(Western Cape Division, Cape Town)

Case No: 523/2022

In the matter between:

CADENTIA PROPERTIES CC Applicant

vs

B STEER 2 ROUTE 27 (PTY) LTD Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 10 JUNE 2022

MANTAME J

Introduction

[1] This is an application for an ejectment of the respondent from the applicant's premises situated at 104 Sandown Road (Corner of the R27 West Coast Road and Sandown Road), Bloubergsands ("*the Property*"). This application was opposed by the respondent. The respondent initially raised a point in *limine*, however at the hearing of this application, it was no longer pursued. The respondent made an application an admission of further affidavits.

Application for admission of further affidavit

[2] It is trite that in motion proceedings, there are three (3) sets of affidavits that have to be filed by the parties. The respondent requested the Courts' indulgence in filing its further affidavit and explained that due to the fact that the current circumstances are not before Court, the fourth set of affidavit should be admitted in the interest of justice and fairness. The applicant, opposed this application on the basis that these facts were known to the respondent when it filed its answering affidavit. There is nothing new that that should come to the attention of this Court.

[3] It is indeed so that the Court has wide discretion to allow the filing of further affidavit. It is therefore upon the party filing a further affidavit to furnish an explanation to the satisfaction of the Court that it was not malicious in filing the extra set of affidavit and what is contained thereby will not prejudice another party as it would have no right to respond to that affidavit.

[4] In *Khunou & Others v Fihrer & & Sons,*[1] the Court stated that:

> *"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them,*

[1] 1982 (3) SA (WLD)

but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner".

[5] It might be so that the respondent was aware of the circumstances that are contained in this affidavit at the time he filed his answering affidavit, however it dawned to it immediately before the matter was heard that these issues be put before Court. In the interest of bringing his case before Court, I do not think it should be penalised for proceeding in that way. In my view, the respondent was justified in fling this fourth set of affidavit as the Court needed to understand the respondent's circumstances before it issued an order. The respondent's fourth set of affidavit is therefore admitted.

Background Facts

[6] The applicant and the respondent entered into a commercial lease agreement in respect of the property for a period of three (3) years, commencing on 1 October 2015 and terminating on 30 September 2018. The respondent took occupation of the property and commenced trading under the name and style, *Black Bull Steakhouse*. A year after the expiring of this lease and on 21 October 2019, the parties entered into an addendum to the lease agreement, extending the initial lease agreement and the terms thereof. In accordance therewith, the applicant stated that the lease was meant to expire on 30 September 2021.

[7] The respondent took issue with the date of expiry of the lease agreement as contained in the addendum. According to respondent, the parties agreed to an option of an extension of five (5) years.

[8] On or about January 2020 to November 2020, the relationship between the parties deteriorated due to an alleged breach of an agreement by the respondent. Be that as it may, the applicant stated that the lease agreement came to its conclusion by effluxion of time while the previous action proceedings (damages claim) are still pending. In essence, this application is only premised in the termination of the lease agreement on 30 September 2021 and the resultant ejectment.

Issues

[9] As a result thereof, the applicant seeks the confirmation of the written lease agreement between the parties on 30 September 2021, and ejectment of the respondent from the leased premises since the applicant exercised its decision not to extend the terms of the lease agreement. In so doing, the applicant seeks a determination essentially that the respondent's continued occupation of the property post 30 September 2021 is unlawful.

Submissions

[10] The respondent asserted that the suggestion by the applicant that the lease agreement terminated on 30 September 2021 is wrong. The initial lease agreement contained an option to extend the agreement for a period of five (5) years. As a result thereof, the expiration date would have been 30 September 2023. The applicant denied this allegation and contended that if regard is had to the addendum *(ALMH4),* it is common cause that neither party lawfully exercised the five (5) year option. If indeed the agreement would come to an end on 30 September 2023, the respondent would at least have furnished proof to that effect, it has not done so.

[11] It was respondent's further submission that despite the agreement having been signed a year after the expiration of the initial lease agreement, the contractual relationship between the parties could have been extended by a further year.

[12] The respondent further stated that at the outset of the inception of the lease, the property had no electricity supply or shop fittings. The respondent had to make its own arrangements to reconnect it. During its occupation of the property, the respondent paid for water, sewerage and refuse removal charges. Without any agreement, the applicant unilaterally placed tenants into the property who operated a nursery and used the same utilities for which the respondent is held liable, which includes bins, sewerage, water and electricity. Despite the respondent's request to the applicant to amend the utilities amounts levied against the respondent, repay for overcharged services and invoice those nursery tenants for the services utilised, that was never done.

