



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1388/2012

In the matter between:

**S. & T. PROPRIETARY (PTY) Ltd
t/a Fashion World**

APPLICANT

AND

**SIMUNYE PLAZA (PTY) LTD
MCINISELI BHEMBE NO**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *S. & T. Proprietary (Pty) T/A Fashion World Ltd V. Simunye Plaza (PTY) Ltd & Others (1388/2012) [2013] SZHC54 (2013)*

Coram:

M.C.B. MAPHALALA, J

For applicants

Attorney L. Mzizi

For Respondents

Attorney N. Mabuza

Summary

Civil Procedure – Lease – the respondents obtained *ex parte* an interim order to perfect a landlord's hypothec – they attached property from the leased premises and did not remove the property – they proceeded to lock the premises without the requisite court order authorising same – applicant instituted an interlocutory application to declare the locking of the premises unlawful in circumstances – application accordingly granted.

**JUDGMENT
6th MARCH 2013**

- [1] This is an urgent application seeking an order that pending finalization of this application, the applicant be and is hereby granted permission to access the rented premises being Shop No. 38 at Simunye Plaza. The applicant further sought an order for the issue of a rule *nisi* calling upon the respondents to show cause on a date to be determined by the court why the following orders should not be made final: firstly, that the locking of the shop on the instruction of the first respondent be and is hereby declared unlawful. Secondly, that the applicant be and is hereby granted access to the shop. Thirdly, that the respondents be and are hereby ordered to pay costs of suit the one paying for the other to be absolved.
- [2] The applicant is a tenant of the first respondent. On the 13th December 2012, the applicant was served with an application dated 8th August 20112 as well as a Court Order dated 10th December 2012 by the second respondent. At the time of service, the rented premises had already been locked by the second respondent on the 12th December 2012.
- [3] The applicant alleges that on the 14th December 2012 he met first respondent's attorney at the High Court and they agreed to meet at his offices in the afternoon of the same day; however, the attorney did not honour the meeting. On the 18th December 2012 an agreement was concluded between the applicant and the first respondent's attorney that the arrear rental be liquidated in terms of post-dated cheques in respect of the locked premises.

- [4] The applicant argued that despite the payment made, the respondent have refused to open the premises so that it could trade and generate income to honour the post-dated cheques.
- [5] The applicant further argued that the proceedings between the parties dated back to August 2012, and, that the first respondent has not been handling the matter as urgent; he also argued that the first respondent, pursuant to the proceedings obtained *ex parte* an order for the perfection of the landlord's hypothec, and the respondents locked the premises without the requisite court order entitling them to do so. To that extent the applicant argued that his right to access the premises and consequently trade is being infringed by the respondents.
- [6] It was submitted on behalf of the applicant that the locking-out of the premises without a court order or giving the applicant an opportunity to be heard prior to the locking-out is contrary to the dictates of natural justice which entitles a party to be heard prior to an adverse order being issued against him particularly in an *ex parte* application. The applicant further argued that the locking-out of the premises in the circumstances is not only unlawful but is in bad faith because the first respondent accepted payments of the post-dated cheques in liquidation of the arrear rental.

- [7] The applicant argued that this matter is urgent and that it could not be afforded substantial redress at a hearing in due course because the act of locking the premises is unlawful as it was not authorised by the court. Furthermore, it argued that payment has already been made in respect of the debt owed, and, that it was losing business by the continued locking of the premises.
- [8] The applicant explained that this was an interlocutory application designed to prevent the unlawful locking of the premises because it was not part of the interim order obtained by the first respondent.
- [9] The application is opposed by the first respondent. In *limine* it argued that the application is highly irregular, improper and highly defective. It was argued on behalf of the first respondent that the applicant on being served with an order perfecting the landlord's hypothec, it was enjoined to file an opposing affidavit or a Notice to anticipate the return date. It was further argued that the applicant has wilfully brought about a conflict of two co-existing orders disingenuously.
- [10] The second point in *limine* is that the application is not urgent on the basis that the main application was moved and obtained on the 10th October 2012 and subsequently served upon the applicant on the 13th December 2012 but that the applicant has failed to bring this application timeously. To that extent it was argued that the applicant does not take the court into its confidence by failing to

disclose what it did in the intervening period. In addition it was argued that financial prejudice is in law not a ground for urgency.

[11] The third point of law is that the applicant has approached the Court with dirty hands. It was argued that the applicant has taken the law into its own hands and engaged in self-help; and, that after obtaining the interim order, the applicant proceeded to break into the premises and removed a locked padlock.

[12] The fourth point in *limine* is that the applicant has conveniently not mentioned that it has continuously, frequently, blatantly and materially breached the lease agreement. It was argued that the applicant was now in material breach of the lease and is in arrear rental in the sum of E223 156.16 (two hundred and twenty three thousand one hundred and fifty six emalangeneni sixteen cents).

[13] The fifth point in *limine* is that the applicant has failed to meet the requirements for a declaratory relief.

