



IN THE HIGH COURT OF SOUTH AFRICA,
LOCAL GAUTENG DIVISION, JOHANNESBURG

CASE NO: 44987/2014

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

5/12/2017
DATE

[Signature]
SIGNATURE

In the matter between:

**BROADBRUSH INVESTMENTS 21
(PTY) LIMITED**

First Applicant

JAY MOTHIBI INCORPORATED

Second Applicant

and

PAPDIMOS: CONSTANDINOS

First Respondent

NAV EQUITY INVESTMENTS (PTY) LIMITED

Second Respondent

JUDGMENT

MIA, AJ

[1] The applicants, Broadbrush Investments 21 (Pty) Limited ("Broadbrush"), the owner and Jay Mothibi Incorporated (Jay Mothibi Inc.) a tenant ("the applicants") seek an order evicting the respondents from an office in the business premises. The respondents oppose the

application on the basis their occupation is integrally linked to the occupation of the tenant Jay Mothibi Inc.

[2] The first applicant concluded a lease agreement with Jay Mothibi Inc. dated 25 May 2004 which commenced on 1 July 2004. The lease agreement provided for an initial lease period of ten years commencing from 1 July 2004 until 30 June 2014. This agreement was the only agreement entered into between the first and second applicant during this period and became known as "the Jay lease". This lease was terminated on 13 December 2013, seven months before it was due to end.

[3] By reason of an oral agreement with the first applicant the first respondent occupied an office in the first applicant's premises. The terms of such occupation were recorded in a letter from "Broadbrush" to the first respondent of which the relevant portion reads as follows:

"1.2 The office on the mezzanine level previously occupied by Gordon Schacat shall be made available to you rent free for the duration of **the existing Jay lease**.

1.3 It is recorded that the office provided in terms of 1.2 above is in lieu of your efforts in securing 9 Arnold Street.

2....

3. I trust the above correctly reflects our discussion.”(my emphasis)”

- [4] The period of the lease according to clause 1.2.4 of the agreement provided that “*the Lease Period’ shall be for period of 10 (ten) years commencing on the Rental Commencement Date....*”. The rental commencement date was 1 July 2004 as provided in clause 1.2.6 of the Jay lease. Whilst the lease agreement was concluded to continue until 30 June 2014 the second applicant terminated the lease on 13 December 2013 seven months earlier.
- [5] The applicants contend that “Broadbrush’s” agreement with the respondents entitled the respondents to occupy the premises for the “duration of the existing Jay lease” which endured until 30 June 2014 but was terminated on 31 December 2013. The respondent placed on record two versions of their defence why they should hold occupation beyond the date of the Jay lease. The first defence raised by the respondents was that they would be entitled to use the mezzanine level rent free for the duration of the entire period the premises was occupied by Jay Mothibi Inc in terms of any lease with “Broadbrush”¹. A second version of the respondents’ defence is then raised that first respondent submits that their occupancy is not based on any lease agreement but on the basis of the second applicant’s continued

¹ Answering affidavit :paragraph 6.2 p 188

occupation of the premises. However Mr Riley appearing for the respondent submitted that the respondents are entitled to occupy the premises as long as Jay Mothibi Inc is a tenant in the building notwithstanding that the "existing Jay lease" ended on 13 December 2013. I intend to deal with the "the duration of the existing Jay lease" before I deal with the respondents' other defence for occupation as the lease as admitted initially as the ground for occupation.

THE DURATION OF THE EXISTING JAY LEASE

[6] It is not in dispute that the only Jay lease extant as at the date of the letter dated, 15 June 2004, confirming the oral agreement between "Broadbrush" and the first respondent, is the one dated 25 May 2004. The dispute hinges on the interpretation of the agreement between Broadbrush and the respondents.

