

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE

CASE NO.: 13342/2015

In the matter between:

JEEVAN'S PROPERTY INVESTMENT (PTY) LIMITED

APPLICANT

and

REUNION CASH AND CARRY CC

RESPONDENT

JUDGMENT

MADONDO DJP

[1] The applicant seeks an order evicting the respondent from commercial premises, 34 Rana Road, Isipingo Rail, Durban, on the grounds that the lease agreement the parties had entered into in the year 2010 terminated by effluxion of time on 31 December 2015. According to the applicant the respondent has, therefore, no lawful reason to remain in occupation of the premises in question. The respondent opposes the application on the basis on that it renewed the lease before its expiry by giving a written notice of renewal on 28 August 2015. In addition, the respondent contends that the applicant has anticipated the holding over of the leased property by the respondent on termination of the lease during the currency of the lease. The applicant launched an application for an eviction order on 17 December 2015, almost 13 days before the termination of the lease on 31 December 2015. It is common cause that at the time the respondent was by then entitled to occupy

the premises until 31 December 2015. According to the respondent, at the time of the institution of the application, no right had accrued to the applicant to seek eviction of the respondent from the premises nor did a *prima facie* right accrue in its favour. In which event the application was a nullity from the outset and accordingly the respondent argues that on that ground alone the applicant's application for an eviction order should be dismissed with costs.

[2] As a consequence, the respondent brings a counter application for an order interdicting and restraining the applicant from interfering with, harassing or in any manner disrupting the respondent's peaceful and undisturbed possession and occupation of the premises in question, pending the institution of an action for, amongst other things, a declaration of rights on a lease agreement between the applicant and respondent and for damages occasioned by misrepresentation by one Ebrahim Cassim to be joined in the action as the second defendant. Such action had to be instituted within thirty days of the receipt of a replying affidavit by the applicant. Further, for an order interdicting and restraining the applicant from representing to the members of the public or respondent's customers or respondent's security company that the managing director, Ebrahim Cassim, or his agents will take over and operate the respondent's business.

Parties

[3] The applicant is Jeevan Property Investments (Pty) Ltd, a company duly registered and incorporated according to the laws of South Africa and having its registered office at 9 Chestnut Crescent, Marianhill, Pinetown.

[4] The respondent is Reunion Cash & Carry CC, a close corporation duly registered and incorporated according to the laws of South Africa, having its registered office at 1 Hulston Road, Clare Estate and its principal place of business at 34 Rana Road, Isipingo Rail, Durban. The respondent conducts the business of general retailer at the premises in question.

Background

[5] It is common cause between the parties that on 2 November 2010 they entered into a partly oral and partly written lease agreement in respect of business premises at 34 Rana Road, Isipingo Rail, Durban, for a period of five years commencing on 1 January 2011 and ending on 31 December 2015. At the time of the conclusion of such agreement, the applicant was duly represented by Ebrahim Cassim and the respondent by Yacoob Goolam Hoosen Asmal and Mariam Bibi Cassim. It was one of the essential terms of the lease agreement that the respondent would pay rental to the applicant in terms of Rent Schedule, which appears on a manuscript in the lease agreement and that at the termination of the agreement on 31 December 2015 the respondent would vacate the premises.

[6] The respondent consists of two members namely Mariam Bibi Cassim, the daughter of Ebrahim Cassim, and her husband Yacoob Goolam Hoosen Asmal. Before the conclusion of the lease agreement of November 2010 the respondent had been in occupation of the premises by virtue of the earlier lease agreement entered into between the parties. The November 2010 agreement was in fact an extended lease.

[7] Because of the relationship between the members of the respondent and of the applicant, the respondent had occupied the premises in question on favourable terms and

the applicant had received a rental which was below what it could receive in an open market arms - length situation. At some stage the mental relationship between Mariam and Yacoob Asmal deteriorated to such an extent that Mariam found it proper to divorce Yacoob Asmal and wind up all the common estate. This resulted in the applicant being no longer disposed to granting the respondent a favourable status it had granted in terms of rental and no longer wished to keep the respondent in occupation of the premises.

