REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 18211/2019

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

SIGNATURE .... DATE 4/5/2020

In the matter between:

UVONGO FALLS 26 (PTY) LTD — **APPLICANT**

And

GRAYSTON CHAMBERS (PTY) LTD — **FIRST RESPONDENT**

ALL UNLAWFUL OCCUPIERS — **SECOND RESPONDENT**

JUDGMENT

WINDELL, J:

INTRODUCTION

1. This is a commercial eviction application. The applicant seeks an order confirming the cancellation of a lease agreement with the first respondent, as well as the eviction of the first and second respondents from the leased premises.

2. The applicant, Uvongo Falls 26 (Pty) Ltd, is the owner and landlord of Capital Hill Building, situated at 6 Benmore Road, Sandton ("the leased premises"). The first respondent, Grayston Chambers (Pty) Ltd, provides chambers accommodation and related ancillary services to customers, referred to as "members". The members are admitted advocates and members of the Johannesburg Society of Advocates ("JSA"), as well as of a group of advocates called Grayston Chambers. Members of Grayston Chambers constitute all the unlawful occupiers occupying the 3rd Floor of the leased premises.

3. On or about 4 May 2017 the applicant and the first respondent entered into an oral lease agreement (hereinafter intermittently referred to as "the Grayston lease agreement" and "the lease agreement"). The parties have divergent views about the terms and conditions of the Grayston lease agreement. The applicant avers that the first respondent breached the lease agreement by failing to pay the monthly rental, and after the non-payment of the rental amount for a period of approximately 20 months, the applicant, through its attorney of record, demanded payment of the sum of R2 788 094.39 from the first respondent. In a letter dated 30 January 2019 (which was delivered to the first respondent by email on 5 February 2019) the applicant afforded the first respondent 14 days to remedy its breach. The first respondent failed to remedy the breach and the first respondent cancelled the lease agreement on 18 February 2019.

4. The first respondent contends that it was not indebted to the applicant in the sum alleged, and was therefore not in breach of the lease agreement. It further contends that the applicant did not give proper notice of cancellation of the lease agreement and was consequently not entitled to cancel the lease agreement.

5. The application is not opposed by the second respondent. Their right to occupy the leased premises is derived by way of a sub-lease with the first respondent. If it is therefore proven that the lease agreement with the first respondent was lawfully cancelled, the second respondent's right to occupy will automatically follow.

BACKGROUND FACTS

6. It is common cause that during the period August 2015 to April 2017, and before the Grayston lease agreement was entered into, the leased premises was occupied by Benmore Advocates NPC in terms of two written lease agreements, The first agreement was concluded in 2015, and the second in 2016 ("the Benmore lease agreement"). Benmore Advocates NPC, and its subtenants, who were members of the Benmore Advocates Group, were in occupation of the leased premises until April 2017. On 19 April 2017, the Benmore lease agreement was terminated by agreement between the applicant and Benmore Advocates NPC, with immediate effect. Subsequent to that, and on 4 May 2017, the applicant, represented by Mr. Gary Harlow, and the first respondent represented by its director, Mr. John Kayser, the sole shareholder and director of the first respondent, (a newly incorporated company), had a meeting. It was during this meeting that the parties entered into the Grayston lease agreement.

7. The applicant avers that it agreed to continue to lease a smaller portion of the leased premises, which formed the subject of the Benmore lease agreement, to the first respondent with immediate effect on a monthly lease with a reduced monthly rental of R150 000 per month, exclusive of utilities and other ancillary charges. This smaller portion constituted the 3rd floor of the Capital Hill Building. Mr. Kayser was a senior member of the Benmore Advocates Group, and a sub-tenant of Benmore Advocates NPC. He was also a director of Benmore Advocates NPC, until he resigned on 1 April 2016. The applicant avers that Mr. Kayser was, as a result of his involvement in Benmore Advocates Group, fully aware of the terms and conditions of the Benmore lease agreement and he accepted that the terms and conditions of the Benmore lease agreement would apply to the Grayston lease agreement.

