1297

THE HIGH COURT OF SWAZILAND

Civil Case No.1944/2002

In the matter between:

R.M.S. TIBIYO (PTY) LIMITED **Plaintiff**

And

INNOVATIONS (PTY) LIMITED t/a FUTURE FLOORING **Defendant**

CORAM : **MASUKU J.**

For Plaintiff : **Mr Z.D. Jele**
For Defendant : **No Appearance.**

JUDGEMENT
7th August 2003

Background

The parties, the Plaintiff and the Defendant are the lessor and the lessee, respectively. In or about 9th April, 2001, the Plaintiff, (Lessor), concluded a written agreement of lease in terms of which certain premises described as Shop No.U35, Bhunu Mall Manzini, were let out to the Defendant. Both parties were represented by duly appointed officials to conclude the aforesaid agreement of lease and a true copy of which was annexed to the pleadings.

In or about June 2002, the Plaintiff sued out a summons from the Registrar's Office and in which it claimed the following: -

(a) Payment of the sum of E34, 516.76, in respect of arrear rental;

(b) Payment of the sum of E17 545.92 in respect of damages for three months rental

(c) Interest on the above amounts at the rate of 9% per annum a *tempora morae*

(d) Costs of the suit.

On delivery of a notice to defend by the Defendant, the Plaintiff moved an application for summary judgement which was granted as prayed above by Matsebula J. on the 26th July 2002. The Defendant thereafter moved an application for rescission of the summary judgement. By judgement dated 25th October 2002, I granted the application for rescission and placed the Defendant on terms to file its affidavit resisting summary judgement.

On the 10th July 2002, the matter again served before me and Mr Mkhatshwa for the Defendant informed the Court that after the rescission was granted, the parties engaged in negotiations which culminated in the Defendant conceding claim (a) but resisting claim (b) for damages. The concession in (a) saw the Defendant paying a sum of E24, 350.90 (Twenty four Thousand Three Hundred and Fifty Emalangeni and fifty cents). This payment was accepted by the Plaintiff. A dispute then arose regarding whether this payment was or was not in full and final settlement, as alleged by the Defendant and vehemently denied by the Plaintiff.

Regarding the claim for damages, the Defendant was put to terms to files its Plea on or before close of business on the 17th July 2003, with the Plaintiff granted leave to file its replication, if any, on or before close of business on the 23rd July 2003. The parties undertook to hold a pre-trial conference before the trial and the matter was postponed for trial. The date of trial was set for the 29th July 2003, in the presence of Counsel on both sides. To this end, it was agreed that the parties would exchange the summary of evidence of any witnesses they wished to call in relation to this head of the claim.

In relation to the dispute regarding whether the aforesaid payment by the Defendant was or was not in full and final settlement, the Defendant sought and obtained leave to file a supplementary affidavit strictly on this question on or before close of business on the 17th July 2003. The Plaintiff was to respond thereto on or before close of business on the 23rd July 2003

with Defendant filing a reply thereto, on or before the 28th July 2003, by noon. The parties were further ordered to avail any witnesses that may be necessary for resolving this dispute if *viva voce* evidence proved essential, according to the Court's determination, based on the affidavits filed. The matter was then postponed to the 29th July on the foregoing terms for hearing of the outstanding issues in both claims (a), and (b), at the usual Court time, namely 09h30.

When the matter was called well after 10h00, Mr Mkhatshwa was not present in Court. Mr Jele indicated that he called Mr Mkhatshwa's office to remind him that the matter was to proceed, but the latter was reportedly out of office. Mr Jele then left a message for him to attend Court as early as practicable. Mr Jele further informed the Court that he had not received any papers from Mr Mkhatshwa as ordered by the Court, in respect of both claims and that as such, he could not file any papers in response. He further informed the Court that two (2) attempts to hold the pre-trial conference and to prepare a minute thereof failed because of Mr Mkhatshwa's non-attendance.

