IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 19002/20

Coram: **Montzinger AJ**

Hearing: **30 November 2021**

Judgement: **6 December 2021**

In the matter between:

M V ANDRE BUILDER JOINER CC Applicant

and

TAVIA NORDIEN Respondent

JUDGEMENT DELIVERED ELECTRONICALLY ON 6 DECEMBER 2021

MONTZINGER AJ:

[1] This matter involves a commercial eviction.

[2] The applicant seeks an order confirming the cancellation of lease agreements and the ejectment of the respondent from the commercial premises situated at 10 Marine Circle, Milnerton ("the premises").

[3] The respondent opposes the application on various grounds. The dilatory grounds are: (1) opposition to the condonation for the late filing of the applicant's replying affidavit, (2) the wrong forum (i.e. either magistrate's court or arbitration); and (3) security for costs.

[4] On the merits the respondent contends that: (a) the lack of authority of the deponent and an empowering resolution to institute the proceedings by the applicant, (b) the lease agreements were not correctly cancelled, (c) a supervening impossibility[1], and (d) that the respondent exercises a lien over the premises for improvements.

[5] This Court is satisfied that the applicant has made out a case for the relief it seeks. In exercising its discretion this Court finds that it would be fair and reasonable in the circumstances of this case that the respondent be provided with an opportunity until 31 January 2022 to vacate the premises. An order in the aforementioned terms appears at the end of this judgment.

CONTEXTUALIZING THE DISPUTE

[6] On October 6, 2017 the applicant and the respondent entered into a commercial lease agreement in respect of portions 2, 3, and 3A of the Milnerton

[1] By claiming that as a result of the Covid 19 pandemic and the resultant lockdown regulations that came into effect on March 2020 the business of the respondent was unable to generate sufficient income to pay the monthly rental and service charges.

premises. The parties concluded a further lease agreement on five April 2018 for potion 4A of the same premises.

[7] The terms of these agreements are identical and contain the traditional clauses regulating the relationship between a lessor and lessee in a commercial lease setting. In essence the respective agreements would run, at the agreed rental amount, from the date of their respective conclusion until both terminated on 30 November 2020.

[8] It is not in dispute that the respondent has failed to make the monthly rental payments since April 2020. At the time of the hearing of this application is still in default with its monthly rental obligations. By December 2020 the outstanding amount was R 708 418.02[2]. The respondent still occupies the premises.

[9] On 15 and 17 April 2020 the applicant demanded, in writing, that the respondent cures the breach as a result of its non-payment. These notices did not have the desired effect. On 12 June 2020 the applicant, through its attorney, cancelled the agreement.

[10] During September 2020 the respondent, relying on a renewal option in the lease agreements[3] proposed to renew the lease agreements for a further 3 years. This was followed by a settlement offer on 17 November 2020. All of these interactions culminated in another notice by the applicant, on 4 December 2020, requesting the respondent to vacate the premises.

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[2] This amount had increased since then at a rate of approximately R 60 000.00 p/month.
[3] Clause 50.1 – 50.8 allow for the option to be exercised 120 days before the commencement of the renewal period.

THE GROUNDS OF OPPOSITION

[11] Various grounds were raised in opposition.

Condonation of the replying affidavit

[12] The applicant delivered its replying affidavit out of time. An application was filed seeking to condone the non-compliance. Condonation was opposed on the basis that the late delivery denies the respondent the opportunity to lead further evidence in response to the issues raised in the replying affidavit. Especially in relation to the issue of authority. Considering my finding below on the issue of the deponent's authority and the applicant's resolution to authorise the institution of the proceedings, there is no discernible prejudice for the respondent if I condone the late delivery. I ordered condonation of the late delivery.

The wrong forum or alternative dispute resolution

[13] Both lease agreements provide in clauses 30 and 31 for a choice of process and dispute resolution. The respondent relies on these clauses to oust this court's jurisdiction.

