



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 7155/2011

**AHMED ASRUFF ESSAY, N.O.
ABOObAKER JOOSAB NOOR
MAHOMED, N.O.
AHMED VALLY MAHOMED, N.O.
HAROUN MAHOMED GANIE, N.O.
MAHOMED ABDOOL GAFFAR JOOSAB, N.O.
AHMED YUSUF LOCKHAT, N.O.
MEHMOOD AHMED KHAN, N.O.
EBRAHIM CASSIM JEEWA, N.O.
MOHAMMED SAAD KAZI, N.O.**

FIRST PLAINTIFF

SECOND PLAINTIFF

THIRD PLAINTIFF

FOURTH PLAINTIFF

FIFTH PLAINTIFF

SIXTH PLAINTIFF

SEVENTH PLAINTIFF

EIGHTH PLAINTIFF

NINTH PLAINTIFF

And

**MEMBER OF THE EXECUTIVE COMMITTEE
FOR EDUCATION FOR THE PROVINCE OF
KWAZULU-NATAL**

DEFENDANT

JUDGMENT

Delivered on: 08/12/2014

MBATHA J

1.

The plaintiffs are the Trustees of the Juma Musjid Trust, bearing the reference number, IT854/1951, Pietermaritzburg, issued by the Assistant Master of the High Court, Pietermaritzburg, hereinafter referred to as “the Trust”.

2.

The defendant is The Member of the Executive Committee for Education for the province of KwaZulu-Natal, hereinafter referred to as the “MEC”.

3.

3.1 The plaintiffs are the Trustees of the Juma Masjid Trust. The Trust is the owner of the immovable property at 62 – 64 Cathedral Road, Durban.

3.2 On or about 1997 the Trustees of the Juma Masjid Trust agreed to permit the defendant to conduct a public school with Islamic ethos on its private property. This was in accordance with the provisions of section 14(1) of the South African Schools Act, No. 84 of 1996 (“SASSA”)¹, subject to the conclusion of a written agreement between the MEC and the Trust providing for such occupation and setting out all the terms and conditions that were to regulate such a relationship.

4.

The following issues are common cause:

¹ South African Schools Act, No 84 of 1996

- 4.1 That such an agreement as provided by Section 14(1) of SASSA² was never concluded. The defendant remained in occupation of the premises from the 1st January 1998 until the 31st December 2010 in terms of the order made by the Constitutional Court, whereby the defendant, together with others, who claimed a right to occupy the property through or under the defendant, were ordered to vacate the premises occupied by the school by the 31st December 2010. The Defendant complied with the order;
- 4.2 Prior to the aforesaid eviction order the parties were unable to reach agreement on several issues, amongst others rental, maintenance of the building, rates, taxes, etc.;
- 4.3 That the defendant tendered to pay to the Trust the nominal rental amount of R3 000.00 per annum which is the usual rental tendered in respect of the so-called Section 14 Agreements;
- 4.4 That the Trust gave the defendant notice to vacate the premises occupied by the school on several occasions since 2003. That irrespective of these notices to vacate, negotiations continued, which were unfruitful. Finally, on the 24th July 2008 an application was instituted in the KwaZulu-Natal Provincial Division of the High Court, Pietermaritzburg under case No. 10230/2008 seeking an order for eviction of the defendant from the premises. This application was opposed by the School Governing Body of the School, “the SGB”³. On

² South African Schools Act, No 84 of 1996

³ School Governing Body

16 September 2009, an eviction order was granted by the Pietermaritzburg High Court;

4.5 That leave to appeal sought by the SGB and parents of the learners, who joined as parties to appeal to the Supreme Court of Appeal failed and the Trust sought to execute the eviction order. An urgent application was brought by the defendant to stay the execution, which order was granted;

4.6 The SGB and parents brought an application for leave to appeal to the Constitutional Court. The matter finally came to the Constitutional Court; and

4.7 The Constitutional Court, amongst other findings, found that the plaintiff acted reasonable in seeking the order for eviction in the Pietermaritzburg High Court.

5.

5.1 **CLAIM A**

a) Payment of an amount of R34 200.00;

b) Interest calculated at the rate of 15.5% per annum on the undermentioned amounts with effect from the undermentioned dates:

- (i) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 1999;
- (ii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2000;
- (iii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2001;
- (iv) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2002;
- (v) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2003;
- (vi) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2004;
- (vii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2005;
- (viii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2006;
- (ix) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2007;
- (x) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2008,

until the date of payment thereof.

