IN THE HIGH COURT OF SWAZILAND

Case No: 1047/2013

In the matter between:

MURAILBALL INVESTMENTS (PTY) LTD	**APPLICANT**
AND	
INDLELA YETFU INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
JIMSON THWALA	**SECOND RESPONDENT**
NKOSINATHI MOTSA	**THIRD RESPONDENT**

Neutral citation: *Murailball Investments (Pty) Ltd v. Indlela Yetfu Investments (Pty) Ltd and 2 Others (1407/2013) [2014] SZHC59 (3 April 2014)*

Coram: M.C.B. MAPHALALA, J

Summary

Civil Procedure – Contract of Lease – application to perfect a landlord's hypothec – respondents failing to advance a defence on the merits – the legal basis of the liability of a tenant to pay rent considered – held that the first respondent was indebted to the applicant for arrear rental – *rule nisi* confirmed with costs.

JUDGMENT
3 APRIL 2014

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[1] This is an urgent application to perfect the landlord's hypothec. The applicant further sought payment of arrear rental of E231 155.40 (two hundred and thirty one thousand one hundred and fifty five emalangeni forty cents) together with an order for cancellation of the lease as well as eviction. The applicant further sought an order for costs on the scale between attorney and own client as well as tracing fees and collection commission. The rule nisi was accordingly issued perfecting the landlord's hypothec.

[2] The applicant and the first respondent concluded a lease agreement on the 1st September 2010 in respect of Factory Unit No. 24 situated at Lot No. 471, King Mswati III Avenue at the Matsapha Industrial Site. The lease was for a period of three years terminating on the 31st July 2013; the applicant has an option to renew the lease for a further period of three years. The second and third respondents executed a deed of suretyship on behalf of the first respondent.

[3] The applicant alleges that the first respondent is in breach of the contract as a result of being in arrears with rentals of E231 155.40 (two hundred and thirty one thousand one hundred and fifty five emalangeni forty cents) which amount is inclusive of penalty charges. The applicant further

contends that the second and third respondents bound themselves as surety and co-principal debtors "*in solida*" to and in favour of the applicant for the payment of all sums of money which the first respondent may from time to time owe to the applicant. The applicant further contends that the first and second respondents by virtue of the suretyship agreement, they acknowledged that their liability shall include all damages that the creditor shall suffer as a result of cancellation of the lease including termination. The applicant also contends that in the circumstances the first, second and third respondents are jointly and severally liable to the applicant on the amount of E231 155.40 (two hundred and thirty one thousand one hundred and fifty five emalangeni forty cents) including costs at attorney and own client scale.

[4] The respondents have raised certain defences to the application. Firstly, in *limine,* that the applicant failed to disclose material facts in the *ex parte* application that when the proceedings were instituted and the *rule nisi* granted, the applicant had already locked the premises on the 2nd November 2012 without a Court order and further ejected the employees. Secondly, that the applicant has not disclosed that E100 000.00 (one hundred thousand emalangeni) was paid as rental subsequent to the institution of the proceedings after having made arrangements with the applicant. According

to the respondents, the Court would not have granted the Rule Nisi on an ex parte basis if it had been aware of the above facts.

[5] Thirdly, that the applicant has approached the Court with dirty hands by locking the premises without a Court Order, and, that it persists to date notwithstanding that the Rule Nisi did not grant the prayer for locking the premises.

[6] Fourthly, it is the lack of urgency in launching the proceedings on the basis that the applicant locked the premises on the 2nd November 2012 and ejected the employees; thereafter, it engaged the first respondent in settlement negotiations from November 2012 until January 2013. According to the respondents, the applicant only launched the proceedings in April 2013. It is argued by the respondents that at the time, the applicant was not entitled to commence urgent and *ex parte* proceedings six months after locking the premises and further engaged in settlement negotiations with the respondents.

[7] On the merits the respondents contend that the applicant in as much as it exercised self-help and locked the premises with the stock and equipment

inside, it is not entitled to a Court order for the perfection of the landlord's hypothec and cancellation of the lease agreement

[8] The respondents further argued that certain payments totalling E100 000.00 (one hundred thousand emalangeni) have not been deducted from the amount of arrear rental; however they don't deny that they still owe arrear rental. The respondents contend that the first respondent has a counterclaim against the applicant for damages for loss of business in excess of the arrear rental claimed on the basis of the unlawful locking of the premises. The factory manager of the first respondent has filed a confirmatory affidavit stating that on the 2nd November 2012 an employee of the first respondent named Zweli Dlamini locked the business premises after evicting all the employees. Mr. Dlamini informed them that he was acting on the instructions of Ralston Smith, the Managing Director of the applicant, and, he left a statement of account reflecting that the amount owing was E220 232.35 (two hundred and twenty thousand two hundred and thirty two emalangeni thirty five cents). The applicant concedes the payment of E100 000.00 (one hundred thousand emalangeni) by the first respondent in respect of arrear rental; however, the applicant argues that this amount has already been deducted from the total arrear rental owing.

