THE HIGH COURT SWAZILAND

MBABANE DEVELOPMENT CORPORATION (PTY) LTD

Applicant

And

ZULU INVESTMENTS (PTY) LTD T/A SWANKS

Respondent

Civil Case No. 2457/2003

Coram S.B. MAPHALALA-J MR.

WARING MR. MDLADLA

For the Applicant

For the Respondent

JUDGMENT

(23/01/2004)

Before court is an application brought under a certificate of urgency for ejectment of Respondent from Applicant's premises situate at Shop No. 25 Swazi Plaza, Mbabane (hereinafter called the "premises").

According to the Applicant in its founding affidavit on or about the 1st August 2001 and at Mbabane, the Applicant represented by Mavis Ross, a duly authorised employee and director, entered into a lease agreement with the Respondent who was represented by Sibongile Myeni. A copy of the lease agreement is annexed to the

Applicant's founding affidavit marked "MD1". The lease agreement is not signed and it is averred by the Applicant that Respondent has neglected to do so despite numerous reminders to that effect. It is averred in this regard that the Respondent has however by conduct agreed with the terms of the lease.

The Applicant alleges that the Respondent has enjoyed the use and benefit of the leased premises, and has exercised certain rights in terms of the lease agreement, e.g. Respondent has renewed the lease for a period of 2 years.

It is contended that the Respondent has committed a fundamental breach by failing to pay rentals on time, which may result in the cancellation of the lease agreement Rent in terms of the agreement should be paid on the 1st business day of each and every month.

The Respondent opposes this application and has filed an opposing affidavit to that end. The defence put forth is found at paragraph 11 of the said affidavit The Respondent avers as follows:

> "The Respondent (sic) cannot at this stage rely on the lease agreement attached hereto nor any of its clauses as same was never signed. I aver that to the best of my understanding there was an oral agreement in place. It has not been breached".

It was argued for the Applicant that under common law, writing is not an essential requirements for the formation of a contract. Mere agreement on essential terms is sufficient. Writing may be intended merely as a record of the oral agreement already concluded. In this respect, the court was referred to the case of ***Woods vs Watters 1921 A.D 303*** at ***305*** where Innes CJ states that:

> "...The broad rule is that writing is not essential to the validy of a contract. The consensus of the parties need not be so evidenced".
>
> "The parties may agree that their contract shall not be binding until reduced in writing. If they so agree, then no contract shall come into being until it is in writing".

It is contended on behalf of the Applicant that in the present case, the parties contracted orally, Applicant by letting out the premises to the Respondent, and Respondent by hiring the premises. No written contract being signed.

In deciding whether an oral agreement existed or not the test is objective. In this regard, the court was referred to ***Gibson on Merchantile Law (6th ED)*** at ***52*** where ***Gibson*** states that:

> "...I **must be quite clear that the parties intended to contract, and deciding that question, the test is objective and not subjective".**

Mr. Waring argued that objectively, no dispute can arise as to a verbal contract being in place as Respondent has occupied the leased premises for at least 2 years, leasing the premises on the terms and conditions as evidenced in the unsigned lease.

He argued further that, failure to pay rentals on time is a ground for cancellation of the lease, and Applicant is empowered to exercise this right in terms of the agreed terms and conditions of the lease, as evidenced in Clause **4** of the unsigned lease agreement. In this regard, the court was referred to the case of ***Oatorian Properties (Pty) vs Maroun 1973 (3) S.A. 779 (A)*** at ***785 C*** to the proposition that the court is not empowered to take away the lessor's right to cancel a lease agreement. In ***casu,*** Applicant has cancelled the lease agreement and now wants Respondent ejected from the premises.

The argument advanced ***au contraire*** on behalf of the Respondent is that where the parties have agreed that there shall be no binding contract between them until the terms of the latter contract have been set out in writing, there is no valid contract.

The agreement will only acquire legal effect and obligations when the contract has been signed. For this proposition the court was referred to ***Jourbert, The Law of South Africa Vol 5*** at page ***80*** and the case of ***Meter Motors (Pty) Ltd vs Cohen 1966 (2) S.A. 735.*** In the latter authority in an action by a seller under a hire-purchase agreement against the surety, the surety took exception to the declaration on the ground that the agreement was not signed by the seller. In point of fact it had been

signed by one Smith. It was held ***inter alia,*** that as the parties intended the document to be the very document between the parties, that the document had to be signed in order to be binding.

The above are the issues for determination by the court. According to ***W.E Cooper, The S.A. Law of Landlord and Tenant (2nd ED)*** at page **75.** The parties to a lease may agree to reduce it to writing if they do so, two situation may arise:

1) Writing may be intended as a requirement for the formation of the lease, or
2) Writing may be intended as a record of the oral lease already concluded.

In the absence of express agreement couched in unequivocal language it may be difficult to determine whether parties intended (a) or (b) to ascertain their real intention then becomes a question of inference and construction, bearing that the ***onus*** is on the party alleging that writing was a formal requirement (see ***Woods vs Watters 1921 A.D. 303 at 305)*** and in accordance with the maxim ***scriptura est magis ad probationam quam ad solemnitatem (writing is intended rather as proof than as a formality)*** an agreement to record a lease is presumed to be merely for convenience and to facilitate proof of the oral agreement already concluded.

If writing is made a requirement to the formation of a lease, no binding contract will come into existence unless the lease is reduced to writing; if not, the failure to reduce it to writing will not affect the enforceability of the oral lease.

In ***Standard Bank of South Africa Limited and another vs Ocean Commodities Inc & others 1983 (1) S.A. 276 (A)*** Corbett JA stated the following:

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probability, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to and did in fact, contract on the terms alleged".

I agree with ***Mr. Waring*** for the Applicant that in ***casu,*** the conduct of the parties leaves no doubt as to the existence of a contract of lease in place e.g the Respondent occupies the lease premises; paid water and electricity exercised its rights in terms of the lease to renew the contract; paid rentals at Applicant's head office in the amount agreed upon in the lease; and did not raise any objection when Applicant made reference to specific clauses in the lease agreement.

I agree further with the Applicant's contention that the Respondent has not brought any information or facts or evidence to dispel the ***onus*** which lies on it to show that failure to have the lease agreement signed, renders the oral lease agreement, non existent. Instead what Respondent has done is to rely on the existence of an oral lease, in the form of an indulgence whose terms and conditions it has not stated. Rule 18 (6) of the High Court Rules provides that " ***a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".***

Respondent has not complied with this rule and has failed to comply with the ***onus*** on it, by stating with whom it entered into an oral agreement with and who represented Applicant, where and when and what were terms of the oral agreement.

For the afore-going reasons I have come to the conclusion that the Applicant has proved its case for the relief sought.

In the result, the application is granted in terms of prayer 5 (a), (b), (c) and (d) of the notice of motion.

S.B. MAPHALALA
JUDGE