**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

**HELD AT JOHANNESBURG**

CASE NO: 20209/2019

In the matter between:

**ANGLICAN CHURCH OF SOUTH AFRICA**
**DIOCESE OF JOHANNESBURG** **Applicant**

**And**

**DRAGON CITY MANAGEMENT (PTY) LTD** **1st Respondent**
**ANCHOR PROJECTS (PTY) LTD** **2nd Respondent**

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**J U D G M E N T**

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**BABAMIA AJ**:

**INTRODUCTION**

[1] The applicant, the Anglican Church of Southern Africa: Diocese of Johannesburg, is the owner of the following properties:

1.1 Portion 40 of the farm Langlaagte, No. 224;

1.2 Erf 52 Crown North Township, Registration Division IQ

(these two properties are cumulatively referred to as the parking lots); and

1.3 Portion 159 of the farm Langlaagte, No. 224 (the church property).

[2] The applicant seeks an order ejecting the first and second respondents from the parking lots and the church property, together with certain ancillary relief, more fully set out in the notice of motion. That ancillary relief is reflected further below.

[3] The core allegations of the applicant may be summarised as follows:

3.1. The applicant is a diocese, regulated by its constitution and the cannons of the Anglican Church of Southern Africa.

3.2. Its constitution requires all its property (moveable as well as immoveable) to be dealt with and administered by the trustees of the applicant.

3.3 Reverend Evelyn Abrahams - who previously served as the applicant's church minister, purported to lease the properties to the respondents.

3.4. The details of the purported agreement are unknown to the applicant. However, Reverend Abrahams had no authority to represent the applicant when concluding the purported lease, as she was never a trustee of the applicant. As a result of her conduct, Reverend Abrahams was relieved from her position.

3.5. Nevertheless, the respondents took possession of the parking lots and a portion of the church property - namely, the rectory (for convenience referred to as the leased property).

3.6. The respondents caused massive illegal structures to be constructed on the leased property without the approval of the applicant, the City

of Johannesburg or any other relevant authority. The City of Johannesburg issued a stop order instructing the respondents to desist from any further construction on the leased properties.

3.7. On 6 November 2018, the applicant sought to terminate the lease agreement between the parties. In its letter of termination of 6 November 2018 (annexure FA13.6), the applicant did not concede the existence of a validly concluded lease agreement. It communicated it's termination of the lease agreement on the assumption that there may have been a validly concluded lease agreement. In this regard, the applicant stated:

> "In any event and even if a lease had been validly entered into, either as alleged or at all, such agreement can only be one for a monthly tenancy. That being the case, our Client hereby gives written notice - insofar as any contract may exist - of the cancellation of the contract. Your client is accordingly required to vacate the property by no later than 31 December 2018."

3.8 There was an exchange of correspondence during the course of this period between the applicant's and the respondents' respective attorneys, which culminated in an urgent application between the parties, which came before Keightley J on 13 November 2018 under case number 2018/41935 (the urgent application). As appears from annexure FA14 to the founding affidavit, by agreement between the

parties, Keightley J granted an order interdicting the respondents from carrying on any construction work, remedial work or maintenance work to the existing structure, whether legal or illegal, situated on the leased properties, without the consent of Mr Sibusiso Zungu, (the deponent to the founding affidavit), which consent would not be unreasonably withheld. The court order of Keightley J also required the parties to mediate their disputes before a mediator, which had to be completed before the end of February 2019. It appears that the mediation process did not yield a resolution of the dispute between the parties. Finally, the court order of Keightley J directed that the costs of the urgent application be costs in any proceedings that may ensue upon the failure of the mediation between the parties.

3.9 On 12 February 2019, the City of Johannesburg's attorneys, directed a letter demand to the applicant, in which it contended that the City conducted an inspection of the church property and found that the applicant was in contravention of the Johannesburg Town Planning Scheme 1979 insofar as it pertained to the church property.