[7] The relevant wording of the document on which the respondents contend their occupation is based is paragraph 1.2. Paragraph 1.3 gives the proper context and is included therefore. Paragraph 3 is relevant to the respondents versions. These paragraphs read as follows:

"1.2 The office on the mezzanine level previously occupied by Gordon Schacat shall be made available to you rent free for the duration of **the existing Jay lease.**

1.3 It is recorded that the office provided in terms of 1.2 above is in lieu of your efforts in securing 9 Arnold Street.

2....

3. I trust the above correctly reflects our discussion."(my emphasis)"

[8] The letter identifies the lease between "Broadbrush" and Jay Mothibi Inc. as "the Jay lease". The parties to that lease are not contested. However it is not any (past, present, future) lease between "Broadbrush" and Jay Mothibi Inc. upon which the respondents tenancy is founded and by which it is circumscribed. "Broadbrush" specifically inserted the word "existing" to identify the relevant Jay lease.

[9] Broadbrush specifically inserted the word "existing" to identify the relevant "Jay lease" and the period referred to in the oral agreement. The insertion of the word "existing" makes it clear that the period referred to was circumscribed and referred to "the existing Jay lease" as at 15 June 2004. The dictionary definitions of the word "existing"² make it clear that the object thus described is a concrete reality.

[10] Our law has previously had occasion to consider the import of the word "existing" In *De Villiers and another v Barnard and Others*

² "existing"- that exists or has existence; that exists at any implied or specified time see Oxford English Dictionary (Eighth edition); "exist"- "to have reality or being; be to occur or be present or to continue being; live" see Webster's New World (Fourth edition)

1958(3) SA 167(A) Fagan CJ at p 180 in discussing the existing rights of a riparian owner stated:

“ Obviously the term ‘existing rights’ here cannot mean the common law right of appropriating the water, for that would make the section nugatory and leave the common law unchanged. **It can only refer to particular rights,...**”(my emphasis)

In *Van Horsten NO v District Commandant SA Police* 1948 (3) SA 79 (N) it was contended that the word exists meant in its context. The Court per Carlisle J found that in the context of the legislation:

“ The verb “exists” would appear to have reference to the time of (1) the application and (2) the grant.”

In *Noble and Barbour v South African Railways and Harbours* 1922 AD 527 Innes CJ commented at p 536 that “An existing right is one actually vested at the contemplated date in the person concerned.” (as opposed to an accrued right). The authorities all indicate that an existing state of affairs is not hypothetical or but refers to a particular circumscribed or present position or circumstance.

- [11] The document which confirms the oral agreement relies on the agreement which provides free accommodation for the duration of an already calculated lease against the background of the respondent's efforts recorded in paragraph 1.3 of the letter “It is recorded that the office provided in terms of 1.2 above is in lieu of your efforts in securing 9 Arnold Street.”. The letter moreover circumscribed respondent's tenancy to the

"the duration of **the existing Jay lease**". By limiting the respondent's tenancy to "the duration of **the existing Jay lease**" a period of time was introduced which duration was known to the parties.

[12] Mr Riley submitted on behalf of the respondents that there was a dispute with regard to the interpretation of the words "the existing Jay lease", the interpretation applied by the first respondent was that upon receiving the letter dated 24 June 2004 he phoned Mr Georgiades and informed him that the recordal was correct except for the terms of clause 1.2. in the letter. The respondent communicated that he was to be afforded the use of the premises at all times that Jay Mothibi Inc was in the building. This correction was agreed to by Mr Georgiades according to the first respondent. The applicants dispute this version. Mr Georgiades denies such communication with the first respondent and states that he would have recorded a variation of the agreement in writing. Mr Riley submitted that the applicants' ought to have foreseen a dispute on this issue and requested it be referred for oral evidence. They did not do so, consequently the application ought to be dismissed. In the alternative, Mr Riley submitted that the meaning of the words "the existing Jay lease" should be referred to oral evidence.

[13] Mr Cassim, on behalf of the applicant, submitted that this court could nevertheless still refer the matter to oral evidence if it was of the view

that there was a dispute based on *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A). He submitted however that the first respondent changed his version under oath on the papers. The respondents' first defence was that they would be entitled to use the mezzanine level rent free for the duration of the entire period the premises was occupied by Jay Mothibi Inc in terms of any lease with "Broadbrush"³. The respondents' version then changes dramatically when the first respondent submits that his occupancy is not based on any lease agreement but on the basis of the second applicant's continued occupation of the premises. Mr Cassim submits that the first applicant is a legal person separate and distinct from the second applicant. The respondents have contradicted themselves on the papers and the discrepancy and dispute could only be with regard to the version of the respondent neither of which sustained a defence to the first applicants' claim.

- [14] In as far as the respondents submitted that the question of the interpretation of the document containing the phrase "for the duration of existing Jay lease" should be referred to oral evidence in view of a discussion with a director of Broadbrush, Mr Georgiades regarding a variation of clause 2.1 of the latter dated 15 June 2004, such referral is not supported by the applicants' denial of a variation. Mr Georgiades denies that it was agreed that the respondents could occupy the premises for as long as Jay Mothibi Inc occupied the premises. Mr.

³ Answering affidavit :paragraph 6.2 p 188

Georgiades did not confirm this new agreement after the conversation in writing or replace the letter dated 15 June 2004. In fact Mr Georgiades denies that the first respondent contacted him at all and states that he would not have agreed to a variation which would have impacted on the shareholders of Broadbrush and Jay Mothibi without consulting them.

- [15] In considering whether to refer the matter to oral evidence I have taken into account that the respondent places different versions before this Court for their occupation of the premises. At paragraph 6.2 of the respondents' answering affidavit the respondent claims entitlement to use of the office space rent-free for the entire duration that Jay Mothibi Inc rents office space. Later at paragraph 37 the second respondent claims their occupation is not based on any lease. This is contrary to the first respondent's earlier statement in his answering affidavit that he spoke to Mr Georgiades about clause 2.1 and altering the content thereof. Clause 2.1 links the respondents' occupation to "the duration of the existing Jay lease". Any variation of clause 2.1 would be a variation of occupation linked to "the duration of the existing Jay lease". There is no altered clause 2.1 presented to this Court. In the absence of a varied clause 2.1 the respondents seek to extend "the duration of the existing Jay lease" to any lease or any occupation. There is no dispute regarding the "the duration of the existing Jay lease".

[16] The letter dated 15 June 2004 is clear with regard to the terms of the respondents' occupation. Whilst the respondents' dispute the terms thereof such dispute only arose towards the end of the term of the lease when there was an early termination and the respondents sought to extend their right to remain until 30 June 2014. Thereafter the respondent developed a view that they were entitled to remain for as long as Jay Mothibi were tenants and then as long as Jay Mothibi were in the building. No agreement is produced which supports such entitlement and sustains the respondents in their defence. The respondents are not presently in lawful occupation of the building. The applicants are entitled to the relief sought.

[17] This was not a complicated matter and no special order was sought as to costs. Costs are awarded on the usual party and party scale. The applicant did not persist with the relief for holding over of the property.

ORDER

[18] In the result the following order is made:

1. The first and second respondents are ordered to vacate the Mezzanine floor and particularly the office space occupied by the respondents at 9 Arnold Avenue, Rosebank, Johannesburg on or before 11 December 2017.

2. In the event that the respondents fail or refuse to vacate the premises by 11 December 2017, the Sheriff of this Court is hereby authorised to enter upon the premises and to evict the first and second respondents from the property forthwith.
3. The first and second respondents are ordered to pay the costs of the application jointly and severally.

A handwritten signature in dark ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv N Cassim SC
Instructed by	:	Jay Mothibi Incorporated
On behalf of the respondent	:	Adv N Riley
Instructed by	:	Bose Attorneys Inc.
Date of hearing	:	31 October 2017
Date of judgment	:	4 December 2017