IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 2670/2021

In the matter between:

PUBLIC WORKS & INFRASTRUCTURE BLOEMFONTEIN Applicant

and

MICHAEL PHAKAMISA DYONASE First Respondent
MOHOKARE LOCAL MUNICIPALITY Second Respondent

JUDGMENT BY: MTHIMUNYE, AJ

HEARD ON: 10 FEBRUARY 2022

DELIVERED ON: 24 FEBRUARY 2022

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[1] This is a two-pronged application by the National Department of Public Works Bloemfontein (the applicant) in terms of which it seeks primarily an order terminating the Lease Agreement entered into by and between itself and the first respondent, and subsequently, evicting the first respondent and all other persons occupying the subject property.

[2] The first respondent is Michael Phakamisa Dyonase, an adult male and tenant in occupation of the subject property in terms of the lease agreement.

[3] The second respondent is Mohokare Local Municipality, a metropolitan municipality as contemplated in the Constitution of the Republic of South Africa, 1996 and the Local Government: Municipal Structures Act, 117 of 1998 as amended. No relief is sought against the second respondent. It is cited herein only as an interested party in terms of the provisions of the Prevention of Illegal Evictions Act from and Unlawful Occupation of Land Act, 1998. The fact that the second respondent is the employer of the first respondent is of no consequence to this application.

[4] The applicant is the custodian and manager of all government owned land and buildings nationally including the subject matter property, which is a residential property situated at 22 Committee Street, Zastron. To avoid vandalism, dilapidation and unlawful occupation, the applicant decided to lease this property out to the public. To this end, an advertisement for proposals was issued on 16 July 2019. The only proposal received was from the first respondent and it was approved by the Applicant's Regional Bid Adjudication Committee. Subsequently a written lease agreement was entered into by and between the applicant and the first respondent for the period 01 September 2019 to 31 August 2024 (Five Years). Pursuant to this, the first respondent took occupation and remains in occupation.

[5] The relevant and pertinent clauses of the lease agreement are the following:

> "3. PERIOD OF THE LEASE
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> 3.1. The period of the lease shall be for a fixed period of Five (5) years commencing on 01 September 2019 and shall terminate on 31 August 2024 subject to the provision [*sic*] of 3.2.
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> 3.2. If the Lessee intends to renew the lease he shall do so upon the terms as agreed by the Parties provided he applies for such renewal in writing at least three months before the termination of this Agreement. The Lessor shall not later than thirty days after the receipt of the application inform the Lessee in writing of the

outcome thereof. Should the application to renew not be successful, the lease shall expire at the date of termination.

...

19. SALE OF PROPERTY

19.1. The Lessee agrees that the Lessor shall be entitled to dispose of the property during this lease. Should the Lessor decide to dispose of the property during this lease, the lessor shall give a six months termination notice and the lessee shall not be entitled to claim for damages or any other costs as a result of the termination of the lease.

...

23. DEFAULT BY THE LESSEE

23.1. In the event of the Lessee failing to comply with any of the provisions of this Agreement, including the payment of rent, the lessor shall give written notice to the Lessor of the alleged breach of contract and of the Lessor's intention to cancel the Agreement.

23.2. Should the Lessee still be in default twenty (20) days after the notice referred to in 23.1, the Lessor shall be entitled to:

23.2.2. [*sic*] terminate the contract in writing and claim damages.

23.2.3. evict the Lessee and claim damages

...

25. WHOLE AGREEMENT

25.1 This is the entire agreement between the Parties.

25.2 Neither Party relies in entering into this agreement on any warranties, representations, disclosures or expressions of opinion which have been incorporated into the Agreement as warranties or undertakings.

25.3. No variations or consensual cancellation of the Agreement shall be of any force or effect unless reduced to writing and signed by both Parties.

25.4. No amendment of any term or condition of this Agreement or any waiver of any right herein shall be of any force or effect unless reduced to writing and signed by the duly authorised representatives of both parties."

[6] On 19 October 2020, the applicant served a notice of termination to the first respondent giving the first respondent three (3) months' notice to vacate the property. The reason cited for the termination was that the applicant needed the property for official purposes.

[7] It is noteworthy that the lease agreement contained no standalone termination clause. The only provisions for premature termination on notice were in relation to the disposal of the property by the applicant (Clause 19) and where the first respondent is in default (Clause 23). The applicant is also not asking for any rectification of the agreement.

[8] It is also common cause that the first respondent is not in any form of default and as such the applicant could not rely on the default clause for its termination; and further that the property was also not being disposed of by the applicant. These are the only two conditions upon which the applicant could prematurely terminate the agreement on notice.

[9] The applicant premises its entitlement to prematurely cancel this agreement on three grounds. Firstly, that the 'New Lease Out Submission', a document appearing to be an internal memorandum by the applicant's Deputy Director to the Regional Bid Adjudication Committee contained, in paragraph 4(b)(iii) the following provision:

> "Lease term: Lease term commencement date 1 September 2019 and ending on 31 August 2024 with a two (02) months termination notice period notice [*sic*] required from either party."