[8] In contemplation of the termination of the agreement by effluxion of time on 31 December 2015, the applicant's attorney of record, Shaukat Karim, sent the respondent's erstwhile attorneys an email dated 10 April 2015 reminding them that the respondent's lease would expire on 31 December 2015 and requesting the respondent to indicate whether or not it would vacate the premises timeously. If it failed to make such an indication, the applicant's attorneys would bring an application for an eviction order on the instructions of the applicant.

[9] On 12 May 2015 the applicant sent the respondent an email notifying it of the unanimous decision of the applicant's directors, taken at the then recent directors' meeting, that as the lease would expire on 31 December 2015 it would not be renewed. The applicant further advised the respondent that it was then given seven months to deplete its stock and vacate the premises on the termination of the lease and that there would be no negotiations as the decision by the applicant's directors was final. The respondent did not respond to any of the correspondence the applicant had forwarded to it.

[10] On 28 August 2014 the respondent purported to renew the lease agreement for a further period of five years by addressing a written notice in this regard to the applicant. The applicant denies receipt of such notice nor did the respondent make any effort to ascertain whether or not the applicant did receive such intended renewal notice. However, in a letter dated 9 December 2015 the applicant's attorneys sought an undertaking from the respondent that it would vacate the premises upon termination of the lease agreement on 31 December 2015. Notwithstanding all such notifications and reminders the respondent did not make any undertaking or show any intention to vacate the premises on termination of the lease agreement.

[11] Since the applicant did not want to find itself in a situation where it could only commence eviction proceedings after 31 December 2015, in the event of the respondent failing or refusing to vacate the premises, it instituted eviction proceedings against the respondent on 17 December 2015 before expiry of the lease period. The respondent had feared that the eviction proceedings after the termination of the lease agreement on 31 December 2015 might be protracted and that delay in evicting the respondent, in the event of its refusal of move, would cause the applicant to suffer losses in terms of finding a tenant who would pay a market related rental.

[12] The applicant contends that it was reasonable for it, in the face of the respondent's failure to respond to any of the notifications, reminders or requests the applicant had forwarded to it, to assume that on 31 December 2015 the possibility of the respondent refusing to vacate the premises was too great. Accordingly, the applicant argues that it was

reasonable and advisable for it to launch this application in anticipation of such refusal by the respondent to vacate the premises on termination of the lease.

Issues

[13] The issues arising from the facts of this case are:

- (a) whether the respondent is entitled to remain in occupation of the premises after the expiry of the lease; and
- (b) whether the law relating to eviction allows the applicant to anticipate the holding – over of the leased property by the respondent (i.e. remaining in occupation of the leased premises after termination of the lease).

[14] It is common cause between the parties that during November 2010 they entered into a lease agreement which terminated by the effluxion of time on 31 December 2015. Accordingly, the question whether or not the applicant validly and lawfully terminated the lease does not, in the circumstances, arise. However, the date of termination of the lease has come and gone but the respondent remains in occupation of the leased premises.

[15] The first question for decision is whether the respondent is entitled to remain in occupation of the property after the termination of the lease. In *Chetty v Naidoo* 1974(3) SA 13 (A) at 20 the court held:

‘It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold from the owner unless he is vested with some right enforceable against the owner (i.e. a right of retention or a contractual right). The owner, in instituting a *rei vindication*, need, therefore, to do no more than to allege and prove that he is the owner and that the

defendant is holding the res- the onus being on the defendant to allege and establish any right to continue to hold against the owner.'

See also *Pretoria Stadsraad v Ebrahim* 1979(4) SA 193(T) at 195 E-F.

[16] In the present case, as it is common cause that the parties had entered into the lease agreement and that the lease has terminated, the onus is on the respondent to allege and prove that it is entitled to remain in occupation of the premises even after the termination of the lease. The respondent avers that it had before the expiry of the lease entered into an oral lease agreement with the applicant in terms of which the applicant would extend the lease for a period of five years subject to five percent rental increase. According to the respondent, in fact, Hassim Seedat of the applicant had given it a perpetual right to renew the lease. The respondent has gone on to state that a written renewal notice was not required as a term of the contract but only to give directors a peace of mind. The respondent alleges that Seedat had told it that formal renewal of the lease was not necessary. Seedat went on to advise the respondent that all that was required, was to write a renewal letter closer to the expiry of the then current lease.

