



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 4467/2018

In the matter between:

VAN DER STEL SPORTS CLUB

Applicant

and

CAPE PERFECT HEALTH CC t/a PERFECT HEALTH

Respondent

JUDGMENT DELIVERED 3 DECEMBER 2018

SAVAGE J:

Introduction

[1] The applicant, the Van der Stel Sports Club, a voluntary association, seeks an order of eviction from commercial premises, being erf 235, Stellenbosch ('the premises'), against the respondent, Cape Perfect Health CC, trading as Perfect Health, with a punitive costs order.

[2] For some weeks following the hearing the matter on 20 September 2018 the parties engaged in unsuccessful attempts to settle matter. On being advised that efforts to resolve the dispute between them had failed, the parties were requested to make further written submissions in relation to the matter. These submissions were received from counsel on 23 November 2018, following which this judgment was prepared.

Relevant factual background

[3] The premises in issue, used by the respondent to operate a gym, are owned by the Stellenbosch Municipality. As from 8 March 2002 the premises have been leased to the Stellenbosch Sport and Recreation Association ('the SSRA'). In terms of this lease agreement "*(t)he Municipality shall maintain the exterior of the Premises as well as the main exterior walls and roofs thereof in good order and repair*". With effect from 1 May 2004 the SSRA sub-leased the premises to the applicant for a period of 9 years and 11 months, following which the lease has been tacitly renewed on a month to month basis. In terms of clause 10 of that lease, it was agreed that "*(t)he SSRA shall maintain the exterior of the Premises as well as the main exterior walls and roofs thereof in good order and repair*".

[4] The respondent occupies the premises in terms of a written "membership fee agreement" entered into between the parties on 31 March 2015 for a 10-year period

from 1 April 2015 until 31 March 2025. The agreement records that fixed monthly *ledegelde* will be paid to the applicant by the respondent. It is not in dispute that these fees are in effect monthly rental payments and that a landlord and tenant relationship exists between the parties. The applicant agreed, in clause 4, to pay a third of the monthly costs of financing any approved improvements to the premises of a capital nature, up to a limit of R26 000,00 per month, for the period of the applicable financing agreement secured for this purpose. Clause 4.4 requires the applicant to act reasonably in considering any improvement requests, recognising that the respondent intends on a continuous basis to improve the premises; and clause 8 requires the applicant to report any structural or maintenance problems forthwith to the municipality.

[5] Any variation or amendment to the terms of the membership fee agreement is to be recorded in writing and signed by the parties, with it expressly recorded that the applicant is not responsible for any damage to person or property which occurs at the premises. Clause 19 records that the applicant's rights will not be limited or prejudiced by any leniency granted to the respondent in respect of non-adherence to the terms of the agreement. Clause 16 provides that if membership fees are not paid on or before the seventh of the month and the respondent fails to remedy any breach of the agreement within five days of receipt of notice to do so, the applicant is entitled to cancel the agreement forthwith without further notice.

[6] It is not in dispute that the roof of the premises has leaked over an extended period, causing damage to the interior of the premises, which in turn has caused the respondent to have to undertake repairs and has led to it incurring losses in relation to

the operation of its business. The state of the roof had been an ongoing problem, with the matter reported to the Municipality but with no steps taken by the Municipality to repair the roof. This led the applicant in March 2017 to indicate to the respondent that it would repair the roof in the future if the Municipality did not. The respondent states that the damages incurred by it due to the roof leak are “*well in excess of R1 760 911,10*”, which exceeds the sum of the monthly amounts due to the applicant over the period from 31 March to October 2017, being the period during which the respondent claims the applicant agreed it could halt payments to the applicant. After the applicant gave notice to the respondent that it had fallen into arrears for this period in its payment due to the applicant, the respondent did not act to cure its default as it did not consider itself to be in arrears. The lease was thereafter cancelled by the applicant.

