

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

Case Number: 21528/2021

In the matter between:

HYPROP INVESTMENTS LIMITED

(Registration Number: 1[...])

Applicant

and

A & M INVESTMENTS (PTY) LTD

(Registration Number: 2[...])

Respondent

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for handing down judgment is deemed to be 10h00 on 29 December 2022.

JUDGMENT

DE WET AJ:

[1] This is an opposed eviction application where the issue in dispute is whether the respondent was renting a commercial space owned by the applicant on a month-to-month basis for an indefinite period, or whether the rental agreement was for a fixed term period which resulted in it automatically terminating at the end of September 2021.

The factual matrix:

[2] The applicant is the registered owner of the immovable business complex known as Cape Gate, situated at Erf 1[...], Brackenfell, Western Cape (“the property”).

[3] The respondent is a company with its principal place of business at Musica Court Exhibition Space, Cape Gate Shopping Centre (“the exhibition premises”) which is located within the property. As the owner of the property, the applicant had the required *locus standi* to launch the eviction application.

[4] On 12 March 2021 and at Cape Gate, the respondent, represented by Muhammad Ahtsham (“Ahtsham”) and the applicant, represented by Amanda McCarthy, concluded a written exhibition agreement in relation to the exhibition premises. The exhibition agreement was to endure for a period of one month, commencing on 1 March 2021 and terminating on 31 March 2021.

[5] The respondent took up occupation of the premises in terms of the exhibition agreement and is still in occupation thereof. There were no written agreements or addendum agreements in respect of April, May and June 2021 between the parties, but it is common cause that the respondent continued occupying the exhibition premises during these months.

[6] On 21 July 2021, the respondent, represented by Ahtsham and the applicant, represented by Zoe Ganz, concluded a written addendum to the exhibition agreement, *inter alia*, extending the exhibition agreement for a further month period, it being from 1 to 31 July 2021.

[7] On 5 August 2021 and 3 September 2021 respectively, the parties concluded two further written addendums to the exhibition agreement, *inter alia*, to further extend the exhibition agreement for two periods being from 1 to 31 August 2021, and then from 1 to 30 September 2021. The conclusion and terms of the exhibition agreement and the addendums thereto are not in dispute.

[8] On 16 September 2021 the applicant's sales representative advised the respondent that it was required to vacate the premises on 30 September 2021. This sparked the respondent into action. Mr Ahtsham, the sole director of the respondent, addressed email correspondence to Mr Buckle, the sales manager of the applicant, with the subject "Unhappy". In the email, he stated that:

"...

I just want to explain my story, we came from Canal walk to your mall referred by Canal walk, we feel let down by your mall because we spend so much money on improving our kiosk and we did all demands coming from Kim, now to be asked to leave the mall because our offerings not needed it is sad, we don't have any other place to go, my staff will be out of work and we are happy in your mall, its so sad to see that leasing has giving the kiosk by mr price offer but not us and we have been paying our rental on time. I am willing to pay R 30 000.00 for a lease each month our business is slow but we trying to improve always, I did not also send my turnover to leasing but with no success. In all fairness we have to get an offer because I was never approached for a full lease i even said we will take away anything they not happy with, but i cant move until i get other place please can you help us i beg of you. We have not had 1 complaint we are on time and professional we have good relations with tenants too. All I ask for 1 year give us that 1 year if you not happy we then leave but i believe every income can help the mall i even ask for a shop if that is possible, we are legal in the country and we are going to expand to the US as franchise." (sic) (my emphasis).

[9] On the same day, the respondent was advised that his request had been escalated to ascertain whether "a plan" could be made for the respondent to rent the premises for a further one-year period.

[10] On 20 September 2021, as no response was forthcoming, Mr Ahtsham send yet another email stating:

“I am just following up on feedback as I am getting worried its getting to month end.”(sic).

[11] On 19 October 2021, the respondent was advised that the applicant did not intend entering into a further lease agreement with the respondent and that it had to vacate the property by 1 November 2021. The respondent failed to do so and is still, more than a year later, in occupation of the property.

The parties’ respective contentions:

[12] It is the applicant’s case that the exhibition agreement is clear and unambiguous. The exhibition period was for the period 1 March 2021 to 31 March 2021. The addendum agreements subsequently concluded, were all three for fixed term periods, the last one being from 1 September 2021 to 30 September 2021. No further agreement, be it tacit or implied, was concluded between the parties, even on the respondent’s version, after the last fixed term agreement came to an end on 30 September 2021. The respondent is therefore in unlawful occupation and the applicant is entitled to an eviction order.

[13] The respondent opposed the relief sought by the applicant on two main grounds, namely.

13.1 That the lease agreement between the parties is an indefinite lease on a month-to-month basis and therefore the applicant was required to give, at least, a month’s notice to the respondent of the termination of the agreement and that the applicant failed to do so.

13.2 That the applicant’s correspondence to the respondent requiring the respondent to vacate the premises at the end of September 2021 and later, in subsequent correspondence, by 1 November 2021, amounted to a formal notice of non-renewal of

the lease agreement and neither Mr Buckle nor Mr Oliphant, was authorised to provide such notice to the respondent on behalf of the respondent.

The nature of the lease:

[14] If the exhibition agreement and later addendums constituted an indefinite month-to-month lease, reasonable notice would be calculated, with reference to the work of WE Cooper¹, as set out in the matter of Airports Company South Africa Soc Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books 2017 (3) SA 128 (SCA) at para 18, as follows:

“A periodic lease continues until it is terminated by notice given by either party. In the absence of agreement to the contrary, notice must be given a reasonable time before the date on which a party decides to terminate the lease. The period of such notice must be such that the lessor has a reasonable opportunity of letting his premises or the lessee of finding other premises. A day’s notice is considered reasonable in the case of a daily lease; a week’s notice in the case of a weekly lease; and a month’s notice in the case of a monthly lease, but there is no fixed ratio between the period of the lease and the notice period.”

[15] If the lease was for a fixed term period and such period came to an end, the position is that the lease terminates automatically by operation of law². De Villiers AJ in Tiopaizi v Bulawayo Municipality 1923 (AD) 317 at 326 aptly stated the legal position in such situation as follows:

“If 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.”

¹ The South African Law of Landlord and Tenant 2nd edition pp 65 -66

² See *Glover Kerr’s Law of Sale and Lease* (4th Edition) 23.3.1

[16] It was conceded by counsel for the applicant that for the months of April, May and June 2021, there must have been a tacit agreement or an extension of the initial exhibition agreement in respect of the exhibition premises. This tacit agreement, according to counsel for the respondent, changed the exhibition agreement into an indefinite month-to-month exhibition agreement and the applicant therefore had to provide the respondent with a month's notice for it to lawfully cancel the exhibition agreement. It was common cause that if it was an indefinite lease agreement, the applicant gave short notice of cancellation.

[17] In support of its argument that it was an indefinite lease agreement, the respondent relied heavily on the fact that Mr Buckle, on 28 October 2021, after the exhibition agreement had expired according to the applicant in terms of the fixed term addendum, advised the respondent as follows:

“After much deliberation and weighing our options a business directive has been taken to not allow a further extension of your month-to-month agreement. I realise that this is unfortunate news and that it will have a real financial impact on us both, but the decision is final and won’t be reconsidered in any further deliberations . . . Your team will be required to vacate the mall at the end of the weekend as Nicolas requested a while ago. . .”

[18] In my view, having regard to the express and unambitious wording of the three addendum agreements and regardless of the tacit agreement that existed in respect of April, May and June 2021, the parties entered into further fixed term agreements in respect of July, August and September 2021. In the final fixed term exhibition agreement, it is recorded, as was the case in respect of the previous two addendums, that the reason for the addendum(s) was to add additional dates, those being from 1 to 30 September 2021. Whatever the situation was prior to the further addendum(s) being signed, is in my view irrelevant and does not change the terms of the addendum(s) entered into between the parties.

[19] The respondent's reliance on the email of Mr Buckle of 28 October 2021 that there was an indefinite month-to-month exhibition agreement is misplaced and I am not convinced that Mr Buckle was of the view that the parties had entered into an indefinite month-to-month exhibition agreement. To me, it rather appears that he was simply reiterating what Mr Oliphant, the general manager of the applicant, had already advised the respondent on 19 October 2021 in layman's terms: the applicant would no longer be entering into monthly addendums with the respondent and it had to vacate the exhibition premises. In any event, whatever Mr Buckle may have thought or opined, the express wording of the addendum to the exhibition agreement is that the right of the respondent to lawfully occupy the exhibition agreement would cease on 30 September 2021.

