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

CASE NO.: 41475/2018

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
29/09/21

In the matter between:

CEZ INVESTMENT (Pty) Ltd

Applicant

And

WYNBERG AUTO BODY (Pty) Ltd

Respondent

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 29 September 2021.

Summary: Urgent application. Eviction from a commercial property. Commercial interest like other interests such as protecting life and liberty may be a ground for urgency. Urgency founded mainly on the offer to lease the property by a third party. The applicant likely to lose the offer to lease if it was to bring the application in ordinary course.

JUDGMENT

Molahlehi J

[1] This judgment provides the reasons for the order made on 12 September 2021 in which the respondent was directed to vacate the commercial premises it occupies in Wynberg, Johannesburg. The order, which reads as follows, was made following the urgent application launched by the applicant:

1. The forms and services provided for in the rules of this court are dispensed with, and accordingly, this matter is heard as one of urgency in accordance with Rule 6(12).
2. The oral lease agreement between the applicant and the respondent relating to the commercial immovable property at [...] Main Pretoria Road, Wynberg, Johannesburg (the premises) is cancelled, and accordingly, the respondent is an illegal occupier of the premises.
3. The respondent and all persons occupying the premises are ordered to vacate the premises within 7 (seven) days of the granting of this order, failing which the Sheriff be duly authorised to evict the respondent from the premises and anyone occupying the premises through the respondent;
4. The Sheriff is authorised to request any person, including members of the South African Police Services, to assist the Sheriff in evicting the respondent from the premises and or anyone occupying the premises through the respondent.
5. The respondent is to pay the costs of this application on the attorney and client scale.

[2] As stated above, the applicant, CEZ Investment (Pty) Ltd, sought an urgent eviction order against the respondent, Wynberg Autobody (Pty) Ltd, from its commercial immovable property at Erf [...] Wynberg, Johannesburg (the property).

[3] The applicant initially based its case on the written lease agreement with the respondent and in terms of which amongst others, the respondent was expected to pay rental in the sum R127 711. 36 per month. The lease agreement commenced on 1 December 2018 and was to expire on 31 May 2019.

[4] The applicant also sought rectification of the lease agreement by replacing the word "without" with the word "with." This issue fell away following the acceptance by the applicant in the alternative that there existed a verbal lease agreement between the parties.

[5] On 12 January 2021, the applicant, through its attorneys, addressed a letter to the respondent in terms of which section 345 of the Companies Act 71 of 2008 demanding payment of the arrear rental in the sum of R1 17513 7.09.

[6] In response to the above letter, the respondent, amongst others, raised the issue about the calculation of the above amount. The respondent contends further in the same letter that it had effected repairs and improvement on the property, which cost R96 000.00, and that a compromise had been reached between the parties in this regard.

[7] On 19 February 2021, the erstwhile attorneys of the respondent addressed an email to the applicant's attorneys wherein, amongst others, a proposal was made that a new lease agreement be concluded between the parties.

[8] Further to the letter from its erstwhile attorneys, Shaheed Dollie attorneys, the respondent on 30 November 2019, advised the applicant that the written lease agreement expired by effluxion of time during January 2020, and after that, the parties entered into an oral lease agreement. It was further stated in the same letter that in terms of the oral agreement, the lease was for a period of five years commencing January 2020, and the rental would remain as was from the expired written lease, and that it would remain constant for the duration of the lease period. The rental would be in

the sum of R1 27 711.36. According to the respondent, the oral agreement also gave consent for the respondent to effect the necessary improvement to the property. The repairs that had been effected at that stage were, according to the respondent at the cost of R1 229 149.00.

[9] The applicant in the founding affidavit refuted the existence of the oral lease agreement and contended that the allegation was untruthful. It, however, abandoned this position and based its case on the alternative position, namely accepting that there existed an oral agreement between the parties.

[10] On 27 May 2021, the applicant addressed a letter demanding payment of the outstanding rental in the sum of R2 277 091.68 as provided in the written lease agreement. The applicant contends that the non-payment of R1 385 925.22 despite the demand constitutes a material breach of the lease agreement.

[11] The respondent disregarded the demand, and accordingly, the applicant cancelled the written lease agreement. However, despite the cancellation, the respondents failed to vacate the property.

[12] The applicant contends in the founding affidavit that it validly cancelled the lease agreement on 12 June 2021, and it further argues in the alternatively that it cancelled the oral agreement.

[13] The applicant avers further in the founding affidavit that on 6 August 2020, it received an offer to lease the property from a third party, Curopax (Pty) Ltd. The offer is to lease the premises from 1 October 2021 for a period of three years. In this regard, the acceptance of the offer is conditional upon the applicant accepting and signing the offer by 31 August 2021. According to the applicant, Curopax advised that it is not prepared to wait beyond 31 August 2021 to finalise the lease agreement.

[14] The respondent opposed the application and contended that the application was not urgent, and if there was urgency, it was self-created as the dispute between the parties arose on 12 January 2021 when the applicant issued a notice in terms of section 345 of the Companies Act.

[15] The respondent further contends that:

- a. on the applicant's version, the issue of eviction arose on 10 June 2021.
- b. in the event the existence of the oral agreement was rejected, it (the respondent) was entitled to remain on the property because it has a lien arising from the improvements effected over the property.

