

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

Case No: 9300/2010

In the matter between

Ethekwini Municipality

Applicant

and

Sensation Transport Services CC

First Respondent

Wesand Freight Logistics CC t/a

Freight Logistics

Second Respondent

Louis Kisten

Third Respondent

JUDGMENT

2 December 2011

Steyn J

[1] This is an application to evict the respondents from the premises situated at 10 Ebonyfield Avenue, more fully described as Site MT1534 of Rem, Erf 391 Springfield, Durban pursuant to the termination of a lease agreement.

[2] The matter was set down as an opposed motion and argued

on 20 November 2011. Mr Saks acted on behalf of the applicant and Mr Tobias acted on behalf of the second and third respondents.

[3] The background

The applicant is the owner of the said property and through its predecessors-in-title, leased the premises to the first respondent. Applicant and first respondent concluded a tenancy agreement that was for an indefinite period of time terminable by each party on a one month notice and it could also be terminated in the event of any of the parties being in breach of the terms of the agreement. It was a material term of the agreement that the respondent would pay a monthly rental which the respondent failed to do.

The respondent accordingly was in breach of the agreement. Notice was given to the respondent to either remedy the breach or accept that the lease would be terminated. Another notice was sent to the respondent to confirm the earlier termination of the lease and to give the respondent one month's notice to vacate the property.

The second and third respondents were joined as respondents based on the fact that they indicated that they are in occupation of the premises by virtue of a sub-tenancy agreement entered into between them and the first respondent. It is common cause that the first respondent has been wound up pursuant to a final order of liquidation.

[4] Mr Tobias in his written heads of argument opposed the application on the following grounds:

- i) that there is no proper evidence that the North Central and South Central Local Council were in fact the predecessors-in-title to the applicant; and
- ii) that there is no proper evidence that the applicant is the owner of the premises as described; and
- iii) that the agreement was not properly terminated; and
- iv) that the third respondent should not have been joined in these proceedings; and
- v) that the notice as per annexure “D”, was waived by the conduct of the lessor since eight years have

passed before an application for ejectment was launched.

[5] When the matter was argued Mr Tobias no longer persisted in pursuing the arguments raised under (i) and (ii) above. This was a very wise approach since the respondents previously stated under oath that the applicant is the owner of the premises. In light of the aforesaid I will therefore deal with the contentions listed *supra* under (iii) to (v). I will start with the notice as referred to under (v).

[6] Can it be said that the notice that was sent to the first respondent was a clear and unequivocal termination of the lease agreement? In my view the content of the notice should be considered to answer the question. The notice reads as follows:

***“FINAL NOTICE: Arrear Rental: Site MT1543:
Ebonyfield Avenue: Account: 83074746038***

The City Treasurer has informed me that your rental account is still in arrears notwithstanding several reminders by the Director: Consolidated Billing requesting payment.

In terms of your Tenancy Agreement, the rental is payable in advance on or before the 7th (seventh) day of each month and your failure to do so constitutes a breach of the

Agreement.

Accordingly, I hereby serve notice upon you, in terms of clause 17 to remedy the breach within 14 days of the date of this letter by paying in full, the arrear rent, administration charges and any tax due or by making suitable arrangements with the Director: Consolidated Billing to settle your account.

Should you fail to remedy the breach within the period stated above, your Tenancy Agreement will be terminated without further notice and the Council will require vacant possession of the land. Upon such cancellation and should you have failed to vacate the land, not only will legal action be instituted against you for the recovery of all monies due to the Council but also for eviction and damages, all costs being to your account.

In the circumstance, it will be in your best interests to give this matter your urgent attention.”

(My emphasis)

It is evident from the content of the notice, if the first respondent fails to remedy the breach within 14 days, then the agreement would be terminated without further notice. Mr Tobias has argued that the letter sent by the applicant on 10 February 2009 should be considered as being the notice of termination, since the earlier notice was waived by the lessor through its conduct.

