

SOUTH AFRICA / JUDGMENT

Acrewood Property Investments (Pty) Ltd v Pelo Chicken (Pty) Ltd (11396/21) [2021] ZAWCHC 196 (8 October 2021) [2021] ZAWCHC 196

COURT

Western Cape High Court, Cape Town

BEFORE

Montzinger

CASE / FILE NUMBER

11396/21

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Case number: 11396/21

Before: The Hon. Acting Justice Mr Montzinger

Hearing: 6 October 2021
Judgment: 8
October 2021

In the matter between: ACREWOOD
PROPERTY INVESTMENTS (PTY) LTD
Applicant
and
PELO
CHICKEN (PTY)
LTD
Respondent

JUDGMENT

MONTZINGER AJ:

- [1] This matter involves a commercial eviction.
- [2] The applicant launched its application on 7 July 2021 seeking an order evicting the respondent from its commercial premises situated at ground floor, Stand Alone building, St Peters square, 441 Main Road, Observatory. The respondent conducts a food take away business from these premises.
- [3] The respondent was served with the application papers on 20 July 2021 with notice that the application will be made on 5 August 2021. The respondent delivered a notice of opposition on 25 July 2021.

A certain Mr Clifford Sibanda signed the notice in his capacity as the representative of the respondent. A notice of set down was also served on the respondent on 27 July 2021 again confirming that the application will be made on the unopposed motion court roll on 5 August 2021. On this day, Henny J postponed the matter agreement in terms of a draft order.

- [4] The order by agreement made provision that the matter be postponed for hearing on 6 October 2021 on the semi-urgent court roll. It also regulated the filing of further affidavits. In compliance with the order the respondent delivered an opposing (sic) affidavit on 16 August 2021. This affidavit was also deposed to by Mr Sibanda. The remainder of the terms of the agreed order was complied with, except that no heads of argument was filed on behalf of the respondent.
- [5] The matter came before the Court for hearing on 6 October 2021. On this day Mr Sibanda was again present and addressed the court in his capacity as the representative of the respondent. He was however not inclined to argue the merits of the matter and requested a postponement to be able to appoint an attorney to assist him.

He was of the view that the matter is complex as it involved issues relating to how the Covid-19 pandemic has affected the business of the respondent. The Court pointed out to him that it cannot consider statements in open court that are not under oath. The Court enquired from him whether the respondent will be able to record the reasons for the postponement in an affidavit. Mr Sibanda undertook to do so by close of business and did comply with this undertaking. The applicant was provided an opportunity until 13:00 on 7 October 2021 to respond to the further affidavit in support of the postponement application.

- [6] Notwithstanding the request for further affidavits the Court invited the parties to address it on the merits of the matter should the respondent's application for postponement be refused. The Court then heard argument in respect of the postponement and the merits, with Mr Sibanda participating, and stood the matter down until 8 October 2021 for judgment in respect of the postponement application and if the postponement is refused judgment on the merits.
- [7] Three issues emerged for consideration. Firstly, whether a postponement should be granted. If refused, whether the applicant has made out a case for the relief it seeks. Thirdly, what will be a reasonable period for the respondent to vacate the premises.

The postponement application:

- [8] In the respondent's postponement affidavit various grounds were advanced why the court should postpone the matter sine die to allow the respondent to appoint an attorney.
- [9] The allegations in the postponement affidavit are aimed at conveying a sense that the hospitality industry, in which the respondent operates, is on the road to recovery because President Ramaphosa reduced the lockdown restrictions to level 1. For this reason, it is implied that the business of the respondent will start to recover again. This will then enable the respondent to comply with its contractual obligations. Reference was made to the fact that several employees are dependent on the continued trading of the respondent.
- [10] It is common knowledge that the continued lockdown restrictions have had a detrimental effect on various industries in general, but the hospitality industry in particular. The situation in which many small businesses find themselves in because of the effect of the Covid-19 pandemic and its associated lock down restrictions is a reality, and the Court is almost inclined to facilitate an outcome that will prevent unnecessary loss of employment in the context of our country's already high unemployment numbers. However, the aforementioned reality does not constitute a ground for a postponement.
- [11] The only allegation in the postponement affidavit that is remotely connected to a reason for a postponement relates to a request to be allowed to appoint an attorney so that attorney can place facts before the court. This Court is no wiser what these facts will be and how it will be relevant in respect of the merits of the application. Also, no clarity was provided how the anticipated facts will be different to the fact that are already before the Court. In total the respondent has had three opportunities to answer to the allegations by the applicant. Firstly, in the form of a plea in the Magistrate's Court proceedings. Secondly, the answering affidavit in the present proceedings and thirdly an

affidavit in support of the postponement application.

- [12] The applicant filed an affidavit opposing the postponement. The opposing affidavit primarily takes issue with the respondent's failure to take reasonable steps to obtain legal representation. It also highlights the prejudice the applicant would suffer if a postponement would be granted.
- [13] When considering the postponement application two issues were considered. Firstly, whether the respondent's right to legal representation compels the court to grant a postponement. Secondly, if the lack of legal representation is not a bar to refuse a postponement, whether there are any other grounds upon which the Court can grant a postponement.
- [14] The legal confines in which a Court must consider a postponement application is well established. Suffice it to point out that the legal position and the requirements an applicant must comply with to succeed with a postponement application has been consistently endorsed by our Courts including the Constitutional Court. In this regard the Constitutional Court's summary of the principles underlying a postponement application in *National Police Service Union and Others v Minister of Safety and Security and Others* 2000
- (4) SA 1110 (CC) at 1112 C – F[1], guides the Court's consideration in this matter.
- [15] Having regard to these principles, an applicant is at the mercy of the Court as an indulgence is sought and the party must provide a reasonable explanation for the need to postpone[2] and must thus show a 'good and strong reason'[3] for the grant of the postponement.
- [16] Since, in this matter, the primary reason for the postponement is premised on the respondent's need to obtain legal representation, the Supreme Court of Appeal has emphasised[4] that the right to legal representation is a corollary of the right of access to justice. The denial of this right has wide-ranging consequences for the nature and experience of justice. Nevertheless, the Supreme Court of Appeal also issued a caution: a litigant may not benefit from his own misconduct or otherwise careless approach to legal proceedings.
- [17] Considering the facts of this matter this Court is of the view that the respondent will benefit from its own misconduct or leisured approach to the litigation if a postponement is granted. This Court is of the view that by not granting a further postponement to appoint an attorney will not deny the respondent justice. The respondent has had a significant amount of time to appoint an attorney and had the opportunity to place its defence before the court on numerous occasions. Also, Mr Sibanda who indicated that he is the manager of the respondent and has studied accountancy is not a vulnerable person for who a Court should go the extra mile when the right to legal representation is raised as a justification for a postponement. Moreover, the right to be afforded an opportunity to be allowed an attorney at this late stage is only one of the factors the Court should consider with all the other factors whether to grant a postponement or not and cannot on its own justify a postponement.

- [18] As mentioned before the application was initially set down for 5 August 2021. This date was known to the respondent and on that date, Mr Sibanda was present and represented the respondent and in fact negotiated a draft order with counsel on behalf of the applicant. Mr Sibanda impressed me as a person who is educated and with an ability to understand the proceedings. In court he informed me that he studied accountancy and is currently managing the business of the respondent. That Mr Sibanda has a full appreciation of the proceedings is demonstrated by the fact that a notice of opposition and an affidavit in opposition to the application was delivered. The Court is thus not confronted with a situation where the respondent is entirely helpless with no ability to understand the gravity and impact of the relief the applicant seeks.
- [19] However, the issue of legal representation must also be considered in the context that during September 2020 the applicant launched proceedings in the Cape Town Magistrate's Court seeking relief in respect of payment of the arrear rental, cancellation of the lease agreement and ejectment of the respondent from the lease premises. The respondent evidently filed a plea on 19 April 2021 in those proceedings. Mr Sibanda and his wife, who is apparently the sole director of the respondent, signed the plea. The respondent did not obtain or appoint legal representation in that matter. On 29 June 2021 the applicant withdrew the action in the Magistrate's court and pursued the current application only seeking the ejectment of the respondent from its property. While the Magistrate Court proceedings was pending the respondent did not appoint an attorney despite being aware of the applicant's intention to pursue its remedies through the legal machinery of the law.
- [20] This is thus not a situation where the respondent was surprised by the institution of the court proceedings seeking its ejectment. It has effectively had an opportunity to obtain legal representation since September 2020. More than a year later the respondent arrives at Court seeking a postponement to instruct an attorney, without any explanation what happened in the intervening period since September 2020 until 6 October 2021.
- [21] As the Appellate court has said in *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (A) that the interest of other litigants, like the applicant, and the Court is also important. Having considered the fact that the parties have effectively been in litigation since September 2020; the respondent's inability to provide a 'full and satisfactory' explanation or a good and strong reason' why a legal representative could not be present at court on 6 October 2021; the lateness of the postponement application; and the lack of good cause as there is no conceivable defence on the merits of the matter this Court finds that the respondent will benefit from its own careless approach to the legal proceedings and should the right to legal representation, in the context of the facts of a matter, not come to the respondent's rescue.
- [22] Having regard to the other factors that a Court should consider when asked to grant a postponement the respondent's request must unfortunately also fail. There is no reasonable explanation in Mr Sibanda's affidavit why the application for a postponement was delayed.

The application for a postponement properly contextualised cannot be seen in any other light but as an attempt to delay the applicant's quest to obtain its relief. The Court has serious doubts that the application is bona fide and is of the view that the respondent recklessly disregarded the rules of the Court to obtain some benefit in the form of time.

[23] Finally, when the Court considers the potential prejudice that a postponement will cause both parties the applicant's prejudice cannot be cured by a costs order and thus outweighs the respondent's potential prejudice. The applicant has suffered the inability of the respondent to pay rental for a period exceeding a year. In addition, because it is evident that the respondent is unable to settle the arrear and current rental suggest that any monetary judgment will be cold comfort for the applicant. A postponement with a costs order will solicit the same consequence.

[24] For all these reasons the application for a postponement is refused.

The ejectment application:

[25] There are no disputes of facts on the material issues the applicant must establish to be successful with the relief.

[26] The essential material terms of the lease agreement provide for a lease period of five years commencing on 1 July 2020 at an amount of R 20 125.00 rental per month. The agreement also contains the ordinary terms applicable to commercial lease agreements that determines the rights and duties of the contracting parties as well as the effects and consequences of the obligations.

[27] The respondent immediately, since July 2020, failed to comply with its obligations in terms of the lease agreement. On or about 1 June 2021 the respondent was already indebted to the applicant in the amount of R 215 235.31 for arrear rental and R 48 852.59 in respect electricity charges. Currently, these amounts have increased and is the respondent indebted to the applicant in the total amount of R 348 988.44.

[28] On 25 August 2020 the applicant called on the respondent to rectify its breach. The breach was not rectified and on 11 September 2020 the lease was cancelled. Since the last-mentioned date, the respondent has thus been in unlawful occupation of the premises.

[29] It is not in dispute that the applicant is the owner of the leased premises[5]. The failure to pay rental, the request to rectify the breach and the ultimate cancellation is also not disputed. This Court is therefore satisfied that the applicant has made out a case and is thus entitled to an order for the respondent's

ejectment.

[30] The only glimpse of a defence the respondent advanced on the papers seem to be one of fairness and equity. It blames its inability to pay rental on the prevailing lockdown restrictions and thus by implication relies on a defence of supervening impossibility of performance. It also accused the applicant for not providing

breaks in the obligation to pay rent. It mentions a fire involving a former tenant. An allegation of a proposed payment

plan agreed with the applicant is also made. These are all issues of equity and fairness and they do not present a defence to the applicant's claim. The legal position is that a Court has no equitable discretion to refuse the granting of an eviction order if the applicant has established all the grounds. This principle was confirmed in the reported judgment of *AJP Properties CC v Sello* 2018

(1) SA 535 (GJ) ("*AJP v Sello*") [6].

[31] Reliance on the defence of supervening impossibility of performance does not require much consideration. A recent judgment by the Gauteng Local Division in the matter of *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another* and related matters

[2020] 3 All SA 499 (GJ) [7] where a similar defence was raised by respondents in four different matters dismissed the reliance on the 'force majeure' defence as no such clause was provided for in the contract. In that matter the defences raised by the respondent companies were that because of the national lockdown, force majeure presented, excusing them from their obligations to their employees and their other creditors, who therefore had no locus standi to bring the applications.

[32] As recently as August 2021 the Gauteng Local Division in *Freestone Property Investments (Pty) Ltd v Remake Consultants CC and Another*

[2021] ZAGPJHC (25 August 2021) in a matter where the facts correlate with the matter before this Court found that the declaration of the state of disaster and the continued effect of the Covid-19 pandemic may have resulted in a dramatic decline of customers through the shopping centre in which the lease premises were situated, does not afford a defence to the lessee [8]. The respondent in this matter is in a similar position as the respondents in *Freestone v Remake* and should the respondent's defence, at least in respect of the obligation to vacate, suffer the same result.

Equitable date to eject:

[33] What remain is to determine an equitable date on which the respondent should be ordered to vacate the premises. In its notice of motion the applicant contends for 3 days and in its written submissions a period of one week is requested.

[34] According to *AJP v Sello* supra although a Court's discretion is limited if all the grounds for an ejectment order has been established, our law does recognise that courts can exercise a discretion which, it appears, is not derived from its inherent jurisdiction but from a

common law power to stay or suspend the execution of an ejectment order. The Court in *AJP v Sello* cogently narrated the debate as to whether a Court has a discretion to postpone or suspend an eviction order, in the context of commercial property. Spilg J concluded that a Court always has a discretion to postpone or suspend an eviction order, which discretion must be judicially exercised. Such an approach, the Court reasoned, is in line with the discretion afforded to a Court in terms of Uniform Rule 45A to suspend execution of its orders. Eviction or Ejectment is a species of execution.

[35] Similar to the Court's approach in *AJP v Sello* this Court finds that the interests of justice will deny an applicant who fails to afford the respondent a fair opportunity to relocate. The applicant must bear the financial consequences of its conduct when considered against the economic realities faced by the respondent and its employees if the Court was to direct an eviction with immediate effect or within the timelines proposed by the applicant.

[36] The objective economic realities, which by definition should have been appreciated by the applicant, and which appear from the papers are at least as follows:

(i) Unless the respondent is able to find suitable alternative premises it faces significant financial hardship if not financial ruin. This also jeopardises the staff contingent and their dependents; staff are likely to be laid off temporarily until suitable premises are found or be exposed to retrenchment if the respondent is obliged to downscale or totally closed its doors.

(ii) The respondent is required not only to reinstate the applicant's premises to its pre-occupation state but must also find suitable premises to relocate its business, negotiate a new lease, effect necessary alterations and install shopfittings in order to recommence business.

(iii) The respondent has been in the premises for over a year. The applicant did start proceedings in a lower court but unilaterally

decided to withdraw that action only on 29 June 2021. The respondent's plea in the Magistrate's Court proceedings

was filed on 19 April 2021. The applicant thus effectively sacrificed a period of seven (7) months by unilaterally withdrawing

the action and relaunching the current proceedings.

(iv) If the litigation was diligently pursued in the Magistrate's Court the respondent could have been ejected from the premises by now.

(v) The applicant still has a claim for outstanding rental and holding over against the respondent and the sureties. So, it is not without recourse, although it seems as if any monetary judgment will not be easily satisfied.

- [37] Considering the applicant's own conduct in the manner it handled the litigation the applicant's request to eject the respondent in such a short period is not justified. This Court is of the view that it would be harmful to the interests of justice to compel the respondent to vacate immediately instead of affording it the opportunity of finding suitable alternative premises that would serve not only its interests but also those of its clientele and employees. I am satisfied that these constitute sufficient grounds, to justify a delay in enforcing the ejectment order.
- [38] The respondent has not indicated in its postponement affidavit, despite being requested by the Court to do so, how much time it will require to relocate. Notwithstanding, the absence of any indication from the respondent I believe that in all the circumstances real and substantial justice requires that the respondent be afforded four (4) clear weeks to find alternative premises to relocate and bearing in mind, as the Court stated in *AJP v Sello* that relocation is often the principle consideration for delaying the execution of an eviction order in respect of commercial premises.

Appropriate Costs order:

- [39] Costs should follow the event. However, I'm not satisfied to grant costs on a High Court tariff. The applicant started the proceedings in the Magistrate's Court. No justifiable reason appears from the papers why the matter was withdrawn and relaunched in this Court. The matter should have stayed in the Magistrate's Court and be finalised in that Court. This Division's inherent jurisdiction is not ousted to entertain this matter. However, this Court is of the view that the only justification for withdrawing the matter in the Magistrate's Court and instituting it in this Court was to achieve a faster resolution of the dispute. Such an approach by litigants impact the right to access to Courts for other litigants. Such an approach should be discouraged. An appropriate costs order is reflected in the order below.

I would therefore make the following order:

- [40] An order is made in the following terms:

- (1) The respondent and all other persons or entities occupying the premises situated at Ground Floor, Stand Alone Building, St Peters Square, 441 Main Road, Observatory is ordered to vacate the premises on or before 5 November 2021.
- (2) The Sheriff of this Honourable Court (or his/her deputy) is authorised and directed to take all steps on 11 November 2021, or any time thereafter, to give effect to prayer (1) above if the respondent does not vacate the premises on 5 November 2021.
- (3) To the extent necessary and if requested by the Sheriff the South African Police Services are directed to assist the Sheriff in carrying out paragraph 2 of this Order.
- (4) The respondent shall pay the applicant's costs of this application on a scale as between attorney and client on the Regional Court scale.

A MONTZINGER

Acting Judge of the High Court

Appearances:

Applicant's counsel:

Adv Nicola Van Zyl

Applicant's attorney:

STBB Attorneys

Respondent:

In person represented by Mr Sibanda

[1] Also *Lekolwane and another v Minister of Justice and Constitutional Development* [2006] ZACC 19; 2007

(3) BCLR 280 (CC) para [17]

[2] *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) para [54]

[3] *Gentiruco A G v Firestone SA (Pty) Ltd* 1969

(3) 318 (T) at 320 C - 321 B

[4] *Pangarker v Botha and another* [2014] 3 All SA 538 (SCA)

[5] *MC Denneboom Service Station CC and another v Phayane* 2014

(12) BCLR 1421 (CC) confirming *Chetty v Naidoo* [1974] 3 All SA 304 (1974 (3) SA 13) (A) that it is generally sufficient for an applicant to succeed with an ejectment order to demonstrate that it is the registered owner of the property.

[6] Para 17 referring to various judgment. In this judgment the court dealt with a commercial eviction.

[7] Referring to *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA)

[8] At par 29

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