

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 200/2020

Date Heard: 1 September 2020

Date Delivered: 1 September 2020

In the matter between:

ANWAR HOSEN MOOSA N.O.

First Applicant

NASSER MOOSA N.O.

Second Applicant

MOHAMED SHABEER MOOSA N.O.

Third Applicant

and

PIERRE KOTZE

Respondent

JUDGMENT

RONAASEN AJ:

Introduction

[1] The applicants in their capacities as trustees of the Ridge Trust (“the trust”) seek the eviction of the respondent and any persons occupying through him from the immovable property situated at 14 Darby Road, Deal Party, Port Elizabeth (“the premises”). The trust is the owner of the premises.

[2] In January 2018 the trust and the respondent concluded a written agreement of lease in respect of the premises (which are commercial premises) in terms of which:

- 2.1. the trust let to the respondent the premises for a period of 12 months, commencing on 8 January 2018 and terminating on 7 January 2019;
- 2.2. the monthly rental was in the sum of R9 000.00 plus VAT.

[3] It is not in dispute that the respondent remained in occupation of the premises after 7 January 2019. On the applicants' version his continued occupation of the premises was unlawful. It is also not in dispute that after 7 January 2019 the respondent paid no rental or other consideration for his continued occupation of the premises.

[4] It appears that attempts were made to resolve the impasse created by the respondent's continued occupation of the premises, without success. That lack of success caused the launching of the present application, which was opposed by the respondent on various grounds. Given the latest turn of events, with which I deal below, it is not necessary for me to deal in any detail with the respondent's contentions as to why he was entitled to remain in occupation of the premises, other than to the extent that such contentions may have a bearing on my findings.

[5] The matter was due to serve before me on the opposed motion roll on 30 July 2020. It was however contended by the respondent that the matter had been

irregularly enrolled for hearing on that date. In order to avoid the matter becoming unduly protracted by interlocutory disputes I postponed the application for hearing on 1 September 2020, a date which was convenient to counsel for the parties.

[6] The respondent in heads of argument filed on his behalf has advised that he has elected not to contest the applicants' right to an eviction order and that he thus consented to an order that he be evicted from the premises. He has accepted liability for the costs of the application, save for the costs occasioned by the proceedings on 30 July 2020, and has tendered to pay such cost on the scale as between party and party.

[7] The respondent, furthermore, has filed a supplementary affidavit in which he seeks a suspension of any eviction order I will make against him for a period of two months, i.e. until 31 October 2020, saying that this extended period is required to allow him sufficient time to move his property from the premises and to secure alternate premises.

[8] Thus, the following issues remain to be determined:

- 8.1. whether I have a discretion to suspend my order for eviction and, if so, whether I should exercise such discretion in favour of the respondent and, further, if so, for what period I should postpone the eviction;
- 8.2. who is to be liable for the costs of the proceedings on 30 July 2020;

- 8.3. the scale on which I am to direct the respondent to pay the applicants' costs of this application.

Does a court have a general discretion to postpone or suspend an eviction order?

[9] Glover in *Kerr's Law of Sale and Lease*, fourth edition (2014) at 587, under the heading "Suspension of an ejectment order" confirms that our courts have still not provided a legal justification for delaying the enforcement of an eviction order.

[10] The debate as to whether a court has a discretion to postpone or suspend an eviction order, in the context of commercial property, has conveniently been set out and cogently discussed in the detailed judgment in *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ).

[11] I respectfully align myself with the views expressed in the *AJP Properties* matter and accept that I do have a discretion to postpone or suspend an eviction order, which discretion must be judicially exercised. This is in line with the discretion afforded to the court in terms of Uniform Rule 45A to suspend execution of its orders. Eviction is a species of execution.

[12] The facts in this matter, of course, differ vastly from those in the *AJP Properties* matter. The respondent in this matter is hardly in a position to equate his position to that of the tenant in *AJP Properties*. The principle underlying that

judgment is that the cancellation of a lease should not, where the tenant has complied with its terms, result in the demise of the tenant's business.