[17] However, the letter dated 28 August 2015 betrays the respondent in that in the letter the respondent acknowledged that the lease would expire on 31 December 2015. As a result, the respondent asked for the renewal of the lease to June 2021. This contradicts the respondent's assertion that the parties had earlier on entered into an oral agreement as to the extension of the lease for a further period of five years, as from January 2016. In its own version, the respondent had renewed the 2010 lease agreement with the applicant by giving thirty (30) days written notice. This supports the version by the applicant that the lease

renewal between the parties has always been in writing. This, further finds support in the alleged oral agreement between the respondent and Seedat that a renewal letter was required for the extension of the lease.

[18] The respondent alleges that it personally delivered the written notice of renewal by hand to Ebrahim Cassim of the applicant on 28 August 2015. This contradicts the respondent's earlier version that the renewal notice to the applicant was issued through the email. The letter itself specifies that the response thereto should also be by email correspondence. However, the respondent has sought to retract its version, it made under oath, in its Replying Affidavit in a Counter Application, that the renewal notice was issued other than by email. The respondent attributed this to a common error between it and its legal practitioner. But, its legal practitioner has not tendered any evidence to corroborate the respondent's version in this regard. All this betrays the respondent as being untruthful with regard to the circumstances surrounding the issue of the renewal notice.

[19] Mr Padayachee for the respondent has argued that the question whether or not the applicant had received the renewal notice, constitutes a dispute of fact which could not be resolved on the papers. I do not agree with the counsel for the respondent in this regard since the letter of 28 August 2015 specified the mode of response to the notice as by email correspondence. It therefore, follows that had any response been received through email, it should have formed part of the respondent's papers as proof of receipt of the renewal Notice. Regard being had to the fact that the respondent has withdrawn its allegation that the renewal notice was issued other by email, the only mode in which the applicant could have responded was by email. In any event, it has been common cause between the parties

that there had been no response by the applicant to the respondent's purported written notice. Nor did the respondent make any follow-up to its renewal notice with the intention to establish whether or not the applicant had received the notice. If the applicant did receive the renewal notice, to ascertain whether or not it was accepting the offer contained in the respondent's letter of 28 August 2015.

[20] This remained the position despite that the applicant had earlier on told the respondent that it should vacate the premises on termination of the lease. Further, the applicant had categorically put to the respondent that the non-renewal of the lease agreement was not negotiable as it was final. The respondent had, seven months before the expiry of the lease, been advised to deplete its stock in preparation to vacate the premises on 31 December 2015. YGH Asmal of the respondent had personally delivered the renewal notice of the earlier lease to MB Cassim of the applicant. The latter verified and accepted the contents of the renewal letter.

[21] A notice of renewal is an offer which has to be accepted by the other party. The ordinary rules of offer and acceptance should apply. A basic rule is that:

‘an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together.’

See *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001(3) SA 952 (SCA) at 958A.

[22] In the present case notification of acceptance was necessary to constitute a binding contract between the parties. Such notification had to be communicated to the respondent through email or otherwise. However, such communication did not take place, and as a

consequence, no renewal of the lease agreement came into existence between the parties. See *McCain Frozen Foods (Pty) Ltd vs Beestepan Boerdery (Pty) Ltd* 2003(3) SA 605(T) at 612 F-G. As no renewal of the lease agreement could have resulted from the unilateral act of the respondent, the respondent has failed to prove that it has any lawful basis upon which it is entitled to remain in occupation of the premises after the termination of the lease. Nor could the respondent's holding over of the leased property be said to be a tacit relocation of the lease agreement, for lack of the applicant's consent. See *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC* 2002(1) SA 822(SCA) at 825D-E.

Was the applicant entitled to anticipate the holding-over of the property by the respondent?

[23] The lease between the parties was to terminate by the effluxion of time on 31 December 2015. For fear that the respondent would hold over the property after the termination of the lease, the applicant saw it fit to bring an application on 17 December 2015 for an order directing the respondent to vacate the leased premises by no later than 1 January 2016. It stands to reason that at the time of the institution of the eviction proceedings, the relationship of lessor and lessee between the parties had not ceased. See *Bowhay v Ward* 1903 TS 771 at 778.

