

SOUTH AFRICA / JUDGMENT

AJP Properties CC v Sello (39302/10) [2017] ZAGPJHC 255; 2018 (1) SA 535 (GJ) (8 September 2017) [2017] ZAGPJHC 255

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

39302/10

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 39302/10

Reportable

Of

interest to other judges

Revised.

8

September 2017

In

the matter between:

AJP PROPERTIES

CC

Applicant

And

SELLO,

DITONKANA ABRAM

Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. AJP Properties CC launched an urgent eviction application against Mr Sello the sole proprietor of Kempton Gate Pharmacy.
2. The facts are straight forward. The applicant is the lessor of the Elgin Shopping Mall in Kempton Park. In December 2010 it concluded a five year lease with the respondent in respect of premises situated in the mall.

In terms of the lease the premises were to be used exclusively as a pharmacy. The premises were identified on an attached plan of the mall.

3. Although the standard form lease agreement that was signed made provision for an option to renew this clause was excluded from the terms of their agreement. The reason for the renewal clause not being included was not explained and is irrelevant to the determination.
4. The lease continued beyond its expiry date which triggered the provision of clause 2.4. The clause provides:

“After the expiry of the period then all the terms and conditions of the lease shall remain in force save that:-

2.4.1 the monthly rental shall vary from time to time provided the lessor shall have given the lessee not less than one calendar month’s written notice of a change in rental

2.4.2 the lease shall be terminable by either party giving to the other one calendar month’s written notice of termination”

5. The respondent’s pharmacy continued to occupy the premises for another one and a half years with rental increases in terms of clause 2.4.1 which allowed for increases on one calendar months’ notice.
6. However on 30 May 2017 the applicant gave the respondent one month’s written notice of cancellation of the lease terminating on 30 June.

The letter also required the pharmacy to reinstate the premises by dismantling all fixtures and furnishings, all interior building works and alterations, restoring the ceiling to a flat, lay-in acoustic board ceiling, removing floor coverings, restoring the cement screed to a condition that will receive a floor finish , and removing all stock in trade and advertising signs.

THE DISPUTES

7. The respondent's initial response, albeit a few days before the date by when he was to vacate (it is however apparent that there were negotiations to provide him with alternative premises within the mall), was to request that he not be evicted from the premises until he could find suitable premises to relocate the pharmacy.

A spoliation application was threatened on the grounds that the pharmacy employs 20 people whose jobs would be affected, that the

business was worth R3.5 million and that it would not be possible to vacate within the time allowed. It was also alleged that the

applicant was negotiating with the respondent in a manner which created the impression that it would buy his business for that

amount, which lulled him into believing that he did not have to find alternative premises, and that only a week earlier (i.e. on about 21 June) an offer was made to the respondent of R1million which he rejected. It was finally alleged by the respondent that there were other suitable empty premises in the mall which could be utilised without evicted him.

8. The reply to the letter was a denial of any negotiations to purchase the business. All that had occurred according to the applicant was a suggestion that the respondent should contact the Pick n Pay pharmacy group to enquire if they were interested but there never was an offer of R1million. It had however been suggested that the respondent relocates to another part of the mall and he was offered shop 14a measuring 68 square metres and shop 26 measuring some 29.5 square metres.

The applicant quite properly attached this correspondence to its founding papers.

9. The respondent's answering affidavit raised a number of points in limine, including lack of urgency. None has merit.
10. The answering affidavit then set out that the respondent had bought the pharmacy in December 2010. It was an existing business operating in the mall under its present name. The purchase price for the pharmacy was an amount of R1.1 million.

Accordingly the lease between the applicant and the respondent was as a consequence of the previous owner of the pharmacy disposing of his business, which would have included the ability to continue operating from the mall premises. The respondent however said that instead of being given the same premises (shops no 16 and 17 of 140 to 180 square metres) the applicant had unilaterally relocated him to shop16A which was at least 20 square metres smaller.

11. The respondent's substantive contention was that the one calendar month notice period provided for in clause 2.4.2 was contra bonos mores.