The issues

[16] The two main issues for determination in this matter are:

- a. urgency and whether the respondent has the right to remain in occupation of the property.
- b. The ownership of the property is not in dispute, and it is also not in dispute that the last payment of the rental by the respondent was on 18 March 2021.

[17] As indicated above, the respondent contends that the matter is not urgent as the applicant delayed instituting the proceedings from when the dispute arose. Another point raised by the respondent is that the applicant should have sought an urgent application before seeking the offer to lease from the third party. In support of this contention, the respondent referred to the unpublished judgment in *Ramodutoana Investment (Pty) Ltd v City of Johannesburg Property Company [SOC] Limited and Others*. [ftn1](#)¹

[18] In my view, the facts in the present matter are distinguishable from those in the above case. In that case, there was no offer to lease the property by a third party. In other, words the applicant was not faced with the risk of losing a tenant who was, unlike

¹ [2019/1855] [2019] ZAGPGHC 51 [23 July 2019].

the respondent, willing to pay rental. The other point is that the court in that case noted that the applicant did nothing to address its dispute for a period of over three years.

[19] It is trite that commercial interest, like any other interest, may find urgency given the circumstances of a particular case. This means that the court has the power to hear an application as a matter of urgency to protect the commercial interests of a litigant. In other words, urgency is not limited to protecting liberty or threat to life only. It may include commercial interests.² The court considers the explanation proffered in each case in evaluating urgency and exercising its discretion.

[20] In the circumstances of this case, it is apparent that if the applicant was to wait and launch the application in the normal course as laid down in the rules, it will not be afforded a substantial redress in due course.

[21] The pertinent facts and circumstances of the present matter require that the issue of urgency be weighed in the context involving commercial premises. The recalcitrant tenant is not paying rental nor offering to do so at any stage. The continued non-payment of rent if the respondent is not evicted is likely to affect the value of the property,³ and thus prejudicing the commercial interest of the applicant.

[22] In dealing with a similar situation as that in the present matter concerning urgency in the circumstances where there was an offer to lease the property by a third party, Matojane J, in the unpublished judgment of *Elkam (Pty) Limited v Ferej, Tariku Nure trading as Magnum General Trading, The Occupants of Shop I, Cumberland Court, 9 Pretoria Street, Hillbrow, Johannesburg*,⁴ said:

² *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G.

³ See *Tyaak Properties (Pty) Ltd v Explorer Corporation (Pty) Ltd* 12000/23927) [2000] ZAGPHC 30 (13 November 2000).

⁴ Unpublished in the Gauteng Local Division, Johannesburg case number 10019/2018.

“[18] In the circumstances, I find that the matter is urgent because by the time this application would be heard in the ordinary course the applicant could have lost Chicken Licken as a tenant.”

The same approach was adopted by Adams J, in the unpublished judgement in Silverbalde Investment (Pty) Ltd v Bay Tower Properties 247 (Pty) Ltd Lanoman and Others,⁵ where the court in dealing with urgency said:

“[10] This then brings me to the issue of urgency. The first respondent contends that the applicant's urgent application should be dismissed due to non-compliance with practice directives applicable in this division. Closely linked to this contention is the first respondent's submission that the application should fail for lack of urgency. I do not agree with these submissions for the simple reason that the applicant's case for the eviction of the first respondent is overwhelming. It would not be in the interest of justice not to grant the applicant the eviction order, especially if regard is had to the fact that, according to the uncontested evidence of the applicant that it stands to lose out on a new lease agreement with a new tenant, who has indicated that he would conclude a lease agreement with the applicant provided he be given occupation during January 2018.”

[23] I align myself with the above authorities and thus in the circumstances, I was satisfied that this matter was sufficiently urgent to be enrolled and be heard as an urgent application.

[24] Turning to the merits of the case, it has already been stated that the applicant has a potential tenant to take occupation of the property that the respondent unlawfully occupies. It needs to be emphasised that the last time the respondent paid the rental was in March 2021 and thus is in breach of its contractual obligation.

[25] In my view, considering all the facts and the circumstances of this case, the applicant has made out a case, warranting the eviction of the respondent. The

⁵ Case number: 2017138318.

circumstances also do not favour the suggestion made by the respondent that it be afforded a "period of time" to decommission and remove its machinery. The respondent does not state the time period it requires to prepare the removal of its machinery. There are no discernible reasons why the respondent should be provided with unlimited time to arrange its evacuation of the property. I am, however, inclined to permit the respondent limited time to evacuate the property.

Costs

[26] The applicant has prayed for cost on a punitive scale. In considering the issue of costs, account has to be taken that the respondent is in unlawful occupation of the property and has not been paying rental but then opposes the application when called to vacate the property. The applicant has a result of the respondent's opposition incurred unnecessary costs.

[27] It was for the above reasons that the order quoted above was made.

E Molahlehi
Judge of the High Court,
Gauteng Local Division,
Johannesburg

Representation:

For the Applicant: Adv L Hollander

Instructed by: TWB-Tugendhaft Wapnick Banchetti and Partners

For the Respondent: Adv M Reineke

Instructed by: Rowe Taylor Attorneys.

Date of hearing: 24 August 2021

Date order made: 13 September 2021

Date of the reasons: 29 September 2021