CLAIM B

- a) Payment of the amount of R1 317 195.00;
- b) Interest calculated at the rate of 15.5% per annum on the undermentioned amounts with effect from the undermentioned dates:
 - (i) On the amount of R390 555.00 (three hundred and ninety thousand five hundred and fifty five rand) with effect from 1 January 2009, alternatively with effect from the date of service of the summons on the defendant;
 - (ii) On the amount of R439 065.00 (four hundred and thirty nine thousand and sixty five rand) with effect from 1 January 2010, alternatively with effect from the date of service of the summons on the defendant;
 - (iii) On the amount of R487 575.00 (four hundred and eighty seven thousand five hundred and seventy five rand) with effect from 1 January 2011, alternatively with effect from the date of service of the summons on the defendant,until the date of payment thereof.

CLAIM C

- a) Payment of the amount of R499 149.00;
- b) Interest thereon at the rate of 15.5% per annum with effect from the date of the service of the summons on the defendant to date of payment.

6.

- 6.1 On Claim 1 for rental, the defendant has conceded liability and consent to the full payment of the plaintiff's claim in this regard, together with interest thereon.
- 6.2 The defendant also consents to judgment in respect of Claim 3, being a claim for damages to restore the premises together with interests thereon.

7.

The claim for damages for use and occupation is the only claim that is challenged by the defendant. In summary the Plaintiff's claim is as follows:

- 7.1 On the 17th July 2003, the Trust through its agents, Wakefield, cause a notice to be served on the defendant requiring the defendant to vacate the property occupied by the defendant by not later than 31 December 2004. The defendant undertook to vacate the property by the 31st December 2004. A reminder was sent to the defendant on the 9th December 2004;
- 7.2 A further reminder dated 15 December 2005 for the defendant to vacate the property was addressed to the defendant on the 19th October 2005;
- 7.3 A further reminder for the defendant to vacate the property by 15 December 2005 was addressed to the Defendant on 17 November 2005;

- 7.4 A further notice to vacate was furnished by way of a letter dated 10 May 2007, requesting the defendant to vacate the property by 15 December 2007. It also called for an undertaking from the defendant that by 31 May 2007 that the defendant would do so;
- 7.5 On the 4th September 2007 a repeated request for the undertaking from the defendant to vacate by 15 December 2007 was called for by the plaintiff;
- 7.6 On the 29th November 2007 the defendant was called upon to confirm as a matter of urgency the arrangements that had been undertaken to vacate the premises by 15 December 2007;
- 7.7 On the 26th May 2008 the defendant was required to vacate the premises by no later than 19 December 2008. An undertaking that the defendant would do so was called for by 13 June 2008; and
- 7.8 On 27 July 2008 the eviction application under case number 10230/08 in the High Court Pietermaritzburg was instituted by the plaintiff. The defendant finally vacated the premises consequent upon the granting of the order by the Constitutional Court on the 10th December 2011, directing the defendant to vacate the premises by the 31st December 2010.

8.

- 8.1 The plaintiff's contention is that in the absence of an agreement as to rental or any of the material terms of lease, there is no lease agreement between the parties. The occupation by the putative lessee of the

premises being the Defendant, cannot convert the arrangement underlying such occupation into a lease agreement and relies on various authorities for this contention, including **Brown v Hicks 1902 19 SC 314 at 315, Lobo Properties v Express Lift Company 1961 (1) SA 704 (C)**⁴ where the court stated as follows:

“Where the plaintiff had in claiming an amount of £ 600 as reasonable rent, alleged that the defendant had with its tacit consent occupied premises without an agreement having been entered into as to the amount of rent to be paid; held that the plaintiff was entitled to claim for the already completed use and occupation, a monetary award by way of conduction”.

8.2 The plaintiff relies further on **Cooper: Landlord and Tenant**⁵, published by Juta where the learned author states as follows:

“Although the putative lessor is not entitled to recover rent from a putative lessee, the latter is unable to pay the former a reasonable amount for the use and occupation of the property. The rental value of the property in the open market being the criterion, for the assessment of this amount”.

8.3 Furthermore, that the lessor, being the plaintiff herein, is entitled to a reasonable amount of compensation for the use and occupation of the property being the market value of the property in the open market

8.4 That it is also immaterial whether the lessee was required to vacate the premises or when the lessor's was required to do so. It is also the case irrespective whether the lessor occupation was *bona fide* or not, as long

⁴ Brown v Hicks 1902 19 SC 314 at 315, Lobo Properties v Express Lift Company 1961 (1) SA 704 (C)

⁵ Cooper: Landlord and Tenant

as the lessee remained in occupation, he is obliged to compensate the putative lessee for the reasonable value of the accommodation.

