

IN THE HIGH COURT OF SWAZILAND

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M & F MARKETING (PTY) LTD

vs

INTERCON CONSTRUCTION (PTY) LTD.

Case No. 3493/97

Coram

S.W. Sapire

For Applicant

Mr. B. Simelane

For Respondent

Mr. P. Flynn

JUDGMENT

(16/12/97)

The applicant has come to Court on application as a matter of urgency. The material relief which it seeks is that it be allowed access to its goods which are at warehouse no. 1 plot 494, Interpark, Matsapha Industrial Sites.

The circumstances giving rise to this application are described by one Maziya in the finding affidavit.

Before proceeding to deal with the application itself I again notice that in the opening paragraph of the finding affidavit the deponent claims that he is duly authorised to make this affidavit on behalf of the applicant. I have repeatedly pointed out that no one requires authority to make an affidavit. The making of an affidavit is a personal action by the deponent in the same sense as the giving of oral evidence in the witness box. As far as the applicant is concerned the authority of its attorney to represent it has not been charged.

The applicant was the lessee of certain premises owned by the respondent. The respondent has sued the applicant in the Magistrate Court at Manzini for E20 100.00.

It appears that default judgment was entered against the applicant for the amount claimed together with an order for ejection from the property with costs. This judgment was however rescinded but it is common course that the amount of arrear rental owing, the lease has terminated and that the applicant has vacated the premises formerly leased by it and the respondent as owner has been restored to possession.

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There are on the premises a quantity of vehicles comprising raw materials, sawing machine spare parts and finished products which the applicant claims are more than two million Emalangeni in value.

I find it a matter of some surprise that goods to this value would have been attached in order to secure a claim of some E20 100.00. It is not for this court on this application to enquire into or to deal with this matter. I must accept that there is an attachment or interdict in respect of all valuables in the premises.

The relief sought by the applicant is access to its goods and property. In effect the applicant is seeking an order requiring the respondent to allow the applicant onto its property. It is not quite clear what is meant by the word "access" but I assume in favour of the applicant that what it wants to do is to go on to the property with a potential buyer for the valuables in order to facilitate the negotiations of a sale of all the goods.

The fact that the goods are under attachment is not really relevant and means only that the goods may not be removed from the premises which were formerly leased until the arrear rentals are paid.

The only defence the respondent has to this claim for the arrear rentals is an alleged counterclaim for damages in an amount of E2 000 000.00. It is tried law that an illiquid claim may not be set off against a liquidated claim. This being so the goods remain subject to the landlord's hypothec to the extent of the arrear rental.

There is however no proper valuation and description of the goods which are under attachment and it does seem to me that if there is truth in what the respondent says that it may claim release of all the goods to the extent that the value thereof exceeds the amount of the respondent's claim.

It is clear however that the respondent has misconceived remedy in the situation. In order to be granted an order allowing the respondent or its representative access to the goods by necessary implication it would be necessary for the respondent to have some right to go on to the respondent's premises where the goods now are.

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The respondent has no right in law to come up to the premises notwithstanding the fact that some of its goods may be there and the respondent has no corresponding obligation to allow the applicant or its representative to come on to the property. This being so the order sought by the applicant cannot be made and accordingly the application is dismissed with costs including fees of counsel which are satisfied as necessary in terms of the rule.

S.W. SAPIRE

ACTING CHIEF JUSTICE