THE HIGH COURT OF SWAZILAND

PHILLIP LOBENGULA NSIBANDE

Applicant

P. R. HOLDINGS (PTY) LTD

Respondent

Civil Case No. 3045/2004

Coram: S.B. MAPHALALA - J

For the Applicant: ADVOCATE L. MAZIYA (Instructed by Mthembu, Mabuza)

For the Respondent :MR. L. HOWE

JUDGMENT

(24/03/2005)

[1] Serving before court is an application brought under a Certificate of Urgency for the following relief:

1. Waiving the usual requirements of the rules of this Honourable Court regarding notice and service of applications and having this matter enrolled as one for urgency.

2. That the Respondent tie and is hereby interdicted from removing the movables from the premises situated on the remaining extent of Farm 1067 and 1068 at Malkerns in the Manzini district.

3. That the Deputy Sheriff or his lawful deputy of the district of Manzini is hereby authorised, directed and, required to:

a) Serve the Order, Notice of Application and Founding affidavit upon the Respondent and to explain the nature and exigency thereof to him.

b) To attach all movables in the premises and

c) To make an inventory thereof.

d) To make a return to the Applicants attorney and the Registrar of this Honourable Court, of the execution of this order.

4. The Applicant's claim iiamely for:

a) Payment of the arrear rental in the amount of E52, 939-20.

b) Ejectment of the Respondent from the premises.

c) Costs of suit dn the attorney and own client scale.

5. That the Order in terms of prayers 1 - 4 returnable on the 15th October, 2004 at 9.30am orsoon thereafter as the matter may be heard whereupon the Respondent if he so wishes to oppose the application to:

a) File within 3 days of service of this Order notice in the manner prescribed by the rules of this court of his intention to do so.

b) Not less than [two days before the date of the hearing file such affidavits as he may with to do so in support of his opposition and in answer to the Applicant's Founding affidavit.

c) Appear in court in attendance at the time stated for the hearing

6. If the Respondent is prejudiced by the interdict and/or attachment of the and contends that no rental is owing, he may apply to court for the rescission of variation of this order within the period and manner provided for in the rules of court.

[2] The application is founded on the affidavit of the Applicant who has outlined the salient facts in support thereto. A number of annexures are also attached.

[3] The Respondent is opposing the granting of the application and to that end the opposing affidavit of its Director Petrus Jansen Van Vuuren is filed. In the said affidavit a point of law in limine is raised as follows:

"I am advised by my attorneys that a claim in terms of the notice of motion, at paragraph 4 (a) for payment of the sum of E52, 939-20 cannot be issued by the court by way of application and must proceed by way of acton as there is a dispute which is known to the Applicant.

4. I am advised ably, that the appropriate procedure by the Applicant is by way of action in respect of payment of the sum claimed and ejectment as material allegations have to be alleged in support of the

breach and the ejectment for purposes of reaching such legal requirements ..."

[4] The facts of the matter'are that the parties concluded a contract of lease over a portion of the remaining extent of Farm No. 1067 and 1068 measuring twenty-one (21) hectares of land for the cultivation of sugar cane. The land in question is situated at Malkerns in the Manzini district. It includes a dam and outbuilding comprising a compound of nine (9) rooms, two sheds with offices, a kitchen and dining room area with tables and an open store area. The said contract was for a period of five (5) years and seven (7) months which commenced on the 1st June 2004, until the 31s' December 2008. The monthly rental foj- the initial period was fixed at E3, 300-00 being E2, 000-00 in respect of the land and dam as well as El, 300-00 in respect of the outbuilding on the land (with effect from the 1st June 1998 until 31st May 1999) escalating at the rate of 10% per annum on the land and dam portion one year after the commencement date and every year thereafter and 10% per annum on the outbuilding only after two years after the! commencement date and annually thereafter. It was agreed further that the monthly rental payable in the option period would continue to escalate at 10% per annum after the initial period.

[5] The arguments advanced in support of the point of law in limine are found in Respondent's Heads of Arguments in paragraphs 4 to 11 thereof. The gravamen of the point raised is that this matter must proceed by way of action as opposed to application in that there are disputes of fact in both affidavits of the Applicant more particularly in the replying affidavit where various issues of election are raised on page 70 at paragraph 5 and 6 regarding the election in terms of the lease agreement. On the essential requirements: of the contract of lease the court was referred to A.J. Kerr, The Law of Sale and Lease, 1984 reprinted 1991 at page 164 and the cases of Oatorian Properties (Pty) Ltd ys Maroun 1973 (3)

S.A. 779 (A) and that of Enters Centre Enterprise (Pty) Ltd vs Brogmeri 1972 (1) S.A. 117(c) at 123.

[6] Per contra arguments are that in the present case the supposed disputes of fact are not material in the sense (hat they have nothing to do with the contract entered into between the parlies and that to hold that there are material disputes in this matter would be tantamount to amending the contract between the parties, and that is legally not permissible. To emphasise this point, Mr. Maziya took the court through the provisions of the lease agreement viz Clause 3.3 and 20.6. Therefore, so the argument goes, the supposed disputes of fact are not only self-invented, they are also not material in view of the provisions of the lease. They do not I any way disqualify this matter from being decided on affidavit, it is contended.

