

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

CASE NO. 12482/2008

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

ZEDEK TRADING 82 CC

RESPONDENT

JUDGMENT

MURUGASEN, J.

- 1] This is an application by the eThekweni Municipality, the owner of immovable property described as Sites 129, 130 and 133 on Remainder of Erf 301, Springfield situate at Electron Road ('the property') for the ejectment of the respondent, Zedek Trading 82 CC, and all persons occupying the property through it, from the property and costs.

- 2] One day prior to the hearing of this application, the respondent brought an application to stay these proceedings pending the joinder by the applicant of the respondent's seven sub-lessees on the grounds that they had a direct and substantial interest in any order granted in this application.

- 3] The applicant opposed the application, and advised that it had its own arrangements and undertakings in place with the subtenants.

- 4] The application was dismissed with costs as the respondent had failed to bring the application timeously.

Factual Background

- 5] On 17 August 1994, the City Council of Durban (as the applicant was then known) entered into a short term tenancy agreement ('the agreement') with one P Naidoo ('Naidoo'), in terms of which the property was leased to Naidoo. The agreement was deemed to have commenced on 1 May 1994.
- 6] In terms of a written agreement of assignment, the applicant consented to the assignment by Naidoo of his rights and obligations in terms of the agreement to Mr V Reddy ('Reddy') with effect from 1 October 1997. Reddy accepted the assignment and assumed all the obligations of the tenant in terms of that agreement.
- 7] The applicant thereafter concluded a further agreement of assignment with Reddy and the Respondent, in terms whereof Reddy assigned his rights and obligations to the Respondent, who assumed such rights and obligations with effect from 12 July 2002. In concluding that agreement Reddy represented himself and the respondent.

The following is common cause:

- 8] The applicant is the owner of the property. The property is commercial albeit some occupants reside thereon. The respondent is in occupation thereof, and the seven subtenants occupy the property under a sublease with the respondent.
- 9] The original lease agreement between Naidoo and the applicant and the agreement of assignment between Naidoo and Reddy was signed with the consent of the applicant and the tenancy by Reddy was subject to the same terms and conditions as the lease agreement.
- 10] The agreement of assignment between Reddy and the Respondent was executed with the consent of the applicant and the respondent occupied the property in terms thereof.

11] Reddy the sole member of the respondent, is now deceased and Leenderen Reddy represents the Respondent in these proceedings by virtue of his office as duly authorised executor in the estate of Reddy.

THE APPLICANT'S GROUNDS

12] The applicant alleges that the respondent occupied the property on the same terms and conditions as set out in the tenancy agreement with Naidoo as the terms and conditions in the agreement remained binding on the tenants who subsequently occupied the property in terms of the assignment agreements.

13] Some of the pertinent and material terms of the tenancy agreement were:

- 1 the tenancy of the property was made available only as an interim measure pending alienation of the property; the City Council was not obliged to find a replacement site for the tenant when the property was alienated.
- 2 In the event that the any portion of the property was required by the applicant for any purpose, the applicant was entitled to terminate the agreement in writing, without any obligation to compensate the tenant.
- 3 The tenancy agreement could be terminated at any time by either party provided that one month's notice of such intention was given to the other party in writing.
- 4 Should the City Council proceed with legal action consequent to any breach of the terms and conditions by the tenant, the tenant would be liable to pay the City Council's costs on an attorney and client scale.

14] Each assignment agreement contained a non variation clause in terms of which 'no variation or cancellation or institution of rights or obligations under the assignment agreement would be binding unless reduced to writing and signed by all the parties thereto'.

15] The applicant alleges that the lease was properly terminated, after written notice was served on the respondent on 29 January 2008 that its

tenancy would terminate on 28 February 2008 and that should the respondent fail to vacate the property by that date, legal action for its eviction and damages would be instituted. The notice was received by L Reddy in person.

17] As the respondent has failed and / or refused to vacate the property despite the notice, it is in unlawful occupation and the applicant is consequently entitled to an order for the eviction of the respondent from the property and costs on an attorney and client scale.

18] The applicant also contends that it will be prejudiced if the property were not available for use by its Water and Waste Service Unit, while the respondent will suffer no prejudice as it could conduct its business on alternative sites. The intended development by the applicant was also in the public interest.

THE RESPONDENT'S GROUNDS OF OPPOSITION

- 19] The respondent has opposed the application, on the following grounds:
- 1 the applicant has failed to prove a nexus between the agreements it relies on and the agreement in terms of which the respondent occupies the property;
 - 2 the applicant had not properly cancelled the lease and the respondent accepted the notice of termination on 29 January 2008 without prejudice to its rights;
 - 3 the cancellation will result in financial prejudice to the applicant while the applicant has alternative immovable property resources;
 - 4 the applicant has failed to join the subtenants to the prejudice of their constitutional rights to property;
 - 5 the respondent is not in breach of the agreement of lease between the parties as it has paid the rental in accordance with the invoices submitted by the applicant;
 - 6 the applicant has accepted the rental paid by the respondent and is not entitled to occupational damages;

The issues that lie for determination are :

- 1 Whether the terms and conditions of the tenancy agreement dated 1 August 1994 apply to the agreement of assignment under and in terms of which the respondent occupies the property?
- 2 Whether the lease of the property was cancelled by the applicant by way of the notice dated 29 January 2008?
- 3 Whether the respondent is able to resist the cancellation of the lease because it alleges that the applicant has other immovable property at its disposal for alternative use for the same project it intends developing on the property?
- 4 Whether the rights of the subtenants are prejudiced by the application and is there a constitutional imperative obliging the applicant to join them in this application?
- 5 Whether the applicant has waived the termination of the lease by accepting the monies paid by the respondent?
- 6 Whether the applicant entitled to the relief it seeks?

The assignment of the lease :

- 20] Assignment is the transfer by a lessee of his rights and obligations under a lease to a third party, the assignee. 'The effect of an assignment of a lease by a lessee is that the assignee steps into the lessee's shoes: the assignee acquires and the lessee is divested of his rights *and obligations* under the lease.' (**Cooper:Landlord andTenant 2nd edition page 245.**) The assignment therefore has the effect of creating a new lease between lessor and assignee. (**Cooper page 269**)
- 21] The respondent relies on the failure of the applicant to attach a copy of the agreement dated 1 May 1994 concluded with P Naidoo to the agreement of assignment (AGT 2), and alleges that as the copy of the agreement of assignment between the applicant, Naidoo and Reddy (AGT2) was unsigned, there was consequently no nexus between agreements AGT1 and AGT3. It contends further that the short term tenancy agreement concluded on 1 May 1998 was deliberately not annexed to the papers because the terms and conditions thereof do not

favour or assist the applicant.

22] A perusal of the relevant documents (including the application by the respondent under Case No. 4451/2007 furnished by the applicant in support of the allegations in its replying affidavit) reveals the following :

1 the short term tenancy agreement ('the tenancy agreement') which was the principal agreement of tenancy between the applicant and Naidoo was effective from 1 May 1994, despite the date of signature thereof by the parties.

2 The tenancy agreement contained the material terms and conditions of the lease and regulated the rights and obligations between the applicant and Naidoo. This included the right of the parties to terminate the lease by giving one month's written notice of the termination to the other party.

3 Naidoo assigned his rights and obligations under the tenancy to Reddy, who accepted same, with the consent of the Applicant with effect from 1 October 1997 by way of an agreement of assignment dated the 10 April 1998.

4 Although the assignment agreement refers to "a Short Term Tenancy Agreement (a copy of which is attached) completed on 1 May 1994, there can be no doubt that what is referred to is the tenancy agreement between the applicant and Naidoo **with effect from 1 May 1994**. (my emphasis), even though a copy of the tenancy agreement was not attached to the assignment agreement.

5 Reddy then in effect became the tenant. Therefore when the applicant, Reddy and the Respondent entered into the agreement of assignment dated 2 December 2002 with effect from 12 July 2002, the parties relied on the same tenancy agreement, although the paragraph 1 thereof refers to "a Short Term Tenancy Agreement (a copy of which is attached) completed on 1 May 1998", and the tenancy agreement was not attached.

23] It is apparent from a perusal of all the agreements that the Applicant used a proforma agreement; the format and contents of the Assignment

agreements are the same except for the dates and details of the parties.

- 24] The tenancy agreement relied on by the applicant and the Respondent under Case No 4451/2007 is the agreement between the applicant and Naidoo which was effective from 1 May 2004. He therefore knew that there was no tenancy agreement dated 1 May **2008**, and his allegation that the applicant has failed to prove a nexus between AGT 1 and AGT 3 smacks of dishonesty.
- 25] The probabilities therefore favour the conclusion that there is no other Tenancy Agreement but the original one effective from 1 May 1994 (AGT 1) and the reference to '1998' in AGT 3 was a typographical error.
- 26] It is trite that an applicant must make out its case in its founding papers; but I am satisfied the furnishing of an unsigned copy of the assignment agreement (AGT 2) is not fatal to the application. The signed copy was furnished by the applicant when the respondent relied on the applicant's failure to furnish a signed copy, although it had a signed copy in its possession, on which it relied in its application under Case 4451/2007 to establish its *locus standi*.
- 27] The respondent's conduct is therefore disingenuous and dishonest, particularly his allegation in paragraph 8.2 of his answering affidavit that 'these agreements can only be in the possession of the Applicant'. Further despite its dispute of the agreement relied on by the applicant, the respondent has itself not provided the basis on which it occupies the property .
- 28] I am in the premises satisfied that the respondent occupied the property under the terms and conditions as contained in the tenancy agreement with effect from 1 May 1994 (AGT 1), and the applicant was entitled to terminate its occupation by way of one (1) calendar month's written notice to the respondent.

Cancellation of the lease

29] As the applicant relies on the letter of termination dated 29 January 2008, and not the notice issued in 2003, the respondent's objection thereto disseminates, as it has submitted that the aforesaid notice is not valid 'if the Applicant wants to rely on the earlier termination of 28 January 2003' (page 71 paragraph 11.2).

30] The applicant was entitled under the tenancy and assignment agreements to terminate the lease on one month's written notice; the only further obligations on the applicant apart from the period of notice and that it had to be in writing, was that the notice of cancellation had to be clear and unequivocal (**Ponisammy v Versailles Estates 1973 (1) SA 372 (A) at 385 G** and communicated to the Respondent (**Swart v Vosloo 1965 (1) SA 100 (A)**).

Notice of termination is effective from the date when it is communicated to the mind of the lessee and it does not require acceptance. (**Cooper page 67**)

31] I am satisfied that although the applicant referred to the letter dated 28 January 2003 (AGT 4) in its notice of termination dated 29 January 2008 (AGT 6), it has properly complied with its aforementioned obligations and there is no merit in the respondent's submissions disputing the cancellation.

32] In the premises, the lease between the parties terminated on 28 February 2008, from which date the respondent was obliged to vacate the property.

THE INTENDED USE OF THE PROPERTY

33] In cancelling the lease, the applicant has relied on the relevant terms of the tenancy agreement, *inter alia* the tenancy of the property was made available only as an interim measure pending alienation of the property; the tenancy agreement could be terminated at any time by either party provided that one month's written notice of such intention was given to

the other party.

- 34] The respondent however resists the application on the grounds that that the cancellation of the lease will result in financial prejudice to the respondent, while the applicant has vast immovable property resources available for alternative use for the intended project by the Water and Sanitation Unit.
- 35] Although the applicant has provided details of the use to which the property is to be put once the respondent has vacated the property, the submissions are not necessary to the relief it seeks, while the submissions of the respondent are ill founded and lack merit, particularly the allegations against Tromp, and it is apparent that it is attempting to protect its own financial interests at the expense of the applicant.
- 36] An essential element of a lease is that the lessor gives and the lessor receives temporary use and enjoyment of the property (**Cooper page 3**). Once the lessor properly cancels the lease in terms of the lease agreement, it is entitled to restoration of the leased property to it.
- 37] The applicant was therefore entitled to the restoration of the property, no matter what the intended use.

THE PROTECTION OF THE CONSTITUTIONAL RIGHTS OF THE SUBTENANTS

- 38] Mr Marnewick argued that while traditionally sub-lessees did not have the right to receive notice of ejectment proceeding or to be joined in ejectment proceedings, the applicant was constrained by the provisions of Articles 25 and 34 of the South African Constitution to join the sub-lessees as interested parties with the right not to be deprived of property. He also exhorted the court not to persist with an apartheid era attitude that the rights of the registered landowner were paramount to the exclusion of the rights of all others, including subtenants, by failing to afford recognition to the property rights of the subtenants, which

extended to any property, movable or immovable which the sub-tenants had on the leased land to conduct their business, albeit subsidiary to those of the landowner.

39] This court recognizes that there is a constitutional imperative that the property right of all occupiers of land must be weighed against that of the owner of the property, and that these property rights have been recognized by the superior courts as rights worthy of protection.

However this property is utilised for commercial purposes and the benefit derived by the subtenants is financial as is the benefit to the respondent. The same constitutional protection afforded to the occupants of residential property does not apply. **(Ndlovu v Ngcobo; Bekker & Another v Jika 2003(1) SA 113 S C A)**

40] The effect of the respondent as lessee subletting is to create a lease between the respondent and the sublessee without creating a contractual nexus between the sublessee and the original lessor, viz, the applicant and without affecting the original lease or the contractual rights and obligations between the applicant and respondent.

41] It is therefore not for the respondent to insist that the subtenants be joined. The decision lies with the applicant and a risk that the applicant must take should it decide not to join the subtenants as parties to this application.

42] Furthermore any order of this court will not preclude the subtenants from exercising any right of recourse that they may have against the applicant and any grievance that the subtenants may feel against the Applicant may be ventilated at their instance and in any forum they consider appropriate. The applicant has in any event advised that it has an arrangement with the subtenants and has given an undertaking that any occupier will not be evicted without recourse to due procedure.

43] I am therefore not persuaded that should this court order the ejectment of

the respondent given the facts and circumstances of this case, it would be neglecting its constitutional and common law obligations to protect the rights of the subtenants.

