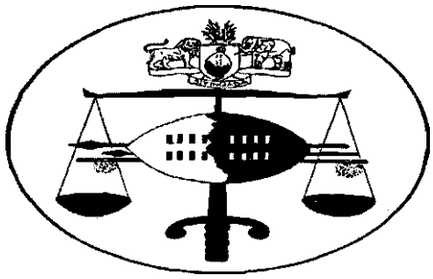

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE — CIVIL CASE NO. 3457/2008

In the matter between:

SWAZILAND PROPERTY MARKET (PTY) LTD — APPLICANT

AND

NOZIDUMO INVESTMENTS (PTY) LTD — RESPONDENT

CORAM: — ANNANDALE J

FOR THE APPLICANT: — MR. S. HLOPHE OF SIPHO MATSE ATTORNEYS

FOR THE RESPONDENT: — MS. N. DLAMINI OF SHILUBANE MASEKO & PARTNERS

JUDGMENT 25th MARCH 2009

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[1] The focus of the matter at hand is to decide whether an existing rule *nisi* should be set aside or be confirmed. The order was obtained *ex parte* whereafter the return date was anticipated, at which time a consent order expunged interim and immediate effect from the relief.

[2] The Respondent Company has been in occupation of leased premises but is alleged to have fallen in arrears with its monthly rentals for a considerable time. Long afterwards, the Applicant decided that the matter has suddenly became so urgent that rules of procedure and time limits should be dispensed with in order to avoid loss of the landlord's hypothec, pleaded to be the Applicant's tacit hypothec, which as shown below, cannot be correct. The Applicant simultaneously claimed ejectment and payment of arrear rentals.

[3] The initial order which the Applicant Company obtained was firstly, to have a relaxation of the applicable Rules and time limits and an urgent hearing. It also obtained provisional cancellation of the lease agreement and an interdict to prevent removal of any

movables, fittings and fixtures from the premises, pending payment of arrear rentals "and other charges".

[4] The deputy sheriff was directed to serve the applicable papers and Order on the Respondent, to attach movable property found upon the premises and ensure its retention, inventorise it and file his return.

[5] As is usual practice in such matters, this interim relief was ordered to have immediate effect. The initial order of the 4th September 2008 had a return date of the 26th September which was anticipated and resulted in a consent order setting aside interim and immediate effect of the rule *nisi.*

[6] The Applicant claimed E 44 398 as arrear rentals and other charges as well as ejectment from the premises and costs. It did not also include a prayer for *mora* interest.

[7] The Applicant stated on affidavit that over an eight month period ending in September 2008, no rental payments were received. A simple calculation confirms it to be so, but with the claimed amount being full term at the end of September whereas the application was brought before court earlier that month, on the 4th. Nevertheless, there is no dispute with the amount claimed to be in arrears.

[8] The point sought to be illustrated is that for as long as almost eight months, no rental payments were received but nevertheless, it then became a sudden case of "urgency". Furthermore, the Applicant did not lay a factual foundation to motivate its apprehension that the Respondent might all of a sudden decide to vacate the leased premises and take all movables along, depriving the landlord of its otherwise available remedies which depend upon the vesting of a tacit hypothec.

[9] In the founding affidavit of the Applicant, it is stated that:

> *"The matter is urgent because the continued occupation of the premises by the Respondent is occasioning the Lessor financial prejudice in so far as the Respondent is not paying for his (sic) occupation and hence unjustly enriched at the expense of the Lessor who claims (sic) no benefit from the Respondent's occupation.*
>
> *If the Respondent vacates and removes its movables, the Lessor will be deprived of its right to enforce its legal hypothec which is provided for in the lease agreement".*

[10] The Applicant further stated that:

".. Applicant fears that Respondent might remove the movable properties from the premises before the matter is finalized hence defeating the whole purpose of this application".

[11] On the basis of the founding affidavit, devoid as it is as to the sudden emergence of urgency, despite its inordinately long delay in bringing the matter to court but without any explanation as to futile attempts made to demand and recover outstanding lease payments or as to the basis for its belief that the lessor might abscond and leave it with empty lands, the initial application was nevertheless granted by this court, in the form of a rule *nisi* with a return date some three weeks ahead.

[12] At that time, a now contentious statement by the Applicant was also accepted at face value. It was said that:-

"By reason of the default aforesaid the Respondent is in material breach of the said written Lease Agreement, hence the Applicant is entitled, on behalf of the Lessor, to cancel the said agreement and eject the Respondent from the premises. Moreover, the Applicant is entitled to

demand payment of the arrear rentals which are due, owing and payable".

[13] *Cooper* in the second edition of *Landlord and Tenant* says at page 183-4 that: "Most Judicial authorities seem to require a Lessor to have some (albeit slight) apprehension that his hypothec is about to be defeated before he applies to court for an attachment". For this statement, the learned author relies upon *Sikwe v SA Mutual Fire and General Insurance Co. Ltd 1977 (3) SA 438 (W) at 440G- 441 A* and *Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA 109* where it was held that: ".. *the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment".* It is therefore required that sufficient cause be set out in all matters brought on urgent basis. *"In every affidavit or petition filed in support of an application the applicant shall set forth explicitly the circumstances which he avers renders the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course"* (Rule 6 (25)).

