

SOUTH AFRICA / JUDGMENT

SFT Property Investment (Pty) Ltd v Black Diamond (Pty) Ltd (4056/2022) [2022] ZAMPMHC 26 (5 December 2022) [2022] ZAMPMHC 26

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

4056/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO: 4056/2022

(1)REPORTABLE:

NO

(2)OF

INTEREST TO OTHER JUDGES: NO

(3)REVISED

DATE:

05/12/2022

In

the matter between:

SFT

PROPERTY INVESTMENT (PTY) LTD APPLICANT/PLAINTIFF

AND

BLACK

DIAMOND (PTY)

LTD RESPONDENT/DEFENDANT

JUDGMENT

LANGA J:

Introduction

and background

- [1] In this application for summary judgment the plaintiff seeks the ejectment of the defendant from its premises on the basis that the defendant was given two months' written notice to vacate the property as the lease had reached the end of its term. The defendant opposed the application on a number of grounds which are fully dealt with below.
- [2] The parties are not in agreement regarding the details and type of agreement. The plaintiff averred that on or about the 1 August 2021 it and the defendant entered into an oral or tacit lease agreement in respect of the commercial premises known as the Night Club Premises, situated at Portion 47 of the farm Naaupoort 335, Witbank Mpumalanga. The plaintiff contended that it is in terms of the said oral or tacit agreement that the defendant took occupation of the said premises and paid the rent of about R30 562. 16 per month as per agreement. The defendant on the other hand contended that there is an existing written agreement between the parties based on which it is asserting its right to occupy the property. A copy of the said lease agreement was attached by the defendant as annexure BD2.
- [3] It is common cause that on 31 March 2022 the plaintiff addressed a letter of demand and notice of cancellation of the lease agreement to the defendant informing the latter that the lease is cancelled and that the defendant is given two months' notice to vacate the leased premises.
- [4] It is further common cause that the defendant raised a special plea in which it canvassed a number of points. Firstly, it contended that the plaintiff had failed to comply with section 129 of the National Credit Act 34 of 2005 (NCA) in that the plaintiff failed to address a letter of demand to the defendant prior to the issuing of the summons, ostensibly as the matter concerns a debt arising out of an agreement. Secondly, the defendant contended that the High Court lacks jurisdiction as clause 7 (a) of the agreement provided that the parties consent to the jurisdiction of the Magistrates Court in respect of any action or proceedings that may arise out of the agreement or breach thereof. Thirdly and most importantly, the defendant further contended that it had entered into a written lease agreement with the plaintiff and attached a copy of the lease agreement in question. The defendant maintained that this document constitutes the lease agreement between the parties and that there was no oral agreement involved as argued by the plaintiff. Therefore, right through its argument, the defendant has relied on this written agreement whereas the plaintiff contended that the agreement was oral.

- [5] The defendant averred further that had been complying with this written lease agreement and paying R16 000.00 per months to the plaintiff, in terms of clause 2 (a) of said agreement. The defendant argued that it is instead that the plaintiff who breached the agreement by making renovations on the property without informing the defendant and by so doing the plaintiff drove the defendant's customers away.

The issues in dispute

- [6] From the above the issues in dispute can be summarized as follows. The first and main issue is whether the agreement was oral or in writing and consequently, whether the written agreement relied on by the defendant is between the parties in this matter. The second issue is whether the agreement was oral as alleged by the plaintiff and if so, whether it was properly terminated. The following question would be whether the plaintiff is entitled to eject the defendant from the premises. The third issue is whether the provisions of the NCA, in particular section 129 therefore, are applicable in this matter.

Common cause issues

- [7] It is not disputed that the plaintiff is the owner of the premises forming the subject matter of this action. It also common cause that the defendant is occupying the property on the basis of a lease agreement. It is further common cause that the defendant continues to occupy the property despite the plaintiff having terminated the lease.

Whether there is a written and oral lease agreement between the parties.

- [8] The question whether or not there is a written and oral lease agreement between the parties is issue is capable of being dispositive of all the issues before court particularly in view of the fact that the defendant's case is basically anchored on this lease agreement. The defendant alleged that it is entitled to occupy the property based on this written lease agreement attached to its papers as annexure BD2. If it is found that there was no written lease agreement that may be the end of the road for the defendant as its case is underpinned by the alleged written lease agreement.
- [9] The plaintiff is relying on both the rei vindication and the oral lease agreement. The plaintiff therefore argued that it is the owner of the premises and it is entitled to evict the defendant therefrom as the lease has lapsed.
- [9] It must be pointed out from the onset that on the face of the document purporting to be the written lease agreement between the parties, the parties are not the plaintiff and the defendant in this action. The document clearly reflects the parties as Viljoen Familie Trust, the lessor and Amara Khalef, the lessee. Furthermore, apart from this issue, on the face of it, this written lease agreement was for a period of 60 months starting from 06 June 2017 and would have therefore expired on 05 June 2022.

