

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1052/95

In the matter between:

EMMANUEL UDOIDUNG Applicant

and

FARHAD SHADRAVAN 1st Respondent

ACCOUNTANCY TUTORS (PTY) LIMITED 2nd Respondent

CORAM: S.W. Sapire A.C.J.

FOR THE APPLICANT Mr. P.R. Dunseith

FOR THE RESPONDENTS Mrs. J. Currie

Judgment

(5/7/96)

The applicant has applied on Notice of Application dated 16th June 1995 for an order affording him relief under different headings as follows –

- a) Declaring the lease agreement dated 21st October 1994 between the applicant and the 1st respondent to be of full force and effect and binding upon the 1st respondent.
- b) He asks for an order directing the 1st respondent to comply with his obligations in terms of the said lease agreement.

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- c) He further seeks judgment against the 1st respondent in his favour for the sum of E13,500.00, and interest thereon at 9% per annum a tempore morae to date of payment.
- d) Lastly the applicant seeks an order directing the 1st respondent deliver to the applicant upon termination of the said lease agreement certain movable property comprising :

- i. 2 playground double swings;
- ii. 2 ceiling fans with light fittings;
- iii. one air conditioner

The application is opposed.

In an affidavit attested to by the applicant attached to the notice of motion, the applicant after describing the parties states as follows:

(a) He describes himself as an accountant, lawfully residing and working in Swaziland. He holds 50% of the shares in and is a director of the company Accountancy Tutors (Pty) Limited which is the second respondent. The remaining shares are owned as to 30% by his wife and 20% are held by one Patience Ebel.

It is common cause that the second respondent was at all material times since the 20th February 1994 registered owner of plot No. 444 Featherstone Street, Mbabane over which property the Swaziland Building Society had registered a first mortgage bond to secure its mortgage loan to the second respondent.

On the 1st March 1994 the second respondent leased the property to the applicant for a period of three years, commencing on the 1st March 1994 at a fixed monthly rental of E2,500.00. The lease provides for an option to renew the tenancy for a further three years at the same rental.

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The applicant took occupation of the property and resided therein until the 31st October 1994.

The applicant entered into a written agreement of some lease with the first respondent on the 21st October 1994 for a period of three years, commencing on the 1st November 1994 at a monthly rental of E2,700.00. This rental is subject to adjustment on each anniversary of the commencement date in accordance with a formula based on increases or decreases in the cost of living index published by the Central Bank of Swaziland.

The first respondent took occupation of the property, and initially paid rental the applicant's agents Messrs. Swaziland Property Market (Pty) Limited.

The second respondent fell into arrears with the payment of its bond instalments to the Swaziland Building Society, and although the applicant made efforts on behalf of the second respondent to negotiate an extension of time, the property was sold in execution on the 27th January 1995.

The first respondent who is the applicant's tenant in terms of the agreement of sub lease before referred to, purchased the property at the sale in execution for a price of E290,000.00.

At the time that this application was lodged, the property had not yet been transferred to the name of the first respondent. Notwithstanding this, as from the 1st January 1995 the first respondent has failed to pay the monthly rental and is presently indebted to the applicant in the sum of E13,500.00 representing the rental for the period from 1st January to the 31st May 1995.

According to the applicant, the first respondent is refusing to pay rental because he purchased the house at the house at the sale in execution.

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The applicant I support of his claim for delivery of movables states that when he rented the property to the first respondent there was certain playground equipment comprising two double swings and two ceiling fans with light fittings and an air conditioner which had been personally installed by the applicant at his own expense and which do not belong to the second respondent or form part of the premises.

The respondent though appears claims that he acquired ownership of these items when the property was purchased. In an answering affidavit filed by Farhad Shadravan, the first respondent. This affidavit does not really raise any dispute of facts and the substantial allegations made by the applicant are indeed unanswered.

It is clear that the purchase of the property on the sale on execution had no effect on the lease between the applicant and the second respondent nor did it in any way affect the lease between the first respondent and the applicant.

It is true that when a lessee acquires the property which he has taken on hire, if the lessor is the owner and from whom the property is acquired, the lease would be extinguished by. In other words the lessee would be both the owner of the property and the lessee thereon. In this case, the position is different as the first respondent occupies the property by virtue of a lease with the applicant on acquisition of the property by the first respondent from the second respondent, the applicant's lease remains intact. On the other hand, the applicant's obligations to the second respondent will on transfer become payable to the first respondent.

In so far as there are receiptal obligations under the leases, the rental payable will be discharged by set off savings so far as the obligations under the sublease are greater than those under the original lease.

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It follows that the applicant is entitled to an order in terms of prayer 8 in the notice of motion. It also follows that the first respondent is to comply with his obligations in terms of the lease agreement and that he is obliged to pay the arrear rental of E13,500.00 together with interest thereon at 9% per annum *an tempore more* against this. The first respondent is entitled to judgment on his counterclaim for E1,788.82 in respect of rates and taxes on the leased premises paid by the 1st respondent in discharge of an obligation of the applicant.

The evidence relating to the movables is such a conflicting nature that it is impossible to make any decision thereon on the papers as they stand. This is not a case where a referral to evidence would be in the interest of a party.

Accordingly I am making no order on prayer D in the notice of application.

Accordingly there will be judgment for the applicant and an order is made -

- a) declaring the lease agreement dated the 21st October 1994 between the applicant and the 1st respondent to be in full force and in effect and binding upon the 1st respondent.
- b) directing the 1st respondent to comply these obligations in terms of the said lease agreement and
- c) ordering the 1st respondent to pay to the applicant a sum of E13,500.00 and interest thereon at 9% per annum *an tempore more* on date of payment.

The first respondent is to pay the applicant's costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE