

SOUTH AFRICA / JUDGMENT

Meercathoryx Property (Pty) Ltd v Burchells Bush Lodge Shareblock Ltd (2015/42556) [2017] ZAGPJHC 207 (28 July 2017)

[2017] ZAGPJHC 207

COURT

South Gauteng High Court, Johannesburg

BEFORE

B A Mashile

CASE / FILE NUMBER

2015/42556

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 2015/42556

Not

reportable

Not

of interest to other judges

Revised.

28/7/2017

In the matter

between:

MEERCATHORYX

PROPERTY (PTY)

LTD Applicant

and

BURCHELLS

BUSH LODGE SHAREBLOCK

LTD Respondent

JUDGMENT

MASHILE, J:

- [1] This matter concerns cancellation of a written lease agreement (“the lease”) and the eviction of the Respondent as a lessee. The Applicant owns an immovable property described as the Remaining Extent of Erf 332, Sabi Park, Extension 1, Mpumalanga (“the property”) for which it holds title deed number T99002/04 for its ownership and title to the property. The Respondent has since 2003 been occupying the property and runs a timeshare scheme thereon.
- [2] The Respondent’s rights of occupation of the property derive from the lease, which the parties concluded in 2003. The Respondent, which is a share block company in terms of the Shareblocks Control Act 59 of 1980 remains in occupation of the property. Accordingly, the cancellation of the lease agreement and subsequent possible ejectment from the property of the Respondent, as a share block company, do not attract the application of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No 19 of 1998 (“the PIE Act”).
- [3] There are three applications currently serving before this Court, one is the initial application (“the main application”), the other is for the admission of a further affidavit and the last is one to strike out. The Applicant has urged this Court to consider the application for the admission of the further affidavit first as the further ground for cancellation contained therein could be dispositive of the whole matter.
- [4] As it will become clear with the unfolding of this judgment, the view that I take of the latter two applications renders it superfluous to consider the applications at all. That said, I will still tersely refer to the legal position regarding cancellation in those instances where a lease agreement specifically stipulates a date on which performance should occur. Against that backdrop, I proceed to deal with the facts that gave rise to the main application hereunder.
- [5] On 28 August 2015, the Applicant sent to the Respondent a letter of demand reminding it that it still had not received a response to its letter dated 2 February 2015 and that the project plan for 2015 was still outstanding. The letter goes further to state that most of the works which were required to be performed in terms of the parties’ previous consultation have not been done. It then concludes by giving the Respondent a period of 14 days within which to remedy its default failing which it threatened to invoke the provisions of Clause 16.1.
- [6] The Respondent replied to the demand outlined above on 8 September 2015. The essence of its answer is that it was adamant that it had submitted the 2015 project plan as envisaged in Clause 6 of the lease. It alleged that the project plan was submitted to the Applicant on 4 December 2014, 3 February 2015 and 2 March 2015. The balance of the letter is not really relevant for purposes of this judgment but it is necessary to mention that the Respondent concludes its letter by stating that it will vehemently oppose any proceedings that the Applicant may institute against it.

- [7] In another 14 day notice to cancel dated 15 September 2015, the Applicant reiterates that it still had not received a response to its demand dated 2 February 2015 and to its letter of 20 May 2015. The Respondent's letter of 8 August 2015 was regarded as not being sufficient to address the contents of the Applicant's letter of 2 February 2015. The notice to cancel of 15 September 2015 mentioned in this paragraph and sent in terms of Clause 16 of the Lease, sets out the manner in which the Applicant believes the Respondent has violated the lease.
- [8] Replying to the Applicant on 29 September 2015, the Respondent denied that the property was in a state of disrepair and asserted that the property was in a well maintained state and better than that which was handed to it at the inception of the lease. The Applicant responded thereto by letter dated 9 October 2015 essentially informing the Respondent that it considered the lease cancelled and terminated as per the provisions of Clause 16.1.
- [9] The Applicant then proceeded to stipulate a date on which it would expect the Respondent to vacate the property. The stipulated date was 30 November 2015. The Respondent refused to vacate the property and remains in occupation, which the Applicant regards as continued unlawful occupation. It is against that background that the Applicant seeks to eject the Respondent from the property.
- [10] Two crisp issues that arise against the above factual setting are firstly, whether or not the alleged breaches of the lease by the Respondent entitled the Applicant to cancel and secondly, whether or not the Applicant is entitled to eject the Respondent on the basis described above.
- [11] The Applicant premised its cancellation of the lease and ejectment in the main application on Clause 6, which is headed, Operating Costs. Clause 6.1 provides as follows:

"6.1 In addition to the rental and VAT provided for in clause 5 of this agreement, the lessee shall be responsible for the maintenance and repair of the property as envisaged in the project plan submitted annually to the lessor ..."

Clause 6.4 of the agreement of lease provides that the Respondent would be required to pay the operating costs which:

"shall include servicing and cleaning expenses, the contribution and maintenance of roads and paths, security expenses, insurance

premiums, garden upkeep and maintenance... Costs of repairs and general maintenance, painting, redecorating and renovation of [the] property ..."

- [12] The Applicant maintains that the Respondent has contravened the lease in 2015 by failing to:

12.1 Submit a project plan annually to the Applicant as specified in c Clause 6.1 of the lease above;

12.2 Maintain and repair the property as envisaged in the 2014 project plan;

12.3 Perform most of the work in the 2014 project plan;

12.4 Submit a project plan for 2015. There was no agreement on the works to be performed in terms of the project plan;

12.5 Maintain and repair the improvements on the property.

[13] The Respondent denies having received the Applicant's letter of demand dated 2 February 2015 wherein the Applicant advises it that it requires from it a project plan for 2015. It also denies that it did not submit a project plan for 2015 and refers to paragraph 15.24 to 15.27 of its answering affidavit where it states the following:

"13.24 Respondent submitted a project plan for 2015 on 4 December 2014 (the 2015 project plan) which is an extract from Respondent's 10 year project plan that covered maintenance work until 2025.

13.25 A copy of the 2015 project plan appears in Applicant's papers as annexure 'JB8', but that document is incorrectly identified at paragraph 6.19 of the founding affidavit as 'an earlier project plan which resulted from the initial retraction of the cancellation of the lease in 2014'.

13.26 The covering e-mail message that accompanied the 2015 project plan on 4th December 2014 also invited the Respondent to attend a site inspection concerning the 2015 project plan. A copy of the covering e-mail message referred to in this paragraph is attached marked 'A8'.

13.27 The 2015 project plan, was submitted to Mr Brankin, to Advocate Rob Cohen who is the chairperson of Applicant's Board of Directors and to Applicant's attorney of records on 3 February 2015 and on 2 March 2015. Copies of the covering e-mail messages referred to in this paragraph are attached marked 'A9' and 'A10' respectively."

[14] The Respondent also contends that since it has assumed the responsibility of effecting maintenance and repairs to the property,

it has the sole discretion to unilaterally decide what maintenance works and repairs are needed or should be performed.

[15] A clause that is directly in point on the two issues is 16 of the lease headed Breach, and it provides:

"In the event of the lessee failing to make payment of the rent, or of the operating costs due by it on due date, or being in default of any other obligation imposed upon the lessee in terms of this lease and failing to remedy such breach within 14 (fourteen) days written notice of such breach, the lessor shall be entitled either:

16.1 Forthwith to declare the lease cancelled and terminated, to take repossession of the premises and to recover from the lessee such damages as may be needed in order to compensate the lessor for whatever loss it has suffered in consequence of the said cancellation; or