Whilst I agree with Mr Tobias that the applicant has inordinately delayed the application for ejectment I do not agree that such delay constitutes a waiver of the first notice. It

is disturbing that the applicant could adopt such a laid back approach, which ultimately impacts on the ratepayers of the area.

It is common cause that there is no contractual nexus between the second and third respondent and the applicant. The second and third respondents are subtenants and accordingly their rights can go no further than the main tenant that is the first respondent. The delay cannot be interpreted, given the circumstances of this application, as abandoning the intention to eject the respondents from the property.

[7] Proper termination of the agreement

I shall now turn to the submissions under (iii) above. The applicant had sent a notice of breach to the first respondent. There is no suggestion that the first respondent remedied the breach within 14 days. Henceforth I do not consider it necessary to decide whether the agreement was terminated by the s 37(2) of the Insolvency Act 24 of 1936 since the agreement was in my view properly terminated before the first respondent was wound up.

[8] Joinder of the Third Respondent

The third respondent has been joined by the applicant as a party which has a direct and substantial interest in the application. The third respondent deposed to an answering affidavit and stated the following:

“The second Respondent and I concluded an oral agreement of sub lease of the property from the first Respondent.”

In another affidavit, attached to the papers as annexure “F” he stated:

“I am the sole member of Applicant . . . conducts business at 10 Ebonyfield Place, Springfield Park, Durban.”

Based on the aforesaid and what was stated by the Court in *Amalgamated Engineering Union v Minister of Labour*¹ it is clear to me that the third respondent had an interest in this application, since, the relief sought would certainly impact on the third respondent. I am therefore not persuaded that the third respondent should not have been joined in these proceedings.

1 1949 (3) SA 637 (A) at 657.

[9] Costs

It is a recognised principle in our law that costs follow the result. In *Letsitele Stores (Pty) Ltd v Roets*² the Court dealt with the general principles that should find application:

“In an appeal of this nature two general principles should be observed. The first is that the Court of first instance has a judicial discretion in regard to costs and this Court cannot interfere unless it is satisfied that the discretion was not exercised judicially. The second is that the successful party should as a general rule, have his costs. This is a rule which should not be departed from without the existence of good grounds for doing so. When a successful party has been deprived of his costs an appeal Court will enquire whether there were any grounds for this departure from the general rule and, if there are no such grounds, then ordinarily it will interfere. Any grounds here mean any grounds on which a reasonable person would come to the conclusion arrived at. (Merber v Merber 1948 (1) SA 446 (A) at 452-453 and the cases there cited.) The discretion of the Court a quo is therefore not unlimited and this Court should interfere if it can be shown, for example, that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought an unbiased judgment to bear on the question or has not acted for substantial reasons.”

(My emphasis)

It is common cause that the applicant delayed the application for more than 7 years and that the delay also negatively impacted on the rights of the second and third respondent. It is also common cause that applicant failed to act in the

2 1959 (4) SA 579 (T) at 579H-580B.

interest of all ratepayers in the district of the EtheKwini Municipality. Whilst I am satisfied that applicant is entitled to the relief sought, I am of the view that this Court should show its displeasure in the manner in which applicant acted. I am not prepared to make a punitive costs order against the applicant, but in my view the applicant should bear its own costs.

[10] Order:

Accordingly the following order is granted:

1. That the respondents or any person occupying through them, be and are evicted from the premises known as 10 Ebonyfield Avenue, Site MT1534 of Rem, Erf 391 Springfield, Durban.
2. That the Sheriff of this Honourable Court be and is hereby authorised to give effect to the terms of paragraph 1 hereof, in the event that the respondents fail to do so.
3. Each party to pay their own costs.

Steyn, J

Date of Hearing: 22 November 2011

Date of Judgment: 2 December 2011

Counsel for the Applicant: Adv Saks
Instructed by: Berkowitz Cohen Wartski
Attorneys

Counsel for the First and
Second Respondents: Adv Tobias
Instructed by: Naidoo & Company Inc