

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 14487 / 2024

In the matter between:

**CAMPS BAY INVESTMENT TRUST
PROPRIETARY LIMITED**
(Registration Number: 2022/871627/07)

Applicant

and

**INFUSION SOCIAL CLUB CAMPS BAY
PROPRIETARY LIMITED**
(Registration Number: 2023/782936/07)

Respondent

Coram: Wille, J

Heard: 10 July 2024

Order: 11 July 2024

Reasons requested: 24 July 2024

Reasons delivered: 19 August 2024

REASONS

WILLE, J:

INTRODUCTION

[1] This was an urgent application for the eviction of the respondent from commercial premises. The matter came before me in the urgent fast lane during the court recess. I considered the matter overnight and issued an order the following day.¹

[2] After that, the respondent curiously filed a request for reasons and an application for leave to appeal on the same day. It is unclear why the respondent requires reasons if it, in the absence thereof, could adequately formulate sufficient grounds for an application for leave to appeal. It may be that the respondent refuses to abide by the terms of the order granted.²

[3] The respondent is an incorporated private company and trades as the '*Infusion Social Club*' as its business. The applicant is also a private company, and its trade consists of managing a portfolio of property investments. The premises from which the respondent conducts its business is a single shop in a portion of the subject property owned by the applicant.³

[4] The applicant's business is a family investment business that has done business for many generations. This family business is respected in the local community and earned the trust of the residents and traders. The property is situated in an upmarket address on the beachfront. It is a two-story building that is occupied by several tenants, including doctors and estate agents. There is also a restaurant area in the building, which occupies part of the ground floor and part of the upper floor via an internal staircase. The applicant employed a model for the selection of tenants to occupy its premises. The core selection criteria related to the symbiotic business relationship that any prospective tenant would enjoy with the other current

¹ I ordered the respondent to vacate the premises and ordered costs on the attorney and client scale.

² The request for reasons and the application for leave to appeal were filed together on 24 July 2024.

³ The property consists of a portion of Erf 162, Camps Bay, also known as Central Parade, Victoria Road, Camps Bay.

tenants and their businesses conducted in the property so that they would operate harmoniously.⁴

OVERVIEW

[5] The premises were previously occupied by a business concern that operated a restaurant as a café where patrons could enjoy a coffee, freshly pressed juice, or a smoothie. It was a health-minded space attracting families and the local community. This business was in keeping with the applicant's community and health-minded approach and operated symbiotically with other tenants who occupied the property. This café was, however, not financially profitable and ran into arrears in connection with its rental payments to the applicant.⁵

[6] The respondent approached the applicant with a proposal whereby the respondent invested capital and resources to assist the café in improving its operations and making its business profitable. Ultimately, the café's business proved too distressed to be resuscitated, and it was not feasible to continue operating. After that, the respondent proposed that it would take over the café's business and enter into a new lease agreement with the applicant.⁶

[7] At all material times, the applicant understood (and it is alleged that the respondent so represented to it) that the respondent would be conducting the same business as the café had undertaken previously. This representation was reinforced by the express representations contained in a written presentation submitted to the applicant by the respondent.⁷

[8] After that, the café's lease was terminated, and the respondent concluded a commercial lease agreement (including an addendum) to lease the premises from

⁴ The tenants of the building had to be upstanding citizens, and the businesses had to be symbiotic with each other.

⁵ The café was indebted to the applicant in the amount of R226,836.50 in respect of arrear rental.

⁶ The respondent would step in the shoes of the previous tenant who conducted the business of a café.

⁷ The "business proposal/plan" submitted by the respondent to the applicant.

the applicant. The lease agreement contained a vitally important material term in which the respondent agreed to use the premises to conduct the business ordinarily undertaken by a restaurant, which included cooking and selling food and serving drinks and alcohol.⁸

CONTEXT

[9] Following this historical context, the respondent agreed that it would not do or suffer to be done anything that might create a nuisance to the other tenants or occupants who occupied the property. It also agreed that it would punctually and fully comply with the laws, by-laws, and regulations, particularly those about the business carried on by it, and would not commit or allow to be committed any act calculated to be a nuisance and to disturb the peace and enjoyment of the public.⁹

[10] In addition, the respondent agreed that if it committed any breach of any lease agreement terms and failed to remedy such breach within seven days after receipt of prior notice, the applicant would have the right to terminate the lease without further notice and retake possession of the premises. Thus, the lease would terminate, and the respondent would immediately give the applicant vacant possession of the premises.¹⁰

[11] Necessary for this case was that the respondent contractually agreed that it would not under any circumstances have any claim or right of action whatsoever against the applicant for damages or losses of whatsoever nature and that no act on the part of the applicant in accepting any payments or amounts from the respondent would in any way be regarded as a waiver by the applicant of any of its rights.¹¹

⁸ The lease agreement also recorded that the premises would not be used for any other purpose without the applicant's consent.