16.2 To claim specific performance from the Lessee of the obligation of which the Lessee is in breach."

- [16] Ownership of the property is not contested by the Respondent. The Respondent, by its concession that the Applicant is the owner of the property, has attracted to itself, the onus of establishing that it has an impregnable right to continue occupying the property. See *Graham v Ripley* 1931 TPD 476 and *Myaka v Havemann* 1948 (3) SA 457 (A). Accordingly, the Respondent will be ordered to vacate if the Applicant was within its rights to cancel.
- [17] The Respondent's refusal to vacate the property means that it must set out facts that, if proved, would show its entitlement to continued occupation of the property. See: *Chetty v. Naidoo* 1974 (3) SA 13 (A). According to the Respondent, the Applicant had no right to cancel the lease. It therefore considers itself still entitled to continue occupation in terms of rights flowing from the lease. This persistence that it has the right to continue occupation is rather extraordinary in circumstances where the Respondent, without amplification, denies that it did not supply the project plan for 2015.
- [18] Clauses 15.24 to 15.27 represent a vain attempt by the Respondent to explain what it means by its denial that it did not submit a project plan. Whatever the Respondent submitted it could not have been what is contemplated by the parties in Clause 11.4 of the lease. Clause 11.4 provides:

"11.4 At all times during the period of this lease, the Lessor will agree with the project plan submitted by the Lessee and delegate the responsibility for repairs on the property as envisaged in Clause 6.

There is no evidence that the Applicant agreed with the 'project plan' submitted by the Respondent. In fact, the evidence presented points to the contrary. That view is fortified by the Applicant's invitation of the Respondent to a site inspection. Accordingly, Clause 11.4 was not complied with and no agreed project plan can be said to have been submitted."

- [19] The Applicant's allegation that the Respondent has contravened Clause 6.1 of the lease as it has failed to submit a project plan annually and in particular, that it did not submit one for 2015 must be upheld. While there are other grounds of cancellation, which primarily concern failure to maintain and repair the property as envisaged in previous project plans, the Respondent's inability to submit the 2015 project plan agreed to by the Applicant is sufficiently fatal to dispose of the matter.
- [20] The Respondent's assertion that since it is responsible for the maintenance and repair of the property, it alone has the right to determine the project plan is farcical and unsustainable in view of the property being owned by the Applicant. I agree with the Applicant that hypothetically, it is possible that the Respondent can run down the property without the Applicant having a say. Given the lengthy duration that the lease is still to endure, the Applicant may have no property to be restored to it at the end of the lease.

- [21] According to the provisions of the lease it is the Applicant who delegates what is to be maintained and repaired to the property. If that is the case, where does the Respondent derive its authority to appropriate to itself the right to decide what, where and when to maintain and repair the property. The position is simply that no such right exists in terms of the lease and the Respondent cannot point out a single clause that affords it the right.
- [22] In the result, the Respondent has failed to show that the cancellation of the lease was invalid and that as such it is entitled to remain in occupation. The Applicant has successfully established that the Respondent did not submit a 2015 project plan, which failure constitutes a contravention of Clause 6 of the lease. The violation of Clause 6 triggered the Applicant to invoke the provisions of Clause 16, which it did. That conclusion, in my view, makes it unnecessary to consider the application to strike out.
- [23] The judgment on the main application having been finalised, I turn my attention to the point raised in the application for the admission of the further affidavit. Before I do so, however, it bears mention that I would have admitted the affidavit on the basis that it would have been in the interest of justice to do so. Whether or not I would have agreed with the point raised therein is what I intend to briefly canvass.
- [24] The further ground upon which the Applicant avers could cancel the lease and evict the Respondent concerns the latter's alleged failure to effect payment of rental plus Value Added Tax ("VAT") monthly in advance on or before the seventh day of each calendar month as provided for in Clause 5.4 of the lease. The amount that was due, owing and payable for which the Applicant had issued an invoice for the month of October 2016 was R133,139.15, which amount is inclusive of VAT.
- [25] The background facts of the late payment of the rental and VAT are that the Applicant issued an invoice to the Respondent in the sum of R133,139.15 to the Respondent for payment of the month of October 2016, it being common cause that the amount of R153,139.15 mentioned in the founding affidavit is a cosmetic typing error. The Respondent does not dispute that it did not settle the invoice amount on or before 7 October 2016.
- [26] For what it is worth, it asserts that in the past, it has settled the rental amount even prior to receiving the Applicant's invoice and in some instances, has done so well after the due date. Having not received the October rental, the Applicant advised the Respondent at 13h06 on 11 October 2016 that it was cancelling the lease and that it would henceforth consider it terminated.
- [27] The Applicant cancelled the lease without first putting the Respondent in mora principally arguing that it was entitled in terms of Clause 16 to "forthwith declare it cancelled and terminated, to take repossession of the premises and to recover from the lessee such damages as may be needed in order to compensate the lessor for whatever loss it has suffered in consequence of the said cancellation".