- 8.5 Therefore, on the basis of the evidence of the expert witness, Kenneth Jones, who gave evidence on rental determination of the place, whose evidence remained unchallenged in so far as to what the premises could be let for, the lessor is entitled to compensation for the rental value on the open market.

9.

- 9.1 This claim by the plaintiff is opposed by the defendant on the basis that it does not satisfy the requirements for an enrichment claim, as according to Mr Chambers' evidence there were no any other premises available for the school and accordingly the defendant would not have been obliged to expend the sum claimed on such premises;
- 9.2 In respect of the holding-over claim, the defendant submits that the final notice to vacate is dated the 26th May 2008 and the Trust confirmed that the defendant's occupancy of the property had been terminated with effect from the 31st May 2008. Therefore at best the period in question commenced from 1 June 2008 and not from 1 January 2008 as alleged by the plaintiff;

- 9.3 Furthermore, the defendant was informed in the final notice that an order allowing the Trust to evict the defendant after 19 December 2008 would be sought. Therefore, such damages should be determined from 1 January 2009 and not 1 January 2008 as claimed by the plaintiff and defendant would consent to an order under Claim A being increased by R34 200.00;
- 9.4 The defendant submits that it does not challenge the amount for damages, save that the plaintiff is not entitled to damages for holding over, as the defendant's occupation of premises was neither wrongful or unlawful and whether this period ran from 1 January 2008 or 1 June 2008 or 1 January 2009 until the Constitutional Court finally ordered, which order superseded its earlier provisional order dated 7 September 2010 and the eviction order dated 10 December 2010, that the defendant vacate the premises not later than 31 December 2010;
- 9.5 Defendant submits that it was impossible for the defendant to vacate the premises as a result of the attitude of the SGB and the concomitant competing interests and rights of the Trust, the SGB and the learners that made it impossible for the defendant to do so; and
- 9.6 The eviction could also not be done without the oversight of the court. In the light thereof, the defendant did not act wrongfully or unlawfully and the claim for damages should fail.

10.

10.1 It is common cause that it is the duty of the State to provide basic education in terms of section 29 of the Constitution⁶. *“Everyone has a right to a basic education, including basic adult education”*;

10.2 Section 14 provides that a public school may be provided on private property only in terms of an agreement between the Member of the Executive Council and the owner of the private property. It is common cause in this matter that this agreement did not materialise, which led to the final eviction of the school from the premises held by the plaintiff. Therefore there is no privity of contract between the plaintiff and defendant. In fact there are no fixed terms as to rental, duration of the lease, etc., which in general are often agreed upon, when parties enter into a contract;

10.3 The occupation is not in dispute, it is known by both parties. **Cooper at page 234** as to the determination of rental states as follows:

“The measure of the Lessors’ damages is the market rental value. In the absence of evidence to the contrary the rental value of the premises is assumed to be rent paid under a lease”.

⁶ Constitution of the Republic of South Africa, Act 108 of 1996

- 10.4 There was no lease, the plaintiff could only claim by way of damages, the reasonable rental for the premises occupied by the Defendant;
- 10.5 The rental being the reasonable rental that could be obtained from letting the premises to a third party; and
- 10.6 In a holding over it is trite that the landlord is entitled to free and undisturbed possession, unless the occupier can justify his/her continued occupation on legal grounds. Holding over is placing the lessor in a position where he would be had the lease been properly conducted and such damages according to Cooper are measured by the market related retail value.

11.

11.1 The defence raised by the defendants that there were no other premises available to relocate the school, cannot be sustained. The defendant could not conclude the contract with the plaintiff for a period of about 13 (thirteen) years. It is very much unlikely that during all these years the school could not be relocated either if its terms were not acceptable to the Plaintiff. As early as 2003, the defendant undertook to vacate the property by December 2004. Thereafter each and every year they were reminded by the Plaintiff that they had to vacate the premises, but failed to do so. It was Mr Chambers', the witness for the defendant, evidence that they needed at least 4 to 6 months to re-settle the children in other schools, but it is clear that such an exercise was never undertaken by the Defendant; until the Constitutional Court intervened and gave directions in its first order;

11.2 The defendant delayed until the application for eviction was brought to the High Court in July 2008. It was only after the directions of the Constitutional Court of Appeal that the defendant engaged in any feasibility study. It is clear to me that had the courts not intervened the MEC would not have done anything to relocate the pupils or to enter into an agreement with the Plaintiff;

11.3 The department as early as 24 October 2002 had assured the SGB that if the school were to be evicted from the premises, the department would either close the school or relocate it. The department made several undertakings to vacate but did not, instead asked for meetings which did not yield any results until the Trust brought the application for an eviction order in the High Court. All these steps are fully set out in the judgment of **Nkabinde** on paragraphs 12 to 14 of her judgment in **Governing Body of Juma Musjid Primary School**⁷;