3.10 The applicant and the respondents (through their respective attorneys) exchanged further correspondence, in which, the applicant expressed its dissatisfaction with being targeted by the City of Johannesburg for the illegal building structures on the church property. This ultimately led to the applicant directing a further letter

of cancellation upon the respondents on 29 May 2019 (annexure FA20). This letter reads as follows:

"1. On or about 6 November 2018, our client sent a letter terminating the purported lease agreement with your clients. The reason for such termination are fully ventilated in the said letter.

2. Despite the above termination, your client failed / refused to vacate our client's property.

3. Thereafter, pursuant to a court order granted by Madam Justice Keighley [sic], the parties attempted to find a solution to a dispute. As you are well aware, such mediation process failed to resolve the dispute. As such the matter remains unresolved.

4. In addition, our client has on numerous occasions requested that you provide us with plans and necessary approvals for the illegal structure your clients have constructed on our client's property. Your clients failed to adhere to this request. As a result of your client's actions of building illegal structures on the property, our client is now attracting penalty rates from the municipality for an alleged unauthorised use of the property, amounting to thousands of Rands per month.

5. We hereby confirm that your client's right to occupation of the property through a lease agreement or otherwise has been validly terminated, alternatively, is hereby

terminated.

6. We hereby request that you provide our office with a confirmation within two days of receipt of this letter, and by no later than 03 June 2019, that your clients will vacate our client's property by no later than 30 June 2019.
7. Should your clients fail to provide confirmation as requested above, our client has no alternative but to approach the Court for ejection of your clients from the property."

[4] Needless to say, the respondents did provide the confirmation sought by the applicant in their letter of 29 May 2019. Instead, on 1 June 2019, the respondents' attorney responded and specifically stated that the demand made in paragraph 6 of the letter of 29 May 2019 was refused. The respondents' attorney also indicated that all issues pertaining to this matter would be fully ventilated in proceedings which the applicant may institute.

[5] As a result, the present application was brought on 6 June 2019.

[6] The respondents defences to the present application may be summarised as follows.

[7] **First**, the respondents contend that the first respondent (Dragon City)

occupies the properties pursuant to an oral lease agreement concluded between the Dragon City and the applicant on 15 April 2016 (see answering affidavit paragraph 4.13). The respondents contend that the applicant was represented by Reverend Abrahams. They further contend that in terms of the lease agreement:

7.1 Dragon City would lease from the church the parking lots for storage of material and shipping containers and the rectory on the church property wherein employees of Dragon City would reside.

7.2 Dragon City would pay to the applicant a deposit in the sum of R50,000.00; a monthly rental of R15,000.00 for the rectory; and R5,000.00 for the parking lots.

7.3 Dragon City would effect extensive improvements on the leased property.

7.4 Dragon City would be entitled to utilise the leased property for storage purposes, including the placing of containers on the leased property.

[8] The respondents further contend that in light of the extensive improvements which Dragon City would effect to the applicant's properties **at no charge**, "it was envisaged by both parties that in the event of the applicant wishing to terminate the lease, it would give at

least six calendar months written notice to [Dragon City] of such termination".

[9] Finally, and of significance, the respondents state that it was an implied, alternatively a tacit term of the lease agreement, that should the applicant seek to terminate the lease agreement, it would be required to give at least six calendar months written notice to Dragon City of such termination.

[10] **Second**, the respondents contend that the applicant is estopped from denying the authority of Reverend Abrahams, and by implication, the conclusion of the lease agreement.

[11] **Third**, the respondents contend that they hold an enrichment lien in respect of the leased property and for that reason, cannot be ejected from the leased property.

[12] **Fourth** and finally, the respondents deny that the lease agreement has been validly cancelled, and in any event, contend that even if the lease agreement had been cancelled, it has been tacitly revived.

