IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: 1755/2013

IN THE MATTER BETWEEN:

YELLOWWOOD PARK CLUB **APPLICANT**

And

AVINASH MAHARAJ **RESPONDENT**

JUDGMENT

Delivered on: _____

GOVENDER AJ:

Factual background and context

[1] The Respondent is presently conducting a car wash business called Yellowwood Park Car Wash on part of the premises of the Yellowwood Park Club which is situated at 2 Swallow Street, Yellowwood Park, Durban. The Applicant is a voluntary association which operates as a sports and social club. The Applicant derives its right to occupy these premises from a notarial deed of sublease that was signed by representatives of the Applicant and those of the Stainbank Trust (the Trust). The Trust derived its right over the property from a notarial deed of lease

concluded between the Trust and the Yellowwood Park Health Committee, one the predecessors of the eThekwini Municipality.

[2] One of the material clauses of both notarial deeds provided that the lessee (the Applicant) shall be entitled during the term of the lease to construct and erect sports fields, buildings and playing fields of every description on the property provided only that the building erected shall be part of or pertain to some communal and/or sporting activity. The shorter Oxford dictionary defines *communal* as 'of or belonging to a community'. It is clear that the object of leasing and subleasing the property was to benefit the local community and specifically to erect and maintain sports fields. Given that a nominal rental was paid by the applicant for the use of the property, it is clear that the intention of the Trust was that the Applicant was meant to maintain and use the property for the benefit of the community that it served.

[3] The Applicant and the Respondent entered into two separate written lease agreements which were signed by the Respondent and by representatives of the Applicant. The first lease agreement was entered into on the 10th of August 2009 and the duration of which was specifically stated to be from 1st September 2009 to the 31st of August 2010. This agreement permitted the Respondent to use the area designated as a car wash and kiosk which was part of the premises for the purposes of conducting a car wash business. The Respondent had purchased a car wash business that had been conducted on the premises for many years. Clause 4 of the first lease agreement stated that the contract is renewable for a 'further two years after on an annual basis.' However in terms of clause 5 the agreement could be terminated on one month's calendar notice. This agreement ran its course and upon its termination in August 2010, the Respondent remained in occupation and paid a monthly rental. It was common cause that during this period, the Respondent occupied the premises as a monthly tenant.

[4] On the 27th of July 2011, the Applicant gave the Respondent one month's notice of the cancellation of the tenancy and required the Respondent to vacate the

premises. However the parties subsequently reappraised their positions and the Applicant decided to permit the Respondent to occupy the premises for a further period. A second written lease agreement was concluded at the end of September 2011 which was signed by Mr Andrew Dutchie of the Applicant and thereafter by the Respondent on the 6th of October 2011. The 2nd lease agreement stipulated a number of conditions with which the Respondent agreed to comply. The 2nd lease agreement dated 30th of September 2011 expressly stated that the Applicant had decided to grant the Respondent a 'grace period for a year, commencing on 1 October 2011, for the purposes of affording you time to find alternative facilities.' In addition to stipulating the rental of R 900.00 per month, the lease agreement required the Respondent to ensure that all his staff were registered with the UIF and Workman's compensation, that no unauthorised persons were permitted to loiter around the car wash area and that proof be provided that the car wash business has obtained short term insurance in respect of public liability. The Respondent was also required to pay all the arrears owing to the Applicant within 30 days of the commencement of the 2nd lease agreement.

[5] It was clear that the inclusion of these conditions was motivated in part by the concern that the Applicant would be liable for injuries caused to the public by a business being run on its premises or in some manner to be held liable for the failure to comply with statutory obligations. Clause 6 of the 2nd lease agreement provided that there would be no further extension to the agreement and that the Respondent would be required to vacate the premises by close of business on the 30th of September 2012. The Respondent, in signing the 2nd lease agreement, expressly accepted all the conditions stipulated in the lease agreement.