12. In its replying affidavit the applicant admitted that it moved tenants from time to time within the centre. In order to show financial prejudice the applicant had already produced in its founding papers the lease it had concluded with Pepkor in which it was required to give occupation on 15 August. In the replying affidavit it was contended that Pepkor intended opening an Ackermans store which would benefit all tenants and that the pharmacy was “at this stage not extremely busy”.
13. At the court’s request a supplementary affidavit was filed identifying the employees working at the pharmacy. There are twenty-two, of whom all but one are said to be single parent young women. The respondent also clarified that he had purchased the pharmacy with a bank loan and that the purchase price included payment for “clientele and goodwill” by which I would understand the inclusion of a goodwill factor for location.

THE ONE MONTH NOTICE CLAUSE

14. It is trite that under ordinary commercial law principles of lease a tenancy in respect of which rental is payable monthly becomes terminable on one calendar month’s notice. Accordingly to suggest that a clause that mirror’s the common law is contra bonos mores would be far reaching. It may also raise issues of inequality of treatment if the lessor cannot claim a similar ground for relief if the roles were reversed.
15. However that does not conclude the enquiry. The issue is a legal one based on the facts presented and the parties were requested to specifically address it.
16. There however appear to be a number of legal factors that have application.

The first is that, even though under common law a residential tenancy is similarly terminable on one calendar month’s notice if rental is payable monthly and the lease has been lawfully terminated, our courts exercise a residual power when granting an eviction order to give the tenant a reasonable time to vacate; and this may be for a longer period than one month after the order is made.

I should preface this part by indicating that I am only concerned with the common law position to the exclusion of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

17. Although the court has no equitable jurisdiction to decline the grant of an eviction order^[1] it has nevertheless given the erstwhile tenant time within which to vacate. The following cases are mentioned by WE Cooper in *Landlord and Tenant* (2nd ed 1994) at 375-6 under the topic “Stay of execution”; *Voortrekker Pers v Rautenbach* 1947 SA 47 (A), *Lovius and Shtein v Sussman* 1947(2) SA 241 (O), *Van Reenen v Kruger* 1949(4) SA 27(W), *Graaff-Reinet Municipality v Mkwane* 1950(3) SA 883(E) and *Woudstra v Jekison* 1968(1) SA 453 (T) at 458B.

In the last two cases the discretion was considered exercisable in a magistrates' court (which is a creature of statute and

therefore devoid of inherent jurisdictional powers). The author also referred to Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* Vol 1 (see now 10th ed at 622).

18. Van Reenen is significant because of the following statement by Ramsbottom J (at the time) at 29:

'The difficulties mentioned by VAN DEN HEEVER, J., appear to have been shared by CENTLIVRES, J.A., and were expressed in his judgment in *Potgieter v Van der Merwe*, to which I have already referred. I appreciate these difficulties but I agree with VAN DEN HEEVER, J., that the Appellate Division has decided the matter in *Voortrekker Pers v Rautenbach*, and consequently I must hold that the Court has a discretion.'

19. In the most recent edition of Kerr's *Law of Sale and Lease* (4th ed 2014) by Graham Glover under the heading "Suspension of an Ejectment Order" the author repeats much the same sentiment as Cooper did; that the courts still have not provided a legal justification for delaying the enforcement of an eviction order.[2] Glover adds a number of other cases where a court has considered delaying the execution of an eviction order. For sake of completeness

they are *Potgieter v Van der Merwe* 1949(1) SA 361 (A) at 373-4 (which left the issue open but leaned against it save in exceptional circumstances[3]), *Bhyat's Departmental Store (Pty) Ltd v Dorklerk Investments (Pty) Ltd* 1975(4) SA 881(A) and *EP Du Toit Transport (Pty) Ltd v Windhoek Municipality* 1976 (3) SA 818 (SWA) at 819B-F where Hart J dealt extensively with the cases and concluded, effectively applying Van Reenen, that the court had a discretion. See also *Beyers v Mlanjeni* 1991

- (2) SA 392 (C) at 397E to 398F.

To this list can be added *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 261C-F, a judgment of Ackermann J who followed the Ramsbottom J line of reasoning (in Van Reenen) that, despite subsequent reservations, the appellate division case of *Voortrekker* remained binding.

20. In *Lovius* the appellant's heads of argument [4] relied on the common law which allowed a court to grant an extension of time on equitable principles and cited Voet (19.2.18) as well as Huber, *Hedendaagsche Rechtsgeleertheit* (Gane's translation vol. 2, p. 355).[5]

Selikowitz J in *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) at 72G-I referred to *Lovius* and other cases to demonstrate that the courts have frequently exercised this discretion in ejectment cases.

