



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1034/2003

In the matter between

MODEST KAMENGA

Plaintiff

vs

ALLEN MANGO

Defendant

Coram

Annandale, ACJ

For Plaintiff For  
Defendant

Mr. M. Fakudze Mr.  
M. Thwala

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JUDGMENT  
**8** SEPTEMBER 2004

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In its application for summary judgment, the plaintiff seeks an order in the following aspects:-

- 1) Cancellation of the Lease Agreement;
- 2) Ejection of the Defendant from the premises;

- 3) Payment of the sum of E7 600; Interest thereon at the rate of 9% *per*
- 4 *annum*; Costs of suit on the attorney and own client (scale); Collection
- ) commission at the rate of 10% on the total claim; Further or alternative
- 5) relief.
- 6)

Plaintiff issued summons in May 2003, some one and a half years ago. Therein, it is stated that the parties entered into a written agreement of lease, with the plaintiff being represented by Swaziland Property Market (Pty) Ltd., a firm of Estate Agents. Clauses of the agreement referred to in the particulars of claim are that the lease would be for a period of one year, commencing on the 1<sup>st</sup> February 2003. The defendant is alleged to have been in occupation since then. The rental payment was agreed to in the sum of E3 880 per month. The usual term that non-payment of rental by the due date would lead to a right to cancel the lease is alleged.

Probably due to a typographical error, as there is a blank line in the particulars, which was not rectified afterwards, it is not also alleged that in such event, the lessor shall have a right to re-take vacant possession of the

leased premises, as is provided under clause eleven of the agreement. No issue was made of this omission.

It is further alleged that in the event that the lessor or his agent has to instruct attorneys to enforce any conditions of the lease or to recover any due monies, the lessee will be liable for costs on the attorney/client scale, including collection commission at the rate of 10% on the total claim.

All these allegations are in line with the agreement of lease between the parties, a copy of which is attached to the summons.

The final allegations in the summons are that the defendant has failed to pay rentals due for the months of April and May 2003, resulting in arrears to the amount of E7 600, which despite demand, defendant fails or neglects to pay, wherefore the relief claimed is set out, in the same terms as now sought by the application for summary judgment.

Following on Defendant's notice to defend, the plaintiff applied for summary judgment. In his affidavit to support the application, plaintiff's agent, a director of the estate agents which represented him in the lease

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agreement, made the standard allegations. He confirms the cause of action, states his belief in the absence of a *bona fide* defence and alleges that notice to defend was entered solely for the purpose of delaying the action.

The latter allegation is denied in the defendant's opposing affidavit and continues to set out some background facts. He says that he is also an estate agent and that two prospective tenants approached him, seeking a place to rent. As he had none available and knew of the premises listed with the plaintiff's agents, he approached the agents "to offer them the tenants". The prospective tenants could only afford the premises if they shared the rent, one to occupy the main house and the other a one bedroom outbuilding. He states that:

"Mr. Masina (my underlining) from Swaziland Property Market acting on behalf of plaintiff rejected the idea of having two tenants in one property and it was at that point that I offered to act as a middleman and sign the lease on behalf of both tenants with whom I was to in turn enter into two individual lease agreement(s). Through this arrangement I was to collect the rentals from both tenants and then transmit same in one payment to Mr. Masina of Swaziland Property Market. The first payment which was for March rentals plus the customary deposit, was transmitted by me by cheque dated the 14<sup>th</sup> March 2003."

This confessed conduct of the defendant must be viewed against clause 10 of the lease agreement. It reads, under the heading: Cession, Assignment and Subletting:-

"The lessee shall not have the right to cede or assign this lease or to sub-let the whole or any portion of the leased premises without the prior written consent of the lesser which consent shall not be reasonably withheld."

It is to be noted that the defendant entered the lease agreement in his personal capacity and not representing the two prospective tenants he mentioned. Also, it is clear from his own version that the plaintiffs agents were not in favour of having two tenants. No permission was sought or granted to sub-lease. The defendant says that the arrangement was that he would collect rentals from the two tenants and transmit it as one payment to plaintiffs agent, with the first such payment, for March 2003, being paid on the 14<sup>th</sup> March by way of his own cheque. He then avers that Mr. Masina (my underlining) of plaintiffs agent approached the tenants directly at the premises and demanded that they pay all future rentals directly to him. He says that this information was conveyed to him by the two tenants, and that Masina apparently was unhappy with the delay occasioned by the defendant

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first having to get the cheques of the tenants cleared before defendant paid the plaintiff.

Defendant states that he and Masina came to an agreement about the above matter, in that Masina would collect the rent from the tenants directly, not from the lessee, the defendant, to "...cut on the time for the cheque clearances and therefore to minimise the inconvenience on himself and his principal."

Due to his belief that Masina now dealt directly with the tenants (and not the lessee), he was "shocked" to receive a letter dated the 22<sup>nd</sup> April 2003 from plaintiff's agents that he was given notice to vacate the leased premises. It also states that he breached the lease agreement by defaulting with rental payments in that the rental for March was paid late and nothing for April, rental being due monthly in advance. He says that he went to the agent's offices and found Masina in the company of the two tenants, it being "proof to me that as per our verbal agreement (that) he had continued to deal directly with them". He blames Masina for the financial loss of plaintiff, and says that Masina served notice to vacate on the tenants directly.

