IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2481/2022

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

BIG CEDAR TRADING 6 (PTY) LTD
(Registration number: 2002/025827/07) Applicant

and

NKWE VACCINATION CLINIC (PTY) LTD Respondent
(Registration number: 2016/536092/07)

HEARD ON: 15 SEPTEMBER 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 16 SEPTEMBER 2022. The date and time for hand-down is deemed to be 16 SEPTEMBER 2022 at 15H30.

[1] The applicant, a duly registered and incorporated private company, seeks the ejectment of the respondent from the immovable property of which it is the owner situated at Aescalapium Medical Centre, Kruis Street, Parys. The cornerstone of the case for the applicant is that the existing lease agreement was terminated. The respondent, also a similar business entity, is resisting the application ostensibly on the basis that a second lease agreement was entered into between the parties and is still valid. Therefore, there is no valid termination. The respondent contends that it is not in unlawful occupation of the immovable property

[2] The side show to the main matter is the application for condonation for the delivery of the respondent's affidavit. The court was informed at the commencement of the oral hearing that the parties have reached a settlement on it to the effect that it is no longer a live issue between them. On that basis, the application for condonation is granted.

[3] It is apposite at this stage to set out the chronology of the facts that brought the parties to this unenviable point. On 30 November 2018 the parties entered into a written lease agreement which was to run for a period of one (1) year starting 15 December 2018 and end on 15 November 2019.[1] It is common cause that the lease agreement expired by effluxion of time. It was not renewed or cancelled but the lease agreement continued on a month to month basis as stipulated in paragraph 32 of the written lease agreement. This provision stated that it can be ended from either side by giving at least one-month notice.

[4] The applicant gave the respondent the required notice on 1 February 2022. The applicant was even generous that the period granted to the respondent was set at two (2) months instead of the required one (1) month. The response from the respondent is clearly contained in an e-mail forwarded to the applicant. In it, the respondent tabulated various reasons that it will be humanely impossible to move within the specified period. Further that it is faced with a real problem of acquiring suitable space within the magisterial district of Parys.[2] In fact, this was a plea for an

[1] Page 26 – 40 of the Indexed Papers.
[2] Page 69 – 70 of the Indexed Papers.

extension instead of a challenge that there was something untoward about the notice of cancellation.

[5] According to the applicant the immovable property was sold with effect from 1 April 2022. On that day the occupation and risk of the immovable property ought to pass to the new owner who is not a party to the proceedings before this court. At the heart of the opposition to the application, is the contention that a valid second written lease agreement was concluded between the parties. The "new" lease agreement was set to expire by effluxion of time on 30 November 2023. Further that any cancellation prior to the aforementioned date was invalid. This aspect is denied by the applicant. The pillar of the contention of the respondent is that there is a genuine dispute of facts and as such motion proceedings are unsuited in the circumstances.

[6] Both parties are *ad idem* that in order to succeed in this application the applicant must establish the following: -

1. That it is the owner of the property.
2. The agreement in terms of which the respondent occupied the property has been validly cancelled.
3. The respondent's continued occupation of the property is unlawful.[3]

There is no issue about the ownership of the immovable property. The dispute centres on whether there was valid termination or not. The obvious effect of proving that the lease agreement has been validly cancelled is that any subsequent occupation of the property will be unlawful.

[7] To get to the nub of the dispute, the important aspect is to determine whether a second written lease agreement exists or not. The standpoint of the applicant is that it does not. There were negotiations which were underway but those did not materialise into a written lease agreement. The respondent holds the view that it does. Alternatively, it was argued that no final determination could be made on the face of glaring dispute of facts and that the issues can be properly ventilated if the matter is referred for *viva voce* evidence to be led at a later date.

[3] Shoprite Checkers (Pty) Ltd v Jardim 2004 (1) SA 502 (O) at 505E-507E.