**ISSUES ARISING**

[13] The following questions fall to be determined in this application. **First**, was there a valid lease agreement concluded between the applicant and Dragon City? **Second**, assuming that there was a valid

lease agreement concluded between the applicant and Dragon City, was it cancelled? If it was not cancelled, then Dragon City has a right to remain on the property. Counsel for the respondents conceded that the second respondent is not entitled to occupy the leased property and in fact, does not occupy the leased property. **Third**, if the lease agreement was properly cancelled, is there any other impediment to granting the applicant the relief that it seeks in this application?

[14] In respect of the third question, the respondents raise three such impediments. The first is the tacit revival of the lease agreement; the second, is the enrichment lien; and third is the application of the Prevention of Illegal Eviction Act, 19 of 1998 (the PIE Act) to the residential dwellers on the rectory of the church property.

[15] In what follows, I deal with each of these questions in turn.

**FIRST QUESTION: VALID LEASE AGREEMENT**

[16] Having regard to the conclusion that I have reached this matter, I will assume in favour of the respondents that a valid oral lease agreement was concluded between the applicant and Dragon City on the express terms stipulated in paragraph 14.14 of the respondents' answering affidavit. As such, there is no need for me consider the authority of Reverend Abrahams or the *estoppel* plea raised by the respondents.

**SECOND QUESTION: VALIDITY OF THE CANCELLATION OF THE LEASE AGREEMENT**

[17] The applicant relies upon two documents, which it contends, evidences its cancellation of the lease agreement.

[18] The first document is its letter dated 6 November 2018 (annexure FA13.6). This letter, denies the existence of a binding lease agreement between the parties. The remainder of the letter sets out the applicant's perceived breaches of the lease agreement by the respondents. Through this letter, the applicant sought to terminate any lease agreement that may be said to exist between the parties. When the applicant transmitted this letter to the respondents, the respondents did not object by contending that they ought to be afforded a six month notice period.

[19] The second document is annexure FA20 – the applicant's letter of 29 May 2019. As appears from this letter, the applicant once again took the position that to the extent that any lease agreement may be said to exist, they elected to terminate that lease agreement. Once again, notwithstanding the fact that the applicant sought to terminate the lease agreement by affording the respondents a little bit over a month for purposes of vacating the premises, there was no objection from the respondents that they ought to be afforded a six month notice period.

[20] In *Swart v Vosloo* 1965 (1) SA 100 (AD) at 105G, the then Appellate Division held that a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party. Cancellation does not take place until that happens. The respondents received the letters of 6 November 2018 and 29 May 2019. This is not in dispute. Instead, the dispute is whether the failure by the applicant to give the respondents a six month notice period rendered the notice of cancellation ineffective.

[21] I believe it did not. There are two reasons for this.

[22] First, it does not appear that the applicant was required to give the respondents six calendar months' notice terminating the lease agreement. The respondent advances this requirement at paragraph 14.16 of the answering affidavit as an implied, alternatively tacit term of the oral lease agreement. Mr Stockwell, who appeared for the applicant, quite correctly pointed out that this term cannot be implied as there is no common law or statutory law permitting its implication. So, is it a tacit term of the lease agreement? I do not believe that it is. There was no indication from the answering affidavit from which this tacit term could be established. Moreover, at no stage prior to filing its answering affidavit did the respondents convey to the applicant that it ought to be afforded a six month notice period for vacating the leased property after receiving the notices of

cancellation.

[23] Second, assuming that I am wrong and that such a tacit term may be read from the answering affidavit, the applicant's failure to indicate that it was affording Dragon City six months' notice prior to which the respondents ought to vacate the premises, does not render the notice of cancellation ineffective. In this regard, more than one and a half years has elapsed since 6 November 2018 when the agreement was first cancelled, and almost a year has passed since 29 May 2019 when the agreement was cancelled for the second time. The respondents have already had the benefit of more than six months after communication of the notices of cancellation. The notices are not ineffective because they failed to indicate to Dragon City that the cancellation would take effect six months from the date of the notice. If such a tacit term may said to exist under the lease agreement, then it merely affords the respondents the right to occupy the leased property for six months upon cancellation of the lease agreement. At the risk of repetition, the respondents have exhausted that right by occupying the leased property for more than six months after cancellation of the lease agreement.

