



SWAZILAND HIGH COURT

Tshabalala Estates (Pty.) Ltd.

Applicant

V

BP Swaziland (Pty.) Ltd.

Respondent

Case No 2102/99

Coram

SAPIRE, CJ

For applicant

Mr. Flynn

For Respondent

Mr. Howe

Judgment

(26/05/2000)

The present interlocutory application was made following a previous order made by me in connection with the main application.

The main application is a claim for the ejectment of the Respondent from property let by the applicant to the respondent. A registered notarial lease governs their relationship as lessor and lessee. The applicant's claim for ejectment is based on an allegation that the Respondent is in breach of the lease as amended in failing despite due notice to pay to the Municipal authorities monies which became payable as a result of improvements having been effected to the property.

A number of factual and legal issues have been raised in the Replying affidavit. Of these only one is relevant at this stage. That issue is whether the Respondent's representative who it is alleged effected the amendment to the notarial lease was authorised so to do. The Respondent has denied such authority in its replying affidavit. The Applicant has not yet filed a n answering affidavit.

After the time for the filing of a replying affidavit had passed the Applicant applied for an order in terms of rule 35(19) requiring the Respondent to produce under oath a large number of documents. The application came before me. Its attorney, Mr. Howe who represented the Respondent requested a postponement. I declined to order a

postponement, and informed the parties that I proposed, so to curtail the proceedings, to order the production of the items specified in the notice of application, and that the Respondent would if it objected to the production of any document or was for any other reason unable to do so, to deal with the reasons for non production in an affidavit. I understood that Mr. Howe agreed to such an order.

The Respondent produced no documents but filed an affidavit in which it is submitted that I should not have made the order requiring production in the first place. Because of the attempt to curtail the proceedings, these arguments had not been advanced. Before I made my order.

The respondent's reaction to the order of court has caused the Applicant to make the present application. The relief sought is that, because of the Respondent's willful disobedience of the order of court the defence should be struck out and judgment entered. The applicant also seeks that it be awarded the costs of the application and that it also be awarded to costs in respect of which awards have been reserved. This would be a draconian punishment for what amounts to the respondent seeking to maintain its position on the production of the documents. It would be a miscarriage of justice for the merits to be determined in this manner.

Moreover it is not clear what is meant by striking out the defence. Is the Respondent to be precluded from arguing the legal defences it has raised? I think not. On reflection I consider the order for the making of discovery to have prematurely made. The Applicant is would not normally be entitled to discovery before the filing of its answering affidavit. The Respondent is justified in its opposition to the production of the documents requested by the applicant. My previous order dealing with the production of the documents being interlocutory, may be withdrawn. There is I think good reason why this should be done. As claimed by the Respondent in its counter application The order was I thought made with the concurrence of the respondent's attorney. I was clearly under the wrong impression. There is really no reason for early discovery to be made especially in these motion proceedings If and when the matter is referred to trial or for the hearing of oral evidence on the factual dispute as to the authority of the Respondent's representative, then discovery will be appropriate.

I do not wish at this stage to make any further observations in regard to the application.

The order I make is

- 1 The order of the 19th November is recalled
- 2 No order is made on the present application
- 3 The award of costs of these proceedings is reserved for decision by the judge who eventually decides the main application.


SAPIRE, CJ