



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

CASE NO: 2021/6114

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

10/10/2022
DATE

J Moorcroft
SIGNATURE

In the matter between:

ITALITE INVESTMENTS (PTY) LTD

Applicant

and

DZUNI PROPERTIES CC

First Respondent

NGOBENI, CHARLES

Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Eviction – commercial lease – lease expired – agreement of lease cancelled – applicant entitled to eviction order

Order

[1] In this matter I make the following order:

1. *The application brought by the respondents for postponement of the main application is dismissed;*
2. *The first respondent and all who or that occupy through or with the first respondent are evicted from the premises at Shop 48, Makhado Crossing, corner Highway and Sibase Road, Limpopo, and are ordered to vacate the premises before or on 18 October 2022;*
3. *In the event of the first respondent failing to comply with the order the Sheriff or Deputy Sheriff of the High Court with jurisdiction over Sibase Road, Limpopo, is authorised and directed to evict the first respondent and all who or that occupy through or with the first respondent from the aforesaid premises;*
4. *The respondents are ordered to pay the costs of the application for postponement and of the main application, jointly and severally the one paying the other to be absolved, on the scale as between attorney and client.*

[2] The reasons for the order follow below.

INTRODUCTION

[3] This is an application for the eviction of the first respondent from commercial premises leased by the first respondent from the applicant. The second respondent is a member of the first respondent and alleged to be liable to the applicant in terms of a written deed of suretyship.¹

¹ Caselines 001-89

APPLICATION FOR POSTPONEMENT

[4] When the matter was called on 4 October 2022 the second respondent appeared in person and requested a postponement for a day or two, for him to appoint new attorneys to represent the respondents. He advised that he was not satisfied with advice from the attorneys who assisted him to prepare the answering affidavit and heads of argument. The matter was then stood down until the 5th.

[5] On the afternoon of 4 October 2022 the respondents launched a postponement application. It was uploaded to Caselines on the 4th but was however not served on the applicant. The applicant elected not to file affidavits and the application was argued on the 5th.

[6] The deponent to the founding affidavit is the attorney who appeared for the respondents but his name has been left out. His identity appears from the context. This is an oversight but I understand that the affidavit was prepared under time constraints.

[7] The deponent explains that he first consulted with the second respondent on 30 September 2022.

[8] No new defences are raised in the affidavit. The affidavit does not deal with the fact that the first respondent was still in occupation of the leased premises even though the lease expired in January 2022, and is also silent as to why the respondent delayed the appointment of attorneys until the day before the scheduled hearing date under circumstances where the set-down was served on 28 July 2022 and the application proper was initiated in February 2021. The applicant's heads of argument became available on 5 August 2021 and the respondents filed heads in May 2022.

[9] After hearing argument on the merits I dismissed the application for a postponement and argument on the merits followed.

THE MERITS

[10] The applicant and the first respondent entered into a written agreement of lease in March 2017.² In terms of the agreement the applicant as lessor let commercial premises situate at Shop No. 48, Makhado Crossing, corner Highway and Sibase Road, Limpopo, to the first respondent. The lease was for a period of five years terminating on 31 January 2022.³ The lease provided for what appears to be an option to renew for a further five years on condition that the lessee gave notice of its intention six months before expiry of the initial lease period, and provided that the lessee was not in breach of the agreement. The option was not exercised.

[11] The agreement also provided, inter alia,

11.1 that non-payment of rent and other charges shall constitute a material breach,⁴

11.2 that all amounts payable shall be paid on the first day of the month,⁵

11.3 that the landlord shall be entitled to cancel the lease in the event of a

² Caselines 001-25

³ Clauses 3, 17 and 21 (Caselines 001-37). The application was of course brought before the termination of the lease by effluxion of time

⁴ Clause 4.8 (Caselines 001-40)

⁵ Clause 4.4 (Caselines 001-39)

failure to pay rent or any other amount on due date,⁶

11.4 that the tenant shall not have any claim against the landlord arising out of *vis maior* or *casus fortuitus*,⁷

11.5 for a *prima facie* proof certificate of amounts due;⁸

11.6 for payment of costs on the attorney and client scale.⁹

[12] There are two pending actions in the magistrates' court¹⁰ for payment of R162 832.90 and R154 198.84 in respect of arrear rental and these amounts are in dispute. The dispute need not be resolved in this application.

[13] The applicant as landlord cancelled the lease in the second of these actions and again gave notice of cancellation in the founding affidavit in this application.¹¹ It is common cause that the first respondent is in occupation of the premises and refuses to vacate.

[14] In the answering affidavit the respondents deny that the account was in arrears and rely on payment of arrears made on 11 January, 9 March and 21 April 2021.¹² It is therefore apparent that on any possible version amounts were paid late, that the account was in arrears when the application was launched, and that the applicant as landlord was entitled to cancel the lease. No payments were received during the period

⁶ Clause 21 (Caselines 001-58)

⁷ Clause 20.6 (Caselines 001-57)

⁸ Clause 4.12 (Caselines 001-40, 114)

⁹ Clause 26.5 (Caselines 001-69)

¹⁰ Annexure D and E to founding affidavit (Caselines 001-100 and 001-111), and

¹¹ Paragraphs 30 and 32 of answering affidavit (Caselines 001-20 and 001-21)

¹² Paragraphs 7 to 9 of answering affidavit (Caselines 006-3)

February to June 2020.¹³

[15] The respondents say that they were involved with the landlord in Covid19 discussions but nothing materialised.¹⁴ The landlord did not incur or commit to any additional obligations.

CONCLUSION

[16] I conclude that the first respondent's right to possess has been terminated¹⁵ and that the applicant is entitled to an eviction order.

[17] I therefore make the order set out in paragraph 1 above.



J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their

¹³ Paragraph 2.4 of replying affidavit (Caselines 007-5)

¹⁴ Answering affidavit paragraph 18 (Caselines 006-3)

¹⁵ Compare *Boshoff v Union Government* 1932 TPD 345 and *Myaka v Havemann* 1948 (3) SA 457 (A)

legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **10 OCTOBER 2022**

COUNSEL FOR THE APPLICANT: W WANNENBURG

INSTRUCTED BY: FOURIE VAN PLETZEN INC ATTORNEYS

ATTORNEY FOR RESPONDENTS: N RALIKHUVHANA

INSTRUCTED BY: KATLEGO RALIKHUVHANA MOKGOLA
ATTORNEYS

DATE OF THE HEARING: 4 & 5 OCTOBER 2022

DATE OF ORDER: 10 OCTOBER 2022

DATE OF JUDGMENT: 10 OCTOBER 2022