MAHABUL S v KHETOO S & ANOR

2025 SCJ 111

SC/LD/CH/283/2024

THE SUPREME COURT OF MAURITIUS

(Before the Judge in Chambers)

LAND DIVISION

In the matter of:-

Sunilduth MAHABUL

Applicant

v

Sayahbye KHETOO

Respondent

And in the presence of:

Ministry of Housing and Land Use Planning

Co-Respondent

Judgment

This is an application for a *writ habere facias possessionem* to be issued against the respondent to quit, leave and vacate the commercial premises situated at Trou D'Eau Douce Village, Flacq.

Pursuant to a Crown Land lease agreement made on 13 September and 9 October 1991, registered and transcribed in TB 179/116, the applicant became the lessee of a portion of land of the extent of 200 m^2 being part of lot 60Bis (sub lot 6) at Trou D'eau Douce Village, Flacq for a period of 20 years expiring on 30 June 2010. Subsequently, the applicant caused to be erected on the said land a building composed of a basement and a ground floor.

The subject matter of the present application is in relation to the ground floor of the said building which, pursuant to a lease agreement dated 22 August 2003, the applicant rented to the respondent for the operation of a restaurant, known as the Green Island Beach Restaurant (the property *in lite*).

Factual background

Ex facie the applicant's affidavits, it can be gleaned that upon expiry of his lease agreement, on 18 November 2010 the applicant applied for its renewal, following which a site visit was effected by an officer of the then Ministry of Housing and Lands. It was observed and imparted to the applicant that a restaurant was fully operational on the site leased contrary to the lease agreement.

A letter of intent dated 28 August 2014 was issued to the applicant for the grant of a new building site lease *"on usual terms and conditions"* and wherein it is stated that *"the validity and effectiveness of the new lease is subject to a deed being drawn by this Ministry and signed by both parties to witness the agreement."* It is the applicant's contention that in so far as he was not allowed to sublet, the new lease agreement has not been signed yet inasmuch as this is subject to the condition that the respondent has vacated the property *in lite*.

Subsequently, he entered an action against the respondent before the District Court of Flacq but which he withdrew following the amendments brought to the Landlord and Tenant Act, 1999. Thereafter he caused a notice "Mise en Demeure" to be served on the respondent giving her notice to vacate the property *in lite* by 20 July 2024, but till now the latter has failed to do so. Hence the present application for an order of a writ *habere facias possessionem* to be issued against the respondent to quit, leave and vacate the property *in lite* within a reasonable delay as may be determined by this Court.

The respondent is resisting the present application and has moved that it be set aside on the following grounds which can be summarized as follows:

a. The applicant does not hold a valid lease agreement in respect of the property *in lite* and hence has no locus *standi* to enter this present application as he is neither the owner and/or valid lessee of the property *in lite*.
b. There is no urgency.
c. The Judge in Chambers has no jurisdiction to entertain the present application.

On the merits, the respondent has pleaded that

(i) she is a protected tenant notwithstanding the *"alleged"* (sic) amendments in the law and;

(ii) she has a "droit de retention" on the property *in lite*.

Analysis

I have duly considered the submissions of learned Senior Counsel appearing for the applicant and learned Counsel for the respondent and the affidavits of the respective parties as well as the documents annexed thereto.

I propose to deal with the preliminary objections as reproduced above and then the defences on the merits of the present application.

Does the applicant hold a valid lease agreement

It is trite law that in an application for a writ *habere facias possessionem*, the primary requirement is for an applicant to have a clear and unambiguous title to the property *in lite*. Once the applicant has satisfied this condition, the onus then shifts on the respondent to establish that he has a serious and *bona fide* defence - vide **Gujadhur vs Reunion Ltd and Gujadhur & Sons Ltd [1960 MR 208]** and **Lallmohamed vs Matombé and Anor [1966 SCJ 146]**) where the following extracts are of pertinence:

> *"…the onus is primarily on the applicant to establish a clear and unambiguous title to the immoveable property he claims when the onus is thereafter shifted to the respondent to show that he has a serious and bona fide defence to put forward. Should the applicant fail to establish such a title, the order cannot in any event issue……..."*

