

SOUTH AFRICA / JUDGMENT

Kistnasamy and Others v Pillay and Another (D5841/2023) [2024] ZAKZDHC 31 (24 May 2024)

[2024] ZAKZDHC 31

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D5841/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D5841/2023

In

the matter between:

INDRA
LOGAN
KISTNASAMY
FIRST APPLICANT
LEANE
VENTURELLA AND CAROL COETSEE
SECOND RESPONDENT
PARTNERSHIP
INSTRUMENT
- PROJECTS CC
THIRD RESPONDENT
and
DAYALAN

PILLAY
FIRST RESPONDENT
ETHEKWINI
MUNICIPALITY
SECOND RESPONDENT

Coram: Mossop J

Heard: 24 May 2024

Delivered: 24 May 2024
ORDER
The

following order is granted:

1.
It is declared that the oral sub-lease agreement concluded between the first applicant and the first respondent has been cancelled.
2.
The first respondent, and any and all persons occupying by, through or under him, are hereby ordered to vacate the immovable property with the physical address of Unit 2[...], 1[...] L[...] Road, Athlone Park, Amanzimtoti, within 10 days of the service of this order upon the first respondent.
3.
In the event of the first respondent and any or all persons occupying by, through or under him, failing to comply with the order in paragraph 2 hereof, the sheriff of this court is authorised and directed to forthwith eject the first respondent and any and all persons occupying by, through or under him from the property and to hand vacant possession thereof to the applicants.
4.
The first respondent is directed to pay the costs of this application on scale A.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an ex tempore judgment.

- [2] The third applicant is the juristic entity that owns commercial business premises situated at 1[...] L[...] Road, Athlone Park, Amanzimtoti (the premises). The third applicant has two members who are also the partners in the second applicant in this application. The second applicant acts as the agent of the third respondent in

letting out the premises and concludes lease agreements on its behalf with selected tenants. The first applicant claims that he is the tenant in lawful occupation of the premises, having concluded a lease agreement with the second applicants.

- [3] The first applicant uses the premises to conduct the business of a restaurant and pub that rejoices under the name of 'Hot Rock Café' (the Café). The first applicant claims that he purchased the Café from the first respondent but later orally agreed that the first respondent could sub-let a portion of

the premises to run a video games business. He now alleges that the first respondent has breached the oral agreement of sub-lease and all of the applicants join together in this application to seek his ejectment from the portion of the premises that he sublets.

- [4] To the contrary, the first respondent claims that he is entitled to be in occupation of the premises because the lease that he concluded with the second applicant is extant and has never been cancelled. He accordingly rejects his eviction from the premises and does not acknowledge the sub-lease to which he is purportedly a party.

- [5] There is a second respondent joined in this application, namely the eThekweni Municipality. Why this has occurred is a mystery as no reference is made to it and no relief is claimed against it and I shall accordingly make no further mention of it as a result.

Representation

- [6] Ms Athmaram appeared for the applicants this morning and Ms Miranda appeared for the first respondent. I am indebted to both counsel for their helpful argument.

The lease agreements

- [7] There appear to be two lease agreements that have been concluded between the second applicant and their tenants that are relevant to this matter. Having mentioned two lease agreements, it is so that three lease agreements have in fact been attached to the application papers but one of them does not appear to constitute a binding agreement. I mention all three lease agreements in chronological order:

- (a) The earliest of the lease agreements is one put up by the first respondent and is between himself and the second applicant. I shall

call this 'the first lease agreement'. It was signed by both parties on 1 March 2019^[1] and records that the lease would commence on that date and would endure for a period of five years, terminating on 29 February 2024. The first lease agreement does not record the existence of a right of renewal;

- (b) The second lease agreement is also put up by the first respondent. I shall continue to refer to it as the second lease agreement. It indicates that the parties to it are the second applicant and an entity described as 'K2022335257 t/a The Rock (Restaurant and Bar)' (K2022335257). The second lease agreement would commence on 1 March 2022 and would run for a period of 5 years, with an option to renew, expiring on 28 February 2027. Despite referencing the right

of renewal, the second lease agreement does not provide any particularity as to how it is to be exercised. It is signed by the

erstwhile three principals of K2022335257, which included the first applicant and the first respondent, but it is not signed by the second applicant and is, therefore, inchoate; and

- (c) The third and final lease agreement (the third lease agreement) is put up by the applicants and it records that it was concluded between the first and second applicants. It was signed by the last signing

party on 10 February 2023 and it incorporated an option to renew the lease and a first option to purchase the premises. As with the second lease agreement, no particularity is provided in this agreement about how these conferred rights were to be exercised. The third lease agreement was to run from 1 March 2023 for a period of four years and eleven months, expiring on 31 January 2028.

- [8] All the lease agreements acknowledge that the premises are to be utilised by the respective tenants as a sports bar and restaurant and for purposes of gaming.

The issue

- [9] From the heads of argument delivered by the first respondent, there is but a single issue raised by him. It is that the first lease agreement was never cancelled by the second applicant and therefore

he is the lawful tenant and he is entitled to resist any attempt to dislodge him from the premises.

- [10] To be entirely accurate, the first respondent did also raise a point in limine in his answering affidavit dealing with an alleged lack of locus standi in respect of the first applicant but Ms Miranda, who appears for the first respondent, did not persist with the point in argument. It was an entirely sensible decision not to do so, in my view.

The sale of the Café

- [11] It is not to be doubted that the first respondent was the prime mover regarding the Café; he founded it, set it on its feet and conducted its business. But it appears that with the passage of time he began to experience financial difficulties, falling into arrears with his payment obligations to the second applicant regarding the consumption of utilities at the premises. There is objective evidence of this liability in the form of an acknowledgement of debt signed by the first respondent in favour of the second applicant in which the first

respondent admits to owing it slightly more than R250 000

in respect of unpaid utility charges. The acknowledgment of debt is dated 8 April 2022.

[12] About a month before he signed the acknowledgment of debt, the first respondent put pen to paper and signed a sale agreement in terms of which he sold the Café to the first applicant (the sale agreement). That document is also before the court and it reveals that it was concluded on 1 March 2022.

[13] It appears that initially the first respondent intended to sell the Café to K2022335257, for the sale agreement appears to indicate that it was designed for the signature of a corporate entity.[2] That did not occur for reasons that need not detain us. The sale agreement date of 1 March 2022 coincides with the date of the second lease agreement, being the inchoate lease agreement, to which K2022335257 is a party. The fact that the sale between the first respondent and K2022335257 did not eventuate may explain why the second lease agreement remains inchoate. The agreement prepared for that sale was then utilised to record the sale to the first applicant. There can be no doubt as to who the purchaser of the Café was: clause 2.2 of the sale agreement unambiguously defines the purchaser as being the first applicant. This morning Ms Miranda, who appears for the first respondent, confirmed that it was not in dispute that the sale agreement was concluded between the first respondent and the first applicant.

[14] The sale agreement is not an elegantly drafted document but it has the basics that one would expect to find in a business sale agreement. Several terms of the sale agreement invite attention:

(a) Clause 7.1 provides the following:

‘The Seller undertakes to discharge all its liabilities to creditors in respect of the business as at the preceding date.’[3]

The second applicant was a creditor of the first respondent and the wording of that term may explain why the acknowledgment of debt,

referenced earlier, was agreed to by the first respondent shortly after the sale agreement was signed;

(b) Clause 12.1 provided as follows:

‘the Seller undertaking (sic) to transfer all licenses to the Purchaser immediately, upon payment of the deposit as stipulated in the payment clause. The seller undertakes that he will take full responsibility to transfer all licenses to the purchases (sic) as his cost.’

As is discussed hereunder, the first respondent met his obligations in this regard.

(c) The issue of the lease with the second applicant was dealt with as follows:

‘The Purchaser shall be liable for the payment of the rental and utilities for the business premises on a monthly basis.’

[15] It is evident that the sale agreement was given effect to. The clearest evidence of this appears from the facts relating to the liquor licence. The first applicant required the liquor licence to be transferred into his name in order to be able to continue to run the bar at the premises. That the first respondent honoured his obligations in this regard is confirmed by the following pieces of evidence:

(a) The first respondent sent the following WhatsApp message to an agent who was to attend to the transfer of the liquor licence on his behalf on 25 January 2023:

‘My partner from hot rock will contact u. His name Logan so he is buying the business (sic) so u going to do his liquor transfer.’

(b) The first respondent completed annexure ‘ILK2’ to the founding affidavit, which is a document entitled ‘Resolution to transfer the liquor licence and manage business’, in which the following wording appears:

‘I, Dayalan Pillay, id no: would like to state that I sold the business and have agreed to transfer the liquor licence for hot (sic) Rock Café (Licence no: K[...]) to Indra Logan Kistnasamy, id no: 7[...].’