[14] The clauses read as follows:

> **30. CHOICE OF PROCESS**
>
> Should the tenant breach this agreement then the landlord shall choose whether the dispute is to be brought in the Magistrate's Court or by way of arbitration as set out in clause 31 below. If the landlord chooses the Magistrate's Court, then the parties are

taken to have consented to the jurisdiction of the Magistrate's Court for any action in terms of or relating to this lease.

31. DISPUTE RESOLUTION

Should the landlord choose arbitration as referred to in clause 30 above then the dispute shall be determined and resolved by an expedited arbitration process administered by the Arbitration Foundation of Southern Africa (AFSA) in accordance with AFSA'S Expedited Rules by an arbitrator selected in accordance with such Rules. This arbitration clause survives termination of the lease agreement.

[15] Neither of these clauses, either individually or collectively, embody an *agreement to arbitrate*. At best it provides the applicant with an election between either arbitration or court proceedings in the magistrate's court. In any event, the election is afforded to the applicant only. To fall within the ambit of an arbitration agreement and for the applicant to be bound by such a dispute resolution mechanism the clause must clearly be couched in terms that embodies an agreement. The mere fact that the clause appears in 'an agreement' does not elevate it to an agreement to arbitrate and falls foul of the definition of 'arbitration agreement' as contemplated in s 1 of the Arbitration Act 42 of 1965.

[16] I'm fortified in my approach as the Supreme Court of Appeal found in *De Lange* that an arbitration agreement is a contract[4], and in *North East Finance* said that the agreement to arbitrate is construed according to the ordinary principles governing the interpretation of contracts[5].

[17] Reliance on the purported arbitration clause also fails because s 6 of the Arbitration Act requires a litigant, invoking an agreement to arbitrate to bring an

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[4] *De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa* 2015 1 All SA 121 (SCA); 2015 1 SA 106(SCA) paras 46, 51, 56

[5] *North East Finance* (*Pty*) *Ltd v Standard Bank of SA Ltd* 2013 3 All SA 291 (SCA); 2013 5 SA 1 (SCA)

application for a stay of the proceedings. However, s 6 contains a qualification. The application may be launched after an appearance to defend is delivered *but before* any pleadings are delivered or any other steps are taken in the proceedings. Section 6 must be understood in the shadow of the position in our law that an arbitration agreement does not deprive the court of its jurisdiction over the dispute[6]. Therefore, since all the pleadings have been exchanged it does not behove the respondent to only now rely on a purported arbitration clause to compel the stay of the proceedings.

[18] There is another reason the proposition is not sustainable. As mentioned, the clause rather embodies an election. The fact that clause 30 limits the applicant to choose the magistrate's court does not bar this Court from having jurisdiction over the matter. The Supreme Court of Appeal in *Standard Bank of SA Ltd and Others v Thobejane and Others*[7] has found that the concurrency of jurisdiction in circumstances in which a claim justifiable in a magistrate's court has been brought in a High Court has been recognised in case law for over a century. Therefore, when a High Court has a matter before it that could have been instituted in a magistrates' court, it has no power to refuse to hear the matter.

Security for costs

[19] On 25 November 2021 the respondent delivered a notice requesting the applicant to provide security in the amount of R 200 000.00 in terms of uniform rule

[6] Illustrated by at least s 2, 3, 6 and various other provisions in the Arbitration Act.
[7] *Standard Bank of SA Ltd and Others v Thobejane and Other Standard Bank of SA Ltd v Gqirana N O and Another* (38/2019; 47/2019; 999/2019) [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (25 June 202

47(1). The rule requires a demand for security of cost to be made as soon as practicable[8]. Although this is not an inflexible limitation of the right to request security, I am of the view that the request is too late. This late request for security does not bar the application from its continuation. In any event, the request for security loses its purpose when one considers that the value of the Milnerton premises and the amount of money the respondent is indebted to the applicant for, far exceeds the security requested.

No authority to depose to founding affidavit or to institute proceedings

[20] The founding affidavit is deposed to by a Ms Grace Vorster. She alleges that she is a manager of the applicant. It appears from the record that the respondent and Ms Vorster has had numerous engagements. It is thus untenable to deny that Ms Vorster represents the applicant.

