



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 361/2013

In the appeal between:

MBABANE ESTATE AGENTS (PTY) LTD

APPLICANT

and

KOWLOON FAST FOODS (PTY) LTD

FIRST RESPONDENT

KOWLOON GIFT SHOP

SECOND RESPONDENT

Neutral citation: *Mbabane Estate Agents (Pty) Ltd vs Kowloon Fast Foods (Pty) Ltd & another (361/2013) [2013] SZHC174 (9 August 2013)*

CORAM: M.C.B. MAPHALALA, JA

Summary

Lease Agreement – application to perfect the landlord’s hypothec on the basis of arrear rental – no evidence established that the respondents are in arrear rental – application dismissed with costs.

**JUDGMENT
9 AUGUST 2013**

[1] This is an urgent application for the perfection of the landlord's hypothec. The applicant alleges that in December 2012, the parties concluded a contract of lease which is partly written and partly oral. During the conclusion of the said contract the respondents were represented by their authorised director Mr. Kwok Choon; the applicant was represented by Michael M.M. Jordan Rozwadowsky, its managing director.

[2] The first respondent operates business at offices No. 1,3,4,5, and 6 at lot No. 1 of portion 60, Gwamile Street, in Mbabane; and, the second respondent operates its business at offices No. 2 and 2A at Portion No. 1 of Portion 60, Gwamile Street in Mbabane.

[3] The applicant alleges that the duration of the lease is a period of one (1) year commencing on the 1st January 2013 and terminating on the 31st December, 2013 and, that the monthly rental for the first respondent is the sum of E15, 315.00 (fifteen thousand three hundred and fifteen emalangeni) and that the rental for the second respondent is E10 000.00 (ten thousand emalangeni) per month payable to the applicant. The directors of the respondents were required to sign a Suretyship Agreement as surety and co-principal debtors with the respondents in favour of the applicant. The lease provided that in the event the respondents fail to pay rentals and/or breach the agreement, the applicant would be entitled to cancel the contract and retake possession of the premises; and, that in the event the applicant engages Attorneys to enforce its rights arising from the failure of the respondents to pay rental,

then the respondents would be liable to pay the expenses thereby incurred on the scale as between attorney and own client including collection commission.

[4] The applicant further alleges that the Lease Agreements being annexures 'MEA1' and 'MEA2' were handed over to the respondents for signature but they have not done so notwithstanding that the applicant has already signed the leases. The applicant also alleges that the respondents took occupation of the premises on the 1st January 2013 pursuant to the conclusion of the Lease Agreements.

[5] The applicant contends that the respondents have failed to pay the monthly rentals, as set out in the Lease Agreements and that they insist on paying lower rates which are not in line with the agreement between the parties. The applicant further contends that the respondents are liable to pay the amount of E20, 538.38 (twenty thousand five hundred and thirty eight emalangeni thirty eight cents); and, that consequently, the respondents have breached the agreement, and, the applicant is entitled to cancel the Lease, eject the respondents from the premises and demand the outstanding rental. It is further alleged that in view of the said breach, the applicant cancelled the Lease Agreements in writing on the 5th February 2013.

[6] The application is opposed by the respondents. In their Answering Affidavit, they argued in *limine*, that the above honourable Court does not have jurisdiction to hear and determine the matter on the basis that the amount of the claim is less than E30 000.00 (thirty thousand emalangeni); that the matter is not urgent because the

dispute came to the fore in December 2012; that there are disputes of fact in the matter even though they do not state the nature of the disputes. The respondents further argue that the applicant has no *locus standi* to institute the proceedings on the basis that the lease which the applicant seeks to rely upon has not been signed. However, they do not deny that they concluded a contract with the applicant or that the applicant is an agent of the owner of the property.

