

REPUBLIC OF SOUTH AFRICA



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

CASE NO. 41419/2015

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

DATE

SIGNATURE

In the matter between:

ITOKOLLE CLINIX HOSPITAL (PTY) LIMITED

Applicant

And

MNGOMEZULU AND MISTRY INCORPORATED

Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an application for the eviction of the Respondent from the premises it occupies, located at the Victoria Private Hospital, Victoria Street, Mafikeng South, North West Province, such premises measuring 215 square metres, located opposite the theatre annexed to the Male Ward on the passage leading to the Paediatric Ward.
2. On the Applicant's version, there is a month-to-month lease in place between it and the Respondent, in respect of such premises. The Respondent avers that the Lease was for an indefinite period of time, although it concedes the Applicant's entitlement to give notice of termination.
3. The dispute central to the issues lies in the duration of the period of the notice for termination.
4. On 2 April 2015, the Applicant provided an effective three months' notice of termination of the Lease.
5. Such notice would be effective upon 30 June 2015.
6. The Respondent contended for a notice period of four years, advancing its argument on the basis that it is not a conventional tenant inasmuch as its Agreement of Lease was inextricably linked to its agreement to provide radiology services at the Applicant's hospital.

7. The Applicant has attempted to narrow its relationship with the Respondent to one purely of Landlord and Tenant, when in fact and in truth, this is not so.
8. The facts are that the Respondent has been in occupation of the premises for the past fifteen years, during which time it has provided radiology services at the hospital, without a written agreement in respect of either.
9. There was much wordplay by the Applicant as to whether the radiology services are provided by the Respondent *at* the hospital or whether such services are provided *to* the hospital.
10. To my mind, this is a question of semantics.
11. Unlike the usual commercial relationship between landlord and tenant, where the owner of a building has no particular interest in the purpose for which a commercial tenant leases a premises, this relationship is differentiated by the fact that the landlord operates the business of a hospital from the building and requires the services of a radiologist, which the Respondent has provided throughout the fifteen year tenure of its occupation of the premises.

12. Without giving notice of termination for the provision of radiology services, the Applicant, on 5 March 2015, invited the Respondent, and others, to tender for the provision of radiology services to be supplied to the Applicant at the hospital. The invitation in itself constitutes a concession that radiology services are provided to the Applicant at the hospital.
13. By virtue of the Respondent's failure to submit a tender in accordance with the invitation of 5 March 2015, and on 27 March 2015, the Applicant addressed a letter to the Respondent informing it that arising out of its failure to have responded to the invitation to tender, the Applicant assumed that the Respondent had no interest in participating in the tender and requested that it be provided with an undertaking to vacate the premises by 1 May 2015. This letter, whilst not strictly expressed as such, effectively purports to serve as one month's notice to the Respondent to vacate the premises.
14. Subsequently, and on 2 April 2015, the Applicant addressed a further letter to the Respondent, referring to the aforesaid letter of 27 March 2015 and stating that notwithstanding the prior notice with effect from 1 May 2015, it would be prepared to extend the notice period to 30 June 2015. This letter also purports to terminate the Agreement for the provision of radiology services, although it is somewhat inelegantly drafted and was not delivered on 01 April 2015, as would have been required if a period of three months would have constituted a reasonable notice period.

15. On the Respondent's version, the issues cannot be narrowed down to the mere conveying of notice of intention to terminate a commercial lease, as the considerations applicable to the termination of the radiology services are far more complex and deeper than the considerations applicable to the mere termination of a commercial lease. The Respondent avers that the termination of the radiology service results in retrenchment of staff, the closing of a functional business and a substantial loss to the Respondent on expensive amortised capital assets. The Respondent expended some R4 000 000.00 capital expenditure in radiology equipment during March 2014, which is financed over a period of five years, in anticipation of its continued occupation of the premises and the continued provision of the radiology services. Moreover, the Respondent avers to have taken these steps with the Applicant's knowledge (which is not denied by the Applicant) and to the Applicant's benefit inasmuch as the provision of such equipment equated to the provision of a better quality of radiology services to be provided at the hospital. For these reasons the Respondent submits that four years would represent a reasonable notice period for termination.
16. Whilst one can sympathise with the Respondent for its naivety in incurring R4 000 000.00 capital expenditure payable over five years, against the backdrop of a fifteen year oral history, without signed agreements in place, one cannot create fixed term contracts for the Respondent as a result of its ineptitude in having failed to bed down a signed lease with the Applicant, which it could and should have done prior to the incurring of such

expenditure. Courts cannot create agreements for parties, which do not exist.

