



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 03/2012

In the matter between:

**SWAZILAND NATIONAL PROVIDENT
FUND BOARD**

Applicant

And

VIKELA LEGAL CONSULTANTS (PTY) LTD

Respondent

Neutral citation: *Swaziland National Provident Fund Board v Vikela Legal Consultancy (Pty) Ltd (03/2012) [2013] SZHC 181 (3rd May 2013)*

Coram: M. Dlamini J.

Heard: 3rd April 2013

Delivered: 3rd May, 2013

– Application to perfect landlord hypothec – purpose of relief is to provide landlord with security for arrear rentals over other creditors on movable attached while in the premises – that the lessor has breached the lease agreement will not justify non-payment of rentals so long as the lessee continue to enjoy undisturbed possession and occupation of the premises - defendant opposing application on the basis that application includes other

prayers irrelevant to the application for perfection of landlord hypothec – orders for ejectment and cancellation of contract of lease are appropriate in application to perfect a landlord hypothec.

Summary: By Notice of Motion under a certificate of urgency, the applicant filed an application commonly associated with one for landlord hypothec perfection. The respondent opposed the application on the basis that the applicant does not only seek for an order to perfect a landlord hypothec but also for orders on ejectment and cancellation of the contract of lease.

[1] The applicant and the respondent entered into a lease agreement on 26th October 2006. This agreement was for a period of one year. The monthly rentals would be the sum of E3,548.00. Respondent took occupation of the leased premises. The lease agreement expired on 30th October 2007. Thereafter respondent continued to occupy the premises on a month to month basis. On 21st May 2010 applicant issued a notice terminating the month to month lease agreement and making an offer of a new lease agreement wherein the monthly rentals were increased to E6,750.00. Applicant contends that although respondent, represented by **Mr. Ian Carmichael**, an officer of this court, signed the offer of a new lease agreement, refused to sign the new lease agreement. However, respondent continued to occupy the premises. Applicant states further that from the month of September 2010, respondent defaulted in paying rentals. At the time of the application, respondent has been in arrear rentals for the sum of E39,009.00.

[2] The respondent strenuously opposes this application for reasons which I shall refer to later.

[3] It is common cause that the applicant and the respondent as represented by **Mr. Ezrome V. Mntshali** and **Mr. Ian Carmichael** respectively, entered into a lease agreement. It is not in issue that the said lease agreement expired and there was a one to one month lease agreement in place. Further that an offer for a new lease was tendered to the respondent which was signed and that respondent refused to sign the lease agreement. It is further not disputed that the new monthly rentals were not paid by respondent. In fact respondent informs the court that it then paid reduced rentals to the tune of E2,500.00 as from March 2011.

[4] Before highlighting the principle of law governing the rights of a landlord to perfect his hypothec, it is apposite to state the defence raised by the respondent under the hand of **Mr. Ian Carmichael** in *casu*.

[5] **Mr. Carmichael** deposed to a very lengthy affidavit, putting up a defence to applicant's application. I shall endeavor to cite the same verbatim.

[6] At page 69 paragraph 7 and page 70 paragraphs 7.1 and 7.2 he avers:

“7. I admit the allegations contained in paragraph 6.61 of Derrick's affidavit, but for the sake of completeness humbly aver that the tenants' obligations contained in paragraph 9.5.1 of the lease agreement would only be enforceable if the applicant had first complied with its obligations to hand to the respondent, premises that were in good order and repair, and 100% tenable at the time of taking occupation. I have been advised and humbly submit that this principle is supported by the fact that the lease agreement made provision for the incoming tenant, at the time of taking

occupation, to report any patent defects or breakage already existing on the property to the landlord.”

