

THE HIGH COURT OF SWAZILAND**SVMS INVESTMENT (PTY) LTD Applicant****And****FUTHITHEODORAH SHABANGU Respondent****Civil Case No.2214/05****Coram****S.B. MAPHALALA - J****For Applicant****Mr. S. Masuku****For the Respondent****In Absentia****JUDGMENT 19th August 2005**

[1] On the morning of the 8 August 2005 in the "8.30 Roll" I heard submissions for confirmation of a rule *nisi* which was issued by this Court on 17th June, 2005 for perfection of a Landlord hypothec. The Applicant was represented by Mr. S. Masuku and there was no appearance for the respondent despite a notice of set down served on the Respondent's attorneys Ntiwane & Associates at 14:56hrs on the 3rd August, 2005 for hearing on 8th August, 2005. I allowed counsel for applicant to address me on the confirmation of the Rule. After hearing his argument I confirmed the rule and intimated that full reasons will follow in due course. Following are those reasons for the confirmation of the Rule issued by this court on 17th June 2005.

[2] The rule *nisi* issued on the 17 June 2005 was for an order in the following terms:

"WHEREUPON: Having heard counsel for the Applicant and there being no appearance by the Respondent:

IT IS HEREBY ORDERD THAT

1. The above Honourable Court dispenses with the usual time limits forms and provisions of service as are required in terms of the rules of this Honourable Court and that this matter be heard as one of urgency;

2. **The Deputy Sheriff for the District of Hhohho or any other authorised person, be and is hereby ordered and authorised to attach and seize all movable goods in the residential premises occupied by the Respondent known as plot 427 (a portion to portion 170 of Farm 188) situate in Likhwindla street, Dalriach East, Mbabane, Hhohho District, Kingdom of Swaziland to perfect applicant's Common Law hypothec for the said goods for the recovery of arrear rentals amounting E9, 000.00 (Nine Thousand Emalangi);**

3. **The *rule nisi* do hereby issue, calling upon the Respondent to show cause on the 1st day of July, 2005, why the order referred to herein should not be made final pending the outcome of an action to be instituted by the Applicant against the Respondent claiming:-**

3.1. **Payment of E9, 000.00 (Nine Thousand Emalangi) in respect of arrear rentals owed by the Respondent;**

3.2. **Interest thereon at the rate of 9% per annum *a temper morae*;**

3.3. **Cancellation of the lease agreement;**

3.4. **Ejectment of the Respondent from the premises;**

3.5. **Costs of suit;**

4. **Paragraph 2 herein operates forthwith, with immediate effect as an interim order, pending the finalisation of the action to be instituted by the applicant;**

5. **This matter be heard as of *ex parte* application;**

6. **The Respondent be ordered to pay the costs of this application;**

7. This Honourable Court grants such other and/or alternative relief."

[3] The Applicant had filed a Founding Affidavit of one Reynold Baartjies who is the manager and director of the applicant. The respondent opposes the application and she has filed her opposing affidavit in respect thereto. She has also filed pertinent annexures. In turn the applicant filed its replying affidavit in the normal way.

[4] According to the applicant's averments on about the 1st April, 2005 applicant and respondent entered into an oral lease agreement in terms of which the applicant, as lessor leased to the respondent, as lessee, a residential house known as plot 427 (a portion of portion 170) of farm 188 Dalriach East, Mbabane. The applicant was represented by Reynold Baartjies and the respondent was represented by herself. In paragraph 7,8, 8.1, 8.2 and 8.3 of the founding affidavits the material terms of the said lease are outlined, *inter alia*, that respondent/lessee would pay an agreed rental of E4, 500.00 monthly in advance on or before the 7th business day of each calendar month for the right of use and enjoyment of same.

[5] The applicant further avers in paragraph 9 thereof that the respondent/lessee is presently in arrears for the months of May 2005 and June 2005 and any further rentals falling due thereafter. The arrear rentals are due, owing and payable by the respondent/lessee in the sum of E9, 000.00.

[6] The respondent on the other hand advances a defence in his opposing affidavit where in paragraph 4.2 to 4.18 she set out the historic background of her relationship with the Applicant. The essence of her defence is a denial that there was ever a lease agreement between the parties but an agreement of sale of the said house.

[7] In reply the applicant averred in its Affidavit that the respondent agreed to lease applicant house for E4, 500.00 per month and that the lease would be on a month to month basis on the understanding that applicant was selling the house to respondent. It would be absurd for the respondent to conclude that she can just occupy the house for an unspecified period without paying rent.

[8] It appears in the pleadings that respondent paid E5, 000.00 on the 1st August, 2005 reducing her indebtedness to E13, 000.00 which is what the present application is asking for. Mr Masuku for the Applicant contended that respondent by doing so concede that she was indebted as alleged, and it appears to me to be so.

[9] In the totality of the facts before me and the arguments advanced by Mr Masuku I have come to the conclusion that *in casu* there was a valid lease. I say so for the following reasons. First, it is not in dispute that respondent is in beneficial occupation of the house to date thus satisfying one of the basic essential elements of a lease, *viz'* use and enjoyment of the property. Secondly, it is also not in dispute that the parties agreed on E4, 500.00 thus satisfying the second essential element that of consideration (rent). Thirdly, what seems to be problem in terms of the lease respondent says that the rentals was to be E4, 500.00 for the month of April. In this regard I agree *in toto* with the submissions by Mr Masuku and his reliance on the authority of *W.E. Cooper, Landlord and Tenant, 2nd Edition at page 65*. The learned authors states the following;

" Where R. lets a house to A at a rent of E1 50.00 a month without specifying the terminal point of the lease, the implication is that the agreement is a periodic monthly lease."

[10] In conclusion, therefore the applicant has fulfilled all three essential elements of a valid lease. The foregoing constitutes my reasons for confirming the rule *nisi* from the 8th August 2005.

S.B. MAPHALALA