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IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 68/2000

In the matter between

SWAZI SPA HOLDINGS LIMITED	**APPLICANT**
VS	
JOSEF ANDREW MURRAY	**RESPONDENT**
Coram	S.B. MAPHALALA – J
For Applicant	MR. P. FLYNN (Instructed by Millin and Currie)
For Respondent	MR. S. DLAMINI

JUDGEMENT
31/07/2000

Maphalala J:

The Swazi Spa Holdings Limited is the applicant in this application brought against its former employee. The applicant seeks ejectment of the respondent from a house leased by applicant from Tisuka TakaNgwane for the respondent. The applicant further seeks damages in the amount of E8, 800-00 and costs of this application.

The house was allocated to the respondent to afford him accommodation while the respondent was an employee of the applicant. The respondent was employed on the 19th July 1996, as its Rooms Division Manager at the Lugogo Sun Hotel. The terms of the contract of employment are set out in a document annexed in the applicant's papers as "JF1". In terms of "JF1" the respondent was provided with accommodation. On the 19th July 1999, the respondent's services were terminated by the mutual agreement of the parties. This is reflected in another document annexed marked "JF2". This document is dated the 12th July 1999, addressed to the respondent and reads in part as follows:

> **"Dear Josef,**
>
> **Re: Voluntary Redundancy**
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> 1. **We refer to the above matter and confirm that you applied for voluntary redundancy. Be advised that your application has been accepted....."**

2. **Your services with the company will be terminated on the 19th July 1999. Your redundancy package will be set out in annexure "A" attached hereto on the terms and conditions set out therein...."**

It appears from the papers that the respondent accepted by agreement a sum of E35, 991-71 as full and final settlement as reflected in a letter dated the 12th July 1999.

Following upon the termination of the contract of employment the respondent was called upon to vacate the accommodation. The respondent has steadfastly refused to comply with the request to vacate and it has become necessary for the applicant to seek an order for ejectment against him.

The gravamen of the applicant's cause of action is that the respondent remains in occupation of a house leased by the applicant in order to provide the respondent with the accommodation, which was a term of the contract of employment. The respondent was required to vacate the premises not later than the last day of August 1999, but refuses to do so. The applicant has in the meantime been required to pay the rent for the premises and therefore seeks payment of the sum of E8, 800-00 by the respondent in respect of the rent. The applicant is further of the view that the respondent has no defence to the application for ejectment but merely contends that it is just and equitable that he retains possession of the house until applicant has paid his repatriation package.

When the matter came for arguments Mr. Flynn for the applicant referred the court to the judgement of the Chief Justice in the matter of ***Royal Swaziland Sugar Corporation vs Simon Nhleko & 9 others (Case Nos 785/98 to 2794/98 (unreported)*** where a similar dispute came before the court. The court was persuaded to follow the ***dicta*** in that case.

The respondent in his answering affidavit raised two points ***in limine*** viz, that this matter is within the exclusive jurisdiction of the Industrial Court, because it has gone through the gauntlet of the dispute procedure laid down in the Industrial Relations Act No. 1 of 1996 and the Commissioner of Labour has issued a certificate of unresolved dispute, secondly, that in the event the court finds that it has jurisdiction respondent submits in the alternative that this application is fatally defective because no empowering resolution from the applicant's governing body is attached to the founding papers. The proceedings have not therefore been authorised by the applicant's board. On the merits various averments are made in rebuttal.