7.1 I think it would be prudent to mention at this juncture that at the time I took occupation of the premises, the tenant who had previously occupied the property was in arrears with his rental, and as a result, had failed to maintain the interior of the premises. As a result, I found the interior of the premises in a general state of disrepair. I have been advised and humbly submit that the principle enunciated in our common law is that if a lease agreement dictates that a tenant is to maintain the interior and/or exterior of any property, that the landlord should ensure that the property or premises are handed to the tenant in a state of good order and repair. I am advised that the principle has developed in order to avoid a state of affairs where tenants would ultimately be responsible, by virtue of the fact that they were renting premises, to improve, upkeep and maintain premises where this obligation rested on the landlord, thereby unduly enriching the owner of the property.

7.2 I confirm that upon taking occupation of the premises, and in accordance with my obligations in terms of the lease, I notified the applicant about various deficiencies that appeared in and were patently clear on the property.

[7] Having said this, he then goes on to draw a long list of items which needed attendance by applicant as evidence in his proceeding paragraphs.

[8] He then reveals at page 72 paragraphs 7.6 and 7.7.

“7.6 Given the fact that my wife had recently given birth to my first child, that I desperately needed to find accommodation in Manzini, that the rental was reasonable and provided a number of benefits such as the security of a separate secure complex with a large yard, I decided to take occupation of the premises even though the various maintenance problems referred to in paragraph 7.3 above had not been attended to.

7.7 As a result, I made the decision to take occupation of the premises and after giving the applicant time to try and complete the renovations on the house, moved in on the 01st of December 2006.

[9] Then at page 73 paragraph 9 he states:

“I aver further that upon the expiration of the lease on the 30th October 2007, I refused to sign a new lease.

[10] He repeats the same at page 82 paragraph 9.31:

“9.31 I would like to reiterate that it was because of the problems that I had been experiencing with the premises, that I refused to sign a new lease.

[11] He emphasises at page 82 paragraph 9.29 as follows:

“9.29 As a direct result of the applicant’s continued failure to repair the premises and to place same in a tenantable state, I have been deprived of the beneficial use and occupation of a portion of the premises, namely the master bedroom and the cupboards

contained therein as I am unable to sleep in the bedroom or to store my personal effects in the cupboards.”

[12] He contends at pa84 paragraph 9.36:

“9.36 At the point that we experienced this further loss, I once again approached the respondent and asked that the respondent once again consider reducing the rental for the portion of the premises that I was unable to use, and to further compensate me for the damage I had suffered due to the burst pipes.”

[13] He further states at page 87 paragraph 16.2:

“16.2 It was after the water damage experience in March 2011 that I once again approached the respondent asking for a remission of the rental while the property was repaired and further, be compensated for the damage I suffered.

[14] Then at paragraph 16.5 at page 88 he reveals:

“16.5 Through previous experience I was also aware that the applicant responded very slowly to most requests and as a result, I took it upon myself to begin paying a reduced rental in anticipation of a positive response from the applicant that my rent would be reduced.”

[15] He proceeds to tabulate the amounts in remission and then states at page 94 paragraph 22:

“22. Save to admit that I remain in possession of the premises I deny each remaining allegation contained in paragraph 7.3 of Dereck’s affidavit. In amplification of this denial I state that I have continued to pay on a monthly basis either the full rental due, alternatively the lower rental of E2,500.00 (two thousand, five hundred emalangi) in order to recoup the money due to me by the applicant.”

The doctrine

[16] The doctrine of landlord hypothec was well canvassed by **Innes J.** in **Webster v Ellison 1911 AD 73** at page 86 as follows:

“For the old distinction between urban and rural tenements in this connection has admittedly disappeared, and by later Dutch law the landlord’s rights in regard to animals brought upon leased land and furniture brought into a leased house are for all practical purposes identical. The security in question takes the form of a special tacit hypothec, though with characteristics so marked that the propriety including it, at any rate, when first constituted, in that category, has been sometimes questioned. Though it springs directly 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 invoked. And all movables on the property being in the possession and at the disposal of the tenant, it follows that the allata et inventa which, it contains any fluctuate indefinitely from time to time.