[6] On the 22nd March 2012, the Applicant wrote to the Respondent drawing his attention to the facts that the car wash business remained in arrears, that proof of compliance with the statutory requirements and proof that public liability insurance was taken had not been provided. In an e-mail dated 4th April 2012, the Respondent acknowledged being in arrears and promised to make good on the arrears owed. He also indicated that although he was currently uninsured he had approached an

insurance company to provide public liability cover only. He also undertook to ensure compliance with the UIF requirements.

[7] On the 14th of August 2012, the Applicant in a letter informed the Respondent that, after reviewing the situation, it stood by its original decision that the Respondent would have to vacate the premises no later than the 30th of September 2012. In effect the Applicant gave notice requiring the Applicant to vacate the premises upon the expiry of the term of the 2nd lease agreement.

[8] In a letter dated 31st of August 2012 and drafted by his attorneys, the Respondent informed the Applicant that he would not be vacating the premises on the 30th of September 2012. In the letter, the Respondent stated that he had purchased the car wash business from Mr Robbie Martin who as that time was a committee member of the Applicant. The Respondent stated that Mr Martin informed him that as long as he obeyed the rules he could conduct his business. According to the Respondent, he was 'shocked to read' that the first lease agreement was for a period of one year renewable for a further two years. However according to him, he was assured by the club chairman and by Mr Martin that this was a standard document and that he could remain there as long as he wanted. He claimed that he purchased the car wash business on the basis of the verbal assurances given to him. The letter contends that 'tacitly speaking client was of the opinion that it was a long lease.' The letter went on to state that he (the Respondent) was coerced into signing the 2nd lease as the Applicant had unlawfully disconnected the electricity and water supply to the car wash business. Thus the Respondent contended that there was some sort of tacit long lease and that that the 2nd lease that had terminated on the 30th of September 2012 was only signed by the Respondent under duress because the water supply and electricity had been disconnected.

The issues

[9] The Applicant seeks an order that the Respondent and all other persons occupying through him be evicted from the premises. In resisting this application, the Respondent proffered a number of defences. These are that the parties had entered into a tacit long lease, that the 2nd long lease was entered into under duress, that there is a material dispute of fact on the papers, that as the replying affidavit was submitted more than three years after the answering affidavit was filed it should be disregarded and based on the principle in *Jajbhay v Cassim,*[1] the Applicant should be denied the relief sought. I will deal with each of these issues sequentially.

The tacit long lease defence

[10] In his answering affidavit, the Respondent suggested that the impression that he got from his discussions with Mr Martin and Mr Duthie, members of the Applicant, was that he would be permitted to occupy the premises for a period of at least 10 years. In the letter sent by his attorneys to the Applicant, it was suggested that the car wash business could be there for a further period of another 14 years. The Respondent therefore appeared to vacillate as to the duration what he describes as the 'tacit' long lease. The Applicant denies that these assurances were given to the Respondent.

[11] I am satisfied that the Respondent's vague assertion of a 'tacit' long lease of varying length is simply untenable and incompatible with the documentary evidence. The Respondent signed a one year lease agreement with an option to renew for a further period of two years. This is incompatible with his version that some sort of long lease had been agreed upon prior to the first lease agreement being signed. Similarly he signed a 2nd lease agreement that stated unequivocally that it was for no more than one year. The specificity regarding the duration of the lease with the termination date being expressly recorded cannot be reconcilable with the version

[1] *Jajbhay v Cassim* 1939 AD 537

that there was some sort of agreement on a long lease. The 2nd lease agreement stated expressly that the Respondent was to vacate the premises on the 30th of September 2012 and that no further extensions would be granted.