(c) The first applicant has put up documentation that shows that he has submitted all documentation to the relevant authorities to secure the transfer of the liquor licence into his own name.

The oral agreement of sub-tenancy

[16] The first applicant indicates that the relationship between himself and the first respondent soured after concluding the sale agreement and he was ultimately required to obtain a high court interdict against the first respondent to prevent him from reselling the Café and from retreating from his obligation to transfer the liquor licence.[4]

[17] Notwithstanding that, the first applicant states that he was prepared to permit the first respondent to continue to operate a business called ‘V-Slots’ (V-Slots) from a portion of the premises.[5] That business had been run from the premises by the first respondent prior to him selling the Café to the first applicant.

[18] To this end, the first applicant asserts that he concluded an oral agreement of sub-lease with the first respondent that would permit the business of V-Slots to continue to be conducted from the premises. This was intended to be a temporary arrangement. The rental agreed upon was R8 000 per month.

[19] The first respondent, however, made no payments whatsoever and after four months, he was R32 000 in arrears. Payment was formally demanded from him by the first applicant's attorneys, but had no effect other than eliciting a denial that there was an agreement of sub-tenancy. The first applicant thereafter cancelled the oral agreement in writing, a copy of which cancellation is before the court, and the first respondent was directed to vacate the premises. He declined to do so and this application was consequently launched.

The defence

[20] The first respondent does not recognise the sub-tenancy agreement. He makes that plain both in his answering affidavit and in the content of his legal representative's letters that were written on his behalf from time to time. His principal defence is that he remains the tenant of the second applicant by virtue of the fact that the first lease agreement has never been cancelled. He is thus entitled to occupy the premises and does so independently of the so-called

sub-tenancy agreement. In addition, he is the rightful holder of the liquor licence and only he may thus sell liquor from the premises.

[21] There is a fundamental difficulty that the first respondent faces with the pointed defence that he has taken. This application is being argued today, which is Friday, 24 May 2024. The lease agreement relied upon by the first respondent to justify his continued occupation of the premises is the first lease agreement: that must be so because the second lease agreement is inchoate and he is not a party to the third lease agreement. The first lease agreement had a limited life span of five years and did not permit of a renewal. It expired on 29 February 2024. It follows that the first respondent's

right of occupation of the premises, assuming that he is correct in asserting that the first lease agreement was never cancelled, has also come to an end. On his own version, he therefore cannot remain in occupation of the premises.

[22] But the first respondent's proposition that the first lease agreement was never cancelled cannot just be accepted as being correct and must be critically and carefully assessed. Overlooking the expiration of the first lease agreement for a moment, the first respondent states that he is still the second applicant's tenant and he remains cloaked in the rights of a tenant. That is a false defence. The following WhatsApp messages and conversations reveal what really occurred:

(a) Message from the first respondent to the second applicant:

'Spoke to Logan[6] he is happy to move forward providing you give him the lease';

(b) Message from the first respondent to the second applicant:

'Need you to do a new lease on logans (sic) name';

(c) Conversation between the first respondent and the first applicant:

First respondent:

‘When do you want to sign the lease? And starting date?’

First applicant:

‘15 Feb if possible (sic)’

‘Possible’

‘Even 1st March’

‘Will do that as you helping me out big time. I will send to you by tonight. Just at OR Tambo now.’

(d) Message from the first respondent to the first applicant:

‘Bru leane[7] (sic) is doing the lease in ur (sic) name’.

[23] These WhatsApp messages were exchanged in January and February 2023.[8] Ms Athmaram drew my attention to two further pieces of correspondence, in the form of emails.

Chronologically, the first email is dated 20 January 2023. It was sent by Ms Leane Upton (Ms Upton), a member of the second applicant, to both the first applicant

and the first respondent. It stated the following:

‘Please see attached Drafted (sic) Lease Agreement for your perusal, as per our telephonic conversation between myself and you both.

Please note that this lease can only come into effect if we can resolve the eThekwin Payment Agreement.’

Then on 7 February 2023, Ms Upton communicated further with the first applicant and first respondent, again by email. She stated the following:

‘This email is a confirmation that a new Lease agreement will be put in place on Logan name for a period of 5 years with option to renew or should we sell the premises then Logan will have first option to purchase.’

[24] That then is precisely what happened: the terms mentioned in the email of 7 February 2023 appear in the third lease agreement. Clearly, in the eyes of the second applicant, a satisfactory arrangement had been concluded in respect of the unpaid utility charges.

