IN THE HIGH COURT OF SWAZILAND

CASE NO.2656/08

In the matter between:

SWAZILAND INDUSTRIAL

DEVELOPMENT COMPANY LIMITED **APPLICANT**

AND

JOHNNY FIFTY FIVE (PTY) LIMITED **RESPONDENT**

CORAM **MAMBAJ**
FOR APPLICANT **MR. K. MOTSA**
FOR RESPONDENT **MR. L. HOWE**

JUDGEMENT 24th OCTOBER, 2008

[1] In its summons the Plaintiff has claimed for the following order against the Defendant:

1. Payment of the sum of E173, 760.00 being in respect of arrear rentals as of June 2008 in respect of premises situate on Lot 478 Matsapha Industrial Site.
2. Ejectment of the Defendant from the leased premises.

3. Legal interest (i.e. 9% per annum) on the above sum, from date of issue of summons to date of final payment and costs at attorney and own client scale.

[2] Following the filing of a notice of intention to defend the action by the Defendant, the plaintiff has moved an application for Summary Judgement - in the usual form - alleging that the Defendant has no bona fide defence to the action and notice of intention to defend has been filed solely to delay plaintiff in its quest for the relief it seeks.

[3] The Application for summary judgement is opposed by the Defendant who has filed its grounds on oath, for doing so. The plaintiff has, in turn and with leave of the court, filed a replying affidavit and the matter was argued before me on the 10th instant and judgement was reserved.

[4] It is common cause that the plaintiff is the owner of certain premises on plot number 478 situate at Matsapha Industrial Site. These premises are currently occupied by the Defendant who is engaged in the business of manufacturing furniture and other timber products.

[5] It is common cause further, that the premises are let to the Defendant by the Plaintiff. The Plaintiff alleges that annexure 'A' to its Declaration is the Lease Agreement entered into by and between the parties herein and contains the terms and conditions of the agreement between them. The Plaintiff alleges further that the monthly rental for the year ended September 2008 was a sum of E23, 232.00 and that in June 2008 the Defendant was in arrears in its monthly rentals in the sum of E173,760.00. These allegations have not been disputed by the Defendant who has contended itself by merely alleging that:

> "9.1 The respondent signed a lease agreement on the 1st of October,2005 similar to the one attached and returned it to the Applicant.
>
> 9.2 On numerous occasions the Respondent requested a copy of the same and was advised that it had not been signed by the Applicant. This was as recent as this year.
>
> Therefore it is not correct that the agreement was signed on the 1st of October, 2005 by the Applicant and he is put to the proof thereof."

With respect to the Defendant, this is not a denial of a fact but rather an

assertion of lack of knowledge of the issue asserted or averred by the plaintiff. But more significantly, the Defendant has not denied its authorized agents signature appearing on annexure 'A'. Mr Ramkolowan is the alleged agent or representative of the Defendant (according to the Plaintiff). Mr Ramkolowan has deposed to the affidavit resisting summary judgement by the Defendant and he has not denied that he signed Annexure 'A'.

[6] It is further not insignificant that the Defendant has not denied any of the terms of the lease agreement as averred by the plaintiff or that it is in occupation of the leased premises; that the premises belong to the plaintiff or that the Defendant is in arrears of rental as alleged by the plaintiff.

[7] The Defendant, has raised three issues which it avers each constitutes a defence to an application of the nature under consideration. These are the issues:

Firstly, in June 2008 a verbal agreement was entered into between the parties whereby the Defendant was to surrender 50% of the leased space back to the plaintiff and the monthly rentals would be reduced, proportionally. To date the surrender has not been done and the rental reduction has not been effected. The verbal agreement has not been executed, by either side.

Secondly, the written lease agreement between the parties "has an illegal provision in clause 9 which makes it the responsibility of the Respondent to pay the rates ...[and this] is unlawful in terms of the Rating Act." Defendant avers that further he "has made payments to a total of E40,598.00 ...being the rates amounts as per the Matsapha Town Board" and he has a counter-claim against the plaintiff for this. He argues that the Rating Act 4 of 1995 places the duty or obligation to pay rates on the owner of the property and not the tenant or mere occupier.

