IN THE HIGH COURT OF SWAZILAND

HOLDEN AT MBABANE

CIV. CASE NO. 1421/11

In the matter between:

INYATSI CONSTRUCTION LIMITED **Applicant**

And

SUNLA INVESTMENTS (PTY) LTD t/a

SAVE AND SMILE SUPERMARKET **Respondent**

Date of hearing: 29 April, 2011

Date of judgment: 03 May, 2011

Advocate M. Van der Walt for the Applicant

Mr. Attorney M. Nkomondze for the Respondent

RULING ON POINTS *IN LIMINE*

CASE SUMMARY

CIVIL PRACTICE: Urgent application for a declarator that a lease agreement between the parties has been validly cancelled and ejectment of respondent from leased premises. Provisions of Rule 6 (25) examined. Held that there was an unexplained and inordinate delay between the notice of cancellation and the bringing of the application on urgency. Application for enrolment of matter in terms of Rule 6 (25) refused with costs.

MASUKU J.

[1] This matter comes before this Court on a rebound. It previously served before me and, .subsequently before the Supreme Court last year. In issue then and now is the tenancy of a supermarket business, called Save and Smile, situate in Manzini at Lot 760 Dr. Hynd Street, owned by the applicant.

[2] In the present bout of proceedings, as in the previous, the applicant seeks: a declarator that the lease agreement that was signed *inter partes* has been validly cancelled; ejectment of the respondent from the aforesaid premises and costs of the proceedings, including the costs of Counsel as certified in terms of the provisions of Rule 68 (2) of this Court's Rules.

[3] The respondent opposes the granting of the relief sought and has, as a prelude, raised points of law *in limine,* indicating that it was unable to file papers on the substantive basis for the reason that its directors, who were to give instructions on the merits had travelled outside the country and were unavailable when the application was initially served. For the avoidance of doubt, the respondent indicated

that it had not filed a notice in terms of Rule 6 (12) (c) of the Court's Rules. It specifically indicated that it wished to plead over on the merits but was hamstrung by the absence of its directors as aforesaid.

[4] The respondent has raised two points of law and which are the subject matter of this Ruling. In the first instance, the respondent claims that this matter is not urgent or sufficiently urgent to justify the invocation of the urgency procedures. Second, the respondent contends that the matter was settled in its favour by this Court and the Supreme Court, such that the matter was finally determined and that the *exceptio rei iudicatae* applies, which should render it proper for the applicant to be non-suited.

[5] The major thrust of this Ruling, as indicated, is to decide whether there is any merit to the two contentions raised above. In order to come to a view on this matter, it is pertinent that one closely considers the papers filed by the applicant, together with all the supporting documents, including the attached judgment of the Supreme Court, which is relevant to the *exceptio* mentioned above. I shall commence with the issue of urgency.

Urgency

[6] The relevant provisions relating to urgency, are to be found in the provisions of Rule 6 (25) (a) and (b) of the Rules of Court. Sub-Rule (25) (b) above, bears particular resonance and appears to be the pivot on which the respondent's contentions in this regard, revolve. It provides that the applicant should, in its affidavit, state explicitly the reasons why it contends that the matter is urgent and also state why it claims it cannot be afforded substantial redress at a hearing in due course. These twin requirements, it must be stated, are mandatory and a failure to satisfy either may result in the Court refusing to enrol the matter as one of urgency. See *Humphrey H. Henwood v Maloma Colliery and Another* Case No. 1623/93; *H P Enterprises (Pty) Ltd v Nedbank (Swaziland) Ltd* Case No. 788/99; *Megalith Holdings v RMS Tibiyo (Pty) Ltd* Case No. 19/ 2000 and *Ben Zwane v Deputy Prime Minister And Another* Case No. 624/00.

[7] In his submissions, Mr. Nkomondze argued that the matter is not sufficiently urgent to justify the abridgment of the Rules at all. In

particular, he argued that regard being had to the history of the matter, particularly considering that the lease agreement in question is alleged to have lapsed in October, 2010, there was no reason for the applicant to rush to Court at the speed of a deer, to use Mr. Nkomondze's exact words, and ask the Court to deal with the matter on an urgent basis.

