

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3540/06

In the matter between:

EXPRESS TEXTILES MILLS (PYY) LTD

APPLICANT

and

HAJI BARKAT INVESTMENT (PTY) LTD

RESPONDENT

CORAM

FOR THE PLAINTIFF FOR
THE DEFENDANT

Q.M. MABUZA -J MR.

SIMELANE MR. Z.

MAGAGULA

DIII INC 016/07

[1] Before me is an application for summary judgment which is resisted by the Defendant. The summary judgment is for the ejectment of the Defendant, costs of suit, further and / or alternative relief.

[2] The issues are somewhat confusing. However, what appears **ex facie** the papers is that the Plaintiff leased certain movable property on Plot 37, Portion 14 of Farm 65 Malkerns to the Defendant. A lease agreement between the parties was entered into by and between the parties. It was to commence on the 1st June 2004 and was to continue for a period of 5 years.

[3] The Plaintiff states that during the duration of the above lease it was substituted for a new one which commenced on the 1st January 2005 and was to run for 1 year. The second lease is between Bomambane Trust and the Defendant. The first lease is between the Plaintiff and the Defendant.

[4] There is no dispute as to ownership of the property. Plaintiffs Counsel contends that the first lease was abandoned in favour of the second lease. I have examined the second lease and nowhere in it is there provision for the abandonment, termination or cancellation and replacement of the first lease. My view is that the leases run side by side or concurrently and I so hold. This would probably explain why the Plaintiff is still Express Textiles (Pty) Ltd and not Bomambane Trust.

There is no notice to amend Plaintiffs name in the papers before court.

[5] It is not clear ex-facie the papers that if the Plaintiff owns Plot 37, Portion 14 of Farm 65 Malkerns how does Bomambane Trust enter into a lease for the same property which it does not own nor does it allege that it is holding the property in trust for the Plaintiff or even that it is a caretaker for the Plaintiff. The connection between the two should be stated.

[6] If the second lease has expired it is my view that the first lease upon which the Defendant relies has not expired. The Plaintiff would have to give the requisite notice in terms of the first lease.

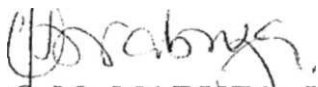
[7] I agree with the Defendant that summary judgment is a drastic remedy which closes the door finally and irrevocably on the Defendant. In this case it would be drastic because the issues have not been clearly pleaded and there is a need to ventilate them with oral evidence in due course. It would be a travesty of justice to grant summary of judgment at this point because the court is unclear of the issues involved.

[8] Both leases provide for notice to be served on the Defendant and not his attorneys. The notice sent to the Defendants attorneys is therefore improper.

[9] In the event there is no need for the court to go into detail with regard to the merits as Counsel did in their respective submissions.

[10] The particulars of claim are very scant. The allegations averred to in the replying affidavit do not appear in the particulars and the Court cannot grant summary judgment because the summons lack the necessary averments. The replying affidavit seeks to amend the summons and such procedure is improper and cannot be allowed. The Plaintiff should have set out its case properly in either a combined summons or declaration.

[11] In the event, summary judgment is refused. Costs are hereby reserved and the matter is to take its normal course in terms of the rules.


Q.M. MABUZA-J