A tacit hypothec over so undefined a subject matter would be of little practical value (save in a concursus creditorum),... without some special

machinery to enforce it. The law of Holland, therefore, allowed a landlord whose tenant was in default, by a species of informal attachment (praecclusio), to earmark the illata et invecta on the property, and thereby to perfect and complete his lien. Apparently no order of Court was necessary, but when the tenant failed to pay his rent, a public official entered the premises at the request of the landlord, made an inventory of the movables affixed his seal, and then closed the doors (Pothier, Pandects, 30, 2, 9, n. 4). The result was greatly to strengthen the landlord's position; not only were the article identified and impounded, but he thereafter enjoyed preference over their proceeds. He became a privileged creditor. The exact machinery thus provided in Roman Dutch practice is unknown in our modern procedure; but the principle of assisting a landlord by summary process to protect his rights is one approved by all South African Courts. Sometimes an interdict restraining removal or alienation by the tenant pending an action for rent is applied for and granted; but the issue of an order of attachment is also well recognized. And such an order, operating as it does directly upon the goods themselves, seems the appropriate form of relief in such cases, and the one which most nearly resembles the remedy afforded by Roman Dutch law. Seeing that it substitutes for the executive act of a public official the formal order of a Court of law, it is probably even more effectual. Moreover, it has this advantage, that it can be put into force as easily in respect of animals grazing upon leased land as in respect of furniture stored in leased buildings. And the cases show that such an attachment is obtained without difficulty when the circumstances reasonably require it."

[17] The learned Judge proceed to cite **Lieberman v Guardian Assurance Co. 1909 T. S.** and states as follows at page 87.

“I ventured to remark that there was much to be said in favour of the view that a landlord was entitled to an attachment as of right as soon as rent was in arrear, because it was difficult to see how otherwise he could effectually protect his hypothec.”

[18] Sitting on the same case, **Webster** *supra*, **Solomon J.** eloquently wrote at page 93:

*“Now, in all the Roman-Dutch authorities, as far as I know, the landlord’s right over illata et invecta is described as a tacit mortgage, which attaches so soon as the rent falls in arrear. It has, indeed, been questioned whether juristically it is correct to say that the goods in the leased premises are subject to a tacit mortgage before they have been actually attached; and in the case of **Leech vs. Gardiner, Hertzog, J.**, expressed the opinion that the right was one merely to have the goods hypothecated to him, that there was no real hypothec until after arrest, and, consequently, no right of preference over the creditors. I can find no warrant, however, for that view in any of our authorities, and it is in direct conflict with some of the decisions in South African Courts, such, for instance, as the case of *In re Stilwell* (1 M., 537), where it was laid down that “the landlord’s hypothec did not require any judicial arrest to make it effectual over the tenant’s property, and that the judicial arrest was only necessary to prevent the property being removed from the house, and the hypothec being thereby defeated.” I treat it then, as settled law that the right is one of tacit hypothec.”*

[19] He continues to highlight at page 94:

“The landlord, no doubt, can protect himself by obtaining an order of attachment; but if he fails to do so, he runs the risk of losing his hypothec.”

[20] The direct question faced by the court is whether a party served with an application for an order to arrest movables as security for arrear rentals can allege that in as much as he was in occupation, the premises were deplorable.

[21] Before addressing the said question it is clear from the respondent's averments as cited above that the respondent admits the following:

- that he has continued to occupy the premises;
- that he is not paying the agreed amount of rentals. I say this because at paragraph 22 page 94 of the book of pleadings the respondent has averred that;

“I have continued to pay on a monthly basis either the full rental due, alternatively the lower rental of the lower rentals of E2,500.”

- This amount was unilaterally decided upon by respondent who stated at page 88 paragraph 16.5:

“As a result and from approximately March 2011 I started paying a reduced rental amounting to E2,500.”

[22] A similar question was faced by his **Lordship Van Winsen J.** in **Arnold v Viljoen 1954 (3) S.A. 322:**

[23] In that case, respondent admitted that he entered into a contract of lease with applicant. However, like in *casu*, he averred that he was excused from paying the rentals owing to a number of grounds. Like in *casu*, he

complained of the roof and a number of repairs or renovations that needed to be attended to the premises. The respondent in **Arnold's** case *supra* as in *casu*, claimed remission of rent.

