Suffice it to say that, taking all the arguments to the contrary into account, I remain entirely unconvinced that a stipulation to pay a reasonable rental is sufficient to enable the parties to establish with certainty the ambit of the respective rights and obligations .I find myself respectfully in accord with those South African decisions which held that such a stipulation is void for vagueness.” ’

⁴ Supra at 633.

⁵ *Hattingh v Van Rensburg* 1964(1) SA 578(T).

⁶ *South African Reserve Bank v Photocraft (Pty) Ltd* 1969(1) SA 610(C).

⁷ *Pieters v Theron* 1994 NR 307 at 318.

⁸ *Trook t/a Trook's Tea Room v Schaik and Another* 1983(3) SA935 (N) at 939A.

[36] Counsel for the defendants argued, correctly in my view, that the option, even should it be regarded to be one, nonetheless fails, as it is vague and cable of more than one meaning. The first defendant would thus not be capable of accepting the same and converting it into a binding contract. That is, not only does the option not refer to a period of time for which it is to be held open, but nowhere in the lease agreement are the terms relevant to the “renewed period” of the lease, inter alia the rental, addressed at all.

[37] Counsel for the plaintiff argued, on the other hand, that if the parties did not specify the rental and terms, it follows that the rental and terms applicable in the contract itself will apply. I disagree. The terms of the offer, which is an essential element of the option, must be clear and definite for the offeror to accept. The terms include the rental payable and the period.

[38] In this case, and relying on the authorities mentioned above, the terms are not clear. What would be the rental payable and the period? Those are essential terms of the agreement which must be clear. Counsel for the plaintiff argued that the rental will again be what was provided for the first, second and third years as well as the other terms. If that submission is correct, does it mean a new lease agreement with the rent payable the same amounts as it was paid in the first, second and third years? Or does it mean the lease agreement should be extended for another three years, beginning at the fourth year up to the sixth year with an annual rent increase payable? On what period should the stamp duties then be calculated? A fixed six years or three years? That is not clear.

[39] The option in clause 5.1 is capable of more than one meaning and it is vague and unenforceable. The option to renew the lease agreement is, accordingly void and invalid for vagueness. As per the stated case, I make the following order:

Order:

- (a) The option to renew the lease agreement is void and invalid for vagueness.
- (b) In terms of section 22(2) of the Stamp Duties Act 15 of 1993, the stamp duties must be calculated in respect of the fixed period only(i.e. three years).

- (c) The stamp duties calculated in respect of the fixed period(i.e. three years) and on the rental amounts set out in clause 7 of the agreement are N\$12,909 00.
- (d) The plaintiff's claim (claim 1) is dismissed with costs, such costs to include costs consequent upon the employment of one instructing and one instructed counsel.
- (e) The matter is postponed to 20 August 2020 at 14h00 for case management.

G N NDAUENDAPO

Judge

APPEARANCES:

FOR THE PLAINTIFF

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Of Ellis Shilengudea Inc.
Windhoek

FOR THE 1st and 4th DEFENDANT

Adv. Jones
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