⁹ This was a material term of the lease agreement.

¹⁰ It is common cause that this notice was given to the respondent by the applicant.

¹¹ This is important because the respondent belatedly agreed to vacate the premises upon payment of a large sum of money.

[12] Further, an addendum to the lease, among other things, contained the following express terms: (a) the respondent would settle the arrears of the former tenant, (b) the consent of the applicant for the respondent to be a tenant would be entirely dependent on the nature of the business conducted on the premises and, (c) and that a symbiotic relationship with the other tenants was specified as a prerequisite for the applicant to accept the respondent as a tenant in the premises. In summary, the respondent would not commit or allow any act to be committed that would result in a nuisance that would disturb the enjoyment of the premises by the other tenants or the public in general.¹²

[13] Following the conclusion of these commercial agreements, the applicant was contacted by several tenants in the building and informed that the respondent would be selling cannabis to the public from the premises and that the respondent would be operating a cannabis 'smoking lounge' from the premises. These tenants informed the applicant they would terminate their leases if this continued. In addition, a group of concerned residents expressed their dismay that the applicant was facilitating the sale of cannabis to minor children and stated that they would not support the tenants in the building should this position be allowed to continue.¹³

[14] A meeting with the representative of the respondent followed, who conceded that the respondent would be selling cannabis to the public from the premises. The applicant explained that the sale of cannabis in any context was inconsistent with the applicant's family's values and the stated and agreed requirements of the lease agreements for the business to be operated symbiotically with the other tenants conducting business from the building.¹⁴

[15] The respondent also conceded that the food offered in the restaurant would be infused with cannabis products, including 'tetrahydrocannabinol', which is a scheduled substance with psychoactive properties. It was undisputed that the

¹² This was a material term of the contract of lease read with the addendum to the lease.

¹³ The applicant was put on terms by several of its other tenants in the building.

¹⁴ The applicant contended for an accrued right to terminate. (see *De Wet NO v Uys NO* 1998 (4) 694 (T) 706).

respondent had failed to mention the cannabis-related trading activities to the applicant. According to the applicant, these trading activities were inconsistent with the trading activities for the building. The respondent insisted that excluding these cannabis-related trading activities from the respondent's business model was not feasible.¹⁵

[16] The applicant terminated the lease agreement because of this impasse concerning the respondent's trading activities. The termination followed because of the alleged non-disclosure and because an integral part of the respondent's intended business model was not a symbiotic fit with the applicant. After that, settlement discussions ensued, and the applicant alleged that the matter was settled because the respondent agreed that the lease agreement had been validly terminated.¹⁶

CONSIDERATION

[17] Notwithstanding the allegation that the occupancy of the premises had been settled and that the lease agreement had been validly terminated, the respondent remained in occupation of the premises. Belatedly after that, the respondent alleged (for the first time) that it had not materially breached the lease agreement and that no right to cancel the lease agreement had accrued to the applicant to warrant the termination of the lease agreement. This was then the core issue for determination in this application.¹⁷

[18] An analysis of the papers revealed that the respondent materially misrepresented the true nature of its business by failing to disclose its cannabis business activities to the applicant fully. The lease agreement was conditional on a complete and accurate disclosure. Further, from a reading of the papers, it seemed to me that the respondent structured its business in an attempt to exploit a perceived

¹⁵ At this time, the respondent insisted that it would be trading with cannabis-related products.

¹⁶ The material before me clearly showed that a settlement between the parties had been concluded.

