

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

Case Number: 2024/031754

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

In the matter between:

EMM PROPERTY HOLDINGS (PTY) LTD

Applicant

and

WORLDWIDE RAIL AND MINING SOLUTIONS (PTY) LTD

Respondent

JUDGMENT

NOKO, J

Introduction

[1] The applicant launched proceedings for the ejectment of the respondent and all persons occupying the premises described as:

- [a] A portion of Erf 4[...] and Erf 4[...], J[...] P[...] Extension 15 Township, held under Deed of Transfer T[...]; and
- [b] A portion of the remaining extent of Portion 170 of the farm Witkoppie, held under Deed of transfer T[...], (collectively, “the Premises”); and
- [c] The portion of the Remaining Extent of Portion 170 of the Farm Witkoppie No. 6[...], Registration Division IR, Gauteng Province and held under Deed of transfer T[...], as identified north of the entrance

of J[...] P[...] Road, situate at 6[...] J[...] P[...] Road, J[...] P[...], Boksburg.

(hereinafter collectively referred to as the “premises”)

[2] The respondent is opposing the application.

Parties

[3] The applicant is EMM Property Holdings (Pty) Ltd, a private company duly incorporated in accordance with the company laws of the Republic of South Africa, with registration number 1976/001806/07. The applicant’s chosen *domicilium citandi et executandi* is 120A, 8th Avenue, Fairland, Johannesburg.

[4] The respondent is Worldwide Rail and Mining Solutions (Pty) Ltd, a private company duly incorporated in terms of the company laws of the Republic of South Africa, with registration number 2016/296981/07. The respondent’s chosen *domicilium citandi et executandi* is 6[...] J[...] P[...] Road, J[...] P[...], Boksburg.

Background

[5] The parties entered into a lease agreement of the premises on 10 May 2023, which consist of warehouse, workshop, and office facilities. The lease commenced on 1 June 2023. The monthly rental payable in advance was R300 000.00, to increase to R600 000.00 per month from 1 June 2024. The monthly municipal rates payable were R40 300.00, plus increases as contemplated in the lease agreement, of which the respondent would be liable for 50% as per the local authority’s invoice. The total monthly rental is exclusive of VAT, which shall be added on a monthly basis.

[6] The applicant instituted eviction proceedings on 20 March 2024 on the basis that the respondent breached the lease agreement by failing to pay rental when due, and that the lease agreement was accordingly cancelled.

Parties’ version and submissions

[7] The applicant avers that the respondent was in arrears in the sum of R46 345.00 for the rates and was served with a notice to remedy the breach on 2 August 2023, requiring payment within seven days, failing which the agreement would be terminated. The notice was sent by email to the respondent's representatives. The applicant proceeded to terminate the lease in writing on 15 August 2023, and a copy of the termination letter is annexed to the founding papers. Although the notice was not delivered at the chosen *domicilium*, the applicant contends that it came to the respondent's attention as it was subsequently attached to correspondence from respondent's attorneys. The applicant relied on *Sandton Square Finance (Pty) Ltd*,¹ where it was held, he submitted, that if the notice reaches the respondents, failure to deliver at the *domicilium citandi et executandi* is of no moment.

[8] The respondent only made payment on 18 August 2023. Nonetheless, the respondent was requested to vacate the property on 31 August 2023, as the agreement had been cancelled.

[9] The applicant further sent a notice of another breach on 4 March 2024 to the respondents' attorneys,² stating that the respondent was in arrears in the amount of R515 584.00 for failure to pay rental and related charges.³ The notice provided that, without derogating from the termination already effected on 15 August 2023 (and *ex abundanti cautela*), if the respondent failed to remedy the breach within seven days, the agreement would be cancelled. The respondent failed to remedy the breach within the stipulated period, and the lease agreement was accordingly cancelled, as set out in the founding affidavit.⁴

[10] The applicant referred to the following clauses in the lease agreement relevant to the issue before me:

¹ *Sandton Square Finance (Pty) Ltd and Others v Biagi, Bertola and Vasco and Another* 1997 (1) SA 258 (W).