[10] This document was never annexed to the Lease Agreement that was signed by both parties, neither was this clause transposed into the agreement. Counsel for the applicant argued that even though this was not done, this document was 'made known' to the first respondent and the lease must be read together with this document. When asked how it was 'made known', her explanation was that it formed part of the approval documents that were submitted to the Bid Adjudication Committee. This assertion that this document was made known to the first respondent and that it was to be read together with the lease agreement was however not made in the applicant's founding affidavit and Counsel for the respondent argued that it was never the

applicant's case that this document be read together with the lease agreement.

[11] The second premise, is that in terms of Section 4(5)(c) of the Rental Housing Act 50 of 1999, which governs the written lease agreement, a landlord has a right to terminate the lease agreement on grounds that do not constitute unfair practice[1]. This section provides:

> "The landlord's rights against the tenant include his or her right to terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease".

[12] The third ground relied upon by the applicant is the general principle of law that entitles the Lessor to cancel the lease on 'reasonable notice' in the event that the contract is silent on the notice period[2]. I will, in the following paragraphs deal with each of these grounds separately.

[13] In response to the applicant's notice, the first respondent pointed out that the termination notice was defective and in breach of the provisions of the lease agreement as it was not as a result of the property being disposed of, which in any event required a six months' notice. In essence the first respondent refused to vacate the property, even after receiving subsequent communication from the applicant on the basis that the lease remained valid and in force, thus prompting the applicant to bring this application.

[14] The first respondent argues that the applicant's actions amounted to a unilateral variation of the lease agreement. He asserts that the contract was for a fixed term and will only terminate on 31 August 2024, and that it did not contain a cancellation clause save in the event of disposal or breach, which it is common cause that they are not at play *in casu*. He contends that applicant does not have a right to cancel and both the cancellation and the eviction

[1] Para 25.3, 43.3, 55 to 57 of the Founding Affidavit.
[2] Para 43.4 and 47of the Founding Affidavit.

application must be dismissed with costs on a punitive scale. That is the question this court is seized with i.e. whether or not the applicant has a right to prematurely terminate the lease agreement on notice, as it asserts; and if the answer is in the affirmative, whether the applicant is entitled to an order of eviction.

[15] I now deal with the applicant's grounds for termination as outlined in paragraphs [9] to [12] *supra*. With regards to the applicant premising its cancelation on the provisions of section 4(5)(c) of the Rental Housing Act[3] i.e. entitlement to cancel on circumstances that do not constitute unfair practice, the first Respondent correctly argues, that these circumstances must be specified in the lease. The section upon which the applicant relies reads:

> "(5) The landlord's right against the tenant include his or her right to-
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> ...
>
> (c) terminate the lease in respect of rental housing property on the grounds that do not constitute an unfair practice **and** are specified in the lease;
>
> ..."

[16] The basic rules of interpretation dictate that the use by the Legislature of the word 'and' denotes an additional requirement. The applicant may argue that its premature termination of the lease agreement does not constitute 'unfair practice' as it may not fall within the unfair practice regulations in terms of the Act, however, that is not the only requirement. An additional requirement is that the reasons for termination of the lease must be specified in the lease. This aspect has been adequately dealt with in the aforegoing paragraphs, save to say that the applicant meets the same demise in respect of this ground.

[17] The applicant in its papers took pains to explain its legislative mandate to provide its departmental clients, in this case being the Department of Home Affairs with suitable accommodation. The challenge this court has with this

[3] Act 50 of 1999.

assertion is that the applicant, being fully aware of its legislative mandate to provide departmental clients with property, enters into this agreement to rent the subject property out to the first respondent for a period of five years, and in doing so, omits to reserve for itself a right to cancel for 'official use'. Nothing precluded the applicant from having this provision in the lease agreement the same way it provided for termination in the event of default or disposition.

[18] The contract contained no clause for termination on the basis of official use. It is trite that a litigant is bound by its pleadings. **Jacob and Goldrein on _Pleading: Principles and Practice_ at 8-9** articulates this as follows:

> "For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no party of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its character and nature if it were to pronounce upon any claim or defence not made by the parties...."

[19] The terms of the agreement did not make provision for cancellation for 'official use'. Further complicating the applicant's case is that the lease contained a variation clause that states:

> "No amendment of any term <u>or condition</u> of this Agreement or any waiver of any right herein shall be of any force or effect unless reduced to writing and signed by the duly authorised representatives of both parties."

[20] If the provisions of the New Lease Out Submission were to be read together with the lease and the provisions thereof be made conditions of the lease agreement, such should have been explicitly stated in the lease agreement and signed by duly authorised representatives of both parties, which was not done in this case. The applicant asserts that it is entitled to prematurely

terminate the contract 'for official purposes', yet there is no provision in the lease agreement for termination on this basis. It is my view that termination of an agreement on reasons not provided for in the agreement itself undermines the common law rule that agreements are binding and must be enforced – *pacta sunt servanda* **(Barkhuizen v Napier[4]).** It follows therefore that the applicant's argument in this regard must be rejected.