Mr. Dlamini for the respondent when making his submissions contended that the applicant does not have ***locus standi in judicio*** to bring this application in that it is merely a lessee and the true owner of the premises where respondent is sought to be ejected is Tisuka TakaNgwane. Tisuka TakaNgwane has a direct interest in this matter and thus a proper party to move these proceedings. The applicant has not sought to join Tisuka in these proceedings. He went further to argue that the judgement by the learned Chief Justice in ***Royal Swaziland Sugar Association (supra)*** is distinguishable in a number of respects viz, the applicant in that case was the owner of the premises in which the respondents were sought to be ejected, in the case in ***casu*** the question of repatriation is at the centre of the dispute between the present litigants before the Industrial Court. Furthermore, Mr. Dlamini directed the court's attention to Section 43 of the Employment Act of 1980 to the proposition that

applicant is enjoined by law to pay respondent's subsistence payment from the date of the termination of the contract up to the time he is repatriated. The house which is the subject matter of this dispute is part of the subsistence which the applicant is entitled to pay in terms of the Act. On the question of the claim for damages by the applicant it is Mr. Dlamini's view that such is untenable as these are a result of the applicant's own action. Finally he argued on the strength of the ***dicta*** in the case of ***Lovius and Shtein vs Sussman 1947 (2) S.A. 241*** that the court has discretion whether to order an ejectment.

It appears from the papers filed that the contracts of employment between the applicant and the respondent has been terminated. Although the respondent argue that his dismissal was unfair and the case of his unfair dismissal is pending in the Industrial Court, which I might state is in itself not a defence to the applicant's claims. In this connection I agree with the learned Chief Justice in the ***Royal Swaziland Sugar Corporation case (supra)*** where the following sentiments were expressed:

> "The respondents even if successful in their actions in the Industrial Court, are not entitled to reinstatement of their contract but are confined to damages or an equivalent thereof for the unfair or unlawful dismissal. It is for the Industrial Court to make an appropriate award in the circumstances. In making an award the Industrial Court will take into account the benefit of accommodation which the respondents enjoyed in terms of their respective contracts."
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> Further on,
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> "Whatever the outcome of the proceedings in the Industrial Court may be, the respondents are not at all entitled to remain in occupation of the premises pending that hearing. This is so because the contract is at an end and there is no basis for their continued occupation of the premises". (my emphasis).

On the question of ***locus standi*** raised by Mr. Dlamini for the respondent I tend to agree with Mr. Flynn for the applicant that the respondent has a right to sue for ejectment as a lessee who had sub-let the premises to a third party. There is ample authority that this can be done. (see ***The South African Law of Landlord and Tenant by Cooper (1973) page 113*** and the authorities cited thereat). I thus dismiss this point ***in limine*** as being misconceived.

Now coming to the point ***in limine*** that the court does not have jurisdiction as the matter is before the Industrial Court. It appears to me that this is not so and I would follow the ***dicta*** in ***Royal Swazi Sugar Corporation (supra)*** which is at fours with the case in ***casu.***

It appears to me from the papers that the respondent has no defence to the application for ejectment but merely contends that it is just and equitable that he retains possession of the house until applicant has paid his repatriation package. The respondent clearly accepts that the contract of employment has been terminated. The applicant submits that there has been a full and final settlement while respondent has reported a dispute and seeks maximum compensation for unfair dismissal. The respondent does not seek reinstatement. On either version the respondent has accepted the cancellation of the contract and is accordingly not entitled to remain in occupation of the premises (see ***Royal Swaziland Sugar Corporation (supra), National Union of Textile Workers and others vs Stag Parkings (Pty) Limited and another 1982 (4) S.A. 151(T); Coin Security (Cape) vs Vukani Guards and Allied***

Workers Union 1989 (4) S.A. 294 at 241 – 242 and Royal Swazi National Airways Corporation Limited vs Lynette Dlamini and others Civil Case No. 201/90 (unreported).

The respondent cannot in law hold the applicant at ransom, as it were, on the issue of repatriation. The fact of the matter is that the contract of employment has come to an end and the applicant is not obliged to provide respondent with accommodation. It would be open for the defendant to claim damages he may have suffered as a result of the loss of accommodation based on the alleged unlawful dismissal. The respondent's argument cannot in the circumstances be sustained as a defence to the applicant's claim for ejectment.

In the result an order is granted in terms of prayers 1, 2 and 3 of the notice of motion.

S.B. MAPHALALA
JUDGE