



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

DELETE WHICHEVER IS NOT APPLICABLE

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

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

CASE NO: 2020/39156

In the matter between:

BLUE CREST HOLDINGS (PTY) LTD

Applicant

and

BODY ACTION HEALTH CLUBS (PTY) LTD

Respondent

JUDGMENT

McLEAN AJ:

Introduction

1. This is an urgent application for the eviction of the Respondent from its business premises in Bedfordview (“**the premises**”). The Respondent’s occupation of the premises is in terms of a lease agreement concluded between the parties in September 2019 (“**the lease agreement**”). The premises is currently being occupied by the Respondent for commercial purposes, for use as a gymnasium.
2. The Respondent’s business has been severely impacted by the Covid-19 pandemic and the Respondent has not paid the Applicant anything since 21 July 2020. The Respondent’s difficulties, however, appear to have begun earlier than that, although there is a dispute as to whether the Respondent short paid on its rental prior to the lockdown period.
3. As at 1 November 2020, the Applicant contends that the Respondent owes it an amount of R830 134,09 in terms of the lease agreement. In addition, it appears to be common cause that the Respondent owes the Applicant a further R2 405 563,33 in terms of a previous lease agreement between the parties.
4. The Applicant seeks the Respondent’s eviction on two bases, either of which is sufficient to terminate the lease agreement:
 - 4.1. first, the Applicant contends that it validly cancelled the lease agreement on 24 June 2020, based on the Respondent’s repudiation in failing to pay all

amounts due in terms of the lease agreement, and after the Respondent's failure to remedy the breach upon notice by the Applicant giving it an opportunity to do so in accordance with the lease agreement; and

4.2. second, the Applicant asserts that even if the lease was not validly terminated on 24 June 2020, the lease terminated through the effluxion of time on 31 October 2020.

5. The Respondent contends that the lease was not validly terminated on 24 June 2020, and raises disputes of fact on the papers as to whether the Respondent underpaid the full amounts due or not. The Respondent's version is that far from being in arrears, the Respondent is in fact in credit as a result of the Applicant overcharging it on several occasions, and the Applicant was not entitled to cancel the lease agreement. For the reasons which follow, it is not necessary for me to decide this aspect, as I conclude that the lease agreement – if still in existence at that point – would have terminated on 31 October 2020.

6. Before dealing with this ground of termination of the lease agreement, I deal with the question of urgency.

Urgency

7. The relevant time line for determining urgency is as follows:

7.1. on 3 June 2020, the Respondent was put on terms to rectify its breach as a result of non-payment;

- 7.2. after no response was received to the Applicant's letter of 3 June 2020 and the breach was not rectified, the Applicant then sent a second letter on 24 June 2020, indicating its election to cancel the lease agreement, and demanding that the Respondent vacate the premises by 30 June 2020;
- 7.3. between 28 May 2020 and 26 August 2020, the parties engaged in "*without prejudice*" settlement discussions which ultimately failed to resolve the dispute;
- 7.4. on 18 September 2020, the Applicant confirmed the cancellation, but granted the Respondent a "grace period" to vacate the premises until 31 October 2020, failing which it would bring this urgent eviction application;
- 7.5. on 2 November 2020, the Respondent advised the Applicant that it would remain in occupation until its new premises were complete and would not vacate the premises; and
- 7.6. this application was issued on 18 November 2020, but only served formally on the Respondent on 20 November 2020.

8. The Applicant contends that the matter is urgent because:

- 8.1. it is already but of pocket, and if the Respondent is not evicted urgently, the Respondent will continue to accrue debt until the Respondent vacates the premises;

- 8.2. there is a risk that the Respondent may be liquidated without prior notice being given to the Applicant of a liquidation application, as occurred with the Respondent's predecessor, and that the Respondent is in a vulnerable financial position following the effects of Covid-19 on its business;
- 8.3. the Respondent's continued occupation means that the Applicant is unable to find an alternative tenant to occupy the premises.
9. This Court has previously found in *Twentieth Century Fox Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G, that commercial interests may justify the use of urgent proceedings, and this aspect is correctly not contested by the Respondent.
10. Instead, the Respondent disputes the urgency of the matter on the grounds that:
- 10.1. the Applicant would have access to substantial relief in the form of a damages claim were this matter to be heard in the ordinary course;
- 10.2. it told the Applicant as early as 23 July 2020 that it would not be vacating the premises at the end of October 2020, and any urgency in these proceedings is accordingly self-created;
- 10.3. it has tendered its vacation of the premises by 1 May 2021; and
- 10.4. it has been prejudiced by the curtailment of time frames in these proceedings.

