

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 23803/2014

In the matter between:

IMERAAN MUNNIK

29/8/2014
Applicant

and

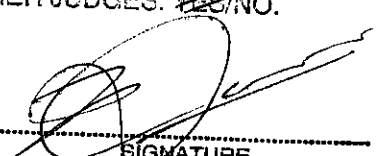
LEON ANTONIHO SAMUEL KOERT

Respondent

JUDGMENT

DAVIS, AJ

INTRODUCTION:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED: 1	
28/8/2014	
DATE	SIGNATURE

- [1] In this application the Applicant seeks a declaratory order regarding the cancellation of a lease agreement between the parties, eviction of the Respondent from a commercial property and an order for payment for the holding over period of the leased premises as well as costs.

FACTUAL MATRIX:

- [2] The facts are largely common cause and are the following:

- 2.1 The parties have entered into a written lease agreement with each other for premises principally known as Eureka Butchery situated in Eldoradopark X5, Johannesburg. The written agreement was annexed to the Founding Affidavit and the period of lease covered therein was from 1 December 2003 until 30 November 2004.
- 2.2 The rent payable during the aforesaid period was R4 500,00 per month.
- 2.3 The agreement otherwise contained the customary terms to be found in a lease of business premises.
- 2.4 After the expiry of the lease period the Respondent remained in the premises and the lease agreement continued on a month-to-month basis and the rental payable escalated on an annual basis.
- 2.5 During October 2013 and at the instance of the Applicant, he and the Respondent discussed the drafting of a new lease agreement as well as an increase in the monthly rental amount.

- 2.6 An increased deposit in the amount of R11 300,00 as well as an increased monthly rental for the period of 1 November 2013 to 31 October 2014 were proposed by the Applicant.
- 2.7 The Respondent paid the increased deposit amount of R11 300,00 on 2 November 2013.
- 2.8 The newly drafted lease agreement was never signed by the Respondent and the parties could not reach an agreement on the increased rental.
- 2.9 On 30 November 2013 the Applicant hand-delivered to the Respondent a letter of cancellation and gave the Respondent notice to vacate the premises by no later than 16:00 on 31 December 2013. Despite further attempts to communicate with each other, no new lease agreement materialised and the Applicant's termination notice was followed up by a letter from his attorney to the Respondent personally on 11 December 2013 in terms whereof the Applicant's notice of cancellation and demand for eviction was reiterated.
- 2.10 Attempts to reach a new agreement, *inter alia* via round-table meetings took place until 12 March 2014 whereupon the

Applicant's attorney advised as follows, expressing some frustration:

"Bogemelde aangeleentheid, ons onbeantwoorde skrywe van 6 Maart 2014 asook die daaropvolgende telefoongesprek tussen skrywer en u Mnr Olckers op die 12de Maart 2014 het betrekking.

Tydens die telefoongesprek het skrywer u Mnr Olckers spesifiek gevra wanneer u kliënt beplan om die perseel te verlaat aangesien ons geen antwoord op ons skrywe ontvang het nie en is die aanname dus gemaak dat die terme soos uiteengesit in ons skrywe van 6 Maart 2014 nie vir u kliënt aanvaarbaar was nie.

Weereens het u Mnr Olckers nie geweet van enige skrywe wat ons deurgestuur het nie en het ons aan Mnr Olckers aangedui dat ons skrywe, wat 'n antwoord was op u skrywe van 28 Februarie 2014 reeds aan u deurgestuur was op 6 Maart 2014 om 12:32.

Ons herinner u aan die vorige geleentheid waar die kontrak aan u kantore deurgestuur is vir deurlees daarvan voordat die ronde-tafel samesprekings by u kantore geskeduleer was en dat nie u of u kliënt enigsins na die kontrak gekyk het nie.

Ons herinner u ook aan die skrywe vanaf ons kantore aan u kantore op 25ste Februarie 2014 waarin bevestig is dat die ronde-tafel samesprekings weereens by ons kantore gereël was vir die 3de Maart 2014 om 14:00. Van hierdie skrywe het u ook geen kennis gehad nie.

Ons kliënt was by ons kantore gewees vir die ronde-tafel samesprekings en het hy al die pad verniet gekom aangesien nie u of u kliënt die ordentlikheid gehad het om ons kantore te skakel en te bevestig dat die ronde-tafel samesprekings nie meer voortgaan nie. Tydens die gesprek op die 12de Maart het u Mnr Olckers toe aan skrywer meegedeel dat aangesien u kliënt moet trek, moet ons kliënt u kliënt maar 3 maande tyd gee om die perseel te verlaat.

Die enigste aspek uitstaande tussen die partye was die kwessie rondom die bedrag huur en dat u kliënt wou beding vir 'n verminderde bedrag nieteenstaande die feit dat die bedrag reeds deur hom aanvaar was sover terug as Oktober 2013 en het hy volgens u en volgens u kliënt maandeliks die gelde in u trustrekening inbetaal hangende die afhandeling van die ondertekening van die kontrak waarna die gelde aan ons kliënt oorbetaal sal word.

Ons plaas dus op rekord dat daar geen ander terme soos deur ons voorgestel in ons kontrak in dispuut is nie en dat dit duidelik is dat u kliënt net hierdie forum en die

geleentheid probeer gebruik om ons kliënt onder druk te plaas om 'n verminderde bedrag te aanvaar.

U kliënt speel speletjies en dit is ons instruksies om onmiddellik voort te gaan met die bring van 'n dringende aansoek vir die uitsetting van u kliënt ..."

- [3] Hereafter the Applicants' application was launched, initially on an urgent basis, Eventually the matter came before me on the ordinary opposed motion court roll on 25 August 2014.

DISPUTE:

- [4] The Respondents' argument before me proceeded on the following basis (and I quote from the Heads of Argument of Mr Kruger who appeared on behalf of the Respondent):

- “1. *As the Applicant points out in his Heads of Argument, the facts of this matter is (sic) mostly common cause.*
2. *The Respondent states that he is quite willing to enter into a lease agreement provided that the terms of the lease agreement are not rammed down his throat.*
3. *The Respondent however raises one important issue, which the Applicant fails to answer satisfactorily. He is*

not the owner of the property that he has been leasing out to the Respondent for the past 10 years.

4. *The Respondent raises the issue under the heading 'lack of locus standi' on p. 50 of the opposing affidavit. He states that it is quite uncertain that the Applicant was ever the title holder or owner of the lease (sic) property. The Respondent shows with clear certainty that the property is not registered in the name of the Applicant, but that it is in fact registered in the name of the Gauteng Provincial Housing Advisory Board. When the Respondent asked the Applicant for proof of ownership, the Applicant relies on a will of his father to show his ownership. However, he then confirms that the administration of the estate of his father has not become finalised and that the executor of the estate is still busy therewith. The Applicant cannot even go as far as to show to any confirmatory documentation from any Gauteng Provincial Department regarding to the alleged sale of the property.*

5. *There is no proof that the father was the owner of the property. If he was not the owner, he was not able to transfer any rights to the building to the Applicant in accordance with the rule *nemo plus juris ad alium transfere potest quam ipse haberet.*"*

[5] The Respondent also produced extracts from the Deed Registration System, Johannesburg which indicated that Erf No. 4085 and Erf

4089 of the Eldoradopark X5 Township are registered in the name of the Gauteng Provincial Housing Advisory Board. The Respondent also produced a Title Deed to this effect. It appears that the leased property is either situated on Portion 8 of Erf 4089 or constitutes Shop 8 in a building on Erf 4085 Eldoradopark. The full and correct property description is not decisive of the matter as the parties are *ad idem* which premises they refer to, namely the shop in which the Eureka Butchery is conducted in Eldoradopark X5.

[6] The Applicant could not in reply refute the allegations regarding ownership raised by the Respondent. In turn, the Applicant relied on a last will and testament of his late father, Solomon Munnik, the relevant portion which reads as follows:

"3. *I hereby bequeath my estate, movable and immovable, as follows:*

3.1 *My butchery known as Eureka Butchery, together with the entire contents thereof, including all fixtures, fittings and equipment and the property on which it is situated namely Portion 8 of Erf 4089 Eldoradopark X5 measuring 264 square metres, I leave to my son Imeraam Munnik, insofar as it may be necessary. I declare that Imeraam Munnik has paid me the sum of R58 000,00 in*

respect of the butchery and the abovementioned erf ...”

[7] The Applicant then further alleges that the transfer of the property has taken some time due to difficulties experienced with the local authority regarding rezoning thereof.

[8] Despite his contentions to the contrary, on the papers before me, it is clear that the Applicant is not the owner of the leased property.

[9] The matter does not end there however. It is trite that a landlord claiming eviction need not allege and prove any title to the property from which the occupant is to be evicted.

See: the summary of the position in **Harms, Amler's Precedents of Pleadings**, 7th. Ed., under the title "*Eviction or Ejection*".

[10] For the above supposition, the learned author relies on **Ebrahim v Pretoria Stadsraad** 1980(4) SA 10 (T), being a decision of a Full Court of this division who confirmed the abovementioned principle, *inter alia* in the following fashion (at 14A-D):

"In die onderhawige geval blyk dit dat die Respondent se reg om die Appellant uit te sit, korrek geformuleer is in die

volgende passasie van die uitspraak te 196C: [being a reference to the judgment in the court a quo reported at 1979(4)SA 193(T)].

"n Bewering dat 'n persoon die verhuurder van 'n saak is, impliseer myns insiens dat hy besit en besitsreg van die saak gehad het en dat hy vrywillig daardie reg tydelik aan 'n ander kontraktueel oorgedra het. 'n Verdere bewering dat die huurkontrak beëindig is, hou na my mening verder in dat die beperking wat die huurkontrak op die verhuurder se bevoegdhede geplaas het, verdwyn het en dat sy regte weer ten volle in hom setel. Dit vorm, as dit bewys word, 'n voldoende skuldoorsaak om 'n persoon van die eiendom te laat uitsit, tensy laasgenoemde persoon 'n sterker reg beweer en bewys.'