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The defendant continues to state in his opposing affidavit that the plaintiffs action is misconceived in that it targets him while the people who actually stayed there are known to the plaintiff and his estate agents. He notes that no mention is made of the rental deposit that was paid together with the rentals for March.

The essence of his stated defence is set out to be that:-

"...In as much as I personally signed the lease agreement it was known to all parties involved that my signing was merely to facilitate the contract between Swaziland Property Market acting on behalf of Plaintiff and the two tenants who were ready and willing to enter into the contract."

As stated above, the position is not that the defendant represented two tenants when the lease agreement was entered into. He represented himself. Further, no sub-leasing was permitted in terms of the contract, without written approval of the lessor, which the defendant readily admits was not acceptable to the lessor, who did not want two tenants in the same property.

The defendant then goes on to attack the plaintiffs agent. He states that it is Mr. Masina, the person who he said had acted for the plaintiffs

agent when he sought to have two tenants lease the premises, who is to carry the blame.

He states that

"Masina's conduct of deciding to take over the regulation of the affairs of the tenants while in occupation of the property through the above arrangement, signalled an end of my involvement with the running and management of the property and its tenants (my underlining). It is therefore naive on the part of the plaintiff to let the tenants vacate without making means to secure their rental owing, only to turn around and demand that from me. The actual service was never at any point rendered on me."

I find it difficult to accept the attitude expressed by the defendant. The plaintiff and his agents had a lease agreement with the defendant and not with two other people who may have occupied the premises. It is the defendant who, contrary to the express terms of the contract and against the stated rejection of his idea to have two tenants occupy the premises and share the rent, nevertheless placed two tenants in the property. He now feigns surprise at the action of the plaintiff to seek outstanding rentals from him, the lessee. There is no contract between plaintiff and the two tenants, furthermore, the "arrangement" that he refers to, was sought from the plaintiff's agents but refused.



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In view of the defendant's response, plaintiff sought and was granted leave by the court on the 25<sup>th</sup> July, 2003 to file a replying affidavit.

Therein, plaintiff's representative states that the defendant approached him in his personal capacity when the lease was entered into and that he did not mention that he acted for anyone else. He denies any knowledge of any arrangement as alleged by the defendant. This replying affidavit, as well as the supporting affidavit, was deposed to by Manene Khombelwako, not Masina. Khombelwako states that it is he who went to the leased premises when no rentals came from the defendant to demand it of him, but that he found different tenants there, not the lessee/defendant. These people told him about a lease agreement they had with the defendant and that they had paid rent. He wanted their proof of payment, therefore one of them attended at his office, where the defendant saw her. He vehemently denies any agreement between himself and defendant, in variation of the lease agreement with the defendant.

From a reading of the papers, the defendant states that the "agreement" was between himself and a Mr. Masina, while Khombelwako

refers to himself as the one who did not do so. No affidavit of Masina has been filed to admit or deny the allegation and Khombelwako does not explain the position of Masina in his agency, nor whether Masina was entitled or not, to make such an arrangement.

For some unknown reasons, neither of the attorneys who appeared at the hearing of the summary judgment application argued this point. The defendant mentions Mr. Masina by name as the person with whom he came to the alleged arrangement. He stated that Masina is the person he dealt with from the onset, yet Khombelwako addresses all of the personal references as if he is Masina. I cannot understand or accept that Mr. Masina and Manene Khombelwako are one and the same person.

This leaves me with no choice but to accept the papers as I find them - this is that the defendant has raised a defence, based on an alleged agreement he had reached with a Mr. Masina of the plaintiffs estate agent, the terms and existence of which are not denied by the plaintiff. The plaintiff has chosen to file a replying affidavit which he denies the alleged agreement, but it is denied by a different person than the one with whom it is alleged to have been made, and further with a total absence of any

explanation as to the identity of Masina, vis-a-vis Khombelwako. Otherwise put, the latter may well deny the existence of the alleged arrangement, but the defendant never stated that the arrangement has been made with him, but that it was made between defendant and Masina.

It is this basic and crucial aspect of identity that neither of the attorneys, nor Khombelwako for that matter, seem to have noted. It is precisely because of the defence that the defendant has raised in his opposing affidavit that the plaintiff obtained leave of court to file a replying affidavit. No less than nine (9) times the plaintiffs agent states that the defendant is put to proof of his allegations. That is what the plaintiff challenges the defendant to do. I thus find it anomalous that the plaintiff still wants to have summary judgment, a remedy that is not suitable where there is a triable defence or a dispute of fact. The plaintiff has joined issue through its replying affidavit. The defendant in summary judgment proceedings need not prove its defence on any balance of probabilities, but need at least raise an arguable and triable issue. From the above, it is clearly the case at hand that there is a defence which was raised by the defendant against which issue is taken with, which has not been dealt with by the plaintiffs reply.

Accordingly, the application for summary judgment stands to be dismissed, with costs. The matter is referred for trial.

A handwritten signature in black ink, consisting of a long, sweeping horizontal line followed by a vertical stroke and a small flourish.

JACOBUS P. ANNANDALE  
ACTING CHIEF JUSTICE