IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO: 1298/2020
Heard on: 10 June 2021
Date delivered: 17 August 2021

In the matter between:

MEC FOR DEPARTMENT OF PUBLIC WORKS	Applicant
and	
LENNOX BOGEN GAELER	First respondent
KING SABATHA DALINDYEBO MUNICIPALITY	Second respondent

JUDGMENT

MAJIKI J

[1] The applicant describes himself as the nominal political head of the Eastern Cape department of public works (the department). Amongst other duties, he says he is championing the operation of recovering state property that is massively being stolen by some people, and ensures that the same is returned to the government. In this matter he applies for an order declaring

that the lease agreement entered into between his department and the first respondent was terminated by either effluxion of time or notice. Further, that the respondent and those occupying erf 2320 situated at 38 Sisson Street, Fortgale, Mthatha (the property) to be evicted from the property and other ancillary reliefs. The application is opposed by the first respondent only.

[2] According to the applicant, despite the fact that the property belongs to the Transkei government, the property was vested in the Eastern Cape provincial government by the South African government, the Transkei government's successor in title. The vesting was agreed to as reflected in the attached minutes of the meeting of the Provincial State Land Disposal Committee, held on 17 September 2010, in terms of item 28(1) of Schedule 6 to the Constitution of the Republic of South Africa Act, 108 of 1996 (the Constitution).

[3] It is common cause that on 1 February 2017 the department and the first respondent entered into a lease agreement for a period of 24 months (the agreement). That period ended on 31 February 2019. According to the applicant it was never renewed. It was governed by common law after the expiry date, in terms of which it was on a month to month, with the fist respondent being entitled to a 30 days' notice, of termination.

[4] The lease agreement reflects a sum of R9800.00 (nine thousand eight hundred rand) per month. Next to that amount there is a manuscript endorsement of "1,200.00" and initials "LBS", presumably being initials of the first respondent. The first respondent disputes that he had an obligation to pay rent in the sum of R9800.00 (nine thousand eight hundred rand) but the sum of R1200.00 (one thousand two hundred rand).

[5] It is common cause that the first respondent failed to pay the full amount of the said rent. According to the first respondent during September 2005 he concluded a lease agreement with the applicant. The rent was a sum of R1000.00 (one thousand rand) per month. During 2017 the rent increased to R1200.00 (one thousand two hundred rand) per month and during 2019 it increased to R1320.00 (one thousand three hundred and twenty rand) per month. He says he has always complied with the rental obligations in the above amounts, therefore he has no arrears. He attached a tax invoice stamped on 21 November 2019, reflecting a total of R2640.00 (two thousand six hundred and forty rand), described as rent for September and October 2019, with an indication that the arrears were not included.

[6] According to the applicant the agreement was terminated. In terms of the agreement, the first respondent had to give the department, a notice of intention to lease the property for a further year, not less than two months before the date of the expiry of the lease. The rental for such renewed lease would not be less than the rental payable during the month preceding the renewal period. Where consensus could not be reached about the rent, within 45 days of the said notice, the lease would terminate on the expiry date. According to the applicant the lease agreement was not renewed and could not be renewed due to the fact that the agreement was breached by the first respondent by falling into arrears with his rent. Further, the department could cancel the agreement in 20 business days after giving the written notice of the material breach of the agreement. The agreement also provided that at the end of the term of the lease, the lease would automatically continue on a month to month basis.

[7] Further, on 9 November 2019 the respondent was served with a letter confirming the expiry of his lease. He was also given a notice to vacate the property. He was advised that his occupation, then, was on a monthly contract

and that he would be entitled to a 30 days-notice to vacate. He was also informed that he was still obliged to pay rent until he vacated the premises. The notice was received by the first respondent's son, Buntu Gaeler. The first respondents did not heed the notice.

[8] Furthermore the department required the property for essential services, for housing people with Covid 19, for quarantine. It was suffering prejudice of being liable to pay municipal services, in order to avoid disconnection of these services. As at 31 March 2020, it paid a sum of R7,703.28 (seven thousand seven hundred and three rand twenty-eight cent) to the municipality.

[9] According to the first respondent, after the expiry of the lease of 1 February 2017, the lease kept on being tacitly renewed and the property being relocated to him as before until 16 January 2020. The lease has not expired. The applicant accepted his rent. Also, he never received the letter giving him notice to vacate as the applicant has alleged. The applicant has been failing to pay municipal services. He experienced disconnections due to such a failure.