[9] The applicant has filed a replying affidavit contending that the premises were locked by the consent of the parties after a series of meetings between the parties with regard to payment of arrear rental. The applicant further contends that the first respondent had agreed to signing an Acknowledgement of Debt but it was never signed. The applicant also contends that the respondents had undertaken to present a payment plan which they failed to present as undertaken; hence, the premises were locked by mutual consent pending payment of arrear rental. However, there is no addendum to the Lease Agreement for purposes of amending the Lease.

[10] Clause 4 of the Lease Agreement provides the following:

> **"34. This document constitutes the whole agreement between the parties and no warranties or representations, whether express or implied, not stated herein shall be binding on the parties. No agreement at variance with the terms and conditions of this lease shall be binding on the parties unless reduced to a written agreement signed by or on behalf of the parties. Relaxation or indulgence which the Lessor may show to the Lessee shall in no way prejudice its rights hereunder and in particular no acceptance by the Lessor of rental or other amounts after due date (whether on one or more occasions) shall preclude the Lessor from exercising any rights enjoyed by it hereunder by reason or any subsequent payment not being made strictly on due date. Unless otherwise stated by the Lessor in writing the receipt by the Lessor or its agent of any rental or other amounts**

shall in no way whatsoever prejudice or operate as a waiver; rescission or abandonment or any cancellation affected or acquired prior to such receipt."

[11] The applicant contends that it does have a clear right to institute the present proceedings as it is clearly owed a substantial amount of rental by the respondents. It further contends that it is suffering great prejudice by the continued storage of first respondent's movable property and non-payment of rentals. The applicant further disclosed that the Lease expires on the 1st July 2013, hence the need to eject the respondents and their movables sold to recover the rental owing in an action to be instituted after the perfection of the landlord's hypothec.

[12] The parties have argued both the Points of law raised by the respondents as well as the merits simultaneously. It is apparent from the evidence that the respondents do not have a defence on the merits; and, that they are indebted to the applicant in the amount of arrear rental claimed. The evidence further shows a series of correspondence between the parties with regard to the payment of arrear rental; and, it is clear in the said correspondence that the applicant was demanding payment and the respondents making unfulfilled promises for payment. Similarly, it is clear from the evidence that a series of meetings were held by the parties in this regard. The

respondents do not deny that they are indebted to the applicant for arrear rental, and, the applicant has further explained that the E100 000.00 (one hundred thousand emalangeni) paid by the first respondent has been incorporated into the statement of account presented to the respondents. In the circumstances the points of law raised by the respondents cannot assist the respondents as a defence; namely, the failure to disclose the lockout prior to the issue of the rule nisi, which it is argued also constitutes litigation with dirty hands. Furthermore, the second and third respondents have not disputed their indebtedness on the basis of the Deeds of Suretyship.

[13] In the case of S*waziland Polypack (Pty) Ltd v the Swaziland Government and Swaziland Investment Authority (SIPA)* Civil Appeal Case No. 44/2011 at para 11, 12 and 13; I had occasion to say 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 (D) at 224 (A)**

12. *Lord De Villiers CJ* in the case of *Webster v Ellison* (supra) at page 79 stated the law as follows:

> **'The landlord's lien is in the nature of a special tacit hypothec which is confined to *invecta et illata* upon the land leased…. To render this hypothec effectual it is necessary to attach the property, and the general rule is that the attachment must take place while the things are on the leased premises.'**

13. At page 82 of the judgment, His Lordship continued and stated the following

> **'…The Court will always assist vigilant landlords seeking to attach goods on the leased premises upon prima facie proof that there are reasonable grounds for apprehending that the goods will be removed. The landlord will always mainly rely upon the facility with which he can prevent the removal of the goods rather than upon the bare possibility of his being able to get hold of them after they have been removed.' "**

[14] Accordingly, the *rule nisi* is hereby confirmed with costs against the first, second and third respondents jointly and severally the one paying the others to be absolved.

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

For Applicant	Attorney M. Nkomondze
For Respondents	Attorney S. Madzinane