[24] This is to be contrasted with a cancellation clause requiring certain procedures to be followed for that cancellation to take effect, such as for example, affording the defaulting party an opportunity to remedy a breach prior to a right to cancel accruing in favour of the aggrieved

party. This is not such a case.

[25] In the circumstances, I find that the lease agreement has been validly cancelled.

**THIRD QUESTION: OTHER IMPEDIMENTS TO GRANTING RELIEF SOUGHT**

**(i) Tacit Revival**

[26] The respondents contend that if I were to find that the lease agreement has been validly cancelled, then the lease agreement was tacitly revived. In *Golden Fried Chicken (Pty) Ltd v Sirad Fast Food* CC and others 2002 (1) SA 822 (SCA) at [4], the SCA states the following of significance:

> "A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement. … The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds. …"

[27] I was unable to locate any evidence of a tacit lease agreement in the answering affidavit. In argument, the respondents' counsel was requested to provide references in the answering affidavit from which the existence of this tacit lease agreement and its terms could be

gleaned. Mr Kaplan, who appeared for the respondents, pointed me to page 177 of the papers and in particular, paragraph 21.4 of the answering affidavit. That paragraph does not reveal the existence of a tacit agreement. Instead, it reveals dissensus between the parties following the first termination of the lease agreement. It reveals that the applicant returned the rental paid by the respondents back to the latter after the first termination of the lease agreement. The respondents repaid that rental to the applicant and simply insisted that they were going to abide by the terms of the lease agreement. That is not consensus between the parties evidencing the existence of a tacit lease agreement.

[28] Insofar as the external manifestations of the parties are concerned, the one overwhelming factor to my mind that reveals that there could not have been a tacit agreement between the parties following its cancellation, is the fact that shortly after the second letter of cancellation on 29 May 2019, the applicant, within a matter of seven days or so, brought the present proceeding seeking the ejectment of the respondents. To this, Mr Kaplan submitted that I need to take into account the conduct of the parties insofar as the respondent continued to pay rental to the applicant, and the applicant continued to accept that rental. I am not unmindful of that. However, as was correctly submitted by Mr Stockwell, it is not uncommon under circumstances whereby a party insists on making payment of rental in respect of property which they occupy, that such rental is retained without

prejudice. That is precisely what transpired in this matter.

[29] Ultimately, the respondent alleged the existence of a tacit lease agreement – which it called a tacit revival of the lease agreement. It bore the onus to establish that tacit lease agreement. I find that the respondents failed to discharge that onus.

**(ii) Enrichment Lien**

[30] The respondents contend that they had made significant improvements on the leased property and as a result, enjoy an enrichment lien.

[31] But reliance upon an enrichment lien is betrayed by paragraph 14.15 of the answering affidavit.

[32] Paragraph 14.15 of the answering affidavit states that the extensive improvements which Dragon City would effect to the properties would be at no charge provided that the applicant terminated the lease agreement by affording to Dragon City six calendar months written notice. It would be recalled that Dragon City has already had the benefit of one and a half years, alternatively almost one year following the termination by the applicant of the lease agreement - depending on which letter of termination one would apply.

[33] As a consequence, the reliance upon an enrichment lien is

unsustainable.

[34] Even if I am wrong, there have been several notices issued by the relevant authorities pertaining to the illegality of those structures erected by the respondent on the leased property. Under those circumstances, it is unclear as to how the applicant would have been enriched by illegal structures on the leased property, which in any event, fall to be removed.

**(iii) Application Of The PIE Act**

[35] Mr Stockwell submitted that the PIE Act is not applicable to the six individuals that are utilising the rectory for residential purposes. He referred me to two authorities pre-dating the PIE Act, which I found to be inapposite.

