

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2199/2010

In the matter between:

**KAREEM ASHRAFF MONA
ASHRAFF**

VS

GIGATECH (PROPRIETARY) LIMITED

DEFENDANT

CORAM

OTA, J

FOR THE PLAINTIFFS

L.R Mamba

FOR THE DEFENDANT

B.Mndzebele

JUDGMENT

OTA J.

[1] By combined summons the Plaintiffs herein claim the follow reliefs against the Defendant:-

- a) An order ejecting the Defendant and all claiming title under it from the premises.

b) Interest thereon at the rate of 9% per annum calculated from the date of issue of summons to date of final payment

c) Costs of suit

[2] The Defendant filed a notice of intention to defend; thereafter the Plaintiffs commenced the summary judgment application instant. The Defendant filed an affidavit resisting summary judgment, wherein it raised the legal defence of *lis alibi pendens* on the grounds that the parties herein, the subject matter and cause of action are the same as in the earlier action instituted by the Plaintiffs in an action styled Case No. 1405/2009, therefore this action should be stayed pending the outcome of 1405/2009. In a judgment delivered on the 1st of June 2011, I dismissed the special plea of *lis pendens* for all the reasons elucidated in that judgment.

[3] In the circumstances the application currently under contemplation is the summary judgment application, for the relief claimed in the combined summons, which I have set forth ante. I heard argument on this application on the 19th June 2011.

[4] What appears to be the case for the Plaintiffs as demonstrated by their particulars of claim is that they are the sole trustees for the time being of the Aman Family Trust, a trust registered in terms of the laws of Swaziland, (hereinafter called the Trust). That the Trust is the registered owner of Property known as Portion 23 of Farm 300, situate in the Manzini District (hereinafter called the suitland), as evidenced by Deed of Transfer No. 78/2004, exhibited to these proceedings as annexure A. That during the month of May 2007, the Trust which was then represented by it's agent, entered into a written agreement of lease in terms of which it leased the suitland to the Defendant, which was then represented by it's Directors, king Ntiwane and George Fetbia, as is evidenced by a copy of the said agreement exhibited to these proceedings as annexure B. That in terms of the lease agreement, the initial period of the lease would commence on the 1st of May 2007 and expire on the 30th Of April 2009, and the renewal period would commence on the 1st of May 2009, and expire on the 30th of April, 2010. That notwithstanding the expiry of the lease and the renewal period, the Defendant continues to occupy the suitland and refuses and/or fails to vacate same. It is in consequence of the

foregoing facts that the Plaintiffs instituted the action instant against the Defendant.

[5] I have hereinbefore demonstrated that the Defendant is opposed to this summary judgment application. I find it however apposite at this juncture, before dabbling into the nitty gritty of the Defendant's Affidavit Resisting this application, to first restate the very familiar but fundamental principles that must guide the Court when dealing with a summary judgment application.

[6] I count it now judicially settled that the summary judgment procedure is designed to enable a Plaintiff with a clear case obtain swift enforcement of his claim against a Defendant who has no real defence to the claim. By its characteristic features, summary judgment shuts the door of justice in the face of a Defendant thereby foreclosing him from pleading to the Plaintiffs case. It is this stringent nature of summary judgment that compelled the warning that has been issued to the Courts over the decades to approach this remedy with the greatest caution, to prevent turning it into a dangerous

weapon of injustice. Erasmus in Supreme Court Practice BI - 206, issued this caution in the following parlance:

"The remedy - is an extra-ordinary and a very stringent one in that it permits a judgment to be given without trial. It closes the door of the Court to the Defendant. Consequently it should be resorted to and accorded only where the Plaintiff can establish his claim clearly and the Defendant fails to set up a bonafide defence. Whilst on the one hand the Court wishes to assist a Plaintiff whose right to relief is being balked by the delaying tactics of a Defendant who has no defence, on the other hand, it is reluctant to deprive the Defendant of his normal right to defend except in a clear case"

[7] It is in a bid to ensure the exercise of due caution that the Courts are enjoined to scrutinize the affidavit of the Defendant resisting summary judgment to see if same discloses a bonafide defence pursuant to Rule 32 (4) of the rules of this Court. That rule of Court places a burden on a Defendant who resists an application for summary judgment to satisfy the Court through his Affidavit *"with respect to the claim, or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part"*

[8] The import of the duty placed on the court and the Defendant by that rule of Court was exploded in the case of **National Motor Company Ltd V Moses Dlamini, Civil Case No. 1363/1993**, in the following language:-

" Where the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in his summons or combined summons are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities, in favour of the one party or the other. All that the Court enquires into is (a) whether the Defendant has fully disclosed the nature and ground of his defence and the material facts upon which it is founded and (b) whether on the facts so disclosed the Defendant appears to have, as to either the whole or part of the claim, a defence which is both bonafide and good in law. The word fully connotes in my view that while the Defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court decide, whether the affidavit discloses a bonafide defence".

