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

Case No: 22/13020

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

In

04/03/2024

SIGNATURE

DATE

the matter between :

AFHCO CALGRO M3 CONSORTIUM (PTY) LIMITED

Applicant

and

MAHLOMOLO: MAPHANGA

First Respondent

**THE CITY OF JOHANNESBURG METROPOLITAN
COUNCIL**

Second Respondent

Coram: Ingrid Opperman J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 4 March 2024

ORDER

- (a) The First Respondent and all those claiming occupation through and under him are evicted from Unit No. C[...] J[...] L[...] E[...], 3[...] M[...] Street, [...] (*'the premises'*).
- (b) The First Respondent and all those claiming occupation through and under him are ordered to vacate the premises by no later than 30 April 2024;
- (c) In the event of the First Respondent and all those claiming occupation through and under him failing to vacate the premises by 30 April 2024, the Sheriff of this Court or his lawful deputy is authorised, directed and empowered to carry out the eviction order on 1 May 2024;
- (d) The First Respondent is to pay the costs of this application as between attorney and client.

JUDGMENT

INGRID OPPERMAN J

Introduction

[2] This is an application for the eviction of the First Respondent from Unit No. C[...] [...] [...] E[...], 3[...] M[...] Street, [...] (*'the premises'*).

Relevant Facts

[3] On 25 November 2019, the Applicant and the First Respondent entered into a written lease agreement (*'the lease agreement'*). The duration of the lease was for a period of 1 year terminating on 30 November 2020 and would thereafter continue on a month-to-month basis.

[4] The monthly rental was R4 400 payable monthly in advance. In addition to the monthly rental, the First Respondent agreed to pay monthly, on demand, the cost of the use of electricity, water, sewer, refuse and rates including any increase in those amounts. In terms of the lease agreement, if the property were fitted with a pre-paid

electricity meter, the First Respondent would be obliged to procure electricity from a registered pre-paid vendor. The Applicant would not bill the First Respondent for electricity under such circumstances. The First Respondent implemented this option.

[5] If the First Respondent failed to pay to the Applicant any amount in terms of the lease agreement on due date, and failing to remedy such breach within twenty business days of written notice to remedy such breach, the Applicant would be entitled to cancel the lease forthwith and claim repossession of the property without prejudice to its rights to claim arrear rental. The lease agreement also precluded the withholding of rentals for whatever reason.

[6] The First Respondent fell into arrears and on 10 January 2022, the Applicant caused to be sent to the First Respondent a letter of demand. Having received no response the Applicant on 8 February 2022, sent a notice of cancellation.

Defences

Lack of authority

[7] At the hearing, Mr Smanga, representing the First Respondent, abandoned the lack of authority point raised as a point *in limine*.

Service of the mora notice

[8] Clause 32.1 of the lease agreement took centre stage. It reads:

“32 BREACHING OR NOT COMPLYING WITH THE TERMS AND CONDITIONS

32.1 The Landlord shall be entitled, over and above any other rights in law, to immediately cancel this Lease if the Tenant fails to pay the rental or any other amount, or fails to comply with any other terms as required in terms of this Lease after (2) twenty days of a letter being **posted** to the Tenant telling him what is necessary to sort out the wrong doing”. (emphasis provided)

[9] The Applicant’s case is that the letter of demand was delivered by hand to the First Respondent. A confirmatory affidavit of Mr Sibusiso Sithole, the building

manager of the Applicant, who delivered the letter is attached to the founding affidavit. The First Respondent denies having received the cancellation letter and contends it only came to his attention when the application was served on him on 6 April 2022.

[10] Clause 32.1 only states to whom the letter must be posted. It does not state to which address it must be posted. The answer to this lies in Clause 17 of the lease agreement which deals with the addresses where the Tenant and the Landlord will receive letters, notices and summons. The clause, in relevant part reads as follows:

‘17.2 The Tenant **chooses the Premises** as the address where he will receive letters, notices and summons.

17.2.1 any letters, notices or summons that either the Landlord or the Tenant sent by registered post ...

17.2.2 Letters, Notices, or Summons delivered to the Premises by hand or ... shall be considered received on the date of delivery or transmission.’ (emphasis provided)

[11] The notice was hand delivered at the premises.

[12] The question is therefore, do the provisions of clause 32.1 preclude this Court from finding that the lease was validly cancelled because the letter of demand was delivered by hand to the First Respondent at the address agreed to in the lease agreement (the premises) and not posted to him at such address?

[13] The parties requested leave to file supplementary heads of argument dealing with this feature which leave was granted.

[14] Mr Smange, in the supplementary heads of argument, argued that the Applicant should be held to the terms of the lease agreement and that the requirement of postage in clause 32 is clear.