¹⁷ I was in the main guided by the jurisprudence in *Singh v McCarthy Retail t/a McIntosh Motors* 2000 (4) SA 795 (SCA)

loophole in the law which prohibits the sale of cannabis but permits the growing thereof by individuals for personal consumption.¹⁸

[19] It was difficult (if not impossible) to understand on what legal basis the respondent contended it was in lawful possession and occupation of the leased premises and thus refused to vacate them. The respondent's stance was that it seemingly wanted to wish away the materiality of its non-disclosures with complete disregard for the extant provisions of the lease agreement and the addendum to it.¹⁹

[20] The only avenue left for escape by the respondent was to undertake that it would not trade with these cannabis-related products from the premises. This it belatedly did. In the circumstances, this undertaking was to be evaluated, considering the respondent's overall and general business model, which promoted the sale of cannabis-infused substances (by its group of companies) from several other premises where it conducted business to be its core and primary business. This undertaking was also given after a number of breaches had manifested.²⁰

[21] Despite the termination of the lease, the respondent remained in unlawful occupation of the premises and refused to vacate the premises. What was of concern was that despite the express statement by the respondent that notwithstanding the valid termination of the lease, it steadfastly refused to vacate the premises. I say this because the respondent conducted a business that was not disclosed to the applicant, and the lease agreement was conditional on the nature of the respondent's trading activities. A condition which the respondent did not meet.²¹

[22] What remained was the undertaking by the respondent that it would refrain from conducting cannabis-related business from the premises. This undertaking only

¹⁸ See the (The Haze Club (Pty) Ltd v Minister of Police and Others [2022] ZAWCHC 269: [2023] 1 All SA 280 (WCC)).

¹⁹ This was the reason for the settlement agreement between the parties shortly after the lease was signed.

²⁰ This was not engaged with in any material manner by the respondent and thus must be accepted as correct.

²¹ Thomas v Henry 1985 (3) SA 889 (A).

surfaced after the breach and valid termination of the lease. The respondent's entire business model and core business were inconsistent with the type of business the applicant had expected and contractually demanded from its tenants.²²

[23] The respondent materially misrepresented the business to be conducted by it and the business it intended to perform. The applicant, in turn, entered into the lease agreement on the basis that the respondent's business was as disclosed in its business plan. I reasoned that the applicant would not have entered into the lease agreement had it known the true nature of the respondent's business, even if the respondent subsequently did not conduct some aspects of that business from the premises.²³

[24] More importantly, these misrepresentations could not be remedied after the fact. Further, I found that a settlement had been reached by which the respondent agreed to terminate the lease and vacate the premises. Certain additional breaches of the lease also manifested in the form of disturbances emanating from the premises (including smoke from cannabis consumption) and complaints from other tenants impacting their businesses. Further, the respondent allowed smoking inside the premises, violating prevailing extant sub-ordinate legislation. Finally, the respondent embarked on alterations and branding to the premises without prior approval from the applicant in breach of the lease agreement.²⁴

[25] The applicant demonstrated on the papers that, almost daily, it received complaints from the tenants of the building, occupants of the adjacent premises, and members of the general public about how the respondent conducted its trading activities from the premises. The respondent persisted in using the same branding (which features a cannabis leaf) used by its other businesses, and the focus of its unilateral alterations made to the premises was inconsistent with its undertaking

²² This was one of the reasons for the addendum to the lease.

²³ The misrepresentation was material as it founded the applicant's right to terminate the lease.

²⁴ In breach of the lease agreement and the addendum thereto.

regarding the nature of the café business that it would have conducted going forward.²⁵

CONCLUSION

[26] I found that the respondent's conduct, as described, left the applicant with no alternative but to approach the court for urgent relief. Undoubtedly, the applicant stood to lose the business of its other tenants should the respondent be allowed to continue to occupy the premises, and it would have exposed the applicant to liabilities against its other tenants, who may have been entitled to cancel their lease agreements with the applicant. The confirmatory affidavits alone exhibited that the applicant ran the risk of having the premises forfeited as an instrument in unlawful trading activities.²⁶

[27] The applicant's insurer issued a notice of cancellation of the insurance policy and placed the applicant on notice because of a material change in the risk occupancy of the premises and opined that they were no longer prepared to keep the insurance cover over the applicant's building. Thus, I found that the respondent's conduct was manifestly unreasonable and allowed the applicant to charter its application as a matter of urgency. Finally, the applicant took several steps to settle the matter amicably before approaching the court for relief, and there was no other remedy available to the applicant.²⁷

[28] These are my reasons for having granted the order together with the costs.

E. D. WILLE
(Cape Town)

²⁵ The breaches could not be remedied by undertaking to conduct business contrary to the respondent's business model.

²⁶ This may find application in terms of the Prevention of Organized Crime Act, 21 of 1998.

²⁷ Luna Meubel Vervaardiges (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W).