[24] The respondent contends that the law of eviction does not allow for a premature anticipated breach to found an action or application for eviction. The eviction proceedings may only be brought when the lease has validly been terminated. The applicant has brought this application on the same papers as at 17 December 2015, being the date this matter first served before this court. The respondent was required to vacate the leased premises not

later than 1 January 2016. It is common cause that the lease would only terminate on 31 December 2015. While it is true that the order sought would only take effect on 1 January 2016, it is not the effective date which matters but the initial date, being the date on which the application was first launched before this Court. It, therefore, follows that this matter falls to be decided on the papers as they stood on 17 December 2015.

[25] In *Ndlovu v Ngcobo; Bekker and another vs Jika* 2003(1) SA 113(SCA) at 131 B-C the Supreme Court of Appeal held:

‘When the owner acknowledges ... that the occupier has or had a right of occupation (for example in terms of a lease), the owner has, in addition, to prove that the right no longer exists or is no longer enforceable, for example that the lease between them has expired or has been cancelled lawfully....’

[26] It is common cause that at the time of the institution of the eviction proceedings the respondent had a right to hold the property in terms of the lease agreement. In order for the applicant to succeed on its claim it must have proved that such right has by then terminated. It stands to reason that as at the time of the institution of the eviction proceedings the lease had not terminated the applicant’s statement of claim did not have any cause for action or application.

See *Worcester Court (Pty) Ltd v Benatar* 1982 (4) 714 (C) at 721H- 722A; *Henning v Petra Meubels Bpk* 1947(2) SA 4079T at 412. On the balance of probabilities, the applicant has failed to prove that at the time of the institution of the eviction proceedings the respondent had no lawful reason to occupy the leased property. The respondent was by then entitled to occupy the premises until 31 December 2015.

[27] The unlawful occupier means a person who occupies the property without the express or tacit consent of the owner or person in charge or without any other right in law. The lease had not yet terminated and the respondent was still entitled to occupy the property in question. I do agree with Mr Padayachee for the respondent on that as on 17 December 2015 the lease had not terminated, the applicant was not entitled to bring ejectment proceedings in anticipation of the respondent's future conduct. The inevitable conclusion is that the applicant acted prematurely in bringing the application for an eviction order on 17 December 2015.

[28] The applicant states the reason for anticipating the holding over of the property by the respondent on termination of the lease as that the applicant had on three occasions addressed reminders, notifications and requests asking the respondent to confirm that it would vacate the premises on the termination of the lease with no response. In the circumstances, the applicant contends that it was entitled to act pre-emptively.

[29] The fear of the applicant that on termination of the lease the respondent would refuse to vacate the premises was still imaginary. There was no basis for such a conclusion save the assumption that since the respondent had failed to respond to reminders and letters the applicant had addressed to the respondent notifying it to vacate the property on termination of the lease. Other than that the respondent had made no indication that it would hold the property after termination of the lease. For the applicant to succeed on its claim against the respondent, it has to prove that at the time of institution of the eviction

proceedings the lease had terminated and that the respondent had no lawful basis for remaining in occupation of the property. This shall be the position notwithstanding that the respondent has now failed to prove that it has any lawful basis to remain in occupation of the property after termination of lease.

[30] The market related rental upon which the respondent also relies as the reason to evict the respondent during the currency of the lease period, could not justify the premature bringing of the application for an eviction order. The lessor is entitled to claim damages arising from the lessee's continued occupation of the property after the termination of the contract of lease. See also *LTC Horns Amler's Precedents of Pleadings 8ed* (2015) at P233.

[31] Claims for holding over are found on a breach of the contractual obligation of the lease as required by the relevant clause of the agreement or as an incidence of the common law. The amount claimable is not rental but damages being market related rental value of the premises. See *Hyprop Investments Ltd and another v NCS Carriers and Forwarding CC and another* 2013(4) SA 607(GSJ). As the question relating to the determination of the parties rights in the lease agreement has been addressed earlier on, I do not find it necessary to deal with the respondent's counter application.

Order

[32] In the result, I make the following order:

The applicant's application for an eviction order is dismissed with costs, such costs to include costs consequent upon the employment of a senior counsel.

Date reserved: 19 October 2016

Date delivered: 25 November 2016

Counsel for Applicant: Adv Phillips SC

Instructed by: Shaukat Karim and Company

(REF: Mr S Karim/C711)

Counsel for Respondent: Adv Padayachee SC

Instructed by: Campbell Attorneys

(REF: DCC/tw/REU6/0001)