In the present case, it is the respondent's contention that the applicant does not have a clear and unambiguous title to the property *in lite* inasmuch as he only has a "letter of intent" dated 28 August 2014 from the co-respondent for the grant of a new building site lease. Reference was made to the case of **Mackay M R P and Anor v Philippe J G and Ors [2009 SCJ 296]** and the judgment of the learned Judge in Chambers in **Ramsaha & Co.Ltd v. Dantier E. [2018 SCJ 352].**

Whilst it is true to say that as at date no lease agreement has been signed between the applicant and the co-respondent, can it be said, however, that the applicant is a licensee as per the respondent's contention and therefore has no locus to enter this present application. Or can it be said that the lease has been renewed by way of "tacite reconduction" pursuant to article 1738 of the Code Civil Mauricien (CCM) since the applicant was allowed to remain in occupation after the expiry of the lease in 2010 as submitted by Learned Senior Counsel for the applicant.

Article 1738 of the CCM reads as follows:

> *"Si à l'expiration des baux écrits, le preneur reste et est laissé en possession, il s'opère un nouveau bail dont l'effet est réglé par l'article relatif aux locations faites sans écrit."*

The operation of article 1738 of the Civil Code is subject to the following conditions as illustrated from the following extracts in **Encyclopédie, Jurisclasseur Civil Code**:

> *"§ 4 La tacite reconduction reposant sur une présomption de volonté des parties (Cass. 1re civ., 31 mars 1965: D. 1965, p. 472; RTD civ. 1965, p. 822, obs. Cornu) est établie à partir de faits déterminés, qui en constituent les conditions et qui sont : l'existence d'un bail initial expiré ; que le preneur soit laissé en possession cela, sans opposition du bailleur.*
> *L'existence de cette présomption de volonté est souverainement appréciée par les juges du fond (Cass. 3e civ., 16 mai 1973: Bull. civ. III, n° 348).*
>
> *"§ 7 L'article 1738 du Code civil attache la tacite reconduction au fait que le preneur est laissé en possession. Mais cette dernière n'a valeur de présomption qu'à la condition d'être effective, d'être suffisamment prolongée, d'avoir été connue du propriétaire, de ne pas être équivoque, de ne pas être contredite par une manifestation de volonté."*
>
> (Underlining mine)

The above conditions have been endorsed by the Supreme Court namely in **Dowlut M R v Eldomotors Limited [2013 SCJ 263]** and **Caudan Development Limited v Comptoir Colonial de Chamarel Ltée [2010 SCJ 444],** cited by learned Senior Counsel for the applicant. Further, in **Tauckoor S v The Central Water Authority [2008 SCJ 255],** it was observed that "the Court will find a "*tacite reconduction" where the intention of the parties is clear and free from doubt."* Reference was made to the following note from **Code Civil Annoté Fuzier -Herman - Tome VI- Livre III – Titre VIII – Articles 1738 à 1740:**

> *"8. Il faut également, pour qu'il y ait tacite reconduction, que le preneur se maintienne dans les lieux loués, avec l'assentiment du bailleur ; ou, comme le dit l'article 1738 qu'il soit "laissé en possession". Il s'agit, en effet, d'un nouveau contrat pour lequel le consentement des deux parties est nécessaire.*
>
> *Il n'y a donc pas tacite reconduction, parce qu'i y a doute sur la volonté du bailleur, lorsque celui-ci a ignoré le maintien en jouissance. Cass. Civ. 9 févr. 1875 [S. 1875 1. 158, Ref. Sirey, D. P. 1876. 1. 27].- Caen, 26 août 1880 [Rec. Caen, 1881, p. 175]."*

Turning to the instant case, there is undisputed evidence that the lease granted to the applicant has already expired on 30 June 2010. Further, it clearly transpires that upon expiry of the said lease, the applicant was allowed to remain in occupation of the State land without any opposition from the co-respondent and *"au vu et au su"* of the co-respondent. It is also not disputed that up to date the applicant is still in occupation of the said land and is paying the rent, which as per the submission of learned Counsel for the co-respondent *"is to be reckoned as payment in respect of the Applicant right of use and occupation of the site in question."*

Furthermore, the letter of intent issued to the applicant by the co-respondent indicates the latter's approval to grant to the applicant *"a new cum commercial site lease ……. on usual terms and conditions over the above-mentioned plot of State land ……."* and hence reveals the unequivocal intention of the co-respondent to renew the State land lease agreement made on 13 September and 09 October 1991.