[7] The respondent contends that an agreement was reached with the applicant that rental payments to the respondent could cease from March to October 2017 while steps were taken to repair the roof . While this is disputed by the applicant, the respondent accepts that this agreement was not recorded in writing, as required by the membership fee agreement. Similarly, no written agreement was entered into between the parties relating to the set off of the cost of the damages sustained by the respondent against the payment of membership fees due to the applicant and the applicant disputes that any agreement of set off was entered into between the parties.

[8] The respondent opposes the application on a number of other grounds. These include that neither Ms Kemp, nor the applicant’s attorneys, were properly authorised by the applicant to launch these proceedings.

Evaluation

[9] It is trite that the eviction of commercial occupants and juristic persons does not fall within the ambit of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and that the Court is empowered in such proceedings before it to make an order that is just and equitable.¹ What is required in order to succeed with an application for commercial eviction is that there was a valid termination of the respondent's right to occupy the premises and that there has been continued occupation of the property by the respondent, or someone holding on behalf of or through the respondent. An applicant need not allege and prove any title to the property from which it seeks a respondent to be evicted since a lessee is bound by the provisions of a lease even if the lessor has no title to the property and when sued for ejectment at the termination of the lease, it does not avail the lessee to show that the lessor has no right to occupy the property.² This is so, since it is not open to a sub-tenant, such as the respondent, to raise the alleged lack of title of a sub-lessor, such as the applicant, as a defence to a claim for eviction.³

[10] In its opposing affidavit issue is taken by the respondent with the authority of the deponent to the founding affidavit, Ms Freda Kemp, to institute these proceedings on the basis that the applicant's constitution provides that it is the executive committee of the applicant which has the requisite authority and there is no indication

¹ *MC Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC) at paras 12 and 18.

² *Broompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) at 351 H-J.

³ *Mighty Solutions t/a Orlando Service Station v Engen Petroleum* 2016 (1) SA 621 (CC).

that the institution of the current applicant has been ratified by the executive committee. The resolution put up by Ms Kemp, signed by Ms Suzaan Jones, in her capacity as club manager, records that ‘the Committee’ of the applicant resolved on 13 December 2017 that the applicant’s attorneys institute eviction proceedings against the respondent, that Ms Kemp is authorised to sign all documents in doing so and that any steps taken by the attorneys are ratified. I am satisfied that this document, read with the applicant’s constitution, indicates that that Ms Kemp had the requisite authority to institute this application. As to the authority of the applicant’s attorneys, although rule 7(1) provides an available remedy to a party who wishes such a challenge,⁴ there is nothing before me to persuade me that the applicant’s attorneys were not duly authorised to institute these proceedings on behalf of the applicant, nor that the ratification by the applicant of any steps taken by such attorneys was in any sense irregular.

[11] The respondent contended that the applicant had lost its right to possession of the premises given that lease agreements between the SSRA and the Stellenbosch Municipality and between the SSRA and the applicant had expired and had not been tacitly renewed; and that the Municipality has tacitly consented to the respondent’s continued occupation of the premises. I am not persuaded that on the material before me that any of this has been shown to be so. There is no reason not to accept that the applicant remains a lawful tenant who sub-leases the property to the respondent, even if the applicant’s occupation is on a tacitly agreed month-to-month basis; and there has been nothing put up by the respondent that persuades me that the respondent has

⁴ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at para 16.

been authorised by the Municipality to remain in continued occupation of the premises.

[12] The respondent relies on the existence of an alleged agreement that rent would not be paid given the problems which had arisen with the leaking roof. Such an agreement was denied by Ms Kemp on behalf of the respondent and rejected as “far-fetched”. She stated that since she lacked the authority to agree to an alteration to the terms of the lease agreement with the respondent, she would not have agreed that the respondent could stop paying rent. However, even had an indulgence been granted to the respondent in relation to the payment of rent given the clear difficulties it had experienced due to the state of the roof, clause 19 of the lease agreement recorded that no such indulgence was to limit or prejudice any of the applicant’s rights in respect of such agreement. Furthermore, clause 9 required any variations to the agreement to be reduced to writing and signed by the parties. This did not occur.