- [28] It is not relevant to consider whether or not the rental amount was paid after the Applicant had cancelled the lease notwithstanding that the parties seem to make it an issue. It should suffice to state that Clause 22.4 of the lease which provides that “no indulgence, extension of time, relaxation or latitude ...”, which the one party may allow to the other shall be construed as waiver of its rights would have been invoked to protect the Applicant.
- [29] The issue that I am required to traverse is whether the Applicant could, in view of the 7th day of each and every month having been stipulated as the date on which performance shall take place, forthwith declare the lease

cancelled and terminated without affording the Respondent the opportunity to remedy its default. While the dispute also turns

on the interpretation of Clause 16, the issue is really no more than as described above.

- [30] Chapter 13 of Christie’s Law of Contract in South Africa, 6th Edition, entitled Mora and Breach - Consequences of mora gives guidance on the legal position on the issue with which this Court must make a decision. It appears that the facts in the instant case are a perfect fit of the following paragraph uplifted from Christie’s Law of Contract in SA:

“When a time for performance is fixed, however, the debtor’s failure to perform by that time is a breach, and no demand is necessary to make it so. It then becomes necessary to decide whether time is of the essence of the contract because, if it is, the breach is of sufficient magnitude to justify the creditor in cancelling, also without prior demand because the remedy of cancellation follows as of right from the serious breach. This has long been accepted law, and the inquiry in the cases has been directed to whether it ought to be concluded from the nature of the contract and the surrounding circumstances that time was of the essence.”

- [31] Clause 5.4 specifies a particular time on which performance must occur but nowhere in the agreement is it stated that ‘time is of the essence’ nor is it alleged that the surrounding circumstances or that the nature of the lease render time of the

essence. In the absence of one of the aforesaid allegations and a background upon which they are premised, this Court cannot infer that the Respondent’s failure to perform punctually automatically entitled the Applicant to invoke the provisions of

Clause 16.1.

- [32] At best, the Respondent’s failure to perform as contemplated in the lease entitled the Applicant, without first furnishing a demand, to cancel it. The cancellation flowed automatically from the Respondent’s non-compliance with the relevant terms of the lease. However, since time is not stipulated as being of the essence, eviction cannot follow axiomatically. Accordingly, the application cannot succeed on the basis that the Respondent’s failure to perform on the stipulated date of the month gave the Applicant the right to both cancel and evict.

- [33] The application nonetheless succeeds on the ground that the Respondent failed to submit a project plan for 2015 as envisaged in clause 6.1 of the lease. Prior to the invocation of the remedy described in clause 16, the Applicant had duly complied with the provisions of the lease by furnishing a demand as set out in the clause and the Respondent failed to respond to the demand.
- [34] Both parties have pleaded that costs should be granted at a punitive scale in the event of their success. Save to state that this is not a case that is deserving of the losing party being visited with punitive costs, it should suffice to make an order granting costs at the ordinary scale.
- [35] Having regard to the above, I am constrained to grant the order and I make the following order:
1. The Respondent and all persons purporting to hold title through it are directed to vacate the property, the remaining extent of portion 332, Sabi Park, extension 1, Mmpumulanga, within 14 days of date hereof;
 2. Should the Respondent fail to vacate as directed in paragraph 1 above, the Sheriff of this Court or his deputy is authorised to forthwith evict the Respondent and other persons in occupation from the property;
 3. The Responden is directed to pay the costs of the Applicant.

B A MASHILE

JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT: R G COHEN

INSTRUCTED BY:

GLYNNIS COHEN

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DATE OF HEARING:

DATE OF JUDGMENT:

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