[14] On this aspect alone the granting of interim urgent relief is already doubtful, but in itself does not automatically render it liable to be

set aside. There are other aspects which jointly add weight into the scales for ultimately leading to that result.

[15] A further two, now contentious, averments were made by the Applicant when the matter initially came before this court. The Applicant's director, "by virtue of his position as such", averred that:

> "On the 31st January 2008, the Applicant was expressly appointed as agents to act on behalf of Muzikayise Dlamini (the Lessor) and responsible for the management and rent collection in respect of (the premises)".
>
> "The Respondent was duly advised by letter dated the 31st January 2008 of the Applicant's appointment as agents for and acting on behalf of the lessor" (emphasis added).

[16] For this contention, the Applicant Company relies upon two documents which it filed with its application. The first of these is Annexure "A", which from the face of it is a letter from the lessor, addressed to "all the Tenants" of the premises. It states that the letter "serves to confirm that I have appointed (the Applicant Company) to be my agents responsible for management and rent collection on my behalf ..." and further that "Swaziland Property

Market should renew all the leases for the tenants with a rent escalation of 10% as from 1st February 2008".

[17] The second document is a letter from the Applicant Company, advising the Respondent Company that it has been "... appointed to take over management and rent collection in respect of the property ..." and that"... it means that from (the 1st February 2008) all your current and future rentals shall be directed to our offices at (...) ..."

[18] The immediate and obvious aspect of these two documents, which forms the basis on which the Respondent Company relies to have the rule *nisi* set aside, is that neither of the documents authorise the Applicant Company to litigate on behalf of the lessee. There is no express mandate to do so, no power of attorney to institute legal proceedings against any errant tenant, specifically not to sue the Defendant on behalf of the lessor.

That the Applicant conveyed this much to the tenants or the Defendant in particular is expressed in its letter, annexure "B". There it is stated, as recorded above, that it was appointed by the lessor to "take over management and collection", which it stated to mean that "current and future rentals" shall be directed to its stated address.

For such a situation to have arisen, it is patently clear that the lessor and the Applicant must be two different entities. This is borne out by the Applicants papers, which contains a copy of the written lease agreement. It is between the Respondent Company and one Muzikayise M. Dlamini, as lessor, quite a different kettle of fish as the Applicant which purports to act on his behalf.

[21] The testament of the agreement as embodied in Annexure "C" to the founding affidavit prohibits the lessee to cede or assign the agreement to another, but it does not state that it allows the lessor to do so. What it does record is that the lessor's representative, such as the present Applicant, shall have the right to inspect the premises at all reasonable times. This seems to fall under the auspices of "management", as deferred to the Applicant by the lessor.

[22] Paragraph 8 of the lease agreement records the position that is to arise in the event of non payment of rent. If 14 days lapse after the due date of payment, or upon breach of the other stated terms and conditions of the lease, ".. the lessor (emphasis added) shall have the right forthwith to declare the lease cancelled and ... take (re-)possession of the premises let or eject the lessee ...without prejudicing any claim which the lessor may have or thereafter have against the lessee for any rent due

[23] What the agreement does not provide for is a tacit or automatic cession of a right by the lessor onto any agent, such as the Applicant, to institute legal proceedings on its behalf should the lessee fail to comply with its obligations under the contract. Of course, the lessor may decide to do so at any time, at his choice, but he needs to do so expressly.

[24] The argument advanced on behalf of the Respondent or lessee, is that in the absence of express authority to do so, the Applicant has acted on a frolic of its own. In turn, it lacks *locus standi* to sue the Respondent. It was not mandated by the lessor to litigate on his behalf.

[25] In its affidavit, the director of the Respondent Company raises issues on the merits of the matter which in turn raises serious concerns about the legality of the lease and the *bona fides* of both parties to the agreement. Unconscionable averments are made with regard to the agreement, such as that the lessor is the husband of the Respondent's director and that both were shareholders in the Respondent's "family company" but with

the husband/lessor having ceded his shares to their son. It then contains the disturbing allegation that "... the lease agreement was never intended to be a lease in Law; it was done to obtain a loan from the Swaziland Building Society".

[26] If these assertions turn out to be true if could be against the morals of society, ex *turpi causa non oritur actio* and might adversely impact on the future of this litigation once it is brought back before court. (See Maseko v Maseko 1992 (3) SA 190 (W)).

[27] However, these untoward mudslinging allegations, as well as the other stated aspects which seek to deal with the merits of the matter in a dismally presented pleading, devoid of any significant detail, do not in itself result in the inevitable outcome of the matter.

[28] The reason for the resistance to having the interim relief confirmed is incorrectly stated to be that "(t)he Plaintiff... has no *locus standi in judicio* to sue because the document on which it relies only authorizes it to represent the landlord in legal proceedings only" (sic).

[29] That this statement is manifestly incorrect is obvious when regard is given to the "authority" on which the Applicant relies upon to have instituted the present matter.

