THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)

Case no.**548/2025**

In the matter between:

GARDEN ROUTE DISTRICT MUNICIPALITY **APPLICANT**

and

BYXISCAN (PTY) LTD **RESPONDENT**

REGISTRATION NUMBER: 2018/619371/07

Summary: Eviction – Commercial Property – Tacit Lease – Eviction Granted

Coram: Wille, J

Heard: 20 May 2026

Delivered: 28 May 2026

JUDGMENT

WILLE, J:

INTRODUCTION

[1] The applicant is the registered owner of a piece of immovable property, a portion of which is used as a restaurant facility known as the '*Victoria Bay Restaurant'* in Victoria Bay.[1]

[2] In summary, the applicant seeks an order against the respondent in the following terms, namely that:

(a) The lease agreement entered into between the applicant and the respondent on 29 October 2019 was terminated by the effluxion of time on 31 May 2023.

(b) The express, alternatively, tacit lease agreement entered into between the applicant and the respondent in respect of the premises after 31 May 2023, be declared void *ab initio*, and of no force or effect.

(c) The respondent's occupation of the premises, absent a valid and binding written lease agreement entered into between it and the applicant as prescribed by the Municipal Asset Transfer Regulations (MATR), 2008, promulgated under the Municipal Finance Management Act, 56 of 2003 (MFMA), is unlawful.

(d) The respondent, and all those occupying the premises under and by virtue of the respondent's occupation thereof, be ordered to vacate the premises within five (5) days of the date of the order sought herein, being granted.[2]

[3] It is undisputed that the applicant is the registered owner of the property and that the prior written lease between the parties has expired by effluxion of time.[3]

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[1] Portion of Farm 195 Kraaibosch, Victoria Bay, George (the "premises").
[2] This remains undisputed.
[3] The period in the last addenda was recorded as 31 May 2023.

RELEVANT BACKGROUND

[4] Nearly seven (7) years ago, the applicant and the respondent entered into a written lease agreement in terms of which the applicant leased the premises to operate a restaurant. The lease agreement provided that any amendments shall be in writing, signed by both parties, and included a standard non-variation clause.[4]

[5] Two written addenda were issued, pursuant to which the initial term of the lease agreement was extended, and the lease ultimately ended three (3) years ago.[5]

[6] Thus, there is no written lease in place. The respondent says that the premises were thereafter leased to it on a month-to-month basis by tacit agreement with the applicant. The respondent has also not paid any rent for at least the last 3 years.[6]

[7] There is a dispute between the applicant and the respondent as to the lawfulness and enforceability of the month-to-month tacit lease agreement between them after the period in the last addendum expired by effluxion of time.[7]

CONSIDERATION

THE WRITTEN LEASE AGREEMENT

[8] This agreement has been euthanised because its long stop date has passed. What remains is how this document regulated the parties' rights going forward, which I now address. There is a non-waiver clause in the agreement that regulates an indulgence or a delayed enforcement by the applicant. Most importantly, the following clause is significant:

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4 Clauses 19 and 20 of the initial lease agreement.
5 On 31 May 2023.
6 This is not disputed.
7 On 31 May 2023.

'…The failure of either party to comply with any non-material provision of this lease shall not excuse the other party from performing the latter's obligations hereunder fully and timeously….'[8]

THE TACIT AGREEMENT

[9] The applicant is vested with a direct right and interest concerning the subject matter of the litigation that is attached to itself, and this right is an existing right underscored by section 25 of the Constitution.[9]

[10] Thus, the appropriate manner to address the existing dispute regarding the lawfulness and enforceability of the tacit month-to-month lease agreement is by means of a declaratory order. This the applicant seeks to do. In these circumstances, the applicant alleges that the onus is on the respondent to establish a right to continue to hold against the owner.[10]

[11] Put another way, the applicant adopts the position that the tacit month-to-month lease agreement is and was void from inception. The grant of a declarator is thus dependent upon the judicial exercise of the court's discretion with due regard to the circumstances of the matter before it.[11]

[12] An application for a declaratory order requires a two-stage approach. Firstly, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. Secondly, if the court is satisfied that such an interest exists, it must be considered whether the order should be granted.[12]

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[8] Clauses 21.1 and 21.2 of the written lease agreement.
[9] This is not disputed.
[10] Chetty v Naidoo 1974 (3) SA 13 (A) at 20 B – D).
[11] YB v SB 2016 (1) SA 47 (WCC) at 61 I - 62 B.
[12] The applicant's 'interest' is not disputed.

[13] In exercising its discretion, the court may decline to deal with a matter where there is no actual dispute between the parties, either legal or factual and technical hurdles are put up to frustrate the rights of a party or parties.[13]

[14] Some other factors may include the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties.[14]

[15] Indeed, there may not be a justifiable advantage that flows from the grant of the order sought. In addition, there are considerations of public policy, justice and convenience, the practical significance of the order and/or the availability of other remedies.[15]

[16] Turning now to the facts of this dispute (as it is currently formulated). Upon termination of the lease, the respondent continued to occupy and trade on and from the premises under a tacit month-to-month lease, supposedly on some of the terms set out in the written lease.[16]

[17] As a matter of pure logic, a month-to-month tacit lease agreement cannot, by any reasonable definition, be purposively interpreted as a lease that could run indefinitely and thus be exempt from the provisions of the MFMA. Self-evidently, this will bypass the procurement requirements of the MFMA and ignore the constitutional and statutory regime that applies to the leasing and letting of municipal capital assets.[17]

[18] Tacit agreements must be lawful. If they are not, then any such purported tacit agreement will be void from inception. Put another way, it must be so that a tacit agreement that does not comply with public procurement legislation is *per se* unlawful.[18]

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[13] The respondent's shields are highly technical in nature.
[14] No doubt, a declarator will have the effect of settling the issues between the parties to this specific dispute.
[15] The applicant here has no other remedy.
[16] This is not disputed.
[17] This is not disputed,
[18] The respondent does not meaningfully engage with this issue.

THE MFMA

[19] The provisions of the MFMA require that the lease of the applicant's premises must be in writing, must contain certain prescribed information, and must have been signed on behalf of the parties. The relevant section provides as follows:[19]

'…A contract or agreement procured through the supply chain management system of a municipality or municipal entity must—

(a) be in writing;

(b) stipulate the terms and conditions of the contract or agreement, which must include provisions providing for -

(i) the termination of the contract or agreement in the case of non or under-performance

(ii) dispute resolution mechanisms to settle disputes between the parties;

(iii) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years; and

(iv) any other matters that may be prescribed…'

[20] The granting of rights to use, control or manage municipal capital assets are strictly regulated.[20]

[21] Regulations 45 (1) and (2) of the Municipal Asset Transfer Regulations, 2008 ("MATR"), provide as follows:

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[19] Section 116 of the MFMA, and Regulation 45 of the Municipal Asset Transfer Regulations.
[20] In Chapter 4 of the Regulations.

'…A municipality or municipal entity may grant a right to use, control or manage a capital asset to a private sector party or organ of state only by way of a written agreement concluded between the municipality or entity and the private sector party or organ of state to whom the right is granted…'

'…An agreement referred to in sub-regulation (1) must –

(a) set out the terms and conditions on which the right is granted, including, as a minimum –

(i) a sufficient description of the capital asset in respect of which the right is granted, in order to identify the asset.

(ii) particulars of any subsidiary assets that are to be made available with the capital asset.

(iii) the period for which the right is granted;

(iv) the amount of compensation payable to the municipality or municipal entity for the granting of the right, and the terms and conditions of payment;

(v) requirements for the private sector party or organ of state to whom the right is granted to maintain and safeguard the asset for its intended purpose, taking into account the condition of the asset and its estimated remaining life at the date of granting of the right;

(vi) where the asset is to be used by the municipality or municipal entity and the public sector party or organ of state to whom the right is granted, the basis of how the asset is to be shared as well as how the costs and benefits of the shared asset will be apportioned between the parties;

(vii) the extent to which the public sector party or organ of state to whom the right is granted will be required to make improvements or enhancements to the asset, and the terms and conditions regulating such improvements or enhancements;

(viii) a statement to the effect that the risk and accountability for the asset is transferred to the public sector party or organ of state to whom the right is granted;

(ix) the effective date from which the risk and accountability for the asset is transferred;

(x) and a clause disallowing the private sector party or organ of state to whom the right is granted from ceding or subcontracting the right to another person; and

(b) be signed on behalf of the municipality or municipal entity and the private sector party or organ of state to whom the right is granted…'[21]

[22] It is not in dispute that no written lease agreement was concluded between the parties in respect of the respondent's occupation and use of the premises after the last addenda to the written lease expired by effluxion of time. Thus, the regulations under the MATR were not complied with by the parties to this dispute regarding this tacit month-to-month agreement, which is effectively relied on by the respondent. What is also challenging to understand is that the respondent does not dispute that it has not paid any rental in connection with the premises for at least the last 3 years.[22]

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[21] Regulation 45 (2) of the MATR.
[22] The respondent raises a very novel defense to this non-payment issue.