11. On the first issue raised by the Respondent, this objection is misplaced. The relief sought is not for an interdict, and the Applicant does not need to satisfy this Court that it has no alternative remedies available. The relief sought is for specific performance in terms of the lease agreement, namely, the return of the premises upon the expiry of the lease agreement (see *Manley Van Niekerk (Pty) Ltd (Now Video Sound Studios (Pty) Ltd) v Assegai Safaris And Film Productions (Pty) Ltd* 1977 (2) SA 416 (A) 422H–423A). The fact that the Applicant may have an alternative damages claim is not relevant to whether the relief sought is urgent.
12. As to the second of the Respondent's objections, I find that the Respondent's statement in its letter of 23 July 2020 is at best ambiguous. The Respondent wrote that: "*Our client hereby notifies your client that it is unable to vacate the premises due to the global pandemic at the end of the lease term.*"
13. The Applicant states that it did not interpret that statement to mean that the Respondent refused to vacate the premises prior to 1 May 2021 in any circumstances, and interpreted the Respondent's statement to mean that under the restrictions as they stood on 23 July 2020, the Respondent was unable to move its business. That restriction fell away on 17 August 2020. I am in agreement with the Applicant that at this point (23 July 2020) there was no unequivocal indication by the Respondent that it would refuse to vacate the premises prior to 1 May 2021.
14. In any event, the question of whether a matter is urgent is answered by determining whether an applicant may be afforded substantial redress in the

ordinary course or not. If not, then the matter is urgent. A delay by an applicant in instituting proceedings is, in itself, not sufficient to determine that a matter is not urgent – although it may be an indication of whether an applicant is able to be given substantial redress in the ordinary course. A delay might also be occasioned by the parties attempting to settle the matter. (See *Stock and Another v Minister of Housing and Others* 2007 (2) SA 9 (C) at 12 I – 13A; and *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* 2011 JDR 1832 (GSJ) at paras 7 and 8.)

15. In this matter, while the Applicant may be criticised of some tardiness in November 2020, any delay in launching this Application would not have affected the essentially urgent nature of the relief sought. Similarly, the period from 28 May 2020 to 26 August 2020 where the parties sought to reach a settlement agreement, and the “grace period” afforded the Respondent does not undermine the urgent nature of the relief sought.
16. The third ground on which the Respondent opposes urgency, is on the basis that it has tendered to vacate the premises by 1 May 2021. I deal with the Respondents tender from paragraph 34 below as it is not relevant to the question of whether the application is properly urgent.
17. And fourth, the Respondent opposes urgency on the basis that it was prejudiced by the curtailed time periods afforded to it by the Applicant to file its Answering Affidavit. This assertion of prejudice, however, is not made in the Answering Affidavit and the Respondent managed, in the time afforded to it, to file an 81-page Answering Affidavit in response to the Applicant's 25-page Founding

Affidavit. The Respondent was afforded six days to file its Answering Affidavit and, in fact, filed its Answering Affidavit on 2 December 2020, two days after the date specified in the Notice of Motion. Given the urgency of the matter, I do not find that the period afforded to the Respondent to file its Answering Affidavit was unreasonable.

18. In the circumstances, I am satisfied that the matter is urgent.

Expiry of the Lease Agreement

19. Clauses 11.3 and 12.1 of the lease agreement make it clear that the lease agreement runs for 14 months and terminates on 31 October 2020. The “*right of renewal*” clause was deleted by the Respondent on signature.
20. Clause 40.1 of the lease agreement also contains a standard “*no variation clause*”.
21. The Respondent contends that the written terms of the lease agreement are not exhaustive of the agreement, and that it was the parties’ intention for the lease to run for a period of *at least* 14 months, and that the Respondent would be entitled to remain in occupation until the alternative premises it was building were completed. In this respect (and in other respects), the Respondent asserts that the lease agreement was partly written, partly oral.
22. The Applicant contends, correctly in my view, that it is not open to the Respondent to rely on an alleged oral or tacit term on the lease agreement, as it is precluded from doing so in terms of the parole evidence rule. In terms of that

rule, a party is excluded from leading any extrinsic evidence which contradicts or alters the express terms of a written agreement.

23. In the well-known decision of *Johnston v Leal* 1980 (3) SA 927 (A) at 942I – 943G, Corbett JA explained the parol evidence rule as follows:

“As has been indicated, the parol evidence rule is not a single rule.

