IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

Case no: 1194/2024

In the matter between:

CHANGING TIDES 91 (PTY) LTD	1st Applicant
BOARDWALK MALL (PTY) LTD	2nd Applicant
FLANAGAN & GERARD INVESTMENTS 3 (PTY) LTD	3rd Applicant

and

AZAM & FRIENDS (PTY) LTD t/a URBAN ROTI	Respondent

JUDGMENT

GQAMANA J

[1] This is an urgent application brought by the applicants[1] (herein referred to as "the Consortium") for eviction of the respondent Azam &Friends (Pty) Ltd *t/a* "Urban Roti", from the leased premises at the Boardwalk mall. The relationship between the Consortium and the respondent is purely a commercial one arising from a lease agreement concluded between the parties.[2]

[2] The Consortium's case hinges on the cancellation of the aforementioned lease agreement and the respondent's continuous unlawful occupation of the leased premises.

[3] The application is opposed by the respondent. At the heart of its opposition is the validity of the cancellation of such agreement.

[4] The foundational facts which underpins this application and the issues at hand are largely common cause. Early 2022, the Consortium and the respondent concluded a commercial lease agreement (the first lease agreement) wherein the latter leased premises at Boardwalk Mall for purposes of operating restaurant business. The respondent fell into arrears with the payment of rental and other amounts dues in terms of that lease agreement. Such lease agreement was cancelled in June 2023 and the Consortium also instituted legal proceedings in the High Court, Johannesburg against the respondent claiming arrear rental and other sums due. That litigation culminated in a settlement agreement wherein the parties agreed that a new lease agreement would be concluded. The settlement agreement led to the conclusion of the lease agreement referred to in paragraph one above. The aforementioned lease agreement was concluded in October 2023.

[5] The Consortium contends that the respondent breached the terms of such lease agreement in that, it failed to make timeous payment of the rental due or other charges for the months of October, November, December 2023 and January 2024. Consequently, the Consortium cancelled

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[1] The three applicants are Changing Tides 91 Pty Ltd, Boardwalk Mall (Pty) Ltd and Flanagan &Gerard Investments 3 (Pty) Ltd.

[2] A copy of the lease agreement is at pages 27 to 93 i.e. Annexure "**FMS1**".

the lease through a letter dated 12 January 2024.[3] The Consortium also cut the electricity supply to the leased premises on 9 February 2024.

[6] To protect its business interests, the respondent instituted an urgent application in this Court against the Consortium. Relevant herein is that, amongst the relief sought by the respondent was an order for the immediate restoration of the electricity supply to its premises and also a declaratory order that cancellation of the lease agreement by the Consortium constitutes a repudiation which was not accepted by it. The urgent application was opposed, however a rule *nisi* was granted on 15 February 2024.

[7] Despite the pending legal proceedings the Consortium concluded a lease agreement with Galxboy (Pty) Ltd ("Galxboy") on 28 February 2024, for the same premises.[4] The commencement date of such lease agreement is 01 June 2024, subject to the provisions of clause 3.3 therein. Clause 3.3 reads:

> "3.3 If for any reason whatsoever the LESSOR shall be unable to make the premises available to the LESSEE on the beneficial occupation date the LESSEE shall nevertheless be bound and hereby undertakes to accept occupation upon such later date as the LESSOR may advise the LESSEE in writing that the PREMISES shall be available for such occupation. In the event of such a delay the period the period of the Lease shall remain and the date of commencement and termination of the Lease shall be extended accordingly. The LESSEE shall not be entitled to claim damages or cancellation of the Lease by reason of the delay in obtaining such occupation and commencement."

[8] On the return date, the matter was argued and subsequent thereto a judgment was delivered on 26 March 2024, discharging the rule *nisi.* At paragraphs 53 and 54 of the judgment the court said the following:

> "[53] In my view the respondent *[the consortium]* has complied with the terms of the lease agreement in cancelling the contract. This court is unable to make a declaratory order that the respondent's cancellation of the current contract of lease between the parties on 12 January 2024 is invalid, as it appears in prayer 3.1 of the Rule Nisi issued.
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> [54] As correctly pointed out by the respondent it is clear the remainder of the interdictory relief sought in paragraph 3.2 falls away because if the cancellation is valid, there is no basis to interdict or restrain the respondent from evicting the applicant. Alternatively, the parties may still re-negotiate another contract as previously proposed by the respondent."

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[3] The cancellation letter Annexure "**FMS2**".
[4] Annexure "**FMS 9**".

[9] The respondent has since filed an application for leave to appeal against such judgment. That application is still pending and has not been heard as yet.

[10] Two days after the delivery of the aforementioned judgment, the Consortium issued a letter of demand to the respondent to voluntary vacate the leased premises on or before 12 April 2024. Cut to the chase, the aforesaid demand yielded no positive results and the Consortium lodged this urgent application on 9 April 2024. In the notice of motion, the respondent was given one day apart to file its notice of opposition (i.e. 10 April 2024) and also one day to file its answering affidavit, (i.e. 11 April 2024).

[11] The answering affidavit and the annexures thereto consisting of 117 pages in total was served on the Consortium attorneys on 15 April 2024 and only made available to me when the matter was called at court. That necessitated the court to stand-down the matter to the end of the roll in order to read the answering affidavit. The respondent in its opposition, lack of urgency became a sore thumb issue. There were also other grounds of opposition. However, I intend to consider the issue of urgency first.

[12] In terms of Rule 6(12) of the Uniform Rules of Court, an applicant is required to set forth explicitly, the circumstances which it avers render the matter urgent and the reasons why it claims that it cannot be afforded substantial redress at a hearing in due course.[5] A proper case for urgency must be made out in the founding affidavit. Urgent applications are not there for the taking.