[13] The applicant stated that it is disingenuous for the respondent to raise an issue of the nursery tenants in these proceedings. That issue has been well taken care of in the action proceedings that are currently pending before this Court.

[14] It may be that the Covid - 19 had an impact on the respondent's business during the period of lease, however, it was the applicant's contention that the allegation is irrelevant for purposes of this application. In applicant's opinion, the respondent's inability to trade at full capacity has no bearing on the duration of the lease agreement entered into between the parties. The respondent's claim to any rental remission, it was said has no relevance in this application. Save for the period 26 March 2020 to 30 April 2020, the respondent was able to conduct its business as a restaurant.

[15] The applicant submitted that in *Johannesburg Consolidated Investment v Mendelsohn & Bruce Limited.*[2] It was held that:

> *"The consequence of holding that the defendants in this case are entitled to a remission of rent appears to me to be far-reaching. It would involve this, that on the happening of any event amounting to vis major, which caused a temporary diminution of the population of a town, every tradesman who could show that he had sustained a temporary loss or a considerable diminution of profit might be entitled to a remission of rent. Suppose for instance, that in consequence of the outbreak of an epidemic disease a large proportion of the inhabitants fled, with the result that owing to the absence of their usual customers the tradesman temporarily were carrying on business at a loss, and closed their shops, it would come as unpleasant surprise to the lessors to find that the whole of the loss is to fall upon them, and that they occupy in effect the position of insurers of their lessees' custom."*

[16] The applicant submitted that the respondent's reasons for its inability to trade are for its burden to bear. In *Freestone Property Investments (Pty) Ltd v Remake Consultants CC & Another,*[3] the Court after dealing with rental remissions owing to Covid 19, confirmed the *dicta in Johannesburg Consolidated Investment (supra) and* held that:

> *"Similarly in the present matter, that the declaration of the state of disaster and the continued effect of the Covid 19 pandemic may have resulted in a dramatic decline*

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[2] 1903 TH 286 at 295
[3] 2021 (6) SA 470 (GJ) at para 29

of [customers] through the shopping centre in which the leased premises were situated, does not afford a defence to the first defendant as lessee."

[17] The applicant contended that the undisputed fact is that the respondent has no right to occupy the property after the termination of the contract. In *Broompret Investments (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd,*[4] Van Heerden JA stated:

"It is also clear when sued for ejectment at the termination of a lease it does not avail the lessee to show that the lessor has no right to occupy the property."

[18] Further, the applicant argued that in *Tiopaizi v Bulawayo Municipality,*[5] De Villiers JA stated:

"If the parties agree upon a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time and with it the relationship of lessor and lessee ceases."

[19] In turn, the respondent submitted that the relief sought by the applicant will cause a grave injustice to it. Amongst others, it disputed that it owes an amount of approximately R700 000.00 in arrears. Although the respondent argued that it made payments towards these arrears, the applicant stated that no payments were received at least between February 2022 – May 2022. The respondent acknowledged that it was

[4] 1990 (1) SA 347 (A) at 351 H - I
[5] 1923 AD 317 at 325

required to vacate the property. It was its assertion that it has made some good headway towards relocation, however it was still in the process of negotiating with a new landlord.

[20] There are various by-laws that regulate the food industry. It cannot transfer its licence until it secures new operating premises. Further, it would be required to move a significant amount of machinery and fittings to its new restaurant. It therefore required at least eight (8) months to find suitable premises and to relocate its restaurant and reinstate the applicant's premises to its pre-occupation state. This is a family restaurant with a staff compliment of thirty (30). Should the eviction be granted the respondent will be forced to close its doors immediately and that will add to the statistics of unemployment. Such situation will endure until the new premises are secured or be exposed to retrenchment if the respondent is obliged to downscale or totally close its doors.

[21] In this circumstances, the respondent submitted if this Court order that it should vacate the property, that order should not operate immediately. It should be afforded an opportunity to acquire new premises and settle its operations.