[30] It is not authorised to represent the landlord in legal proceedings, at all. Although the Respondent incorrectly states it to be so, the

two Annexures from which quotations are recorded above do not substantiate this. What the Applicant was authorised to do was to be an agent of the lessor, responsible for management and rent collecting on behalf of the landlord.

[31] The delegation of powers held by the lessor under the lease agreement is in consonance with such agreed abrogation or delegation of powers and there exists no issue with that. It follows that payment of due rental obligations could well have been required to be made directly to the agent, being the Applicant herein.

However, to institute legal proceedings on behalf of another, to sue for ejectment, cancellation, attachment of movables and claim arrear rentals is a different matter altogether. If the Applicant Company wanted to do so, it would have had to be specifically empowered by the lessor by way of a power of attorney to act on his behalf. This right, as already stated, is not conferred upon the Applicant Company in terms of the lease agreement between the landlord and tenant, nor anywhere else. The agent presented that its mandate also included this power, but it did so under a misapprehension.

In *Sentrakoop Handelaars Bpk v Lourens* and *Another 1991 (3) SA 540 (WLD),* Marais J held at p.545 D-E that:

"I am therefore of the view that both on principle and on the authorities it is not proper for an agent to sue as representing his principal by suing in his own (that is the agent's) name, where the claim being enforced is that of the principal and the principal is the true plaintiff. This does not, of course, apply where the agent has the right to sue in his own name, as is the case where he has contracted on behalf of an undisclosed principal and sues on the relevant contract".

[34] The present Applicant does not purport to sue on behalf of an undisclosed principal but on the erroneous assumption that he has a power of attorney or mandate to do so. That this is clearly not so has already been alluded to. This aspect also distinguishes this case from authorities such as *Hollis and Co. v Eastern Districts Sporting Club 1909 TS 450 at 452* referred to by Marais J in Sentrakoop.

[35] There is no application before this court to substitute the name of the unauthorized Applicant with that of the lessor, which would have been the obvious way to go if the Applicant conceded the legal point raised by the Respondent on affidavit.

It filed no affidavit in reply, thereby conceding the point in issue. The conspectus of authorities on this issue is that for the agent to

sue on behalf of his principal, although defective, is not so fatally defective as to vitiate the proceedings and that it should not be treated such that the *rule nisi* should be discharged on this ground alone.

[36] However, in the absence of persuasive argument to the contrary, and in view of its clear mandate to only act on behalf on the lessor with regard to management of the premises and to collect rent on his behalf, it is my considered opinion that the Applicant should not have brought the matter to court in the first place. It simply was not authorized to do so and secondly, it did not seek to remedy the situation when it was called to order by the Respondent on this aspect. The Applicant Company only entered the stage much later in the course of events, after it was mandated by the landlord to manage the lease property and collect his rent. By then, then Respondent's lease had been in existence for one and a half years. In fact, it had expired on the 31st December 2007, without having been expressly renewed, whereas the agent was appointed in January the following year. It did not see to it that the lease was renewed under revised terms, including escalation of rental and with itself stepping into the shoes of the lessor insofar as legal proceedings go. It could have done so but it did not. It also seems to have failed to carry out its mandate until August

2008, when it belatedly put the Respondent to terms to pay its accumulated arrear rentals within 14 days.

By notifying the Respondent that if it fails to pay in time its client instructed it to hand the matter to its attorneys, does not vest it with legal standing to sue the Respondent in the name of the agent.

It is when the combined weight of opposition to the application comes to be considered that the scales sway in favour of the Respondent. By so saying, this court remains mindful of the further but untested and unpronounced averments by the Respondents, which remain without gainsay.

[39] The Respondent holds the view that the lease had long ago expired and that it was for the lessor to give notice of renewal, which was not done. This contention, ostensibly based on clause 1 of the lease agreement, is not as straight forward as the lessee wishes to interpret it. Furthermore, the lessee does not deny that it is still in occupation of the premises, nor does it aver to have paid rent during its prolonged tenancy. It holds out that the lease is not valid anymore, also being in denial of having been given notice to remedy its alleged breach. These issues are also not as "cut and dried" as portrayed.

[40] In fact, the affidavit filed by the Respondent Company falls far short of properly addressing the merits of the heart of the matter, namely that it has occupied leased premises for an inordinately long period of time without paying rent.

[41] It is because of the failure of the Applicant to substantiate its legal standing and to sue in the manner in which it chose to do, that the *rule nisi* cannot be confirmed but has to be set aside.

However, due to the nature of the matter and the reasons set out in this judgment, it would have a severe but unintended adverse impact on the lessor if in consequence it would allow the lessee to pack up and leave the landlord without redress. In order to avoid such a situation, the lessor should be afforded an opportunity to rectify the anomalies in this matter if he so chooses and institute proceedings afresh if he is so advised.

J P ANNANDALE JUDGE OF THE HIGH COURT

In the event, it is ordered that the *rule nisi* dated the 4th September 2008 is ordered to be set aside, not forthwith, but after the expiry of 21 calendar days from date of pronouncement hereof. In particular, removal of any attached movables from the premises remains interdicted until then, Costs of the present application are ordered in favour of the Respondent.