



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 1209/2012

In the matter between:

**SANTOS PROPERTIES (PTY) LIMITED**

**Applicant**

And

**LONGCOBI ENTEPRISES (PTY) LTD**

**T/A MARBLE GRAN GALLERY**

**1<sup>st</sup> Respondent**

**GABSILE PRECIOUS NXUMALO**

**2<sup>nd</sup> Respondent**

**MPENDULO BRIAN SIBUSISO SHONGWE**

**3<sup>rd</sup> Respondent**

**Neutral citation:** *Santos Properties (Pty) Limited v Logcobi Enterprises (Pty) Ltd and 2 Others (1209/2012) [2013] SZHC 179 ( 3<sup>rd</sup> May, 2013)*

**Coram:** **M. Dlamini J.**

**Heard:** **11<sup>th</sup> October 2012**

**Delivered:** **3<sup>rd</sup> May, 2013**

*– application for an order to perfect a landlord hypothec – purpose of application - order cannot be granted where security has already been provided.*

Summary: The applicant lodged application proceedings under a certificate of urgency calling for an order to perfect a landlord hypothec. This was as a result of respondent owing rentals. The respondent raised a number of *points in limine viz.*, lack of urgency, doctrine of unclean hands and that security was already provided before applicant filed the present application. On the date of hearing, the court dismissed the application on the basis that security had already been granted. The reasons thereof are now reduced into writing.

[1] The applicant entered into a lease agreement with respondent. The agreement was for a period of one year being 1<sup>st</sup> November 2010 to 30<sup>th</sup> October 2011. Monthly rentals were fixed at E6,500.00. 1<sup>st</sup> respondent however defaulted in payments of the monthly rentals. 2<sup>nd</sup> and 3<sup>rd</sup> respondents stood as surety for the 1<sup>st</sup> respondent.

[2] In answer to the application, the respondents averred at paragraph 12.2, page 46:

*“...Furthermore, the applicant is in possession of the respondent’s motor vehicle, being a VW Golf 4 whose registration number is YSD 313 AM. The respondent offered the motor vehicle as security to the applicant in good faith after realising that it would not be able to settle the outstanding balance within the given time.”*

[3] To this assertion, applicant replies at paragraph 5.3 page 55:

*“...The motor vehicle that is in the possession of the applicant was voluntarily handed over by the respondents as a form of security to the arrear rentals accumulated by the 1<sup>st</sup> respondent from the leased premises.”*

[4] From the parties' assertion as highlighted above, it is clear that it is not in issue that the applicant was in possession of a security regarding arrear rentals.

[5] This calls for me to discuss the purpose of a landlord hypothec perfection order.

[6] **Innes J.** in **Webster v Ellison 1911 AD 73** at page 86 the learned Judge states of this principle:

*“Though it springs direct and immediately from the relationship of landlord and tenant, it is operative only when and so long as rent is in arrear, and affects solely movables of a particular kind which happen to be on the leased premises when its assistance is involved.”*

[7] The honourable Judge described the movables in the same judgment (**Webster supra**) at page 86 as “*the security*” which “*takes the form of a special tacit hypothec*”.

[8] From the above *dictum* it is clear that the purpose of attaching lessee's movables is to hold the same as a *lien* for arrear rentals. At page 91 his **Lordship Innes J.** reiterates that the goods which are in the leased premises provide as security for arrear rental. If there is fear that such security is about to be “*endangered*” then the lesser is entitled to apply to court for attachment. Once attached, the lesser has a preferential right over other creditors. The goods are therefore subject to a tacit mortgage as Roman-Dutch writers seem to suggest.

[9] In *casu*, both parties are at consensus that the motor-vehicle provided by respondent was security for arrear rentals. It is therefore incorrect for applicant to launch an application for security for arrear rentals when it had already been provided by respondent of the same unless applicant can show on its application that the security provided was insufficient to relinquish the debt in a form of arrear rental.

[10] For that reason the applicant's application stands to be dismissed with costs.

[11] When the matter was argued, by consent of the parties, the lease agreement was ordered as cancelled.

[12] The following orders are hereby entered:

1. Applicant's application is dismissed.
2. Applicant is ordered to pay costs.
3. The lease agreement between the parties is declared cancelled.

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**M. DLAMINI**  
**JUDGE**

**For Applicant** : **Mr. W. Maseko**  
**For Respondent** : **Mr. B. Magagula**

