IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No:3446/10

In the matter between:

RMS Tibiyo (PTY) Ltd t/a Bhunu Mall **Applicant**

And

Bridge Finance (PTY) Ltd **Respondent**

CORAM MCB MAPHALALA, J

For Applicant Mr. B. Ngcamphalala

For Second Respondent Mr. S. Mamba

Summary

Contract of Lease - *ex-parte* application to perfect a landlord's hypothec -interdict against removal of movables from premises - attachment of the movables pending finalization of application - ancillary relief being cancellation of Lease and ejectment - Landlord required to prove that rent is owing - no legal requirement that Lease agreement be in writing.

JUDGMENT
07th MARCH 2011

[1] The Applicant instituted proceedings by way of urgency seeking the following relief:

1. Dispensing with the normal and usual requirements of the rules of the above Honourable Court relating to service of process and

notices and that this matter be heard as a matter of urgency in terms of Rule 6(25) of the Rules of the above Honourable Court

2. Pending payment of arrear rental in the sum of E49,834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents) claimed by the Applicant from the Respondent in respect of the premises being office No. 214, measuring approximately 40 m2 (forty square metres) at Bhunu Mall, Manzini, Swaziland ("the premises"), the removal of any movables from the said premises is hereby interdicted.

3. That a rule nisi do hereby issue calling upon the Respondent to show cause on the 24th September 2010 why orders 4, 4.1, 4.2, 4.3 and 4.4 should not be made final.

4. The Deputy Sheriff for the District of Manzini be and is hereby directed and required to:

4.1. Forthwith serve this order, the Notice of Motion and Founding affidavit upon the Respondent and explain the full nature exigency thereof.

4.2. Attach all movables upon the premises and keep them under lock and key and do whatever is necessary to prevent their removal;

4.3. Make an inventory thereof; and

4.4. Make a return of service to the Applicant or his attorneys and the Registrar of the High Court of what he has done in execution of this order

5. The Applicant's claim is based on the allegations in the affidavit for;

5.1. Payment of rental arrears in the amount of E49,834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents).
5.2. Interest on the sum of E49,834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents) at the rate of 9% per annum a *tempore morae;*
5.3. Cancellation of the Lease Agreement;
5.4. Ejectment of the Respondent from the premises known as Office No. 214 measuring approximately 40m2 (forty square metres) at Bhunu Mall Manzini.;
5.5. Costs of suit at attorney and client scale;
5.6. Further and/or alternative

[2] It is common cause that a rule nisi was issued on the 12th September 2010. The applicant alleges that on the 8th April 2010 the parties concluded a written lease agreement in respect of premises known as office No. 214 Bhunu Mall in Manzini; the applicant is a landlord and the Respondent is a tenant. The applicant further alleges that the lease is for a period of five years as reckoned from the 1st June 2009 to the 31st May 2014 at a monthly rental of El 992.00 (One thousand nine hundred and ninety two Emalangeni). A deposit of E7

626.00 (seven thousand six hundred and twenty six Emalangeni) is payable on conclusion of the contract.

[3] The Applicant alleges that as at 31st July 2010, an amount of E49,834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents) remains outstanding; and that it has a hypothec over the movable assets brought onto the premises by the Respondent in respect of arrear rental; hence, it has brought this application to court in order to confirm the hypothec.

[4] The Respondent opposes this application, and, it has raised a Point In *Limine* that the written lease is not binding on the parties because it was only signed by the Respondent. It is common cause that the Respondent is a tenant of the Applicant in respect of office No. 214 Bhunu Mall in Manzini, that it occupies the said premises for the purpose of conducting its business; and, that it pays monthly rental to the Applicant in recognition that it is a tenant leasing the premises. The written document is not enforceable because it was only signed by the Respondent; however, this does not mean that a valid oral agreement does not exist between the parties. The oral lease between the parties is legally valid and enforceable. There is no legal requirement that a lease agreement has to be in writing. In the appeal case of **Siboniso Clement Dlamini v Africa City Properties Ltd** Civil Appeal No. 53/2008 **His Lordship Ramodipedi J.A.** as he then

was, quoted with approval the case of **Goldblatt v Fremantle** 1920 AD 123 at 128-129 where **Innes CJ** stated the following:

> "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract."

4.1 At page 10 His Lordship quoted with approval the decision of **Woods v Walters** 1921 AD 303 at 305- 306 where **Innes CJ** stated the law as follows:

> "The broad rule is that writing is not essential to the validity of a contract; the consensus of the parties need not be so evidenced. There are certain definite exceptions to that rule, but none which affect the present dispute. The parties may of course agree that their contract shall not be binding until reduced to writing and signed, and if they so agree there will be no "vinculum" between them until that has been done... the onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it."

4.2 A contract of lease in respect of immovable property is a reciprocal agreement between the landlord and the tenant whereby the landlord agrees to give the tenant the temporary use and enjoyment of the property in return for the payment of rent. Three essential elements have to be agreed between the parties, namely,

that the landlord has to give and the tenant to receive the temporary use and enjoyment of the property, the property to be let has to be identified, and rental should be payable in return for the use and enjoyment of the property. The legal position is that writing is not required for the formation of a lease. However, the parties may agree to reduce it to writing; if they do so the writing may be intended as a requirement for the formation of the lease. The writing may also be intended merely as a record of the oral lease already concluded. If the writing is made a requirement to the formation of the lease, no binding contract will come into existence unless the lease is reduced to writing; if not, the failure to reduce it to writing will not affect the enforceability of the oral lease. Neither occupation of the property let nor registration of the contract is necessary to make a lease binding upon the parties; however, occupation or registration is necessary to give the tenant rights in the property itself. A lease entitles the tenant to claim delivery of the property let from the landlord, a lease entitles the landlord to claim rental from the tenant and further acquires a tacit hypothec over movable assets brought on the premises and owned by the tenant.

- **Cooper, South African Law of Landlord and Tenant, pages 2, 3, 79, 77, 276 and 277**
- **De Jager v Sisana 1930 AD 71 and 81**
- **Graham v Local and Overseas Investment 1942 AD 95 at 108**
- **Siboniso Clement Dlamini v Africa City Properties (supra) at pages 8-10**

[5] It is against this background that the Point of Law raised by the Respondent has no merit and it is misconceived; it is therefore dismissed. There is no evidence before court that writing was made a requirement to the formation of the lease; hence, the failure of the Applicant to sign the lease does not invalidate it. It is evident that the written lease is a record of the oral lease already concluded. After signing the lease, the Respondent was given occupation of the premises, and it commenced its business operations. Furthermore, the Respondent paid rental in respect of the use and enjoyment of the premises.

[6] The Point of Law was argued together with the merits, I will now proceed and deal with the merits. The relief sought by the Applicant has serious legal implications. It seeks the attachment of all movables upon the premises belonging to the Respondent and keep them under lock pending payment of arrear rental of E49 834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents); and, the application is brought *ex-parte* for a Rule Nisi for the attachment of the said movables without giving the other side the opportunity to defend himself. The Respondent would lose the right to the use of his property pending the return date notwithstanding that it has not been proved on a balance of probabilities whether he is in arrears with its rental. It is important that before an applicant embarks on an application of this nature he should satisfy himself that rental is owing because of the drastic and prejudicial nature of the remedy. If on the

return day the landlord fails to prove arrear rental, the tenant should be entitled to costs at a punitive scale; the reason being the prejudice which the tenant has suffered, as well as the fact that the proceedings were not necessary. Furthermore, the applicant seeks the cancellation of the Lease agreement as well as ejectment; again, this goes to show the drastic nature of this remedy in view of the financial and psychological suffering to which the tenant is subjected. Lastly, it has become a practice in this court for the landlord in such applications to seek costs at a punitive scale, as is the case in this matter.

[7] It is a principle of our law that a landlord seeking to perfect his hypothec has to establish on a balance of probabilities that the tenant is in arrears. Once that has been done, the landlord becomes entitled to an order for attachment and an interdict restraining the tenant from disposing of or removing the movables from the leased premises pending payment of the rent or the determination of proceedings for the recovery of the rent.

- **Cooper, South African Law of landlord and Tenant, Juta & Company Ltd at page 174**

- **Watermeyer J, in Frank v Van Zyl 1957 (2) S.A. 207 at 208**

7.1 **Cooper, South African Law of landlord and Tenant, Juta & Company Ltd** at page 174 states that:

"In modern law a lessor perfects his hypothec by applying to Court for an order of attachment or an interdict restraining the lessee from disposing of or removing the movables from the hired premises pending payment of the rent or the determination of proceedings for the recovery of the rent. To obtain an attachment order or an interdict the lessor must establish that the lessee is in arrear with his rent."

7.2 **Watermeyer J, in Frank v Van Zyl 1957 (2) S.A. 207 at 208** stated as follows:

"...Applicant's claim is for the enforcement of her tacit hypothec as Landlord... upon the leased premises for rent due. The first thing which she would have to show... is that rent was in arrears...."

[8] It is the finding of this Court that the Lease agreement between the parties was partly written and partly oral for the following reasons. Firstly, that the parties entered into a lease on the 8th April 2010 for a period of five years which was deemed to have commenced on the 1st June 2009 to 31st May 2014. This is not denied by the Respondent in his Opposing Affidavit save to state that the lease is invalid because it was not signed by the Lessor. Secondly, the Respondent's Director Musa Kunene signed the lease evincing an intention that he agrees with the provisions in the lease and is willing to be bound by them.

