IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No: 10574/2017

In the matter between:

Tuzi Gazi Waterfront (Pty) Limited Applicant

and

Avesh Manishunkar Respondent

Judgment

Lopes J:

[1] This is an application for the ejectment of the respondent from commercial premises in Richards Bay. The applicant seeks the ejectment of the respondent on the basis that the lease which existed between the parties has been terminated.

[2] It is clear from the affidavits that the following are common cause:

(a) On the 3rd September 2014 the applicant and the respondent concluded a written lease agreement for premises which I shall refer to as 'the original site'.

(b) The initial period of the lease was from the 1st September 2014 to the 30th August 2015.

(c) The lease agreement contained a renewal period to endure from the 1st September 2015 to the 30th August 2016.

(d) Clause 4.4 of the General Terms and Conditions of Lease ('the conditions') provides as follows:

'In the event of the LESSEE remaining in occupation of the Leased Premises after the expiration of the period stipulated in the Lease without a formal agreement signed by both the LESSOR and the LESSEE having been concluded for any reason whatsoever and irrespective of any oral discussion, negotiations and correspondence that may have been exchanged between the LESSOR and LESSEE, and without the LESSOR in any way conceding or acknowledging that the LESSEE is entitled to remain in occupation of the Leased Premises after the termination date and without prejudice to any rights that may be available to the LESSOR in terms of the Lease and / or in law arising out of the LESSEE failure to vacate the leased premises by the termination date, the LESSEE will be deemed to lease the leased Premises on a temporary basis subject to all the terms and conditions contained in the lease, provided that either party will be entitled to terminate such lease by giving 1 (one) month written notice of termination to the other party…'

(e) Clause 22.3 of the conditions provides:

'No variation or consensual cancellation of this agreement shall be of any force or affect unless reduced to writing and signed by both parties'.

(f) The applicant avers that it delivered the requisite written notice to the respondent on the 31st July 2017 in the following terms:

'We hereby give you 30 days' notice to leave the premises. Your last month renewal is due on the 1st as discussed with Renee.'

This was in direct response to an email from the respondent of the same date (35 minutes' earlier) alleging that the applicant had to give him 30 days' notice to 'leave the premises'.

(g) The respondent has refused to vacate the original site. The defences of the respondent may be summarised as follows:

(a) Two points-in-limine are raised.

(i) That the deponent to the applicant's affidavit has no authority to depose to the affidavit. Accordingly the applicant

lacks the locus standi to depose to the affidavit, and has no authority to do so.

(ii) This matter is *lis pendens* because the respondent brought a spoliation application in the Empangeni Magistrates' Court, and an order was granted on the 8th August 2017. The order is contained in two parts, one being a draft order signed by the magistrate, and the other an order in the magistrates' handwriting. The collective effect of the two orders is that an order was issued in the following terms:

'(a) That the Sheriff of the Magistrate's Court be directed and authorised to instruct the Respondent to restore possession to the Applicant of Tuzi Gazi building, situated at Tuzi Gazi Waterfront Car Wash, Small Craft Harbour, Richards Bay, Newark Road, Tuzi Gazi, to the full extent to which it has been in peaceful and undisturbed possession of the Applicant, until the expiry of the verbal agreement of lease.

(b) Respondent is hereby called upon to show cause why this order should not be made a permanent order.'

Mr *Nirghin*, who appeared for the applicant, did not persist with the first point-in-limine.

[3] The second point-in-limine is based on the action in the Empangeni Magistrates' Court where the respondent brought spoliation proceedings in respect of the original site. Although those proceedings do not appear to have been determined, they play no role in the application before me. The application in the Magistrates' Court was brought on the basis that the respondent had been in peaceful and undisturbed possession of the original site, and feared an unlawfully deprivation of it by the applicant. The application appears to have been precipitated by an incorrect oral notice given to the respondent indicating that he had a day's notice to vacate. His reply, which was sent by e-mail, is contained in the applicant's

papers as well as the applicant's further written advice that the lease was terminated on one month's notice.

[4] Mr *Nirghin* submitted that the respondent was entitled to stay on in the original site which he occupied on the leased property whilst he awaited occupation of the alternative site on the leased premises. I refer to the sites as 'original' and 'alternative' because both sites are on a large piece of ground fitting the cadastral description of the property. The respondent has variously referred to the original site and the alternative site as forming the subject of an oral agreement which the respondent alleges he concluded with the applicant's representative. Mr *Nirghin* relied heavily on the contents of annexure "A" of the interim order granted in the Magistrates' Court which ends with the words '…. until the expiry of the verbal agreement of lease.' Mr *Nirghin* submits that this is a court order which must be given effect to until it is confirmed or set aside. Mr *Nirghin* concedes that the order itself is extremely vague because it does not indicate which site the respondent is entitled to continue to occupy. The affidavits of the respondent are most confusing in this regard.

[5] Ms *De Vos*, who appeared for the applicant, referred me to the respondent's replying affidavit in the spoliation application. At paras 5.2 – 5.7 the respondent stated:

'5.2 The verbal agreement was at some stage to have been reduced in writing, but I was not concerned about having had a written agreement as I was an occupation of the existing premises on a verbal lease agreement for in excess of a year.