[8] It is necessary to examine the surrounding circumstances pertaining to the written lease agreement that is so much at the centre of the dispute.[4] Each and every page of the disputed document is initialled by the deponents of the founding and confirmatory affidavits respectively. There is no signature or initials appended on behalf of the respondent. The explanation of the applicant is that there were talks or negotiations between them but nothing came to fruition. On the part of the respondent there is no cogent explanation about the anomaly.

[9] The court was referred to the addendum entered into and signed by the representative of both entities on 26 and 28 July 2019 respectively. It was argued on behalf of the respondent that it does not make sense that they would sign such an agreement if it was not to enter into a new lease agreement. This argument is unsustainable because paragraph 2 thereof makes reference to the written lease agreement entered between them on 30 November 2018. The one that has expired. It is effortless to come to a finding that there is no other agreement except the one relied upon by the applicant.

[10] The comparison between the valid written lease agreement and the document purported to be the current one does not come to the assistance of the respondent. The first lease agreement was substantially signed by both parties and they adhered to all its terms and conditions. The one relied upon by the respondent does not even have a single signature on behalf of the respondent. Clearly these two (2) are beyond compare. The fact that the terms and conditions are the same and only signed on behalf of the applicant does not elevate it to the status of a valid written lease agreement between the parties. The submission on behalf of the respondent is that it lacks merit.

[11] Another reason to conclude that no agreement was reached is found on “FA 7” and “FA 8” annexed to the founding affidavit. On 6 June 2019, the agent on behalf of the applicant dispatched the addendum of the lease agreement to the respondent. The deponent to the opposing affidavit on behalf of the respondent wrote back and stated that she required clarity on some aspects, will discuss them later with the

[4] Page 71 to 85 of the Indexed Papers.

landlord and is seeking legal advice. That is about it. The respondent's papers do not have allegations clarifying what then transpired from that point. The question is how does that translate into a valid agreement let alone a written one. There cannot be talk of the existence of a valid agreement under these circumstances.

[12] It is a principle of our law that generally applications are not designed to resolve factual disputes between the parties. They are decided on common cause facts.[5] Probabilities and onus issues are not amenable to being determined in motion court proceedings. The approach is that the court has to accept the facts averred by the applicant that were not disputed by the respondent and the latter's version insofar as it was plausible, tenable and credible.[6] It is undesirable to decide an application on affidavits where material facts are in dispute.

[13] These are of course dispute of facts between the parties about the existence of the second written lease agreement. However, the version of the respondent is improbable to be relied on. This is one matter where the allegations made are so untenable that they are worth to be rejected merely on the papers. There is no basis to hold that there is a second written lease agreement.

[14] This court is inclined to grant the relief as prayed in the notice of motion. There was a valid termination and the applicant granted the respondent reasonable period to vacate the immovable property. Therefore, taking that into consideration, granting the respondent more days is more than reasonable in the circumstances.

[15] On the issue of costs, this court was not provided with any reason why the respondent must be ordered to pay those on attorney and client scale as the applicant has claimed.

[16] The order granted is the following: -

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[5] Plascon-Evans Paints (Transvaal) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).
[6] Airports Company South Africa SOC Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books 2016 (4) All SA 665 (SCA) at para 5.

16.1. The respondent and any person(s) claiming to hold any title under it are evicted from the immovable property known as Aescalapium Medical Centre, Kruis Street, Parys.

16.2. All persons mentioned in paragraph 16.1 *supra* must vacate the immovable property on/or before Monday, 31 October 2022 and not to return thereafter.

16.3. In the event that the respondent does not comply with paragraph 16.2 *supra*, the Sheriff, Parys and/or his/her duly appointed deputy with or without the assistance from the South African Police Service is authorised and directed to evict the respondent or any person from the immovable property.

16.4. The respondent must pay costs on the party and party scale.

M.A. MATHEBULA, J

On behalf of the applicant:	Adv. F.F. Jacobs
Instructed by:	Phatshoane Henney Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. W. Van Der Heever
Instructed by:	Du Bruyn Attorneys C/O Webbers Attorneys BLOEMFONTEIN