REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2020/9980

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

10 December 2020

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MAYER FRAWLEY J

In the matter between:

ZACKEY INVESTMENT PROPERTIES (PTY) LTD Applicant

(Registration Number: 2016/325078/07)

And

VINE CHRISTIAN SCHOOL Respondent

(Registration Number 2019/043904/07)

JUDGMENT

MAIER-FRAWLEY J:

Introduction

[1] This is an opposed application for the eviction of the respondent from commercial property situate at 210 Turf Road, corner 2nd Street, La Rochelle (the property). The applicant is the registered owner of the property which it let to the respondent in terms of a written lease agreement, which agreement was subsequently cancelled by the applicant on account of the respondent's breach of the agreement. Although the respondent opposed the application based on a number of defences raised *in limine*,[1] these were not pursued at the hearing of the matter. The respondent's principal defence is based on an attack of the validity of the applicant's cancellation of the agreement. The respondent contends that the applicant had not yet acquired the right to cancel the agreement when it purported to do so because the respondent disputed being in arrears at the time, seeing as the alleged amount of the arrears was in dispute.

Factual background

[2] The relevant facts are either common cause or uncontroverted. On 7 November 2018, the parties concluded a written agreement of lease (the agreement)

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[1] *In limine* challenges included: (i) a challenge to the authority of the deponent to the applicant's papers; (ii) invalidity of the 'eviction notice' in that it was not served personally on the respondent (a juristic entity); (iii) jurisdiction of the High Court, it being contended that the application ought to have been brought in the Magistrates Court; and (iv) the alleged existence of a factual dispute regarding the quantum of the arrears owing by the respondent to the applicant justifying a need for the referral of such dispute to oral evidence or trial.

in terms of which the respondent leased the property from the applicant on the terms and conditions set out in the agreement. The commencement date of the lease was 1 January 2019.[2] Pursuant to the conclusion of the agreement, the property was made available to the respondent who took occupation thereof for purposes of conducting a school thereat. In exchange for such occupation, the respondent was obliged to pay rent and certain other ancillary charges. In terms of clause 1.1 of the conditions of lease, the rent was payable on the first day of each month, without deduction.[3]

[3] In terms of clause 11. 5, the Lessor was entitled, in its sole and absolute discretion, to appropriate any amounts received from the Lessee towards the payment of any cause of debt or amount owing by the Lessee to the Lessor whatsoever.

[4] The agreement contained certain usual clauses that one expects to find in commercial transactions of this nature, namely, a non-waiver clause,[4] a breach

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[2] Clause 5.

[3] The relevant clause reads: "All payments to be made in terms of this lease shall be payable without deduction, monthly in advance, on the first day of each month, free of exchange at the lessor's domicilium citandi et executandi ..."

[4] Clause 11.2, which reads: "No relaxation, extension of time, latitude, or indulgence which any party ("the grantor") may show, grant or allow to another ("the grantee") shall in any way constitute a waiver by the grantor of any of the grantor's rights in terms of this lease and the grantor shall not thereby be prejudiced or stopped from exercising any of its rights against the grantee which may have then already arisen or which may arise thereafter.

clause,[5] and a clause which imposes liability on the lessee for payment of legal costs on the scale as between attorney and client[6].

[5] In terms of the breach clause, *inter alia*:

"Should the rental or any other amount payable by the Lessee in terms of this Lease not be paid on due date or should the Lessee commit...a breach of any of the other terms of this lease, or fail to make such payment or remedy such other breach within 7 (seven) days after receipt of a notice in writing calling upon it to do so...the Lessor shall be entitled...either:

Forthwith...to cancel this lease and resume possession of the leased premises, without prejudice to its claim for arrears of rent and other amounts owing hereunder or for damages which it may have suffered by reason of the Lessee's breach of contract or of the said cancellation, or

...

...

If the Lessor cancels this Lease and the Lessee disputes the lessor's right to cancel and remains in occupation of the Leased Premises, the Lessee shall, pending settlement of such dispute, either by negotiation or litigation, continue to pay...an amount equivalent to the monthly rent together with all other charges provided for in this Lease, monthly in advance on the first day of each month and the Lessor shall be entitled to accept and recover such payments, and such payments and the acceptance thereof shall be without prejudice to, and shall not in any way whatsoever affect the Lessor's claim of cancellation then in dispute. If the dispute is resolved in favour of the Lessor, the payments made and received in terms hereof shall be deemed to be amounts paid by the Lessee on account of damages suffered by the Lessor by reason of the cancellation of this Lease and/or the unlawful holding over by the Lessee"

[6] Consequent upon the respondent's failure to make timeous payment of the full amount of rental and ancillary imposts, the applicant's attorneys addressed a letter of demand to the respondent on 14 January 2020, calling upon the respondent to remedy its breach by making payment of the outstanding arrear amount of

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[5] Clause 20 of the conditions of lease.

[6] Clause 11.9 – which stipulates the scale at which costs are payable in the event that the lessor instructs its attorneys to take measures for the enforcement of any of the lessor's rights under the lease.

R97 300.00 within 7 days, failing which, the respondent was forewarned that the applicant would terminate the lease, demand that it vacate the property and institute eviction proceedings against the respondent.

[7] In response to the breach notice, on 17 January 2020, the respondent's attorneys sent a letter to the applicant's attorneys in which the respondent did not in fact dispute being in arrears, rather indicating therein, *inter alia,* that the respondent had made payment of the amount of R15 000.00 to the applicant on 16 January 2020.

