

SOUTH AFRICA / JUDGMENT

Acire Property Holdings (Pty) Ltd v Banzi Trade 31 (Pty) Ltd t/a Brick-It (7889/2021) [2021] ZAGPPHC 542 (25 August 2021)

[2021] ZAGPPHC 542

COURT

North Gauteng High Court, Pretoria

BEFORE

Sawma

CASE / FILE NUMBER

7889/2021

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 7889/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

25/08/2021

In

the matter between:

ACIRE

PROPERTY HOLDINGS (PTY) LTD

Applicant

and

BANZI

TRADE 31 (PTY) LTD t/a BRICK-IT

Respondent

JUDGMENT

SAWMA, AJ:

1. On the 7th day of July 2015 the applicant, Acire Property Holdings (Pty) Ltd, entered into a written lease agreement (the “written lease”) with the respondent, Banzi Trade 31 (Pty) Ltd t/a Brick-It.
2. The written lease was to endure for five years, terminating on the 30th of June 2020, that is unless the respondent should have exercised an option to renew it for a further period of five years, that exercise to be effected in writing before the 31st of January 2020. The option was not exercised by the respondent and accordingly the written lease agreement terminated on the 30th of June 2020.
3. Despite this, the respondent remained in occupation of the premises. Neither party pertinently addressed the basis upon which that occupation persisted in the period leading to November 2020, both parties merely asserting that a “month-to-month lease” arrangement was in place but without any further elaboration.
4. On the 9th of November 2020 the applicant’s attorney of record transmitted a letter to the respondent entitled “Letter of Cancellation of Lease Agreement and Notice to Vacate” (the “November letter”). Paragraph 2 of the November letter alluded to the month-to-month lease and paragraph 3 provided as follows:

“Our client has instructed us to hereby give you notice of termination of the lease agreement with immediate effect. Without derogating from the fact that the lease agreement is a month-to-month lease and whilst we reserve all of our client’s rights in that regard, our client has decided to afford you until 31 December 2020 to vacate its property.”
5. The founding papers explain (these allegations are not disputed by the respondent) that, pursuant to the delivery of the letter of termination, the parties attempted to find common ground concerning the basis upon

which the respondent would be prepared to vacate the premises, that engagement focusing on the amount of time that was to be afforded to the respondent to regulate its affairs.

6. When that process failed the applicant’s attorneys wrote to the respondent’s attorneys on the 12th of February 2021, advising that the respondent was required to vacate the premises immediately, that its right to occupation had terminated on the 31st of December 2020 and that the applicant had issued instructions for the launch of an application for eviction (being the application now forming the subject matter of these opposed proceedings).

7. The first issue that falls for determination is this - Did the November letter unlawfully communicate an immediate termination of the month-to-month lease agreement (as the respondent now contends) or did it communicate the termination of the lease agreement with effect from the last day of December 2020 as the applicant contends (the words “with immediate effect” relating to the communication itself, not the termination of the lease)?
8. If I should hold in favour of the applicant on this issue, then the next question that falls for determination relates to the period of notice required to terminate the lease. The applicant contends that the period afforded to the respondent to vacate, being one month and 3 weeks was sufficient. The respondent in contradiction vaguely alluded to a period of between 18 to 24 months. If both of these issues are answered in favour of the applicant, I am then required to consider the question of whether the eviction order ought then to be suspended and if so, for what period.
9. As to the first issue, as already observed, it is common cause that the lease was a month-to-month lease. Neither party has expressly

addressed the way the month-to-month lease arose but, in the circumstances, it appears safe to accept that there was a tacit relocation^[1] (month-to-month), in that the respondent remained in occupation of the premises pursuant to the termination of the written lease with the applicant's concurrence and consent (at least until communication of the November letter) and rental was paid on a monthly basis.

10. Periodic leases of this nature continue until terminated by the giving of reasonable notice. ^[2] Subject to any particular circumstances that might militate for a different conclusion, a month's notice of termination is generally considered reasonable in the case of a month-to-month lease.^[3] Not unexpectedly, therefore, the applicant accepted that at least one month's notice was required of it in the circumstances.
11. It is important to emphasise that the notice in question must be one communicating the termination of the lease, that termination to take effect at the end of the period in question, not at its commencement.^[4] The principle was expressed by Innes, CJ^[5] in the following terms:

“The notice must run concurrently with some term of the lease and must expire at the end of that term.... Reasonable notice in the case of a monthly lease should be so given as to expire at the end of a month, unless there is custom or agreement to the contrary.”^[6]

12. The November letter communicated a termination of the lease agreement “with immediate effect”, not with effect from the 31st of December 2020. To read the word “with immediate effect” as relating to the communication of the decision to terminate, ignores the words “...to hereby give you notice...” that precede the words “termination of the lease agreement with immediate effect”. It also ignores the subject line, introducing the content of the letter. That the letter proceeded to “afford” the respondent until the 31st of December to vacate the property does not derogate from a termination of the lease agreement with effect from the

9th of November 2020 (the date of the November letter). To the contrary, it further contaminates the termination. That is because the period for vacating the property was expressed in the November letter to be one that was “afforded” to the respondent in the context of reserving all of the applicant’s rights, not on the basis that the respondent was, as of right, entitled to such period of notice. As explained by the applicant in its founding affidavit, it had provided the respondent with “an indulgence to vacate by the end of December 2020 failing which the applicant would institute eviction proceedings.”

13. Whilst I accept that a notice communicating the termination of the right of occupation but not specifying when the termination will take effect, coupled with a period during which the lessee is given notice to vacate,[7] would ordinarily communicate the termination of the lease at the end of the period of notice, the plain words of the November letter preclude that outcome.
14. At best for the applicant, however, the letter is equivocal when it is required to be clear and unequivocal to be effective.[8]
15. It is true, as the applicant complains, that the respondent nowhere in its answering papers, adopted the stance that the November letter was invalid because of its communication of the immediate termination of the lease agreement. That point was advanced by the respondent, for the first time, in its heads of argument filed in anticipation of this hearing.
16. In argument it was contended on behalf of the applicant that, reliant upon the principle that affidavits define the issues between the parties,[9] the respondent was precluded from now asserting that the November letter communicated an immediate termination when it had not preconised the applicant of that in its affidavits. The point that the respondent now raises is, however, a point of law. It is covered by the affidavits in the sense that the respondent takes issue with the lawfulness of the termination of its tenancy, contending that the applicant is not entitled to an order for eviction (and that if it is, the execution thereof ought to be suspended). The terms of the November letter itself are not in dispute, nor is it in dispute that the November letter was communicated to the respondent.
17. Accordingly, the only unfairness that would arise in considering the point would be related to the fact that, had it been raised squarely at an earlier point in time, the applicant would no doubt have reconsidered its position and might well have given a fresh notice of termination. That is still something that the applicant can do, and any remaining prejudice is something that can be appropriately addressed by way of a cost order. In the circumstances there is nothing that precludes the consideration of this question of law[10] and indeed the nature of the point is, I would think, one that I must rule on in the nature of things.
18. In the circumstances, the November letter, having communicated an immediate termination of the lease, was ineffectual in bringing about a termination of the lease on reasonable notice.

19. As I have alluded to above, the point of law was raised very late in the day and I consider that, in the exercise of my discretion as to costs, it would be both fair and appropriate to make the cost order set out below. During the course of the hearing the respondent

sought, but was refused, leave to file supplementary affidavits. I directed that the respondent bears the cost of that application. To avoid ambiguity the costs order referred to in paragraph 20.2 below does not impact upon or detract from the cost order so made against the respondent.

20. In the circumstances an order in the following terms is made:

20.1 The application is dismissed.

20.2 The applicant is to bear the respondent's cost in respect of this application from the date of the filing of the respondent's

heads of argument.

20.3 Each party is to bear its own costs prior to the date of the filing of the respondent's heads of argument.

Electronically submitted

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 August 2021.

SAWMA AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 04 August 2021

Judgment

Delivered: 25 August 2021

APPEARANCES

For the Applicants: Adv SG Maritz

Instructed by: Carreira

and Associates Incorporated

For the Respondents: Adv R Grundlingh

Adv ASL Van Wyk

Instructed by: Hefferman

Attorneys

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- [1] See for example *Pareto Ltd v Mythos Leather Manufacturing* 2009 (3) SA 999 (WLD) at 1004 D-E [11].
- [2] See *Airports Company v Airport Bookshops* 2017 (3) SA 128 (SCA) at 134G-135D [17]-[20].
- [3] See *Airports Company v Airport Bookshops* supra at 135A-B [18] and the authority there referred to; AJ Kerr, *The Law of Sale and Lease*, 4th Edition, p370-371, para 17.5.
- [4] AJ Kerr supra, p572, para 23.4.2.
- [5] In the matter of *Fulton v Nunn* 1904 TS 123.
- [6] *Fulton v Nunn* supra at 125-126; See also in this regard *Paruk v Hayne and Co* 1906 NLR 380 at p383; *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at p326; *Rustenburg Town Council v Minister of Labour and Others* 1942 TPD at p224.
- [7] Such as the terminology of the letter in the matter of *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at p374 D-F [5]
- [8] See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) 809 (AD) at p830 E and the cases there referred to.
- [9] The case of *Molusi and Others v Voges NO and Others* supra and *Naude and Another v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA) were relied upon in this regard.
- [10] See *Sarrahwitz v Maritz NO* 2015 (4) SA 491 at p503G-504A [30] and the law there referred to.
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Prepared on 11 October 2026 · Esheria