

SOUTH AFRICA / JUDGMENT

Full Sail 3 (Pty) Ltd v Tsehay Import and Export CC (4448/2021) [2022] ZAGPJHC 145 (14 March 2022) [2022] ZAGPJHC 145

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

4448/2021

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG
CASE NO: 4448/2021

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
14/3/2022

In the matter between: FULL
SAIL 3(PTY)
LTD
Applicant
And
TSEHAY
IMPORT AND EXPORT CC
Respondent

JUDGMENT

MAKUME, J:

- [1] This is an application in terms of which the Applicant seeks an order evicting the Respondent from certain business premises situated at Shop No 5 Aston Mansion, 178 Jeppe Street, Corner Van Brandt Street, Johannesburg.
- [2] The parties concluded a written lease agreement on the 5th August 2013. The duration of the lease was for a period of one year expiring on the 31st July 2014.
- [3] The Respondent as it was entitled to exercised its option to renew the lease for a further three terms of 12 months each eventually expiring on the 31st July 2017 where after it was never renewed. The Respondent however, remained in occupation of the premises.
- [4] On the 25th November 2020 the Applicant informed the Respondent about the termination of the lease and requested the Respondent to vacate by the 31st December 2020.
- [5] The terms of the lease agreement concluded by the parties stated amongst others the following:

5.1 The Rental payable by the Respondent was the sum of R15 000.00 (Fifteen Thousand Rand) per month excluding VAT plus 50% share of any levies or other charges levied on the premises.

5.2 The Respondent would be responsible for payment of electricity, water, special sewerage and affluent charges and any other municipal services charged in respect of the premises.

5.3 The Respondent was prohibited from sub-letting the premises or any portion thereof nor to make any alterations or additions to the premises, structural or otherwise without the prior written consent of the Applicant

5.4 The Applicant would be entitled to cancel the agreement on the happening of any of the following events:

5.4.1 Failure to pay rental or any other amounts and remain in default for a period of 10 days after receipt of a notice calling for such payment.

5.4.2 Breach any other term of the agreement and remain in default for a period of 10 days after receipt of a notice calling for such breach to be remedied.

- [6] The notice informing the Respondent to vacate the premises due to termination of the agreement is dated 25th November 2020. In it the Applicant's attorneys wrote as follows:

"The Lease Agreement has been extended on several occasions, the latest of which expired during 2017.

You have occupied the premises on a monthly basis since that time you are in breach of the lease agreement in that you are in arrear with your rental and other obligations in the sum of R150 608.67 as at date hereof which amount despite demand you refuse to pay.

In addition, you are in breach of the agreement in that you are sub-letting the premises and or making structural alterations to the premise in breach of the agreement.”

- [7] The letter concluded with a paragraph informing the Respondent that the lease is terminated as on the 31st December 2020 on which day the Respondent is expected to vacate the premises.
- [8] The Respondent failed to vacate the premises as a result on the 2nd February 2021 the Applicant launched this application. The Respondent entered appearance to defend on the 17th February 2021.
- [9] It is common cause that the only members of the Respondent CC are Tsehay Sinishaw Degaga and Yosef Habbie Degaga. Mr Yosef Habbie Degaga signed the lease agreement on behalf of the Respondent. It is accordingly not correct that the deponent to the Respondent answering affidavit is a member of the Respondent he Mr Dutore Africitio Wonchaso has not attached any resolution authorising him to depose to the affidavit. His attempt to rectify this in a further affidavit does not help cure the defect. He still has not furnished any power of attorney authorising him to depose to such affidavit. Under normal circumstances this should be the end of the matter. However, seeing that a substantial opposing affidavit has been filed same cannot be ignored.
- [10] In the answering affidavit the Mr Dutore says that he never received the letter informing him about the termination of the lease as it was sent to a wrong address and accordingly that the letter of termination is null and void.
- [11] He continues to say and admits that for the period March 2020 to May 2020 the Respondent did not make any payment of rent due to Covid-19. They did make payment for June, July and August 2020. He then adds that on the 20th September 2020 the premises were destroyed by fire as a result they had to do repairs to the value of R350 000.00
- [12] In the final analyses the Respondent says that it will be fair and equitable if they are exonerated from payment of rental due to the fact that they spent money doing repairs. They lastly say that since the written lease expired in 2017 its terms can no longer be applicable to the oral lease that took effect thereafter. He also denies that there is any sub-letting of the premises.
- [13] It is trite law that under commercial law Principle of lease a tenancy in respect of which rental is payable monthly becomes terminable on one-month notice. This therefore means that the Respondent is in unlawful occupation since the 1st January 2021
- [14] The statement that the notice of termination was sent to a wrong address cannot be sustained. It is the email that was used by Mr Degaga. Mr Dutore does not tell this Court whether the email to which the notice was sent does belong to the Respondent or not.

[15] The termination was valid as the notice was sent to the most recent email that Mr Degaga had used. The defence of non-receipt falls to be dismissed. Alternatively, the service of this application is also sufficient notice of termination and calls upon the Respondent to vacate (See the matter of Middleburg Town Council vs Trans Natal Steenkamp Korporatie Bpk 1987 (2) ALL SA 244.)

[16] There is no valid defence to the eviction application and in the result I hereby grant an order in the terms as per attached craft order marked "X".

Dated at Johannesburg on this 14 day of March 2022.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING :

15 FEBRUARY 2022

DATE OF JUDGMENT : MARCH 2022

FOR APPLICANT :

ADV K NAIDOO

INSTRUCTED BY :

MESSRS VALLY CHAGAN & ASSOCIATES

FOR RESPONDENT :

ADV ROBERTS

INSTRUCTED BY :

ESTATES INCORPORATED

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