[7] Section 16 (1) of the Magistrate Courts (Amendment) Act of 2008 provides the following:

“16.1 Subject to section 16 bis and any other provision of this Act or other law the jurisdiction of Magistrate’s Courts in civil matters shall be-

(a) In the case of Principal Magistrate’s Courts, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed E30 000.00 (thirty thousand emalangeni);

(b) In the case of Senior Magistrate’s Courts, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed E20 000.00 (twenty thousand emalangeni);

(c) In the case of any Magistrates’ Court (lower than a senior magistrate’s Court) all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed E10 000.00 (ten thousand emalangeni).”

[8] It is apparent from a reading of section (16 (1) above that the amendment does not oust the jurisdiction of the High Court to hear and determine civil claims where

the amount in dispute does not exceed E30 000.00 (thirty thousand emalangeni). What section 16 does is to limit the civil jurisdiction of the Magistrate's Courts; hence, this Court has jurisdiction to entertain this matter.

[9] Another point in *limine* raised by the respondents is that the applicant has approached the Court with dirty hands by allegedly instructing the Deputy Sheriff to lock the premises. However, this point in *limine* overlooks the fact that the High Court on the 8th March 2013 issued an order that the Deputy Sheriff should 'attach all the movables from the premises and keep them under lock and key and do whatever is necessary to prevent the respondents from removing the movables'. Accordingly, this point of law cannot succeed.

[10] On the merits the respondents argue that they first moved into the premises in 1987 and that they have been paying rental to VJR Estate Agencies until November 2012, after which, the applicant took over as the new Estate Agent. The respondents further contend that the earlier Lease Agreement terminated in February 2012 and VJR Estate Agencies offered them a Lease Extension on the usual escalation of 5% per annum; and that they argue had no reason to conclude a new lease, and, that they continued to pay rental and VJR Estate Agencies accepted same.

[11] It is not in dispute that by letter dated 15 February 2012 VJR Agencies wrote a letter to the respondents and stated inter alia:

“Lease Agreement Shop Premises on Lot 60 Gwamile Street, Mbabane.

We have pleasure in enclosing three copies of the above Lease Agreement for a period of three years commencing 1st March 2012 at a rental of E7 597.49 (seven thousand five hundred and ninety seven emalangeni forty nine cents) per month.

Would you please initial the bottom right hand corner of each page, sign as Lessee and return all three copies to us so that we may obtain the Lessor’s signature, and thereafter return one copy to you for your records.”

[12] It is not in dispute that the respondents delivered a letter advising the applicant that VJR Estate Agencies had renewed their lease when it expired in February 2012 for a further period of three years at an annual escalation rate of 5%; and, that the renewed Lease expires in February 2015. The respondents expressed surprise that their lease was being interfered with by the imposition of a shorter period and increased rentals. They also argue that since they occupied the premises in 1987, their Lease would run for a three year period. Accordingly, they argue that they are not in breach of the lease, and, that they have continued to pay the rental as agreed with VJR Estate Agencies. The respondents contend that they cannot sign new leases with the applicant in the face of existing leases concluded with VJR Estate Agencies commencing in March 2012.

[13] The respondents deny that they have failed to pay rental; they attach receipts showing payments for January, February and March 2013. They argue that they also have receipts for the period beginning February 2012 to December 2012 which can be made available to the Court if need be.

[14] The respondents made a written reply to the letters of cancellation written by the applicant on the 21st January 2013 reiterating that they concluded a Lease Agreement with VJR Estate Agencies in February 2012 commencing on the 1st March 2012 for a three year period prior to the engagement of the applicant in December 2012. The respondents further contend that they are willing to sign a written Lease which reflects the verbal agreement concluded with VJR Estate Agencies.

[15] The respondents further refer the Court to a letter written by the applicant dated 29th November 2012 and directed to all tenants advising them of its appointment as Agents. The applicant advised the tenants that the appointment is with effect from 1st December 2012. What is of paramount importance is that the applicant undertook to honour all existing leases. The letter reads in part:

“... We are pleased to advise you that the new owners of the properties at Lot No. 1 of 60 and Lot No. 60, Gwamile Street, Mbabane has appointed us as their agents for the collection of rentals and management of their property with effect from 1st December 2012.