It follows therefore that "tacite reconduction" as per the conditions laid down in **article 1738 of the CCM** does find its application in the present case in respect of the State land leased to the applicant and on which stands the property *in lite*.

Additionally, I find it pertinent to refer to the judgment in the case of "**Ramsaha"** (supra) relied upon by the respondent. It is significant to highlight that **"Ramsaha"** went on appeal and the decision of the learned Judge in Chambers was quashed and the Supreme Court ordered instead that the application be non-suited (Vide **Ramsaha & Co. Ltd v. Dantier E. [2020 SCJ 165].** The facts in **"Ramsaha"** are quite similar to the present case inasmuch as at the time of the application for a writ *habere facias possessionem* against the respondent, the lease which was granted to the applicant over the plot of State land on which stands the premises *in lite*, had already expired since 30 June 2018. The Learned Judge in Chambers held that the applicant no longer had a *"clear and unambiguous title"*. On appeal, the Supreme Court observed that *"although, the appellant's* (then applicant) *initial lease had already expired since 30 June 2018, there was clear evidence on record to the effect that the Ministry of Housing and Lands had made an offer for a renewal of the lease and the appellant had irrevocably accepted the offer."* However as the Ministry of Housing was not made a party to the case, the Supreme Court considered that "….*whether the appellant has a good title to the lease can only be determined in presence of the Ministry of Housing and Lands as lawful representative of the State and lessor of the State Land…..".* Hence, the Supreme Court ordered a non-suit *"so that in the eventuality of any fresh application for a writ by the appellant, such application would be determined in presence of the Ministry……."*

In the case in hand, unlike the **"Ramsaha"** case, the Ministry of Housing and Land Use Planning is a party to the present application (as co-respondent) and has put in an affidavit dated 03 October 2024 wherein its stand is very clear. Though averring that it is abiding by my decision, at paragraph 17 of the said affidavit, the co-respondent averred that it is supporting the present application *"inasmuch as Applicant was not authorized by the Co-respondent to sublet the building……."* This tends to show that the co-respondent explicitly recognizes the respondent as being an illegal occupier of the property *in lite.*

(Underlining mine)

Based on all the above considerations, I am satisfied that the applicant has discharged its burden of establishing that he has a clear and unambiguous title to the State land leased to him and on which stands the property *in lite*. As lessee the applicant has the required locus *standi* to enter the present application against the respondent – *vide* **Rangloll v. Nobin [1979 MR 94].**

Urgency

Though the issue of urgency has been raised as a preliminary objection, however the respondent did not offer any submissions on this particular aspect. Be that as it may, suffice it to say that urgency is not *per se* a material requirement in an application for a writ *habere facias possessionem.* As explained by Lallah Judge, as he then was, in **Ragavoodoo v Apayya and the Registrar of Associations [1985 MR 18]** referred to in the case of **Pavadi M W v Choyta S [2008 SCJ 243],** the summary jurisdiction of the Judge in Chambers in an application for a writ *habere facias possessionem* may sometimes lead to confusion:

> *"Far too often, confusion is made between the jurisdiction of the Judge in Chambers to grant relief and the jurisdiction of the Judge in Chambers to grant relief in matters requiring celerity so as to implement or protect a clear legal right to the exercise of which there is no serious or bona fide defence."*

The Court in **"Pavadi"** considered the rationale of this type of application, which is "*to protect a true and genuine owner against the need to resort to lengthy and costly proceedings according to the nature of his executory title*." **"Pavadi"** further referred to the case of **Ramlagun v Gangaram [1978 MR 206]** where Glover J, as he then was, found that *"l'urgence is not a material consideration"* in such cases.

