IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No. 2889/10

In the matter between:

Smart Media Investment (PTY) Ltd First Applicant
Sakhile Shabangu Second Applicant

AND

Makabongwe Investments (PTY) Ltd Respondent

In Re:

Makabongwe Investments (PTY) Ltd Plaintiff

And

Smart Media Investment (PTY) Ltd First Defendant
Sakhile Shabangu Second Defendant

CORAM MCB MAPHALALA, J

For Applicant Mr. M. Nkomondze

For Respondents Mr. B. Mdluli

Judgment
21 February 2011

[1] The First and Second Applicants instituted an urgent application against the Respondent for the following relief:

1. A rule nisi do hereby issue, calling upon the Respondent to show cause on a date to be appointed by the Honourable Court, why an order in the following terms should not be made final;

1.1. that the above Honourable Court dispenses with the usual forms and procedures relating to time limits, forms and provisions of services as are required in terms of the Rules of this Honourable Court and that his matter be heard as one of urgency;

1.2. that the Court condones non compliance with the above time limits and forms of procedure;

1.3. that the Respondent restores to Applicants possession of the premises to wit; Shop No. 3, 2nd Floor, Makabongwe building, Nkoseluhlaza Street, District of Manzini; and

1.4. Pending finalization of this application, interdicting the Respondent from letting out the premises as described in paragraph 1.3 above to anyone.

2. That prayer 1.4 operate with immediate and interim effect.

3. Costs of suit at Attorney and own client scale as against the Respondent alternatively costs *de bonis propiis* against the Respondent's Attorneys.

4. Further and or alternative relief.

[2] This application is a sequel to an action brought by the Respondent against the First and Second Applicants claiming the following relief:

(a) An order confirming the cancellation of the lease agreement between the parties;
(b) An order evicting the applicants and any other persons holding and/or occupying shop No. 3, Second Floor, Makabongwe Building, Manzini, District of Manzini;
(c) Payment of the sum of El 1 553.00 (Eleven Thousand five hundred and three Emalangeni)
(d) Costs of suit at an Attorney and own client scale;
(e) Interest and the prime rate of +2% per annum;
(f) Collection commission in terms of the Law Society Bye-laws;
(g) Further and / or alternative relief.

2.1. The action was defended by the applicants, and, the Respondent lodged an application for Summary Judgment on the basis that the Applicants had no *bona fide* defence to the action. The Applicants, inturn, filed an Affidavit Resisting Summary Judgment in which they raised a counter-claim in excess of E50 000-00 (Fifty thousand Emalangeni) for damages sustained as a result of the roof leakage to the premises; they further argued that the failure to pay the rental as agreed was due to the fact that they could not conduct their business from March 2010 to July 2010 when the premises were being repaired.

2.2. The Court found that the Applicants had breached the contract by failing to pay their rental as agreed; hence, the court issued an order cancelling the lease. The court further issued an Order evicting the Applicant from the premises. However, the court referred the claim for arrear rental of E l l 553-00 (Eleven thousand five hundred and fifty three Emalangeni) and the other ancillary prayers to trial in the light of the counter-claim raised by the Applicants. The court based its decision on Annexure M3 to the combined Summons wherein the Applicants signed an Acknowledgement of Debt for E9 086.05 (Nine thousand and eighty six Emalangeni five cents).

2.3. The Applicants noted an appeal to the Supreme Court challenging the eviction as well as the cancellation of the Lease. However, the Respondent proceeded and executed the Order for Eviction on the 1st December 2010; the Applicants were evicted from the premises by the Deputy Sheriff.

[3] The Applicants subsequently lodged the present proceedings by way of urgency on the 6th December 2010 to restore possession of the premises. The basis of this application is that the Noting of the Appeal automatically stays execution of the Orders of Eviction and cancellation of Lease pending outcome of the Appeal. They submit that this gives them a clear legal right to institute the present proceedings. They further argued that the Eviction is causing them irreparable harm because they cannot operate their business; this is also the basis of the urgency.

[4] The Respondent has opposed this application. It has raised a Point In *Limine* challenging the Urgency of the Application; it argues that the application is not urgent because the eviction was effected on the 30th November 2010, and, the Applicants waited until the 6th December 2010 to approach the Court on Urgency. Furthermore, that the matter has lost any urgency it might have due to the lapse of time. The Applicants in response submit that the Eviction Order was issued on the 25th November 2010, and, on the next day, they noted the Appeal against the judgment; hence, the Eviction was automatically stayed pending the outcome of the Appeal.

[5] The Applicants further submitted that the Respondent was not entitled to evict them on the 30th November 2010 in light of the Notice of Appeal. Furthermore, that on the 1st December 2010 the Applicants wrote Annexure SM3 to the Respondent's Attorneys advising them that the Eviction was unlawful in light of the Notice of Appeal; they further demanded restoration of possession of the premises. The Applicants further submit that the lapse of six days does not defeat the urgent nature of the application because the Notice of Appeal had been noted and there was correspondence in the interim between the parties.

[6] The Respondent further submit that the Applicants have failed to comply with Rule 6 (25) (b) by failing to state the circumstances which render the matter urgent and why they could not be afforded substantial redress at a hearing in due course. Rule 6 (25) (b) states as follows:

> "In every affidavit or petition filed in support of an applicants under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

[7] Contrary to the assertion by the Respondent, the Applicants at paragraph 14 of their Founding Affidavit have set out fully the basis of the urgency and why they will not be afforded substantial redress at a hearing in due course. First, that they are suffering financial loss of business due to the Eviction. Secondly, that the intervention of the Court is necessary to prevent the Respondent from leasing the premises to a third party. Thirdly, the Eviction is unlawful in light of the Notice of Appeal.

[8] The Second Point of Law raised by the Respondent is the Non-Joinder of one Amos Nyembe who is alleged to be the new tenant. However, there is no evidence tendered by the Respondent that the premises have been leased to a Third Party. The Respondent has failed to annex a lease with the said Amos Nyembe or a confirmatory affidavit to that effect. Furthermore, the Second Applicant at paragraph 6.2 of the Replying Affidavit state that he has checked the premises on the 9th December 2010 and found them to be unoccupied. This Point of Law stands to be dismissed.

[9] The Applicants have complied with Rule 6 (5) (b) and further showed that the application is urgent. Immediately after the judgment was issued on the 25th November 2010, they filed a Notice of Appeal on the 26th November 2010. In addition, after the Eviction was effected on the 30th November 2010,

the parties exchanged correspondence with regard to the Eviction. In the circumstances, the lapse of the six day period cannot be said to have rendered the matter not urgent.

[10] At this stage, I will not deal with the issue of the validity of the Appeal and/or whether the summary judgment is interlocutory or final. These are issues to be dealt with on the merits together with the issue of costs and whether or not Applicants are approaching the Court with unclean hands.

[11] The two Points of Law raised are dismissed, and, the matter is to proceed to deal with the merits. Costs will be costs in the course.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT