REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/40973

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

....
DATE SIGNATURE

In the matter between:

ALAN LEWIS t/a LEWIS PROPERTIES Applicant

and

LYES BOUDJEMAA Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application for the eviction of the Respondent from business premises described as 236 Johannesburg Road, La Rochelle, Johannesburg (hereinafter "the premises") following an alleged infringement of a commercial lease by the Respondent.

[2] A brief exposition of the facts in this matter will assist to put the outcome of the judgment in perspective. On 1 May 2014 at La Rochelle, Johannesburg, both parties duly represented, concluded a written commercial lease agreement, which was deemed to have commenced on 1 January 2014.

[3] The lease agreement was in respect of the premises as described in Paragraph 1 herein. Some of the material terms and conditions of the lease agreement were that:

3.1 The Respondent would pay monthly rentals of R17 100.00 to the Applicant;

3.2 The Applicant let the premises to the Respondent on the understanding that the latter would utilize them for business purposes;

3.3 The Respondent would pay monthly rentals to the Applicant in advance, without deduction or set-off, on the first day of each month;

3.4 The Respondent would not for any reason be entitled to withhold or delay payment of any monies to the Applicant in terms of the lease agreement regardless of the Applicant's compliance with its obligations;

3.5 The Respondent undertook to be responsible for the payment of all expenses, costs, and charges, which the Applicant might incur occasioned by the default of the Respondent of any of the terms and conditions of the lease agreement, including collection commission at the ruling rate and all legal costs as between attorney and client

3.6 No relaxation which the Applicant might show at any time whatsoever in regard to the carrying out of its obligations in terms of the lease agreement shall prejudice any of its rights under the lease agreement in any manner whatsoever or be regarded as a waiver of any of its rights in terms of this lease agreement;

3.7 No alteration or variation of the terms of this Lease including this clause or any alleged cancellation by mutual consent shall be of any force or effect unless reduced to writing and signed by both parties or their duly authorized representatives.

[4] Notwithstanding that the parties only signed the lease agreement on 1 May 2014, the Respondent took occupation on 1 January 2014 and continues to be to date hereof. It is common cause that the Respondent defaulted to make his monthly rentals on 1 September 2014 following which the Applicant caused a letter of demand to be sent to the Respondent.

[5] In that letter of demand, the Applicant gave the Respondent twenty days, reckoned from the date of receipt, within which to make payment of the arrear rental failing which the Applicant threatened to cancel the lease agreement and to take the necessary action, including an application for the respondent's eviction and an action for damages.

[6] The Respondent's default for payment of the arrear rental persisted and on 13 October 2014, the Applicant employed the services of the sheriff who served the Applicant's letter terminating the lease agreement between the parties. The Respondent continues to remain in occupation of the premises and according to the Applicant such occupation is unlawful in view of its letter dated 13 October 2014 cancelling the lease agreement.

[7] The sole issue that stands for determination is to establish whether or not the Applicant is under the circumstances legally entitled to evict the Respondent from the premises. Put differently, is there any legal excuse that justifies the Respondent's continued occupation of the premises his failure to perform in terms of the lease agreement notwithstanding?

[8] The Applicant's position is that the Respondent signed the lease agreement thereby committing himself to adhere to the terms thereof. His failure to make payment as envisaged in the lease agreement constitutes a contravention thereof. The Applicant has issued a letter demanding payment and the Respondent has failed to perform. In consequence of the Respondent's failure, the Applicant cancelled the lease agreement and has

now launched an application for his eviction.

[9] In response, the Respondent has put forth, in the main, three defences that he thinks sanction his persistent occupation of the premises and these are:

9.1 Subsequent to the parties' signature of the lease agreement on 1 May 2014, they entered into an oral agreement in terms of which the Applicant suspended payment of the monthly rentals until the amount by which it had overcharged the Respondent is set-off;

9.2 Although during argument there was an indication of an acknowledgment by Counsel for the Respondent that the provisions of the Prevention of Illegal Eviction Act No. 18 of 1998 Cannot find application under the circumstances of this case, the defence is nonetheless in the answering affidavit of the Respondent and the court must therefore apply its mind to it; and

9.3 The Respondent has also intimated that it has a counterclaim against the Applicant.

[10] The legal position regarding eviction from commercial premises is not

governed by the Prevention of Illegal Eviction Act No. 18 of 1998. It is quite apparent that all the submissions of the Respondent pertaining to PIE are misguided and stand to be disregarded completely.

[11] The Respondent has hinted that it has a counterclaim against the Applicant. The court has noted that other than this bare allegation that it has a counterclaim against the Applicant, it has until the date of the hearing of the application not formulated such claim. In the result the court cannot entertain it at all.

[12] A defence which perhaps requires more attention is the one relating to the alleged conclusion of the oral agreement. In this regard, I need to remark that the Respondent does not dispute that the lease agreement contains a 'no variation except in writing clause'. Once this is the case, the Respondent's claim that the parties concluded an oral agreement is preposterous and should be dismissed as devoid of any merit.

[13] For what it is worth, I should add that an oral agreement and a 'no variation except in writing clause' are like chalk and cheese and cannot co-exist. The existence of the 'no variation except in writing clause' in the lease agreement is a complete bar to an oral agreement meant to vary the lease agreement. In this regard the judgment in *SH v GF and Others* 2013 (6) SA 621 (SCA) at [16] where Van der Merwe AJA said the following should be helpful:

"[*16] In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of a public policy, and this is now rooted in the Constitution. See SA Sentrale Ko-op Graanmaatskappy Bpk* v *Shifren en Andere 1964 (4) SA 760 (A) at 767A - C and Brisley v Drotsky 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363) paras 7, 8, 90 and 91. SA Sentrale Ko-op Graanmaatskappy BPK v Shifren 1964 (4) SA 760 (A); SH v GF and Others 2013 (6) SA 621 (SCA); Affirmative Portfolios CC v Transnet Ltd t/c Metrorail 2009 (1) SA 196 (SCA); Kovacs Investments 724 (Pty) Ltd v Marais 2009 (6) SA 560 (SCA); Academy of Learning (Pty) Ltd v Hancock and Others 2001 (1) SA 941 (C); Pelser v Smith 1979(3) SA 687 (T); Brisley v Drotsky 2002 (4) SA 1 CSC A); Van Tonder en 'n Ander v Van der Merwe en Andere 1993 (2) SA 552 (W); HNR Properties CC and Another v Standard Bank of South Africa Ltd 2004 (4) SA 471 (SCA); Cecil Nurse (Pty) Ltd v Nkola 2008 (2) SA 441 (SCA)*."

[14] In *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae*) *2011 (5) SA 329* (SCA) para [35] Brand JA said:

> "'*As explained in Brisley v Drotsky 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo.*'"

[15] I reiterate that in view of the existence of the 'no variation except in writing clause' the Respondent's allegation of an oral agreement is completely misplaced. The application to evict the Respondent must therefore succeed.

[16] Perhaps this is an an appropriate moment to mention that the Respondent launched two interlocutory applications, one for the postponement of the eviction application and the other, that he be allowed to give *viva voce* evidence to explain why his erstwhile attorney withdrew as attorney of record. This court dismissed both these applications and it promised to furnish reasons during the main judgment on eviction. These are now the reasons for the dismissal of the two applications.

[17] To begin then with the application for the postponement of the eviction application. A party seeking postponement of a matter must give sound reasons for doing so in particular, show prospects of success of the case that he wants to postpone. The Respondent came to court not prepared to argue

the merits of the eviction application. He furnished two reasons for his failure.

17.1 On 30 April 2015 he and his erstwhile attorneys, Mabuza Attorneys, had a fallout that culminated in the latter abandoning him to proceed on his own;

17.2 He did not have sufficient opportunity to peruse the file to be ready for argument on 7 May 2015.

[18] The Respondent knew since 7 April 2015 that the eviction application was set down for 4 May 2015 and that if not heard on that day it would nonetheless be during the course of that week. On 28 April 2015, the registrar notified all the parties, the Respondent included, involved in the motion court for the week that began on 4 May 2015 of the precise dates on which their matters would be heard. The Respondent therefore became aware of the date of 7 May 2015 as the date of hearing on 28 April 2015.

[19] The disagreement with his erstwhile attorney conveniently did not occur until the very last day, 30 April 2015. Moreover, while he states that his erstwhile attorneys withdrew, evidence demonstrates that Mabuza Attorneys only served and filed a Notice of Withdrawal as Attorneys of Record on 7 May 2015, the date on which the matter was to be heard. Similarly, the present attorneys of record could not have come on record until the withdrawal had been effected.

[20] This raises the suspicion that no fallout ever existed between the Respondent and his erstwhile attorneys on 30 April 2015 because if it did, his erstwhile attorneys would have at the earliest available moment ensured that they withdrew and would have notified the attorneys of Applicant accordingly. If the attorney failed to do that then the Respondent must explore means of ameliorating his current position against him because his actions amount to failure to execute his mandate. .

[21] This whole matter about an argument between the Respondent and his attorneys on 30 April 2015 is reminiscent of a gambit that is designed to persuade the court to grant a postponement. The court rejects it as being false.

[22] If one adopts the attitude, as this court does, that the fallout between his erstwhile attorney and himself is a ploy, there is no reason why the Respondent could not have been ready to argue this matter on 7 May 2015. What is more is that he did not even prepare heads, which shows that even if this matter was set down on a different date he still would not have been ready to proceed.

[23] The Respondent's application for postponement cannot be considered in isolation from the prejudice that would ensue to the Applicant if it were to be allowed. The default occurred in September 2014 and the Respondent has since not been paying any rentals whatsoever, his excuse for doing so being a feeble allegation based on the conclusion of an oral agreement that allowed

him to continue occupation without payment. Needless to point out that the Applicant will suffer severe prejudice if this matter is delayed any further.

[24] In addition, the fact that there did not appear to be any prospects of success against the eviction application weighed heavily against the granting of the postponement. I have already pointed out that, for reasons furnished above, PIE cannot avail the Respondent under these circumstances.

[25] Furthermore, the Respondent himself conceded that the lease agreement contains a 'no variation except in writing' clause'. It is inconceivable that, given the defences raised by the Respondent, he is still contemplating to overcome all these hurdles in the event that this court grants him the indulgence.

[26] A postponement of this matter will be nothing but a further gratuitous delay, which will indubitably prejudice the Applicant. For those reasons, the application for the postponement of the application was refused.

[27] The next and probably the last application, also launched by the Respondent after the postponement was declined, is one where he requested this court to allow him to adduce *viva voce* evidence to explain why there was a fallout with his erstwhile attorneys.

[28] In this respect it should be instructive to to refer to the case of Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014 (3) SA 96

(SCA) where Theron JA stated as follows para [13] at 100, 101:

> "[13] "....***It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out.*** Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit." Also see the remarks of Cloete JA in Minister of Land Affairs & Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) para [43] at 200.

[29] The Respondent elected not to explain the difficulty that he had with his erstwhile attorneys in his affidavit. Proceedings by way of application are not meant to accommodate *viva voce* evidence except in deserving circumstances and this is not one of them.

[30] In the result, the application for the eviction of the Respondent succeeds and I make the following order:

1. The Respondent is evicted from the premises and must vacate within 14 court days of date of this judgment;

2. If the Respondent does not vacate the premises within the 14 day period referred to in 1 above, the Sheriff of the Court is hereby authorised and required to carry out the eviction order on

or after the aforesaid date by removing from the premises the Respondent and all persons who occupy the premises by, through or under him;

3. The Respondent is to pay the costs of the Applicant as at the scale between attorney and client.

_____

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	: 07 MAY 2015
DATE OF DELIVERY	: 15 MAY 2015
COUNSEL FOR THE APPLICANT	: Adv. J K DRIVER
INSTRUCTED BY	: RYAN D LEWIS ATTORNEYS
COUNSEL FOR THE RESPONDENT	: Adv. ADV. ZWANE
INSTRUCTED BY	:VUZA BIYAYA & ASSOCIATES