[21] I now deal with cancellation by a landlord on reasonable notice. Counsel for the respondent argued, which argument I align myself with, that this general principle applies where the contract makes provision for premature cancellation without being specific of the notice period. In this case, the lease contained no such provision. On the contrary, it is very specific on the notice period and the circumstances under which such 'notice period" must be given i.e. default or disposition, none of which are at play *in casu*. The applicant relied herein on **Maphango and Other v Eangus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curiae)[5].** The applicant's reliance on this case is misplaced because unlike in this case, the lease in **Maphango** contained a termination clause but did not specify the notice period. The specific provisions thereof read:

> "Each lease was to run for a specified initial period, during which the landlord could terminate the tenancy for breach (these included the usual grounds: non-payment of rent, damage to the premises, contravention of laws or by-laws). After this, the lease would continue on the same terms and conditions, subject to termination by either the landlord or the tenant on a specified period of written notice. ..."
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> "Third, the lease provides that the landlord has the right on written notice to the tenant four years after signing the agreement to "change the nature of [the] tenure" under the lease..."

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[4] 2007 (5) SA 323 (CC).
[5] 2012 (5) BCLR 449 (CC).

[22] It is clear that the facts in Maphango are quite distinguishable from those in this application. In this again, the applicant seeks to rely on a provision that was not contained in the contract. It follows that his argument must also fail.

[23] The second part of this application is an order evicting the first respondent from the subject matter property. The first hurdle that an applicant for an eviction order must cross is establishing the status of the respondent as an unlawful occupier. An unlawful occupier is defined in the PIE Act[6] as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997 and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996".

[24] In terms of this definition, the occupant must have no right in law to occupy land or the subject property. In other words, there should be not lawful defence to eviction. This is the first line of inquiry. It is only after the court has found no defence to eviction that it would then look into whether it would be just and equitable to grant the eviction order[7].

[25] For the first respondent to be an unlawful occupant in this case, the lease must have been cancelled. The applicant's eviction application therefore is dependent on the success of the termination of lease. It follows that if the latter fails, the former automatically falls off. In my view, the first issue for determination is whether or not the First Respondent is an unlawful occupier. If this question is answered in the positive, then I proceed to deal with whether or not the applicant has complied with the procedural aspect outlined in the PIE Act. In the event that the first question is answered in the negative, I am

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[6] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[7] City of Johannesburg v Changing Tides 74 ((Pty) Ltd **2012 (6) SA 294 (SCA).**

of the view that it is of no consequence for this court to consider the procedural aspects of this application.

[26] The first respondent is in occupation of the subject property in terms of a valid lease agreement, which lease the applicant seeks to terminate in terms of the first leg of this application. In the preceding paragraphs I have dealt with the reasons why all the grounds upon which the applicant relies must fail. It follows therefore that the lease agreement between the applicant and the first respondent remains valid. Guided by the above principles, I am persuaded that this application must fail.

[27] I now turn to deal with the issue of costs. The applicant has asked for costs against the respondents on an attorney and client scale. The approach to costs rests on two principles, firstly that unless expressly otherwise enacted, the granting of costs falls within the discretion of the court. The second principle is that generally, costs follow the results, i.e. they are awarded in favour of the successful litigant. An attorney and client scale is a punitive scale reserved for matters where there has been conduct on the part of a litigant that the court views so serious that it warrants a punitive scale. It is meant to punish a litigant where there has been conduct which is unreasonable and objectionable that it demonstrates a total disregard of the court processes and its authority by a litigant.

[28] Further, it is to ensure that the successful litigant is not out of pocket in respect of expenses caused to him or her by the losing party's approach to litigation. In **Nel v Waterberg Landbouwers Kooperatiewe Vereeniging**[8] this principle was expressed as follows:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising wither from the circumstances which give rise to the action from the conduct of the losing party, the

[8] (1949) AD 597 at 608.

court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for the purpose. But in fact, a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill...Therefore, in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say 'as far as it can' because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party..."

[29] It has been argued by the first respondent that the applicant is using a draconian approach because it is an organ of the State and as such must be mulcted with punitive costs. On one hand, I am constrained by the principle that costs cannot be used to instil fear in prospective litigants such that they are fearful to approach a court of law for the resolution of their disputes. For this reason, I am not persuaded that a punitive scale is warranted.

[30] Consequently, I make the following **order**:

1. The Application for termination of the lease and eviction of the first respondent is dismissed.

2. The applicant is ordered to pay the costs of the first respondent on a party and party scale.

D. P. MTHIMUNYE, AJ

Appearances:

For the Applicant:	Adv T. Ntoane Instructed by State Attorney Bloemfontein
For the First Respondent:	Adv L. A. Roux Instructed by Peyper Attorneys Bloemfontein