IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***14th December 2017*** Signature:

APPEAL CASE NO: A3052/2017

COURT *A QUO* CASE NO: 7097/2017

In the matter between:

SIDDERS: BRYAN Appellant

- and -

NIYAKI: CHRISTA N O First Respondent

NIYAKI: ALEKSEY VLADIMIROVICH N O Second Respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

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JUDGMENT

ADAMS J:

[1]. This is an appeal against a portion of the judgment and the order of the Johannesburg North Magistrates Court in Randburg (Additional Magistrate H Banks), handed down on the 3rd of April 2017. The court *a quo* granted the following order against the appellant in favour of the first and second respondents:-

(a) It is declared that the appellant and all persons occupying the property through and under him, are in unlawful occupation of Erf […], Kyalami Estates Extension 3, situate at […] F. Street, Kyalami Estate ('the property'), and that it is just and equitable that the appellant and all persons occupying the property through and under him, on the grounds set out in the founding affidavit, should be evicted from the property in terms of s 4(1) read with s 6(1) of Act 19 of 1998.

(b) The appellant and all persons occupying the property through and under him, be and is hereby ordered to vacate the property on or before the 30th April 2017.

(c) Should the appellant and all persons occupying the property through or under him, fail or refuse to vacate the property on or before the 30th April 2017, the sheriff of this court be and is hereby authorised to evict them from the property.

(d) Costs are awarded to the first and second respondents.

[2]. In sum, the court below had ordered the eviction of the appellant from the property with effect from the 30th of April 2017. The court *a quo* had found that the respondents, who are the owners of the property, had lawfully cancelled a lease agreement between them and the appellant due to the fact that appellant had breached the lease agreement by falling into arrears with payment of his monthly rental.

[3]. It is common cause that on the 1st of March 2017, when the respondents caused the application for the eviction of the respondent to be issued, the respondent was no longer in arrears with his monthly instalments, he having brought the instalments up to date on the 1st of February 2017. The respondents' attitude at that stage was however that the lease agreement had been cancelled by notice on the 3rd of January 2017, and same had not been reinstated, which meant that the appellant had no legal right to occupy the property. In the founding affidavit in support of the application for eviction dated the 24th February 2017, the respondents conveniently make no mention of the fact that by then the appellant had brought his monthly instalments up to date and that there had been discussions between the parties presumably with a view to the reinstatement of the monthly tenancy. What the respondents did allude to were facts, which in their view, indicate that it would have been just and equitable to have the appellant evicted from the property by a date to be determined by the court.

[4]. The application for eviction was opposed by the appellant mainly on the grounds that he should be given more time to vacate the property and to look for alternative accommodation. He also placed before the court factors which he suggested demonstrated that it would be just and equitable for the court to give him a further three months within which to vacate the premises. The application was heard on the 3rd of April 2017, and the learned Magistrate gave the above order for the appellant to be evicted from the premises if he fails to vacate same on or before the 30th April 2017.

[5]. The appellant appeals only against that part of the judgment and the order of the Magistrates Court which ordered him to vacate the leased premises by the 30th April 2017. My reading of the notice of appeal is that the appellant does not take issue with the rest of the judgment and the order. The appellant appears to have accepted that the respondents had the right to cancel the monthly lease tenancy. He however does not accept that, having regard to the circumstances in this matter, the respondents were entitled to have him evicted on the 30th April 2017. That portion of the order, so it was contended by the appellant, should not have been granted by the court below, as it was unjust and iniquitous, all things considered, for him to have been ordered to vacate the premises by the 30th April 2017.

[6]. On appeal it was submitted by Ms Humphries, Counsel for the appellant, that a court hearing an eviction matter is obliged to take all the relevant circumstances into account in order to balance the interest of the unlawful occupier as well as those of the owner in order to arrive at a just and equitable decision. In that regard, we were referred to: *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC) at 233F.

[7]. The court, after concluding that an eviction order should be granted, is required to determine the date on which to evict and the conditions on which the eviction should occur, in order to ensure that the order is just and equitable. See: *Occupiers, Berea v De Wet NO and Another,* 2017 (5) SA 346 (CC) at [46] and [48].