[13] It has been settled that commercial interests may justify the invocation of sub-rule 6 (12).[6]

[14] The grounds upon which the Consortium views the matter to be urgent are set out at paragraph 45 (inclusive of the sub-paragraphs thereof) and 46 of the founding affidavit. The Consortium's case is that, it has concluded a new lease agreement with Galxboy, and it is obliged

[5] Luna Meubel Vervaardigers (EDMS) BPK v Makin t/a Makins Furniture Manufacturers 1977 (4) SA 135 (W) at 137.
[6] Bandle Investment (Pty) Ltd v Registrar of Deeds 2001 2 SA 203 (SE).

to give beneficial occupation to the latter by 1 May 2024. The commencement date of the that lease agreement is 1 June 2024. The new lease agreement provides for 30 days' beneficial occupation, a period which the new tenant requires to fit out the premises based on its business model.

[15] Further, the Consortium states that, prior to the new tenant being provided beneficial occupation, it requires approximately two weeks to restore the leased premises to a suitable \ condition. Because the respondent remains in unlawful occupation of the premises it would be unable to meet its obligation to provide beneficial occupation to Galxboy. In addition, the Consortium stands to suffer financial prejudice in the form of loss of rental, if there is any delay in the commencement of the trading by Galxboy.

[16] The Consortium also contends that; it stands to suffer reputational harm because Galxboy is a tenant of national interest and there are other possible lease agreements that could be concluded between it and Galxboy in relation to its other properties.

[17] Aside of financial losses, the Consortium also argued that it would not be afforded substantial redress at a hearing in due course and its likely to lose the lease with Galxboy if it is unable to meet its obligations and to provide timeous occupation.

[18] Ms *Ntsepe* counsel for the respondent (appearing together with Ms *Masiza*) argued that, the Consortium has failed to set forth explicitly the circumstances which it avers render the matter urgent and that it would not be afforded substantial redress in a hearing in due course.

[19] As indicated above the cancellation of the respondent's lease agreement was hotly contested by the respondent.

[20] As indicated in paragraph 2 above, there was litigation pending between the parties and a rule nisi that was granted on 15 February 2024. The Consortium although it was acutely aware of such factual situation, it proceeded as if its business as usual and concluded the lease with Galxboy on 28 February 2024 on the terms and conditions as set out in annexure "FMS9". In terms of such

lease agreement the commencement date is 01 June 2024 and the Consortium has to provide 30 days' beneficial occupation. On its own volition the Consortium concluded the new lease with such time period. Having done so, but it took no further steps to ensure that it would be able to meet its obligations. It was only a month later, i.e. on 28 March 2024 that a letter of demand was sent to the respondent's attorneys. When that demand did not yield the desired outcome, the respondent and its legal representatives were given extremely short period of time, a day apart to give the notice of intention to oppose and to file the answering affidavit. Such time frames gave no due and proper respect to the respondent and its lawyers.

[21] To avoid the risk of the judgment being given by default, the respondent filed its answering affidavit. As indicated above the answering affidavit was handed up in court and as result, I had to stand-down the matter in order to read the answering papers. The Consortium had no respect for the court and to the respondent's lawyers when it gave such extremely short time periods in a matter which raises interesting and challenging questions of law.

[22] The court's discretion to abridge the times prescribed by the rules and to accelerate the hearing is guided by three factors, the prejudice which an applicant may suffer by having to wait for a hearing in due course, the prejudice the other litigants may suffer if an applicant is given preferences and the prejudice the respondent might suffer by the abridgments of prescribed times.[7]

[23] The time periods imposed on the respondent were in no way justified by degree of urgency of the matter. The respondent was required to prepare its answering affidavit and obtain services of counsel for the hearing in great haste. The Consortium has not explained why, despite clause 3.3 of the new lease agreement with Galxboy, it deemed necessary to rush to court with such drastically truncated time frames.

[24] If for any reason the Consortium fails to make the premises available within the agreed time period, the new lease agreement would remain extant. This is so because of the wording in clause 3.3 of such lease agreement. There would be no reputational harm or financial loss to the Consortium. Furthermore, as long the respondent is in occupation of the leased premises, its

[7] IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd 1981 (4) SA 108 (C) at 112H – 113A.

financial obligation to the Consortium to pay the rental and other dues in terms of the lease agreement concluded in October 2023 as mentioned in paragraph one above, remains. The Consortium's anxiety that it would not be afforded substantial redress in a hearing in due course has no merit in light of clause 3.3 of the lease agreement with Galxboy.

[25] On the facts herein, the matter is neither urgent nor are there reasons why the Consortium would not be afforded redress at a hearing in due course. Even though the respondent managed to produce and file substantive answering affidavit but the Consortium should not be allowed to jump the queue. The alleged loss that it contends it would suffer is not the kind of loss that justifies the disruption of the court's roll and the resultant prejudice to other litigants. There are also other deserving matters which have waited for their turn in the court roll.

[26] For all the above reasons, the matter lacks urgency and it stands to be struck from the Roll with costs. The respondent argued for the costs of two counsel on the basis that the matter involves issues of complexity. Although the matter raises interesting questions of law, but the employment of two Counsel was unnecessary.

[27] Tempting as it maybe, it is unnecessary for me to consider the other interesting grounds of opposition raised by the respondent in light of my findings.

[28] In the result the following order is issued:

1. The application is struck from the Roll with costs.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicants	:	*Adv G J Gajjar*
Instructed by	:	Van Heerden Attorneys Inc.
		Gqeberha
Counsel for the Respondent	:	*Adv N L Ntsepe and Adv A N Masiza*
Instructed by	:	Kuban Chetty Attorneys
		Gqeberha
Dates heard on	:	16 April 2024
Judgment Delivered on	:	24 April 2024