[10] Further, various meetings had been held among the tenants of the department, other stakeholders and government representatives the last having been on 8 June 2020. The said discussions culminated in an agreement that there would be no eviction proceedings that would be instituted.

[11] With regard to the R9 800.00 (nine thousand eight hundred rand) rent he said that during 2016 or 2017 the first applicant's employees inflated the monthly rent to the said sum without any legal or logical basis agreement. From 2005 to 2019, there was an agreement with the first applicant's predecessor, Ms Thandiswa Marau that the rent would not be increased, pending the sales of the properties to the existing tenants. However, the issue

of disposal value could not be finalised in time. Despite the approval of the disposal strategy by cabinet, the property was never disposed of.

[12] Further, he effected improvements on the property, he was supposed to have been re-imbursed or claim a reduction of the total costs of the improvements from the rent due.

[13] He also said even if he had disavowed the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which he denies, the right to housing is his Constitution entrenched right, it could not be waived. He stays with 3 minor children and unemployed cousin. The second respondent has not provided him with alternate accommodation.

[14] The applicant in reply stated that the applicant is not selling the property, he never entered into an agreement of sale with the first respondent. The authority to sell government property vests with the Premier. As regards the defence of lien, it does not arise. It has not been alleged that there was agreement for the alleged improvements to be done. The lease agreement specifically provided that there would no recourse for maintenance of the property. He was prohibited from effecting unauthorised improvements. The applicant denies that the alleged improvements were effected.

[15] Further, the applicant submitted that clauses 15 and 16 of the agreement regulate the issue of damage to the property. The applicant therein, is afforded options about how to approach the issue of damage to property.

[16] During the hearing Mr. Gwala, counsel for the applicants, submitted that the termination of the month to month rental with 30 day-notice accords with common law. The said period was reasonable.

[17] Further, he submitted that the applicant never renewed the 2017 contract or tacitly relocated the property to the first respondent. Such an extension in any event would offend section 217 of the Constitution.

[18] With regard to the respondent's version that the lease was extended until 16 January 2020, regardless of the fact that such would have been unlawful, he said that expired in January 2020 by effluxion of time

[19] Mr. Matotie, counsel for the first respondent, in his submissions seemed to agree that the contract of lease continued on a month to month basis after the expiry date. However, he said, the determination of expiry date of the agreement, in terms of the provisions of the agreement, would have been after giving of a written notice of not more than eighty (80) and not less than forty (40) business days, before the expiry date of the agreement, of the impending lease. That notice was not given or shown to have been given. In the circumstances, it was not open for the applicant to make a case of effluxion of time.

[20] Regarding the receipt of the November 2019 letter, he submitted that, with no confirmatory affidavit from the person who allegedly served the letter on Mr. Buntu Gaeler, the version on the first respondent that he did not receive the notice ought to be preferred. This submission seems to ignore that the first respondent in his own version had also averred that he was surprised when he received a letter from the applicant's attorneys of record, demanding that he should vacate the property or face eviction. The evidence reveals that only one letter was written to him, that of November 2019.

[21] The issue for determination is whether the applicant is entitled to an order of eviction.

[22] Firstly, the judgment considers the argument about 40 (forty) to 80 (eighty) days' notice. The first respondent's pleaded case was that the 2017 lease was being renewed up to 16 January 2020. During that time, he was waiting for the implementation of the disposal policy that would see to the property being transferred to him. Further, he had a lien over the property. In argument the case that was pursued on his behalf was that, he was not given a notice of about forty (40) to eighty (80) days, in terms of the agreement.

[23] In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324 F-I after explaining the purpose of affidavits stated:

> 'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. See *Lipschitz and Schwarz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H and *Port Nolloth Municipality v Xahalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111B—C'. In *Heckroodt NO v Gamiet* 1959 (4) SA 244 (T) at 246A-C and Van *Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509 E-510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged.'