8. Mr. Kayser, on behalf of the first respondent, avers that the dire financial situation and failure of Benmore Advocates NPC as a group, led to a situation in which the applicant and the first respondent both stood to sustain significant losses: in the event that Benmore Advocates NPC vacated the leased premises, the applicant would be without a tenant after investing approximately R8 000 000.00 (eight million rand) on the installation on the leased premises; and, the first respondent would have to overcome negative perceptions by other stakeholders in the legal profession due to the precarious position in which it found itself, which was compounded by the fact that it would have only limited resources available to create a viable premises. The applicant and the first respondent proceeded to salvage the situation by finding a mutually beneficial, albeit risky, solution which entailed the applicant securing a tenant for what would otherwise be vacant premises.

9. Mr. Kayser states that the incorporation of the first respondent therefore came about in light of "*the catastrophe that was unfolding at Benmore Advocates NPC ("Benmore Advocates") a non-profit company established in 2015 for the same purpose as the first respondent*". He contends that it was emphasised at the meeting between the applicant and the first respondent on 4 May 2017, that the first respondent was not a successor in title or liability to Benmore Advocates and that the purpose of incorporating a new company was to "*force a break from the old venture*". The first respondent avers that the parties concluded an oral common law lease agreement in respect of the leased premises, and that it was agreed that the rental would be R150 000 per month "all inclusive", and that the first respondent could occupy the leased premises on a month-to-month basis. According to the first respondent, the terms of the Benmore lease agreement did not apply to the Grayston lease agreement.

10. The first respondent further denies the calculation of the quantum of the outstanding rental amount claimed by the applicant. It further contends that an essential terms of the Grayston lease agreement was "arrears could develop in the near term which the first respondent would liquidate once it had become fully established and economically viable". In support of the its contentions, the first respondent attached an email that was sent to Advocate Pierre Rossouw SC of the JSA on 31 May 2017. In the email Mr. Kayser confirmed the conclusion of the Grayston lease agreement and recorded the salient terms thereof. Point 7 of the email recorded that, "*...Grayston Chambers has obtained a substantial reduction in rent (including the utility and operating costs) until 31 December 2017 in order to facilitate the establishment of the new group whereafter a new 5 year lease...is to be negotiated...*".

11. The first respondent submits that as the Benmore lease agreement's terms and conditions were not applicable to the Grayston lease, the applicant was not entitled to place reliance upon the breach clauses in the Benmore lease agreement to justify its 14 day notice to the first respondent to pay the arrear rental payments and its letter of immediate cancellation of the lease agreement.

CONCLUSION

12. In order for the applicant to succeed with the application for an eviction order, the applicant must allege and prove the right of the respondents to possess (in this instance the lease agreement), a valid termination of the right to possession, and the continued occupation by the respondents or someone holding through them.[1] The appellant must further prove that there was a breach of the lease agreement, and an accrued right to cancel, because the breach was material, or in the event that the agreement contains a cancellation clause, that its provisions have been complied with. The applicant must also prove that a clear and unequivocal notice of cancellation was conveyed to the other party, unless the agreement dispenses with such notice.

13. It is common cause that the appellant and the first respondent entered into the Grayston lease agreement, and that the first respondent acquired its right to possess as a result of the lease agreement. The applicant alleges that there was a breach of the agreement, in that from May 2017 until January 2019, the first respondent failed to make payment of the rental and ancillary charges due to it in terms of the lease

[1] *Chetty v Naidoo* 1974 (3) SA 13 A at page 20

agreement. It is averred that the outstanding amount, as on 30 January 2019, was R2 788 094.39. The applicant avers that the rental was payable on a monthly basis in an amount of R150 000, **exclusive** of other charges. The first respondent avers that the rental was R150 000 **inclusive** of other charges, and that the quantum of the alleged arrears is incorrect and the first respondent is therefore not in breach in the amount claimed.

14. For purposes of this application it matters not whether the R150 000 was inclusive or exclusive, because even on the first respondent's version there was a breach of the lease agreement. The applicant performed a reconciliation of the first respondent's version that an "all-inclusive" rental of R150 000 was payable by the first respondent. This reconciliation demonstrates that, as a January 2019, the first respondent owed the applicant R1 824 500.00. The applicant's March 2019 tax invoice and statement indicates that one further payment of R100 000 was received in January 2019. Despite this payment, an amount of more an R1 million was still due and owing to the applicant. It is therefore largely uncontested that the first respondent failed to make payment of R150 000 "all inclusive", and that it was in breach of the lease agreement. The failure to pay the rental was clearly a material breach and the applicant was entitled to cancel the lease agreement.

15. But was the lease agreement lawfully cancelled? The applicant avers that the terms and conditions of the Benmore lease agreement applied to the Grayston lease agreement, and that its notice to the first respondent to rectify the breach and the later cancellation of the lease agreement was done in compliance with the breach clause in the Benmore lease agreement. The applicant therefore instructed its attorney of record to proceed with the cancellation of the lease agreement by way of a written

notice addressed to the first respondent. On 5 February 2019 the applicant delivered the written notice to the first respondent calling upon it to pay the amount outstanding within 14 days. The first respondent failed to pay the outstanding amount and the applicant, through its attorney, issued a letter on 18 February 2019, addressed to the first respondent, in which the lease agreement was cancelled with immediate effect. In this letter the respondent was also given notice to vacate the leased premises immediately.

16. The first respondent contends that the parties entered into a common law lease agreement, and that the applicant's reliance on the breach clause in the Benmore lease agreement was misplaced. The cancellation of the lease agreement was as a result premature. In reply to the cancellation letter issued on 18 February 2019, Mr. Kayser addressed two letters to the applicant's attorney of record dated 11 March 2019 and 18 March 2019 respectively, in which he denied the applicant's cancellation of the lease agreement in terms of which the first respondent occupied the premises. This, in turn, lead to further correspondence between the applicant's attorney of record and the first respondent in which it was reiterated that the first respondent was in material breach of an essential term of the lease agreement and it was stressed that the applicant had unequivocally cancelled the lease agreement.

17. In support of its version that the terms of the Benmore lease agreement applied to the Grayston agreement, the applicant attached a copy of redacted minutes of the meeting held on 4 May 2017. It is common cause that the minutes, *inter alia*, recorded the conclusion and terms of the Grayston lease agreement. In paragraph 19 of the minutes Mr. Gary Harlow, who attended the meeting in the capacity of a director as the applicant, noted the following:

"He indicate that if Grayston Chambers would pay R150 000.00 per month out of the R300 000.00 per month that was due for one floor, Uvongo be prepared to let Grayston continue a month to month basis, but could terminate with just one month's notice".

18. From the minutes of the meeting four aspects of the Grayston agreement were made clear: (1) Rental is R150 000; (2) No fixed period was agreed upon and the lease would be an a "month to month basis"; (3) The lease agreement can be terminated by giving one month's notice and; (4) No reference is made to the terms of the Benmore lease agreement being applicable to the Grayston agreement.

19. The first respondent does not dispute receipt of the letter of demand from the applicant on 5 February 2019, and it also does not dispute receipt of a further letter dated 18 February 2019 in which the applicant purported to cancel the lease agreement and demanded that the first and second respondent vacate the leased premises immediately. The first respondent contends that the notice period was insufficient and therefore invalid for the want of compliance with the common law terms of the Grayston lease agreement.

20. The applicant bears the onus to prove that the lease agreement has been terminated in accordance with the terms of the lease agreement.[2] The minutes of the meeting on 4 May 2016 clearly recorded that the lease agreement could be terminated

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[2] *Chetty v Naidoo supra at* 21G-H.

with "one month's notice". The applicant was not entitled to rely on the breach clause in the Benmore lease agreement, which allowed for only 14 days, to terminate the lease agreement. The termination was not valid.

21. So, although the first respondent committed a material breach of the lease agreement (even on its own version), by repeatedly failing to pay its rental due to the applicant, the applicant did not cancel the lease agreement in accordance with the oral lease agreement concluded on 4 May 2017.

22. In the result the following order is made:

22.1 The application is dismissed with costs.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the applicant:	Advocate B. Manning
Instructed by:	Fullard Mayer Morrison Inc.
Counsel for the first respondent:	Advocate D. Milne
Instructed by:	Beder – Friedland Inc.
Date of hearing:	28 January 2020
Date of judgment:	4 May 2020