[8]. The relevant factors in this matter, so it was submitted on behalf of the appellant, are the following: the appellant is a 72 year old male; he is self – employed and in financial difficulty in that he is reliant on funding for his business in order to pay his rentals; by the time the eviction application was issued by the respondents, the appellant had already settled the arrear rental

and was at that stage no longer in breach of the lease agreement; the appellant had just launched his new business and all that he required was more time in order to stabilise his new business whilst seeking new residential and business premises; as the appellant had settled the arrear rental and was, at that stage, paying the rental due, the respondents would not suffer any prejudice if the court allowed the appellant three more months within which to vacate the premises; and the respondents did not put up any evidence to show that the trust, which the first and second respondents represent in these proceedings, would have suffered any real prejudice, let alone severe prejudice if the appellant was allowed to remain in the premises for a further three months.

[9]. A just and equitable order would have been to allow the appellant three more months within which to vacate the premises on the condition that he keeps paying the rental and other obligations pursuant to his occupation of the property.

[10]. I find myself in agreement with these submissions by the appellant, who placed reliance on the *ratio decidendi* In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*, 2017 (4) SA 243 (GJ). In that matter, the court (Van Oosten J) dealing with cancelation of a lease agreement in accordance with the letter of the agreement, has this to say:

> '[28] In considering the issue the court is enjoined to make a value judgment based on the constitutional concepts and values as referred to in the authorities quoted above. In particular and adopting an objective approach, the concepts of fairness and *ubuntu* are paramount. All the facts and circumstances disclosed by the parties are relevant and fall to be weighed together with contractual principles such as freedom of contract and *pacta sunt servanda*. The final test is whether the circumstances of this case constitute sufficient cause for the relaxation of *pacta servanda sunt*.

> [29] Some information as to the nature of the hotel business conducted by the respondent is apposite. The five-storey building in which the hotel is housed comprises 292 rooms, a restaurant, a bar, 5 meeting rooms, a 'team' room, an outdoor pool, a gymnasium and parking. The premises have been utilised for the conducting of the business as a hotel since 1982. The nature of the business, primarily, is hotel accommodation across all market segments, including corporate, government, leisure, standard tour operators, conferencing and food and beverage services. Guests from abroad are primarily from Europe, especially France and Germany'.

[11]. And then also at par [35] Van Oosten J concludes as follows:

> '[35] In a nutshell the court is required to balance the late payment of the October rental, on the one hand, juxtaposed with the bank solely having to bear the blame for the late payment, and the prospect of the respondent suffering disproportionate prejudice in the event of eviction. The determinant criterion is the demonstrable unfairness in the implementation of clause 20, in granting an order for eviction as sought by the applicant. I am accordingly bound to find that the judicial precedent set in Venter, considered against the normative framework of the Constitution in developing the common law, no longer applies. Applying the value of ubuntu, 'carrying with it the ideas of humaneness, social justice and fairness' (Everfresh para 71), to the facts of this matter, finally leads me to conclude that an order for the eviction of the respondent, as sought by the applicant, would offend the values of the Constitution I have alluded to, and that the application accordingly must fail'.

[12]. In the *Mohamed's Leisure Holdings* matter the court dismissed the owner's application for the eviction of the lessee from the property. The court had accepted the lessor's entitlement to cancel the lease agreement because the lessee had fallen into arrears with his monthly rental, albeit through no fault on its part. The court nevertheless dismissed the eviction application on the basis that with reliance on ss 34 and 39 of the Constitution, and in particular the concepts of *ubuntu* and fairness, there should be a relaxation of *pacta sunt*

servanda on the ground that the implementation of the cancellation clause contained in the agreement, in the circumstances of that case, would manifestly cause irreparable harm and offend against public policy.

[13]. Applying these principles *in casu*, it may well be that the appellant was entitled to resist outright the respondents' application for eviction. However, on the 1st of December 2017, the Judgment of Van Oosten J was overturned by the Supreme Court of Appeal, which held that the cancellation clause in the lease agreement in that matter was not unfair or unreasonable. The doctrine of *pacta sunt servanda*, so the SCA held, should be enforced and applied, and that it is impermissible to infuse principles of *ubuntu* and good faith in the circumstances of that matter.

