IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 24/12

In the matter between

SHREE-RANG INVESTMENTS (PTY) LTD LIMITED — APPELLANT

and

SWAZI NATIONAL HOUSING BOARD — RESPONDENT

Neutral citation: Shree-Rang Investments (Pty) Ltd v Swazi National Housing Board (24/12) [2012] SZHC 91

Coram: **OTA J.**

Heard: **18th April 2012**

Delivered: **30th April 2012**

Summary: Appeal against the decision of the Magistrates Court: Summary judgment principles applicable: Section 35 of the Constitution Act 001 2005 interpretation thereof: Appeal dismissed.

[1] This Appeal epitomizes the situation which is frequently seen in courts, of a lease relationship gone awry. The lessor and lessee, who I presume, since there is nothing to suggest otherwise in the record, signed the lease agreement in cordiality, have become bitter opponents before the courts. The acrimony between the parties and its attendant dispute, is one which the court by reason of its responsibility as an abiter of justice, is duty bound to resolve.

[2] What appears to be the history of this case from the tale told by the papers serving before court, is that the lessor / Respondent, leased it's property described as Mobeni Flats Block MA 48 2 Lot No. 440/441/473, Matsapha, in the District of Manzini, to the Lessee / Appellant. The lease agreement had enured between the parties for over 8 years, before relations between them went sour. The whole problem started with the renewal of the lease agreement which was for a period of 9 months, commencing from the 27th May,

2010 and terminating on the 31st March 2011, as evidenced by annexure SNHB1.

[3] It appears that the Respondent by notice of non renewal dated the 9th of February 2011, which it allegedly served on the Appellant, sought not to renew the said lease agreement, upon its termination on the 31st March 2011. The Appellant based on the allegation that it never received the notice of non renewal and for a host of other reasons, which I will come to anon, refused to vacate the premises, on the 31st March 2011.

[4] It was the apparent unrelenting stance of the Appellant not to vacate the premises, that caused the Respondent as Plaintiff, to commence proceedings against the Appellant as Defendant, by way of combined summons in a suit styled Case No. 1613/11, before the court a quo, claiming *inter alia* the following reliefs:-

‘‘1. Ejectment of the Defendants and all those holding through or under it from Mobeni Flats Block MA 48-2, Lot No. 440/441/473 Matsapha in the District of Manzini

2. Costs of suit at attorney and own client scale.

3. Such further and/or alternative reliefs’’.

[5] The Appellant/Defendant delivered a plea together with a counterclaim. Thereafter, the Respondent/Plaintiff, delivered a Defendant’s plea in reconvention, which it followed up with a summary judgment application for the reliefs prayed for in its combined summons. It is on record that the Appellant/Defendant filed an affidavit resisting summary judgment together with a counter application / counterclaim. It is apposite for me at this juncture to set out the reliefs sought by the Appellant/Defendant in the said counter application as appear on page 90 of the book of pleadings. They are as follows:-

1. a) *Declaring the Respondents decision not to renew the applicants lease as being unconstitutional.*

<u>Alternatively</u>

b) *Reviewing correcting and setting aside the Respondents decision not to renew the lease agreement between the parties.*

c) *That the Respondent's notice of non-renewal of the lease agreement be declared null and void ab initio and/or set aside.*

1. a) *Declaring the applicant as entitled to a renewal of the lease agreement between the parties.*

<u>Alternatively</u>

b) *Declaring the applicants lease agreement with the Respondent, to have been renewed.*

2. *Costs of suit at attorney and own client scale.*

3. Further and/or alternative relief''.

[6] The foregoing prayers elicited an immediate notice of objection from the Respondent/Plaintiff, questioning the jurisdiction of the court a quo in respect of the cause of action disclosed in the counter application. The Respondent /Plaintiff, followed this objection up by a notice to raise points of law couched in the following terms:-

1. In respect of 1 (A) the applicant seeks to have Respondent's decision not to renew Applicant's lease as being unconstitutional.

i) This Honourable court has no jurisdiction to enquire into the matter as its jurisdiction is ousted by section 35 (1) of the Constitution.

ii) The alleged basis of discrimination are not supported by Section 20 of the Constitution. The equality clause in the Constitution only refers to, equality before the law.

- *The Applicant can only invoke Section 20 if it has been discriminated upon by an adjudicating authority.*
- *The Applicant has not identified suitable comparator to gainsay its allegations of discrimination.*
- *This Honourable court in terms of Section 35 (3) is enjoined to decide the matter, since the raising of the Constitutional question is frivolous and vexatious.*

iii) *The Applicant has no voice as it is a company, Section 20 not applicable.*

2. *As an alternative to the above, the Applicant seeks to have the decision by the Respondent not to renew the lease, to be reviewed, corrected and set aside.*

i) *A subordinate court, such as the above Honourable court has no jurisdiction. The jurisdiction of these above Honorable Court is set out in Section 15 and 16 of the Magistrates Court Act.*

3. *As further alternative relief, the Applicant seeks an order declaring the notice of non renewal of the lease agreement to be null and void and be set aside.*

   i) *This prayer cannot be granted as well because the validity of the lease is not dependent upon the issuance of the notice of non renewal. The lease was for a specific period. Whether notice of non renewal was served or not the lease could not extend for a period not covered in the lease itself.*

   ii) *Consequently, it is of no moment whether a notice of non renewal is served or not. The period for which the lease was to endure has elapsed as at 31st March 2011.*

   iii) *Setting aside the notice of non renewal does not ignite life back to a lease that has already expired. The notice of non renewal is generally not necessary, because the period of the lease is specified.*