Afgesien van die voorgaande benadering, blyk dit dat die wel erkende beginsel van toepassing is, naamlik dat behalwe waar hy deur 'n geregtelike proses gedwing word om die huurgelde aan 'n derde te betaal of waar hy reeds uitgesit is, die huurder nie die verhuurder se titel kan betwis nie. (Kyk Voet 19.2.23 (Gane se vertaling Band 3 te 447); ...Cooper, The South African Law of Landlord and Tenant te 25 – 26, Kerr, The Law of Lease te 5 – 9)." (Reference by counsel to the newer edition of the work of the learned author Cooper, did not detract from or contradict the stated position).

- [11] The other authority relied on by the learned author Harms, namely **Boompriet Investments (Pty) Ltd v Paardekraal Concession**

Store (Pty) Ltd 1990(1) SA 347 (A) also confirms the position, in the following terms (at 351H-J):

"It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property."

[12] It appears from the aforementioned judgment further that the lessee's only defence could be if he had acquired a separate independent right to occupy from a person with a stronger right than that of the Applicant.

[13] As I read the Respondent's papers, the Respondent did not even go as far as the lessee in the **Boompriet**-matter, namely to the extent to allege that the Applicant as landlord had no right to lease out the premises. I read his affidavit to object only against the Applicant's lack of ownership and based thereon, denied the Applicant's *locus standi*. Mr Kruger on behalf of the Respondent sought to convince me otherwise when this issue was canvassed in the debate by referring to an e-mail from the Respondent's attorneys dated 28 February 2014 which contained the following sentence:

"We have received your reply to our client's request and it is my instructions that our clients herein is reserved (sic) and further that he is in good faith however (sic) needs clarity as proof of ownership and/or any legal nexus between your client and the said property."

- [14] Whilst it is correct that the "nexus" which the Applicant sought to produce in reply does not go as far as ownership as he contended, it does establish that he had purchased the butchery from his father and thereafter had inherited it.
- [15] Insofar as the Respondent's denial of the right of the Applicant to lease out the premises may go further than the limited issue of ownership (contrary to what I understood from Mr Kruger's Heads of Argument which I had quoted previously), and insofar even as such an objection may be permissible in terms of the case law which I have quoted, then there is still an absence of any claim of an independent stronger right by the Respondent to occupy the premises. Further, on a balance of probabilities, I also find that the Applicant had been entitled to act as landlord and remained so entitled. I am fortified in this view by the fact that his father clearly had conducted the Eureka Butchery on the property, the Applicant had then purchased the butchery from his father and continued to conduct the business on the same property whereafter he had

leased the butchery "*situated on*" the property to the Respondent for a period of 10 years without there being any indication on the papers that any other person, let alone the registered owner or the Respondent himself made any claim to any rights to the property or to have disputed the Applicant's right to act as landlord. Insofar as the property may have been and may still be registered in the name of the Gauteng Provincial Housing Advisory Board, it had clearly for a period of 10 years acquiesced in the Applicant's leasing out of the property and there is no indication on the papers that this position has changed.

[16] I therefore find that the Applicant had leased the property in question to the Respondent and that the Applicant had validly cancelled the month-to-month lease agreement which existed between the parties as he was entitled to do. It follows that the Respondent should be evicted from the property and that the Applicant is entitled to damages suffered as a result of the holding over.

[17] The amount claimed for holding over has been calculated by the Applicant at the rate of the increased monthly rental. I debated this mode of calculation with counsel and after such debate I am of the view that it is incorrect to award the Applicant damages on an amount which is in dispute. The last rental payable prior to the

Applicant's insistence on a new lease agreement and increased rental constituted the last fair monthly rental for the property in respect of which the parties were still in agreement. This amount was R1 070,00 per month.

[18] The issues regarding the returns of the previous deposit of R5 000,00 and the later increased deposit of R11 300,00 are issues which the parties must deal with subsequent to the return of the premises having regard to the normal principles applicable to the state of such return and the repayment of deposits. I express no view thereon.

[19] In the Notice of Motion the Applicant claimed costs on the scale as between attorney and client but I find no reason to punish the Respondent with an increased scale of costs. Costs should however in this matter still follow the event.

[20] In the premises I make the following order:

1. The Respondent is ordered to vacate the property known as the Eureka Butchery situated in Eldoradopark X5, Johannesburg by no later than 30 September 2014;

2. In the event that the Respondent does not adhere to the previous order, the Sheriff of this Court with the necessary jurisdiction is ordered and authorised to immediately thereafter evict the Respondent from the said premises;
3. Judgment is granted against the Respondent for payment of the amount of R10 170,00 per month calculated from 1 December 2013 together with interest thereon at the rate of 15,5% per annum calculated on the amount due at the end of each month until 30 July 2014 and thereafter at the rate of 9% per annum until full payment thereof.
4. The Respondent is ordered to pay the costs of the application.



N DAVIS
ACTING JUDGE OF THE HIGH COURT