² At this time the respondent's attorneys conveyed that the service should be effected at their offices.

³ Other breaches were that the respondent effected numerous alterations, had damaged polycarbonate sheets and was requested to replace same.

⁴ See para 53 of the Applicant's Founding Affidavit.

- [a] The applicant is entitled to cancel the agreement if the respondent fails to remedy any breach within seven days of receiving notice requesting rectification.⁵
- [b] The respondent is prohibited from improving the premises without the applicant's written consent.⁶
- [c] In the event of any alterations, the respondent waives any claim for the value of those improvement in favour of the applicant.⁷

[11] In its defence, the respondent contended that the notice of breach was not compliant with the terms of the lease agreement because it was not delivered at the *domicilium* address and should therefore be considered *pro non scripto*.

[12] The respondent's second defence was that the applicant failed to ensure that the premises was fit for purpose, thereby necessitating alterations. In this regard, counsel submitted, the Supreme Court of Appeal held in *Thompson v Scholtz*⁸ that a tenant is entitled to withhold the rental amount. The respondent further contended that the premises were not properly maintained and that water ingress from roof leaks damaged its diesel locomotive engine, necessitating repairs at a cost of USD 508 000.00. The respondent intends to institute a claim against the applicant for those damages and, in view thereof, contends that it is entitled to an improvement lien over the property.

[13] In reply, the applicant submitted that, as set out above, the respondent waived in the applicant's favour any benefit arising from alterations effected to the property. Moreover, the respondent has not satisfied the requirements for an improvement lien, including the requirement that the value of the alleged improvements be quantified. It is also a prerequisite to the exercise of a lien that the lienholder neither trade on nor use the premises.

[14] The respondent further argued that, since the purported termination of the lease agreement, there have been several discussions between the parties with the intention of

⁵ Clause 24.4 of the Agreement at CL 02-53.

⁶ Clause 12.1 of the Lease Agreement at CL 02-45.

⁷ Clause 12.2 read with 12.5 of the Agreement at 02-26.

⁸ [1998] ZASCA 87; 1999 (1) SA 232 (SCA).

reinstating the lease. The respondent has also continued making payments and, to date, there is no amount outstanding. The applicant submitted that this argument is untenable, pointing out that it made no concession at any stage that the termination was withdrawn. Moreover, the agreement⁹ expressly provides that, once terminated, the respondent remains liable for rental if it continues in occupation. Accordingly, the contention that the agreement was impliedly reinstated is unsustainable.

[15] Finally, the respondent contended that the municipal charges would not attract VAT. Moreover, the respondent understood that the applicant would provide the statement from the local authority.

Issues

[16] The issues for determination are whether the applicant has established a case for the eviction of the respondent from the premises and whether the defences raised are sustainable.

Legal principles and analysis

[17] The basis for eviction is predicated on evidence that the premises belong to the applicant and that the occupier's right of occupation has been lawfully terminated. The applicant alleged that it is the owner of the premises and has cancelled the lease agreement. The respondent does not dispute the applicant's ownership but contends that the lease agreement was not cancelled or, alternatively, was reinstated.

[18] Where a tenant holds over—that is, remains in occupation after disputing the cancellation of the lease—the tenant shall continue to make all payments and comply with the obligations set out in the agreement.¹⁰

⁹ See clause 001-53 of the Agreement of Sale at CL 001-53.

¹⁰ See clause 26 of the Lease Agreement. See also *Willis, Principles of South African Law* 9 ed at 919 (by Graham Bradfield et al), where the following is stated: “On the termination of a lease, it is the duty of the lessee to vacate the property; if he ‘holds over’, he is liable in damages, or on the basis of unjust enrichment, depending on the circumstances, to the lessor, in addition to ejectment under order of court.”

[19] The agreement provides that if the tenant fails to make payment under the lease agreement by the due date,¹¹ or breaches any other term of the lease¹² and fails to remedy such default or breach within seven days of receiving a written demand to do so, the landlord is entitled to forthwith cancel the lease.¹³

[20] In *Sandton Square Finance (Pty) Ltd*,¹⁴ the court stated that the mere fact that a *domicilium* address has been chosen does not preclude effective service by another method provided for in the Uniform Rules of Court.¹⁵ However, the judgment cited does not support the applicant's case, because the method actually used is not among those listed in the Uniform Rules.

[21] One may be tempted to conclude that the respondent's acknowledgment of receipt of the emailed notice suffices for service as contemplated in the agreement. This would, however, mean that the agreement was effectively amended without complying with the *Shifren* clause. It bears noting that courts are expected to respect principles of contractual autonomy, including the common law principle of *pacta sunt servanda* (agreement must be kept). Notwithstanding these principles, the Constitutional Court held in *Beadica 231 CC and Others*¹⁶ that contractual clauses should be enforced unless doing so would be unfair, unreasonable, and/or contrary to public policy.

[22] In any event, the Rules of Court ordinarily govern the service of court processes, not termination notices. Accordingly, I find that the alleged service of the first notice was not in accordance with the agreement and is to be regarded as *pro non scripto*. Moreover, the agreement makes no provision for communication by electronic means; accordingly, any such service would have to comply with the Electronic Communications and Transactions Act.¹⁷ I note that the applicant did not advance this argument.

¹¹ See 24.1.1.

¹² See 24.1.3.

¹³ See 24.2.2.

¹⁴ See n 1 above.

¹⁵ Id at 260 C-D. See *Motloung v Meyersdal Nature Estate Homeowners Association (NPC)* [2021] ZAGPJHC 477 at para 18.

¹⁶ *Beadica 231 CC and Others v Trustees for the time being of Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

¹⁷ Electronic Communications and Transactions Act Act 25 of 2002.

[23] Turning to the second notice, the applicant correctly contended that the service address had been changed and that the new address for service of the notice was that of the respondent's firm of attorneys. The termination, as set out in the founding affidavit, may therefore be construed as the notice of termination envisaged in the agreement. The lease agreement provides that, should the respondent fail to remedy the breach or default, the "... Landlord shall be entitled ... to forthwith cancel this lease, resume possession of the Leased Premises and claim full value of all arrear amounts owing in terms of this Lease together with the present value of each unpaid but not yet due and payable Total Monthly Rental for the unexpired portion of the Lease as pre-determined liquidated damages."¹⁸ There is no requirement that cancellation be in writing, and accordingly termination through court process is valid.

Conclusion

[24] Having regard to the foregoing, the other issues raised by the respondent warrant no attention by this Court. Accordingly, I find that the defences raised by the respondent are unsustainable, except insofar as they relate to the first notice, which was sent by email.

Costs

[25] There is no reason why the costs should not follow the results.

Order

[26] I make the following order:

1. That all persons holding occupation through the respondent be ejected from the commercial lease premises described as:
 - 1.1. A portion of Erf 4[...], J[...] P[...] Extension 15 Township, Township, Registration Division, IR, Gauteng Province and held under Deed of transfer T[...].

¹⁸ 24.2.2 at CL 02-53

- 1.2. A portion of Erf 4[...], J[...] P[...] Extension 15 Township, Township, Registration Division IR, Gauteng Province and held under Deed of transfer T[...].
- 1.3. The portion of the Remaining Extent of Portion 170 of the Farm Witkoppie No. 6[...], Registration Division IR, Gauteng Province and held under Deed of transfer T[...], as identified north of the entrance of J[...] P[...] Road, situate at 6[...] J[...] P[...] Road, J[...] P[...], Boksburg.
- 1.4. The respondent is ordered to pay the costs for the application on a scale as between attorney and client.

MV Noko
Judge of the High Court
Gauteng Division, Johannesburg

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **9 May 2025**.

Date of hearing: 30 April 2025

Date of judgment: 9 May 2025

Appearances

For the Applicant: H. G. Dobie, instructed by Reaan Swanepoel Inc.

For the Respondent: A. Allison, instructed by Vardakos Attorneys.