THE HIGH COURT OF SWAZILAND

Civil Case No. 1331/04

In the matter between:

G.S. FRANCO INVESTMENTS (PTY) LTD And **Applicant**

CARR CORP INVESTMENT (PTY) LTD **Respondent**

CORAM **MASUKU J.**

For the Applicant For the Respondent **Mr M.B. Magagula (Millin & Currie) Ms K. Nkambule**

JUDGEMENT

21st June, 2004

This is an application for the ejectment of the Respondent from the premises described as Shop No.l L.M. Restaurant, situate at Plot 384, Gilfillan Street, Mbabane, District of Hhohho. The Applicant also applies for costs on the scale between attorney and own client.

According to the Founding Affidavit, the Applicant let the said premises to the Respondent in terms of a written lease agreement, dated 3rd October, 2002. The duration of the lease was a period of three (3) years with a further option to renew. Rental was fixed at E12, 500.00 per month for the first year with an escalation rate of 10% for the remaining two years.

The Respondent took occupancy of the premises but fell into arrears, totalling El20, 000.00 from August, 2003 to date and still remains in occupation. On the 2nd March, 2004, the Applicant, through the instrumentality of its attorneys of record issued a notice to the Respondent to make good the indebtedness within fourteen (14) days from that date. This

was followed by a notice of cancellation of the agreement. Notwithstanding cancellation, the Respondent remains in occupation and is not paying any rentals for its continued occupation. The Applicant claims that it has prospective tenants wishing to take over the premises and wishes to mitigate its damages by reclaiming the property through the eviction proceedings.

The Respondent's main gripe is that the Applicant failed to deliver the premises on time and in a fit condition to carry out the business for which the premises were let in the first place. In this regard, the Respondent claims that it was forced to undertake renovations and make its own applications for the granting of liquor licences.

The Respondent also denies that the amount of E120, 000.00 is owing but only E82, 000.00. The Respondent continues to state that it secured Keith Segwane who offered to pay the anear rental on the Respondent's behalf but the Applicant refused to accept payment, claiming it was only interested in securing the ejectment of the Respondent from the premises. The Respondent also questions the Applicant's right to cancel the lease agreement for non-payment of rent and relies in that regard on a judgement by Shabangu A.J. which was between the same parties under Case No. 1958/03 (unreported). The Respondent claims, in reliance on that judgement, that it is entitled to remain on the premises without paying its rental, in line with the *exceptio non adimpleti contractus.* It is the Respondent's further contention that the Applicant has no clear right to reclaim the premises whilst the lease agreement still obtains.

In reply, the Applicant rejects the Respondent's bases of opposition in every respect. Jn particular, the Applicant claims that it was entitled to refuse the offer from Sigwane which was for E50, 000.00 in full and final settlement of the claim. The Applicant states further that the Respondent, in that transaction sought to sell the business to Sigwane without any regard for the relevant clause of the lease agreement, being clause 7, which prohibits such a sale without the Lessor's written consent having been obtained.

The main question that the Court is called upon to determine is whether the Respondent, notwithstanding its non-payment of rentals which it does not deny, is entitled to continue in occupation of the premises, particularly after the notice of cancellation was issued as aforesaid.

Two main issues arise for determination from the judgement of Shabangu A.J. and these are the"following: -

(1) whether *exceptio non adimpleti contractus* can be used as a defence even at this stage; and

(2) whether the cancellation of the agreement, from which the application for ejectment flows was effectual.

I shall deal first with the former.

(a) Applicability of the *exceptio*

In the B.K. TOOLING VS SCORE PRECISION ENGINEERING 1979 (1) SA 391 (AD), the Court explored the history and delineated the scope of the application of the *exceptio* in some detail.

It is worth pointing out that to our disadvantage in this jurisdiction, the judgement is reported in the Afrikaans language.

R.H. Christie, in his work entitled "The Law of Contract", 3rd Edition, Butterworths, 1996, at page 467, in reference to the judgement of Jansen J.A. in the B.K. TOOLING case *(supra)*, states the following: -

> *"In B.K. Tooling (Edms) Bpk vs Scope Precision Engineering (Edms) Bptk 1979, S.A. 391 (A), the Appellate Division reviewed in some detail the history and scope of what have become known as the principle of reciprocity and the exceptio non adimpleti contractus. The principle of reciprocity recognises the fact that in many contracts the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances, and the exceptio gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or tendered to perform. "*

Regarding the circumstances when the *exceptio* can avail a defendant, Corbett J. applied the principles as follows in ESE FINANCIAL SERVICES (PTY) LTD VS CRAMER 1973 (2) SA 805 (CPD) © at 808 - 9:-