[14] On the merits the first respondent argued that there is no authority attached by the deponent to the founding affidavit as evidence that he is authorised to depose to the affidavit. However, it is apparent from the affidavit that the deponent is the director of the applicant.

[15] The first respondent conceded that it locked the premises when the interim order in the main application was served. However, it argued that it was authorised by order 4 (b) to lock the premises. The said order provides the following:

“4. That the deputy sheriff for the district of Lubombo is hereby directed and required to;

....

(b) Do all that is necessary to prevent the respondents from removing and/or alienating the items referred to in paragraph 2 hereof.”

[16] It is apparent from the Return of Service of the interim order that the second respondent served the interim court order, attached certain items in the shop without removal and further locked the premises.

[17] The attorney for the first respondent has filed a confirmatory affidavit denying that he had undertaken to meet Siphon Samson Tsabedze at his offices on the 14th December 2012 but failed to keep his undertaking. According to him, he only advised Mr. Tsabedze that he would not confirm the rule *nisi* on that day but would extend it to the 8th February 2013 as an indulgence and allow him to attempt settlement of the matter.

[18] Mr. Mabuza contended that he took the post-dated cheques from Mr. Tsabedze without prejudice subject to the approval of the first respondent. However, the

first respondent subsequently turned down the applicant's request to settle the debt by means of post-dated cheques; and, that Mr. Tsabedze was advised that his proposal was rejected.

[19] In its replying affidavit the applicant reiterated that it was entitled to bring an interlocutory application on the grounds that the first respondent was abusing the court process by locking the premises without the requisite Court Order to do so. It conceded, however, that it has to file an Answering affidavit to the main application; however, it argued that the said affidavit would be filed accordingly. The applicant emphasized that the interim order does not authorize the locking of the premises and its eviction. To that extent it was argued that the matter does merit urgency because the first respondent was abusing the court's process.

[20] The applicant further denied that it approached the court with dirty hands; and, it argued that it gained access to the premises on the strength of the interim court order. It denied that order 4 (b) authorises the first respondent to lock the premises as alleged.

[21] The applicant annexed cheques drawn in favour of the first respondent's attorneys in liquidation of the debt. The cheques had been deposited by the said attorneys and honoured by the applicant's bank.

[22] Mr. Tsabedze, reiterated that he did meet the first respondent's attorney at the High Court and he undertook to meet him at his offices in the afternoon. Furthermore, he denied that the applicant's cheques were rejected by the first respondent and insisted that the cheques were being deposited by the first respondent's attorneys as and when they fell due, and, that they were honoured by the applicant's bank.

[23] It is common cause that the first respondent lodged an *ex parte* application to perfect the landlord's hypothec on the premises leased by the applicant; the interim order was obtained on the 10th December 2012 but was not executed until the second respondent acting on the instructions of the first respondent had locked the leased premises. On the 13th December 2012 the second respondent served the applicant with a notice of motion dated 8th August 2012 as well as the interim court order dated 10th December 2012.

[24] The second respondent, pursuant to the interim order, filed a Return of Service of the interim court order. The return of service reflected the service of the order, attachment without removal of several items listed in the inventory as well as the locking of the premises.

[25] The first respondent concedes that he instructed the second respondent to lock the premises on the strength of order 4 (b) hereof. The applicant argues that the order does not entitle the respondents to lock the premises. It is against this

background that the applicant instituted an interlocutory application against the respondents to declare the locking of the premises unlawful, and that the applicant be granted access to the premises.

[26] I don't agree with the first respondent's argument in *limine* that the applicant's interlocutory application is highly irregular, improper and highly defective on the ground that it has brought about two co-existing orders. There is nothing wrong with the applicant instituting the interlocutory application if the respondents were acting outside the scope and authority of the interim order. If the first respondent felt strongly that the time for the applicant to file an answering affidavit in the main application had lapsed, it should have set down the matter for hearing. This point stands to fail.

[27] Contrary to the first respondent's contentions, it is apparent from the evidence that the applicant has complied with Rule 6 (25) (b) in respect of urgency. The interim order in the main application was obtained *ex parte* on the 10th August 2012 but it was only served upon the applicant on the 13th December 2012 together with the Notice of Motion; it was only on that date that the applicant became aware of the legal proceedings in the main application.

[28] From the 14th December 2012 the applicant met the first respondent's attorney as well as the first respondent's property manager Mandla Zwane in an attempt to resolve the issue relating to the locking out of the premises. On the 18th

December 2012 the applicant gave post-dated cheques to the first respondent's attorney Mr. Mabuza in an attempt to liquidate the arrear rental. There is evidence that some of these cheques have been deposited into the bank account of the first respondent's attorneys and they have been honoured by the applicant's bank. Notwithstanding such negotiations and payments, the respondents did not open the premises; hence, the applicant had no other option except to institute the interculutory application. Again the point of law relating to urgency fails.

