

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 13661/11

In the matter between :

Abdool Rahiman Areff NO

First Applicant

Abdul Khalek Areff NO

Second Applicant

Nazeer Ahmed Ballim NO

Third Applicant

and

Mohamed Kolia t/a Spinners

Respondent

Judgment

Lopes J

[1] The applicants in this matter are the trustees of the Ahmed Aruff Will Trust ('the trust'). The trust owns an immovable property situated at Ballim's Building, 54 Hulett Street, KwaDukuza ('the property'), from which it seeks the ejectment of the respondent.

[2] It is common cause between the parties that :

- a) a verbal agreement of lease of the property was concluded by the first

applicant, on behalf of the trust, and the respondent acting personally;

b) the agreement contained two clauses :

(i) that the trust let the property to the respondent; and

(ii) that the respondent would pay a monthly rental to the trust.

[3] The respondent alleges an additional term of the agreement, namely that he was entitled to occupy the premises for as long as he wanted to, and that the agreement would only be terminable upon him giving the trust reasonable notice of his intention to vacate the premises. He maintains that it is that arrangement that has enabled him to occupy the premises for the last ten years. The respondent maintains that the first applicant confirmed that arrangement with his son, and it was also confirmed to him by the second applicant.

[4] The trust avers that the respondent fell into arrears with the payment of monthly rentals and an action for the recovery of the outstanding rent was instituted out of the Stanger Magistrates' Court. The respondent has defended the action and filed a plea and counter-claim.

[5] In his answering affidavit in this application the respondent deals with the non-payment of the rental as follows :

'I purposely withheld the rental from the Applicant for the period claimed in its summons as the Applicant refused to accept liability for the losses I had suffered owing to the rain water damage occasioned to clothing stocks warehoused on the premises.'

Those damages, together with others, form the subject of his counter-claim in the

Stanger Magistrates' Court.

[6] The respondent raises two further defences :

- a) he admits having received the letter dated the 21st July 2011 from the trust's attorneys requiring him to vacate the premises by the 31st August 2011. In this regard he refers to the defences set out above;
- b) that the trust waived the notice given by it to him, and continued to accept rental payments from him for the months of November and December of 2011, and January and February of 2012.

[7] Ms *Singh*, who appeared for the applicant submitted that the respondent's counter-claim in the Stanger Magistrates' Court could not provide a defence to the application for the ejectment of the respondent from the property in this court. In that regard she relied upon the authority of *Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk and Others* 1984 (3) SA 760 (N). In *Amavuba* the applicant sought an order ejecting the respondent as the occupier of premises. The respondent raised a counter-claim of compensation for improvements. Law J held that the claim for ejectment was not capable of being extinguished, either in whole or in part, by any judgment given on the counter-claim.

[8] That case may be viewed as being somewhat distinguishable because the counter-claim was conditional upon a finding by the court that no valid lease had been concluded between the parties, and it was accordingly inconsistent with the

existence of a lease. The general rule provided for in Rule 22(4) of the Uniform Rules, upon which the respondents in that case placed reliance, is designed for cases in which both claim and counter-claim sound in money. He continued at page 766 H - I :

‘It would in general be inequitable that a plaintiff with a valid claim for immediate ejectment should have his rights frustrated by a counterclaim having no bearing on his claim for ejectment.’

[9] In my view in the circumstances of this matter the counter-claim for damages has no bearing on the grant of an order for ejectment, and, even if successful, does not negate or extinguish the right of the applicant to claim ejectment.

[10] Mr *Dheoduth*, who appeared for the respondent, conceded that the counter-claim would be dealt with adequately in the Stanger Magistrates’ Court. I accordingly find that the presence of the counter-claim in that court is no bar to an order for the ejectment of the respondent from the property.

[11] Mr *Dheoduth* submitted that the respondent was entitled to occupy at his instance and pleasure in accordance with the agreement which he alleged in his answering affidavit. Even if such an agreement had been concluded by the parties, it does not assist the respondent because the respondent does not allege that the occupation at his instance and pleasure was not subject to his paying the rental. The property being of a commercial nature, I cannot envisage

that any landlord would have concluded a lease agreement in terms of which the respondent had a right to occupy indefinitely at his instance and pleasure, without there being any possible repercussions for a breach of the agreement by the non-payment of rental. The payment of rental is an admitted material term of the lease agreement. It is not necessary for me to decide whether the additional term alleged by the respondent is so improbable, that I could dismiss it as a defence without more. For even were it to be accepted, it cannot assist the respondent.

[12] With regard to the defence raised that the applicant had waived its rights to rely on the respondent's non-payment of rental because it subsequently accepted rental payments, it is pointed out in the applicants' replying affidavit that all payment for rental were accepted on a 'without prejudice' basis. In my view there is no substance in that defence.

[13] The final matter raised is that the letter of the 21st July 2011 requiring the respondent to vacate the premises does not record a cancellation of the agreement. It is clear, however, from the applicants' founding affidavit that the applicant cancelled the agreement. I refer in this regard to the statement at paragraph 16 :

'I respectfully aver that due to the cancellation of the lease agreement the Respondent's continued occupation of the premises is unlawful ...'

No point regarding this is made by the respondent in his answering affidavits, and in my view, it was not necessary to record the cancellation of the

agreement in the notice to vacate. The only basis on which the notice is challenged as being unlawful, is that it was in breach of the alleged agreement that the respondent could occupy the premises indefinitely at his instance and pleasure.

[14] In the circumstances I grant the following order :

- a) The respondent and any person or persons claiming to occupy through him are directed to vacate the premises described as Shop 1, Ballim's Building, 54 Hulett Street, Kwa-Dukuza, KwaZulu-Natal within 30 days of the service of this order upon the respondent;
- b) in the event of the respondent and/or any person or persons claiming to occupy through him refusing or neglecting to comply with the order in paragraph (a) above timeously, the sheriff of this court is directed forthwith to eject the respondent and/or such other persons together with their belongings from the premises and to hand vacant possession thereof to the applicants' attorney or record, M S Mall Incorporated;
- c) in the event of the services of the sheriff being required as envisaged in paragraph (b) above, the sheriff is authorised and directed to do all things necessary and take all such steps as are necessary to eject the respondent and any other persons together with their belongings from the premises. Such steps may include the breaking of any lock or locks securing the premises, the employment of the services of any locksmith, and any person or persons whose services might be necessary to obtain

vacant possession of the premises;

d) the respondent is directed to pay the applicants' costs.

Date of hearing : 18th September 2012

Date of judgment : 26th September 2012

Counsel for the Applicant : R Singh (instructed by M S Mall Incorporated)

Counsel for the Respondent : N Dheoduth (instructed by Pretorius Mdletshe & Partners Inc)