[9] See also Maharaj V Barclays National Bank Ltd 1976 (1) SA 418 A at 426 B - D.

The natural question thrown up at this juncture is: Has the Defendant disclosed a bona fide defence or triable issue in its affidavit, to entitle it to be permitted to plead to the Plaintiffs claim?. Let us now look at the affidavit resisting summary judgment to see if it discloses any triable issue or bonafide defence as required by the rules.

[10] Now, it is obvious from the said affidavit that the Defendant is not disputing that the said lease and its renewal had expired as is alleged by the Plaintiffs. The gravamen of his defence however, is that there was a subsequent verbal lease agreement between the parties, which disentitles the Plaintiffs, to the ejection sought. The Defendant alleged these facts in paragraphs 8.2- 10 of its affidavit in the following terms:

*8.2. It was a term of the agreement that rental would be payable per month at **146, Sheffield Road, Industrial Site, Mbabane, Swaziland**, whereat a company by the name of **UNION SUPPLIES***

*(PTY) LTD is situate. I was further verbally instructed by the 1st Plaintiff that any rental payments for the above stated premises should, at all material times be made in favour of **UNION SUPPLIES (PTY) LTD.***

*8.3. I confirm that rental for the said premises was duly paid and the terms thereof complied with accordingly by the **Defendant.** It is however strange that despite such compliance, the **Plaintiff** then issued process against the **Defendant** under case number **1405/09** for payment of arrear rental and ejectment of the Defendant from the rented premises. I pause to point out that the aforesaid proceedings are still pending before this Honourable Court and I am advised by the **Defendant's** Attorneys that unless the pending proceedings are completed and or withdrawn by the Plaintiffs, the current proceedings cannot and ought not to be entertained by this Honourable Court.*

*8.4. To illustrate the Defendant's compliance with the aforesaid agreement, on or during **07th January 2008** the Defendant paid to the*

*Plaintiff a sum of **E70,000-00** being rental for the aforesaid premises.*

*Annexed hereto is a copy of the cheque marked "**KN 3**"*

*8.5. Furthermore on or during **August 2008** the Defendant further issued through it's Directors two (2) blank cheques in favour of the Plaintiffs in terms of which the latter was strictly instructed to withdraw from the **Defendant's** account a sum of **E80,000-00** being in respect of a loan that was advanced by the **1st Plaintiff** to the **Defendant**.*

*The **1st Plaintiff** was under strict instruction to withdraw the above mentioned amount however the **1st Plaintiff** withdrew an amount of **E799, 000-00** in total disregard of the **Defendant's** instructions. The aforesaid amount was withdrawn and made payable in favour of **UNION SUPPLIES (PTY) LTD** as follows:-*

*8.5.1. In respect of the blank cheque an amount of **E276, 000-00** was withdrawn without authority from Defendant's account by the **1st Plaintiff**. I annex hereto a copy of a bank cheque in support of the aforesaid marked "**KN4**"*

8.5.2. In respect of the second cheque a further amount of **E523,000-00** was withdrawn from the **Defendant's** account albeit illegally so by the **1st Plaintiff** I annex hereto a copy of the cheque marked "**K2V5**"

8.6 The abovementioned allegations were contained in my affidavit resisting summary judgment under case number **1405/09** as well as my plea. Consequent thereto and further as a result of the above stated amounts that sometime in **April 2010**, and at Matsapha, the **Defendant** acting through myself as director entered into a verbal lease agreement wherein it was agreed that upon expiry of the written lease agreement, with the **AMAN FAMILY TRUST**, represented by the **1st Plaintiff** wherein it was agreed that upon expiry of the written lease agreement, the **Defendant** would continue to occupy the abovementioned premises for an extended period of two (2) years commencing from the **1st May 2010**. The **Defendant** was further promised by the **1st Plaintiff** that since the amount that was withdrawn from **Defendant's** account was a sizeable amount of money, the property which is a subject of the lease agreement would be transferred into the name of the **Defendant** upon expiry of the verbal lease agreement.

