

THE HIGH COURT OF SWAZILAND

NETTA BUJELA MANSER

Applicant

And

MRS HEXIONA NXUMALO

Respondent

Civil Case No. 910/2005

Coram: S.B. MAPHALALA - J

For the Applicant :MR. L. HOWE

For the Respondent: MR. J. MASEKO

RULING

(On points of law in limine) (15th December 2005)

[1] The Applicant in the present case seeks to perfect a landlord's hypothec after obtaining a rule nisi in this court on 18th March 2005, where various forms of relief were granted including an order that the Respondent be and is hereby interdicted from removing the movables from premises situated at Plot 528, farm 2, Fonteyn, Mbabane

in the Hhohho District. The Sheriff or his lawful Deputy Sheriff of the district of Hhohho was authorised to attach and make an inventory of all the movable goods on the premises in perfection of the landlord's hypothec. The said rule nisi had been extended many times by this court until the matter finally came before me where a point of law in limine was argued. This ruling concerns the determination of the said point.

[2] The points of law is found in paragraph 3 of the Respondent's Answering affidavit to the effect that the Applicant's papers are fatally defective in that Applicant has cited Respondent in her personal capacity yet the annexed agreement of lease is between the Applicant and Emmanuel Khayaletu which is a company registered under Section 21 of the Companies Act of 1912 (organization not for profit). A copy of the said Certificate of Incorporation is marked "A" and attached thereto.

[3] Before delving into the issue at hand I turn to sketch a very brief history of the matter for a better understanding of the present dispute. The Respondent is cited in the Founding affidavit as an adult female Swazi married to Mr. Nxumalo of Plot 528, Farm 2 Fonteyn at Mbabane in the Hhohho District. On or about 1st August 2003, the Respondent entered into a written agreement of lease. The lease agreement is annexed marked "NDM1". The material terms of the said lease were, firstly, that the Respondent would lease the property from Applicant known to both parties as a house in Fonteyn. Secondly, that the terms of the lease agreement shall be for a period of three (3) years commencing on the 1st day of August 2003 to the 31st day of July 2006, and thirdly, the agreed monthly rentals shall be the sum of E1, 500-00 per month paid in advance to the Applicant. It is averred by the Applicant in paragraph 6, 7, 8 and 9 of the Founding affidavit that Respondent has breached the said agreement and is now in arrears in an amount in excess of the sum of E28, 000-00. Therefore, Applicant has no other security other than the landlord's hypothec on any movables that may be on the premises.

[4] The Respondent besides advancing this preliminary objection has answered to the merit of the application to the effect that she never entered into any agreement of lease with the Applicant but the said lease agreement is

between Emmanuel Khayaletu and the Applicant. She signed the lease agreement in her capacity as a Director of Emmanuel Khayaletu. Further, that Emmanuel Khayaletu only took occupation of the house in January 2004, and not August 2003. Respondent does not

have any agreement of lease with the Applicant but Emmanuel Khayaletu, hence no need for Respondent to pay any rentals.

[5] The crux of the matter therefore is whether or not the Respondent [Mrs Hexiona Nxumalo] has been properly cited as such in view of what is stated in annexure "NDM1" being the agreement of lease between the Applicant "(the lessor)" and Emmanuel Khayaletu "(the lessee)".

[6] On perusal of the lease agreement under "schedule of information" in item 1.2 thereof the lessee's trade name is stated as "Mrs Sonia Nxumalo". The lessee's public liability insurance cover is Mrs Hexiona Nxumalo's car "Emmanuel Khayaletu Director". It is in any event, common cause that Mrs Hexiona Nxumalo is a Director of Emmanuel Khayaletu. It is also clear that Mrs Hexiona Nxumalo signed the lease agreement on behalf of Emmanuel Khayaletu. It is also evident from annexure "NDM1" viz the lease agreement that the latter also trades as "Mrs Sonia Nxumalo". The question therefore is whether "Mrs Sonia Nxumalo" is the same as "Mrs Hexiona Nxumalo". It appears to me on reading the lease agreement that this is the same person. Respondent trades as either "Mrs Sonia Nxumalo" or "Mrs Hexiona Nxumalo" who has agreed that she signed the lease agreement on behalf of Emmanuel Khayaletu. I do not think Respondent was incorrectly cited in view of the confusion of names in the lease agreement.

[7] Therefore, for the afore-going reasons, I find that the point of law in limine has no merit and is dismissed. Costs to be costs on the merits. The matter to proceed to the merits.

S.B. MAPHALALA

JUDGE