[24] In *Minister of Land Affairs and Agriculture and Others v D& F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 200 A-E the court stated:

> 'The second is that the case argued before this court was not properly made out in the answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. It is not `proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The

> position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[25] In the circumstances, I accept that, the first respondent had defined his case in the answering affidavit. The applicant had prepared to answer to that case. Nowhere in the answering affidavit did the first respondent point to any clause he was relying on in the agreement, in his defence. He is not permitted to seek to pursue a different case in argument. Furthermore, the agreement regulated what would happen after the expiry of the lease. That provision is the pleaded case of the applicant. Clause 20.3 of the agreement provided:

> 'Upon expiry of this Lease at the end of term, it will automatically continue on a month to month basis …'

Forty (40) to eighty (80) days would have no place in terminating a month to month contract. The 1st February 2017 lease had come and gone.

[26] The next consideration is whether the agreement terminated between the department and the first respondent. It is common cause that the agreement was from 1 February 2017 to 21 January 2019.

In *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325 the court stated the following:

> 'Now if the parties agree upon a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time, and with it the relationship of lessor and lessee ceases. But in the same passage *Voet* proceeds to point out that by our law what is called a tacit relocation may take place, e.g., by allowing the tenant to retain possession of the premium after the contract has expired (D. 19.2, *lex* 13, 11). Now, as is stated in D. 19.2, *lex* 14, tacit relocation is one of the consensual contracts for which *nudus consensus* sufficed even in the Roman law, such consent being inferred from the fact that the relationship is allowed by both parties to continue after the contract had come to an end. It was to guard against this danger, therefore, and not to terminate the contract, that notice became essential. This explains Sande, *Dec. Fris*. 111, tit. 6, def. 1: Dat om de wederverhuring te beletten, den huurder van

> het huis of het land voor den eersten Januari denuntiatie of opsegging gedaan moet worden.'' Unless notice is given before the date of the expiry of the lease, it will be too late to resist the presumption that there has been a tacit relocation of the premises. And from this it follows that no definite time was required for such notice. As long as the notice was given before the contract actually came to an end it sufficed.'

[27] No notice was served before the expiration of lease. Further, the lease relationship did not cease after 31 January 2021. I am therefore of the view that the lease did not terminate by effluxion of time.

[28] Similarly, I am of the view that the tacit relocation of the property did not happen because the agreement regulated what would happen after the termination of the lease. In my view that clarifies the tenancy of the first respondent, for the period from 17 February 2017, when the agreement was signed onwards. As soon as the lease expired the common law position, as encapsulated in clause 20.3 of the agreement and transcribed to the November 2019 notice, kicked in.

[29] As regards notice in a month to month contract in *Tiopaizi* (*supra*) at 326 it was stated:

> "From the various cases decided in our courts it may now be taken as settled that in the absence of agreement or custom to the contrary, a monthly contract of letting and hiring for an indefinite period requires a month's notice, to expire, in all cases except in the case of domestic or menial servants, at the end of a month.

[30] In the November 2019 notice the applicant invoked clause 20.3 of the agreement, referred to above. I am therefore satisfied that the 30 days' notice terminated the contract. The present application was issued on 15 May 2020, that was long after the 30 day-notice to vacate.

[31] The applicant also gave notice of the cancellation for the reason of a material breach, that of failure to pay rent. He also invoked provisions of clause 18 of the agreement in relation to refusal or failure to pay the rent.

[32] I am of the view that the first respondent's averment of a further agreement for reduction of the rent to R1 200.00 (one thousand two hundred rand) cannot be accepted. The endorsement of the said amount was not signed by all parties. It is a term contained in the agreement that the variation of the lease would be of force and effect unless reduced to writing and signed by both parties. I accept that he was obliged to pay the full amount of rental provided for in the contract.

[33] As for the submission that there were discussions about the sale of the property, the applicant averred that the property is not for sale, it is required for essential services.

[34] Nothing much need be said about Mr Gwala's submission that the extension of the lease agreement by tacit relocation would be unlawful, for non-compliance with section 217 of the Constitution. The organ of state may not simply renew a contract. A finding that there was no tacit relocation of the property to the first respondent has already been made.

[35] Section 217 of the Constitution provides:

> *'When an organ of state in the national, provincial or local sphere of government ... contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.*

[36] In *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 (6) SA 443 (ECG) at 464 G to 467 H Stretch J analysed the meaning of section 217 in relation to when the organ of state is letting out state owned assets. In that case, the respondent's property policy and

procedure manual stated the purpose of letting out property as being to contribute to its income and profitability.

