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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO. 2022-031616

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|-----|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED: YES / NO |

23 July 2024	
DATE	SIGNATURE

In the matter between:

ZELPY 2058 (PTY) LTD

(Registration Number: 2003/018471/07)

Applicant

and

RIKHOTSO, GEZANI SYDNEY

T/A RIKHOTSO ATTORNEYS

Respondent

JUDGMENT

GOTZ AJ

Introduction

[1] This is an application for the eviction of the respondent from a commercial property owned by the applicant. The property is located at Mansion House, 1[...]

M[...] Street, Johannesburg. It has been leased by the respondent for many years, apparently as office space from which he practices as Rikhotso Attorneys.

[2] The applicant seeks the respondent's eviction due to his failure to pay rental and other amounts owed under the lease agreement. It also seeks an order for payment of those arrear amounts, which according to the latest information made available by the applicant total R 97 859.85.

[3] The respondent failed to timeously file his heads of argument. Accordingly, in May 2023, the applicant applied for and was ultimately granted an order for the respondent's defence to be struck out in terms of paragraph 9.8.2 (12) of this Court's Practice Manual. Presumably as a consequence of this order, there was no appearance for the respondent at the hearing of this application. Ms Gordon, who appeared for the applicant, submitted that in keeping with this Court's current practice,¹ neither the striking out order, nor the respondent's failure to appear, mean that no regard should be had to the respondent's answering affidavit. Ms Gordon proceeded to argue the matter on the basis that I should satisfy myself that on the evidence before me, including that contained in the respondent's answering affidavit, his defence has no intrinsic merit. I have followed this approach and have taken full account of the defence articulated in the respondent's answering affidavit.

[4] The respondent's defence to the application is twofold. First, he alleges that he is not in breach of the lease agreement because he made "*arrangements*" to "*rectify the situation*" with the applicant's managing agent, City Property Administration (Pty) Ltd. He alleges that the arrangement with City Property was that he would make what he calls "*accelerated payments*" in "*settlement of the outstanding rental amounts*". Second, he denies an allegation made by the applicant that the notice of cancellation of the lease agreement was delivered to him.

Background

[5] The applicant, as the registered owner of the property, leased it to the

¹ See the remarks made by Wilson J in *Capitec Bank Ltd v Mangena and Another* (2021/28660) [2023] ZAGPJHC 194 (16 March 2023) at paras 4 to 6.

respondent. The agreement of lease between the parties took effect on 1 February 2011. It ran for an initial fixed period of two years until 31 January 2013, and thereafter on a month to month basis on the same terms and conditions.

[6] The respondent appears to have paid the monthly rental as well as the utility charges in relation to the property on a regular basis for more than a decade. Unfortunately, apparently due to the Covid 19 pandemic, his practice suffered, and he fell into arrears.

[7] On 31 May 2022, City Property sent a notice of default by email to the respondent. In terms of this notice, the respondent was advised that he was in material breach of the lease agreement due to his failure to pay the monthly rental and other charges. The outstanding balance as at the date of the email was R106 720.79. In the notice, the applicant demanded payment of this amount within seven days and told the respondent that, if he failed to pay, the applicant would immediately terminate the lease agreement.

[8] The amount demanded was not paid within seven days of 31 May 2022 and on 29 June 2022, City Property, on behalf of the applicant, emailed a notice to the respondent terminating the lease with immediate effect ("**the cancellation notice**").

[9] The cancellation notice called upon the respondent to vacate the property the following day, being 30 June 2022. He remains in occupation.

[10] This application was launched in October 2022 and served on the respondent on 3 November 2022. The applicant seeks the respondent's eviction as well as payment of the amount of rental and utilities outstanding. It appears from the applicant's replying affidavit, which was filed on 26 January 2023, that the respondent had continued to pay the monthly charges with some regularity but had not made any significant inroads into the arrears that he owed. Thus, at the end of January 2023, the respondent owed an amount of R 97 859.85. This is the most recent reflection of his arrears that is available.

