HIGH COURT OF SWAZILAND

RMS Tibiyo (Pty)Ltd

Plaintiff

V

Alex S Shabangu

Defendant Case No 2398/98

Coram Sapire, CJ

For Plaintiff Mr. Flynn

For Defendant In Person

Judgment

18/08/99

The Plaintiff conducts the business of property management on behalf of its landowner clients. One of the properties managed by it, comprises office accommodation in a building in Manzini known as Bhunu Mall. The Defendant, an attorney had prior to May 1997 occupied offices in Bhunu Mall, from which he conducted and still conducts, his practice.

In May 1997, at the termination of the agreement that then governed defendant's occupation, the plaintiff offered to lease an increased area to the Defendant, The plaintiff set out the terms, which the parties had discussed, some days earlier, in a letter dated 12th May 1997. The Defendant indicated his acceptance of the offer by signing an endorsement at the foot of the document on the same day. The agreement so concluded was between the plaintiff and the defendant. The parties intended that this agreement be

binding on them until the Defendant and the plaintiffs principals who owned the property, executed, a more comprehensive deed.

Although Plaintiff submitted a draft lease to the Defendant for signature, the defendant declined or neglected so to do. The agreement of the 12th May 1997 has therefore remained operative. The Defendant has been and remains in occupation of the premises described in "RMS 1", annexed to the Particulars of Claim, which is the letter recording the agreement of the 12th May 1997.

The Defendant has consistently and persistently failed to pay rental timeously, and has fallen into arrear to an alarming extent. Defendant's failure to honour his undertakings to make good his default has resulted in the present action. The summons was issued and served in October 1998. The plaintiffs claim was initially for payment of E32 882.82 said to be in respect of arrear rentals, and "operational costs", (The latter being an item provided for in the agreement in addition to the rent.)

E550.00 was claimed for the costs of the lease which was never signed. This claim was not persisted in at the trial.

The Plaintiff claims interest on the overdue amount.

Lastly plaintiff sought as it still does seek, and order of ejectment. There is some difficulty with this claim, as I will later demonstrate.

The plaintiff amended the particulars of claim to provide for an augmented claim for arrear rentals and operational costs so as to include amounts which fell due after the service of the summons.

The Defendant has defended the action and has file a plea which he personally signed albeit in the name of the firm of attorneys. The plea is in a number of respects misleading.

The first point made in the plea is that the Defendant challenged the Plaintiffs authority to manage the property in which the premises are situate on behalf of the owner. This issue is entirely irrelevant for as has been seen the contract relied on by the Plaintiff is one to which the Defendant and the plaintiff were parties as principals

The Defendant denied that the contract was in writing. This, notwithstanding that a copy of the contract, bearing Defendant's signature was attached to the combined summons. Paragraphs 3.2 and 3.3 of the plea are difficult to understand or reconcile, especially as no annexure A, which the defendant admitted signing was attached. The pettiness of the issue was demonstrated when at the trial the defendant admitted the original of the letter as being the contract between the parties. Defendant sought to justify his attitude by pointing out that on the copy attached to the summons figures written in ink had been inserted, which did not form part of the document signed by him

Defendant's next significant denial was that there was any agreement in terms of which rental would be paid monthly. Having regard to the wording of the letter of 12th May 1997, which was admitted to constitute the contract, this denial could not have been in accordance with the facts as known to the defendant himself. Equally fatal to the defendant's contentions in this regard is the wording of his own letter to the Plaintiff dated 31st August 1998 in which he stated

"I wish to place it on record that on or about May, 1997, we entered into a new lease agreement with yourselves in terms of which the office space let to us was increased by the incorporation of office number 18

My offices tendered the rentals for each of the three months subsequent to the conclusion of the lease agreement when such rentals fell due for payment, " (my italics)

The defendant's evidence at the trial given by him in attempting to advance his case on this issue was pathetic. Based on this untenable denial he tried to argue that the rental was only payable in arrear and due at the end of the lease. He found himself contradicted by his own words not only those quoted but written by him in admission of his indebtedness on other occasions. His failure to answer of contradict the allegation in

RMS 4 that the rental was payable on the First day of each month, was a farther nail in the coffin of this defence.