[8] On 22 January 2020, the applicant's attorneys sent a letter of cancellation to the respondent in which the latter was notified that *'By letter of 14 January 2020, you were afforded 7 (Seven) days within which to remedy your breach of the lease. We are Instructed that, despite demand, you have failed to remedy the breach and have remained in arrears in respect of your rental obligations to date. We are accordingly instructed to terminate the lease, as we hereby do. Kindly ensure that you and all those occupying the property by, through or under you, vacate the property forthwith. Should you fail to comply with this notice we are instructed to make application for your eviction, the costs of which will be for your account...'*

[9] On the same day, the respondent's attorneys replied to the applicant's letter of cancellation, *inter alia*, therein informing the applicant that the respondent admitted to being indebted to the applicant only in the amount of R70 000.00 and again pointing out that an amount of R15 000.00 had already been paid in reduction

of such indebtedness. In paragraph 7 of the letter, the respondent provided the following undertaking: ' *Our client herewith undertake[s], which undertaking should be seen as an acknowledgment of debt to pay your client the full balance of the arrear amount of R55 000.00 as follows: R15 000 on/or before the close of business on 24 January 2020 and R40 000.00 on/or before the 31st January 2020...'*

[10] The applicant accepted the respondent's payment plan by letter of its attorneys, dated 27 January 2020, however, did not thereupon reinstate the lease agreement.

[11] It is common cause that the amounts referred to in the respondent's letter of 22 January 2020 were not paid by the stipulated dates, as undertaken by the respondent. On 12 March 2020 the applicant's attorneys wrote to the respondent's attorneys, *inter alia*, pointing out the respondent's default on its payment proposal and reiterating that the lease had been cancelled on 22 January 2020. The respondent was again given notice to vacate the property.

Discussion

[12] In the letter of 12 March 2020, the applicant's attorneys recorded that the applicant had, by such date, only received payment of the aggregate total amount of R52 000.00 in liquidation of the arrears as opposed to the R55 000.00 which the respondent had undertaken to pay in its letter of 22 January 2020.

[13] The respondent disputes that it has short paid the arrears, contending, *inter alia,* that it paid an additional amount of R26 000.00 in cash on 6 March 2020 to the

applicant's representative, one 'Mr Steve', which amount it alleges has not been taken into account in the applicant's calculations.

[14] The issue of the computation or quantification of the arrears is not relevant to the present proceedings. Apart from the fact that the respondent's alleged payment of the sum of R26 000.00 is in dispute on the papers (the applicant averring that such amount was not received by it) the applicant is presently seeking to assert its rights to property, and not payment of any outstanding arrears or damages for holding over.

[15] The applicant's entitlement to cancel arose from the respondent's admitted default of its obligations to pay rent by virtue of its acknowledgment that it was in arrears to the tune of R55 000.00 as at 22 January 2020. By that date, the respondent had already been afforded a period of 7 days in which to remedy its default, which, on the respondent's own version, it failed to do. The applicant was therefore contractually entitled to cancel the agreement on 22 January 2020 under the provisions of clause 20 of the agreement. By virtue of the valid termination of the lease, the respondent is by all accounts presently in unlawful occupation of the property.

[16] In view of the fact that this is a commercial eviction, the provisions of the prevention of Illegal Eviction from and Unlawful Occupation of Land act, 19 of 1998 do not apply.[7]

[17] As the undisputed evidence has established that (i) the applicant is the owner of the property; (ii) the agreement in terms of which the respondent occupied the property has been validly cancelled; and (iii) the respondent's continued occupation of the property is unlawful, the applicant has established its entitlement to an eviction order.

[18] Although I have empathy for the learners who attend the school hitherto conducted by the respondent at the applicant's property, and mindful of the fact that, as indicated by the respondent in its papers, it makes payments to the applicant as it receives payment of school fees from parents, I am also heedful of the fact that sympathy is not a basis for deciding disputes, as the Supreme Court of Appeal has been astute to point out on more than one occasion.[8]

[19] In my view, the respondent ought to be given a reasonable period in which to vacate the premises, particularly since an entire school, its staff and learners will inevitably be impacted by the order.

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[7] *Shoprite Checkers Ltd v Jardim* 2004 (1) SA 502 (O) at 505E-507E; *Kanesscho Realtors (Pty) Ltd v Maphumulo and Others and three similar cases* 2006 (5) SA 92 (D) at 94F.

[8] Albeit that the principle was applied within a different context, see: *A M and Another v MEC for Health, Western Cape* (1258/2018) [2020] ZASCA 89 (31 July 2020), para 107; *MEC: Western Cape Department of Social Development v Esau and Another* (379/2019) [2020] ZASCA 103 (16 September 2020), para 46;

[20] The general rule is that costs follow the result. I have not been alerted to any facts or circumstances that would warrant a departure therefrom.

[21] In the result, the following order is granted:

1. The respondent and all those holding title through or under it are ordered to vacate the property situate at 210 Turf Road, corner 2nd Street, La Rochelle, more fully described as Erven 57 & 58, La Rochelle, Registration Division I.R., Gauteng, within 30 (thirty) days of service of this order.

2. In the event that the Respondent does not vacate the property within 30 days of service of this order, the Sheriff of the Court or his lawfully appointed Deputy is authorised and directed to evict the Respondent and all those holding title through or under it from the property.

3. The respondent is to pay the costs of the application.

A MAIER-FRAWLEY
Judge of the High Court
Gauteng Division, Johannesburg

Date of virtual hearing: 1 December 2020

Date of Judgment: 10 December 2020

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 10 December 2020.

For the Applicant:

Adv M. Beckenstrater

Instructed by Vermaak Marshall Wellbeloved Inc Attorneys

For the Respondent:

Mr R. Brits (Attorney)

VR Law Inc Attorneys