

IN THE HIGH COURT OF SWAZILAND

CASE NO.12/96

In the matter between:

HESTER LOUBSER TRUST                      APPLICANT

VS

E B INVESTMENT LIMITED                      1ST RESPONDENT

AND

KAL GRANT                                      2ND RESPONDENT

CORAM

: J.M. MATSEBULA J

FOR THE APPLICANT                              : MR. B.G. SIMELANE

FOR THE RESPONDENTS                              : MILLIN & CURRIE

JUDGMENT 05/07/96

On 5th January 1996 the Applicant under a certificate of urgency moved a notice of application requesting the court to issue inter alia a rule calling upon the Respondents to show cause on a date to be fixed why:

(b) (i) they their agents, employees or any person acting on their behalf should not be interdicted and restrained from entering the premises described as Portion 649 of Farm 188 Hhohho District Swaziland for any purpose other than to inspect same in terms of the Lease Agreement entered into between Applicant and 1st Respondent

(ii) they or their agents employees or any other person acting on their behalf should not be

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interdicted and restrained from interfering or acting in any manner whatsoever whether direct or indirect detrimental to the operations of the business known as "The Castle conducted in the premises referred to in paragraph (i) above (iii) the Respondent should not be ordered to pay costs jointly and severally the one paying the other to be absolved on a scale between attorney and client,

(c) that orders b(i) and b(ii) operate with interim effect pending the return date.

Accompanying the application was an affidavit of one Hester Maria Petronella Loubser who is the sole trustee of Applicant. In her affidavit the deponent referred and annexed annexure 'A' - being a copy of a lease made and entered into by and between Applicant and 1st Respondent and according to annexure 'A' deponent represented Applicant and 2nd Respondent represented 1st Respondent respectively.

All the terms and conditions are clearly set out in annexure 'A' - the lease agreement I need not repeat

them here save to refer to Clause l(c) which states and 1 quote.

"As from the 1st day of the month following that in which the restaurant or dining room and kitchen and swimming pool are all completed and a hotel liquor licence is granted to

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the said Hester Maria Petronella Loubser in respect of the premises the present arrangement set out in (a) and (b) above shall fall away and all the buildings and improvements on the said property shall be regarded as one unit and the lessee will then commence paying E44,000,00 per month for the property together with all improvements as a whole, end of quote.

I have quoted the above clause because it seems from reading it that the Respondents under the Lease Agreement had some obligation of building or erecting certain structures on the premises and at the completion of which and when certain licences were obtained then a rental of E44 000,00 would be payable by the Applicant In her affidavit deponent for Applicant states that these structures had not been completed by the Respondents. It follows therefore that the confirmation of the rule if it is confirmed should be such that the Respondents are placed in a position that they can carry out the terms and conditions of the lease agreement annexure 'A'.

I have gone through the whole of annexure 'A' and am unable to find any clause dealing with the right of the Respondents as allowing them to do what prompted the Applicant's attorneys to write annexure 'B' nor the rights of Respondents to invite other people to go and carry out inspection of the premises as deposed to in paragraph 10.1

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10.5 to paragraph 12 Applicants founding affidavit (read paragraphs in application).

Loubster in her replying affidavit paragraph 7 states in reference to annexure 'H' whose contents purport to have cancelled annexure 'A' that she holds 1st Respondent to the terms of annexure 'A' If Applicant's attitude is to hold 1st Respondent to the annexure 'A' all the more reason that the Respondents be allowed access to the premises in order to carry out their obligations in terms of the lease. In terms of annexure 'A' paragraph 10 the Respondents are entitled to reasonable access to the leased premises for the purposes of inspecting them. I can see nothing in the prayers requesting the granting of the rule suggesting that that right will be affected.

I do not propose to deal in details with the deed of sale save to point out that the lessee's rights are adequately protected in terms of the maxim - "HUUR GAAT VOOR KOOP" which loosely interpreted means "hire goes before sale".

According to the application of this maxim if a vendor sold his property the purchaser was obliged to recognise leases not in longum tempus. Short term leases were those under 10 years under the operation of this maxim huur gaat voor koop the lessee's renewal periods of a short duration were equally protected see in this regard SHALALA VS GELB

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1950(1) SA 866(C). Under the circumstances the court confirms the rule as framed.

As regards the awarding of costs on an attorney and client scale. A court will refrain from awarding costs on an attorney and client scale where by so doing it would be seen as inhibiting a litigant of its right to litigate. In the present case however there are factors which indicate that the Respondents

acted with a total disregard of Applicant's rights I refer to annexure 'B' annexure 'I' and the fact that an application was made to compel Respondents to produce the deed of sale and that this was not done notwithstanding that the court had so ordered. Only on the day of the hearing of this matter was the document produced. Considering all the above the court feels justified to order costs on attorney and client scale - applicant to properly tax such bill.

J M MATSEBULA

JUDGE