IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 52/96

In the case between:

HAROON GANGAAT Applicant

and

S.A.M. (PTY) LIMITED Respondent

CORAM

S.W. SAPIRE A.C.J.

FOR PLAINTIFF MR. L. MAMBA

FOR RESPONDENT ADV. KHUMALO

Judgment

(22/3/96)

This is an application for rescission, of judgment arising in the following circumstances:

S.A.M. (Pty) Limited to which I will refer to as the applicant (notwithstanding that it is respondent in the present application for rescission) applied to court on motion and as a matter of urgency for an order ejecting the respondent Haroon Gangat (to whom I will refer as the respondent, notwithstanding that it is he who is the applicant in these proceedings) from the premises described as shop No. 2 Lot 61 Louw Street Manzini.

In the founding affidavit, attested to by one Shehazadi Begum Ahmed Adam, she describes herself as an adult female, widow and Director of the applicant. The applicant is a company registered in Swaziland and the respondent is an individual who is presently conducting business in shop No. 2 Lot No. 61 Louw Street, Manzini which I will refer as the premises.

The applicant had entered into a lease, a copy of which was attached to the founding affidavit in terms of which it had taken premises comprising both shop 1 and shop 2 at Lot No. 61 Louw Street on hire.

The lease was of three years duration commencing on 1 November 1993. It also provided for an option to renew for a further three years. The rental for both shops was E2430.00 per month. The rental was said to be subject to escalation or de-escalation relative to the cost of living index.

Adam then went on to refer to the terms of the lease which prohibited sub-letting of the premises without the prior written consent of the lessor. Such consent however, (and this was not stated in the founding affidavit itself, but is to be found in the paragraph 10 of the lease to which the reference is made) was not to be unreasonably withheld. The benefits of such a clause are for the landlord and may-be waived, by it.

In May 1995 so it is alleged, the applicant entered into an oral agreement for a monthly subtenancy of

shop No. 2 with the respondent and the agreement related not only to the shop itself but to certain fittings situated therein and the Take Away Trading Licence, which was issued to a company known as Pick A Plastic (Pty) Limited. The monthly rental was E6500.00 per month. The deponent Adam says that she discovered that the applicant was acting in breach of the lease in subletting to the respondent without the prior consent of the Lessor, and using this as a pretex or excuse informed the respondent that the applicant was terminating the oral lease, and that he, the respondent would have to vacate the premises at the end of December 1995.
This naturally was not welcome news to the respondent who protested, but he was informed that whether or not the agreement of sublease was enforceable in law having regard to the provision in the main lease, limiting the right of the lessee to sublet, the applicant was entitled to cancel and was infact so doing by giving a month's notice.

The respondent did not vacate shop No. 2 at the end of December and notwithstanding being requested to vacate by Mr. Hussaian who is a co-director of the applicant, remained in occupation of the premises.

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The applicant then received a letter from the respondent who had consulted an attorney and the attorney, and the attorney made three points.

a) She stated that applicant had no formal contract of sale of the business with the respondent. Consequently she maintained the applicant count not order the respondent, her client, to leave the premises. The logic of this is not quite clear.
b) Legally, she said, he (meaning her client) can only leave the premises if a court order is served on him. I failed to understand why this is so, I do not know.
c) She said she had advised the respondent to rent the shop directly from the Swaziland Property Market as there was no written sublease between the parties and therefore she maintained the applicant could not in law eject. Again, I fail to understand what respondent's attorney was trying to say.

If there is a lease between the applicant and the owner of the property, which it is common cause is the case, then the applicant being in, or having received, possession of the property pursuant to that lease, it is the applicant which is entitled to the occupation thereof, and may eject any strangers who are there.

The upshot of it was that there was an application for ejectment, which was opposed by the respondent.

In argument when the matter first arose the counsel for the applicant indicated that no reliance would be placed on the alleged illegality of the sublease, but that the applicant was relying on the fact that it was the lessee in possession and that the respondent's sublease had either been terminated or on the respondent's story did not exist at all. In either case, the respondent had no right to be in the premises.

There was one issue on which there was a factual dispute. That was whether or not the applicant had given one month's notice. Because of this dispute of fact of limited ambit, I refer the matter to evidence

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on this one aspect of the case. This took place on the 23rd of February 1996. . The matter was postponed for the hearing of evidence on the 29th February i.e. six days later. There is a note on the

court file to this effect which was prepared by the clerk whose duty it is to make such record.

When the matter was called on the 29th February only applicant appeared and the respondent was in default. Evidence was led of the notice which had been given and in due course without giving reasons I ordered the ejectment of the respondent from the premises with costs.

Shortly thereafter an urgent application was made to stay execution pending the outcome of an application for rescission. This is the application which is now before the court.

Clearly this application does not fall under Rule 42 but can properly be heard as an application at common law for rescission.

An explanation has been given for the respondent's nonappearance on the 29th February. The reason for the default is a mistake made by respondent's counsel, and I would certainly not have the results of that nonappearance visited on the applicant. There is no question of the bona fide of the respondent's counsel.

There is however a major difficulty which the respondent has in regard to the application. The respondent in my view has failed to show a defence to the claim. The respondent i.e. Gangat firstly repudiates any lease with the applicant.

If he is correct in so doing, then he has no right to be there for any reason whatsoever. He certainly has no right to occupy the premises adversely to the applicant who it is common cause is the lessee of the premises and who has been in possession in terms of such lease. In this connection the decision in SOREC Properties Hilbrow (Pty) Ltd and Another vs vs Van Ryan 1981 (3) SA 650 is pertinent, I did not understand the respondent's counsel to argue to the contrary.

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This being so and there been no defence to the original application, the application for rescission is refused with costs.

S.W SAPIRE

ACTING CHIEF JUSTICE