4. *In terms of prayer 2 (A) the Applicant seeks a declaration that it is entitled to a renewal of the lease agreement.*

   i) *To grant such prayer would seriously undermine the core principles of freedom of contract. No court has such power to force parties to contract.*

   ii) *To grant this prayer, it means that this is ‘‘a lease at the will of the lessee’’. This is not how the lease portrays itself. In any event such lease would be invalid as it will contravene Section 31 (1) of the Transfer of Deeds.*

5. *As an alternative to paragraph 2 (A) above, the Applicant further seeks an order declaring the lease to have been renewed.*

   i) *This would violate the settled principle of freedom of contract as it now tends to force a party to contract with another.*

   ii) *The above Honourable Court has no such power to issue a declaration. Section 16 of the*

Magistrates Court Act as afore said on cause of action does not include declaratory orders.

iii) *In any event, the Applicant is seeking a declaration not of rights but of facts.*

iv) *If this declaration were competent, it should have its basis on the clear wording of the lease itself. The (sic) is its present form does not have a deeming possession for an inference to be made of a tacit renewal/relocation.*

6. *It is submitted that there are no valid basis set out in the affidavit or at law which entitles the Applicant to a renewal of its lease.*

Wherefore it may please the above Honourable Court to dismiss the counter application with punitive costs ' (see pages 100 to 103 of the book).

[7] It is on record that the Respondent/Plaintiff also filed a Replying Affidavit on the merits of the Appellant /Defendants answering affidavit and counter application. (see pages 105 to 119 of the book)

[8] Suffice it to say, that, it appears that a hearing took place before the Court a quo on the 16th of January, 2011, as appears on page 120 of the book. However, the import of the said hearing is not clearly decipherable from the record. I will come to these matters anon. What is however apparent from pages 121 to 125, is that the court a quo followed up the said hearing with a ruling, styled to be for files No. 1609/11. 1613/11 and 1619/11. In this ruling the court a quo appears to have determined the question of it's jurisdiction, the question of the counter application as well as the summary judgment application all in one breath. The court concluded the said ruling with the following orders as appear on page 125 of the book, which I reproduce hereunder in extenso:-

'' It is hereby ordered that:-

1. *Applicant's (in reconvention) claim is hereby dismissed.*

2. *Summary judgment to the original claim now Respondent (in counter claim) is hereby granted.*
3. *Costs at an attorney own client scale''.*

[9] It appears that this ruling was delivered on the 12th of March 2012. I have gathered this from the totality of the papers serving before Court as the ruling itself is undated.

[10] Suffice it to say that in apparent dissatisfaction with the foregoing orders issued by the court a quo, and promptly on the 15th of March 2012, the Appellant/Defendant, launched the instant Appeal to this Court, under Appeal Case no. 24/12, premised on the following grounds:-

1. *The Court a quo erred in law and in fact in Ruling and or finding that it had jurisdiction to entertain the matter further and pursuant to the Section 35 (of the Constitution of Swaziland) application that had been moved before it, viz: for a referral of the*

Constitutional issues which grounded the appellants defense a quo, to the High Court for determination and adjudication.

2. *The Court a quo erred in law and in fact in prematurely dealing with the summary judgment application, when what specifically served before it (and what was argued in fact), at such time was in fact a question of determining whether or not it had jurisdiction to hear the application in light of the Section 35 (of the Constitution of Swaziland) Application.*

3. *The Court a quo erred in law and infact in prematurely dealing with the merits, when infact the merits were never argued, and the pleadings for such merits unclosed. Judgment was thus granted before Appellant was event (sic) afforded a hearing on such merits of the summary judgment application.*

4. *The Court a quo erred in law and in fact in finding that the Respondent was entitled to summary judgment, thereby holding indirectly that the Appellant has failed to raise triable issue(s). The Appellants affidavit resisting summary judgment and counter-application were infact never replied to and were, in terms of the law therefore uncontroverted pieces of evidence*. (see pages 126 to 127 of the book).

[11] Now, it appears to me that, notwithstanding the prolix applications and counter applications that reside in these proceedings, the numerous papers filed, the copious issues raised and canvassed by the parties, with great measure of anxiety and frenzy, the only question presenting for determination is ‘‘*whether the Magistrates Court was right or wrong in granting summary judgment to the Respondent?*

[12] In raising this lone issue, I am not unmindful of the fact that the question of the fair hearing of the proceedings a quo was raised by the Appellant in grounds 2 and 3 of its notice of appeal. The Appellant via those grounds of appeal, as well as submissions, contends that it was deprived of its right to a fair hearing a quo, in that the learned trial Magistrate in the process of detemining the points taken in limine on the jurisdiction of the Court, also disposed of the summary judgment application without first hearing the Appellant. Counsel for the Appellant Mr Ndlovu argued, that it is obvious from the impugned judgment, that the Court a quo relied soley and wholely on the heads of argument filed by the Respondent a quo in disposing of the summary judgment application. The Appellant thus contended, that this state of affairs deprived it of its Constitutional right of a fair hearing as enshrined in the Constitution of the Kingdom,

[13] For its part, the Respondent contended replicando, that there was a hearing of the whole proceedings a quo before judgment was given. Respondent decried the record of proceedings as appears on page 120 of the book, as unreliable as it is unclear. Respondent also expressed the view that the inquiry before this Court is not how the Court a quo arrived at the conclusion that Respondent is entitled to summary judgment, but whether the grant of summary judgment in the circumstances of this case was proper. Further, that the principles of fair hearing would hold sway only if the application instant were a review application.

[14] Now, it cannot be gainsaid, that the duty cast on the appellate Court is to consider whether the decision of the Court below is right and not whether its reasons for the judgment were right. Therefore, the appellate Court will not interfere with the judgment appealed against which is otherwise correct, merely because it is based on wrong reasons.

[15] It is also the position of our law, that a party in any proceedings whether civil or criminal, must be afforded the right to a fair hearing. This right of fair hearing has Constitutional hegemony in Section 21 (1) of the Constitution Act, in the following terms

‘‘ In the determination of civil rights and obligations or any criminal charges a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law’’ .

Therefore, every Swazi has a right of fair hearing entrenched in the Constitution.

[16] The rule of fair hearing is one of the twin pillars of the principle of natural justice. Its Constitutional flavour makes it mandatory in every civil or criminal proceedings. Therefore, any proceedings where the rule of fair hearing is not upheld is unconstitutional and thus null and void ab initio. As I said in my decision in

the case of **Ernest Mazwi Mngomezulu V Lucky Groening N.O. and Others Civil Case No. 2107/2010. at page 20:**

‘‘--- The rule of fair hearing is not a technical doctrine it is one of substance. The question is not whether injustice had been done because of lack of hearing. It is whether a party entitled to be heard before deciding, had infact been given the opportunity of a hearing. Once an appellate or reviewing Court comes to the conclusion that the party was entitled to be heard before a decision was reached, but was not given the opportunity of a hearing, the order or judgment thus entered is bound to be set aside. This is because such an order is against the rule of fair hearing one of the twin pillars of natural justice which is expressed by the maxim audi alteram partem’’ .

[17] It appears to me from the totality of the foregoing, that this court, whether in the exercise of it’s appellate or review jurisdiction, must always be consious of the

principles of fair hearing. And if the court comes to the conclusion that the decision a quo is tainted by a lack of it, the court must proceed to set aside such proceedings. It seems to me therefore, that the contention of Respondent that the question as to whether the Appellant was afforded a fair hearing a quo cannot be considered in this appeal, is clearly misconceived.

[18] Now, since the Appellant challenges the proceedings a quo for lack of fair hearing, it is apposite for me, to have recourse to the said record of proceedings a quo, in a bid to ascertain the substantiality or efficacy of this allegation. Recourse must be had to the record a quo, because this is an appeal based on the record of proceedings a quo, which is binding on this Court. Therefore, the question as to whether the Court a quo upheld the principles of fair hearing can only be gathered from the record.

[19] The Appellant challenges the part of the proceedings that gave birth to the assailed decision. This part of the proceedings a quo, it is common cause, appears on page 120 of the record. I must say that I have been at much pains in these proceedings, in deciphering from this record what was actually argued by the parties prior to the impugned decision. This is because this portion of the record, which is a photocopy of the hand written record of the Magistrate a quo, is unreadable, thus serving no useful purpose in the task at hand. There is thus much force in the contention of counsel for the Respondent, that this portion of the record of proceedings, cannot be relied upon by this Court in coming to the conclusion, that the Appellant was not heard on the summary judgment application before judgment was entered in respect thereto. The record cannot also be relied on in weighing Appellants contention, that the only question before the court a quo on the day in question was the issue of the jurisdiction of that court to entertain and determine the

Appellants counter application. The state of this portion of the record is compounded by the fact that the learned Magistrate a quo, in the impugned decision, made copious references to the fact of having heard arguments before deciding.

[20] I hold the view, that the record as appears on page 120, has failed by its state of being completely unreadable, in substantiating the Appellants claims of lack of fair hearing a quo. What is evident from the argument tendered before me, is that papers had been filed before the court a quo before its decision. This is clearly decipherable from Mr Ndlovu insistence that the court a quo relied solely on the heads of argument filed by the Respondent in deciding.

[21] The proper procedure in an appeal like this one, is for the Appellant to urge a typed and certified true copy of the record of proceedings a quo upon the court. Mr Ndlovu has tendered a letter which he says he urged on

the Registrar of the court a quo, to transmit the record of proceeding to this court. Whilst not disputing the fact that by the rules the duty to transmit such record of proceedings lies on the Registrar, I however hasten to add here, that the Appellant has the ultimate duty in the final analysis, to ensure that the record of proceedings is properly before the court, before the appeal is heard. I hold the opinion, that where as in this case, the record of proceedings before the court is not clear, the Appellant only has himself to blame.

[22] In any case, having carefully scrutinized the entire matrix of papers that served before the court a quo, it seems to me that the argument by the Appellant that it was not given an opportunity of a hearing on the summary judgment application, prior to the courts decision, is pedantic. I say this because on the state of the papers, any argument on the Constitutional question raised in the counter application, also argued the summary judgment application. There was no way

the court a quo could reach a decision on the Constitutional question without going into the merits of the case. What was then left to be argued? In the circumstances, the issue of lack of fair hearing lacks merits. It fails accordingly.

[23] Now, let me answer the issue I raised at the beginning, to wit, whether the court a quo was right to have granted summary judgment to the Respondent.

[24] It is obvious to me from the impugned decision that the court a quo failed to consider the now hallowed and settled principles that must guide a court in coming to a decision, when faced with a summary judgment application. I will therefore proceed to consider the principles laid down by law for such a procedure in the interest of justice. I embark on this exercise solely to see if when the principles are juxtaposed with the facts evident from the totality of the affidavit evidence that

served before the court a quo, entitled the Respondent to summary judgment.

[25] Now, it is the judicial consensus in the Kingdom, that the summary judgment procedure is an extraordinary, drastic and stringent one, in that it permits judgment to be given in a defended action, without a plenary trial of the action. This is the basis of the warning that has been sounded in the ears of the courts over the years, that this procedure be approached with caution, in other not to turn it into a dangerous weapon of injustice. The law has thus put checks and balances on the path of this procedure, to ensure that it is upheld in the clearest of cases, where the Defendant has no defence, and the appearance to defend is merely a dilatory stratagem orchestrated to deprive the Plaintiff of an early and inexpensive enjoyment of victory.

[26] Over the decades, the different courts in the Kingdom have sounded these sentiments, vociferously, in

different tunes. For instance, in the case of **Zanele Zwane V Lewis Stores (Pty) Ltd, t/a Best Electric, Civil Appeal 22/2001,** the Supreme Court had this to say

‘‘ It is well recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the Defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases, where the Defendant has no bona fide defence and where the appearance to defend has been made solely for the purposes of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a Plaintiff’s claim against a Defendant to which there is clearly no valid defence---’’

[27] Then there is the pronouncement of the High Court, in the case of **Swaziland Development and Financial Corporation V Vermark Stephanus Civil Case No. 4021/2007**, as follows:-

‘‘ It has been repeated over and over that summary judgment is an extraordinary, stringent and drastic remedy, in that it closes the door in final fashion to the Defendant and permits judgment to be given without trial---. It is for this reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a Plaintiff who has an unanswerable case, in more recent cases that test has been expressed as going too far---’’.

[28] Now, the Magistrates Court rules upon which the proceedings a quo was based, laid down certain parameters in this procedure to ensure that it serves the course of justice. Therefore, by order No. 2 (1) (c) the Defendant is required to file an opposing affidavit to the summary judgment application. And order 2 (3)

requires that the affidavit discloses fully the nature and grounds of the defence or counterclaim.

[29] Now, even though the Magistrates Court rules are silent on this issue, however, the recent evolution of the law on the summary judgment procedure, is that in the face of an affidavit resisting summary judgment, a duty is imposed on the Court to scrutinize such an affidavit, to see if it raises any triable issues or discloses a bonafide defence to the claim or part of it.

[30] The duty cast upon the Defendant is thus to raise triable issue or issues via the opposing affidavit, and it is the judicial accord that once the opposing affidavit discloses triable issues, it should disable summary judgment and enable the Defendant proceed to the realm of trial. As the Court stated in the case of **Mater Dolorosa High School V RJM Stationery (Pty) Ltd, Appeal Case No. 3/2000** *''------if the Defendant raises an issue that is relevant to the validity of the whole or*

part of the Plaintiff's claim, the Court cannot deny him the opportunity of having such an issue tried''

[31] Furthermore, though the Defendant is not required at this stage to detail his defence with the precision or exactitude required of a plea, however, for his affidavit to be said to have raised triable issues, the affidavit must be bona fide, forthright, unequivocal and must contain sufficient material facts in answer to the Plaintiff's claim, to enable the court anticipate that a defence may emerge at the trial.

See **Sinkhwa Semaswati Ltd t/a Mister Bread Bakery and Confectionary V P.S.B Enterprises (Pty) Ltd Civil Case No. 3839/2009 Mfananiseni Lyford Mkhaliphi V Somageba Investments (Pty) Ltd Civil Case No, 1044/2011.**

[32] Though the foregoing parameters were evolved pursuant to the summary judgment procedure as laid down by Rule 32 of the High Court rules, I see no

impediments on the path of their application to the summary judgment procedure before the Magistrates Court. I thus hold the view that they apply in equal force, in casu.

[33] It was therefore in honour of the foregoing position of our law, that the Appellant as Defendant a quo, filed an affidavit resisting summary judgment, accompanied by a counter application or counterclaim, in opposing the summary judgment launched by the Respondent. The Appellants affidavit resisting summary judgment and counterclaim appear on pages 81 to 91 of the book of pleadings.

[34] The only question at this juncture is whether the Appellants affidavit and counterclaim a quo, raised any triable issues that should entitle the Appellant to proceed to trial.

[35] Now, the purport of the Appellant's defence and counterclaim are depicted in the averrals in paragraphs 7 to 23 of the counter application, which are as follows:-

'' 7. Amongst the material terms of the parties agreement and or tenancy were that:

i) Rental shall be paid in advance monthly;

ii) The Applicant further had the option to renew the lease for a further period of one year at an escalated rental

iii) The Applicant shall not sub-let the premises without the Plaintiffs consent nor allow any other person or persons to occupy the premises or to reside therein or to obtain possession thereof, save with the Plaintiffs written consent;

iii) The Applicant was to notify the Respondent, within 1 month of its expiry, in the event it intended terminating the lease and not renewing it.

8. Breach of the lease agreement by the Applicant shall entitle the Respondent to cancel the lease agreement and eject the Applicant from the leased premises, and to claim such arrear rentals;

8.1.0 The Respondent complied with its obligations under the lease and handed possession of the leased premises to the Applicant.

9. I am advised and verily believe to be true that the fact that the lease agreement accorded to Applicant a right of renewal of the lease agreement also created legitimate expectation on the part of the Applicant (the Applicant not being in breach of the agreement) that such right would not be taken away from it without good reason, neither would it(sic) taken away from the Applicant without it being afforded an opportunity to state reasons why that right ought not to be taken away. In other words, the right would not be taken away without the Applicant being heard on the issue.

10. *By notice dated 9th February 2011 the Respondent informed Applicant by letter, which letter, the Respondent advised the Applicant of its intention not to renew the lease agreement on its annual anniversary. No reason was stated on the notice. A copy of the same is attached to the Respondents summons.*

11. *It further turned out the notices of non-renewal were sent to a number of the Respondents tenants, most of whom were non-Swazi Nationals. Some of these ‘‘foreigners’’, particularly Ghanaian Nationals, who also either had leases with the Respondent or were representatives of companies who had also received the notices , petitioned the Respondent to review its decision not to renew the leases. A copy of the said Petition is hereto attached and Marked MR1.*

12. *The Respondent replied in the negative to such petition in relation to we (sic) perceived as ‘‘foreigners’’ on the*

ground that we did not qualify for social housing which was reserved for citizens of Swaziland. I should at this point state that I am a legal Swazi Citizen. A copy of the response to the said petition is hereto attached and Marked MR2. Further to the said response, the Respondent also issued a press statement in the Times of Swaziland, a local print media, in which it buttressed their stand on the matter and point as stated in their letter. A copy of the press statement is hereto attached and marked MR3.

13. *The essence of the issue is that the Respondent is in the process of enforcing inter alia the alleged Government Policy of Social Housing and is therefore purging its ranks, of those who are said not to qualify for social housing, who have been served with the said notices of non-renewal.*

14. *I must state that at the time Applicant entered into the lease agreement, over 8 years ago, no such policy was*

in force, hence Applicant was allocated the flat. The policy is therefore new to the Applicant and others like it.

15. *I am advised, and verily believe this to be true, that the decision not to renew the Applicants lease was an administrative act and therefore subject to the test for the requirements of natural justice, including the audi alteram partem rule. In the present instance, the principle of justice alluded to above, was not observed in that the Applicant was never called upon to make any representations on the issue before the decision was taken. To that extent, the decision offends the applicant's right to administrative justice as enshrined in Article 33 of the Constitution of Swaziland.*

16. *Since the Respondents decision not to renew leases negatively impacted on the Applicants right to exercise their option to renew the lease, the Respondent, being a public body seeking to enforce public policy, ought to*

have heard the Applicant before the decision was taken. As that did not happen, the decision is unconstitutional and is liable to be reviewed and set aside, in which event, the Applicant ought to be afforded an opportunity to exercise its option as it would have done had such right not been taken away from it.

17. *As stated above, no such policy (as the one sought to be implemented by respondent) was in place at the time the agreement was entered into. It being a new policy it ought not to have been applied retrospectively. This is as a new policy ought to have affected new tenants and not those who already had existing leases.*

18. *The decision not to renew the Applicants lease is also racially discriminatory in so far as it was targeted at the Applicant's directors who are perceived as ''foreigners'. This constitutes a contravention of Article 20 of the Constitution of the Kingdom of Swaziland which*

provides for equality before the law and specifically prohibits discrimination against individuals on grounds of race, colour, ethnic origin, tribe etc.

19. *The decision not to renew Applicants lease, in so far as it seeks to enforce the Respondent's policy on Social Housing (as defined by the Respondent) is ultra vires the Respondent. The Respondent is enjoined to provide affordable housing generally in Swaziland. The concept sought to be enforced by the Respondent is not one of such objects of the Respondent as stated in Section 4 (1) of the Respondent's enabling statute.*

20. *The Respondent's actions and notices have disrupted my life as I was given the flat by the company to use as part of my benefits. I have lived there for the past ten years with my entire family and cannot find alternative and suitable accommodation for the same value elsewhere. The Applicant has failed to obtain alternative accommodation for me. The decision*

therefore not to renew the lease is liable to be reviewed and or set aside.

21. Furthermore upon the lease's Annual Anniversary on the 31st March 2011, there was an implied renewal and / or alternatively a tacit relocation of the entire terms of the lease agreement between the parties as evinced from one or more of the following;

21.1 The Applicant gave written notice of its intention to renew the parties agreement;

21.2 Applicant did not surrender the premises or return its keys to the Respondent;

21.3 Applicant did not inform Respondent it was surrendering the house;

21.4 Applicant in fact continued his occupation in the leased premises and continues to do so to date;

22. This renewed lease for the extended period, reckoned from the 1st April 2011 to the 31st March 2012, has

incorporated (in law) the same terms and conditions, save for rental escalations, as contained in the previous written lease agreement between the parties.

22.1 Amongst the material terms of the parties renewed lease agreement and/or are that;

22.1.0 Rental was to be Sum E1 482-00 (One Thousand Four Hundred and Eighty Two Emalangeni) per month;

22.1.1 Rental was to be paid in advance monthly;

22.1.2 Applicant was not to sub let the premises without the Respondents consent nor allow any other person or persons to occupy the premises or to reside therein or to obtain possession thereof, save with the Respondents written consent;

22.1.1.3 Breach of the lease agreement by the Applicant would entitle the Respondent to cancel the agreement and eject the Applicant from the premises and to claim arrear rentals.

22.1.4 Respondent to the above end complied with its obligations under the renewed lease and allowed the Respondent the continued possession and occupation of the leased premises. To date the Applicant still occupies the same. Respondent also has continued accepting rentals from the Applicant.

22.1.5 The Applicant therefore has not committed any act of breach of any of its obligations under the lease agreement.

23. Applicant therefore seeks an order declaring the presence of a valid and tacitly renewed lease agreement between the parties.

[36] It is of paramountcy for me to note here, that the foregoing allegations of fact are essentially the same allegations contained in the affidavit resisting summary judgment. I shall thus proceed to deal with the two processes upon the same issues.

[37] Now, it is the stance of **Mr Ndlovu**, Appellants counsel, that the mere existence of the foregoing counterclaim constitutes an automatic defence to summary judgment which will enable the Appellant proceed to trial. Counsel also submitted, that the counterclaim, raised a Constitutional question, which the court a quo ought properly to have referred to the High Court for determination, pursuant to Section 35 (3) of the Constitution Act. Counsel thus prayed the court to set aside the judgment of the court a quo and allow the Appellant defend the action.

