

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. 751/2020

In the matter between:

**MEC, DEPARTMENT OF PUBLIC WORKS  
EASTERN CAPE PROVINCE**

**Applicant**

**and**

**BONIWE V MOLESHE**

**Respondent**

**JUDGMENT**

**LAING J**

[1] This is an application for the eviction of the respondent from several adjacent erven situated in Alice, Eastern Cape.

**The applicant's case**

[2] The applicant avers that the Department of Public Works and Infrastructure ('DPWI') is the owner of properties that it leases to various individuals and corporate entities. He asserts that investigations have revealed that many tenants continue to occupy state properties without paying rental or where lease agreements have expired. This has led to the implementation of a project called 'Operation Bring Back'. The applicant, consequently, has instituted proceedings to ensure the proper use and management of properties such as those that form the subject of this application.

[3] On 14 January 2015, the DPWI concluded a lease agreement with the respondent for erven 354, 355, 356 and 357, Alice. The applicant pleads that the salient terms thereof were, *inter alia*, that the lease commenced on 1 March 2015 and endured

on a month-to-month basis, the properties were to be used for office accommodation, and the respondent was required to pay a monthly rental of R5,531.

[4] The respondent breached the agreement, contends the applicant, by failing to pay rental. An amount of R119,242 is outstanding. In addition, the respondent has failed to pay for municipal services.

[5] On 12 November 2019, the applicant notified the respondent of the termination of the agreement and requested her to vacate the properties. The applicant's attorneys sent a similar notice to that effect on 4 March 2020. Out of caution, avers the applicant, a notice was also placed in the *Daily Dispatch* newspaper on 3 June 2020, addressed to the tenants specified therein, including the respondent.

[6] Notwithstanding the above steps, the respondent remains in occupation. The applicant seeks an order declaring that the agreement has been terminated and directing the respondent to vacate the properties.

### **The respondent's defence**

[7] The respondent avers that she has been leasing erven 354, 355, 356 and 357 since 1998. Upon the termination of the lease agreement, she vacated erven 354, 355 and 356, but continued to occupy erf 357. She operates a petrol station thereon.

[8] In 2018, alleges the respondent, she entered into an agreement for the lease of erf 357. The terms thereof were, *inter alia*, that monthly rental would be payable in the sum of R8,000. She continues to pay such amount. Despite requests for a copy of the agreement, says the respondent, none has been provided. Nevertheless, the lease of erf 357 remains extant.

[9] The respondent denies having received the notices dated 12 November 2019 and 4 March 2020, as the applicant has alleged. She denies having seen the notice in

the newspaper on 3 June 2020. She is adamant that she had been paying her monthly rental at the time and points out that the applicant has failed to furnish her with a proper reconciliation statement for her account, indicating what might have been outstanding. The statement attached to the founding papers made little sense at all.

[10] Consequently, the respondent disputes the allegation that she owes an amount of R119,242 to the applicant. She also disputes that she has not been paying for municipal services.

### **Issues to be decided**

[11] The respondent has raised several points *in limine*. The first pertains to non-compliance with rule 41A of the Uniform Rules of Court. The second and third pertain to issues that relate to the merits of the application and are best decided within that context.

[12] Furthermore, the respondent has argued that there is a dispute of fact and that the matter must be determined in accordance with the applicable case law. This will need to be investigated.

[13] If a dispute of fact does not arise, then the court must decide, overall: (a) whether the lease agreement has been terminated; and (b) whether there is a basis upon which to evict the respondent.

### **Points *in limine***

[14] The provisions of rule 41A facilitate the expeditious and cost-effective resolution of a dispute between litigants.<sup>1</sup> Both parties are required to indicate whether they agree to or oppose the referral of the dispute to mediation. In *Nomandela and another v Nyandeni Local Municipality and others*,<sup>2</sup> the respondent objected to the applicant's failure to have complied with the rule, to which the court observed that the respondent, too, had failed to comply. Majiki J held as follows:

‘...it is not to be underestimated that the rules are meant to be complied with. However, it has been stated often by the courts that the rules are meant for the court, and not the other way round. It is ideal that in the near future litigants should comply with this rule. That would ease the congested court rolls and achieve less costly and speedier resolution of disputes. However, in my view, the present application raises important principles relating to compliance with departmental regulations, the respondent's own policies and alleged infringement of constitutional rights to dignity and to lawful and reasonable procedural administration. In the light of this, I am of the view that, in the interests of justice, those issues call for immediate resolution, than to remove the matter from the roll in order for the litigants to pronounce on whether they would agree or oppose mediation.’<sup>3</sup>

[15] The facts were similar to those in the present matter insofar as they concerned the parties' non-compliance with rule 41A. Here, the respondent has also failed to deliver the notice envisaged under sub-rule (2).

[16] The appropriate time for the referral of a dispute to mediation is at the very beginning, at the onset of proceedings, before the parties have incurred the costs and delays of litigation. Nevertheless, the rule permits the parties to refer the dispute at any stage before judgment. This is qualified to the extent that the leave of the court is

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<sup>1</sup> See *Monkwe Dietetics Services (Pty) Ltd and others v MEC, Department of Education and another* (4663/2021) [2022] ZALMPPHC 12 (22 February 2022), at paragraph [6].

<sup>2</sup> 2021 (5) SA 619 (ECM).

<sup>3</sup> At paragraph [10].

required in circumstances where the trial or hearing of an opposed application has already commenced.

[17] For a party to rely successfully on the other party's failure to have delivered a rule 41A(2) notice,<sup>4</sup> he or she would have to demonstrate that such non-compliance has created prejudice. It would be necessary to show that non-delivery of the notice has hampered the preparation and conduct of his or her defence, or that it has caused harm in the wider sense. The court would need to be satisfied, overall, that it would be in the interests of justice for the case to be removed from the roll.

[18] In the present matter, there is no indication at all from the answering affidavit that prejudice was created. Moreover, it was always an option for the respondent to have filed a notice in terms of rule 30A, which is intended for non-compliance. In circumstances where the respondent has failed to avail herself of the relevant procedural remedy, has failed to plead the nature and extent of any prejudice, and has herself failed to deliver her own rule 41A(2) notice, there was no reason for the court to have removed the matter from the roll to permit the parties an opportunity to consider the referral of the matter to mediation. The applicant has, in any event, never raised such a possibility.

[19] Consequently, the court is not persuaded that the point *in limine* has merit. The remaining points pertain to the alleged non-receipt of the notices of termination and to whether the lease agreement was cancelled or whether it expired by effluxion of time. These will be considered when dealing with the application as a whole.

[20] Before doing so, it is necessary to deal with the respondent's assertions in relation to the alleged dispute of fact.

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<sup>4</sup> The respondent has merely objected to the applicant's non-compliance with rule 41A. However, it is evident from the underlying correspondence between the attorneys that non-service of the notice contemplated under sub-rule (2) is the issue in question.

## Dispute of fact

[21] As a starting point, it may be useful to set out the ‘principal ways’ in which a dispute of fact arises, as discussed in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,<sup>5</sup> where Murray AJP remarked as follows:

‘...The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant’s behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed. There are however other cases to consider. The respondent may (b) admit the applicant’s affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting applicant’s main allegations does not render a case such as this free of a real dispute of fact. Or (d) he may state that he can lead no evidence himself or by others to dispute the truth of applicant’s statements, which are peculiarly within applicant’s knowledge, but he puts applicant to the proof thereof by oral evidence subject to cross-examination.’<sup>6</sup>

[22] In the present matter, the respondent avers, essentially, that she has vacated erven 354, 355 and 356 but remains in occupation of erf 357. She avers, too, that the only surviving lease agreement of relevance to the dispute is that concluded between the parties for erf 357 in 2018. Moreover, she avers that she has been paying monthly

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<sup>5</sup> 1949 (3) SA 1155 (T).

<sup>6</sup> At 1163.

rental and municipal service charges, and never received notification from the applicant or his attorneys about the termination of the agreement.

[23] There are difficulties attached to the respondent's averments. In relation to erven 354, 355 and 356, the respondent has not indicated exactly when she vacated the land. There is nothing to substantiate her allegation. It would have assisted had she provided details of the current occupiers, accompanied by confirmatory affidavits or photographs of the premises or some other form of documentary evidence such as a copy of a utility bill addressed to the current occupiers. The applicant's copy of the lease agreement clearly stipulates that the subject thereof consisted of erven 354, 355, 356 and 357. The respondent has simply failed to adduce any evidence in support of her assertion that she no longer occupies the land in question.

[24] Turning to the agreement for erf 357, the respondent has not provided any information about where and when it was concluded, or who represented the DPWI at the time. She has said very little about the terms of the agreement, save to say that the monthly rental was R8,000 with effect from an unknown date in April 2019. She pleads that she has unsuccessfully attempted to obtain a copy from the offices of the DPWI but has not supplied details about where and when such attempts were made, the identities of any officials with whom she may have engaged, or copies of any written requests previously sent.

[25] Vague and insubstantial averments are not sufficient to give rise to a genuine dispute of fact.<sup>7</sup> The respondent's allegations regarding her vacation of erven 354, 355 and 356 and the conclusion of a new agreement for erf 357 are simply too sketchy, imprecise, and tenuous to persuade the court that it cannot reach a decision on the

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<sup>7</sup> See *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E), 156I-J.

facts, founded on a consideration of the balance of probabilities, without referring the matter for the hearing of oral evidence in terms of rule 6(5)(g).<sup>8</sup>

[26] The respondent's remaining allegations concern the payment of monthly rental and municipal service charges, and whether she received notification from the applicant or his attorneys about the termination of the agreement. These may well give rise to a genuine dispute of fact. However, for the reasons that follow, it is not necessary for the court to make any findings in this regard.

### **Termination of lease agreement**

[27] The applicant has attached a copy of the lease agreement to his founding affidavit. Under the interpretative provisions of clause 2, the lease period is unhelpfully defined as 'the period for which this lease subsists, including any period for which it is renewed'. In relation to monthly rental, the parties contemplated payment of R5,531 'for the first year of the lease' after which it would escalate by ten percent (10%) per annum. The duration of the lease, however, is stipulated as being 'month-month'.

[28] The contents of clause 20, dealing with the provisions of the Consumer Protection Act 68 of 2008, assist (and confuse) to some extent. In terms of clause 20.2, the parties agreed that the lessor may cancel the agreement in the event of the lessee's failure to remedy a material breach, provided that prior notice was given. Furthermore, the lessor was required to provide the lessee with not more than 80 and not less than 40 business days' prior notice of the impending expiry date of the agreement. Interestingly, however, clause 20.3 provides that:

'[u]pon expiry of this Lease at the end of its term, it will automatically continue on a month to month basis subject to any material changes of which the Lessor has given

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<sup>8</sup> See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634H-635B. Furthermore, see the discussion about disputes of fact on the papers and the possible referral thereof for the hearing of oral evidence in Van Loggerenberg, *Erasmus: Superior Court Practice* (RS 15, 2020), at D1-72-6.



notice in terms of clause 20.2.2.1 unless the Lessee expressly directs the Lessor to terminate the Agreement of Lease on the expiry date or agrees to a renewal for a further fixed term.’

[29] The right of renewal is addressed in terms of clause 21. The lessee was entitled to renew the lease, subject to the conditions stipulated.

[30] The provisions of the agreement are in many ways ambiguous and contradictory. It is apparent, nevertheless, that the parties envisaged that the lease would endure for at least a year (at a monthly rental of R5,531), after which it would continue to endure from month to month, subject to termination by either party.

[31] The respondent has opposed the application on the basis that, *inter alia*, she had not been in breach of her obligation to pay rental and municipal charges. This did not, however, prevent the applicant from simply terminating the agreement at his own election, provided that the relevant notice periods were met. The applicant’s letter of 12 November 2019 made it abundantly clear that the agreement would terminate in 60 days’ time. Admittedly, as the respondent has argued, the letter sent by the applicant’s attorneys on 4 March 2020 seems to have undermined the earlier correspondence since it created the impression that the agreement was still extant. Notwithstanding, it cannot be denied that the applicant intended to terminate the agreement, whether because of a material breach or otherwise. The notice placed in the *Daily Dispatch* newspaper on 3 June 2020 places this beyond doubt.

[32] In the absence of any notice provisions or where the notice period is unclear, it is a well-established principle that one month’s notice is adequate where a contract operates on a month-to-month basis.<sup>9</sup> The combination of notices sent or advertised by

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<sup>9</sup> See *Fulton v Nunn* 1904 TS 123; *Tiopaizi v Bulawayo Municipality* 1923 AD 317. More recently, in this division, see *MEC for Department of Public Works and Infrastructure, Eastern Cape v Jane Margaret Fourie and another* (Eastern Cape Local Division, Mthatha, Case no. EL 1297/2020, 16 September 2021, unreported), at paragraph [34]; *MEC, Department of Public Works and Infrastructure, Eastern Cape Province v Pretorius and another* (CA 09/2022) [2022] ZAECMHC 17 (26 July 2022), at paragraph [43].

the applicant were sufficient, either individually or combined, to convey the applicant's intention to terminate the agreement.