- [10] Based on the fact that in the written agreement the parties are reflected as the Viljoen Familie Trust and Amara Khalef, it is not clear on what basis the defendant is insistent that this written agreement is between the parties to this action. It is patent that the written agreement relied on by the defendant is not between the plaintiff and defendant in this case. This document is therefore clearly not relevant to the contractual relationship between the parties in this action, that is SFT Property Investments (Pty) Ltd and Black Diamond 123 (Pty) Ltd. Consequently, on this basis alone, the defendant's contention that there is a lease agreement between the parties should be jettisoned.
- [11] However, even if it was for now accepted that this written lease agreement is between the parties in this matter, it would still have been a sticky situation for the defendant as the said written agreement would have already expired as it expired on 05 June 2022. Therefore, on both these facts, the defendant's defence would have failed. In other words, the written agreement is not between the parties and the agreement in question has in any event expired. Consequently, I find that the defendant has failed to prove that there was a written lease agreement between the parties and the defendant cannot therefore rely on this purported agreement. Therefore, the defendant's defence in so far as it relies on this agreement should be dismissed.
- [12] I now turn to the remainder of the defence which is basically that the NCA is applicable to the agreement. As stated above, the defendant contended that the plaintiff failed to comply with the section 129 of the NCA in that it did not issue a letter of demand before instituting the action as required by section 129. The averment is based on the fact that the debt is based on an agreement.
- [13] In the light of the averment it is necessary to scrutinize this section which provides as follows:

Section 129 (1) - If the consumer is in default under a credit agreement, the credit provider—

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130. (my emphasis).

- [14] Apart from the fact that the agreement relied on by the defendant is not between the parties to this action, it must also be borne in mind that the agreement is a lease agreement. Section 4 (1) of the NCA provides that subject to sections 5 and 6, this NCA applies to credit agreements and in terms of section 8 of the NCA a lease agreement is expressly excluded from the definition of a credit agreement and therefore from the scope of the NCA. Section 8 the NCA provides as follows in sub-section (2):
- (2) An agreement, irrespective of its form, is not a credit agreement if it is—
- (a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;
 - (b) a lease of immovable property; or
 - (c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.
- [15] It is therefore clear that in terms of this section the lease of immovable property is not covered by the NCA and the defendant is therefore this defence is also destined to failure. In any event even if the NCA was applicable, the fact that the agreement is not between the parties in this action renders the defendant's defence inconsequential and therefore of no force. However, as already stated, the lease agreement in question would have expired on 05 June 2022 in any case. Therefore, the defendant cannot rely on the provisions of the NCA to thwart off the legal action and to claim the right of occupation of the property. This defence too therefore ought to be dismissed.
- [16] Based on the evidence and accepted facts, one has to accept the plaintiff's version and conclude that there was an oral agreement between the parties. Therefore, on a balance of probabilities it ought to be found that the oral lease agreement was terminated by the plaintiff after giving due notice to the defendant. I am therefore satisfied that the oral lease agreement was lawfully terminated as the plaintiff.
- [17] The last issue to be dealt with is the defence based on lack of jurisdiction. This defence is also premised on the said written agreement as the defendant contended that in terms thereof the parties agreed to the jurisdiction of the magistrate's court. The argument seems to be that based on Clause 7 the plaintiff was not entitled to sue in the High Court as the clause ostensibly ousted the jurisdiction of this court.
- [18] Firstly, this jurisdictional argument cannot succeed for the same reason that the defendant cannot rely on this agreement. The defendant cannot raise this defence as it is also based on the clause in the agreement and it therefore also stands to be dismissed. However, even if it was accepted that the written agreement in question is between the parties, the clause relied on by the defendant would not assist as in my interpretation it does not oust the jurisdiction of the High Court. It simply provides that the parties agree to the matter being heard in the magistrates' court. In other words, even if the matter would not normally be justiciable in the Magistrates court, in terms of the agreement the parties agreed to the

jurisdiction of that court. That however, does not affect this court's jurisdiction. This defence too is misplaced and therefore also stands to be dismissed.

[19] Lastly I deal with the defendant's contention that it continues occupy the premises and pays the rent and that no valid termination of the lease was effected. While the defendant clearly relies on the written agreement, it however, also seems to be arguing that there has been a tacit relocation in this matter. The problem with this argument is that the defendant does not dispute that the plaintiff has issued it with a notice to vacate the leased premises. The mere fact that the defendant was and is paying rent does not result in a tacit relocation of the lease. In any event there can be no tacit relocation where the lessor has issued the lessee with a notice to vacate.

Conclusion

[20] Upon a conspectus of all the issues above I am not persuaded that the defendant has raised any valid or bona fide defence in this matter. Consequently, the plaintiff is entitled to the relief sought. In the circumstances an order should be granted in the terms of the relief prayed for in the summary judgment application.

Order

[21] In the result I make the following order:

1. The order of ejectment is hereby granted with costs.
2. The defendant and anyone claiming occupation through the defendant at the commercial leased premises described as the Night Club Premises, Portion of the property situate on Portion 47 of the Farm Naaupoort 335, Witbank, Mpumalanga is forthwith ejected from these premises.

MBG LANGA

JUDGE OF THE HIGH COURT

Date of hearing: 28

October 2022

Date of delivery: 05

December 2022

Appearances:

For the Applicant/Plaintiff: Advocate JG Dobie

For the Respondent/Defendant: Advocate D Mtshweni

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 5 December 2022 at 10h00.

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Prepared on 12 October 2026 · Esheria