[14]. Be that as it may, in my judgment, the implementation of the cancellation clause contained in the agreement and the insistence by the respondents to have the appellant evicted, in the circumstances of the matter before the Magistrate, would manifestly have caused irreparable harm and offended against public policy. In light of the recent judgment of the SCA in the *Mohamed's Leisure Holdings* matter, this is not a ground for refusing the application for the eviction of the appellant. In my view, these factors are nevertheless justification for the Magistrates Court granting of the appellant's application for a further period within which to vacate the premises. That request, in our view, was innately fair and objectively reasonable, and the Court *a quo* should have granted that request.

[15]. Moreover, it was submitted by the appellant that a procedural irregularity was perpetrated in the Magistrates Court. In light of the amendment to the Magistrate's Court Rules and in particular Rule 55, the hearing of the matter, after being opposed by the appellant, should not have been proceeded with and heard by the Magistrate on the 3rd April 2017. The matter should have been

placed on the opposed motion court roll and heard as an opposed matter at a date later than the 3rd April 2017, which is the date on which the matter would have been heard if same was not opposed. This contention, so it was submitted by Ms Humphries, is strengthened by the fact that the appellant's replying affidavit had been delivered on the court day preceding the date on which the application had been set down for hearing on the unopposed roll. I agree with these submissions. If regard is had to the principles in the *Berea Occupiers* matter, an injustice had been perpetrated on the appellant. By all accounts, the learned Magistrate did not exercise her judicial oversight duties.

[16]. This appeal is on the basis that the court *a quo* erred in its findings relating to these issues, and it is submitted, on behalf of the appellant, that the Magistrate should not have granted the eviction order.

[17]. For the above reasons I find that the appellant at the very least was entitled to an order giving him more time within which to vacate the premises.

[18]. During argument before us, Ms Humphries submitted that it would have been just and equitable to allow the appellant three months from the date of the order to vacate the premises. I agree with this submission and I therefore intend varying the previous eviction order of Magistrates Court to afford the appellant until the 28th February 2018 to vacate the premises.

[19]. Accordingly, the appeal should be allowed.

Cost

[20]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[21]. As indicated, the appeal stands to be upheld, which means that the appellant is successful on appeal, which implies that the appellant should have been afforded the three months within which to vacate the property. This means that the appellant should be awarded the cost of the application in the Magistrates Court as well as the cost of the appeal.

[22]. On the other hand, the applicant, as it was entitled to do, asserted a contractual right for the relief sought.

[23]. Accordingly, I am of the view that no order as to cost relative to the application in the court a quo as well as in relation to the appeal would be fair, just, equitable and reasonable to all concerned.

Order

Accordingly, the following order is made:-

1. The appeal is upheld.

2. The order of the Court *a quo* be and is hereby set aside and substituted with the following:-

'(a) It is declared that the appellant and all persons occupying the property through and under him, are in unlawful occupation of Erf […], Kyalami Estates Extension 3, situate at […] F. Street, Kyalami Estate ('the property'), and that it is just and equitable that the appellant and all persons occupying the property through and under him, on the grounds set out in the founding affidavit, should be evicted from the property in terms of s 4(1) read with s 6(1) of Act 19 of 1998.

(a) The appellant and all persons occupying the property through and under him, be and is hereby ordered to vacate the property on or before the 28th February 2018.

(b) Should the appellant and all persons occupying the property through or under him, fail or refuse to vacate the property on or before the 28th February 2018, the sheriff of this court be and is hereby authorised to evict them from the property.

(c) Each party shall bear his own costs'.

ADAMS J

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree,

SENYATSI AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	10th October 2017
JUDGMENT DATE:	14th December 2017
FOR THE APPELLANT:	Adv Chantelle Humphries
INSTRUCTED BY:	T K I Scott Attorneys
FOR THE FIRST & SECODN RESPONDENTS:	Adv J Janse Van Vuuren
INSTRUCTED BY:	S S L R Incorporated