[36] It was not in dispute that the six individuals that reside on the rectory do so as residential dwellers. This is an issue that the applicant ought to have foreseen as it was raised by the respondents in their affidavit in the urgent application. As residential dwellers, those six individuals are entitled to the protection afforded under the PIE Act. However, that is not the end of the matter. The parking lots are not occupied by residential dwellers, only the rectory on the church property is. On the basis of the principles set out by the Constitutional Court in *MC Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC), the respondents may be ejected from the parking lots.

However, before the six residential dwellers are ejected from the rectory on the church property the applicant is required to comply with the provisions of the PIE Act. In these circumstances, my order will reflect that the respondents be ejected from the leased property, being the parking lots and the rectory, however, such order will not impact upon the six residential dwellers until such time as the applicant takes steps, if any, against the six residential dwellers in terms of the provisions of the PIE Act.

**COST**

[37] The parties agreed that the costs should follow the result and further agreed that:

37.1 The cost in the urgent application should be the cost in the cause of this application; and

37.2 The successful party should be entitled to the cost of two counsel.

[38] In the circumstances, I make an order in the following terms:

1. The first and second respondents, including all other persons who may claim possession or occupation of the properties through them, except for the six people occupying the rectory as their primary residence, listed in **annexure "A"** attached hereto, are ejected from the properties listed below and that the respondents are ordered to return possession and occupation of the said properties to the applicant within one month from the granting of this order: -

1.1 Portion 40 of the farm Langlaagte No 224, Johannesburg,

Registration Division IQ, previously known as Portion 2 of that portion of the freehold farm Langlaagte No 13, Johannesburg;

1.2 Erf 52, Crown North Township, Registration Division IQ; and

1.3 Portion 159 of the farm Langlaagte No 13;

2 The respondents are directed to remove all containers, illegal structures and other items from the properties and restore the properties to their erstwhile condition within one month of the granting of this Order;

3 In the event of the respondents failing to vacate the properties as is provided for in paragraph 1 above, that the sheriff or his lawful deputy be authorised and directed: -

3.1 to remove the respondents, including all those claiming possession or occupation of the properties or part thereof through or under the respondents, but excluding the six persons occupying the rectory for residential purposes, referred to above, from the properties or such part thereof as they may occupy;

3.2 to request, if necessary, any person or entities to assist in the removal, inclusive of but not limited to members of the South African Police Services;

4 In the event of the respondents having to be removed from the properties as provided for in paragraph 3 above or in the event of the respondents not

complying with the order in paragraph 2 above, that the respondents are directed to pay all costs incurred by the sheriff, the applicant or other entity who may be requested by the sheriff or the applicant to assist in the removal of those occupying the premises or the removal of the containers, illegal structures and other items on the properties and should the applicant, in the respondents' stead, pay such costs that the respondents be directed and ordered to reimburse the applicant in respect of these expenses on demand;

5 The respondents are ordered to pay the costs of this application, such costs to include the costs of the urgent application issued under case number 41935/2018 and the costs consequent upon the employment of two counsel.

Jawaid Babamia

**BABAMIA AJ**

DATE OF HEARING: 06-05-2020

DATE OF JUDGMENT: Ex tempore - 06-05-2020

REVISION TO JUDGMENT: 29-05-2020

Counsel for Applicant: R Stockwell SC (with T Mosikili) instructed by Cherry-Singh Incorporated.

Counsel for Respondent: J Kaplan (with L De Wet) instructed by Ian Levitt Attorneys.

**ANNEXURE "A"**

1. Yunjiang He
2. Mingzhu Wang
3. Zhongqiang Wei
4. Maopin Lyu
5. Yanzhe Wei (minor child)
6. Yanhang Wei (minor child)

*The names of above persons have been extrapolated from the Respondents' Answering Affidavit to the Urgent Application issued in case number: 41935/2018 and filed under case number 20209/2019 on caselines.*