[20] Insofar as it was argued, although not stated as such in the opposing papers, that a further tacit agreement was entered into between the parties after the termination of the exhibition agreement whilst the respondent tried to negotiate with the applicant a further lease agreement, I agree with counsel for the applicant, with reference to the matter of *Barkhuizen v Napier* 2007 (5) SA 323 (CC), that any willingness by the applicant to engage with the respondent with a view of possibly extending the lease agreement or entering into a new lease agreement, did not result in any further agreement being entered into.³ It was also not the respondent's case that a new agreement was entered into or that an extension was granted. In fact, the contents of the correspondence between the parties shows that Mr Ahtsham knew that the respondent had no right to remain in occupation of the premises. He was simply

³ In this regard in the matter of *Pareto Ltd and Another v Coffee Junction CC* (24773/2010) [2011] ZAWCHC 11 (24 February 2011) at para 28 it was held that: *Counsel for respondent also referred me to the case of Barkhuizen v Napier 2007 (5) SA 323 (CC), specifically at pages 330 to 341, where the court dealt with the principle the constitutional value of equality and dignity may prove to be decisive when the parties' relative bargaining positions is in issue. However, the court in Barkhuizen was considering this principle within the context of a contract already concluded and where there was certainty as to the precise terms thereof. In the instant matter, the "term" relied upon by the respondent boils down to nothing more than reliance on something other than an identified constitutional value. The respondent seeks to elevate a willingness to negotiate to the status of an obligation on the part of the applicants to provide the respondent with a reasonable opportunity to rent the premises for a further five years on reasonable basis. Since the respondent cannot (and therefore correctly does not) allege that the written lease agreement was varied whilst it was still in existence, the respondent must rely on events which took place subsequent to June 2010 when the written lease expired. There is nothing on the papers before me which took place subsequent to June 2010 which indicates that such a term exists. At best, the respondent has demonstrated that the applicants indicated a willingness to negotiate. That does not translate into a binding contract to do so.*

begging the applicant, for various reasons, to enter into a new lease agreement with the respondent after the exhibition agreement had terminated on 30 September 2021. He further did not complain that the applicant had given the respondent short notice of termination, nor did he state that the respondent was entitled to a month's notice in order for the exhibition agreement to be validly cancelled.

[21] The uncontested terms of the exhibition agreement and further addendums, further and in any event, sets out in clauses 6.1 and 6.3⁴, that no amendments or variations of the agreement(s) will be valid unless reduced to writing and signed by both parties and that the respondent is precluded from relying on waiver on the part of the applicant or estoppel in respect of any term or representation not recorded in the agreement.

[22] In the circumstances, I find that the parties had entered into a fixed term exhibition agreement which terminated by operation of law on 30 September 2021 and that the respondent is in unlawful occupation of the exhibition premises. In light of this finding it is not necessary to deal with the whether the applicant's representatives had the necessary authorisation to issue a notice of non-renewal to the respondent or whether the applicant provided the respondent with reasonable notice.

Condonation:

[23] The application was issued and served during December 2021. The respondent filed a notice of intention to defend on 22 December 2021 but simply failed to file opposing papers. The applicant, due to the respondent's inaction and in terms of Practice Directive 37(19), obtained an order on 3 March 2022 in terms whereof the

⁴ Clause 6.1 states: No amendments, variations or consensual cancellation of this agreement, or of this clause, will be valid unless reduced to writing and signed by the parties hereto. In particular, no representations of whatsoever nature has been made to either party to this agreement – save for what is contained herein. No waiver on the part of Centre Management will prejudice Centre Management's rights in any way whatsoever.

Clause 6.3 states: Centre Management shall not be bound by an express or implied term, representation warranty, promise or the like not recorded herein, and the Exhibitor waives the defence of estoppel in this regard.

respondent was ordered to file its opposing papers within 10 days of service of the order. The respondent failed to comply with this order and only filed opposing papers on 18 May 2021.

[24] According to the respondent its failure to comply with the order was because of its attorney of record only becoming aware of the order on 25 March 2022, at which stage its chosen counsel was hospitalised and unable to assist. Its attorney of record was further on pilgrimage and out of the country for a period of two weeks during the end of April and the beginning of May 2022.

[25] The respondent offered no explanation whatsoever as to why it failed to file opposing papers after it delivered a notice of intention to defend and its explanation for its failure to comply with the order of 3 March 2022 for a period of about 2 months lacks specificity. It appears to me that the opposing affidavit was only filed because of the matter being set down to be heard on the unopposed role on 9 June 2022. Whilst the applicant had an opportunity to reply to the opposing papers, it was nevertheless prejudiced by the conduct of the respondent as the filing of the opposing papers at that late stage caused the further postponement of the matter to the opposed motion role.