[13] In *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd*⁵, the lease provided that rental was payable ‘*in advance*’, ‘*without any deduction or set-off*’ and the tenant would not have any claim against the landlord ‘*by reason of any interference with his tenancy or his beneficial occupation of the premises*’, caused by repairs or building works. The result was that the Court found that the principle of reciprocity was excluded by the terms of the lease, with the ‘*payment of rent by the lessee ...not contingent upon prior performance by the lessor*’.

⁵ [2005] JDR 1382 (SCA).

[14] In this matter the agreement was clear that any agreed variation to the agreement was to be in writing. The respondent remained in occupation of the premises, albeit in imperfect condition, and it was obliged to pay rent. Since the lease provided expressly that the applicant will not be liable for any damage to any person or property and the respondent indemnified the applicant against any such claims, the damages sustained by the respondent could not be set off from rental due to the applicant. Had there been an agreement to the contrary, such agreement would have to have been reduced to writing. It was not.

[15] In *Tudor Hotel Brasserie and Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd*⁶ the Supreme Court of Appeal found that the application of the principle of reciprocity to contracts is a matter of interpretation; and that it has to be determined whether the obligations are contractually so closely linked that the principle applies whether reciprocity has been contractually excluded or not.⁷ Where a lease agreement provides that rent is payable monthly in advance, such lease agreement alters the reciprocal nature of the obligations of the lessor and lessee, with the obligation of the lessee to make payment of the rent no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

[16] In *Ethekwini Metropolitan Unicity Municipality v Pilco Investments CC*⁸ the Court found that where a tenant was deprived of the use of a portion of the property, it would be entitled to a remission of rent, proportional to its reduced use and enjoyment of the property:

⁶ [2017] ZASCA 111 (20 September 2017) at para 11.

⁷ At para 12.

⁸ [2007] ZASCA 62.

‘...If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted.’

[17] The Court in *Tudor* reiterated that by remaining in occupation the lessee is obliged to pay rent, unless the reduced value thereof is capable of ‘*prompt ascertainment*’. Since the respondent had indemnified the applicant for any damages suffered, in terms 12 of the agreement, any claim against the applicant, whether promptly ascertainable or not, was excluded in express terms and set off of damages sustained could not occur.

[18] The respondent’s failure to pay rent constitutes a clear breach of the agreement entered into with the applicant justifying the cancellation of the agreement. Monies were not owing between the parties which could be set off against the rental amount due and the applicant was not liable for and had indemnified the applicant for any damages suffered by it. Other remedies lay open to the respondent in respect of the damages suffered by it. These did not include the withholding of rental in breach of the terms of the lease agreement with the applicant.

[19] Having called on the respondent to remedy its breach, which the respondent failed to do, the applicant has consequently shown that it validly exercised its right to cancel the agreement. In these circumstances the application to evict the respondent from the premises must succeed and the eviction order granted. Given the nature of the respondent’s business, I consider it appropriate that an extended period be given to the respondent within which to vacate the premises.

[20] There is no reason why costs on the scale between attorney and client, the scale expressly agreed between the parties in the lease agreement, should not follow the result.

Order

[21] In the result, the following order is made:

1. The respondent and all those who hold occupation under it are directed to vacate the premises situated at erf 235, Stellenbosch on or before 1 March 2019.
2. In the event of the respondent and all those holding under it failing to comply with the terms of paragraph 1 of this order, the Sheriff is hereby authorised, upon being provided with a writ of ejectment to be procured by the applicant from the Registrar of this Court, to compel compliance by evicting the respondent and all those holding under it from the premises.
3. The respondent is to pay the applicant's costs of suit on the scale as between attorney and client.

K M SAVAGE

Judge of the High Court

Appearances:

For the applicant: Mr L Wilken

Instructed by Hannes Pretorius, Bock & Bryant

For respondent:

Mr A Walters

Instructed by Eben Klue Attorneys