Mr Jele is an officer of this Court and I am, because of his position, entitled to rely on the information which he furnished to Court. Mr Mkhatshwa, for reasons yet unknown to the Court, was not present to refute what Mr Jele stated for the record. I decided, *ex abudanti cautela,* to call an official in the Civil Registry of the High Court, Mrs Gloria Mabuza and she testified under oath that the Registrar's office had not, from the records, received any papers from Mr Mkhatshwa in relation to this matter on the 17th July 2003 or subsequent thereto. I therefor find for a fact that notwithstanding a clear and unambiguous Order, issued in the presence of the parties' representatives, the Defendant has defaulted in filing the relevant papers on the stipulated dates and times and there is no explanation therefor.

In view of the foregoing, Mr Jele urged the Court to proceed with the matter and in view of its history, as postulated above, I could not but agree with him. I shall now proceed to address both claims having due regard to the Pleadings and Mr Jele's unchallenged submissions.

Claim (a) – Arrear rental.

As indicated above, the Defendant abandoned its opposition to this claim and this was evident when it paid the amount of E24, 350.90, thereby leaving a balance of E10, 165.86 from the

total claim. The Defendant's only contention was that the amount paid was in full and final settlement, which was denied by the Plaintiff. When provided an opportunity to prove that the payment was indeed in full and final settlement of the claim as alleged, the Defendant failed to do so.

It is a trite principle of the law that he who alleges must prove. No evidence was presented by the Defendant in proof of this assertion on the date stipulated in the Order of Court. The issue was further exacerbated by Mr Mkhatshwa's non-appearance in Court. In view of the foregoing. I am of the view that the Plaintiff's claim, which is now reduced to E10, 165.86 must stand, in the absence of proof that the payment was in full and final settlement. Subject to what I say later in this judgement, it is clear that the Plaintiff, is entitled to an Order for payment of the aforesaid amount of E10, 165.86, as prayed.

Claim – (b) – Damages.

In relation to this leg of the claim, the averrals made by Plaintiff as set out in the in Particulars of claim are the following at paragraphs 7 to 10: -

7. On or about the 28th of January 2002, the Defendant informed the Plaintiff that it sought a premature termination of the agreement of lease due to certain difficulties. A copy of the letter is annexed hereto marked "RMS 2".

8. In response, the Plaintiff advised the Defendant that it would accept the early termination subject to certain conditions. A copy of the letter to the Defendant setting out the conditions is annexed hereto and marked "RMS 3".

9. The Defendant failed to comply with the terms set out in annexure "RMS 3" but vacated the premises at the end of March 2002.

10. The Plaintiff seeks damages of three (3) months rental as compensation for the premature termination of the lease.

It is necessary, for purposes of putting matters in proper perspective, to refer to the two annexures referred to above. Annexure "RMS 2" is from the Defendant, and is undated. It

refers to a conversation with the Plaintiff's Mr Vilane regarding the early termination of the lease due to the Defendant's financial difficulties. The Defendant in that letter, undertook to settle the arrear rentals and made a proposal in that regard.

In "RMS 3", dated 6th March 2002, the Plaintiff appears to refer to a letter addressed to the Defendant in which the terms for early termination acceptable to the Plaintiff were set out. This letter was not included in the annexures however. "RMS 3" stated that early termination would be acceptable to the Plaintiff if the Defendant would pay three (3) months flat rental as compensation.

In the affidavit resisting summary judgement, the Defendant deposed as follows in relation to this claim at page 8 thereof: -

> *"It is not denied that the letter (i.e. "RMS 3") was addressed to Defendant's attorneys. It is respectfully submitted however that same did not pre-determine the question of damages as it only amounted to a proposal by the Plaintiff. The parties did not subsequently abide (sic) such proposal and Defendant's vacation of the premises was subject to mutual agreement. Indeed, pursuant thereto, it was Plaintiff that waived its hypothec by surrendering keys to the premises to the Defendant and allowing Defendant to remove its property even assisting by providing some of its human resources.*
>
> *I am accordingly advised that the said letter could not have pre-determined the question of damages and as such the question of damages has to be tried and evidence led."*

In its affidavit in reply, the Plaintiff said the following at paragraph 8: -

> *"The allegations contained in this paragraph are denied.*
>
> *8.1. When the Respondent (i.e. Defendant herein) sought an early termination of the agreement of lease, the Applicant declined but as a concession agreed to the early termination of the lease.*

8.2. The letter dated 6th March 2002, clearly set out the terms on which the Applicant (Plaintiff) was prepared to agree to the early termination.

8.3. To suggest that having refused to agree to early termination, and without there being any concessions, the Applicant then waived its rights to claim payment to the balance of the lease (which it was entitled to) is to say the least very disingenuous on the part of the Respondent. The Applicant never waived its right nor does the Respondent even suggest this.

8.4. I reiterate that the Respondent accepted the terms set out in the letter dated 6th March, 2002 and it was on this basis that it was allowed to remove the goods."

It is clear from the foregoing that the Defendant does not deny that it prematurely vacated the premises nor that the Plaintiff sustained damages as a result of that early termination. This is indubitably proved and accepted. The question, it would seem, relates to the quantum. Without in any way attempting to settle this dispute, it is a matter of note that the Defendant's explanation is not only preposterous, but it is also febrile. I say so for the reason that it refers to a "mutual agreement", in terms of which it vacated the premises. The terms thereof are not specified and more importantly, no full account is given for the reason why the Plaintiff could forgo the balance of the rentals due after the termination and thereafter release the hypothecated items to the Defendant without any security whatsoever. This conduct would be unbecoming of the Plaintiff and unbusinesslike. It would reflect the absence of astuteness and a low business acumen on the part of the Plaintiff, inconsistent with a seasoned and reputable property company of the Plaintiff's calibre. The Defendant's version to me appears to be nothing less than puerile and disingenuous.

My assessment of the veracity or the believability of the one version as opposed to the other is however of no moment in view of the fact that this very question was, by consent, referred to trial. It was in this very wise that the Defendant was on the 10th July 2003 ordered to file a plea by the 17th July, but it is now an indubitable fact that it did not. This fact, for all intents and purposes renders this claim one to proceed by default. The Defendant was afforded an opportunity to contest the Plaintiff's allegations but did not do so. It is in my view clear that there is no defence to the claim and judgement must, subject to what I say further below, be granted in the Plaintiff's favour in respect of prayer (b) as well. There is in my view no need to

follow the Rules regarding the service of a Notice of Bar as the Court had fixed the deadlines for the filing of the relevant papers, including a Plea. Failure to comply with the Order did not entitle the Defendant to any further notice.

It is abundantly clear *in casu,* that the duration of the lease agreement was a period of five (5) years. It is also not disputed that cancellation of the lease agreement was done by mutual consent.

The learned author Joubert, in his work entitled "The Law of South Africa", First re-issue, Vol. 14 Butterworths 1991 page at 181, par 180, states the following:-

> *"The lessor may also claim damages in addition to cancellation so he may claim under this heading an amount equivalent to the rent for the time during which the property remains unlet provided that the time would have been within the period of operation of the lease which has been cancelled, and that mitigation of loss has not been possible"*, - See also A.J. Kerr, "The Law of Sale and Lease", Butterworth Publishers, 1984, at page 234.

It is clear from the foregoing that due to early cancellation, the Plaintiff was entitled to claim for damages and which it has done. This claim is clearly in respect of a time falling within the period of operation of the lease. The only outstanding question for determination is the quantum of damages. In this regard, Mr Jele applied for and was granted leave to prove damages by affidavit. I await receipt of that affidavit in order to determine the amount of damages due to the Plaintiff.

It appears to me proper in the present circumstances, to postpone the matter *sine die* and to defer pronouncement of the prayers to be granted until such time that the affidavit in proof of damages has been filed and considered by the Court.

T.S. MASUKU
JUDGE