[29] The first respondent also argued in *limine* that the applicant has taken the law into his own hands and engaged in self-help by not contacting it to remove the padlock used to lock the premises. It is argued by the first respondent that the applicant after obtaining the interim order proceeded to break into the premises. The interim order declared that the locking of the premises was unlawful and that the applicant should be granted access to the premises. In light of the orders made, it is inconceivable that the applicant could be considered to have exercised self-help; it acted lawfully and in terms of the interim court order. The court order did not require the applicant to look for the respondents to open the premises. For this reason this point of law is also bound to fail.

[30] The first respondent also argued in *limine* that the applicant has conveniently not disclosed that it has frequently failed to pay rental timeously; and, that it has been indulged by the first respondent on numerous occasions. He further

argued that the applicant has always disrespected the said indulgencies. This may be true but it doesn't detract from the fact that the first respondent only executed the interim order on the 12th December 2012. Between the 10th August 2012 and the 12th December 2012, there were negotiations and indulgencies between the parties. This point is also bound to fail. It is open to the first respondent to finalize the main application if it is determined to lawfully evict the applicant from the premises.

[31] The last point of law raised by the first respondent is that the applicant has failed to meet the requirements of a declaratory order. In the case of *Phillip Fanelo Dlamini v. Frederick Hawley* Civil case No. 1494/2011 (HC) at para 12-14 I had occasion to state the following:

- “12. There are generally two requirements for the grant of a declaratory order: First, the applicant must have an interest, not merely abstract or of an intellectual nature, in an existing, future or contingent right or obligation, and on whom the declaratory order will be binding; and, Secondly, there must exist suitable circumstances for the exercise of the discretion of the court...**
- 13. The applicant for a declaratory order must have a direct and substantial interest in the subject-matter of the litigation. He must establish a legal interest which requires him to have a legally enforceable right...**
- 14. The applicant for a declaratory order must also show that he has a legally enforceable right in an existing, future or contingent right or obligation...”**

[32] Contrary to the contention made by the first respondent, the applicant has established the requirements for the grant of a declaratory order. The applicant has a legally enforceable right in an existing right, being the lease agreement still existing between the parties. In addition the applicant has shown not only that it has a direct and substantial interest in the subject-matter of the litigation but it has shown that the court should exercise its discretion in its favour. For this reason this point in *limine* ought to fail.

[33] I now turn to consider whether order 4 (b) issued by this court entitles the respondents to lock the premises. At the onset I should point out that locking premises constitutes an eviction of a tenant; it is a drastic step which must be sanctioned by the court. It is so drastic that it should not be made without affording the tenant an opportunity to be heard, and, certainly not an *ex parte* application.

[34] In the case of *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 state the following:

“7. It is a 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....

7.1 Cooper, South African Law of landlord and Tenant, Juta & Companys 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.”

[35] Generally, the perfection of a landlord’s hypothec doesn’t involve the locking of premises, which as I have just mentioned is a drastic remedy. It merely seeks the attachment of the tenant’s property as well as an interdict restraining the lessee from disposing or removing the property from the premises pending payment of arrear rental or the determination of proceedings for the recovery of the rent. In addition, this court has often been reluctant to allow the removal of the property from the premises on the strength of an order obtained from an *ex parte* application; the attachment of the property and not removing it as well as the interdict suffice. From a reading of Order 4 (b) it is apparent that the court did not authorise the locking of the premises; the order merely seeks to prevent the applicant from removing or alienating the movables.

[36] The locking of the premises was not authorised by the court, and, even if it was, it would have been contrary to the principles of natural justice and in particular the “*audi alteram partem*”. The underlying reasons would be the invasion of the applicant’s rights in an *ex parte* application without affording him the opportunity to be heard. The locking of premises should only be sanctioned once the court has determined the respective rights of the parties to the proceedings.

[37] Lord Wright in the case of *General Medical Council v Spackman* (1943) AC 627 at 644 -5 stated the following:

“If the principles of Natural Justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.”

[38] Innes CJ in *Dabner v. South African Railways* 1920 AD 583 at 583 had this to say:

“Certain elementary principles ... they must observe; they must hear the parties concerned, these parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartiality discharged.”

[39] Kotze JP in *Swaziland Federation of Trade Unions v. The President of the Industrial Court and the Minister for Employment* Appeal case No. 11/1997, Industrial Court of Appeal (I.C.A.) at pages 10-11 stated the following:

“The *audi alteram partem* principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English judge to be a principle of divine justice and traced to the events in the Garden of Eden and has been applied in cases from 1723 to the present time.... Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them.”

[40] From the submissions made by both counsel it is clear that both the points in *limine* as well as the merits were argued simultaneously and that none of the issues raised on the merits remain outstanding.

[41] Accordingly, the rule *nisi* is confirmed as follows:

- (a) The locking of shop No. 38, at Simunye Plaza in the Lubombo region by the second respondent on the instruction of the first respondent is hereby declared unlawful.
- (b) The applicant is hereby granted access to shop No. 38 at Simunye Plaza in the Lubombo region.

(c) The first respondent is directed to pay costs of suit to the applicant on the ordinary scale.

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