



Republic of South Africa

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

CASE NUMBER: 14796/2020

In the matter between:

Helena Elizabeth Stevens

Applicant

and

**Michael John Chester
Veronica Irene Chester
City of Cape Town**

1st Respondent
2nd Respondent
3rd Respondent

MATTER HEARD 10 MARCH 2021

Coram: Mr Acting Justice Hockey

JUDGMENT: DELIVERED ON 16 MARCH 2021

HOCKEY AJ:

- [1] The applicant, as the owner of a property situated at 38 Blythwood Road, Platteklouf Glen, Goodwood ("the property"), seeks an order for the eviction of the first and second respondents ("the respondents") from the property in terms of provisions of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1988 ("the PIE Act"). The City of Cape Town ("the City") was cited as the third respondent in these proceedings.
- [2] The applicant, who is a pensioner, purchased the property as an investment to generate an income for her and her husband during their retirement.
- [3] The first respondent is an 82-year-old male and the second respondent is a 77-year-old woman. They entered into a written lease agreement with the applicant in respect of the property during March 2015. The lease came into existence on 1 May 2015 and subsisted for an initial period of 24 months, whereafter it was renewed for a further period of 12 months.
- [4] On expiration of the extended lease, the respondents remained in occupation of the property on a month to month basis.
- [5] It is common cause that the respondents fell behind in their rental payments, which resulted in the applicant causing her erstwhile attorney to send a letter of demand to the respondents on 17 June 2020 with a demand to rectify their breach. In this letter, it was clearly stated that the applicant elected not to enforce her right to cancel the lease at that time.
- [6] The respondents made some payments reducing the arrears. There is further correspondence with the respondents, and in particular an email from the applicant's attorney to the second respondent dated 9 July 2020, which stated:

"We have been instructed to inform you that if you are unable to settle all of the outstanding rental amounts including the rental amount for August 2020 on or before the 31st July 2020, we are to

provide you with a letter confirming cancellation of the lease agreement.

In terms of the letter of cancellation you will be given 30 days' notice period, and be expected to vacate the leased property by no later than 31 August 2020."

- [7] The respondents failed to settle all arrear rentals, and a notice of cancellation was sent to them on 4 September 2020, requiring them to vacate the property *"by no later than 17:00 ... 31 (sic) September 2020."*
- [8] The respondents failed to vacate the premises resulting in the institution of the present proceedings for the eviction of the respondents in terms of s 4 of the PIE Act.
- [9] This application is brought in terms of s 4 of the PIE Act, in terms of which an unlawful occupier may be evicted. In terms of the PIE Act, an unlawful occupier *"means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any right in law to occupy such land"*
- [10] In the present matter, the respondents occupied the premises for a period of three years, whereafter they remained in occupation on a month to month basis. Since they occupied the premises with the consent of the owner, it follows that for their occupation to be rendered unlawful, a proper notice of cancellation of the lease and to vacate the premises is required. Only on their failure to vacate on proper notice would their continued occupation become unlawful for purposes of the PIE Act.
- [11] Mr Gagiano, who appeared for the respondents, argued that the applicant was required to give notice of cancellation of the lease agreement in terms of s 5(5) of the Rental Housing Act 50 of 1999 ("the RHA"). This section provides:

"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."

- [12] Section 5(5), and in particular the meaning of "at least one month's written notice" was considered in **Luanga v Perthpark Properties Ltd** 2019 (3) SA 214 (WCC) where it was held by Davis AJ (Papier J concurring), after consideration of the common law and various authorities, that the words "one month's notice" must be interpreted to mean "one calendar month, running from the first day of the month and expiring on the last day of the month..."
- [13] The circumstances in **Luanga** were similar to the present matter, where a tenant remained in occupation of premises on a month-to-month basis with the consent of the landlord after expiry of a fixed terms lease. In that matter, the lessor's attorneys, on 4 MAY 2017, delivered a notice of cancellation and requiring the occupants to vacate by 5 June 2017. When the occupants failed to vacate, an application was brought in terms of the PIE Act for their eviction. The court held that the notice of 4 May 2017 did not comply with the requirements of s 5(5) of the RHA and was accordingly invalid and of no force and effect. The court held (at para 32) "[t]hat the purpose of a notice of termination in terms of s 5(5) is to establish with certainty when the rights and obligations under the lease come to an end. If the notice stipulates a termination date which is not in accordance with prescripts of the section, it cannot achieve that purpose."
- [14] The court in **Luanga** concluded (at para 34):

"Since the notice of termination of the lease was invalid for failure to comply with s 5(5) of the [RHA], the lessor failed to discharge the onus resting on it of proving a valid termination of the lease. The appellant had therefore not been shown to be in unlawful occupation of the premises, and the magistrate accordingly erred when he granted an eviction order."