[33] The respondent denies that she received the correspondence of 19 November 2019 and 4 March 2020. She also denies that she saw the notice in the newspaper. The applicant has, however, by way of the present application, demonstrated unequivocally that the respondent's right to occupy erven 354, 355, 356 and 357 has been terminated. There would be no point in expecting or directing the applicant to deliver a fresh notice of termination at this stage.

[34] Similar facts arose in the matter of *Taylor v Hogg*,<sup>10</sup> where Plasket J held that '[w]hether a lease was in place or the relationship between Taylor and Hogg was premised on a *precarium*, the result is the same: Hogg's right to reside in the premises has been revoked by Taylor. As he and his family no longer have the consent of Taylor to live in his premises, they are unlawful occupiers for purposes of the PIE and are liable to eviction.'<sup>11</sup>

[35] The court has little difficulty in finding that the respondent has terminated the agreement. The respondent's continued occupation of the land amounts to a classic example of 'holding over'.

### **Eviction of respondent**

[36] If the applicant has terminated the agreement, as this court has found, then there is no longer a legal basis upon which the respondent can remain in occupation of the land. She can be evicted.

[37] The provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') do not apply. It is common cause that the land is used for

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<sup>10</sup> (CA 317/17) [2018] ZAECHC 64 (10 August 2018).

<sup>11</sup> At paragraph [10].

commercial purposes. The respondent has confirmed that she operates a petrol station on the site and makes no reliance on PIE in her opposition to the application.

[38] It is necessary, at this stage, to discuss the relief to be granted.

### **Relief and order**

[39] The court has already dealt with the respondent's main point *in limine* and decided that there is no merit thereto. The remaining points fell under discussion when considering whether the agreement had been terminated.

[40] No real dispute of fact arises from the papers, there is no need to refer the matter for the hearing of oral evidence. Such differences as there are in relation to the payment of monthly rental and municipal service charges, and the receipt or otherwise of the notices, have no impact on the findings made regarding the termination of the agreement and the right of the applicant to evict the respondent.

[41] Whereas the court has indeed found that the applicant is entitled to the relief that he seeks, it is evident from the papers that his staff can be criticised for having failed to manage the lease properly. The respondent's assertion that she was not in arrears with the payment of either rental or municipal service charges was never refuted by the applicant in reply. The applicant also conceded that the invoice sent to 'N Moleshe', attached to the founding affidavit, was a mistake. The court has been left with the unfortunate impression that the applicant's staff have simply failed to manage properly the public assets in question (erven 354, 355, 356 and 357) but it is hoped that the shortcomings may yet be remedied by the effective implementation of the project described earlier in the judgment.

[42] The applicant admitted, in argument, that sufficient time would need to be allowed to the respondent to wind down operations at the petrol station and to vacate the land. This is reflected in the order to follow.

[43] In the absence of any sign that the respondent would refuse to cooperate with the applicant in the event of her eviction, the court sees no reason why it would be necessary to direct the South African Police Services ('SAPS') to assist in the exercise. The involvement of the sheriff will suffice, failing which there are further remedies available to the applicant to facilitate the enforcement of the order.

[44] Finally, there is no reason why the usual rule should not be applied in relation to costs. The applicant is entitled to payment thereof. The matter is not of such a nature, however, as to justify his recovery of the costs of two counsel.

[45] The following order is made:

- (a) the lease agreement concluded by the parties for erven 354, 355, 356 and 357 Alice ('the properties'), is declared to have been terminated;
- (b) the applicant is entitled to evict the respondent from the properties;
- (c) the respondent and her employees or staff are directed to vacate the properties within a period of 90 days, calculated from the date of this order;
- (d) the sheriff is hereby authorised to evict the respondent and her employees or staff if they fail or refuse to vacate the properties within the period described above; and
- (e) the respondent is directed to pay the applicant's costs of the application.

**JGA LAING**  
**JUDGE OF THE HIGH COURT**

#### APPEARANCE

For the applicant: Adv Mduba, instructed by Mbaleni & Associates, East London.

For the respondent: No appearance.

Date of hearing: 13 October 2022.

Date of delivery of judgment: 31 January 2023