[24] **Van Winsen J.** in deciding the matter first referred to the case of **Sapro v Schlinkman 1948 (2) S.A. 637 AD** where it was held:

“...even where the lessor had committed a breach of the contract of lease going to the root thereof the lessee was bound to pay rent for the period during which he remained in undisturbed possession of the leased premises. The obligation was to pay rent as such and not to make a payment on the basis of a quantum meruit.”(my emphasis)

[25] The learned Judge then held that the respondent was liable for paying rent.

[26] The learned Judge in **Arnold supra** further dismissed submissions similar in *casu* that it could not be said that the tenant was enjoying undisturbed possession because of the deplorable condition of the premises rendering same to be untenable. His Lordship held at page 330 B:

“I think the task for the tenant's liability for rent is whether he was in occupation or in possession of the leased premises and not whether such occupation or possession was beneficial or not.” (my emphasis)

[27] I consider further a point which was also a subject matter in **Arnold's** case. Again as also averred in the present application the respondent alleged that applicant was liable to him for damages and that he will file for a claim in due course. I note that although applicant in this application lodged the said application on the 6th January 2012 and respondent was aware of it at

least by the 19th January 2012 as that is the date upon which notice to oppose was served upon applicant, at the date of arguments on the merits being 8th March 2013, over a year later, no summons were served upon the plaintiff.

[28] For the reasons that the respondent in **Arnold's** case *op. cit.* had not filed a counter-claim as in *casu*, the court rejected its allegation and found that the respondent was liable even for rentals of January and part of February being the date respondent vacated the premises.

[29] Similarly on the basis of the authority cited herein, I find that the respondent is liable for rentals of all the period he is in occupation until such time he decides to vacate as it was common cause that the respondent was in occupation even at the date of argument of this application.

[30] This finding finds support from our *locus classicus* case of **Swaziland Polypack (Pty) Ltd v The Swaziland Government and Another (44/11) [2012] SZSC 30** where his **Lordship Maphalala J. A.** drawing from **Arnold** *op.cit.* at page 20 paragraph 40 held:

“...that the test of a tenant’s liability when sued for arrear rental was whether he was in occupation or in possession of the premises and not whether or not such occupation or possession was beneficial. Accordingly, when the tenant is sued for rent he cannot plead as a defence that he had been deprived of the beneficial occupation of the premises by reason of structural defects which the landlord fails to repair, tenant cannot remain in occupation but refuse to pay the rent” (my emphasis)

[31] For the foregoing respondent defence stands to fall.

[32] **Mr. Flynn**, who represented the respondent argued at length that the applicant ought not have prayed for ejectment and cancellation of the contract. If at all, he ought to have sought for an order restraining the respondents from removing or alienating the movables.

[33] On that note, the relieve prayed for by applicant is one provided under Roman-Dutch law which is our common law.

[34] The reason for such is because once the court grants an order for ejectment and cancellation of the lease agreement, that would pre-determine the action proceedings filed by applicant under case number 1900/12 where applicant claims for arrear rentals owing to the disputed facts. That the question of whether arrear rentals are owed is a question for determination during trial.

[35] **Innes J.** *supra* at page 87 stated on the application:

“Sometimes an interdict restraining removal or alienating by the tenant pending an action for rent is applied for and granted; but the issue of an order of attachment is also well organized. And such an order operating as it does directly upon the goods themselves, seems the appropriate form of relief in such cases and the one which most nearly resembles the remedy afforded by Roman-Dutch law.”

[36] I have already demonstrated that respondent has deposed in its answering affidavit that it *mero motu* decided to reduce the rentals to the sum of E2,500. This on its own, shows that respondent has not paid the amount expected by the applicant as lessor. I have already cited authorities

showing that the ground that rentals have not been paid owing to structural defects or right to remission do not hold on question of arrear rentals. Following the *dictum* at page 82 of **Webster** case *op.cit.* where their Lordships held:

“...the courts will always assist vigilant landlords seeking to attach goods on the leased premises upon prima facie proof...”

[37] Further, it would result in absurdity and defeat business efficacy should the court hold that the respondent’s movables are liable for attachment but allow the respondent to enjoy both use of the movables and the premises without paying rentals. In essence this would amount to the court giving respondent a licence to continue defaulting in his rentals, or put in the wise words of **Franklin J.** in **Greenberg v Meds Veterinary Laboratories 1977 (2) S.A. 277** at 286, where he held:

“And since such failure to pay the rent is a clear breach of contract on the part of the respondent, the applicant has a valid claim for cancellation of the lease and for payment of arrear rentals.”

a situation that would greatly prejudice the applicant financially. It is for this reason therefore, that the application for an order perfecting a landlord hypothec goes hand in glove with an order for ejection and cancellation of the lease agreement, if any, as it is doubtful in *casu* whether there is one as respondent stated that he refused to sign a new lease although he signed an offer for a new lease.

[38] The respondent has further attacked the manner in which applicant has couched its prayers, submitting that it falls outside the directive of the then **Chief Justice Sappire**.

[39] This is totally unfounded. When one compares the prayers in applicant's Notice of Motion and the specimen directive, the two are *pari materia* for all intent and purpose. The specimen directive is copied as is and is as follows:

- “1. *Pending payment of the arrear rental in the amount of (here state amount) claimed by the Applicant from the Respondent in respect of the premises at (here describe premises), (the premises), for the period (here state periods for which rental is unpaid) the removal of any movables from the said premises is hereby interdicted.*

2. *The sheriff or his lawful deputy is hereby directed and required:*
 - (a) *forthwith to serve this order, the notice of motion, and the founding affidavits upon the Respondent and to explain the full nature and exigency thereof to him*

 - b) *attach all the movables upon the premises and*
 - c) *make an inventory thereof*
 - d) *make a return to the Applicant or his attorney and the Registrar, of what he has done in the execution of this order*

- 3(c) *Costs of the Suit.*

[40] At any rate, the *dictum* propounded in **Trust Bank Bpk v Dittrich 1997 (3) 740 C** also guides this court *wit.*;

“The Court does not encourage formalism in the application of the Rules. The Rules are not and end in themselves to be observed for their own sake. They are provided to clear the inexpensive and expeditious completion of litigation before the courts.”

[41] On the question of costs, Mr. Flynn, on behalf of respondent moved an application to have the applicant’s application dismissed with costs including costs of Counsel. He called for a higher scale on the basis that he was Senior Counsel himself. Had the applicants lost the matter, this court would have been compelled to grant respondent costs of Senior Counsel. Similarly, it should be expected of Counsel who demand such scale of costs to be liable to the same scale should they fail to succeed.

[42] Further, it is trite that justice demands that what you ask you should be able to give. In that vain, I will order costs to include costs of Senior Counsel.

[43] I am further influenced by respondent raising *points in limine* from the bar thereby ambushing the applicant. No authorities were cited on behalf of respondent in support of the *points in limine* and the defence raised.

[44] In the premises, the following orders are made:

1. The rule nisi granted on 6th January 2012 is hereby confirmed, namely:

1.1 The Deputy Sheriff is hereby authorized to attach all movables upon the premises House No. 27 in 27 Executive Houses, Extension 6, Manzini;

1.2 Make an inventory thereof;

- 1.3 Make a return to the applicant's attorneys and Registrar of what he has done in execution of this order;
2. Respondent is hereby ejected from the said premises;
3. Respondent is hereby ordered to pay costs, including costs of Senior Counsel.

M. DLAMINI
JUDGE

For Applicant : **Mr. J. Warring**
For Respondent : **Advocate P. Flynn instructed by Cloete / Henwood
Associated**