[15] Ms Fine, representing the Applicant, argued that the phrase ‘*over and above any other rights in law*’ is clearly indicative that the rights embodied in clause 32 are in addition to any other rights which the Applicant has in law. The existing rights the Applicant had, she submitted in her supplementary heads of argument, were those

embodied in clause 4, being to terminate the lease agreement on twenty days' notice as it was a monthly tenancy which did not require the Applicant to place the First Respondent in mora.

[16] Ms Fine argued that although there was a tension between the provisions of clause 17 and 32, as the one requires postage and the other clearly envisages hand delivery, it was of no moment because the consequence of termination of the monthly lease which requires 20 days written notice and cancellation which requires 20 days written notice, is the same. The distinction would only have had significance during the period 26 November 2019 to 30 November 2020 but has no effect on the implementation of the breach or termination clauses on a monthly basis.

[17] In my view, the answer is to be found in the full Court judgment of this court in *Lench and Another v Cohen and Another*¹. Where parties choose a *domicilium citandi et executandi* for the delivery of all documents and process, the purpose thereof is to relieve the party causing service of the notice from the burden of proving actual receipt. By choosing a *domicilium* the First Respondent has taken the risk upon himself that the notice may not come to his attention.

[18] The First Respondent chose the premises as his *domicilium*. Clause 4 of the lease agreement provides that the lease shall be for a period of 12 months from 26 November 2019 until 30 November 2020 and '*shall continue thereafter on a month-to-month basis, subject to termination on 20 business days' notice*'. The notice provided for in clause 4 can be served in the manner prescribed in clause 17.

[19] The lease agreement must be interpreted in a business-like manner. It would lead to an unbusinesslike interpretation of the lease agreement if the *mora* notice could only be 'posted', but the notice of termination of the monthly lease, could be hand delivered at the chosen *domicilium*. It would be different if the requirement were one of registered post but it is not. I thus conclude that **after** the expiry of the 12 month period (the initial period), both the notice of termination (clause 4) and cancellation (clause 32) could be hand delivered at the First Respondent's chosen *domicilium* address.

¹ 2006 (2) SA 99 (W) at para [20] to [22]

Exceptio non adimpleti contractus

[20] The First Respondent contended that he withheld payments due to the Applicant failing to maintain the building and other related reasons. The written provisions of the lease agreement specifically precludes this (clauses 6.1, 6.3, 10.2.7, 24.1, 24.2 and 32.4).

Other factors

[21] The First Respondent has failed to provide all the details of his personal circumstances. All he states is that the property is occupied by himself, his wife and his two children. The ages of the children are unknown so too whether they attend school and if so, where. He does not provide information about his wife's employment.

[22] During the hearing Mr Smanga submitted that if this court were inclined to grant an eviction order, that a period of 3 months would be sufficient for the First Respondent to obtain alternative accommodation.

[23] It appears that the First Respondent has the means to procure alternative accommodation. The amount of the arrears is not disputed and he requested this court to authorise payment into his attorney of record's trust account to demonstrate that he is not in wilful breach of the lease agreement. This tender is relevant for another reason being that the First Respondent clearly has the means to secure alternative accommodation.

[24] This court is entitled to adjudicate this application on the papers filed before this court. In the exercise of this court's discretion, I intend granting an eviction order as I conclude having regard to all that has been placed before me that it would be just and equitable to do so.

[25] This application was served on the First Respondent on 6 April 2022. He has known for almost two years now about the relief sought. The application was argued

during November of 2023 at which point it was suggested that 3 months would be sufficient. In my view a just and equitable date on which the First Respondent should vacate the property is 30 April 2024, affording him even more time than asked.

Costs

[26] Clause 18.2 provides for costs as between attorney and client. No argument was advanced as to why the costs should not follow the result or why the clause should not be honoured.

Order

[27] I accordingly grant the following order:

- (a) The First Respondent and all those claiming occupation through and under him are evicted from Unit No. C[...] [...] [...] E[...], 3[...] M[...] Street, Jabulani (*'the premises'*).
- (b) The First Respondent and all those claiming occupation through and under him are ordered to vacate the premises by no later than 30 April 2024;
- (c) In the event of the First Respondent and all those claiming occupation through and under him failing to vacate the premises by 30 April 2024, the Sheriff of this Court or his lawful deputy is authorised, directed and empowered to carry out the eviction order on 1 May 2024;
- (d) The First Respondent is to pay the costs of this application as between attorney and client.

I OPPERMAN

Judge of the High Court

Gauteng Division, Johannesburg

Counsel for the Applicant:

Instructed by:

Legal Practitioner for First Respondent:

Instructed by:

Adv V Fine

Mervyn Joel Smith Attorneys

Mr Smanga

Memela Jones Inc

Date of hearing:	7 November 2023
Supplementary heads filed for Applicant:	17 November 2023
Supplementary Heads field for First Respondent:	23 November 2023
Date of Judgment:	4 March 2024