[13] For the following reasons I cannot accede to the respondent's request that he be allowed a period of two months within which to vacate the premises:

- 13.1. there were no discernible legal grounds for the respondent to remain in occupation of the premises after 7 January 2019;
- 13.2. the respondent delayed conceding the applicants' right to an order for eviction until the last minute;
- 13.3. the reasons for the respondent wishing to delay the eviction are all tailored solely to his convenience;
- 13.4. the respondent has not offered any consideration for his continued occupation of the premises;
- 13.5. the value of the improvements allegedly effected by the respondent to the premises do not equate to the value of the beneficial occupation of the premises he has enjoyed without the payment of any consideration, since 7 January 2019;
- 13.6. the respondent's eviction from the premises will not lead to the demise of any business he is conducting at present. On his version the premises are used purely for storage and he has not contended that his eviction will lead to the demise of any business.

[14] In my view if the eviction of the respondent were to be obtained through the offices of the sheriff, this process would probably from a practical point of view take approximately a month. In the circumstances, in the exercise of my discretion, I consider it appropriate to afford the respondent one month from the date of this order to remove himself and his property from the premises. This would eliminate the substantial costs attached to an eviction obtained through the offices of the sheriff, both for the trust and the respondent.

The scale on which the respondent must be directed to pay the applicants' costs of this application.

[15] Clause 9.3 of the agreement of lease concluded between the parties provides that in the event of the trust instructing its attorneys to take measures for the enforcement of any of the trust's rights under the agreement the respondent would pay the trust such collection charges and other legal costs on an attorney and client basis.

[16] The respondent did not exercise an option to renew the lease (to the extent that that it was open for him to do so). Thus, in terms of the agreement it was his obligation to vacate the premises after 7 January 2019 from which date the trust had the right to re-occupy the property. In breach of this obligation he remained in unlawful occupation of the premises for a substantial period. As stated, there are no discernible legal grounds on which he could have remained in occupation.

[17] When concluding the agreement of lease the respondent willingly agreed to the provisions of clause 9.3 of the lease. There is no reason why I should not hold him to his obligations in terms of this clause and direct him to pay the costs of this application on the scale as between attorney and client. Even if I am wrong in this regard his continued unlawful occupation of the premises after 7 January 2019, on untenable grounds, offers sufficient justification for me to award costs against him on a punitive scale.

The costs occasioned by the postponement on 30 July 2020

[18] The applicants have admitted to a number of procedural errors with regard to the enrolment of this matter on the opposed motion roll for 30 July 2020 in respect of which condonation would be required. The respondent seized on these with alacrity. Rather than going into the extent, if any, to which the respondent was prejudiced by these procedural lapses I deemed it expedient to postpone the matter to an agreed date in order to avoid unnecessary and protracted disputes over interlocutory issues.

[19] In the circumstances I deem it appropriate to direct that the parties will be responsible for their own costs of the proceedings on 30 July 2020.

Order

[20] Thus, I make the following order:

1. The eviction of the respondent and all persons occupying through the respondent from the premises situated at 14 Darby Road, Deal Party, Port Elizabeth ("the premises") is hereby authorised;

2. The operation of the eviction order is suspended for a period of one month from the date of the order to allow the respondent and all those who occupy the premises through him the opportunity to vacate the premises within the said period of one month from the date of the order;
3. Should the respondent and all persons occupying the premises through the respondent fail to vacate the premises within one month from the date of this order the sheriff is hereby authorised and directed to take such steps as are necessary to evict the respondent and all such persons from the premises;
4. The parties will be responsible for their own costs in respect of the proceedings on 30 July 2020;
5. Save as aforesaid, the respondent is directed to pay the applicants' costs of this application on the scale as between attorney and client.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv I Bands instructed by Henwood Britter and Caney c/o Kaplan Blumberg, Port Elizabeth

For Respondents: Adv A Beyleveld SC instructed by Fouché Paul, Port Elizabeth