These were not the only strings to the defendants bow. In para graph 11.3 of the plea the defendant denied that his admission of indebtedness in his letter of 6th May 1998 in an amount of E28 617.17 "reflected in your statement" was in respect of arrears. He also denies that he undertook to liquidate the amount in the manner alleged by Plaintiff. Plaintiffs version is wholly supported by the letter, which controverts the defendants denials. He goes on however to say that if he did undertake to make payment, (which he had just denied) such undertaking was subject to a suspensive condition. The provisions of the condition itself are left delightfully vague. As was to be expected from such contradictory pleading, the evidence given in support thereof was hopeless.

Defendant's necessity to find an excuse for not paying his rent mothered other inventive defences. At one stage, he claimed that he had arranged with plaintiff's representatives to make payment in fall discharge of his obligations. This transmuted itself under cross-examination into some species of pactum de non-petendo, settlement or novation. All these had no basis in fact and were refuted not only by the evidence of the plaintiff, but by defendant's own letters.

After hearing both sides, it became abundantly apparent that the defendant has no answer to the plaintiff's claim; only the amount thereof has to be determined. Plaintiff compiled and presented a

schedule covering debits and credits passed arising from defendant's occupancy of the premises during a period commencing in May 1996 and ending in June 1999. Only transactions occurring during the period of the lease are relevant to the present action..

The lease provided for initial monthly rental calculated at E31, 75/m2 subject to annual escalation of 12%. This worked out at E2776, 86 for the first year, 3110.08 for the second year and E3483,29 for the third year. Operational cost was stipulated at E10, 00/m2 that translated to E874.60 monthly throughout the lease. The agreement also

provided for an additional deposit of El926, 86, The total amount payable by the defendant is as follows

a) Rental June '97 to May '98 12 x 2 776,86 = 33322.32
b) June '98 to March '99 10 x 3110.08 = 31100.80
c) Operational costs 22 x 874.60 = 19241.20
d) additional deposit = 1926.86

Total 85591.18

Less payments Aug 97 2 800,00

Sept 6 361.76

Oct 3 000.00

Jan 98 7 000.00

June 7 000.00

Aug 11 000.00 37161.76

Amount owing at Mach (Date mentioned

in summons) 48429.42

The amounts appearing in the schedule as charges for interest and electricity are not items provided for in the agreement. There has been no proof of the electricity consumed or the cost thereof. I have not taken into account rental and operational costs accruing or payments made after March 1999 this being the date mentioned in the particulars of claim.

There is no forfeiture clause in the agreement relied upon and no proof that notice of cancellation has been given. Plaintiff's letter of demand makes no mention of ejectment, or termination of the lease. Furthermore, plaintiff is continuing to claim rental as it has been notwithstanding e institution of the action. All this is consistent only with the lease still being operative. An order of ejectment is therefor, not a possibility.

The interest to which the plaintiff is entitled, in the absence of any proof of an applicable conventional rate, is to be calculated at 9% per annum on the balance outstanding from time to time. Interest is not however to be capitalised, so that the outstanding balance upon which the calculation is made is not to include mora interest. It is not for me to make this calculation. For the purposes of inclusion in this award the plaintiff may file and serve an affidavit demonstrating the computation of the amount calculated in accordance with the principles stated above.

As to costs. The defendant's opposition has been, to say the least, vexatious. He has conducted the case personally. He would have been wiser to have employed a colleague to advise him and appear on his behalf. With a more objective assessment of his prospects the Defendant would have been spared his discomfort in the witness box. With independent competent advice he could have avoided

the embarrassment, this litigation has occasioned him. As it is, his professional judgment has apparently been clouded by personal considerations. He has raised and persisted in spurious and specious defences. An attorney should not do this either for his client or on his own behalf. His performance as a witness has done him no credit at all. As a mark of disapproval of his conduct, I will order that the Paintiff's costs be to be taxed on the scale applicable as between attorney and own client.

There is judgment in Plaintiffs favour for

a) Payment of E 48429.42
b) Interest a tempore morae calculated at 9% per annum on the balance of amounts due but unpaid in terms of the lease, owing from time to time, in accordance with the principles stated in the judgment.
c) Costs to be taxed on the scale appropriate to attorney and own client, and to include counsel's fees which are certified in terms of Rule 68

S W Sapire CJ