21. There is accordingly a history of case law spanning close on a century [6] which has, irrespective of its pedigree, become solidified and which has accepted 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.[7]

In this context it is appropriate to cite the passage in *S v Graham* 1975 (3) SA 569 (A) at 576F-577A where Holmes JA confronted the criticism of purists in relation to theft cases by saying, in the context of a history of case law which recognised a claim by an account holder for theft arising from “monies” stolen out of a bank account:

‘It may well be that, strictly according to Roman-Dutch law, only corporeal things were capable of being stolen; see the submissions made in *R. v Milne and Erleigh*, supra at p. 800. However, the Roman-Dutch law is a living system, adaptable to modern conditions’

22. In so far as the high courts are concerned, as pointed out by Selikowitz J in *City of Cape Town* at 72H, rule 45A (which was introduced in 1991) allows it to stay the execution of an order. In terms of the rule which is headed “Suspension of orders by the court”:

“The court may suspend the execution of any order for such period as it may deem fit.”

If it is accepted that our common law in respect of delaying eviction orders in appropriate cases has solidified through decisions on appeal then magistrates’ courts are similarly bound and issues of their not having inherent jurisdiction become moot.[8]

23. I mentioned earlier that there was a second legal strand that might be taken into account.

Another way of considering the issue is by reference to what may be broadly classified as the recognition of commercial reality within our jurisprudence. Legal pragmatism informs the way in which competing contractual interests are balanced. While law may lag to ensure certainty, it does not remain static and eventually evolves to meet the exigencies of commercial reality and fairness.

24. This may be illustrated by the extension of the law of theft of money which became embedded in our common law because of the need to protect principals from the actions of agents entrusted with their money (see *S v Grayston Technology Investments (Pty) Ltd* and another [2016] 4 All SA 908 (GJ) at paras 34-37, 40, 42 and 60 to 73).

It may also be illustrated by *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* 2006

- (6) SA 605 (SCA) at paras 11, 37 ad 46 where the Supreme Court of Appeal rejected the concept that an enrichment lien was not available in respect of an urban tenement. In that case the SCA (at paras 6-9) was compelled to consider the commercial mischief which brought the exemption into existence under article 10 of the Dutch Placaeten[9] of 1658 and 1659, and which was limited to abuse occurring exclusively within rural tenements.

Administrator, Transvaal, and Others v Traub and Others [1989] ZASCA 90; 1989

(4) SA 731 (A) at 756G to 758J is an illustration of both sociological and economic reality being taken into consideration so as to allow judicial review where a legitimate expectation arose in appropriate cases of an entitlement to be heard even if there was not at that time a legally enforceable right to a hearing.

25. More closely related to leases terminable by effluxion of time are the common law principles in relation to the termination of periodic leases which, if nothing is agreed, are informed by economic considerations. In Cooper at 66 the author describes the following:

“Grotius and Van Leeuwen take the view that a year’s notice is required to terminate a yearly lease of rural property; while Pothier says that it is for such time as is necessary for the collection of fruits. Except in an early case, our courts have refused to accept as an inflexible rule that a rural lease is entitled to a year’s notice. The period our courts have considered reasonable to terminate a yearly rural lease has either been three months or six months, being the time that the lessee reasonably required to reap his crops, settle his affairs and find other farm land.[10]

(emphasis added)

26. Perhaps one of the most explicit recognitions of commercial reality underlying the balancing of competing contractual or other economic rights is to be found in the dissenting judgment of van den Heever JA in R. v Sibiya, 1955

(4) SA 247 (AD) at p. 261:

"Nowadays in cases of theft we are apt to look at the economic effect of the act by which a person fraudulently converts value to his own use rather than be hypnotised by the concrete mechanics by means of which the crime is committed."

This passage was referred to with approval in Graham (at 576G-H).

27. Shortly prior to Graham, Holmes JA in Phame (Pty.) Ltd. v Paizes 1973 (3) SA 397 (AD) at pp. 418H – 419B explained the justification for developing Roman- Dutch law as follows:

“That, however, does not conclude the matter, for there remains the question whether the relevant principles of the Roman-Dutch law can be adapted to a modern situation of company law such as the present one. As to that, in 1920 S.A.L.J., p. 265, there is published a lecture by Sir John Wessels, author of 'History of Roman-Dutch law,' and later CHIEF JUSTICE of this country. The lecture is entitled 'The Future of Roman-Dutch law in South Africa.' The learned Judge said:

'If the Roman-Dutch law is to survive, it must adapt itself to changing circumstances, whilst retaining its essential features...'