11.4 The submission made by defendant's counsel that there were no other premises available and that should defeat the plaintiff's claim does not hold water, as the defendant had plenty of time to find alternative accommodation for the school, but did nothing. The shifting of the blame to the SGB's intervening applications does not lessen the duty of the Defendant to provide basic education to the underprivileged children in public schools and to see to it that it is done;

11.5 Indeed it is acceptable that the trustees had a negative duty not to disrupt education. They did so as they kept on giving

⁷ *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC)

notices to the defendant. The notices were given in such a way as not to interfere with the learners' schooling;

11.6 The trustees went out of their way not to disrupt the education of the learners. They gave notices to the defendant. The notices to vacate were given in such a way as not to interfere with the learners' schooling;

11.7 The conduct of the Defendant was wrongful, as they failed to enter into a section 14 Agreement despite the initiative taken by the plaintiff. Defendant failed to take reasonable measures to conclude an agreement as contemplated in terms of section 14 of SASSA. The bone of contention being their failure to meet the Plaintiff halfway when it came to the provision of basic necessities like payment of water, rates, etc. The R3 000.00 per annum stipulated as rental in terms of the Section 14 agreements, is a slap in the face of a landlord who is assisting the government in the provision of basic education to the children. It is clear on my mind that the Defendant created the Section 14 agreements for farm schools where pupils are expected to use pit latrines and use dilapidated buildings as classrooms. The department's failure in this regard is a failure to give basic education to the underprivileged, when they cannot pay for basic necessities to the landlord, save for the R3 000.00 rental per annum;

11.8 It is my view also clear from the defendant's failure to oppose the eviction order in the High Court that it had no interest in the learners' education, thus failing to execute its constitutional duty in terms of section 29(1) of the Constitution;

11.9 The eviction was opposed by the SGB, whilst the defendant adopted a wait-and-see attitude, as stated by Mr Chambers in his

evidence that the defendant can now shift the blame to the appeal launched by the SGB as the cause of the delay in its vacating the premises. There is no positive role that was played by the defendant. Be that as it may, whether the delay was occasioned by the SGB from 1 January 2008 to 31 December 2010, I cannot accept that that gave a right to the defendant to adopt a state of inertial. The issue here is that the defendant was in occupation and the Plaintiff is entitled to compensation for the use of its premises;

11.10 I accept the submissions if Gajoo SC that the claim based on the putative lease should succeed and that to succeed on the holding over; the occupation does not need to be unlawful.

12.

12.1 I therefore make the following order:

12.2 Judgment is entered in favour of the Plaintiffs as follows:

- a) Payment in the amount of R34 200.00;
- b) Interest calculated at the rate of 15.5% per annum on the undermentioned amounts with effect from the undermentioned dates:
 - (i) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 1999;

- (ii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2000;
- (iii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2001;
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- (v) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2003;
- (vi) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2004;
- (vii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2005;
- (viii) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2006;
- (ix) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2007;
- (x) on the amount of R3 420.00 (three thousand four hundred and twenty rand) with effect from 1 January 2008,

until 31 July 2014 and thereafter at the rate of 9% per annum until the date of payment thereof.

c) Payment of the amount of R1 317 195.00;

d) Interest calculated at the rate of 15.5% per annum on the undermentioned amounts with effect from the undermentioned dates:

- (i) on the amount of R390 555.00 with effect from 1 January 2009;
- (ii) on the amount of R390 555.00 with effect from 1 January 2010;
- (iii) on the amount of R390 555.00 with effect from 1 January 2011,

until 31 July 2014 and thereafter at the rate of 9% per annum until the date of payment.

- e) Payment of the amount of R499 149.00;
- f) Interest thereon at the rate of 15.5% per annum with effect from 30 June 2011 until 31 July 2014 and thereafter at the rate of 9% per annum until the date of payment; and
- g) Costs of suit including the costs of Senior Counsel as marked on his brief and any and all reserved costs as well as the qualifying fees and reservation and/or attendance costs including the costs of all consultations with the Plaintiffs' legal representatives of the Plaintiffs' expert witnesses, Kenneth Jones, John Wakefield and Johan de la Querra.

Date reserved : 12 November 2014

Date delivered : 8 December 2014

Appearances:

For the Applicant : Adv. VI Gajoo SC

Instructed by : Legal Resources Centre, Durban

For the Respondents : Adv. AG Jeffrey SC

Instructed by : JH Nicholson, Stiller & Geshen