17. Nevertheless, the consequences of such financed expenditure, which can only be met through the continuation of the contract, is certainly highly relevant to the inquiry as to whether the duration of the notice period was reasonable, per **Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers 2004 (1) SA 538 (SCA) at paragraph 23.**

18. In the normal course of events, if the parties to a lease have not agreed upon the date upon which it will terminate, then the lease will endure for an indefinite period of time and would be terminable by either party giving notice to the other.

19. If a notice period has not been agreed upon, the notice period must then be reasonable, per :
 - 19.1. **Pemberton N.O. vs Kessel 1905 TS (174);**
 - 19.2. **Tiopaizi v Bulawayo Municipality 1923 (AD) 317;**
 - 19.3. **Tshabalala v van der Merwe (1926) 47(NLR) 75**

20. Generally, where the rent is paid weekly, a week's notice would be considered to be reasonable. Where the rent is paid monthly, a month's notice would be considered to be reasonable and in the case of a yearly lease, three months' notice would be considered to be reasonable.

21. The parties are *ad idem* that an effective three months' notice was given and the only real issue in dispute is whether or not such period of time was reasonable at the time, in all of the circumstances.
22. In **Putco Ltd v TV and Radio Guarantee Company (Pty) Ltd 1985 (4) SA 809 AD**, the Court held that reasonable is a relative term and what is reasonable depends on the circumstances of each case. This contention was endorsed by the Supreme Court of Appeal by **Amalgamated Beverage Industries Ltd** *supra*.
23. The Applicant submits that the Respondent has conflated the provision of radiology services at the hospital with its Lease Agreement and thus illegitimately bargains for a longer notice period. The Applicant submits it has not sought to interfere with the provision of radiology services by the Respondent, which it is free to continue to provide, albeit not at the Applicant's premises. This submission falls to be rejected out of hand. It is perfectly clear that without the premises, there will not be a radiology business of which to speak. The hospital is the only private hospital in Mafikeng. On the evidence, the patients who are serviced at the radiology practice come from the hospital and would not be in a position to be taken out of the hospital for radiology services.

24. The Applicant also contends that the Respondent does not and has never performed radiology services to the Applicant but rather at the Applicant's premises, for which it has never paid any fee to the Respondent. For reasons mentioned above, this is a question of semantics and there is no merit in such submission, in circumstances where the Applicant now issued a tender for radiology services to be provided to it at the hospital for no fee.
25. Thus there is no merit in the submission by the Applicant that the true nature of the relationship between the parties is purely one of landlord and tenant. The Respondent very clearly provides (and has provided for the past fifteen years) a radiology service, which was integral to the business of the Applicant.
26. For the above reasons, I find that the Lease Agreement does morph into an agreement to provide radiology services and that is the true nature of the agreement to be analysed in the context of the inquiry as to what would constitute a reasonable notice period for its termination.
27. As I have already stated, the Applicant cannot be visited with the prejudice occasioned by the Respondent's failure to have cemented down a fixed term lease prior to incurring capital expenditure of some R4 000 000.00. This in no way means that the Applicant could expect the Respondent to shut down a business of some fifteen years standing, with complex and expensive machinery, and large staff complement, upon the handing down of a mere three months' notice.

28. I would be more inclined to consider a period of six months to represent reasonable notice, as was the case in **Amalgamated Beverage Industries Ltd** *supra*, where too, there were some thirteen to fifteen employees and a sales representative and a growing business at stake. In the present matter, regard must be had to the position of employees, who would have to be retrenched in accordance with the prevailing labour law and many other aspects which may need to be addressed in relation to the winding down of the business activities. A period of six months would seem to represent a far more reasonable notice period, than the period of three months conveyed, particularly having regard to the fourteen months which have flowed since the letter of notice dated 02 April 2015. During this period, the Respondent has had occupation of the premises and has had the benefit of providing radiology services, well knowing of the Applicant's desire to terminate the relationship.
29. The Respondent has conceded that it would require a period of three months within which to take the necessary logistical steps for the decommissioning, transport and storage of the radiology equipment.
30. Accordingly, the Respondent was entitled to six months' notice of the Applicant's intention to terminate the radiology services provided, so as to avail it the opportunity to wind down its practice, retrench its staff, decommission and store its equipment. Accordingly, the notice period of three months, contained in the letter of 02 April 2016 was inadequate and such notice letter is to be disregarded.

31. In argument, Mr Dalrymple, for the Applicant shared his intellectual honesty with me in conceding that were I to find that three months did not constitute reasonable notice, then the Application must fail.

32. Accordingly, I make the following order:

32.1. the Application is dismissed;

32.2. the Applicant is to bear the costs of the Respondent on the scale as between party and party.

NOCHUMSOHN, G
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: Mr T Dalrymple

Instructed by: Read Hope Phillips Thomas & Cadman Inc

On behalf of the Respondent: Mr KD Iles

Instructed by: Dockrat Inc

Date of Hearing: 08 June 2016

Date of Judgment: 10 June 2016