[8] Ms. Van der Walt argued to the contrary. She submitted that this was not a case of the respondent having been ambushed in the proverbial "knee-jerk reaction". In this case, the respondent had been served with the application on 20 April and expected to file a notice to oppose by 21 April; and answering papers, if any, by 27 April, 2011. It was further submitted on the applicant's behalf that the papers, though appearing bulky, do not consist of new matter as the issue involves old matters for the main part. She finally argued that the applicant had complied with the provisions of Rule 6 (25) and that the urgency alleged was commensurate to the extent of relaxation of the Rules prayed for.

[9] What is clear is that the lease agreement, which was held to obtain between the parties by the Supreme Court, was based on the doctrine of tacit relocation. The applicant, in its depositions, states that it served a 6 months' notice in April, 2010 to the respondent and which expired on 27 April, 2010. The applicant further alleges that at the expiry of the notice period, the respondent was in arrears with its rentals in the amount of E42, 258.00, which remains unpaid. It further claims that after 27 April, aforesaid, it refused to accept any further rental from the respondent, contending, it would seem, that the lease agreement *inter partes* had come to an end.

[10] It is clear in my view that according to the applicant's own depositions, it became entitled to evict the respondent after 27 October, 2010. The question then becomes whether the applicant is entitled, almost some six months later, to come to Court on an urgent basis to claim a declarator and immediate ejectment of the respondent. I am of the firm view that there is no sound basis, in view of the history of this matter, and its antecedents, for the applicant to rush to Court, even to the relaxed extent to which the time limits have been abridged.

[11] The applicant does say that there were some settlement negotiations, presumably after the expiry of the notice period referred to earlier. It is not clear from the papers when the negotiations fell through in relation to the bringing of this application. The applicant was bound, in this regard, to give a detailed account of the events so as to convince this Court that it was not tardy in bringing this application when it did. The applicant can only become chary in this regard, to its own detriment.

[12] The bases upon which the applicant claims the three-fold relief, is that the notice period has expired; that the applicant is in arrears in its rentals and lastly that it has, contrary to the provisions of the lease agreement denied the applicant access to the premises to enable the latter to carry out necessary works to enable it to deliver the premises to its new tenant in good time and in good working order.

[13] Since the applicant was entitled to have sought the declarator and the ejectment from the end of October, 2010, there is in my considered view, no reason for it not to have done so in the previous

months and to then resort to an urgent application after such a long time. There is, in view of the antecedents of the matter, no or sufficient grounds to bring the matter on urgency. The applicant should have brought this application in the normal course and not subject the applicant to the abridged time limits.

[14] I notice that the issue of access to the premises for purposes of carrying out certain works, is not one in respect of which an Order is sought from this Court. Depending on compelling and relevant allegations being made in the founding papers, this could conceivably have been one matter that could have been properly brought on urgency as it does not appear to bear directly on the expiry of the notice period and could have been one that manifested itself well after the notice period had elapsed but one which it is imperative for the applicant to have sorted out in the interregnum while the battle for possession of the premises rages on.

[15] In view of the foregoing, I come to the conclusion that the applicant has failed to demonstrate that this is one matter, regard had to its antecedents that ought to have been brought on urgency. I

therefore find that a sufficient case for urgency has not been made out and I accordingly refuse to have the matter enrolled as one of urgency as prayed for in prayer 1 of the notice of motion.

[16] In view of my findings above, I find it unnecessary to make any Ruling on the issue of the plea *exceptio rei iudicatae.* I should mention, as I indicated to Mr. Nkomondze during the hearing, that he appeared to be skating on very thin ice regarding this particular legal issue. I need not say more at this stage.

[17] In the premises, I grant the following Order:

(l)The application for this matter to be enrolled as one of urgency be and is hereby refused.

(2)The applicant be and is hereby ordered to pay the costs of this application.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 3rd DAY OF MAY, 2011.

T. S. MASUKU
JUSTICE OF HIGH COURT

Messrs. Currie & Sibandze Associates for the Applicant

Messrs. Nkomondze Attorneys for the Respondent