[38] Mr **M P Simelane** for his part, enjoined the court to discountenance the counterclaim. His take is that the trial court was right to dismiss the Constitutional question raised therein as frivolous and vexatious. He contended that the proper course was for the Appellant to raise this issue directly before the High Court pursuant to Section 35 (1) of the Constitution. Counsel further contended that the rest of the issues raised in

the counterclaim on the question of the tacit renewal or relocation of the lease agreement, and whether or not the Appellant should have been given an opportunity to be heard before the notice of non renewal was issued, go to no issue, as these issues are not part of the terms of and did not arise in the lease agreement.

[39] Now, before proceeding to ascertain for myself the merits or demerits of the Appellants defence and counterclaim, it is imperative at this juncture for me to return to first principles to demonstrate the law, in a situation as this one, where a counterclaim is raised in defence of a summary judgment application.

[40] In my decision in the case of **MTN Swaziland V ZBK Services and another, Civil Case No. 3229/2011 at paragraph 10,** I adumbrated on this issue with reference to the work of **Van Nierkerk et al**, in the text **Summary Judgment**, A practical **guide,**

Butterworths 1998, at pages 9-35 and 9-36, where the learned author states as follows:-

‘‘ An unliquidated counterclaim does constitute a bona fide defence to the Plaintiff’s liquidated claim. A Defendant may, accordingly rely on an unliquidated counterclaim to avoid summary judgment even when he admits owing a liquidated amount in money to the Plaintiff.

There is no requirement that the counterclaim should depend upon the same facts and circumstances as those upon which the Plaintiff’s claim is based. Any unliquidated counterclaim, even when it depends upon facts and circumstances differing entirely from those forming the basis of the Plaintiff’s claim, may be advanced by a Defendant and in law constitutes a bonafide defence in summary judgment proceedings’’.

Niekerk et al continued as follows at **paragraph 9.5.7**

‘‘ The principle that an unliquidated counterclaim may be advanced against a liquidated claim is, in turn, based on the underlying principle attendant upon reconventional claims, namely that a Defendant having a claim against a Plaintiff is entitled to request that judgment in favour of the Plaintiff be suspended until such time as the court has adjudicated upon the counterclaim. This procedural remedy enables the claim in convention and the claim in reconvention to be set off against each other’’.

[41] Then there is the work of the learned editors **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, Juta, 1997, at 444,** where the following is stated

‘‘ it is open to the Defendant to raise a counterclaim to the Plaintiff’s claim. In this case also, sufficient detail must be given of the claim to enable the Court decide whether it is well founded. The counterclaim may be unliquidated and need not necessarily arise out of the same set of facts as the claim in convention, though it

must be of such a nature as to afford a defence to the claim''.

See the case of **Alfor Peter John De Souza V Petros Dlamini Civil Case No. 3053/07.**

[42] Now, the question at this juncture is, whether against the backdrop of the foregoing principles, the Appellants defence and counterclaim were sufficient to dissipate summary judgment a quo?

[43] There has been much anxiety accompanied with vehmence by the parties, on the question as to whether or not the Constitutional question raised of an alleged discrimination against the Appellant, ought to have been referred to the High Court by the Court a quo for determination, thus defeating summary judgment. It was this self same constitutional question that elicited the objections of the Respondent to the jurisdiction of the court a quo to entertain and determine same. It is on record that the Court a quo refused to decline

jurisdiction but proceeded to dismiss the Constitutional question as frivolous and vexatious and to grant summary judgment. I find a need therefore, to first tackle the question as to whether or not the court a quo ought properly to have referred the Constitutional question to the High Court for decision.

[44] It is apposite for me for the purposes of the exercise at hand, to have recourse to the provisions of Section 35 of the Constitution urged by both sides. That Section of our law provides as follows, via subsections 1,2 and 3 thereof:-

‘‘ (1) where a person alleges that any of the foregoing provisions of this chapter has been, is being or is likely to be contravened in relation to that person or a group of which that person is a member (or in the case of a person who is detained where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that

person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction:-

(a) to hear and determine any application made in pursuance of subsection (1)

(b) to determine any question which is referred to it in pursuance of subsection (3).

And may make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this chapter

(3) If in any proceedings in any surbordinate court to the High Court, any question arises as to the contravention of any of the provisions of this chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceeding and refer the question to the High Court unless, in the judgment of that person, which

shall be final, the raising of the question is merely frivolous or vexations''.

[45] Both counsel have vociferously decried Section 35 (3) ante, as being contradictory, in the sense that by the use of the pre-emptory word ''shall'' the section made it mandatory for the surbordinate Court to refer Constitutional matters to the High Court, where a party so requests, yet in the same breath, the same provision appears to take away its pre-emptory command, by conferring the surbordinate court with the discretion to first consider the constitutional question to see whether it is frivolous or vexatious, before its referral to the High Court.

[46] This notwithsatanding, Mr Ndlovu held fast to Section 35 (3) as the premise upon which the Court a quo ought to have referred the Constitutional question of discrimination against the Appellant by the Respondent, to the High Court for determination.

[47] Now, irrespective of how Section 35 (3) of the Constitution may be perceived by both sides, there has however been a judicial pronouncement on the purport of that subsection of our Constitution, vis a vis Section 35 (1) and (2) respectively, This pronouncement was made by the court in the case of **Nokuthula Mdluli V Stanley Mnisi and others Civil Appeal No. 431/2011**. Though I am not bound by that decision, it being a decision of a Court of co-ordinate jurisdiction, I am however highly persuaded by it. For the purposes of this exercise I find a need to regurgitate paragraphs 15 to 21 of that decision, for a better understanding of my position in this judgment. They state thus:-

‘‘*15 It would appear, on a reading of the above provisions that this Court has original jurisdiction to hear matters related to the protection and enforcement of the fundamental rights and freedoms set out in Chapter III in two different circumstances. First, is where the issue is raised directly to the High Court for determination.*

Second, is where the said issue is referred to this Court by a Court subordinate to this Court. For the latter to apply, it is apparent, from sub-section (3) above that the issue or question for referral, which must necessarily relate to an alleged or alleged contraventions of the provisions of Chapter III, must arise in the course of any proceedings before such subordinate Court.

16 *From a close reading of sub-section (3) above, the referral to this Court, it would further appear to me, arises in two different circumstances. In the first place, a discretion is reposed in the presiding officer, to mero motu stay the proceedings and refer same to this Court. This should happen where a constitutional question touching upon the contravention of the fundamental rights and freedoms arises in the course of proceedings before that Court. That a discretion is given to the presiding officer, in my view, must be seen from the use of the word ‘‘may’’ occurring therein. It hardly*

need be said that as in all other instances where a discretion is reposed, such discretion, relating as it does to a constitutional function, shall not be exercised capriciously but judicially and judiciously, with a view to ensuring the preservation and enforcement of the fundamental rights and freedoms encapsulated in Chapter III.

17 *The second instance for referral arises where a party to such proceedings before the subordinate Court so requests. In this event, the Court, it would appear to me, exercises no discretion. It is compelled to refer such proceedings and the pointer to the mandatory nature of the referral in this part of the provision, is to be found in the nomenclature employed, particularly the word ‘‘shall’’ occurring in the third line. The mandatory nature of the referral of the proceedings, is not, however open-ended, with the officer having no say completely once a referral has been requested.*

18 In this regard, he or she has to ensure that the said referral has not been made in exercise of frivolous or vexatious intentions or for the purpose of procuring nefarious results, e.g. to delay the proceedings; engaging in fishing expeditions or to harass the opponent or the subordinate Court. This list is, by no means exhaustive. Once vexatiousness and/or frivolity can be shown or are apparent, then the subordinate Court, may decline to make such referral, the request to so refer by a party to the proceedings notwithstanding. Such decision to refuse the referral for reasons of the frivolous or vexatious nature of the request, is however, final, admitting of no appeal according to the section under scrutiny.

19 I am of the view that Mr. Manzini is not correct in his understanding and interpretation of Section 35 (3) relating to referrals. I say this for the reason that the conduct complained of in the instant matter did not take place or arise during the proceedings before the

subordinate Court. In point of fact, the conduct of the 2nd Respondent complained of took place away from the sanctity and full glare of the subordinate Court and certainly not in the course of actual proceedings before that Court.

20 *It would seem to me that the referral becomes necessary where the issue of the contravention of the rights and freedoms in Chapter III actually arises in the course of proceedings serving before that Court and which would ordinarily require the subordinate Court to rule thereon but for the provisions of Section 35 (3). An example would do. If in the course of a criminal matter, an accused claims that his right to fair hearing has been or is about to be infringed, then the referral would be in order as that question requiring immediate determination arises during the course of proceedings before the said Court.*

21 *If on the other hand, a suspect, during Court proceedings escapes and is when caught seriously*

assaulted such that he suffers grave injuries and claims that one or other constitutional rights and freedoms were infringed thereby, nothing could stop that person approaching this Court directly for appropriate relief in terms of Section 35 merely because the incident took place during the continuance of proceedings before that Court. He would certainly be entitled to approach this Court directly for enforcement of his rights allegedly contravened or likely to be contravened thereby''.

[48] I align myself intoto with the foregoing exposition of Section 35 of the Constitution. I see no reason why it should not apply with equal force in these proceedings. There is thus much force in Mr Simelane's contention that the Constitutional question was not an automatic vehicle for the referral of the matter to the High Court. The law still requires that the court a quo, interrogates the Constitutional question to ascertain whether it is frivolous or vexatious before the referral is made.

[49] The learned Magistrate a quo considered the allegation and held that it is frivolous and vexatious. Having done that, the Magistrate removed the impediment on his jurisdiction, enabling him to proceed to determine the summary judgment application, which he granted to the Respondent. To my mind the question as to whether or not the Constitutional question, is frivolous or vexatious cannot be determined in isolation of the summary judgment application. They must be decided as one.

[50] The question here therefore is was the court a quo right or wrong to grant summary judgment in the face of the Appellants opposing affidavit and counterclaim which raised the Constitutional question. **Mr Ndlovu** holds the view that the raising of the counterclaim serves as an automatic vehicle upon which the Appellant ought to be conveyed to trial. **Mr Simelane** expressed a contrary view.

[51] Since it is common cause that the parties signed a lease agreement regulating their transaction, a starting point of this exercise would be the terms and conditions of the lease agreement. I say this because, it is trite learning, that when parties have reduced their intention in writing, no evidence may be given of such document. This position of our law was expressed by **Hoffman and Zeffert** in the text **‘‘ The South African Law of evidence (lexis nexis.) at page 322,** as follows:-

> *‘‘ If however the parties decide to embody their final agreement in written form, the execution of the documents deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible’’.*

[52] Then there is the position of the Court on this subject, as elucidated in the case of **National Board (Pretoria) (Pty) Ltd V Estate Swanepol 1975 (3) SA 16 (A) at 26,** where **Botha JA,** quoted the pronouncement of the learned author **Wigmore** as follows:-

> *‘‘ This process of embodying the terms of a jurat act in a single memorial may be termed the integration of the act i.e its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jurat effect, they are replaced by a single embodiment of the act, in other words, when a jurat act is embodied in a single memorial, all other autterances of the parties on that topic are legally immaterial for the purpose of detemining what are the terms of the act’’.*

These two South African cases were followed by the Courts in the Kingdom, in the case of Busaf (Pty) Limited V Vusi Emmanuel Khumalo t/a Zimeleni Transport, Civil Case No. 2839/2008, as well as MTN (Swaziland) V ZBK Services (supra)

[53] It follows therefore, that the applicable position of the law in the Kingdom is that, where parties have reduced their intention in a written document, non of the parties is entitled to lead evidence tending to prove anything contrary to the express terms of the agreement.

[54] It is by reason of the foregoing position of our law, that I find that the Appellant's defence and counterclaim a quo, were not competent to defeat summary judgment before that court. I say this because, it is clear from the terms of the lease agreement that the parties intended that the lessor /Respondent can decide not to renew the lease agreement. All that the lessor was required to do to exercise the option not to renew,

pursuant to Section 3.3 of the lease agreement, was to give the lessee/Appellant, 30 days notice in writing prior to the termination of the lease of its intention not to renew the lease. It was in honour of this term of the agreement, that the Respondent issued the notice of non-renewal dated the 9th of February 2011 to the Appellant, prior to the termination of the lease on the 31st March 2011. This is all that the Respondent was required to do under the lease agreement to entitle him to the non-renewal.

[55] Even though the Appellant in its Opposing Affidavit denied that the notice of non renewal was served upon it as required by the lease agreement, the Appellant however appears to sing a completely different song in its counterclaim. I say this because in paragraph 10 of the counterclaim, (which I have hereinbefore reproduced), the Appellant clearly acknowledged that it was informed of the non renewal via the said notice of non renewal, which Appellant says was also served on

other non Swazi and expatriate tenants of the Respondent. It seems to me therefore, that Appellant is approbating and reprobating at the same time on this issue. Appellant cannot be allowed to sing in two different voices at the same time. In the circumstances, I find that no triable issue is raised via these allegations.

[56] More to the foregoing, is that the parties did not expect that the Respondent must give reasons to the Appellant for the non renewal. This condition is not part of the lease agreement. In the circumstances, the Respondent has a right to refuse to renew the lease without giving reasons. It is therefore not necessary to dwell much on what reasons it gave or did not give for not renewing. Therefore, the allegation that Respondent's reasons for non renewal is based on a Government policy, which is allegedly discriminatory to the Appellant, whose Directors and Shareholders are non Swazi and expatriates, raises no triable issue.

[57] Similarly, the rest of the defence which the Appellant paraded before the court a quo, in an effort to avoid summary judgment, must fail. This is because it violently offends the terms of the lease agreement between the parties, and therefore cannot lie.

[58] I say this because, there is nothing in the lease agreement to suggest that the Appellant had a right to exercise an option to renew. There is nothing also in the lease to show that the Respondent had a right to terminate the agreement only in the event of breach of its terms and conditions by the Appellant. There is no condition in the agreement to demonstrate, that once the Appellant exercises a right to renew and in the face of no breach committed, a legitimate expectation of renewal is created, entitling the Appellant to a hearing before the Respondent can terminate the agreement. In fact, there is no aspect of the lease agreement that demonstrates that the Appellant must be given an

opportunity to be heard prior to its termination. Therefore, the contention, that the decision to terminate was an administrative act of the Respondent, entitling the Appellant to be heard is unsustainable.

[59] There is also nothing in the lease agreement evidencing the contention that the lease would be tacitly renewed or the terms relocated, upon the Appellant giving notice of intention to renew and in the face of the fact that there was no breach of the terms of the agreement by the Appellant. Therefore, to allow the Appellant to proceed to trial to lead evidence on these issues which are not a part of the lease agreement, is not allowed by law. The question of the alleged discrimination against the Appellant, is one that the Appellant is still at liberty to present before the High Court for redress pursuant to Section 35 (1) of the Constitution. It is not one that could defeat summary judgment a quo.

[60] In the final analysis, I find the defence and counterclaim which the Appellant touted before the court a quo, frivolous and vexatious, thus an abuse of the process of the court. Appellant is clearly trying to use the process of the court to defeat the terms of the lease agreement and stay longer in the premises, as though it has a perpetual lease. The court cannot aid such a venture.

[61] It remains for me to emphasize here, that it is the duty of the court to give effect to the intention of the parties as expressed in the lease agreement. It is not the duty of the court to defeat such intention by reading into the agreement words that are not there or making a new agreement for the parties.

[62] It is by reason of the totality of the foregoing, that I come to the conclusion, that the court a quo was right to dismiss the Appellant's defence and counterclaim and grant summary judgment to the Respondent.

[63] This appeal therefore lacks merits, it fails accordingly.

I hereby make the following orders:-

1) That this appeal be and is hereby dismissed.

2) That the judgment of the court a quo rendered on the 12th of March 2012, be and is hereby affirmed

3) Costs to the Respondent on the scale as between attorney and own client, pursuant to the lease agreement.

For Appellant: Mr T. M. Ndlovu

For Respondent: Mr S.P. Simelane

DELIVERED IN OPEN COURT IN MBABANE

ON THIS THE …….DAY OF APRIL……..2012

OTA J.

JUDGE OF THE HIGH COURT