[7] On the question of urgency it is Mr. Maziya's submission that this issue is academic since both parties have now filed their papers before court. No prejudice has been shown to have been occasioned to the Respondent in any way. At any rate principles of adjectival law arc as of necessity flexible and should only be insisted upon where there is a clear demonstration of prejudice suffered by the other party consequent upon failure to observe them. In this regard the court was referred to numerous cases including Du Khunou vs M. Fihre & Sons (Pty) Ltd 1982 (3) S.A. 353 (W) (per Slomowitz AJ); Trans African Insurance Co. Ltd vs Maluleka 1956 (2) S.A. 278 (A) per Schreiiier JA); Epstein vs Christodoulah 1982 (3) S.A. 347 (\V); (per Reened J); Federated Trust Ltd vs Botha 1978 (3) S.A. 645 (AD) 654 (per Van Winsen AJA); Baeck & Co. S.A. (Pty) Ltd vs Van Zummeran 1982 (2) S.A. 112 (W) at 118 H and Erasmus, Superior Court Practice 1994 Bl - 5.

[8] In this regard I agree With the submissions by Mr. Maziya that the question of urgency is now

academic since both parties have now filed their affidavits and are before court. Therefore, no useful purpose will be served in pursuing this point of law in limine in the circumstances.

[9] Reverting to the more substantial point viz that the matter should proceed by way of action proceedings as there are disputes of fact and having considered the facts on affidavits and the arguments by Counsel I have come to the considered conclusion that indeed, there are materialldisputes of fact which cannot be resolved on the papers as they stand. There are a number of disputes of fact spread throughout both the Applicant's Founding affidavit and his Replying affidavit.

[10] Firstly, it appears there ;is a dispute of fact as to the amount of rentals due in view of the Respondent's claim of damages which has been caused by the loss of the 9 hectares of land as per annexure "PR1". This aspect of the matter centres around the issue of the right of use and enjoyment of the property as an essential requirements for a lease agreement. Further, in this regard it appears in the affidavits that the Respondent has never denied that the amount claimed is not due from itself but has

on previous occasions[1] been stating that it is excused from paying the sum due to the various defences raised, namely the counter-claim that it has against the

Applicant and the necessary improvements that were performed by the Respondent.

[11]The second material dispute of fact pertains to the issue of the renewal of the lease agreement and the exerbise of the option by the Respondent. The Applicant relies on Clause 3.3 of the lease agreement which provides that "the lessee shall exercise the option by written notice to the lessor not less than three (3) month's

prior to the termination of the initial period, failing which the option shall lapse". The argument for the

Applicant in this regard is that since there is no evidence of any written notice to the effect that the Respondent was exercising the option in terms of this clausej it is submitted that it is not open to the Respondent to

complain about the size of the land that is actually suitable for sugar cane cultivation.

The Respondent had five (5), years within which to do that and there is nothing to show that it ever did that. The allegations and suggestion that this was done cannot be supported because there is nothing in writing to that effect. Further, that Clause 20.6 provides as follows:

"All notices, consents, adduce or other communication by the lessor or the lessee to the other of them shall be in writing^ and unless in writing shall be deemed not to have been given or made".

[12] In answer to the above attack the Respondent avers in paragraph 9.1 in fin 9.4 its answering affidavit as follows:

9.1 The contents of this paragraph are denied and the Applicant is put to the strict proof thereof.

9.2 On or about and or during before the expiration of the first term of the lease

agreement, the Respondent instructed its attorneys Millin & Currie to attend to the renewal of the lease agreement and the exercise of its options.

9.3 The afore-said company advised the Respondent that the option would be exercised and also further advised the Applicant of the exercise of the option by the Respondent. A meeting was held in the office where the Applicant requested that an explanation be given to him as to what the option is and such

option and explanation was given to him by the Respondent's attorney.

9.4 Unfortunately the Respondent is unable to produce the latter which clearly indicates that the option was exercised but by way of evidence being led and discovery of the documents such evidence will be made available to the court.

[13] The above averments: have created a dispute of fact where Applicant has responded as follows:

"Contents hereof are denied as if specifically traversed".

[14] In the totality of the facts before me it is abundantly clear that the Applicant has adopted an incorrect procedure by proceeding by way of application instead of action proceedings. I agree J in toto, with the submissions made by Mr. Howe in paragraph 7 to 11 of his Head of Arguments that the application falls to be dismissed in view of the plethora of disputes of facts as outlined above.

[15] According to the authors Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 241 where, at the hearing of motion proceedings, a dispute of fact on the affidavits cannot be settled without the hearing of oral evidence, the court may, in its discretion, (a) dismiss the application;

(b) order oral evidence to be heard on specified issues in terms of the rules of court; or

(c) order the parties to trial (see Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. at 1155 (T) at 1164 and Plascon - Evans Paints Ltd vs Van Riebeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A).

[16] It is further trite law that the court may dismiss the application where Applicant should have realized when launching his application that a serious dispute of fact was about to develop, (see Adbro Investment Co. Ltd vs Minister of Interior 1956 (3) S.A. 345 (A) and the cases cited at folio 90 of Hebstein (supra). In casu I find on the facts that the Applicant should have realized that disputes of fact would develop in view of the nature of the lis between the parties.

[17] In the result, for the afore-going reasons the point of law in limine is upheld with costs.

S.B. MAPHALALA

JUDGE