Albeit the above considerations, the affidavit evidence reveals that once the Notice *"mise en demeure"* dated 29 May 2024 was served on the respondent and the latter has failed to vacate the property *in lite* within the delay mentioned in the said Notice i.e by 20 July 2024, the present application has been entered on 25 July 2024 i.e 5 days later. I pause here to state that computation of delay starts as from the date of the Notice *"mise en demeure"* which puts an end to the lease granted to the respondent. Hence, I fail to see how the applicant can be blamed for lack of urgency in entering the present application. Furthermore, it is undisputed that the applicant was not authorized to sublet the property *in lite.* This in itself accounts for the element of urgency in the present application made by the applicant to seek the

respondent's eviction (which he is trying to do since 2019) in order to regularize his situation with the co-respondent.

I therefore find no merit in this ground of objection which is set aside.

Jurisdiction

The respondent's objection to the jurisdiction of the Judge in Chambers to entertain the present application rested only on a mere averment at paragraph 2 (d) of her affidavit dated 11 September 2024 to the effect that *"The Honourable Judge in Chambers has no jurisdiction to entertain this present application"*. Albeit there is nothing on record to substantiate this objection, same is devoid of any merit in the teeth of the **Rule 3 (c) of the Supreme Court (Judge in Chambers) Rules 2002** which clearly provides for the jurisdiction of the Judge in Chambers *"in the case of an application for an Order for the issue of a writ habere facias possessionem ……..."*.

Furthermore, it is well established that any person who has a clear title to the property which he claims is being illegally occupied is entitled to apply to the Judge in Chambers to obtain an order for possession of the said property as propounded in **Damoo v Nuseeh [1990 SCJ 149]** cited with approval in **Societé Soeurs Chung Ah Pong v Zonnebloem Limited [2017 SCJ 405]:**

> *"It is a party's undisputed right to apply to the Judge in Chambers, as 'Juge des Référés', to obtain an order for possession against someone who is unlawfully in possession of an immoveable property without any right, title or capacity."*

The above objection is devoid of any merit and is consequently set aside.

Defences raised on the merits

The defences raised by the respondent are two-fold namely that she is a protected tenant under the Landlord and Tenant Act and that she has a "droit de retention" on the property *in lite*.

(i) Protected tenant under the Landlord and Tenant Act

At the very outset, it is pertinent to highlight that as far back as 2005 the Landlord and Tenant Act (LTA) 1999 has been amended to remove business premises from its ambit. The

last amendment was made by Act No.1 of 2022, so that the amended **section 3(2) of the LTA** now reads as follows:

> ***3. Premises to which the Act applies***
>
> *(1) …….*
>
> *(2) This Act shall not apply to –*
>
> *(a) ……...*
>
> *(aa) business premises let after 1 July 2005;*
> *(ab) business premises, where they were let on or before 1 July 2005, after 30 June 2022".*
>
> [Emphasis added]

It is the respondent's submissions that notwithstanding the amendments brought to the LTA, the respondent remains a protected tenant inasmuch as the lease agreement between the applicant and the respondent dates as far back as 22 August 2003. Learned Counsel for the respondent also alluded to the fact that the LTA 1999 has been repealed and he submitted that by operation of section 17 (3) (b) and (c) of the Interpretation and General Clauses Act (IGCA), the respondent retains all the rights and privileges that she had in 2023 under the LTA, 1999. I am at pain to follow such an argument which is untenable for the simple reason that the LTA 1999 has not been repealed but only amended to exclude business premises from its ambit as mentioned above.

Now, a careful reading of section 3(2) of the amended LTA clearly indicates that as from 30 June 2022, business premises are no longer governed by the LTA, as correctly submitted by learned Senior Counsel for the applicant. Indeed, since 01 July 2022 tenants of business premises, whether those premises were let on or before July 2005 or let after July 2005, cannot avail themselves of the defence of "protected tenants" under the amended LTA. The lease of business premises is now governed by the general provisions of the CCM as reaffirmed in the case of **Japa Motors Ltd v Fazil Hosenbocus & another [2024 SCJ 108]** where it was pertinently observed that *"the amendment made to the LTA 2005 is meant to remove business premises from its ambit so that tenants of business premises are no longer considered to be protected tenants".*

In the present matter, the lease agreement between the two parties was for a period of five years as from 22 August 2003 as evidenced by Annex A5 of the applicant's affidavit dated 25 July 2024 and which specifically made mention that *"the said lease may be renewed for a further period upon terms & conditions to be agreed by both parties"* (emphasis added). Based on the evidence on record, it transpires that after the expiry of the said lease, there has been no renewal of the written lease agreement. Therefore, it cannot be said that the

relationship between the two parties is still governed by the written lease agreement of 2003. Additionally, pursuant to the amendment made to the LTA as elaborated above, the respondent is no longer considered to be a protected tenant under the amended LTA.

However, it is on record that the respondent has remained in occupation of the property *in lite* after expiry of the lease agreement. Hence, for all intents and purposes, the respondent is now in verbal occupation of the property *in lite* by virtue of a "bail sans écrit" which pursuant to **article 1736 of the CCM** is "à durée indéterminée". Hence both parties can put an end to that lease by "donner congé" as stated in **Cowalparsad and 8 ors v Ministry of Housing and Lands and 3 ors [2007 SCJ 225]**.

This is exactly what the applicant did by giving notice of termination of the lease to the respondent on 29 May 2024 to vacate the property *in lite* by 20 July 2024.

I therefore hold that the defence of 'protected tenant' is not applicable in the present matter.

(ii) "Droit de retention"

In her second affidavit dated 5 November 2024, the respondent has averred, *inter alia*, the following:

> *"…….I have caused to bring to the said premises considerable structural enhancement, refurbishment and other amelioration to the knowledge of the Applicant and which expenses he has never refunded to me although amicably requested to do so. I am advised and verily believe that I therefore hold a 'droit de retention' on the aforesaid building."*

I take note that apart from the above sweeping statement, there is nothing on record to substantiate the respondent's claim to a "droit de retention". On the authority of **Ramnauth v Ramnauth [1969 MR 31]**, it is clear that this defence cannot amount to a serious and *bona fide* defence as aptly explained in the following extracts from the aforementioned case:

> *"Since, however, the acceptance by the judge of a mere allegation of a right by a respondent would have for result to stultify his power to grant speedy remedy to an applicant vested with a clear title, there was gradually evolved the principle that the judge would not stop at such allegation but would see whether sufficient evidence had been at the same time produced by the respondent from which the judge could pronounce on the seriousness of his "contestation" [see Dalloz, Encyclopédie de*

Procédure Civile, vo. Référés note 85; Dalloz, Nouveau Répertoire, Vo. Référé, nos. 39) et Seq. S. 1948.1.157; S. 1928.1.54]. A study of the French case law on the subject is, therefore, bound to be of some profit.

An examination of that case law and of our own shows that a confusion is sometimes made between those facts that would, if established, constitute a defence or "contestation" and those that would tend to show that the defence or "contestation" is invoked seriously and bona fide. A mere statement of those of the former kind will not suffice. There must in addition be averred such facts and circumstances as are likely to help the court or judge in assessing the seriousness of the defence."

[Emphasis added]

In the present matter, it was therefore incumbent on the respondent to establish such facts and circumstances as are likely to help me in assessing the seriousness of her defence. However, this she has lamentably failed to do inasmuch as apart from the mere *ipse dixit* of the respondent of her alleged "droit de retention", which moreover was raised at a late stage, the respondent's claim that she has a "droit de retention" has remained a mere allegation and unsubstantiated by any evidence.

It follows therefore that the defence of "droit de retention" invoked by the respondent does not amount to a serious and *bona fide* defence in the present matter.

Conclusion

Based on all the above considerations, I accordingly grant the present application.

I therefore order the respondent to quit, leave and vacate the property *in lite* **at latest by 30 June 2025**, failing which a writ *habere facias possessionem* shall issue. With costs.

I certify as to Counsel.

K Bissoonauth
Judge

21 March, 2025

For Applicant	:	**Mrs S. Bundhun-Cheetoo, Attorney-at-Law** **Mr S. Boolell, Senior Counsel** **Mr Z. Seekdaur, of Counsel**
For Respondent	:	**Mr V.R. Luchmaya, Attorney-at-Law** **Mr J. Sibartie, of Counsel**
For Co-Respondent	:	**Ms. A Mohun, Senior State Attorney** **Mrs S. Hajee Abdoula-Mamode Ally, Senior State Counsel**