IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA

CASE NO: 43105/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	DATE: 26 JANUARY 2023
	SIGNATURE: ***ML SENYATSI***

In the matter between:

ATTACQ WATERFALL INVESTMENTS First Applicant

COMPANY LTD (REG. NO.: 2000/013587/07)

EAST AND WEST INVESTMENTS Second Applicant

(PTY) LTD (REG. NO.: 1945/018444/07)

And

DELI ONE CATERING (PTY) LTD Respondent

(REG. NO.: 2004/016639/07)

Delivered: *By transmission to the parties via email and uploading onto Case Lines*

The reasons are deemed to be delivered. The date for hand-down is deemed to be

26 January 2023.

REASONS

SENYATSI J:

[1] On 8 August 2022, I granted a commercial eviction order against the applicants who was the respondent in the main application. The parties will be referred to as in the main application.

[2] The reasons for the order are as set out below.

[3] The parties concluded a partly oral agreement, which was reduced into writing. The applicants were represented by Happy Mnisi and the respondent was represented by Frances Koo. A copy of the lease agreement which was month to month turn over based was forwarded to the respondent for signature on 23 July 2020.

[4] The applicants aver that the respondent indicated its acceptance and took occupation of the premises on or about 23 July 2020 and enjoyed the beneficial use, enjoyment and occupation from the date but failed to pay rental and utilities.

[5] The material terms, so aver the applicants between the parties were:

5.1. That the agreement of lease would be on a month to month basis in terms of clause 1.2;

5.2. That the respondent would pay turn over rental i.e. the respondent would pay rental in accordance with the percentage (as agreed to in the schedule) of its net turn-over as set out in clause 1.3; and

5.3. The respondent would pay additional charges on a monthly basis as set out in clause 1.4 and as follows:

5.3.1. Electricity-metered and/or Pro-Rata and/or Pre-Paid and Common area;

5.3.2. Gas-Metered or Pro Rata and common area;

5.3.3. Water-Metered and/or Pro Rata and common area;

5.3.4. Effluent-calculated as a factor of the water consumption;

5.3.5. Refuse Pro Rata or per actual bin count;

5.3.6. Rates and Taxes Pro Rata;

5.3.7. Generator Pro Rata.

[6] It is furthermore averred by the applicants that despite taking occupation of the premises, the respondent failed to return the signed Turn Over Based

Month to Month Lease Agreement to the applicants and that save for a single payment of R3 500.00 made 13 months after the occupation, no other payment was ever made. As a consequence, the applicants cancelled the agreement and they are now seeking eviction.

[7] On or about 29 July 2020, so avers the applicants, whilst already in occupation of the premises in terms of the agreement, the respondent submitted a proposal to the applicants which was not acceptable as it sought to vary terms that had been agreed to.

[8] Consequently, the applicants demanded that the respondent vacates the premises and this led to this litigation.

[9] In its defence, the respondent admits the conclusion of the lease agreement but denies the terms and pleads that a turn-over based rental would be paid if the turn-over was in excess of an amount of R125,000.00. Furthermore, it concedes that it agreed to pay for the utilities electricity, water, refuse removals and other related service but contends that the such charges which it claims are exorbitant. It does not plead that it paid any amount but simply states that the applicants are not entitled to cancel the lease agreements based on the grounds alleged.

[10] The controversy in this matter is whether or not the applicants were entitled to evict the respondent and this was answered in the affirmative by the Court.

[11] The legal framework in eviction applications is trite. In *Graham v Ridley*[1] the common law position was confirmed that in order to succeed with eviction,

[1] 1931 TPD 476

the applicant has to prove that it is the lawful owner of the premises and that the respondent is in occupation of the premises against its will.

[12] The common law position was also confirmed and reinforced in *Chetty v Naidoo*[2] where it was held as follows:

> "the owner, instituting a *rei vindicatio*, need therefore do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner…"

[13] The respondent concedes that there was an agreement between the parties and that it took occupation. It however, disputes the terms of the agreement. Consequently, it refused to sign the agreement on the terms proposed by the applicants. It provided the applicants with a counter-proposal of its own terms which the applicants did not agree to. The respondent was in possession and occupation of the premises from 22 July 2020.