[12] The Respondent's assertion that he signed the 2nd lease under duress is refuted by his own correspondence in which he seeks an indulgence from having to comply with some of the conditions immediately. His appeal for an indulgence for a period of time with which to comply with some of the conditions suggests that he is able and willing to negotiate on these matters. No mention is made in this letter of him being coerced to sign the 2nd lease agreement. For many months he continued to perform in terms of the lease agreement and did not raise the issue that the 2nd lease was signed under duress. The issue of the tacit long lease and the allegation that the 2nd lease was signed under duress appears to have been raised for the first time in the letter dated 31st of August 2012 sent by attorneys acting for the Respondent. This was one month before the 2nd lease was due to expire and after notice had been given to the Respondent that he had to vacate the premises by no later than the 30th of September 2012. The Respondent's version that some sort of tacit long lease was agreed upon or promised is entirely incompatible with the documentary evidence of the signed lease agreements and is rejected. Similarly the version that the Respondent was coerced to sign the 2nd lease agreement is not borne out by his correspondence and by his continuing to perform in terms of the 2nd lease agreement for almost 11 months before alleging that he signed the agreement under duress. On the papers, both these versions proffered by the Respondent are rejected as improbable.

<u>The existence of a material dispute of fact</u>

[13] Mr *Sitaram* on behalf of the Respondent also argued that there was a dispute of fact and that this matter should be referred to oral evidence. For the reasons stated above, I am of the view that there was no real dispute of fact on the papers. The vague and imprecise conversations that the Respondent claimed that he had

were followed by written and precise agreements encapsulating the details of the lease agreements between parties. It was clearly the intention of the parties that the signed written agreements regulate their relationship as lessor and lessee.

The late filing of the replying affidavit

[14] After the Respondent filed his answering affidavit, for some reason which is not entirely clear the Applicant did not file its replying affidavit timeously and filed its affidavit some three years later. During this period, I was informed by Mr *Moosa*, for the Applicant, that the Respondent continued to occupy the premises rent free. Beyond stating that there appears to be a change in attorneys, no substantive reason was submitted for the delay in submitting the replying affidavit. Mr *Sitaram* argued that I should exclude the reply as it was filed out of time without an adequate explanation. The delay did not prejudice the Respondent in anyway. Indeed, the delay benefitted the Respondent as he was allowed to remain on the premises and no rental was paid to the Applicant. It was pointed out by the Applicant that the Respondent had the option, in terms of rule 30A of the Uniform Rules of Court, to request that it submit its replying affidavit within 10 days and in the absence of compliance to apply for this eviction application to be struck off. I am of the view that the Respondent did not act in terms of Rule 30A because the delay in finalising the litigation meant that he remained on the premises and did not have to pay rental to the Applicant. I am satisfied that the Respondent was not prejudiced by the delay and even though the explanation for the delay is not adequate, I am of the view that the replying affidavit should be admitted as it assists in providing a more comprehensive context within which to determine this matter.

The applicability of the principle in *Jajbhay v Cassim*

[15] The main argument made by Mr *Sitaram* at the hearing was that the Applicant acted contrary to the notarial deeds in letting the premises to the Respondent for the purpose of running a business enterprise. His argument was that this was not

permitted in terms of the notarial deed and as a consequence of the long established dicta in *Jajbhay v Cassim*,[2] the Applicant should not be permitted to seek the eviction of the Respondent. Mr *Moosa* submitted that *Jajbhay* is distinguishable on a number of bases. The granting of the lease to the Respondent to conduct a business, even if it was contrary to the notarial deed, was not illegal conduct. He also argued that the facts in *Jajbhay* were distinguishable in that in the matter at hand, the lease agreement had expired whereas the tenancy agreement in *Jajbhay* had not been terminated. Finally he drew my attention to dicta in the judgment which stated:

> 'If either party had terminated the contract and the tenant refused to vacate, the Court would probably assist the appellant to recover his property'.[3]

[16] Mr *Moosa* contended that the Applicant in *casu* had in fact terminated the lease agreement and was seeking the eviction of the Respondent. I am of the view that there is much force in the arguments made by Mr *Moosa*.