[37] In my view, in this matter the court has not been furnished with sufficient information about the process of how the applicant undertakes the lease and or extension of its property; what its regulatory instruments provide, with regard to a number of factors, including the consideration of the amount of the transaction. The court is therefore not able to measure whether the applicant's dispensation in that regard is fair, equitable, transparent, competitive and cost-effective or not, this issue having been raised for the first time in argument.

[38] As regards improvement *lien*, the first respondent's allegation of the applicant's consent to the improvements and compensation for such, is not supported by the provisions of the lease agreement. According to the applicant, clause 15.1.2 required the first respondent to give the applicant notice of any need for repairs after he took occupation. No such notice was given by the first respondent. He also has not stated the amount or extent of the cost of improvements that, amongst other, the applicant had agreed to refund him. Most importantly, in instrument the learned Judge referred to the first respondent has not proved the alleged improvements. The globular amounts reflected in the annexed bank statements do not assist in any way. In his version he is refusing to pay rent because the applicant had agreed to refund him of improvements he made. There is no indication of what he paid, for what and how much has already recouped. In my view, the manner in which the allegations of the improvement have been made, cannot constitute a defence to the current proceedings.

[39] The final aspect relates to the determination of whether it is just and equitable, in the circumstances of the matter, to evict the first respondent. I

seem to agree with the first respondent that the PIE provisions ought to be applicable. Its provisions provide protection against eviction to unlawful occupiers, not room has been provided for PIE provisions to apply or to be waved upon election of the tenant. The instance where its application is excluded are provided for in the Act itself. PIE Act sets out requirements that must be satisfied before the court may grant an order for eviction.

[40] The first procedural requirement is that, not less than 14 days of the hearing of the matter, notice of the proceedings must be served on the lessee and the local municipality. In this matter it was met.

[41] Section 4(7) of PIE, in instances where the unlawful occupier has been in unlawful occupation for more than six months, requires the court to consider whether land has been made available or can reasonably be made available by the municipality or organ of state or another land owner for the relocation of the unlawful occupier and including the rights and needs of the elderly, children, disabled persons and households headed by women. In **City of Johannesburg v Changing Tides 574 (Pty) Ltd and others** 2012 (6) SA 294 SCA at paragraph 11 the court went on to suggest that "… if the requirements of section 4 are satisfied and no valid defence to an eviction has been raised the court must, in terms of section 4(8) grant the eviction order. When granting such order, the court must in terms of section 4(8) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered in terms of section 4(12) to attach reasonable conditions to an eviction order".

[42] The first respondent has only stated that he resides in the property with three minor children and his unemployed cousin. The second respondent has not responded regarding provision of alternate accommodation. The first respondent has not stated that he would not be able to afford to rent or purchase another property. He merely emphasised his being intent on buying this property, which is not for sale. In fact, he refuses to pay the stipulated

rent because he says it is not market related. He also refuses to pay rent because he says he is supposed to be repaid monies he expended on the property. I am not of the view that he would not be able to pay rent, in respect of another property he may consider to be let out at a market related rental, which is within his means, and even to buy it, for that matter.

[43] The first respondent wants to continue holding over the property without paying any rent, whilst the department's liability for rates and services are escalating. When I balance his need to remain in the property on the basis that the second respondent has not availed alternate accommodation and the essential service in the discharge of its social responsibility that the applicant requires the government property for, I am of the view that it is just and equitable to grant the eviction order.

[44] In terms of section 4(9) of PIE the court is obliged to determine a just and equitable date of eviction. The country is currently in alert level 3 of lockdown due to the Covid 19 pandemic. The applicable regulation is Regulation of alert level 3 gazetted in gazette 44895 of 25 July 2021. In terms of regulation 37 evictions during this period are prohibited. Further, the first respondent has been in occupation of the property for about sixteen (16) years.

In the circumstances I consider the following order as appropriate.

1. The first respondent is hereby declared to be unlawful occupier of erf 2320 situated at 38 Sisson Street, Fortgale, Mthatha.

2. The first respondent is hereby liable to be evicted from the property.

3. The date of eviction is hereby suspended until after sixty (60) days of the last day of the national state of national disaster prohibiting evictions.

4. The first respondent is hereby ordered to pay the costs of the application.

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B MAJIKI

JUDGE OF THE HIGH COURT

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