The applicant's entitlement to the relief

[11] One of the incidents of ownership of property is the right to its exclusive possession. Accordingly, the owner may claim their property wherever it may be, from whoever may be holding it. This is the basis of the *rei vindicatio*. Thus, in *Chetty v Naidoo* 1974 (3) SA 13 (A) it was held (at 20A–H):

“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 it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than 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 But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as "unlawful" or "against his will"), other considerations come into play.

If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g., by conceding a lease or a hire-purchase agreement, without also alleging that it has been terminated ...) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then ex facie the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.”²

[12] The applicant has met these requirements. It has gone beyond merely alleging its ownership of the property (which is evidenced by a Lexis Windeed printout attached to the founding affidavit), but it has duly alleged that the lease agreement with the respondent has been validly terminated, bringing to an end his right to hold. In this regard, the applicant relies squarely upon clause 21.1 of

² This dictum was most recently confirmed in *Mc Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC) at para 9, where the Constitutional Court also said “It is generally sufficient, for the purpose of proving ownership for an ejectment order from commercial premises, for a plaintiff to demonstrate that he is the registered owner of the property”.

Annexure A to the lease. That clause provides:

“21.1 Should the Tenant fail to pay any amount due by it in terms of this lease on due date then the Landlord shall be entitled to cancel this lease immediately without prior notice to the Tenant and to pursue any other remedy available to the Landlord in law including but not limited to ejecting the Tenant from the premises and recovering damages.”

[13] It is common cause that the respondent failed to pay various amounts due by him in terms of the lease on the dates they were due. Accordingly, in terms of clause 21.1, the applicant was entitled to cancel the lease. It did so on 29 June 2022 by means of the cancellation notice. That notice was in writing and signed by the applicant’s agent, as contemplated by the lease agreement.

[14] Though prior notice in the form of the letter of demand of 31 May 2022 was given to the respondent, none was required.

[15] As an incident of its ownership of the property, but also by virtue of clause 21.1, the applicant is thus entitled to pursue the ejectment of the respondent.

The respondent’s first defence

[16] The respondent primary defence is that he is not in breach of the lease agreement because he made an arrangement with the applicant’s agent, City Property to make “*accelerated payments*” in settlement of the outstanding amounts that he owes. The defence is set out in paragraphs 3.10.1 to 3.10.5 of the answering affidavit, as follows:

“3.10.1 On behalf of my law firm, I made arrangements with the Applicants to accelerate payments for the purpose of rectifying the situation.

3.10.2 The Applicant, through its agent (City Property), agreed with us regarding the aforesaid arrangements, as the situation was created by circumstances beyond our control, being Covid-19 economic restrictions.

3.10.3 Even under trying economic conditions, we complied with our

undertaking to keep on making payments.

3.10.4 *Payments were consistently made and received by the Applicant in accordance with the aforesaid arrangement (See Annexures "GS1, GS2, GS3, GS4 & GS5").*

3.10.5 *It is denied that we have committed any act of breach as we had the aforesaid arrangement with the Applicant regarding settlement of the outstanding rental amounts."*

[17] In my view, the respondent's allegations are insufficient to establish that he was not in breach of the lease on the date that it was cancelled.

[18] First, and as the applicant has been at pains to point out, the allegations are exceptionally vague. In particular, the respondent has failed to set out when the alleged arrangements were made, and what exactly the terms of the arrangement were (for example, when precisely the accelerated payments would be made, and in what amount). All that the respondent says is that it was agreed that he would "*accelerate payments*" for the purposes of "*rectifying the situation*". This can only mean, in its context, that he would settle the outstanding arrears by making additional payments over and above those that were ordinarily due. It is not clear, however, when those additional payments would be made. Would they be made every month, or is it being suggested that the respondent would start to make accelerated payments at some later date?