We will be grateful if you will provide us with a copy of your existing lease agreement, which will be honoured.

With effect from 1st December 2012, please make all rental payments to our offices at plot No. 130 Siguca Crescent, Mbabane Industrial site (opposite Cashshbuild)....”

[16] In its replying affidavit the applicant argued that the respondents have approached the Court with unclean hands by non-compliance with the interim order,

and, that they should not be heard. The applicant argues that the respondents with the assistance of their attorney prevented the Deputy Sheriff from locking the premises as ordered by the Court. On the contrary it is the applicant who have approached the Court and not the respondents who are merely opposing the application. It was open to the applicant to institute contempt proceedings against the respondents and their attorney; however, they did not.

[17] The applicant conveniently avoids to deal with the defence raised by the respondents that they renewed the lease agreement with VJR Estate Agencies in February 2012 for a further period of three years; and, that when the applicant was appointed as Agent, the lease was effectual. Furthermore, the applicant, on appointment, undertook to honour all existing leases including the leases for the respondents.

[18] Contrary to their assertion in the founding affidavit that the lease between the parties is for a period of one year commencing on the 1st January 2013 and terminating on the 31st December 2013, the applicant in its replying affidavit now contends that the lease is a month to month agreement. The applicant has also failed to disclose in its founding affidavit that the respondents have been occupying the premises since 1987 and paid rental to VJR Estate Agencies and that the latter's mandate only expired in November 2012; it failed to disclose this information notwithstanding that the application has been brought *ex parte* and on a certificate of urgency. It further

failed to disclose that the previous contracts were for a three year period which was subject to a 5% annual escalation in rentals.

[19] In the case of *Swaziland Polypack (Pty) Ltd v. The Swaziland Government and Swaziland Investment Promotion Authority (SIPA)* Civil Appeal case No. 44/2011 at para 11, I had occasion to state the following:

“11. The Landlord’s hypothec is a security right created by operation of the law over movable property belonging to the Lessee who is in arrears with rent payments. The hypothec is intended to secure the Landlord’s claim for arrear rental. The lessee’s property becomes subject to the hypothec as soon as the rent is in arrears; however, the law requires that the Landlord has to perfect the hypothec by attaching the Lessee’s movable property in terms of a Court Order whilst the property is still on the premises. The legal basis for perfecting the hypothec by obtaining a Court Order for attachment or an interdict restraining the Lessee from removing the movable property from the leased premises is to prevent the lessee from disposing of and removing the movable property from the leased premises pending payment of the rent or the determination of proceedings for the recovery of the rent.”

See *A.J. Van Der Walt and G.J. Pienaar*, Introduction to the Law of Property, third edition at page 302; *Webster v. Ellison* 1911 AD 73 at 79-80; *Barclays Western Bank, Dekker* 1984 (3) SA 220 (AD) at 224.

[20] It is apparent from the evidence that the respondents renewed their lease with VJR Estate Agencies in February 2012 for a further period of three years; and, that when the applicant was appointed as the Agent in November 2012, the Lease Agreement was in existence. In the circumstances, it is not open to the applicant to interfere with the existing lease. It is also apparent that the respondents did not default

in the payment of rental; they have consistently paid their rental in accordance with the existing Lease Agreement.

[21] It is not denied that the dispute over the rental payable by the respondents arose in January 2013, and that the application was lodged on an urgent basis on the 8th March 2013; hence, the applicant was not entitled to invoke the urgency procedures in the circumstances. Furthermore, there are no material disputes of fact in this matter which require the leading of oral evidence in light of the decision to which I have arrived. There is no evidence before this Court that the respondents are in arrear rental or that the Lease has lapsed.

[22] Accordingly the following Order is made:

- (a) The *rule nisi* is hereby discharged.
- (b) The application is dismissed with costs.

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

For applicant
For Respondent

Attorney Derrick Jele
Attorney Muzi Simelane