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THE HIGH COURT OF SWAZILAND

SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY LIMITED

Plaintiff

And

ZAMOKWAKHE (PTY) LIMITED

1st Defendant

KARLEEM ASHRAF

2nd Defendant

Civil Case No. 3988/2000

Coram	S.B. MAPHALALA – J
For the Plaintiff	MR. K. MOTSA
For the Defendants	MR. L. HOWE

RULING ON EXCEPTION

(04/07/2003)

The Plaintiff has instituted an inter action claims under Case No. 3986/2002 for a sum of E77, 447-61; and case No. 3988 for a sum of E113, 662-46.

Defendant filed plea and counter-claim. Plaintiff has excepted to the counter-claim and argues that it does not disclose a cause of action on the following grounds:

1. Defendant can not bring a counter-claim for damages against the Plaintiff in view of the Clause 12.2.2 of the lease which states that "effect any repairs which it may be obliged to effect in terms of this lease within a reasonable time after written notification so to do; provided that the lessee shall not have any claim of any nature whatever against the lessor or be entitled to defer payment of rent by reason of the premises, the building in which they are located or the property being in a defective condition or falling into disrepair or any particular repairs not being effected by the lessor in terms of this lease".
2. Secondly, assuming Union Suppliers (Pty) Ltd had any *locus standi* to sue the Plaintiff, such an action cannot even be sustained in law as the Defendant in terms of Clause 16.2 indemnified the Plaintiff against any claims of whatever nature. In particular Clause 16.2 reads "the lessee hereby indemnifies the lessor and its directors, agents, employees and servants against any claims of whatever nature which may be made against any of them arising out of the afore-going occurrences".

    2.1 Ancillary, to the above the Defendant in terms of Clause 16.1 of the lease agreement agreed that the lessor and its employees shall not be liable for any loss or damages to any property of whatever nature in the premises.

When the matter came for arguments *Mr. Motsa* for the Plaintiff contended that it is trite law that a lessor can contractually exclude liability for damages caused as a result of defect in the hired premises. To support this proposition he referred the court to ***Cooper W.E. Landlord and Tenant (2nd ED) 1994*** page ***110*** and the case of ***Herman's Supermarket vs Mona Read Investments 1975 (4) S.A. 391 (F).*** In this particular case, so goes the argument Clause 12. 2.2 specifically exclude the lessor's (Plaintiff) liability to any claims and hence no action in law can succeed against it. Furthermore, the lessee specifically agreed to indemnify the lessor against any claims with costs.

Mr. Howe for the Defendants advanced *au contraire* arguments firstly, that this matter was argued before the court when the summary judgement was made and the court found that there was merit and reason for the matter to proceed to trial. Despite that the Plaintiff proceeded to launch an exception on similar basis and on that aspect alone the exception should fail.

Secondly, the Defendants deny that they had knowledge of the said waiver and in any event if a waiver of such nature was granted in it itself is unlawful. Mr. Howe argued that the lease makes provision for the lessor to be given written notification of any defects. In *casu* written notification was given to the lessor both is writing and verbal and nothing was done as *per* letter dated 25th March 1998. if the court were to hold that the Defendants waived their rights, this waiver is unlawful in itself and is prohibited in terms of the law. In this respect the court was referred to the work by ***R.H. Christie, The Law of Contract S.A. (3rd ED)*** page ***495.*** **"while everyone is entitled to announce their rights introduced for his benefit, this right cedes when the law prohibits the renounciation. But also on public interest for the agreement of the private individuals cannot be delegated from public laws".** *Mr. Howe* went further to refer the court to health requirements and the building codes. This in itself is a triable issue and an issue which would require evidence to be led by a Health Inspector and a member of the building department in the City Council of Mbabane and the Ministry of Works and Construction. He further referred the court to ***Christie*** *(supra)* at page ***490*** to the proposition that the necessity to prove knowledge of the rights allegedly waived before it can be said that the conduct in question amounts to waiver, applies equally to a case where the act of alleged waiver has been performed not by the party to the contract himself but his agent. (see ***Pretorius vs Freyling 1947 (1) S.A. 171 (W)*** at page *177* where *Price J* said; and I quote:

> "It seems to me, however, that in a matter of waiver it cannot be said that the knowledge of the principal is that of the agent or that knowledge of the agent is that of the principal, because before there is a waiver there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. This knowledge, to be effective in the case of waiver, must be the knowledge of a single person, not partly of one and partly of another, because no intention to waive can be inferred unless the particular

person himself who commits the act which is said to constitute waiver knew of the relevant facts and intended to waive the rights of which he was fully aware.

If in this case it is the agent who waived the rights then it must be proved that he himself knew all the relevant facts as well as the principal's legal rights and intended to waive those rights and it must also be proved that he was authorised to waive his principal's rights".

The above are the issues for determination. It is trite law that a lessor can contractually exclude liability for damages caused as a result of a defect in the hired premises (see ***Cooper W.E. (supra)*** at ***110***).

In this case the Clause which seeks to specifically exclude the lessor's (Plaintiff) liability is Clause 12.2.2 which reads as follows:

"Effect any repairs which it may be obliged to effect in terms of this lease within a reasonable time after written notification so to do, provided that the lessee shall not have any claim of any nature whatsoever against the lessor or be entitled to refer payment of rent by reason of the premises, the building in which they are located or the property being in a defective condition or failing into disrepair or any particular repairs not being effected by the lessor in terms of this lease".

Mr. Motsa for the Plaintiff contends that, in *casu,* the lessee specifically agreed to indemnify the lessee against any claims with costs. The lessee signed a lease agreement. Further Clause 16 of the lease agreement states as follows:

"16. Exclusion of liability.

16.1 Neither the lessor nor any of its directors, agents, employees or servants shall be liable for personal injury to or the death of nay person or the loss of damage to any property of whatever nature in the premises, or the building containing the premises or on the property, howsoever, arising or caused and whether by reason of the default or negligence of the lessor or any of the said persons or otherwise.

16.2 The lessee hereby indemnifies the lessor and its directors, agents, employees and servants against any claim of whatever nature which may be made against any of them arising out of any of the afore-going occurrences".

Mr. Howe on the other hand on the strength of the authority in ***R.H. Christie*** *(supra)* contends that if the court were to hold that the Defendants waived their rights, this waiver is unlawful in itself and is prohibited in terms of the law.

In the present case I am persuaded by the arguments advanced by Mr. Howe for the Defendants. Firstly, this matter was argued before the court when the summary judgment was made and the court found that there was merit and reason for the matter to proceed to trial. Despite that the Plaintiff proceeded to launch an exception on similar basis and on this aspect alone the exception ought to fail.

Secondly, the lease makes provision for the lessor to be given written notification of any defect. In *casu* written notification was given to the lessor in writing and verbal and nothing was done. This is evidenced by a letter written by the lessee to the lessor on the 25th March 1998. My considered view, in this regard is that this matter be properly ventilated in a trial.

Lastly, I adopt what was said by Price J in the case of ***Pretorious vs Freyling*** *(supra)* as I have already outlined earlier on in this judgment.

All in all I agree with the submissions made by *Mr. Howe* in opposition of the exception.

In the result, I dismiss the exception with costs.

S.B. MAPHALALA
JUDGE