[26] Although I have serious concerns regarding the explanation tendered by the respondent for its failure to comply with the rules and orders of this court, I have decided, in the exercise of my discretion, to allow the opposing papers in the interest of justice on the basis that the respondent bears the applicant's cost in respect of the chamber book application, the condonation application and the costs occasioned by the postponement of the application on 9 June 2022.

Costs of the application:

[27] The exhibition agreement contains a generic consent to jurisdiction clause which reads as follows:

“The parties agree to the jurisdiction of the Magistrate’s Court in respect of all matters, disputes and claims arising out of this Agreement, although such matters may exceed or be outside such jurisdiction. The Exhibitor be responsible for any legal costs incurred by the Centre Management in enforcing the terms of this Agreement, on the Attorney and own client scale of charges.”

[28] Ostensibly this clause was included to protect a party such as the applicant against a situation where it is out of pocket as a result of being forced to expend legal fees to protect its right of free and unencumbered occupation of its property and the known difficulties experienced by property owners when faced with unlawful occupiers refusing to vacate. The respondent placed no facts before the court that it would be unduly prejudiced or would suffer an injustice should the contractual agreement’s terms in respect of costs be enforced.

[29] In my view, where parties have entered into a valid and binding agreement pertaining to legal costs in the event of a party breaching the terms of the agreement, a court should be slow to interfere with such agreement unless it can be shown that enforcing such terms would not be in the interests of justice. It would consequently be for the party facing a possible adverse cost order, to set out facts why the court should exercise its discretion contrary to the express agreement between the parties in the case of a written agreement. Such circumstances may include issues such as the unequal bargaining power of the parties at the time of entering into the agreement, the quantum of a claim, the forum wherein compliance is sought and the conduct of the parties during the course of the litigation to mention a few.

[30] The applicant however, despite the consent clause, elected to institute an application for eviction in the High Court and requests costs on the High Court scale. The parties were afforded an opportunity to submit further submission in this regard as it was not addressed in the papers or heads of argument.

[31] The parties appear to be in agreement that the applicant could not institute an application, as opposed to an action, for ejectment in the Magistrate's court with reference to s 29(1)(b) of the Magistrate's Court Act 32 of 1944 and that it was entitled to launch an application in this court even if the value of the right of occupation fall within the jurisdiction of the Magistrate's court.⁵

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[32] It is trite that the court has an overriding discretion when it is required to make costs orders and that such discretion must be exercised judicially with reference to the factual matrix of the matter at hand.

[33] The applicant's contention that action proceedings in the Magistrate's court would have taken significantly longer than application proceedings in the High Court and that it was entitled to elect to institute proceedings in this court, do not in my view justify a departure from the agreement pertaining to costs between the parties.

[34] In the circumstances the following order is made:

1. Condonation is granted for the late filing of the opposing affidavit.
2. The respondent and all those holding title under it is ordered to vacate the commercially leased premises known as, Musica Court Exhibition Space, Cape Gate Shopping centre, cnr of Okavango and De Bron Roads, Cape Gate, Cape Town situated at Erf 1[...], Brackenfell, more commonly known as Cape Gate Shopping Centre, on or before 17h00 on Friday, 13 January 2023.
3. In the event of the respondent failing to vacate the aforesaid property, the Sheriff of this Court is ordered and directed to evict the respondent and all those holding title under it, therefrom.

⁵ The SCA in the matter of *Standard Bank of South Africa Ltd And Others v Mpongo and Others* 2021 (6) SA 403 (SCA) in this regard held that a High Court was obliged to hear a matter brought before it, even where the matter fell within the jurisdiction of a Magistrates' Court and that the prejudicial consequences of the choice of forum could be mitigated by an appropriate costs order.

4. The respondent is ordered to pay the costs of this application, including the costs of the chamber book application, the condonation application and the wasted costs occasioned by the postponement of the application on 9 June 2022, on the scale as between attorney and client, on the Magistrate's court's scale, with counsel's fees, where so employed, on the higher tariff.

A De Wet
Acting Judge of the High Court

Coram:	De Wet AJ
Date of hearing:	31 October 2022

On behalf of the Applicant:	Adv J Bence instructed by Pepler O'Kennedy Email: andre@pro.legal
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On behalf of the Respondent	Adv P Gabriel instructed by ZS Incorporated Attorneys Email: waleed@zsinc.co.za
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