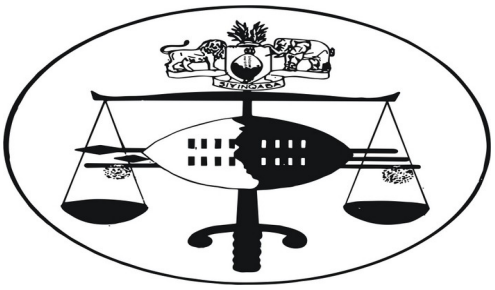

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 9/2012

In the matter between:-

PIGGS PEAK HOTEL & CASINO (PTY) LTD **Applicant**

and

ORION HOTELS & RESORT SWAZILAND (PTY) LTD **Respondent**

Neutral citation: Piggs Peak Hotel & Casino (PTY) Ltd v Orion Hotels & Resort Swaziland (PTY) Ltd (9/2012) [2012] (1st March 2012)

Coram: HLOPHE J

Heard: 9th February 2012

Delivered: 1st March 2012

For the Applicant: Mr. D. Jele

For the Respondents: Mr. E. J. Henwood

Summary

Application to perfect the landlord's hypothec - interim order granted- Applicant relying on Respondent's letter marked "without prejudice" in an attempt to prove that Respondent was in arrears- Confirmation of interim order opposed – Application to strike out offending paragraph- Paragraph against rule 34 (10) - when striking out permissible in terms of the rules – common law applicable as well –common law position on subject.

Long lease - Parties conclude and act in terms of a 17 year written lease agreement but fail to notariarise same as required by section 30 of the Transfer Duty Act- Such agreement null and void – effect of discovery of nature of agreement after more than 9 years of operating in terms thereof- Position not settled- Authorities suggesting a month-to-month lease agreement ensues whilst others suggest otherwise- Facts of the matter such that month-to month lease agreement ensued – Application succeeds – Owing to equal success and loss on the points raised- Each party to bear its costs.

JUDGMENT

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[1] The parties concluded a seventeen years written lease agreement in terms of which the applicant leased certain Hotel premises to the Respondent. After 9 years of the parties believing they had such a

lease in place, and acting in terms of same with rentals having been paid and rental escalation having been observed, the Respondent fell into arrears after failing to pay rentals from March 2011 to the present. It is alleged that as of January 2012, it was in arrears in the sum of E 2 400 819.46 (Two million, Four hundred thousand, Eight hundred and Nineteen Emalangeni, forty six cents.)

[2] As a result of failure by the parties to resolve the issue of outstanding rentals amicably between themselves, the applicant approached this court under a certificate of urgency and on an *exparte* basis on the 7th January 2012 seeking an order *inter alia* perfecting the Landlord's hypothec through attaching all the movable assets found on the premises in question pending payment of the outstanding arrear rentals. There was also sought an order for payment of the alleged outstanding arrear rentals as well as another one for the ejectment of the Respondent from the premises as well as costs.

[3] In line with the prevailing practice of this court, the order perfecting the Landlord's hypothec and the other orders prayed for, were sought on an *exparte* basis as a result of which a *rule nisi* operating with immediate effect as concerns the attachment of the movable assets pending finalization of the matter was granted; whilst it was to operate without such immediate effect as regards the other prayers like the payment of the outstanding rentals, costs and ejectment of the Respondent from the premises.

[4] The rule was extended on several occasions thereafter until the 3rd February 2012, when the matter was postponed for allocation before a Judge who could hear it. Although the court file does not indicate this, it is contended and confirmed that on the said date, the Respondent's counsel applied from the bar for an order, directing that the assets attached to perfect the Landlord's hypothec were not to be used by the Applicants pending finalization of the matter. It is common course this order was granted.

[5] I am mentioning this aspect of the matter because after the matter had been allocated to me by the Registrar, and after I had in turn allocated it a hearing date, I was to receive from the Registrar on the 9th February 2012 an urgent application in the same matter instituted by the Applicant who sought an order of this court *inter alia* rescinding and setting aside the order granted by this court on the 3rd day of February 2012 and to allow the Applicant to use the attached furniture pending the outcome of the matter. The basis for this application was that the Respondents had indicated that they were closing down the hotel with effect from the 9th February 2012 and were expecting the applicant to comply with the order of the 3rd February 2012 interdicting their usage of the assets pending finalization of the application. Apparently the applicant moved the said urgent application because until that day there had been an agreement or understanding that the hotel would not close down as the parties resolved their issues; which understanding the move by the Respondent was now obviously frustrating.

[6] I was made to understand that the duty Judge on the day had directed that since this application pertained to the application already pending before me, she was of the view I deal with the interlocutory one as well. It is a fact that upon hearing brief argument in the matter I directed that the *status quo* as then prevailing be maintained with the result that the applicant was allowed to utilize the furniture now that the Respondent confirmed it was, as of the 9th February 2012 vacating the premises but would not allow the Applicant to use the assets concerned to operate the hotel business.

[7] The major concern of the Applicant as I understood the matter was that the order granted by this court that the furniture and other assets were not to be used by the Applicant in the interim had been granted without it having been notified of it and prepared for same, yet the assets it was being interdicted from utilizing were allegedly its own assets in so far as it had sold same to the Respondent in terms of the same lease agreement of the premises between the parties and ownership was only to pass to the Respondent upon payment of the full purchase price. It was contended that the full purchase price had not yet been paid and in fact it was alleged a sum of E 224 175.65 was still outstanding. It was contended the Respondent was effectively stopping applicant from using its own assets.

[8] The most compelling argument in favour of the interim order was that it was common course between the parties that they had agreed that the Hotel, which is a big business in the Northern Hhohho, was not to be closed pending the finalization of the matter. By insisting on the

order it had obtained on the 3rd February 2012 interdicting the applicants from utilizing the furniture in question after it would have vacated on the 9th February 2012, the Respondent was indirectly calling for the closure of the hotel. It made it worse in my view that ownership of the assets concerned had not yet passed to the Respondent. It was very clear that both parties were alive to the value of keeping the hotel opened as the applicant was allowed to operate same notwithstanding an order having issued in terms of which the business could have been disrupted. I found it difficult to understand why the rules were to change now that the Respondent was to leave the premises. I also add that it was the first time I heard of a situation where the defaulting lessee of premises would turn around and obtain an order against the lessor, particularly where no formal application had been made on the papers. I was, therefore unsure of the legality of that action, hence my directing that the parties address me fully on this. At the back of my mind was the fact that if such action was unlawful, then the order had been erroneously granted as one of the considerations to determine if an order is rescindable on the basis of error is whether it was unlawful to grant. The case of ***FIRST NATIONAL BANK LTD v JURGENS 1993 (1) SA 245 (W) at 247 D*** is instructive in this regard.

[9] It was on the basis of the foregoing that I decided to issue an interim order for the *status quo* ante to be maintained so that the hotel would remain operative whilst the furniture continued being used, as the matter stood down to the next day for opposing papers to be filed and argument to be made. Whether or not I grant the interim order was a

discretionary remedy and I had no doubt that the balance of convenience favoured that I grant the interim order as the prejudice to be suffered by the Respondents would be outweighed by that to be suffered by the Applicants in my view.

[10] It was after all papers had been filed with the matter being ripe for a hearing on the subsequent date, when I was approached by both counsel in chambers who agreed that the interlocutory application be dropped whilst the obtaining *status quo* prevailed until the hearing of the main matter, on the 14th February 2012 which was only one court day away.

[11] On the said day, the main application proceeded before me. It was agreed at its commencement that the point *in limine* raised on urgency was no longer being pursued as it was overtaken by events in so far as an interim order was granted followed by several subsequent postponements and the filing of all papers. I agreed entirely with this approach and confirm that whilst the foregoing considerations will not always necessarily lead to the loss of urgency in a matter, they will always be weighty considerations in that regard, particularly because urgency is a discretionary remedy in the final analysis whose grant or refusal will to a great extent be affected by the circumstances of each matter.

[12] The issues to be pursued in the matter were that of having a certain paragraph 11 of the founding affidavit struck out on the basis that it was based on privileged information and sought to disclose the

contents of a letter, which was allegedly written in furtherance of settlement negotiations between the parties as well as the other point raised *in limine* namely that in so far as the long term agreement signed between the parties was not notariarised as required by section 30 of the Transfer Duty Act, the purported agreement was a nullity from which no obligation could arise. It was argued further by the Respondent that in so far as there was no lease agreement between the parties, it was inconceivable for one to talk of perfecting a landlord's hypothec and therefore that the application should be dismissed on this point alone. I now turn to the issues raised.

Application to strike out

The basis of this application is that in paragraph 11 of the founding affidavit the applicant allegedly disclosed the contents of a meeting aimed at settling the dispute between the parties which were reiterated in an e-mail later sent to the Applicant by the Respondent's Managing Director. It was contended that both the paragraph aforesaid and the letter concerned had to be struck out on the grounds it contravened rule 34 (10).

[13] The Applicant argued to the contrary submitting that Rule 34 (10) was not applicable to the matter at hand because it governed a situation where proceedings had already commenced in line with Rule 34 (1). It was argued that since the meeting referred to in paragraph 11 together with the e – mail concerned were held and respectively written before

the institution of the proceedings between the parties, the contents of the meeting and the e-mail were not protected in terms of the rules.

[14] It seems to me that the applicant's counsel is correct in his contention that the rule is not applicable to the matter at hand as there were no proceedings instituted in court at the time. I however do not think that brings an end to the issue raised by the Respondent's counsel which is to the effect that the contents of both the meeting and e-mail in question ought to be struck out for it is not only in terms of the rule that such issues need to be struck out as the common law equally directs. If it is true therefore that the meeting was held in an attempt to negotiate a settlement of the issues between the parties, then clearly the contents of either the meeting or e-mail concerned have to be protected and cannot be relied upon by either party. I have not understood the parties to be disputing that the meeting concerned was a genuine attempt to resolve the issues between them without resort to litigation. In my view, ***Hofman and Zeffert in their book tittled The South African Law of Evidence, fourth Edition 1988*** express the same position at page 196 when they state the following, whilst dealing with the common – law in relation to without prejudice statements:-

> *''Statements which are made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute cannot be disclosed in evidence without the consent of both parties.''*

[15] This statement suggests to me that such negotiations need not be after the commencement of proceedings in court for issues arising in negotiations to be protected under the common-law.

[16] At page 197 the same authors express the rationale for protecting the issues arising from negotiations as follows:-

> *‘‘ The exclusion of statements made without prejudice, is based upon the tacit consent of the parties and the public policy of allowing people to try to settle their disputes without the fear that what they have said will be held against them if the negotiations should break down.’’*

[17] I have no hesitation that I cannot agree with what Mr. Jele said and dismiss this point without violating the very rationale captured in the foregoing paragraph. This means that although the objection seemed to have been confined to Rule 34 (10) when raised, there is no reason why it should not be upheld in terms of the common law as a matter of law. I had raised this issue with Mr. Jele during the hearing of the matter and I did not understand him to be arguing contrary to the foregoing position. Consequently I uphold the point that paragraph 11 and the e-mail concerned be struck out and they are duly excluded from consideration in deciding the matter.

[18] The exclusion of this paragraph and e-mail does not however bring about finality in the matter and I did not understand the parties to be suggesting that. It remains a fact that the Respondent has not been

paying the rentals with effect from March 2011. This therefore makes the exact amount of the outstanding arrear rentals an issue of calculation.

[19] This conclusion brings about the other issue argued before which it was agreed was the central one in the matter. That is whether or not there was a lease agreement between the parties or put differently what the effect of the non- notariarization of the lease agreement between the parties who before discovering their agreement had not complied with certain formalities, had always acted in terms thereof for about 9 years.

[20] As stated above the Respondent's position is that since the lease agreement in question was not notariarized when it was a long lease, which according to section 30 of the Transfer Duty Act of 1902 had to be notariarized for it to be valid, it was a nullity such that no lease can be referred to as existing between the parties.

[21] The Respondent contends further that it should not matter that the parties believed that their relationship was that of a lessor and lessee and that they acted in terms thereof for a period exceeding 9 years of the intended 17 years of the putative lease agreement. Whilst acknowledging that there were decided cases such as that of ***RUBIN v BOTHA 1911 WLD 99at 105*** *and* ***RANER AND BERNSTEIN v ARMITAGE 1919 WLD 58*** which supported the position, that although the long lease was not valid, there existed however between the parties a month- to- month lease. The Respondent contended the

above cases were wrongly decided. In support of this argument the court was referred to the following extract from a book by ***George Wille tittled ''LandLord And Tenant in South Africa'', Fifth Edition, 1956 Juta at page 73:-***

> *''where parties acted on an invalid lease in the mistaken belief that it was valid, in one case, where the putative lessee, had been given occupation but had not paid rent, it was held that the putative lessee was a 'tenant at will' and in another case where the putative lessee had in addition paid rent monthly that he was a ''monthly tenant," because in the first situation the putative lessor had given the putative lessee occupation of the premises and intended the latter to be a lessee, and, in the second situation, because the lessee had paid rent monthly. Neither occupation nor the parties' belief or payment of rent can convert a void lease into a valid one: if an agreement is invalid because of lack of compliance with prescribed formalities, no vinculum iuris is thereby created. In both* ***RUBIN v BOTHA*** *and* ***RANER AND BERNSTEIN v ARMITAGE*** *the court* erred. *In each case, as the lease was a nullity, there was no contract between the parties''.*

[22] Mr. Henwood further argued as held in ***BARKHUISEN v JACKSON 1957 (3) SA 57 (T) at 58,*** that an informal variation of a lease requiring notarial execution was invalid, thereby contending that the long lease agreement could not therefore be varied into a month to month lease. He argued further that the belief by the parties and the payment of rent could not convert a void lease into a valid one as stated in ***FULS v LESLIE CHROME 1962 (4) SA 784 W at 787 C-D.***

[23] The Applicant's counsel on the other hand argued that the obtaining position in this jurisdiction was that advanced by the above cited cases of ***RUBIN v BOTHA (Supra)*** and ***RANER and BERNSTEIN v ARMITAGE 1919 WLD 58*** which is to the effect that although there was clearly no long lease agreement between the parties there was a 'month to month' lease owing to the fact that the parties had intended to lease the premises concerned with rent being paid and accepted monthly. Furthermore the parties themselves had acted as lessor and lessee for the entire 9 years. Mr. Jele further argued that unlike the above cases, the other cases cited by Mr. Henwood were advancing a general position. Otherwise the cases mentioned above dealt with a situation similar to this one and those judgments avoided absurdity.

[24] I have noted that whilst there are decided cases on what the position should be where the long lease is later found to be invalid, there is a strong criticism of that position contained in Professor G. Wille's book. Brilliant as the criticism may seem technically speaking, it does not seem to me that one may adopt it without bordering on absurdity particularly when considering the facts of the matter at hand; where parties act in the firm belief there is a lease agreement between themselves for 9 years until the day when an application to perfect the landlord's hypothec is made because of failure by the putative lessee to pay what he himself believed, until then, to be ''rentals due and owing." Furthermore, for the fact that the case of ***RANER and BERNSTEIN v ARMITAGE 1919 WLD 58,*** dealt with a situation similar to the prevailing one herein, I would associate myself with the position therein expressed. I agree that the other cases I was referred

to dealt with a general position and are therefore of little persuasive value in the circumstances of this matter. Furthermore, I agree that courts have to avoid a position that leads to absurdity as the one advanced in the contrary seems to be in my view. In my view section 30 of the Transfer Duty Act only outlaws a long lease that has not been notariarized and not a different lease.

[25] It would seem that the interpretation of section 30 in our jurisdiction does not support the argument advanced on behalf of the Respondent. This I say because of what was said by the Supreme Court in the case of ***JOHANNES NKWANYANE vs TOTAL SWAZILAND Ltd SUPREME COURT CASE NO.16/2007,*** where it stated at page 9 of the unreported judgment:-

> ‘‘…*that of course will lead to absurd results. It would mean that for ten years the rights of the parties would have been governed by a void lease. This is clearly untenable. It would mean also that the lessee's right of protection against creditors of the lessor and against subsequent bona fide purchases, which is succinctly embodied in the principle of* ‘‘***Huur gaat voor koop***’’*, which he had enjoyed for ten years, would abruptly terminate one day later. This could never have been the intention of the Legislature in enacting section 30. It is a long established canon of construction of statues that a court should always avoid an interpretation which would lead to absurdity*’’.

Although this case was dealing with a slightly different set of facts, it does however, emphasise the possibility of absurdity if the section is

not properly interpreted, particularly if interpreted in the manner suggested by the Respondents.

[26] I am convinced that the position to adopt in this matter is that advanced by the case of ***RANER And BEINSTEIN vs ARMITAGE (Supra)*** because of its inherent fairness and equity. Furthermore it does not lead to absurdity which is what the contrary position would unfortunately lead to in my view. Further, other than the strong criticism by Professor Wille quoted above, I have not found any case faced with similar circumstances as the present matter where the issue is decided differently from the ***Raner and Bernstein vs Armitage (Supra) case.***

[27] Consequently, I have come to the conclusion that whilst the relationship governing the parties was not emanating from the long lease, it was nonetheless a relationship of Landlord and Tenant arising from the rentals being paid monthly in exchange for occupation of the said premises. This is the basis for the conclusion that the parties had a common law month- to- month lease agreement.

[28] Because of the conclusion I have come to in this matter and as regards the two points raised before me and my decision in that regard, I make the following order:-

28.1 The rule *nisi* issued by this court on the 7th day of January 2012, be and is hereby confirmed.

28.2 Such confirmation however shall not extend to the ejectment of the Respondent from the premises which is overtaken by events as the Respondent has already vacated the premises.

28.3 Each party is to pay its costs as a result of the different conclusions I have come to on the two points raised.

Delivered in open court on this the 1st day of March 2012.

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N. J. HLOPHE

JUDGE