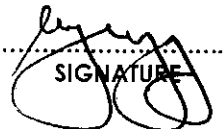




IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>28/02/14</u> DATE	 SIGNATURE

CASE NO: 7392/13

In the matter between:

28/2/2014

MALEWA COMMUNAL PROPERTY ASSOCIATION

1st APPLICANT

**MINISTER OF RURAL DEVELOPMENT
& LAND REFORM**

2ND APPLICANT

**COMMISSION ON RESTITUTION OF
LAND RIGHTS**

3RD APPLICANT

And

KHOMBINDLEA TRADING 1 CC

RESPONDENT

JUDGMENT

KGANYAGO AJ

- [1] In this application the applicants seek the following relief:
- 1.1. That the lease agreement concluded between the second applicant and the respondent on 01 November 2011 (annexure “MW 3”) be and is hereby cancelled;
 - 1.2. That the respondent be and is hereby ordered to vacate the farm being portion 8 of the farm Mooifontein 292 JT, situated in Nelspruit Mpumalanga within thirty (30) days of receipt of this order;
 - 1.3. That the respondent be ordered to pay the costs of this application;
 - 1.4. That the applicants be granted such further and/or alternative relief as to the above Honourable Court may deem meet.
- [2] The respondent has filed and served his answering affidavit out of time. They have applied for condonation of late filing of their papers. I am satisfied with their explanation and condonation for late filing of their papers is accordingly granted.
- [3] On the 1st Novemebr 2010, the respondent and the second applicant entered into a written lease agreement. In terms of the said lease agreement, the respondent leased portion 8 of the farm Mooifontein 292 (“the leased property”) for a period of five years which is back dated from the 02 July 2010 until the 01 July 2015.
- [4] It was a material term of the agreement that the rental in the sum of R30 000. 00 per annum shall be payable in areas on or before the

7th day of each year. It was also the material term of the agreement that interest will be charged should the respondent fail to pay the rental on time. The accounting officer of the lessor shall prepare a certificate which will be prima facie proof of the outstanding interest.

- [5] The first applicant has lodged a land claim on the leased property. The land claim was successful and the property which included the leased property was transferred into the names of the first applicant after the second respondent has entered into a lease agreement with the respondent.
- [6] At some point in time the respondent was in arrears with his rental payments. The second applicant wrote a letter to the respondent requesting them to rectify the situation. The respondent paid the capital amount, but refused to pay the interest which the applicant has calculated to amount of R8 268, 75.
- [7] The respondent requested a breakdown of how the applicants arrived at the amount of R8 268, 75. The respondent paid that amount into the trust account of his attorney and insisted on being issued with a certificate of interest. Instead of furnishing the respondent with the certificate of interest, the applicants launched the present application.
- [8] The applicants are contending that the respondent is in breach of their lease agreement, and that they are therefore, entitled to cancel the agreement and evict the respondent.

- [9] On the 3rd September 2012, the second applicant wrote a letter to the respondent informing it that the lease agreement has been cancelled and that it must vacate the property immediately.
- [10] Counsel for the applicants have also relied on Section 11 (7) of the Restitution of Land Rights Act no. 22 of 1994.
- [11] The respondent denies that it is in breach of the lease agreement. It is the contention of the respondent that it is entitled to ask for a breakdown of how the applicant arrived at the amount of R8 268,75 which was the alleged outstanding interest on the arrear rentals.
- [12] The applicant will be entitled to cancel the lease agreement if the respondent was in breach of terms of the lease agreement. Clause 18 of the lease agreement contains the procedure which the lessor should follow before the lease agreement is cancelled. The lessee must be given 14 days' notice to rectify the breach.
- [13] The first letter informing the respondent that the lease agreement had been cancelled was written on the 03 September 2012. Clause 3 of the letter reads as follows:
- "We record that Malewu CPA who are the Restitution beneficiaries of the property which was acquired under the Restitution Act 1994 had clearly stated that they do not want a lease agreement against their property and had wanted immediate occupation of the land."*
- [14] In my view, the reasons stated in the letter of 3rd September 2012 have nothing to do with the alleged breach of the lease agreement.

