

REPORTABLE
IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 3564/2010

In the matter between:

MEREBANK HOTEL (PTY) LTD

APPLICANT

and

DONNY CHETTY

RESPONDENT

JUDGMENT

Delivered on: 29 October 2010

NGWENYA AJ:

[1] This is an application for eviction of the respondent in this matter and all those who claim through him. The proceedings were brought on motion but due to irresolvable dispute of facts, the matter was referred to oral evidence. I had to decide on trial whether there existed an oral lease agreement between the parties.

[2] As the respondent claimed the existence of an oral lease, as opposed to the plaintiff which claimed the existence of a month to month lease, it became common cause that respondent will present his case first. In this regard he testified on his behalf and thereafter called two witnesses. The two witnesses are his wife, Jayseelan Chetty and Lutchmiah Naidu. The sum total of their evidence is that in February 2009, in the office of Mr. Naidoo, at Chelmsford Hotel, Tongaat, a meeting took place. Present in

the meeting were Mr. Naidoo, plaintiff, his wife and Mr. L. Naidu. What featured prominently in that meeting was the lease between applicant and the respondent.

[3] Respondent wanted Mr. Naidoo on behalf of the applicant to regularise his lease which at that stage was on month to month. He wanted a longer and written lease. Naidoo assured him that he should not worry as he has a lease. It was three (3) years plus another three (3) years. No rental was discussed. Respondent assumed from the practice of the parties that in the past two and half (2½) years, that rental in place would remain the same. So would be the escalation. L Naidu, who was present in the meeting testified that Naidoo stated to respondent that the lease would be on similar terms as the written lease which the parties had between 2005 and 2006.

[4] Applicant testified through Mr. D. Naidoo, whom L Nadiu refers to as Naidoo Senior that the practice of the applicant is to reduce all the leases it has with the tenants into writing. Applicant has twenty one (21) tenants. All of them except the respondent have written leases. When the respondent failed to renew his written lease in 2006 he was given notice to vacate. After exhortation to the applicant not to evict him before the end of 2006, the parties have been on month to month rental agreement. Even this arrangement was reduced to writing as per the letter dated 28 March 2007 by the Applicant.

[5] Ms. Naidoo for the respondent submitted that on the evidence at hand respondent has established the existence of an oral lease. On the other

hand Mr. Phillips contends that taking into account the unassailable evidence as to how the applicant conducted its business, the odds were heavily stacked against the respondent. It was highly improvable that applicant could out of twenty one (21) tenants, decide to enter into an oral lease agreement with the respondent only.

[6] This matter does not involve any serious point of law. In my judgment I accept uncritically that applicant conducted its business in an very formal manner. I have no reason to reject Mr. Naidoo Senior's evidence. Therefore I accept it. Having thus accepted applicant's evidence does not necessarily mean that I reject the respondent's version. I would have to accord it similar evaluation and treatment. The version of both the respondent and his wife are vague. Both only remember that Naidoo Senior told them they have a lease. L. Naidu takes the matter further. He says on behalf of the applicant it was said the lease was on the original terms of the expired lease. This is however curious as neither respondent nor his wife heard this. But even if so, it still does not help the respondent. The court requires proof that parties intended to and did enter into a contract of lease.

[7] It should be noted that according to the respondent the very reason of meeting with the applicant was to get a written lease. They left the meeting which lasted for between fifteen (15) and twenty (20) minutes no better than they were when they arrived. Subsequently to this meeting his conduct towards the applicant was no different. By this I mean if his purpose was to have a meeting to change his status from that of a month to month tenant to a long term tenant, he did not show it. On 01 October 2009, respondent addressed a letter to the applicant in which he

expresses his concerns about the respondent and states:

"I am extremely disappointed that you did not advise me of your intentions. This is contrary to our numerous discussions over the last 3 years an recent discussion after service of you "notice". You promised to give me a new lease after I had sorted out the smoking bar." Emphasis added.

One would expect that if the meeting of February 2009 had already achieved what the respondent wanted, any communication after this will be aimed at asserting rights already granted not promises.

[8] Apparently the letter referred to above was not replied to by the applicant. Subsequently the matter was taken up by the respondent's then attorneys by a letter dated 10 November 2009. While in their letter they do make reference to a lease, this does not refer to the three (3) years plus three (3) years lease which is now the subject of this litigation. No doubt he who avers must prove. On probabilities alone I incline myself to the submission by Mr. Phillips for the applicant. I find the version of the respondent highly improbable and therefore unsustainable. For this reason it ought to be dismissed.

[9] In the circumstances I find for the applicant. I think fairness dictates that respondent be given a reasonable time to vacate. In my judgment one month should be a reasonable period to do so. While I find his defence highly improbable I do not think that a punitive cost order is warranted.

[10] All things considered I make the following order:-

1. That the respondent and any persons claiming through and holding under the respondent be and are ordered to vacate the premises being Suite 202, 2nd floor, Tab Centre, situate at 80 Parthenon Street, Phoenix, KwaZulu-Natal, within one (1) month of service of a copy of this Order upon the respondent;
2. that in the event that the respondent fails to comply with paragraph 1 of this Order, the Sheriff of this Court shall be and is hereby authorised and directed to eject the respondent and any persons claiming through and holding under the respondent from the premises referred to therein;
3. Respondent is ordered to pay costs of this action.

NGWENYA AJ

Date of Hearing : 18 October 2010

Date of Judgment : 29 October 2010

Applicant's Representative : **MR. D PHILLIPS**

Instructed By : **PRIOR & BEZUIDENHOUT**
Applicants Attorneys
1st Floor, Nedbank Building
Glenwood, Durban
Tel: (031) 201 0462
Ref: M. Kinkel

Respondent's Representative: **MS. NAIDOO**

Instructed By: **MAISTRY & MOTSIMBE ATTORNEYS INCORPORATED**
1ST Floor, Suite 102, Excell House
421 Smith Street
Durban
Tel: (031) 305 5059
Ref: YM/sk/01/2010