Rental or Damages for Holding Over?

44] As the lease was cancelled the applicant was entitled to occupational damages and accepts any money paid by the respondent as occupational damages for holding over. The notice of termination states as follows: 'Should you fail to vacate the property; Legal action will be instituted against you for eviction and damages, all costs being to your account.'

The respondent was therefore aware that if it did not vacate the property as it was obliged to on termination of the lease terminated, it would be liable for damages as a result of its unlawful occupation.

45] The respondent alleges that there has been no unlawful holding over because the lease was not cancelled, and therefore the applicant was not entitled to damages.

46] Should a lessor cancel a lease when he is entitled to do so, he may claim damages for unlawful occupation or holding over. Rent is payable to date of cancellation. But once a lease agreement has been terminated, the rights and obligations relating to the payment of rent are also terminated. Thereafter the lessee is liable for damages for the period he remains in occupation of the property ie lessor is entitled to damages suffered as a result of the unlawful occupation of the premises (**Cooper Page 159 – 160**).

47] **In Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd [2002] JOL 9810 (C), Van Zyl J**, considered the approach confirmed by the Appellate Division in **Sapro v Schlinkman 1948 (2) SA 637 (A)** that a lessor was entitled to rent for the actual period of occupation by the lessee after the cancellation of the lease agreement between the parties and has in my respectful view properly focussed on the anomaly therein

when the lessee remains in occupation without the consent of the lessor at page 19 [45] –[46]:

[45] “The fundamental criticism has been that, if a lease agreement has been terminated by cancellation or otherwise, the rights and obligations attaching thereto are terminated. The lessor cannot then claim arrear rent from the lessee should he remain in occupation of the premises after such termination. This would, it is suggested by **AJ Kerr "Incompatible Remedies for Breach of Contract: Is Lease a Special Case?"** in **90 SALJ (1973) 228–233 at 229**, constitute "a radical departure from the general rule that an aggrieved party cannot both cancel a contract and sue for specific performance" (see in this regard **Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A)** at **469G–H**). His remedy would under normal circumstances, Kerr opines, be directed at damages for breach of contract.

[46] This appears to have been the approach in **Easton Investment Co (Pvt) Ltd v Edwards 1967 (2) SA 83 (R)** at **87B–C**, where **Davies J** said:

"In principle rent is a payment for the right to use and occupy the leased premises. Where such right is denied the tenant, for whatever reason, it is contrary to principle to enforce the obligation to pay rent. On this basis, therefore, I am of the opinion that the petitioner has no right to claim any amount as rent in respect of the period subsequent to his cancellation of the agreement, but is restricted to a claim for damages."

48] The applicant was therefore entitled to damages and not rent from the date of cancellation of the lease. *Ex facie* the notice of termination, the intention of the applicant was to claim damages, not rental, for unlawful holding over.

- 49] The respondent does not aver that because its payments were accepted by the applicant, a new lease was tacitly agreed upon by the parties, nor does it make any attempt to prove such agreement. (**Van der Merwe v Erasmus and Another 1945 TPD 97**). It merely relies on the assertion that it was not in breach of the lease agreement in that it has paid the rental for its occupation and the applicant could therefore not cancel the lease or claim occupational damages as its occupation was not unlawful.
- 50] The inference can therefore be drawn that the respondent was aware that it was paying damages and not rental, particularly when the applicant had made it abundantly clear that it has alternative use for the property.
- 51] As the applicant was entitled to damages for unlawful holding over because the respondent failed to vacate the property in compliance with its obligations, the acceptance by the applicant of the monies paid by the respondent did not constitute a waiver of its termination of the lease.

Relief sought by the applicant

- 53] In the premises, I am satisfied that the applicant is entitled to the relief it seeks. In my view the respondent has opposed the application as a dilatory ploy and the application to stay this application pending the joinder of the subtenants was a 'last ditch attempt' to stave off the inevitable.

COSTS

- 54] There is no reason why costs should not follow the result.
As the applicant was compelled to take legal action when the respondent breached the tenancy agreement by failing to vacate the premises when notice of cancellation was properly given by the applicant, in terms of clause 21 the respondent is liable to pay attorney and client costs. In any event given the disingenuous and dilatory conduct of the respondent, the court finds costs on an attorney and client scale appropriate.

ORDER

- 1 The respondent, Zedek Trading 82 CC, and all other persons in occupation under or through the respondent, are directed to vacate the immovable property described as Sites MA 129, 130 and 133 on Remainder of Erf 301, Springfield, and situate at Electron Road ('the property');
- 2 Failing immediate compliance with paragraph 1 of the order, the Sheriff of the High Court is authorised to evict the Respondent and all persons in occupation under or through the respondent, from the property.
- 3 The respondent is ordered to pay the costs of the application on an attorney and client scale.

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