

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO.: 2024-025519

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| (1) REPORTABLE: YES / NO |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) REVISED. |
| DATE |
| SIGNATURE |

In the matter between:

LODESTONE INVESTMENTS (PTY) LTD

Applicant

and

AMOGELANG TRANSPORT SERVICES (PTY) LTD

First Respondent

**SHERIFF OF THE HIGH COURT:
JOHANNESBURG SOUTH**

Second Respondent

**THE STATION COMMANDER
JOHANNESBURG CENTRAL POLICE STATION**

Third Respondent

JUDGMENT

INTRODUCTION

- [1] The applicant seeks urgent relief for the eviction of the first respondent from immovable property described as Erf 18, 4 Prolecom Road, Prolecom Extension 1, Johannesburg, Gauteng (**'the property'**). The first respondent opposed the relief sought, claiming that the matter should not be heard on an urgent basis, and, in any event, that the applicant failed to make out a case for the relief sought. There was no appearance on behalf of the second and third respondents.
- [2] When the matter was called, I directed the parties to deal with the question of urgency and with the underlying merits of the application. I did so, as to my reading of the papers filed on record, the question of urgency is intertwined with some of the material issues raised by the parties.
- [3] Both parties presented argument and I reserved judgment, to be delivered on 26 March 2024.
- [4] In prayer 1 of its Notice of Motion, the applicant prays that *"this application be heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court and that the Honourable Court condone the applicant's non-compliance with these Rules, specifically pertaining to service, filing and time periods"*.

[5] In considering the question of urgency, I *inter alia* had regard to the following common cause facts:

5.1. On or about 5 September 2022, the applicant, as owner of the property, and the first respondent, concluded a written lease agreement that regulated the first respondent's tenancy of the property.

5.2. The lease agreement terminated due to the effluxion of time on 31 October 2023.

5.3. The first respondent did not vacate the property at any point in time thereafter and remains in occupation.

5.4. Clause 3 of the lease agreement provides as follows:

"3. DURATION

3.1 This Lease shall commence on the Commencement Date and shall continue until the Termination Date.

3.2 In the event of the Tenant 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 Tenant and Landlord having been concluded for any reason whatsoever and irrespective of any oral discussions, negotiations and correspondence that may have been exchanged between the Landlord and the Tenant, and without the landlord in any way conceding or acknowledging that the Tenant 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 Landlord in terms of the lease and/or in law arising out of the Tenant's failure to vacate the Leased Premises by the Termination Date, the Tenant will be deemed to lease the Leased Premises on a temporary basis subject to all the terms

and conditions contained in this Lease, provided that either party will be entitled to terminate such lease by giving 1 (one) month's written notice of termination to the other party. The Tenant further agrees that, in such circumstances, the monthly rental and operating costs payable for the first month after the expiration of the Lease shall not be lower than the rental and operating costs payable by the Tenant during the last month of the lease period, escalated by 15%. If the Tenant continues to occupy the leased Premises for a period of 1 (one) year after the expiry date of the Lease, the rental and operating costs will be increased annually by 15% per annum on each anniversary of the expiry date."

[my underlining]

- 5.5. The "Termination Date" is defined in Clause 1.6.2 of the lease agreement as 31 October 2023.
- 5.6. The applicant did not give notice to terminate the lease agreement pursuant to Clause 3.2 quoted above.
- 5.7. On 21 November 2023, the applicant gave notice to the first respondent to vacate the property by no later than 31 November 2023 [see annexure "FA1" to the founding affidavit]. In doing so, the applicant relied on the fact that the lease agreement terminated by effluxion of time.
- 5.8. On 22 November 2023, the first respondent sent an e-mail to the applicant, recording amongst others, the following:

"Your email has been acknowledged and the attachment too, however we had no intention of vacating the premises as they are still in use except that our account is in arrears by almost R600k." [see Annexure "FA7" to the founding affidavit.]

[my underlining]

- 5.9. On 21 November 2023, the applicant issued an application for the winding-up of the first respondent, and it did so in the ordinary course. The winding-up application was eventually set down in the unopposed motion Court, to be heard on 26 February 2024.
 - 5.10. However, that application was removed from the unopposed motion roll due to the filing of a business rescue application in respect of the first respondent.
 - 5.11. On 23 February 2024 the applicant proposed that the first respondent vacate the premises by close of business on 29 February 2024 and that the outstanding arrear amount R497,915.02 as of 23 February 2024 be settled [see Annexure “FA10” to the founding affidavit].
 - 5.12. Then followed this urgent application for the eviction of the first respondent from the property.
- [6] It was argued on behalf of the applicant that the matter should receive urgent preferential treatment, and its argument can be summarized as follows:
- 6.1. On 21 November 2023, the first respondent was in arrears with its rental obligations towards the applicant in an amount more than R600,000.00.
 - 6.2. It would be in the interest of the first respondent if it is ordered to vacate the property so that the debt of the first respondent doesn't increase because of its continuing occupation of the property.