The learned Judge went on to refer to the need for

'making the life of the law coincide with the life of the people'.

Consistent therewith, in the case of Pearl Assurance Co. Ltd. v Union Government, reported in the appendix to the 1934 AD reports, the Privy Council (then the highest court of appeal for this country) at p. 563 referred to the Roman-Dutch law as -

'a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent principles to deal effectively with the increasing complexities of modern organised society!'

It may also be suggested that the incorporation or adaptation of more modern English law concepts into, inter alia, financial, corporate and other commercial areas of our Roman Dutch legal system arose in order to meet the economic realities of new financial instruments and commercial activities.

28. The third legal strand is that the principle of freedom of contract is not absolute. One of the most explicit common law inroads is to be found in the application of the *contra bonos mores* concept. Our Bill of Rights has created further inroads which are expressed in the provisions of s 39:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

...

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.
29. In the recent case of *Mokone v Tassos Properties CC and another* [2017] 25 CC (CCT 113/16 and 291/16) Madlanga J confirmed that these sections were never intended to curtail the existing inherent power that the superior courts have to develop the common law “taking into account the interests of justice” and further referred to s173 of the Constitution”.^[11]
30. Naturally any development is to be treated with caution and may only become hardened into principle, if at all, after adopting a case by case (or *casuistic*) approach. This occurred incrementally in relation to the introduction of legitimate expectation into our law.^[12] Another instance is *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009
- (6) SA 232 (CC) where the court, after considering the accumulation of cases on the subject, extrapolated a series of principles which now governs the question of costs in constitutional matters.^[13]

31. In *Barkhuizen v Napier* 2007(5) SA 323 (CC) the court laid down the proper approach to constitutional challenges of contractual terms. After finding that common law principles contained in contractual terms between private parties are laws of general application and are therefore subject to constitutional challenge the court said (at paras 28 to 30):

“[28] Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.

- [29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.
- [30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms.”[14]
32. In the present case the three legal strands I have discussed can be integrated. The considerations of public policy, when applying the interests of justice test in contractual relationships take into account commercial reality and in turn reinforce the common law procedure our courts, rightly or wrongly, have applied since the 1920s and which is now reinforced in the high court by rule 45A.
33. The caution expressed by Centlivres JA (at the time) in *Potgieter* restricts the words “as the court deems meet” in rule 45A by requiring a court to exercise its discretion judicially.[15] In any event this would have been inferred by s 173 of the Constitution which requires the court to take into account “the interests of justice” when either exercising its inherent power to protect and regulate its own process or when it develops the common law.[16]

Similarly rule 45A has been applied in cases where “real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done”.[17]

34. The exercise of the power, whether under common law or rule 45A, must be rational as does the determination of the period to be allowed before the eviction order can be enforced. Again legal pragmatism plays a role if only because a failure to comply with an eviction order may give rise to contempt proceedings.
35. The first consideration is whether there ought to be a distinction between the ability of a court to delay an ejectment order from a residential property as opposed to a commercial property. While different considerations may apply as to whether to exercise the power in a given case, the case law cited earlier demonstrates that no such distinction exists. Furthermore the old authorities referred to previously had no difficulty in accepting that a reasonable period within which to terminate a periodic tenancy was informed by the nature of the commercial activity undertaken (all be it limited to farming) and the period of time required for the tenant to relocate his activity.
36. The next issue is whether there should be a stay in the enforcement of the ejectment order. This involves a number of considerations.
37. Firstly, it is evident that from the inception of their relationship the parties did not enjoy equal bargaining power. This is demonstrated by the applicant’s unilateral relocation of the pharmacy to smaller premises as soon as the respondent took over the business. Another illustration is that on termination of the lease by effluxion of time the applicant could in terms of clause 2.4.1 (cited earlier) increase the rent at will, and without any objectively determinable criterion, on one month’s notice. It would therefore suit the applicant not to renegotiate a lease if there was a perception that the mall would become an attractive

centre for retailers or if an upturn in the economy was anticipated.