[14] Although the applicants in the initial notice of motion sought, *inter alia*, a monetary judgment of R148 097.25; this was abandoned and only eviction was sought and granted.

[15] The respondent contends that the applicants are not entitled to cancel the agreement. They have been in occupation of the promises and at the time of the order for eviction they were still in occupation.

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[2] 1974 (3) SA 13 at 20 A - E

[16] The respondent also concedes that it never delivered any turn over certificates and states that the reason for not doing so was that the business was achieving less than R125 000 per month.

[17] The defence by the respondent is that the charges by the applicants were exorbitant and that the amount claimed was not due by it. A similar defence was raised in the *Da Mata v Otto N.O*[3] where the Appellate Division was dealing with the question whether or not an eviction order could be granted on motion if there are dispute of facts arising from the affidavits filed by the parties. In providing an answer to the issue, Wessels JA had the following to say:[4]

"It is to be noted that insofar as the nature of the relief claimed may be a determining factor in deciding whether or not motion proceedings are appropriate, it is permissible to grant an ejectment order on motion where facts are, practically speaking, not really in dispute. See e.g. *Frank v Ohlsson's Cape, Breweries Ltd* 1924 AD 289, and *Peterson v Cuthbert & Co Ltd* 1945 AD 420. In the latter case (at p.428), Water-Meyer CJ stated:

> 'In every case, the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done, the lessee against whom judgment is sought might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor.
>
> The crucial question is, therefore, whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be

[3] 1972 (3) SA 858 (A)
[4] Supra at 882 D - H

granted or not. If such a dispute does not arise, it is ordinarily undesirable to settle the issue solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of viva voce evidence. *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions* (Pty) Ltd 1949 (3) SA 1155 (T)

In the preliminary inquiry, i.e.; as to the question whether or not a real dispute of fact has arisen it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavit must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being properly decided only after *viva voce* evidence has been heard. (*Room Hire* case, supra at p1165; *Soffiantini v Mould* 1956 (A) SA 150 (E) at p 154 E-H)."

[18] As regards to the totality of the evidence, it is clear that the respondent never paid any rental or charges and only did so some thirteen months after occupation of the premises by way of paying only R3 500.00 for charges after taking occupation.

[19] Despite the cancellation of the agreement, the respondent fails to vacate the premises and despite consuming water, electricity and other related services, pays nothing else except the R3 500.00 referred to above. It maintained that it should be charged only R3 000.00 per month and pay nothing for the period of its occupation of the premises.

[20] Based on its answer, the respondent simply continued to enjoy the benefits of occupation of the applicant's premises, to the detriment of the owner. This is an injustice to the applicant as they derive no commercial benefit from their own property through occupation thereof by the respondent. This should, in my respectful view, not be permissible and there is no justifiable reason why this situation should continue. The court is empowered under these circumstances to put a stop to this behaviour.

[21] I have not been referred to any authority by counsel for the respondent on why under these circumstances, an eviction order should not be granted. I have also not received any application for the referral of the matter to *viva voce* evidence because of the alleged dispute of fact.

[22] Having regard to the papers before me and the alleged dispute of facts, I find no support that indeed this matter warrants to be referred to *viva voce* evidence. In my considered view the denials of material allegations by the respondent amounts to nothing more than a tactic to delay its eviction.

[23] Accordingly, the applicants have on a balance of probabilities made out a case for the eviction of the respondent. I therefore stand by the order granted.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE OF APPLICATION: 08 August 2022

DATE REASONS DELIVERED: 26 January 2023

APPEARANCES

Counsel for the Applicants: Adv WJ Scholtz

Instructed by: Gideon Pretorius Inc

Counsel for the

Respondent: Adv RJ Bouwer

Instructed by: Martini Patlansky Attorneys