[19] Second, there is no evidence that the respondent ever made any additional payments before the applicant exercised its right to terminate the lease. In paragraph 3.10.4 of his answering affidavit, the respondent alleges that payments were "*consistently made and received*" by the applicant "*in accordance with the alleged arrangement*". The respondent has referred, in an apparent attempt to support this averment, to annexures GS1 to GS5, being five printouts of Nedbank notifications of payment by way of EFT. However, only the first of these, annexure GS1, is dated before 29 June 2022, being the date of the cancellation notice. The other four annexures reflect payments made from 1 July 2022 onwards. The last payment to which respondent refers was made on 17 November 2022. Moreover, the first annexure, GS1, records that a payment of a mere R 9 000.00 was made on 13 May

2022. The statement of account that the applicant has attached to its founding affidavit reveals that this was not an “additional payment” at all. No other payments were made in May 2022 and the amount of R 9 000.00 did not even cover the monthly rental and utility charges in that month. Those totalled R 12 390.84. Accordingly, the respondent failed to pay in full in May 2022, let alone make an accelerated payment.

[20] Thus, on the evidence available, even if an arrangement was made as alleged by the respondent, he failed to abide by it. Indeed, the statement of account produced by the applicant confirms that the respondent did not make any payments in amounts in excess of the monthly charges between 1 October 2021 and 29 June 2022, being the date of the cancellation notice.

[21] Third, in any event, in terms of clauses 23.1 and 23.2 of the lease agreement, the parties agreed that no relaxation or indulgence afforded to the respondent would prejudice, or operate as a waiver of, the applicant’s right to cancel the lease. These clauses read as follows:

“23.1 No relaxation or indulgence which the Landlord may show to the Tenant, nor any failure or neglect upon the part of the Landlord in enforcing compliance with any of the terms and conditions of this lease or any extensions granted by the Landlord to the Tenant for due observance of any of the terms and conditions hereof, shall in any way prejudice the Landlord's right hereunder, or be tantamount to a waiver thereof, and in particular, no acceptance by the Landlord of rent after due date (whether on one or more occasions) shall preclude or estop the Landlord from exercising any rights enjoyed by reason of any subsequent payment not being made strictly by the due date.”

“23.2 Receipt by the Landlord or its agents of rental or any other payment shall in no way whatsoever prejudice or operate as a waiver, rescission or abandonment of any cancellation or right of cancellation effected or acquired prior to such receipt.”

[22] Accordingly, even if the arrangement was made, as alleged by the respondent, this did not preclude the applicant from exercising its right to cancel the lease agreement for non-payment in terms of clause 21.1. Moreover, to the extent that the respondent is seeking to rely upon payments that he made after the date of the cancellation notice, in terms of clause 23.2, the applicant's receipt of these payments did not operate as an abandonment of the cancellation of the lease on 29 June 2022.

[23] In the circumstances, I am of the view that the respondent's reliance upon the alleged arrangement with City Property cannot be sustained. The respondent breached the lease agreement. The applicant, by virtue of clause 21.1, was therefore entitled to cancel the lease without prior notice to the respondent, which it duly did.

The respondent's second defence

[24] The respondent's answer to the applicant's allegation that the cancellation notice was sent to him on 29 June 2022 is nothing more than a bare denial. Thus, although by no means clear, the respondent also appears to be suggesting that this application should not succeed because he did not receive the cancellation notice.

[25] It is unlikely that the respondent did not receive the cancellation notice.

[26] First, the founding affidavit makes the allegation that the cancellation notice was sent by email to the respondent. An email delivery report is attached to the cancellation notice. This reflects the email address to which it was sent, which ostensibly is that of the respondent. It also records that "*Delivery to these recipients or groups is complete*". The email address on the delivery report is the same as the email address provided for the respondent on his notice of intention to oppose as well as the filing sheet of his answering affidavit.

[27] Second, the statement of account that the applicant has attached to the founding affidavit reveals that following the cancellation notice of 29 June 2022, on 1 July 2022, the respondent made significant payments towards his arrears totalling R 25 000,00. This was far in excess of the amounts that he had been paying for the

previous 24 months and also more than double the amount of the monthly rent and utility charges. It is more probable than not that these payments were an attempt on his part to placate the applicant, in the light of the cancellation notice that had been received.

[28] In my view, the applicant has proven actual delivery of the cancellation notice.³

[29] Even if, despite the above, the respondent did not in fact receive the cancellation notice in June 2022, the applicant attached the cancellation notice to the founding affidavit in this application, which was served on 3 November 2022 on the respondent at the property. The applicant has also made the allegation in the founding affidavit that: *“To the extent necessary, this application constitutes (further) notice to vacate the property”*. The service of an application claiming the ejectment of a lessee from the property is also sufficient notice of a lessor’s election to cancel a lease agreement.⁴ At the very least, therefore, the service of the application on the respondent at the property (being the respondent’s chosen *domicilium* address in terms of clause 30.2 of the lease) constituted sufficient and adequate notice of the applicant’s cancellation of the agreement.⁵ Although the date of cancellation would then be 3 November 2022, nothing turns on this.

[30] Accordingly, there can be no doubt that the cancellation has reached the mind of the respondent and has become effective.⁶ There is thus no merit in the respondent’s second defence.

Eviction of the respondent

[31] The applicant has established its right to possession of the property and thus its right to evict the respondent.

³ As to which, see *Swart v Vosloo* 1965 (1) SA 100 (A) at 112H–113A.

⁴ *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) at 463C–D and *Van Achterberg v Walters* 1950 (3) SA 734 (T) at 744F–G (and the cases cited there).

⁵ See *Swart v Vosloo* 1965 (1) SA 100 (A) at 115A–C.

⁶ *Ibid*, at 103G–H.

[32] The applicant's draft order asked that this Court direct that the respondent shall vacate the property "*within 3 days of the granting of this order*". Ms Gordon persisted in arguing that I must impose a three day guillotine. She nevertheless accepted that this was a matter within my discretion. In my view, three days is barely enough time to arrange for a removal company in circumstances where it appears that an attorney's practice is being run from the premises. Moreover, there are likely to be clients, and indeed opposing litigants, that will need to be notified of any change in the respondent's address. They should not be prejudiced by the respondent's sudden removal from the property.

[33] I am of the view that affording the respondent a two-week period (14 calendar days) from the date of the order to vacate the property is sufficient and fair.

The applicant's claim for arrear rental and other charges

[34] In the applicant's founding affidavit, it was alleged that the respondent owed the sum of R 99 245.52 as at 1 August 2022. This was evidenced by a statement of account attached to the founding affidavit. The applicant also reserved its right to supplement its papers to include any further arrears that may accrue between the date of the founding affidavit and the hearing of this matter.

[35] An updated statement of account attached to the replying affidavit confirmed that in January 2023, the respondent's arrears stood at R 97 859.85.

[36] Despite an indication in the applicant's heads of argument that a further supplementary affidavit would be filed, before the date of the hearing of this application, disclosing the amount then in arrears, none has been filed. Ms Gordon, on behalf of the applicant, accepted that in the circumstances this Court could only make an order for payment of arrears in the amount of R 97 859.85.

[37] In terms of clause 21.3 of the lease agreement, whilst the respondent is in occupation of the property, he is obliged to pay all amounts due to the applicant in terms of the lease, and the applicant is entitled to recover and accept those payments, without prejudice, and without affecting, its claim to cancellation of the

lease, or any claim for damages, or a claim of any other nature.

[38] It follows that the applicant is entitled to an order for payment of the arrear rental and other charges in the amount that it has established.

[39] The applicant did not ask for interest on the amount to be awarded.

Order

[40] In the circumstances, I make the following order:

1. The respondent is liable to be evicted from Offices 0156(S), 0517(S) and 0518(S), Mansion House, 1[...] M[...]t Street, Johannesburg, situated at Erf 5[...] J[...] Township, Registration Division I.R., Gauteng ("**the property**");
2. The respondent shall vacate the property within 14 calendar days of the date of this order, failing which the Sheriff is authorised and directed to evict him from the property;
3. The respondent shall pay applicant the sum of R 97 859.85;
4. The respondent shall pay the applicant's costs of this application, including the costs of Counsel.

GOTZ AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 6 February 2024

Date of Judgment: 23 July 2024

Appearances:

For the Applicant: C Gordon instructed by Vermaak Marshall Wellbeloved Inc

For the Respondent: No appearance