5.3 It is indeed correct that it is not for the court to determine whether a lease exists until 2024, but for the court to determine whether my peaceful and undisturbed possession has been impinged in any manner whatsoever.

…

5.7 In so far as point 6, is concerned, I do not wish to deal with this aspect of the Respondent's affidavit as an application to have me evicted from the entire premises, has been launched in the High Court and would be dealt with at that forum.'

[6] Ms *De Vos* submitted that in those circumstances there can be no doubt that the relief sought by the respondent in the spoliation application could only have related to the original site which he has been occupying, and continues to occupy in terms of the written lease agreement. As pointed out by Ms *De Vos,* the respondent concedes in the Magistrates' Court proceedings that the conclusion of the verbal agreement is not relevant to the spoliation relief which he sought. In sub para 5.2 of his replying affidavit in the Magistrates' Court, he alleges that he was in occupation of the original site on a verbal lease agreement for in excess of a year. This must be a reference to the premises forming the subject matter of the written lease. That allegation contradicts other statements by the respondent that the oral lease is in respect of the alternative site.

[7] I understood Mr *Nirghin* to submit in reply that the two premises cannot be looked at in isolation and that the respondent intends to move to the new site, but is entitled to remain on the original site until then. This is not what the respondent alleges in his affidavits. He cannot rely on his occupation of the original site for the continued existence of the oral agreement, which relates to the alternative site.

[8] In my view the spoliation application dealt clearly with the unlawful and disturbed possession of the respondent's right to occupation of the original site by the applicant. It did not relate to the respondent's right to occupy in terms of the oral lease, and he makes that clear in his affidavits. The fact that the learned magistrate may have included words referring to the oral agreement at the end of prayer (a) of the order made in the spoliation proceedings, is simply a consequence of the fact that he followed the draft order sought. No case was made out in the spoliation proceedings for occupation in terms of the oral agreement. The respondent understood that that was a separate issue to be decided elsewhere.

[9] In all the circumstances I am of the view that the requisites for the defence of *lis pendens* are not established, in that the application in the Magistrates' Court and this application do not concern the same subject matter, and is not founded upon the same cause of complaint. The complaint in the Magistrates' Court is founded upon an unlawful deprivation of peaceful and undisturbed possession, whereas the application in this court is based upon a lawful termination of a lease. In addition, the confusion is caused by the respondent's references to an oral agreement, relating, apparently to the original site.

Accordingly, the suggestion of *lis pendens* being a successful bar to the applicant's claim is without merit.

[10] I now deal with the main defence which is that an oral agreement was concluded with the applicant which, on the respondent's version, allows him to stay in the alternative site until 2024. In my view the non-variation clause precludes such an agreement in respect of the original site. In any event, the conclusion of the oral agreement is grossly improbable. I say this because the applicant, as landlord, went to the trouble of concluding a comprehensive written agreement in regard to a two year lease. It did not take the risk of a lease agreement being concluded on an oral basis. Given the fact that the written agreement was a comprehensive agreement, it is inherently improbable that the applicant would have concluded an oral lease. The respondent, as he should have done, has set out no details whatsoever of the oral lease in his answering affidavit. One would have expected the respondent to have set out in great detail the circumstances surrounding the conclusion of the oral agreement and the terms thereof. Then there is a question of the period of that oral agreement. It is improbable that, having initially agreed to a written one year lease, renewable for a further year, the applicant as landlord has now orally agreed to a lease for approximately seven years'.

[11] A further, and compelling circumstance in the conclusion of the alleged oral agreement is that the respondent claims that the oral agreement was for premises other than those which he occupies. It is insufficient in my view to suggest that it is

all part and parcel of the same area of land. It is clear from the respondent's affidavits that the alleged oral agreement was in respect of the alternative site, this time a waterfront facing area. There is no counter-application before me in which the respondent seeks to compel the applicant to provide him with occupation of the waterfront area.

[12] In all the circumstances I am of the view that the defence to the application is one which falls within the ambit of those disputes of fact referred to in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) at 635B-C as follows:

'Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…'

[

13] In my view this is such a case. In all the circumstances, I make the following order:

1. The respondent's continued occupation of the premises described as PORTION 11 OF THE FARM, LOT 223, UMHLATUZI NO 16230, RICHARDS BAY,('the premises'), is declared to be unlawful.

2. The respondent, and any persons occupying the premises through him are directed to vacate the premises with 5 days' of the date of this order.

3. In the event of the respondent and all those occupying through him failing to comply with the order in 2 above, the Sheriff of this Court or his Deputy is authorised and directed forthwith to eject the respondent and all those occupying through him from the property.

4. The respondent to pay the applicant's costs of suit

Lopes J

Date of Hearing:	20th April 2018.
Date of Judgment:	26th April 2018.
Counsel for the Applicant:	Ms *C De Vos* (instructed by Shepstone and Wylie).
Counsel for the Respondent	Mr *R Nirghin* (instructed by Sangham Incorporated).