9. We therefore as Directors of the **Defendant** were shocked to receive a summons from the **Plaintiffs** seeking to eject the **Defendant** from the leased premises. To demonstrate that the **Plaintiffs** are acting in bad faith in this transaction, it took them more than a month to institute the current proceedings despite their claim that the written agreement had expired.

CONCLUSION

10. It is therefore submitted, in conclusion, that the **Defendant** has a bona fide defence to the **Plaintiffs'** claim and therefore the latter, it is contended, are not entitled to eject the **Defendant** from the rented premises.

WHEREFORE I PRAY THAT THE APPLICATION FOR SUMMARY JUDGMENT BE DISMISSED WITH COSTS".

[11] There is no doubt in my mind whatsoever, that the foregoing allegation, of a subsequent oral lease agreement, which was entered into by the parties, pursuant to the alleged withdrawal of the amounts as stated in paragraphs 8.5.1 and 8.5.2 ante, from the Defendant's

account by the 1st Plaintiff, raises a triable issue which in my view constitutes an insuperable obstacle in the path of this summary judgment application. I hold the view, that the mere fact that the cheques via which the said withdrawals were made, i.e annexures KN3 and KN4 respectively, bear the name of Union Supplies Pty Ltd, does not in anyway derogate from the triable issues raised. I say this because the Defendant averred in clear and unambiguous terms in paragraph 8.2 of his Affidavit, that by the terms of the lease agreement, the rental for the suitland was to be paid at **146 Sheffield Road, Industrial Site Mbabane, Swaziland**, in favour of Union Supplies (Pty) Ltd, a company situate at that address. This allegation of fact by the Defendant, and as rightly contended by **Mr Mndzebele**, and in the face of the failure by the Plaintiffs' to file a Replying Affidavit to same, remains uncontroverted and unchallenged through out the tenure of this application and thus must be deemed admitted and as establishing the facts alleged therein. Whilst agreeing with Mr. Mamba that it is not in all circumstances that a party served with an opposing affidavit, is required to file a Reply thereto, however, it is trite learning that where the affidavit in opposition introduces new facts not stated

in the affidavit in support, it becomes necessary for the other party to file a further affidavit in Reply to those new facts. If he fails to file a Replying affidavit, then those new facts introduced will be taken as admitted. The need to file a Replying Affidavit is only obviated where there are sufficient facts in the record of the Court which amply contradict the new facts introduced in the opposing Affidavit, or where the party intends to rely on grounds of law.

[12] This is not such a case. I see no part of the record that contradicts the allegation that the rental was to be paid at **146 Sheffield Road, Industrial Site Mbabane Swaziland**. Rather annexure A, the lease agreement by paragraph 5 thereof, to be found on page 32 of the book of pleadings, clearly demonstrates that the said rental was to be paid at the alleged address. It thus appears to me in the circumstances that the foregoing facts raise an issue fit for trial and I so hold.

[13] There is also the issue raised via the allegation in paragraph 8.6 of the Defendant's affidavit, which also stands uncontroverted and unchallenged, that there was an oral agreement between the parties

that at the end of the oral lease agreement, that the suitland be registered in the name of the Defendant.

[14] I am firmly convinced that these issues will be best resolved at a trial of this matter thus enabling the Court to come to a decision on the balance of probabilities, based on the viva voce evidence tendered, as well as the credibility of witnesses. On these premises, I will dismiss this summary judgment application and order the parties to trial.

[15] In considering the appropriate orders to make in the circumstances, I am mindful of the fact that Rule 6 (17) of the rules of this Court enjoins the Court, where a matter cannot be properly decided on affidavit, to either dismiss the action or make such orders as to it seems fit with a view to ensuring a just and expeditious decision.

[15] I am mainly attracted by the tail end of that legislation which enjoins the Court to "*make such orders as to it seems fit with a view to ensuring a just and expeditious decision*".

[16] In ensuring a just and expeditious decision of this matter, I find it expedient to invite the parties to address me on the question of consolidation of this matter, with that instituted under **Case No. 1405/2009**, since I find both suits interrelated.

DELIVERD IN OPEN COURT IN MBABANE ON THIS THE 17th DAY OF June 2011

**OTA J
JUDGE OF THE HIGH COURT**