[21] The applicant contends that the issue of Ms Vorster's authority is belatedly raised as uniform rule 7(1) requires a litigant to raise the issue within 10 days from being aware of the impediment. The failure to raise it properly and in time means that the respondent cannot now, at this stage of the proceedings complain about the authority.

[22] I agree with the applicant's contestation on the authority issue. The court in *Ganes v Telecom Namibia Ltd*[9] confirms the position that a deponent to an affidavit does not need specific authorisation from the applicant to depose to the affidavit. The correct approach to resolve the authority issue would have been to employ the

[8] *SA Iron and Steel Corp v Abdulnabi* 1989 (2) SA 224 (T) 236
[9] 2004 (3) SA 615 (SCA)

operation of uniform rule 7(1). This position has been confirmed in various case law[10].

[23] The respondent also disputed that the applicant passed a resolution authorising the institution of the current litigation proceedings. Reliance is placed on various case law that affirms the principle that a juristic person, in this case a close corporation, can only act through its members. In this matter it is common cause that the only member of the applicant is a certain Ms Lu, currently residing in Singapore.

[24] The complaint that no empowering resolution was passed is resolved since I accept the deponent's statement that the applicant is pursuing the relief, as sufficient. See *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk.*[11]

Supervening impossibility

[24] Reliance on the defence of supervening impossibility also fails.

[25] My decision is influenced by an August 2021 judgment[12], *Freestone v Remake*[13], where it was found that the declaration of the state of disaster and the continued effect of the Covid-19 pandemic may have resulted in a dramatic decline of customers through the shopping centre in which the lease premises were situated

[10] See *Unlawful* Occupier *School Site v City of Johannesburg ANC 2005 (4) SA 199 (SCA)* as well as *Umvoti Council Causus* & *Others v Umvoti Municipality* 2010 (3) SA 31 (KZP)
[11] 1957 (2) SA 347 (C) at 352C-F, confirmed in *NahrungsmittelGMbH v Otto* 1991 (4) SA 414 (C) that was in turn unanimously confirmed by the SCA *NahrungsmittelGMbH v Otto [1993] 1 All SA 456 (A)*
[12] The facts correlate to a degree with the matter before this Court
[13] *Freestone Property Investments (Pty) Ltd v Remake Consultants CC and Another [2021]* ZAGPJHC (25 August 2021)

but does not afford a defence to the lessee[14]. I find the judgment persuasive and decide to follow and apply it in this case. The respondent in this matter is in a similar position as the respondents in *Freestone v Remake.*

[26] Particular to the matter before me it seems as if clause 3.4 of the lease agreements in any event operate against the respondent to rely on a defence related to the Covid-19 pandemic.

Cancellation of lease agreements

[27] Whether the applicant properly cancelled the lease agreement, really turns on two issues. Firstly, whether the respondent was entitled and in fact exercised its option to renew the lease agreements. This option is contained in clause 50.1 read with 50.2 – 50.8 of the lease agreements. Secondly, whether there was compliance with s 14 of the CPA[15].

[28] The respondent's reliance on clauses 50.1 – 50.7 of the lease is not sustainable. Clause 50.7 expressly provide that the option to renew is not available to the respondent if he has twice during the lease period failed to make payment of the monthly rental. It is apparent from the papers that by the time the respondent purportedly exercised the option that she was already in the position as envisaged in clause 50.7 of the lease.

[29] The respondent also relies on ss 14 (2)(b)(ii) of the CPA. This section requires a landlord to give at least 20 business days written notice to the consumer

[14] At par 29
[15] Consumer Protection Act, 68 of 2008

of a material failure to comply with the agreement. The proposition is that although the applicant has delivered a breach notice on 30 October 2020 no subsequent notice of cancellation was delivered. In the result the leases have not been validly cancelled and have they continued on a month to month basis in terms of ss 14(2)(d) of the CPA.

