



**IN THE HIGH COURT OF SWAZILAND**

Civil case No: 108/2013

In the matter between:

**BUZZBY SERVICES (PTY) LTD**

**APPLICANT**

**AND**

**WORLD NET (PTY) LTD**

**RESPONDENT**

Neutral citation:

*Buzzby Services (Pty) Ltd v. World Net (Pty) Ltd (108/2013)*  
*[2013] SZHC152 (2013) 8 August 2013*

**Coram:**

**M.C.B. MAPHALALA, J**

**Summary**

Civil Procedure – perfection of a landlord’s hypothec and claim for arrear rental as well as the eviction of the respondent from the premises – held that a landlord seeking to perfect its hypothec has to establish on a balance of probabilities that the tenant is in arrears – thereafter the landlord becomes entitled to an order of attachment as well as an interdict restraining the tenant from disposing or removing his movable goods pending payment of rent – held further that the respondent is in arrear rental – rule nisi confirmed and application dismissed with costs.

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**JUDGMENT  
8 AUGUST 2013**

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[1] This is an application to perfect a landlord's hypothec in respect of arrear rental of E24 118.00 (twenty four thousand one hundred and eighteen emalangeni). The parties concluded a lease agreement on the 28<sup>th</sup> April 2005 in respect of office No. 6 situated at the Manzini Post Office Building.

[2] The applicant is the agent of the Swaziland Posts and Telecommunications Corporation, and, it has the powers to sue and recover arrear rentals on its own and to receive payments. The lease is for a period of three years, at a monthly rental of E1 000.00 (one thousand emalangeni) escalating at 10% annually.

[3] Subsequently, the respondent requested for more office space, and, a written lease was concluded on the 1<sup>st</sup> April 2011 in respect of both offices No. 6 and No. 7. The monthly rental for both offices is E2 795.00 (two thousand seven hundred and ninety five emalangeni) escalating at 10% per annum. Arrear rental incurs a penalty of E240.00 (two hundred and forty emalangeni) per annum. In the event of legal proceedings being instituted to recover arrear rental, the respondent is obliged to pay all costs and charges incurred including costs at attorney and client scale as well as collection commission.

[4] The applicant contends that the respondent has not paid rental for the months of April 2012 up to January 2013 in the sum of E24 118.00 (twenty four thousand one hundred and eighteen emalangeni) inclusive of penalties. The applicant argues that

the respondent has consequently breached the contract, and, that it is entitled to cancel the contract, demand arrear rental and further evict the respondent from the premises.

[5] The application was brought *ex parte* on an urgent basis; and an order for the perfection of the landlord's hypothec was issued on the 30<sup>th</sup> January 2013. The order interdicted the removal of movables from the premises pending the payment of arrear rental in the amount of E24 118.00 (twenty four thousand one hundred and eighteen emalangeneni). The rule nisi was returnable on the 8<sup>th</sup> February 2013.

[6] The application is opposed by the respondent. In *limine* he contends that there is a non-disclosure by the applicant that office No. 6 was handed back to the applicant in June 2012; it was argued that the applicant is misleading the Court by not disclosing such information in its application for perfecting the landlord's hypothec. Another point in *limine* relates to urgency, and the respondent argues that the matter is not urgent. However, the issue relating to urgency is now academic in view of the time that has lapsed since the application was lodged in January 2013.

[7] On the merits the respondent contends that it is only conducting business in office No. 7 on the basis that it surrendered office No. 6 back to the applicant in June 2012. It was argued that the applicant subsequently locked office No. 7 without a Court Order. The office was unlocked pursuant to an order by the Magistrate's Court on the 20<sup>th</sup> December 2012; the applicant was ordered to pay costs of suit in the sum

of E4 663.67 (four thousand six hundred and sixty three emalangeneni sixty seven cents).

[8] The respondent argues that the amount of costs of suit in the sum of E4 663.67 (four thousand six hundred and sixty three emalangeneni sixty seven cents), the rental of E3 075.00 (three thousand and seventy five emalangeneni) paid in June 2013, the amount of E3 075.00 (three thousand and seventy five emalangeneni) paid in July 2012 together with the deposit of E1 000.00 (one thousand emalangeneni) should suffice to settle the arrear rental of office No. 7 with effect from August 2012. In the circumstances the respondent denies that it has breached the Lease Agreement as alleged or that it owes any rental to the applicant.

[9] It is not in dispute that the parties concluded the Lease Agreement on the 1<sup>st</sup> April 2011 for a period of one year in respect of offices No. 6 and 7. It is common cause as well that in June 2011, the respondent surrendered office No. 6 to the applicant due to financial problems; however, the applicant rejected the surrender and insisted that the respondent should abide by the contract.

[10] The applicant argues that the arrear rental is in respect of the period April 2012 to January 2013. The respondent contends that it paid E3 075.00 (three thousand and seventy five emalangeneni) in June 2012 and a similar amount in July 2012; however, no documentary evidence has been attached in proof thereof. Similarly, it is not clear from the answering affidavit the months in respect of which these amounts were paid.

Furthermore, no counter-application has been made by the respondent in respect of the taxed costs of suit of E4 663.67 (four thousand six hundred and sixty three emalangeneni sixty seven cents) together with the deposit of E1 000.00 (one thousand emalangeneni); hence, this cannot constitute a defence to the application. It is apparent to me that the respondent is indebted to the applicant in respect of arrear rental and that it has accordingly breached the contract of lease concluded between the parties.

[11] In *RMS Tibiyo(Pty) Ltd t/a Bhunu Mall v. Bridge Finance (Pty) Ltd* Civil case No. 3446/2010 (HC) at para 7 and 7.1, I had occasion to say the following:

**“[7] It is a trite 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’.”**

[12] *Watermeyer J in Frank v. Van Zyl* (supra) at p. 210 states the following:

**“Now it was laid down by the Appellate Division in Webster v. Ellison 1911 AD 73, that a landlord has a tacit hypothec over *invecta et illata* while the goods are on the leased premises, but that to render this hypothec effectual it is necessary that the goods should be attached. This attachment must take place while the goods are still on the leased premises. If the goods are removed from the leased premises before they have been attached the hypothec is lost, but the landlord has a limited right of re-establishing his hypothec by following up the goods and having them arrested while they are still in transit. They must be arrested before they reached their new destination. The landlord may not, however, take the law into his own hands. The arrest must be made pursuant to an order of Court...”**

[13] In the circumstances the applicant has established on a balance of probabilities that the respondent is in arrear rental. Accordingly the following order is made:

- (a) The *rule nisi* is hereby confirmed
- (b) The application is granted with costs.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Applicant      Attorney Mbuso Simelane  
For Respondent    Attorney Thabiso Fakudze