[25] This correspondence is not disputed by the first respondent and he raised no objection at the time to what Ms Upton proposed. It is therefore clear that the first respondent knew of, consented to and actively sought the conclusion of the third lease agreement. The first lease agreement was accordingly replaced by the third lease agreement with the consent of the first respondent. The issue of cancellation is consequently of no moment as regards the first respondent and offers him no basis to claim an entitlement to remain in the premises.

- [26] Accordingly, the only basis upon which the first respondent could notionally remain in occupation of a portion of the premises is in terms of the oral sub-lease that the first applicant states that he concluded with him. The first respondent, however, disavows the existence of the agreement of sub-tenancy.
- [27] In my assessment, the first respondent has been frugal with the truth. Virtually every allegation that he made in his answering affidavit appears to be untrue:
- (a) He stated that the first applicant was not tax compliant. The first applicant was compelled to put up documentation from the South African Revenue Service which establishes that he is in good standing with the tax authorities;
 - (b) He stated that only he holds a liquor licence in respect of the premises and only he can sell liquor there. Again, documentation put up by the first applicant establishes that the first respondent signed the forms required to effect a transfer of the liquor licence to the first applicant and, further, that the first applicant has in the interim been approved as a person who manages the premises in terms of s 77 of the Liquor Act 60 of 2010 (KZN) and can, thus, sell liquor at the premises;
 - (c) He stated that the sale agreement was actually concluded between himself and K2022335257 and not the first applicant. He, however, puts up no proof of such an agreement and the sale agreement already mentioned and considered establishes that the first applicant was the purchaser; and
 - (d) Finally, he appears to contradict his assertion that he sold the business only to K2022335257, for he states the following:

‘Due to the First Applicant’s failure to pay the outstanding balance of the purchase price of the business on behalf of the Company, I duly instructed my attorneys to place them in breach.’

As already noted, a sale agreement between the first respondent and K2022335257 is nowhere to be found in the papers. If the first

respondent sold the Café to K2022335257, why would it then be necessary to place the first applicant in breach?

- [28] On a careful conspectus of the competing allegations, I am driven to conclude that the first respondent is not a reliable witness. His version is largely unsupported by the documentary evidence available. On the other hand, the version advanced by the first applicant is capable of objective verification by reference to documents. I therefore reject the first respondent’s version where it does not conform to what the first applicant states.

[29] I accordingly find that the first applicant did conclude an oral agreement of sub-tenancy with the first respondent, that the first respondent breached its terms and that the first applicant thereupon cancelled the oral agreement of sub-tenancy. The first respondent relinquished his rights as tenant in terms of the first lease agreement by permitting the conclusion of the third lease agreement. It follows that the first respondent has not established a basis in law that entitles him to remain in occupation of the premises.

[30] I accordingly grant the following order:

MOSSOP J

APPEARANCES

Counsel for the applicants: Ms R Athmaram Instructed by: LGR Incorporated Ridge 8 Office Block (Suite 1103) 39 Vuna Close Umhlanga Ridge Durban Counsel for the first respondent: Ms J L Miranda Instructed by: Deepika Ramduth Attorneys Shop 19 Southern Cross Building Arbuthnot Street Scottburgh Locally represented by: K and N Attorneys Suite LG08, The Square 250 Umhlanga Rocks Drive uMhlanga Counsel for the second respondent: No appearance

[1] The premises are described in the second and third lease agreements as being situated at 1[...] L[...] Road, Athlone Park, Amanzimtoti.

The first lease agreement describes the premises as being unit 2[...], L[...] Road, Athlone Park, Amanzimtoti. This simply appears

to be another way of describing the premises, for there is no suggestion that unit 2[...] is situated anywhere other than at

1[...] L[...] Road, Athlone Park, Amanzimtoti.

[2] The first page of the sale agreement, being a cover page, has space for the insertion of a registration number and indicates that the purchaser was being represented by the first applicant. The signature page also states that the first applicant is duly

authorised to sign the agreement.

[3] The phrase 'preceding date' is a defined term and means the day immediately before the 'effective date'. The 'effective date' is also a defined term and means '1 March 2022; or by a date of mutual agreement'.

[4] The order was granted by this court on 12 April 2023.

[5] The name 'V-Slots' is apparently an abbreviated trading name of Vukani Gaming Corporation (Pty) Ltd.

[6] 'Logan' is the first applicant.

[7] Leane Upton (Venturella) is a partner in the second applicant.

[8] The third lease agreement was signed on 10 February 2023 and became effective on 1 March 2023.

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Prepared on 10 October 2026 · Esheria