Thirdly, the lease agreement is inadmissible as proof of its contents inasmuch as it has not been stamped as stipulated in the Stamp Duty Act 37 of 1970. I examine these 3 defences in turn below.

[8] In argument, Counsel for the Defendant did not pursue or argue the 3rd

ground of objection ie. that based on the non compliance with the provisions of the Stamp Duty Act. This was because the plaintiff

submitted annexure T as proof that stamp duty in the sum of E3, 813.12 had been paid to the Swaziland Government.

[9] Again, because the Defendant has not denied having signed the lease agreement; has not denied that it did pay monthly rentals as alleged by the plaintiff; has admitted being in occupation of the property at the relevant time, has not denied being in rental arrears; and has admitted having paid Rates in respect of the leased premises, in compliance with a term of the lease agreement, the conclusion is in my judgement inescapable that annexure 'A' herein is the lease agreement between the parties herein as averred by the plaintiff. The document is further declared admissible as there was compliance with the Stamp Duty Act.

[10] Even accepting for the moment that there was the alleged verbal agreement between the parties herein in June 2008, this does not advance the Defendant's cause. The verbal agreement was to take effect in the future. It was not effected or brought into operation. The Defendant has not stated that it has performed its side or part of the agreement; namely, surrender 50% of the leased premises. But more importantly, the rental arrears in question do not pertain or relate to any period after June, 2008. The alleged reduced rentals would therefore not have affected the arrears claimed. This defence, if it be such, would be relevant or applicable only in respect of the Defendant's occupation of the premises after June, 2008. Such an amendment would in any event have been valid only after it had been reduced into writing and signed by both parties.

[11] As I indicated to Counsel for the Defendant during the hearing I find the reasoning or basis of the proposition or submission by the Defendant pertaining to the Rating Act unsound and strange. The Defendant has argued that its challenge is based on the provisions of s 29 of the Act which

provides that rates on any ratable property shall be borne by the owner of such property. With due respect, these provisions do not prohibit an agreement or any such arrangement whereby the owner of such property may covenant with a tenant for the latter to be responsible for the due payment of the rates. In **PROUD INVESTMENTS (PTY) LTD v LANCHEM INTER (PTY) LTD, 1991 (3) SA 738 @ 747G JOUBERT JA,** stated the position as follows:

> "The purpose of clauses 8 & 9 is to cast on the respondent as tenant a liability to make contributions in respect of certain charges, rates, maintenance and service costs which would according to our common law appertain to the appellant's obligations as landlord. According to our common law a landlord is obligated to pay all taxes and burdens charged upon the leased land unless the parties expressly agreed that they would be borne by the tenant." (The underlining is mine).

However, this arrangement may never be a defence by the owner against the local municipality where the tenant has not complied with his agreement (with the owner) to pay the rates. In short, the owner of rateable property may not be heard to say to the municipality: "Oh, I have ceded or assigned my obligation to pay rates to my tenant, go and demand payment from him."

I am in respectful agreement with the legal position as stated in **W E COOPER LANDLORD AND TENANT 2nd ED.** at 133 to which I was referred by Counsel for the Applicant that:

> "[the lessor and lessee] may regulate liability for rates and taxes by agreement. Thus the parties may agree-
>
> The said lessee shall ...pay and discharge all rates and taxes which may become due or be made and levied by lawful authority upon the said lot (premises) or upon the lessor in respect thereof, and shall refund to the said lessor any such rates or taxes as may be advanced or paid by him in respect thereof or any part thereof. ...
>
> If a Lessee who is merely under a contractual obligation to the lessor to pay rates fails to do so, the authority concerned cannot recover them from the Lessee since there is no vinculum Juris between it and the Lessee. If, despite such an agreement between him and the Lessee, the Lessor pays the rates, he can recover them from the Lessee." (Footnotes have been omitted by me).

[12] There is therefore no cause of action for the counter-claim. For the above reasons, the defendant has failed to raise any triable issue in defence of the application for summary judgement. The Application is allowed with costs.

MAMBA J