Thirdly, the Respondent took occupation of the premises described in the Lease as being office No. 214 Bhunu Mall Corner Ngwane and Louw Streets in Manzini. Fourthly, the Respondent pays the rental mentioned in the Lease agreement. Lastly, the Respondent does not deny the oral lease agreement or that the preparation of the written Lease was based on terms agreed upon by the parties; he merely states that the written Lease agreement was merely an offer to do business or a proposal until the Applicant signs it. In the circumstances described above, it would be absurd to uphold the defence by the Respondent that the Lease was not binding merely because it was not signed by the Applicant. In addition, there is no evidence before this court that writing was an essential element to the validity of the Lease agreement. To that end, this matter is similar to the Supreme Court case of **Siboniso Clement Dlamini v Africa City Properties Ltd** Civil Appeal No. 53/2008 where the Court found that the Appellant tenant could not avoid the legal consequences of a lease merely because he had not signed it; in coming to this conclusion, the Supreme Court took into account the fact that the Appellant took occupation of the premises, paid rental to the landlord, and that the Appellant did not deny the oral lease agreement or that the preparation of the written Lease was based on terms agreed upon by the parties.

[9] It is a principle of our law that in order to obtain an attachment or an interdict, the Lessor must establish that the lessee is in arrear with his rent. The exact amount owing as well as the period for which the rent is claimed should be specified:

■ **Cooper, Landlord and Tenant, at page 174**

[10] In an attempt to prove arrear rental, the applicant stated at paragraphs 6.1 and 6.2 of its Founding Affidavit as follows:

> "From the date of commencement of the Lease, the Respondent has failed, refused and /or neglected to remit the monthly rentals either partially or at all.
>
> As at the 31st July 2010, an amount of E49 834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents) remains outstanding as rentals due, owing and payable. The Lessee's account depicting such amount is annexed hereto marked "RMS3"."

[11] However, the Respondent denies that it is in arrear rentals. The Applicant refers to Annexure "RMS3" as proof thereof. However, the said account begins with a "balance brought forward" of E44 888.00 (Forty four thousand eight hundred and eighty eight Emalangeni) on the 1st August 2010 and ends on the 1st September 2010 with a balance of arrear rental of E49 834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents). It is not clear from the Founding Affidavit how the arrears being claimed are made of; it is further not clear which months are in arrears. From the date of conclusion of the contract on the 8th April 2010 or from the 1st June 2009 which is the date to which the Lease had to be reckoned as the

commencement date, a monthly rental of EI 992.00 (One thousand nine hundred and ninety two Emalangeni) cannot in total amount to E49 834.40 (Forty nine thousand eight hundred and thirty four Emalangeni forty cents); the total amount of rental would by a simple arithmetic be far less than the amount claimed taking into account the fact that this application was lodged on the 15th September 2010. Even if you add the amount of the deposit of E7 626.00 (seven thousand six hundred and twenty six Emalangeni) and administrative fees, the total would still be far lesser than the amount claimed by the applicant. I am conscious of the fact that from 1st June 2010, the monthly rental increased to E2 191.20 (two thousand one hundred and ninety one Emalangeni twenty cents)

[12] Contrary to the allegations by the applicant in paragraphs 6.1 of the Founding Affidavit that the Respondent has failed to remit the monthly rentals either partially or at all, the Respondent has established by way of Annexures to his Opposing Affidavit that he has been making payments; whether or not the payments are adequate is another matter.

[13] The Applicant has instituted Motion proceedings, and it is important that the Founding Affidavit must contain all the allegations of fact to which he relies for relief. **Herbstein & Van Winsen,** the Civil Practice of the Supreme Court of South Africa, fourth edition at page 366, the learned authors had this to say:

> "The general rule which has been laid down repeatedly is that an applicant must stand or fall by his Founding Affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or to deny."

See also the cases of:

- **Swaziland National Housing Board v Thulani Abande Dlamini** Civil Trial No. 48/2010

- **Swaziland National Housing Board v Dumsile Dube** Civil Trial No. 301/2009

[14] In conclusion the applicant has failed to establish that the Respondent is in arrear rental; it has failed to show how the amount claimed is made up. In addition, it has failed to show which months are in arrears. The drastic nature of the remedy sought by the applicant requires that the landlord should establish on a balance of probabilities that the tenant is in arrear rental before the attachment order or the interdict against removal of his movable assets is made. The court should be left with no doubt that the tenant is in arrear rental. . It is the Founding Affidavit which should contain all the necessary allegations and annexures establishing the arrear rental.

[15] The applicant seeks to supplement its Founding Affidavit by its Replying Affidavit by explaining how the balance brought forward in annexure "RMS 3" is made up; in particular it states that "when Broil Management took over as applicant's agents, the Respondent was already in arrears in excess of E45 000.00 (Forty five thousand Emalangeni)". However, it does not go further to state how this balance came into being. Moreover, it is trite law that the Founding Affidavit must contain all the allegations of fact to which it relies for relief.

[16] Furthermore, the applicant seeks an order for costs at Attorney and client scale. It is common cause as well that the lease provides that the tenant will be liable for costs of suit at a punitive scale in the event of court proceedings arising out of a breach of contract. This lends credence to the belief that the punitive scale was agreed between the parties to regulate costs of suit between them in the event they litigate over the Lease.

[17] In the circumstances the application is dismissed with costs at Attorney and client scale.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT