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REPUBLIC OF SOUTH AFRICA

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

CASE NO: 31036/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

7 September 2022

In the matter between:

UNLOCKED PROPERTIES 18 (PTY) LTD

APPLICANT

And

SIPHOKUHLE MJIKWA

FIRST RESPONDENT

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

SECOND RESPONDENT

ZACHARIA SIPHO MATHABA

THIRD RESPONDENT

**UNLAWFUL OCCUPIERS OF UNIT 303
PALM SPRINGS, 35 GEORGIA CRESCENT
COSMO CITY**

FOURTH RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 7th September 2022

TWALA J

[1] Before this Court, is an opposed application in which the applicant seeks the following orders:

1.1 Ordering that the first respondent and all those persons who reside on the property through or under the first respondent and or reside on the property with his authority, vacate the property known as Unit 303 Palm Springs, 35 Georgia Crescent Street, Cosmo City also known as Portion [....] of Erf [....], Cosmo City (hereinafter referred to as the "*Property*");

1.2 In the event that the first respondent or any of those persons who may, through the first respondent and or with his authority, be residing at the property and or fail to comply with prayer 1 above, the Sheriff is hereby authorised to eject the first respondent and any such persons from the property forthwith;

1.3 In the event that the Sheriff requires the assistance of the South African Police Service or a private security company, that the Sheriff be authorised to use such assistance where necessary;

1.4 In the event that the first respondent and or any person who resides on the property through and under the first respondent reinvades the property, the Sheriff be authorised to immediately execute the eviction order again;

1.5 Directing that the costs of this application be borne by the first respondent on an attorney and client scale

[2] At the commencement of the hearing of this case, the applicant moved an application to join the third respondent in these proceedings which application was not opposed – hence I granted an order that the third respondent be joined in these proceedings. Furthermore, I propose to refer to the first and third respondents as the respondents as it is apparent that they are a family and shall refer to the second respondent as the City where necessary.

[3] The foundational facts to this case are in essence common cause and are briefly as follows: on the 1st of December 2019 the applicant and the respondents concluded a written lease agreement whereby the applicant leased the property to the respondents for a period of twelve months ending on the 30th of November 2020 for the rental amount of R5 650.00 per month. It was a term of the lease agreement that upon termination of the initial lease period the lease agreement will automatically continue on a month – to – month basis. The lease agreement expired on the 30th of November 2020 and no new written lease agreement was concluded between the parties and the respondents remained in occupation of the property with the consent of the applicant and continued to pay their rental amount until they stopped paying in January 2021.

[4] In February and March 2021 the applicant sent some members of its staff to the respondents in an attempt to resolve the issue of the arrear rental but without success. On the 21st of May 2021 the applicant issued a letter of demand to the respondents demanding that they make payment of the arrear rental to remedy the breach within seven (7) days from the date of the letter otherwise the lease agreement would be cancelled. There was no response from the respondents – hence on the 5th of June 2021 the attorneys for the applicant sent a letter to the respondents advising them of the cancellation of the agreement and demanding that they immediately vacate the property.

[5] In essence the respondents' defence is that there was no compliance on the part of the applicant with the provisions of section 5(5) of the Rental Housing Act, 50 of 1999 (*"RHA"*) and clause 6 of the lease agreement in that the applicant has failed to furnish them with a one calendar month notice to vacate the premises. Furthermore, that, since the notice period was only fourteen (14) days instead of one

calendar month, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 is not applicable for they are not in illegal and or unlawful occupation of the property.

[6] Before debating the issues and to put the matters in the proper context, it is apposite at this stage to restate the relevant provision of the Rental Housing Act which provides as follows:

“Provisions pertaining to leases

Section 5.(1)

(5) If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month’s written notice must be given of the intention by either party to terminate the lease.”

[7] Clause 6.1 of the lease agreement provides that upon termination of the initial period, the lease agreement will automatically continue on a month-to-month basis. Furthermore, section 6.3 provides that if the lease continues on a month-to-month basis either party shall be entitled to terminate the lease agreement without reason or penalty at any time, provided that they give the other party a calendar Month’s written notice of such termination. The provisions of clause 6 of the parties lease agreement are in line with the provisions of section 5(5) of the RHA.

[8] However, for the purposes of this discussion it is necessary to consider the provisions of clause 23 of the lease agreement which provides for a breach of the lease agreement by the tenant as follows:

“23.1 In the event of the tenant not paying the rental or any other monies due in terms of this lease agreement on the date upon which such monies are due and payable, or committing any other breach in terms of this lease agreement then;

23.1.1

23.1.2 Should the lease agreement continue on a month-to-month basis in accordance with the provisions of clause 6.1, and the provisions of section 14 of the CPA accordingly not apply to this lease agreement, and the tenant remain in breach of any of the terms of this lease agreement for a period of 7 (Seven) calendar days after dispatch of a written notice calling upon the tenant to remedy such breach, then the landlord shall be entitled, in his sole discretion and without prejudice to any other rights that he may have in law, to either claim specific performance in terms of this lease agreement, or to cancel this lease agreement forthwith and without further notice claim all arrear rental and or any other damages from the tenant.”

[9] It is plain that section 5(5) of the RHA is triggered and comes into play immediately the periodic lease is terminated and the tenant remains in occupation of the property with the tacit or express consent of the landlord. I disagree with the applicant's contentions that, where the lease agreement containing a forfeiture clause is terminated by the landlord due to the lessee's failure to pay the rent, section 5(5) of the RHA does not find application. In casu, although the lease agreement made provision that when the initial lease period expires the lease will automatically continue on a month-to-month basis and incorporated in its clause 6.1 the provisions of section 5(5) of the RHA by stating that either party shall be entitled to terminate the lease agreement without reason or penalty at any time, provided that they give the other party a calendar Month's written notice of such termination.

[10] Counsel for the applicant referred the Court to the case of *Magic Vending (Pty) Ltd v Nzeba Tambwe and Others (19432/2019) [2020] ZAWCHC 175; 2021 (2) SA 512 (WCC) (7 Decmber 2020)* in which the Court discussed the provisions of section 5(5) of the RHA as follows:

“Paragraph 14: If on the expiration of the lease the tenant remains in the dwelling with the express or tact consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a

periodic lease, on the same terms and conditions as the expired lease, except that at least one month written notice must be given of the intention by the either party to terminate the lease.

It is plain that the provision is applicable to the termination of a periodic lease that is deemed to have come into being when the lessee remains on in the property with the express or tacit consent of the lessor after the expiration of a pre-existing fixed term lease. It is not applicable in a situation in which a lease containing a forfeiture clause is terminated by the landlord by reason of the lessee's failure to pay the rent. The judgment in Luanga, which held that the one month's notice referred to in s5(5) denoted one calendar months' notice, also has no bearing on a landlord's right to terminate a lease on account of a material breach of contract by the lessee."

[11] The facts of the above case are distinguishable from the present case in that Mr Tambwe had been in occupation of the premises for many years, originally in terms of an oral agreement and later entered into a written lease agreement that operated on a month to month basis. In the present case, at the expiration of the initial period of lease, the parties did not enter into a new or a written lease agreement – hence the provisions of s5(5) of the RHA came into play and entitled either of the parties to a calendar month written notice if the one party intended to terminate the lease.

[12] It is my considered view that it is not competent for the applicant to rely on the provisions of the fixed term lease agreement which was terminated by the effluxion of time and the respondents remained in occupation of the property on the tacit or express consent of the applicant without entering into a new written lease agreement. Although the respondents remained in occupation of the property under the same terms and conditions of the expired lease, the provisions of s5(5) takes precedent since there is not written new lease agreement concluded between the parties. The forfeiture clause the applicant wants to rely upon would only have been effective if it was contained in a new written lease agreement which is the case with Tambwe case.

[13] I therefore conclude that the applicant has failed to meet the requirements of s5(5) of the RHA and that is fatal to the applicant's case. The inescapable conclusion is therefore that the respondents were not in illegal or unlawful occupation of the property since the applicant has failed to furnish a proper notice of termination of the lease in terms of s5(5) of the RHA.

[14] The respondents appeared in person in this case. However, they submitted that they have spent a lot of money in their engagement of counsel to assist them in the preparation of their papers. I am not persuaded by this submission for throughout the proceedings the exchange of papers has been between the applicant and the respondents. At no stage was an attorney engaged to represent the respondents. Furthermore, the respondents did not demonstrate that they incurred any out of pocket costs which they were in fact entitled to be reimbursed if proven. I am therefore of the view that an order that each party pays its own costs would be appropriate in the circumstances.

[15] In the circumstances, the following order is made:

1. The application is dismissed
2. Each party to pay its own costs.

TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Date of Hearing: 29th August 2022

Date of Judgment: 7th September 2022

For the Applicant: Advocate JW Kiarie

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