- 6.3. The applicant is attempting to mitigate its losses.
 - 6.4. The applicant must give any prospective purchaser or tenant of the property unrestricted access to the property. If the applicant fails to do so, the new purchaser or tenant will hold the applicant liable for damages which it (the new purchaser or tenant) might suffer. That will be to the detriment of the applicant.
 - 6.5. There can be no doubt that if this Court does not grant the relief which the applicant seeks, the applicant will be immensely prejudiced, and it would be a travesty of justice if the Court should find that the applicant is compelled to have the first respondent to occupy its property when the agreement lawfully came to an end.
- [7] In opposing the urgency of the matter, it was argued on behalf of the first respondent that:
- 7.1. It is lawfully in occupation of the property by virtue of the operation of Clause 3.2 of the lease agreement. There is accordingly a valid lease agreement between the parties and that lease agreement has not been terminated.
 - 7.2. The applicant has, to date, not cancelled the lease agreement, giving the first respondent the required one month's notice.

- 7.3. The urgency is self-created. On the applicant's own version, it was informed on 22 November 2023 that the first respondent had no intention of vacating the premises and that it intended to continue trading from the business.
- 7.4. The notice of 21 November 2023, in any event, did not comply with the prescripts of Clause 3.2 of the lease agreement. It did not seek to terminate the first respondent's occupation of the property with one month's notice.
- [8] It is trite that an applicant who seeks urgent relief must explicitly aver circumstances which render the matter urgent and why the applicant claims that it could not be afforded substantial redress in due course. Urgent applications require an applicant to persuade the Court that non-compliance with the Rules, and the extent thereof, is justified on the grounds of urgency. An applicant must demonstrate inter alia that it will suffer real loss or damage were it to rely on normal procedure. The Rules adopted by an applicant in such an application must, as far as practicable, be in accordance with the existing Rules and the trite legal principles both as to procedure and time periods applicable.
- [9] An applicant cannot create his or her own urgency by simply waiting until the normal rules [or rather less strenuous rules/time periods] can no longer be applied.
- [10] In this application, the applicant seeks to protect its commercial interests.
- [11] In my view, the event that triggered the urgency of this matter, was the first respondent's e-mail of 22 November 2023. In that e-mail, the first respondent clearly stated that it had no intention of vacating the property. Urgency was not

triggered by the removal from the roll of the unopposed winding-up application on 26 February 2024.

[12] The applicant failed to explain why it could not (and did not) seek urgent relief soon after 22 November 2023. Instead of giving the required notice to terminate the lease created in Clause 3.2 of the lease agreement, and instead of seeking urgent relief to evict the first respondent, the applicant sought the winding-up of the first respondent, and that in the ordinary course. The applicant failed to explain why it cannot protect its commercial interests in the ordinary course.

[13] The applicant accordingly created its own urgency in this matter. Despite having knowledge of the first respondent's intention to remain in occupation, from 22 November 2023, it only issued this application on 6 or 7 March 2024.

[14] The applicant should not be afforded preferential treatment. Nothing prevented it from complying with Clause 3.2 of the lease agreement. In such event, the first respondent would have to vacate the property after a month of receiving notice. Nothing prevents the applicant to further protect its interests in the pending proceedings in terms of the company laws, or other legal avenues available.

[15] In the circumstances, I find that the matter is not urgent, and that the applicant failed to make out a case for the relief sought in prayer 1 of the Notice of Motion.

[16] I issue the following order:

16.1. The application is struck from the roll due to lack of urgency.

16.2. The applicant shall pay the costs of the application.

JM KILIAN
Acting Judge
High Court of South Africa
Gauteng Local Division, Johannesburg

For the applicant:
Adv Groenewald
Instructed by:
VERTON MOODLEY & ASSOCIATES INC.

For the first respondent:
Adv Motshuasi
Instructed by:
LEBESE ATTORNEYS

Date of hearing: 22 March 2024

Date of Judgment: 26 March 2024