[30] This proposition is not sustainable on the facts. For its contention the respondent relies on the notice of 30 October 2020. If that notice is in fact the cancellation notice then the argument could have had some value. However, the notice of 30 October 2020 was preceded by various other notices. The record shows that the applicant demanded that the respondent cured her breach on 15 April 2020. The respondent failed to do so. Then on 12 June 2020, after 20 days[16], the applicant cancelled the lease in writing. Section 14(2)(b)(ii) of the CPA provides the supplier with the option that it *'may cancel the agreement 20 business days after given written notice to the consumer of a material failure by the consumer'*. The applicant has thus complied with this requirement.

[31] Having cancelled the lease on 12 June 2020, after a breach notice, the provisions of ss 14(2)(c) are not activated, as the section surely is not intended to operate if the consumer agreement is already cancelled. It thus no longer embodies the character of a 'fixed term' consumer agreement as envisaged by ss 14(2)[17] of the CPA.

[32] During argument it was also contended that the breach and cancellation notices of April and June 2020 were attached by the respondent in the answering affidavit. Consequently, I must disregard these notices as the applicant has failed to

[16] Provided for in s 14(2)(b)(ii) of the CPA
[17] The introductory part of the section

make out a case in its founding affidavit. However, the principle that a party should make it out its case in the founding affidavit is not an inflexible rule[18].

[33] In any event the cancellation notice of 20 June 2020 is attached to the applicant's founding affidavit. Furthermore, the respondent cannot attached annexures to its answering affidavit and then expect the court from disregarding the evidence, especially where the evidence introduced is not disputed.

[34] Even if this Court accepts that the applicant did not comply with s 14(2)(c) of the CPA, the lease agreements would then have continued on a month to month basis. As soon as that is the position ss 14(2)(b)(ii) of the CPA no longer applies and the parties revert back to the terms of the written lease agreements, which at clause 25.3 provides that a cancellation notice is not required if the lessee has been in default with two rental payments within 12 months. It is not in dispute that the respondent defaulted at least twice in a 12 month period.

[35] However, to be absolutely certain about the cancellation the applicant again demanded payment on 4 December 2020 and then instituted court proceedings. The institution of the proceedings qualifies as confirmation of the cancellation of the lease agreement[19]. The lease agreements were therefore, correctly cancelled.

The existence of a lien

[36] The existence of an improvement lien defence is overshadowed by clause 11.2 of the lease agreements. This clause provides that *"any improvements,*

[18] *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* (1) [1978] 1 All SA 50 (w)
[19] *Thelma Court Flats (pty) Ltd v McSwigin* 1954(3) SA 457 (C) 462 C-D

alterations or additions….which the tenant may have affected to the leased premises shall become the property of the landlord, and the landlord shall not be obliged to compensate the tenant in respect thereof."

[37] The respondent has not attacked the validity of the lease agreements or any of the clauses. Without deciding the issue I am of the view that in these proceedings, the existence of an improvement lien defence is not sufficient to prevent ejectment.

EJECTMENT OF THE RESPONDENT

[38] Since no sustainable defence was raised the applicant is entitled to its relief. It is not in dispute that the applicant is the owner of the leased premises[20]. The applicant is thus entitled to an order for the respondent's ejectment.

[39] The legal position is that our Courts has no equitable discretion to refuse the granting of an ejectment order if the applicant has established all the grounds. See *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) *("AJP v Sello")*[21].

[40] What remain is to determine an equitable date on which the respondent should be ordered to vacate the premises. During argument the applicant contended for between 3 - 14 days.

[41] According to *AJP v Sello supra* although a Court's discretion is limited if all the grounds for an ejectment order has been established, our law does recognise that

[20] *MC Denneboom Service Station CC and another v Phayane* 2014 (12) BCLR 1421 (CC) confirming Chetty v Naidoo [1974] 3 All SA 304 (1974 (3) SA 13) (A) that it is generally sufficient for an applicant to succeed with an ejectment order to demonstrate that it is the registered owner of the property.
[21] Para 17 referring to various judgment. In this judgment the court dealt with a commercial eviction.

courts can exercise a discretion, derived from a common law power to stay or suspend the execution of an ejectment order. This discretion is in line with the discretion afforded to a Court in terms of Uniform Rule 45A to suspend execution of its orders. Eviction or Ejectment is a species of execution.