Evaluation

[22] In these proceedings, the applicant postulates that the lawful occupation of the property by the respondent has terminated by no earlier than 01 October 2021, either by effluxion of time or by the cancellation of the agreement for breach. The respondent disputes the termination date, and according to it, the parties agreed to an option of an extension of five (5) years.

[23] Contrary to the supported case of the applicant with regard to the termination date by the lease terms contained in the addendum *(ALMH4),* the respondent did nothing to convince the Court about the period of extension relied on in its opposition.

[24] It is common cause that the applicant is the lawful owner of the property. Having the respondent failed to furnish proof that the contract expired on 30 September 2023, the only available evidence from the applicant is that the contract terminated on 30 September 2021. On that note, the applicant has proved that the respondent is currently in unlawful occupation of the property.

[25] The respondent argued that if the Court is inclined to grant the ejectment order a considerable amount of time should be given to it in order to allow for them to source and set up its new premises. It is incomprehensible how the respondent would expect to be afforded more time than it already spent in that property. It had not disputed that its relationship with the applicant has deteriorated in 2020 already when it started to breach the terms of the lease agreement. It do not intend to dwell much on the terms of the breach as these issues would be determined by the trial court in the action proceedings. However, it is my opinion that this ejectment has long been approaching, the respondent should have devised means to secure new premises so as to not compromise the family business interests.

[26] After the relationship broke down, the lease agreement came to an end on 30 September 2021. When these proceedings were initially brought before this Court, it appears that the respondent did nothing to purge the breach. It continued with non-

payment of arrear rentals from February 2022 until May 2022 when this matter was before Court.

[27] The Court in *AJP Properties CC v Sello*[6] the Court held that:

> *"The exercise of the power, whether under common law or rule 45A, must be rational as does the determination of the period to be allowed before the eviction order can be enforced. Again legal pragmatism plays a role if only because a failure to comply with an eviction order may give rise to contempt proceedings."*

[28] It would appear that this Court has to confirm the termination of the lease agreement on 30 September 2021 and proceed to grant ejectment. Notwithstanding, our authorities accept that a reasonable period within which to order ejectment, more so to a commercial business should be observed by the Courts as the respondent inadvertently would need to relocate its activity. This Court would have to balance this reasonable period with the fact that the respondent has not ever paid the arrear rentals for almost five (5) months this year. At the same time, it would be unfair for the applicant to subsidize the respondent's business by continuing to provide operating premises free of charge. It is inevitable that the ejectment of the respondent would affect both the respondent and its employees harshly. At the same time, the employers could have managed the relationship with the lessors better.

[29] Further, the respondent submitted that it would be required to re-instate the applicant's premises to its pre-occupation state, but should first find a suitable place to

[6] (39302/10) [2017] ZAGPJHC 255; 2018(1) SA 535 at para [34] (GJ) (8 September 2017)

relocate its restaurant; negotiate a new lease and install the machinery and fittings in order to restart a business at the new premises. The applicant stated that the required eight (8) months by the respondent is too long as realistically, the eight (8) months would have started to count from 1 October 2021 to date (May 2022 when the matter was heard). In the applicant's view, one (1) month would be enough for the respondent to vacate the property.

[30] After considering all the submissions made by the parties, and weighing up the circumstances, the respondents have provided a service to the community of Bloubergsands and surrounds for years. The community it served had to know in advance about the relocation of this business. In my view, the three (3) months would be necessary for the respondents to find the property and restore the applicant's property to its pre-occupation state.

[31] In the result, I grant the following order:

31.1 The lease agreement between the applicant and the respondent terminated on 30 September 2021;

31.2 The respondent is ordered to vacate the property situated at 104 Sandown Road (Corner of R27 West Coast Road and Sandown Road), Bloubergsands, Western Cape Province on 10 September 2022.

31.3 That, should the respondent fail to vacate the property, the Sheriff of the High Court is authorised to take all necessary steps to facilitate the removal of the respondent from the property stipulated in paragraph 31.2 above.

31.4 The respondent is ordered to pay costs of this application on a party and party scale.

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MANTAME J
WESTERN CAPE HIGH COURT

Coram:	**B P MANTAME, J**
Judgment by:	**B P MANTAME, J**
FOR APPLICANT:	**ADV E MENTOOR** **083 375 0146** **mentoor@capebar.co.za**
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Date (s) of Hearing:	**4 May 2022**
Judgment Delivered on:	**10 June 2022**
Judgment delivered on:	**06 June 2022**