- [15] After this matter was argued in front of me, Mr Bruinders for the applicant became aware of the judgment of Binns-Ward of this division in **Magic Vending (Pty) Ltd v Nzeba Tambwe and Others** (19432/2019) [2020] ZAWCHC 175 (7 December 2020). The **Nzeba Tambwe** matter also concerned an eviction in terms of the PIE Act, where the occupants had occupied the premises for a number of years in terms of an oral agreement, but since 2014, occupied the premises under a written lease agreement which operated on a month to month basis. In that matter, on consideration of the applicability of s 5(5) of the RHA, Binns-Ward J concluded (at para 14):

"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 a lessee's failure to pay the rent. The judgment in Luanga, which held that one month's notice referred to in s 5(5) denoted one calendar month's 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."

- [16] I agree with the conclusion of Binns-Ward J for the simple reason that he dealt with a written lease, albeit that it operated on a month to month basis, and the landlord in that matter was entitled to rely on the cancellation or breach clause. Section 5(5) of the RHA provides for a situation where a lessee remains in occupation with the express or tacit consent of the landlord, after the expiration of the fixed term lease. If there is no further written lease agreement, the deeming provision in s 5(5) kicks in, namely that the parties have entered into a periodic lease on the same terms and conditions as the expired lease, but with an exception that one month's written notice must be given by either party to terminate the lease. The exception is clearly there for the protection of both parties, affording both a reasonable opportunity to make alternative arrangements in the event of cancellation of the lease.

- [17] Mr Bruinders also rely on the finding in **Nzeba Tambwe** in support of his argument that proper notice of cancellation had been given to the respondents by the service of the eviction application on them. In **Nzeba Tambwe**, two letters of cancellation were sent to the first respondent. The court accepted that neither of those letters came to the attention of the first respondent, but held (at para 12):

"That is of no moment, however, because the papers that were served on her instituting these proceedings operated as effective notice of the termination of the contract; cf Middelburgse Stadsraad v Trans-Natal Steenkool Korporasie Bpk 1987 (2) SA 244 (T) at 249, [1987] 3 All SA 14 (T) at 18, and Thelma Court Flats (Pty) Ltd v McSwigin 1954 (3) SA 457 (C) at 462."

- [18] The cases relied on by Binns-Ward J, however, both dealt with commercial, as opposed to residential lease agreements. The RHA was not in existence when those matters were decided, and would, in any event, not have found application, as the RHA is applicable only in leases for rental housing purposes. Furthermore, in **Nzeba Tambwe**, s 5(5) of the RHA was found not to be applicable in the situation where a lease containing a forfeiture clause is terminated because of a failure to pay rent.

- [19] Even if one were to accept that the service of the papers in an application for eviction constitutes notice of the termination of the lease, this would not comply with the prescripts of s 5(5). I agree with the finding of Davis AJ, where she held (at para 32):

"The purpose of a notice of termination in terms of s 5(5) is to establish with certainty when the rights and obligations under the lease come to an end. If the notice stipulates a termination date which is not in accordance with the prescripts of the section, it cannot achieve that purpose."

And further, it was held (at para 33):

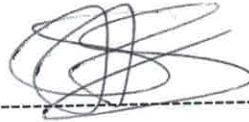
“Nor was the magistrate correct to regard it as relevant that the appellant was in fact afforded more than one month’s notice to vacate since the respondent only launched eviction proceedings three months later, on 16 August 2017. That fact had no bearing on the legal question of whether or not the notice of termination duly complied with the requirements of s 5(5).”

- [20] As held by Davis AJ, compliance with s 5(5) of the RHA is peremptory. The notice of termination sent to the respondents dated 4 September 2020 is not in compliance with the section and therefore void *ab initio*. The applicant had not shown that she validly cancelled the lease which would have rendered the continued occupation by the respondents unlawful.
- [21] Lastly, I should briefly deal with s 14(2) of the Consumer Protection Act 68 of 2008 (“the CPA”) which requires a notice period of 20 business days for the cancellation of a fixed term contract. The contract between the parties in the present matter is indefinite and on a month to month basis. Section 14(2) of the CPA is therefore not applicable as the lease is not of a fixed term nature. This was the conclusion reached in **Makah v Magic Vending Ltd** 2018 (3) SA 241 (WCC) and accordingly no notice period was required to be given to the respondents for the cancellation of the lease under the CPA as is the case in the present matter.
- [22] As for the issue of costs, there is no reason why costs should not follow the result.

Order

I make the following order:

The application is dismissed, with costs.



S HOCKEY
ACTING JUDGE OF THE HIGH COURT

Legal Representation:

Applicant:
Attorney:

Adv. Shaid Bruinders
Mohammed and Leon Incorporated

Respondent:
Attorney:

Mr Gert
Enderstein v/d Merwe Incorporated