> *"In a bilateral contract, certain obligations may be reciprocal in the sense that the performance of one may be conditional upon the performance or tender of performance, of the other. The reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions, that is, each is conditional upon the other. A ready example of this would be delivery of* ***res vendita*** *and payment of the purchase price under a cash sale...Alternatively, the reciprocity may be one-sided in the complete performance of his contractual obligation by the other party may be a condition precedent to die performance of his reciprocal obligation to other party. In other words the obligations, though interdependent, fall to be performed consecutively. An example of this would be a* ***locatio-conductio operis*** *whereunder the* ***conductor operis*** *is normally obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case, the obligation to pay the money is conditional on the pre-performance of the obligation to carry out the work, but, of course, the converse does not apply..... Reciprocity of obligations does not depend, however, merely upon the time fixed for performance thereof. Thus, the mere fact that the contract specifies that the obligations are due to be performed on the same day does not lead to the inference that the parties intended them to be reciprocal.... For reciprocity to exist there must be such a relationship between the obligation by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and in cases where the obligations are not consecutive, vice versa. "*

It becomes clear from the foregoing that whether the reciprocal performances are to be *pari passu* or consecutive is also a question of interpretation, and a defendant can only succeed on the *excepio* if the plaintiffs performance fell due prior to or simultaneously with the performance claimed from the defendant. See R.H. Christie *(supra)* at page 468.

Reverting to the respective performances of the parties *in casu*, it is clear that the agreement was scheduled to commence in October 2002. In raising the *exceptio* successfully before Shabangu A.J., the Respondent argued that it was not until January, 2003, that it could be

given *vacua possessio* of the premises and be able therefor to perform its part in the obligations. This was attributed to the unfit state of the premises' and the absence of the licences, which were issues that fell within the Applicant's part of the bargain. In this regard, the Applicant's performance regarding the fitness of the premises for the purpose for which they were let and the provision ofthe relevant licences by the Applicant fell due before the Respondent could be called upon to pay rental. It was in that regard that Shabangu A.J. upheld the *exceptio* in this case.

It is however common cause that after that initial hitch, the Respondent was given *vacua possessio* and was in a position to operate the premises, a fact which raised a corresponding duty to pay rent as from the 8th February, 2003, as Shabangu A.J. found. That being the case, it is clear that the Applicant had by then performed its part of the bargain and the Respondent could not thereafter raise the *exceptio* successfully, in relation to its obligation to pay rent to the Applicant.

The Respondent interprets the said judgement to be authority that the *exceptio* once upheld lasts for the duration ofthe lease agreement, regardless of performance or a tender to perform by the lessor in this case. As indicated above, the Applicant did subsequently perform in terms of the agreement and thenceforth placed the Respondent in a position to perform its own obligations in terms of the agreement. To construe the judgement in the manner contended by the Respondent is to do violence to the express reasoning apparent in the judgement and stretches perimeters of the reasoning of the judgement beyond elastic limits, indeed to the breaking point. I am confident that this is not how Shabangu A.J. intended the judgement to be construed.

For the above reasons, I find that the Respondent's reliance on the *exceptio* at this stage, despite the change in circumstances is misplaced and is therefor dismissed.

(b) Validity of the cancellation

In the judgement of Shabangu A.J. referred to above, he found on the facts then before him that the Applicant was not entitled to cancellation of the lease agreement because it had not complied with the provisions of the relevant clause. The Applicant, it would appear, retreated to the drawing board in order to take another attempt at putting the agreement to an

end. I am, in the circumstances, called upon to look at relevant clauses of the lease agreement, the papers filed of record, together with the annexures thereto, in order to decide whether the Applicant, who is the *proferens,* has complied with the lease agreement in the cancellation.

The relevant provision of the lease agreement, is Clause 16, which reads as follows: -*"Breach of Contract.*

Should the Tenant be in breach of any of the terms of this agreement, in particular the term relating to the payment of rent and remain in such breach 7 (seven) days after due date, and should the Tenant fail to remedy any breach of the provisions of this agreement for 14 (fourteen) days after written notice to stop the breach shall have been delivered to the Tenant, this lease agreement from that date be automatically cancelled and the Landlord or his agents shall have the right to enter upon and repossess the leased property from any person who may be in occupation, but without prejudice to the Landlord's right to recover all or any arrears or rent and damages for breach of contract. "

In terms of the provisions of Clause 2.2, rental is to be paid on or before the 8th day of each month of the lease.

On the 2nd March, 2004, the Applicant through the instrumentality of its attorneys of record wrote a letter to the Respondent in the following terms: -

"1. We act for G.S. FRANCO INVESTMENTS (PTY) LIMITED, hereinafter referred to as our client.