It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 453 - 5. (For convenience I shall call this latter rule “the interpretation rule”.) Neither rule, in my opinion, affects the matter under consideration.

Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence. On the other hand, in a case such as the present, where ex facie the document itself the contract appears to be incomplete, the object of leading extrinsic evidence is not to contradict, add to or modify the written document or to complete what is incomplete so that the contract may be enforced thus completed, but merely to explain the lack of completeness, to decide why the parties left blanks in a particular clause and what the integration actually comprises, and in this way to determine whether or not the document constitutes a valid and enforceable contract and is in conformity with s 1 (1) of the Act. Consequently, it does not seem to me that the admission of such extrinsic evidence for this purpose in a case of the kind presently under consideration would be either contrary to the substance of the integration rule or likely to defeat its objects. To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered; the evidence which it is suggested could be adduced in this case would be to explain an overt lack of completeness in the document and at the same time to determine what has been integrated with a view to deciding upon the validity of the document as it stands.”

24. Mr Ferreira, for the Respondent, contended that the parol evidence rule was not applicable, as there were a number of terms deleted by the parties in the lease agreement; and the lease was for a period of 14 months, which is an unusual period.
25. Having considered the terms deleted in the contract, I do not find the written agreement to be incomplete or to lack any of the essentialia of a lease agreement. There is therefore no basis on which parol evidence may be allowed to fill in the blanks or to decide whether there is a valid and enforceable agreement in existence. As for the contention that 14 months is an unusual period, this is irrelevant; it is not for the Court to contradict the parties' express intentions.
26. Mr Ferreira for the Respondent also asserted that the parol evidence rule does not apply in circumstances where one of the parties did not sign the contract (as is the case here where the Applicant did not sign the lease agreement).
27. In response, Ms Stein referred to me to *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) at 637, where Holmes JA held that:

"If it has a plain meaning, the Court cannot vary it by reference to oral evidence. The law is definite on this point. That is why people have written contracts: so that he who runs may read. As was said by WATERMEYER, J.A., in Union Government v Vianini Ferro-Concrete Pipes (Pty.) Ltd., 1941 AD 43 at p. 47:

'Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such

document be contradicted, altered, added to or varied by parol evidence.'

That this is still the law in South Africa is indicated by the reliance placed on that passage by this Court in National Board (Pretoria) (Pty.) Ltd. and Another v Estate Swanepoel, 1975 (3) SA 16 (AD) at p. 26A.

In this Court, counsel for the appellant contended that the letter of appointment, followed by the employment of the appellant, constituted or was accepted by the parties as their written contract, even though the appellant himself did not sign it. Counsel for the respondent contested this submission. As to that, the principle seems to be clear. In an unreported judgment of the Transvaal Provincial Division in Union Bank of South Africa Ltd. v Schatz in April 1940, SOLOMON, J., said crisply:

'The rule is that where parties intend a document signed by only one of them to represent the contract between them no parol evidence to vary that document can be admitted.'

This was quoted with approval by FISCHER, J.P., in Gordon Wilson (Pty.) Ltd. v Barkhuizen, 1947 (2) SA 244 (O) at p. 250."

28. The parol evidence rule is thus applicable to the lease agreement, even in circumstances where it is not signed by the Applicant.
29. In these circumstances, it is not open to the Respondent to rely on extrinsic evidence which contradicts the express terms of the lease agreement as to the duration of the lease agreement.
30. Mr Ferreira urged me, in oral argument, to find in favour of the Respondent's version on the partly written, partly oral lease agreement, and stated that in order for me to find in favour of the Applicant, I would have to disbelieve Mr Roets' version of the partly written, partly oral agreement set out by him in the Answering Affidavit.
31. This is not correct: I do not have to find that Mr Roets has lied on oath. On the contrary, I am precluded by the parol evidence rule from considering the

evidence put up by Mr Roets insofar as it contradicts the express terms of the written lease agreement. In doing so, I make no findings on the truth or otherwise of Mr Roet's version. I simply cannot consider them.

32. Similarly, Mr Ferreira's submissions that – on the basis of the test formulated in *Plascon-Evans* – I must find in favour of the Respondent, must be rejected. For purposes of this Application, I am precluded from considering extrinsic evidence with contradicts express written terms of the lease agreement.
33. For these reasons, I find that the lease agreement terminated through the effluxion of time on 31 October 2020, and that the Respondent's continued occupation of the premises is unlawful.