[17] In *Jajbhay* the court was dealing with what was deemed to be an illegal contract. The Applicant in *Jajbhay* sublet his stand to the Respondent but in terms of regulations existing at the time the lease was illegal. As the court put it:[4]

> 'It is clear that the parties entered into an illegal lease (that is, one forbidden and penalised by law) and that in pursuance of the illegal lease the appellant gave possession of the leased property to the Respondent. He now asks the court to relieve him of the consequences of his illegal conduct by restoring possession to him of the leased property, and the question arises whether the court will come to his assistance. Counsel for the appellant advanced the argument that the appellant was in the position of an owner and entitled to claim possession unless the Respondent can show some title to remain in possession, and inasmuch as the sublease was void Respondent was therefore not entitled to remain in possession. If the sub-lease

[2] .*Jajbhay v Cassim* 1939 AD 537
[3] *Jajbhay v Cassim* note 1 above at 545.
[4] Jajbhay v Cassim note 1 above at 547.

had been merely void and not illegal there might have been force in the argument, but the effect of illegality requires consideration.'

[18] The court in *Jajbhay* found that as both parties had 'entered into the lease forbidden and penalised by law and inasmuch as there was no consideration of public policy operative in favour of granting the appellant relief, the general rule in *pari delicto potior est condition defendentis* applied, and that the application was rightly dismissed.' In *Jajbhay*, the Respondent was occupying the property in terms of an illegal lease but was complying with the terms of the agreement. In that case, the Applicant sought to evict him on the grounds that the sublease was illegal but without giving him notice as required in the agreement. Based on the *in pari delicto* principle, the court refused to come to assistance of Applicant.

[19] Even if I proceed on the assumption that the Applicant in *casu* acted contrary to the provisions of the notarial deeds by entering into these lease agreements with the Respondent permitting him to run his car wash business on the premises, these agreements are not illegal contracts as they are not forbidden and penalised by any law. Non-compliance with the conditions of the lease and the sub-lease would vest in the respective lessors the right to take action to enforce the provisions of the lease agreement. The non-compliance does not amount to illegal conduct and therefore the *in pari delicto* principle has no application. The Respondent's reliance on this principle and on *Jajbhay* was therefore misplaced. Further the 2nd lease agreement had expired and the Applicant is now seeking an order of eviction. In terms of the dicta quoted above from *Jajbhay v Cassim*, the court is likely in these circumstances to assist the Applicant recover its property.

[20] Given the above, the issue is whether on the information before me, I am satisfied that the Respondent has a legal basis to remain on the premises. Both the written lease agreements that the Applicant and the Respondent entered into have long since expired and the assertion that there was some sort of vague verbal tacit long lease is rejected as being contrary to the documents signed by the Respondent.

I am satisfied that there is no basis in law justifying the Respondent remaining on the premises and am therefore of the view that the eviction order should be granted.

[21] I was not able to determine whether the car wash business is the sole means that the Respondent has of earning a living. In any event I am of the view that he ought to be given reasonable notice to find alternative premises for his car wash business but that the Applicant should not unreasonably be denied access to the use of the premises.

[22] In the circumstances the following order is made:

Order:

1. The Respondent, and all those occupying through him, are directed before 30th September 2017 to vacate the premises described as the 'Yellowwood Park Car Wash' which is situated at Yellowwood Park Club, 2 Swallow Street, Yellowwood Park, Durban.

2. If the Respondent, and all those occupying through him, fail to give effect to the Order as set out in paragraph 1 above, the Sheriff, or his deputy, is authorised and directed to evict the Respondent and all those occupying through him from the premises described in paragraph 1 above.

3. The Respondent is to pay the costs of this application.

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GOVENDER AJ

Counsel for the Applicant: Mr N Moosa

Plaintiff's Attorneys: Uys Matyeka Schwartz

Counsel for the Respondent: Mr V Sitaram

Respondent's Attorneys: A.B. Maharajh Attorneys