2. Client instructs us that you are in arrears with the rentals in respect of the leased premises in the sum of El 20, 000.00 which is a breach of your obligations in terms of paragraph 2.2. of the Lease Agreement.

(3) Client instructs us further to give you notice as we hereby do, in terms of Clause 16 ofthe Lease Agreement for you to settle the said sum of E120, 000.00 within 14 days from the date hereof failing which, the Lease Agreement will be cancelled forthwith.

(4) All our client's rights are expressly reserved."

This letter was sent by registered post, as exemplified by a copy of a Certificate of Posting, dated 5th March, 2004, to the address furnished by the Respondent to the Applicant in the Lease Agreement, being P.O. Box 5658, Mbabane. The letter appears to have also been hand delivered at the Respondent's premises and was signed for, indicating receipt thereof on the 3rd March, 2004, by one Bongani Dlamini, presumably of the Respondent.

The Respondent denies receipt of the hand delivered notice but that appears immaterial to me, in view of the registered letter, which the Respondent does not deny receiving. The certificate, *prima facie* shows proof, of delivery which is concretised by the Respondent not denying receipt of the registered letter..

For purposes of receiving notice, I will use the latest date being the 5th of March, 2004, and it would appear to me that the fourteen (14) day period set out in Clause 16 was complied with, and within which the Respondent was to remedy its breach. There is no record of any response to that letter.

The above letter was followed by a letter dated 29lh March, 2004, which cancelled the agreement for failure to remedy the breach. The said letter further requested the Respondent to vacate the premises the following day. I interpolate to mention that in terms of Clause 16, the agreement is cancelled automatically after the Lessee's failure to remedy the breach within the stipulated period of fourteen (14) days.

I am of the view that the Applicant complied with the Lease Agreement in cancelling the Lease Agreement. It should be mentioned however that at the time that the Respondent was called upon to remedy its breach, the rental due for the month of March was not then due and

would have only become due after the 8 March, 2004. In the circumstances, it must be assumed that the rental claimed was up to the 8th February, 2004. -

The Respondent appears to take issue with regard to the amount of arrear rental and also appears to raise a counter-claim. That is in my view not a reason for the Respondent to remain in occupation, particularly once the Lease Agreement is adjudged to have been correctly terminated. It makesta business sense and gives effect to the principle of mitigation of damages for the Respondent to vacate the premises. Whatever the amount owing, it is clear that it is substantial.

I observe further that Clause 16 allows the Applicant, as it has done, to claim eviction of the Respondent, which it has done through this application. This is from the reading of the Clause without prejudice to it recovering all or any anears or rent and damages for breach of contract in separate proceedings. That appears to be the truncated form in which the Applicant has chosen to proceed, leaving the disputed issues of the exact amount of arrear rental, the quantum of damages and the counterclaim for determination in an action. The action whether pending or not, should not in my view constitute a bar to the Applicant obtaining the relief which it seeks and is from the papers clearly entitled to.

In MYAKA VS HAVEMANN AND ANOTHER 1948 (3) SA 457 (AD) at 465, Davis A.J.A., cited with approval the statement of Greenberg J. in BOSHOFF VS UNION GOVERNMENT 1932 T.P.D. 345, where the requirements for the grant of an ejectment are laid down. The learned Judge stated the following: -

> *"...I do not think that any Court would be entitled to decree an order for ejectment, when a plaintiff comes to Court and says; lam the owner of the ground; I let that ground to the defendant on a lease which covers the present period; without some allegation that the lease is no longer in force or no longer gives the defendant the right of occupation. It may be that the cause of action in such a case is the ownership of the ground, but where the plaintiff's own allegations in his declaration, or what is equivalent to his declaration, show that he is not entitled to ejectment, it does not appear to me that any Court would be entitled to decree ejectment in his favour. The Court would require (sic) to show that notwithstanding the right that he has given to the defendant, the defendant no longer has a right to remain in occupation. "*

The Applicant has alleged and shown that it is the owner of the premises in question. It has proceeded to show that the lease agreement, which entitled the Respondent to remain in occupation was cancelled. The Respondent, in view of the foregoing, no longer has any right at law to remain in occupation. Since the Respondent declined to comply with the request communicated to it by letter dated 29th March, 2004, it must be evicted from the premises.

In the premises, I grant the Applicant the relief sought in terms of prayers 2 and 3 of the Notice of Motion. I grant the costs on the attorney and client scale in view of the Respondent's attitude in remaining in the premises without a legal justification and refusing at the same time to pay rentals for its continued occupation. The costs at such a scale are a mark of this Courts disapproval and an appreciation of the vexation the Applicant has been put to on account ofthe Respondent's conduct as aforesaid.