The Respondent's Tender

34. On 26 November 2020, after these proceedings were instituted, the Respondent tendered to vacate the premises on 1 May 2021, and to pay to the Applicant what is due and owing on the conclusion of a statement and debatement.
35. This tender was amplified in the course of the hearing, where the Respondent tendered to pay rental in a lesser amount of approximately R40 000 per month to the Applicant, which it contends is commensurate with the restrictions placed on its ability to conduct its business. This amount is less than half of the amount stipulated in the contract of lease.

36. As Ms Stein pointed out, however, the tender is not for the payment of full rental or amounts due in terms of the lease agreement, and the tender is, in any event, refused by the Applicant.
37. In the light of the refusal of the tender – which the Applicant was under no contractual obligation to accept – the tender plays no further role and is irrelevant to the determination of this Application.

Remedy

38. The Respondent contends that even if this Court is to grant an order of eviction, the Respondent is entitled to reasonable notice to vacate the premises, and that a reasonable period would be six months.
39. Mr Ferreira referred me to the decision in *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at paras 14 – 17, where Spilg J held that:

"[14] It is trite that under ordinary commercial-law principles of lease a tenancy in respect of which rental is payable monthly becomes terminable on one calendar month's notice. Accordingly to suggest that a clause that mirrors the common law is contra bonos mores would be far-reaching. It may also raise issues of inequality of treatment if the lessor cannot claim a similar ground for relief if the roles were reversed.

[15] However, that does not conclude the enquiry. The issue is a legal one based on the facts presented and the parties were requested to specifically address it.

[16] There however appear to be a number of legal factors that have application. The first is that, even though under common law a residential tenancy is similarly terminable on one calendar month's notice if rental is payable monthly and the lease has been lawfully terminated, our courts exercise a residual power when granting an eviction order to give the tenant a reasonable time to vacate, and this may be for a longer period than one month after the order is made. I should preface this part by indicating that I am only concerned with

the common-law position to the exclusion of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[17] Although the court has no equitable jurisdiction to decline the grant of an eviction order it has nevertheless given the erstwhile tenant time within which to vacate. The following cases are mentioned by Cooper Landlord and Tenant op cit at 375 – 6 under the topic 'Stay of execution'; Voortrekker Pers Beperk v Rautenbach 1947 (2) SA 47 (A); Lovius and Shtein v Sussman 1947 (2) SA 241 (O); Van Reenen v Kruger 1949 (4) SA 27 (W); E Graaff-Reinet Municipality v Mkwane 1950 (3) SA 883 (E); and Woudstra v Jekison 1968 (1) SA 453 (T) at 458B. In the last two cases the discretion was considered exercisable in a magistrates' court (which is a creature of statute and therefore devoid of inherent jurisdictional powers). The author also referred to Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa 11 ed vol 1 (Juta) at 622."

40. The Applicant, by contrast, contends that three days notice would be reasonable.

The Applicant also points out that in the *Sello* matter, the Respondent was still paying rental; while in this case it is not. Ms Stein urged me, in these circumstances, to consider not only the prejudice to the Respondent, but also to the Applicant, which is presently not receiving any rental.

41. In its Answering affidavit, the Respondent contended that it would take approximately six weeks to move its equipment to another premises as a contractor with specialised equipment would be required. This assertion was denied by the Applicant. Neither party put up any documentary evidence to support their assertions.

42. In the circumstances, I find that a reasonable period of notice would be two weeks, and order that the Respondent must vacate the premises by no later than 31 December 2020.

Order

43. For the reasons set out above, I find that the lease agreement terminated through the effluxion of time on 31 October 2020, and that the Respondent's continued occupation of the premises is unlawful.

44. The following order is made:

44.1. the forms and service provided for in the Rules of this Court are dispensed with and the application is to be disposed of as one of urgency in terms of Rule 6(12)(a);

44.2. the Respondent is directed to vacate the premises at Gym, Building 2, 17 Bradford Road, Bedfordview, 2000, and to deliver up the premises to the Applicant in the same good order and condition as that in which it received it, fair wear and tear expected, and return all keys to the premises and duplicates thereof by no later than 31 December 2020; and

44.3. the Respondent is directed to pay the costs of this Application.

A handwritten signature in black ink, consisting of a large, stylized 'K' and 'M' followed by a horizontal line.

KS MCLEAN, AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG**

Date Argued: 9 December 2020

Date of Judgment: 14 December 2020

For the Applicants: Adv N Stein

Attorneys: Tatham Wilkes Inc

For the Respondent: Adv EJ Ferreira

Attorneys: Texeira Du Toit Attorneys