If that is the reason for the cancellation, then applicants cannot rely on the breach of the lease agreement by the respondent. A different process has to be followed.

- [15] The second letter was written by the applicant's attorneys on the 3rd December 2012 giving the respondent 14 days to remedy the breach. The respondent paid the outstanding arrears before the expiry of the 14 days period, but refused to pay the interest as they wanted the breakdown of how the interest was calculated. Despite the arrears having been paid, the applicants proceeded with their application for the cancellation of the lease agreement.
- [16] The notice of the 3rd December 2012, was a demand calling upon the respondent to comply within a specified time, failing which the contract will be cancelled. The respondent has paid the outstanding arrears in full and paid the disputed calculation of interest into his attorney's trust account. That in my view, was an indication that the respondent was willing to pay and all that they were requesting was a breakdown of the interest. In terms of clause 5.2 of the lease agreement, the lessor was supposed to furnish the respondent with a certificate of interest; however, the applicants have failed to do so. In my view, the request of the respondent was reasonable taking into consideration that the big debt was already settled, and the applicant was unreasonable in refusing to adhere to the respondent's request. In terms of clause 5.2 of the lease agreement, the applicant was bound to furnish the respondent with a certificate of interest.

- [17] In the case of *Transnet Limited v Tatisa Tebeka 7 others* (35/12) [2012] ZASCA 197 at paragraph 23, the court referred to the case of *West Rand Estate Ltd v New Zealand Insurance Co Ltd* with approval, where the court said “*that we must bear in mind that a defendant cannot be said to be mora unless he knows the nature of his duty or obligation, that is to say when and how much he has to pay*”.
- [18] The respondent wanted to have a breakdown of how the applicants have arrived at the amount of R8 268, 75. The applicants have failed to furnish the respondent with that breakdown. Therefore, in my view, the applicant cannot hold the respondent to be in breach of the lease agreement until such time that they have furnished the respondent with the breakdown of the interest or a certificate of interest.
- [19] The applicants in the alternative are arguing that the lease agreement was concluded contrary to the provisions of Section 11 (7) of the Restitution of Land Rights Act 22 of 1994, and therefore, is illegal and invalid. Section 11 (7) reads as follows:
- “Once a notice has been published in respect of any land-*
- (a) no person may in an improper manner obstruct the passage of the claim;*
 - (aA) no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so, and, where such notice was not given in respect of-*
- (i) any sale, exchange, donation, lease, subdivision or rezoning of land and the Court is satisfied that such sale, exchange, donation, lease, subdivision or rezoning was not done in good faith, the*

Court may set aside such sale, exchange, donation, lease, subdivision or rezoning or grant any other order it deems fit;

(ii) any development of land and the Court is satisfied that such development was not done in good faith, the court may grant any order it deems fit;

(b) no claimant who occupied the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner;

(c) no person shall in any manner whatsoever remove or cause to be removed, destroy or cause to be destroyed or damage or cause to be damaged, any improvements upon the land without the written authority of the Chief Land Claims Commissioner;

(d) no claimant or other person may enter upon and occupy the land without the permission of the owner or lawful occupier."

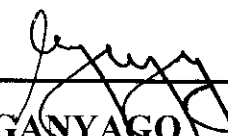
[20] The respondent has occupied the property with the consent of the second applicant who was the owner of the property at the time. By entering into the lease agreement with the respondent, the second applicant wanted to preserve the value of the property so that the beneficiaries must find it still in good condition. That in my view, was done in good faith.

[21] Under the circumstances in my view, I don't find any grounds to terminate the lease agreement which the respondent has signed on the 1st November 2010. Therefore, there is no reason to evict the respondent.

[22] In the result I make the following order:

22.1 The applicant's application is dismissed.

22.2 The applicants are ordered to pay the costs of the respondent jointly and severally the one paying the others to be absolved.



M F KGANYAGO

ACTING JUDGE OF THE HIGH COURT