[42] Similar to the Court's approach in *AJP v Sello* this Court finds that the interests of justice will deny an applicant who fails to afford the respondent a fair opportunity to relocate or vacate the premises.

[43] In determining an equitable date for the respondent's ejectment, this Court's discretion is infused with the following objective factors which appear from the papers:

(i) Unless the respondent is able to find suitable alternative premises it faces significant financial hardship if not financial ruin. Already compounded by the impact of the Covid-19 pandemic. This also jeopardises the staff contingent and their dependents; staff are likely to be laid off temporarily until suitable premises are found or be exposed to retrenchment if the respondent is obliged to downscale or totally closed its doors.

(ii) The respondent is required not only to reinstate the applicant's premises to its pre-occupation state[22] but must also find suitable premises to relocate its business, negotiate a new lease, effect necessary alterations and install fittings in order to recommence business.

(iii) The respondent has been in the premises for over three years.

[22] Clause 36.2.1

(iv) There are allegations that substantial renovations have been effected to the value of approximately R 3,7 million. The applicant admits the renovations but rely on a forfeiture clause in the lease agreement to not compensate the respondent. On this basis even though the respondent is in arrears in approximately R 1,4 million, the applicant will receive the benefit of extensive renovations to its immovable property which should set off the short term discomfort and frustration caused due to a lack of rental income.

(v) The applicant still has a claim for outstanding rental and holding over against the respondent, even should the court allow the respondent a reasonable extended period to vacate.

(vi) Considering the time of the year it is highly unlikely that the respondent would be able to procure an alternative premises at short notice. The record indicates that extensive alterations were done to the premises. Although there may be a dispute over whether the respondent is allowed to remove fittings and alterations, it is certain that the business of the respondent consist of a significant amount of machinery and fittings, as it operates a restaurant, a slot machine casino, a night club and a pool bar.

(vii) The respondent did attempt to negotiate alternative solutions to its predicament caused by the pandemic. These were all dismissed by the applicant. A more commercial practical approach may have resulted in a situation where the respondent could still have traded itself out of its loss trading state, and resume the normal rental as agreed.

(viii) The respondent alleged in the answering affidavit that most of the units are not currently being leased and the applicant is not making much, if any,

effort to procure new tenants. This allegation was not disputed or explained by the applicant.

(ix) The lease agreements envisaged a period of 4 months' notice if the parties do not intend to renew the lease. This period is a good indication of what parties in a commercial lease setting regard as a reasonable period to vacate and find alternative premises.

[44] This Court is of the view that it would be harmful to the interests of justice to compel the respondent to vacate immediately instead of affording her the opportunity of finding suitable alternative premises that would serve not only her interests but also those of her clientele and employees. I am satisfied that the grounds in (i) – (ix) above constitute sufficient grounds, to justify a delay in enforcing the ejectment order.

[45] The respondent has not indicated how much time it will require to relocate. Notwithstanding, the absence of any indication from the respondent I believe that in all the circumstances real and substantial justice requires that the respondent be afforded a period of six (6) months to find alternative premises to relocate. Bearing in mind, as the Court stated in *AJP v Sello* that relocation is often the principle consideration for delaying the execution of an eviction order in respect of commercial premises.

CONCLUSION AND ORDER

[56] The applicant has made out a case for the relief as per the notice of motion. In the circumstances I make the following order:

(1) The cancellation of the lease agreements is confirmed.

(2) The respondent and all other persons or entities occupying under the respondent at portions 2, 3, 3A and 4A of the premises situated at 10 Marine Circle, Milnerton is ordered to vacate on or before 3 June 2022.

(3) The Sheriff of this Honourable Court (or his/her deputy) is authorised and directed to take all steps on 4 June 2022, or any time thereafter, to give effect to prayer (2) above if the respondent does not vacate the premises on 3 June 2022.

(4) The respondent shall pay the applicant's costs of this application on a party and party scale.

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A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Adv T Ferreira
Applicant's attorney:	G Van Zyl Attorneys
Respondent counsel:	Adv P Gabriel
Respondent's attorney:	CK Attorneys