[23] The respondent relies on a shield of total remission of the payable rental resulting from losses incurred because of adverse weather conditions.[23]

LIS PENDENS

[24] The respondent takes the view that there is a live, pending application for its eviction from the premises, together with a pending application for leave to appeal against the court's order dismissing the respondent's application for a stay in the eviction proceedings instituted under these discrete proceedings.[24]

[25] It is trite that this shield raised is dilatory in nature, and the exercise of the court's discretion in this regard is based upon considerations of convenience and the determination of what is just and equitable in the peculiar circumstances of the matter.[25]

[26] In this matter, it is not disputed that the litigation in these proceedings and in the application under the discrete case number relate to the same parties and that the relief claimed is similar, namely, the respondent's eviction from the applicant's property. [26]

[27] The current application for eviction is premised on the illegality of the tacit month-to-month lease agreement between the parties, arising from non-compliance with the peremptory provisions of the MFMA, read with the provisions of the MATR. By contrast, in the other discrete matter, the respondent's eviction was sought for alleged breach of a valid and binding lease agreement due to non-payment of monthly rent. Thus, the cause of action in this application is entirely different. The respondent itself contends for a review of legality.[27]

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[23] This is challenging to understand in view of the tacit agreement contended for by the respondent.
[24] This, despite the formal withdrawal of this prior application by the applicant.
[25] Belmont House (Pty) Ltd v Gore NNO 2011 (6) SA 173 (WCC) at para 9.
[26] Hassan and Another v Berrange NO 2012 (6) SA 329 (SCA) at para 19.
[27] The different cause of action is thus conceded by the respondent.

[28] The applicant has now withdrawn the prior application, along with a tender for a portion of the respondent's incidental costs. The respondent takes the position that the withdrawal of the prior application is not with the respondent's prior consent nor with the leave of the court. Notwithstanding these technical objections, the prior application has been effectively euthanised.[28]

[29] The only possible live issue remaining may be the costs in connection with the respondent's dismissed stay application, in respect of which the respondent's application for leave to appeal is pending, following the court of first instance's refusal of leave. The applicant has tendered the respondent's costs in the main eviction application, save for the postponement of the matter at the behest of the respondent and respect of which the respondent tendered these wasted costs.[29]

[30] The respondent has not made any rental payments for at least the last 3 years, to the extreme prejudice of the public purse. The applicant files this application in accordance with its constitutional mandate to secure its assets for the benefit of its constituency.[30]

[31] Considerations of justice and equity militate against the granting of a stay of the present eviction application pending the final determination of the prior matter.[31]

CONCLUSION

[32] The remission of the rental defence raised does not commend itself to this court because of the parties' non-compliance with the peremptory provisions of the MFMA read with the regulations under the MATR.[32]

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[28] This is a technical defence of no merit.
[29] Again, this is a highly technical defence with no merit.
[30] There is a public policy issue involved in this determination.
[31] Belmont House (Pty) Ltd v Gore NNO 2011 (6) SA 173 (WCC) para 20.
[32] This is in any event a "novel" defence.

[33] I also do not find favour with the respondent's argument that the applicant is obliged to self-review under these circumstances. This defence was never squarely raised on the papers by the respondent and was not properly before the court for determination.[33]

[34] Self-evidently, for a valid tacit relocation of a lease agreement in terms of the common law to be possible, the lessee under the relocated lease must also have made monthly rental payments, which must have been accepted by the lessor.[34]

COSTS

[35] The applicant contends that the respondent's conduct in occupying the applicant's land without making any rental payments for at least 3 years, and then invoking a remission-of-rental defence premised on alleged adverse weather conditions affecting its business, justifies a punitive costs order. I agree.[35]

[36] The respondent has remained in occupation and has enjoyed the use of the property solely for commercial gain in conflict with the law and has ignored the applicant's right of ownership of the property. The conduct for this reason also justifies a punitive costs order.[36]

ORDER

[37] For these reasons, the following orders are granted.

1. It is declared that the lease agreement entered into between the applicant and the respondent on 29 October 2019 was terminated by the effluxion of time on 31 May 2023.

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[33] This issue piloted for the first time during legal argument.
[34] Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd 2002 (6) SA 236 (C).
[35] City of Ekurhuleni Metropolitan Municipality v Tshepo Gugu Trading CC and Another [2024] ZASCA 81 (28 May 2024) at para 38.
[36] City of Tshwane v Ghani 2009 (5) SA 563 (T)).

2. It is declared that the express *or* alternatively tacit lease agreement entered into between the applicant and the respondent in respect of the premises after 31 May 2023 is void *ab initio* and of no force or effect.

3. It is declared that the respondent's occupation of the premises, absent a valid and binding written lease agreement entered into between it and the applicant as prescribed by the Municipal Asset Transfer Regulations, 2008, promulgated under the Municipal Finance Management Act, 56 of 2003 (MFMA), is unlawful.

4. The respondent, and all those occupying the premises under and by virtue of the respondent's occupation, are with this ordered to vacate the premises on or before the last day of June 2026, failing which the sheriff of the court, with the assistance of the police (if necessary) shall be entitled to execute the commercial eviction order as set out above at the cost of the respondent.

5. The respondent shall be liable for the costs of and incidental to this application on the scale as between attorney and client (as taxed or agreed) including the costs of counsel on scale C.

E D WILLE
(Thembalethu)