Moreover the standard option to renew clause, although not operative in the present case, demonstrates the lack of an even hand where the underlying considerations for each party are not much different (or if anything, would be less favourable to the tenant). In its terms the tenant was obliged to exercise its option to renew at least three months prior of the lease’s termination. This indicates the amount of time the applicant believed would be necessary to find a replacement tenant and for that tenant to commence occupation.

38. Secondly the respondent had not breached any of the terms of the lease, was up to date with his rent and could be expected to continue doing so.
39. Other considerations that should be taken into account relate to the conduct of the applicant and to the commercial realities which I believe a court should not ignore when having regard to the interests of justice.

40. I take into account that the applicant did not inform the respondent as soon as it had successfully negotiated a lease for the premises with Pepkor. The contents of the new lease reveal that Pepkor was already in negotiations with the applicant prior to March 2017 and that the lease was subsequently signed on 21 February. The lease is for three years with an option to renew for a similar period. The date of occupation is stipulated to be the 1st of October 2017.

However there is another clause which gives Pepkor actual beneficial occupation rent free as from 15 August 2017 until the 1 October date. The clause also provides for a penalty payment of R5 000 per day if the beneficial occupation date is delayed and notice of a postponed date for taking up beneficial occupation is not given by at least 15 July.

41. Despite receiving a firm offer as early as 21 February, and despite appreciating that it would be subject to penalties if the beneficial occupation date was delayed without a month's prior notification, the applicant never mentioned to the respondent that it had concluded the lease with Pepkor until it delivered the notice to vacate more than three months later (on 30 May).
42. The financial consequences to the applicant of staying the ejectment order is a risk the applicant took by waiting until the eleventh hour to inform the respondent that it had concluded a lease for the premises with another tenant. The applicant may have delayed in doing so to forestall the possibility of the respondent vacating earlier or simply because it was unconcerned about the fate of a tenant who had paid good money to buy a pharmacy with its location and goodwill and who had continued to occupy the premises for over 16 years.

Irrespective of the reason, I believe that the interests of justice shun an applicant who, despite having secured a new tenant, fails to afford the respondent a fair opportunity to relocate when it could have. The applicant must bear the financial consequences of its conduct when considered against the economic realities faced by the respondent and the pharmacy's employees if the court was to direct an eviction with immediate effect.

43. The objective economic realities, which by definition should have been appreciated by the applicant, and which appear from the papers may be identified as follows: The respondent's pharmacy business requires a sustainable floor space considering that it operates a dispensary. Historically the pharmacy's clientele frequent the mall and the goodwill of the business included its location. Termination of a lease should not in cases where the lessee has complied with its terms result in the demise of the tenant's business.
44. 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 pharmacy is obliged to downscale.

45. Another consideration is that 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 his pharmacy, negotiate a new lease, effect necessary alterations and install shopfittings in order to recommence business.

There is a further socio-economic factor; a fully-fledged pharmacy conveniently located provides for the essential medical needs,

generally on a personal level, for those living within the area which would include the elderly.

46. In my view it would be inimical to the interests of justice to compel the respondent to vacate immediately instead of affording him the opportunity of finding suitable alternative premises that would serve not only his interests but also those of his clientele.
47. I am satisfied that these constitute sufficient grounds, to justify a delay in enforcing the eviction order.
48. The final issue is the period of the stay of the eviction order.

The respondent contends he requires five months to find suitable alternative premises. I consider that this is too long bearing in mind the relative interests of the parties. Nonetheless I am entitled to take into consideration and taking into consideration that the applicant failed to play open cards with the respondent at least from the time it secured the lease with Pepkor.

49. In terms of its standard contract the applicant considers a period of three months necessary in order to secure a suitable tenant if its lease is not to be renewed. This period happens to coincide with the length of time the applicant held back informing the respondent that it had concluded a lease with Pepkor. Had it made prompt disclosure then the respondent would have had this

additional time to find suitable alternative premises. I accept that the lease with Pepkor has penalty clauses but the applicant only has itself to blame for jeopardising the respondent's business when there was no need to.

50. I believe that in all the circumstances real and substantial justice requires that the respondent be afforded three clear months to relocate and bearing in mind that relocation is often cited as the principle consideration for delaying the execution of an eviction order in respect of commercial premises.[18] I have stripped the court order of legal formalism in preference for straight forward layman's language which will also ensure, by reason of other provisions of the lease[19], that rental and other relevant charges remain payable under its provisions.

ORDER

51. It is for these reasons that I made the following order on 31 July 2017:

1. The application is urgent.

2. The respondent is ordered to vacate shop 16A in the Kempton Gate Mall Shopping Centre, corner of CR Swart and Rienert Streets, Eldeen, Kempton Park on or before 31 October 2017.
3. The Sheriff is authorised and ordered to take all steps to give effect to prayer 2 above in the event of the respondent not vacating the shop on that date.
4. No order as to costs.

SPILG J

DATES OF HEARING: 26 and 31 July 2017 DATE OF ORDER: 31 July 2017

DATE OF JUDGMENT: 8 September 2017

FOR APPLICANT: Adv JD Robbertse

MD Swanepoel Attorney

FOR RESPONDENT: Adv MJ Koma

MH Mkhabela Attorneys

[1] WE Cooper Landlord and Tenant (2nd ed

1994) at 179 fn 172 citing cases such as *Oatman Properties v Marouw* 1973

(3) SA 779 (A) at 785C

[2] At 587

[3] At 373-4 "There is nothing in the report of the case to indicate that any argument was addressed to the Court on the question whether it had a discretion to grant the defendant time, as pointed out by VAN DEN HEEVER, J. (as he then was), in *Lovius & Shtein v Sussman* (1947 (2), S.A.L.R. 241, at

p. 243), it is difficult to appreciate how the Court can, in the absence of any statutory provision, delay the enforcement of a legal right which it has found a plaintiff is entitled to. In *Gordon v Tarnow* (1947 (3) SALR 525) the appeal which was heard after the case of *Voortrekker Pers Bpk v Rautenbach* (supra), the Transvaal Provincial Division, in allowing an appeal from a magistrate's court, granted an order of ejectment simpliciter, and this Court dismissed the appeal without giving the defendant time within which to vacate. It is, however, unnecessary for me to decide whether a Court of law has the discretion referred to, but I may add that in my view, if it has that discretion, it must exercise it judicially. It is open to question whether, assuming there is such a discretion, an appellate tribunal should, save in exceptional circumstances,

grant a defendant against whom an order of ejectment has been made by an inferior court, time within which to vacate the premises. In the present case the defendants were ordered to vacate on or before the 30th day of June, 1948. By appealing from that order they stayed the execution of that order and have reaped the advantage of remaining in possession of the premises for five months longer.'

[3] At 373-4

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[4] The heads were prepared by Adv Horwitz KC and Adv S Miller, subsequently becoming judges of the OPD and appellate division respectively.

[5] See *Lovius* at

241. One of the cases referred to in the heads of argument was *G.A. Fichardt, Ltd. v Brand* 1928 OPD 56 where at 63 despite a right to cancel it was accepted that some time must be afforded to the respondent before implementation of the court order: It has, however, been intimated on behalf of the applicants that a period of more or less three months will be allowed the respondent to wind up his affairs in connection with the hotel --- and this appears to be a reasonable period: and so, while the order is now granted herein, execution thereunder will be stayed for a period up to and including the 30th April

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[6] E.g. *G. A. Fichardt Ltd*

[7] In cases where a claim for specific performance is allowed, a court may still delay execution of its order. This may be due to the possibility of contempt

proceedings for non-compliance with orders for specific performance (*ad factum praestandum*) but not necessarily in cases for monetary claims (*ad pecuniam solvendam*)- as to which see now *Eke v Parsons* 2016 (3) SA 37 (CC) at para 31

[8] E.g. *Lovius*

[9] In some cases spelt “Placaaten”

[10] Footnotes omitted

[11] S 173 reads: ‘Inherent power The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

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The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

[12] Commencing with *Traub*- See at 733B-C

[13] Per *Sachs J* at paras 26-28

[14] See more recently *Madlanga J* in *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd* 2015 (CC) at paras 71 to 72

[15] At 374

[16] Section 173 ‘Inherent power The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

[16] Section 173

‘Inherent power

[17] Per Tebbutt J in *Strime v Strime* 1983 (4) SA 850 (C) at 852A – B. See also Erasmus Superior Court Practice (2nd) at D1-603 and the cases mentioned at ftn 4 which including *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd* 1981(2) SA 407 (W) at 411E-F (per Nestadt J (at the time).

[18] Voet 19.2.8, the authorities cited by Cooper at 66 and from recollection certain of the cases referred to in *Adv Horwitz*’

heads of argument in *Lovius*.

[19] See clause 26.3

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