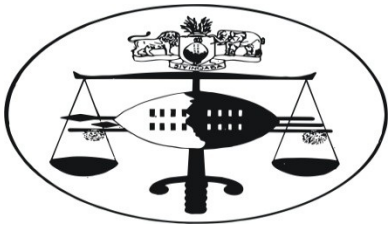

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO: 1698/2013**

In the matter between:

ONE CIRCLE (PTY) LTD t/a **Applicant**

KHAZIMULA'S RESTAURANT

And

AFRICAN EXCURSIONS TOURISM (PTY) LTD

t/a MANTENGA CRAFT & LIFESTYLE CENTRE **1st Respondent**

HOUSE AND HOME (PTY) LTD **2nd Respondent**

Neutral citation*: Khazimula Restaurant vs African Excursions Tourism(Pty) Ltd and Another (1698/13) [2014] SZHC 79 (8April 2014)*

Coram: **J.P ANNANDALE J**.

Heard: 21st March 2014

Delivered: 8th April 2014

For Applicant: Mr. S.C. Dlamini

For Respondents: Ms. M.Boxshall-Smith

***Summary**:* *Interdict- Requirements- Landlord and tenant- Lease- Rights of Lessor and lessee – Early termination of lease during course of verbal agreement of three year lease- Misjoinder of litigant, factual disputes.*

JUDGMENT

[1] Fundamental to this application for a prohibitory interdict is the question as to whether a lessee can oblige a lessor to let it have a continued and undisturbed right to occupy leased premises for the entire agreed period under a verbal lease, or an extension thereof, and whether a lessor is entitled to terminate such lease during its tenure and to refuse renewal. Also, whether a prohibitory interdict against the lessor is justifiable under the specific circumstances *vis-a-vis* the requirements for an interdict.

[2] The background of this application for an interdict requires to be scrutinised in order to determine these issues, and especially to separate the corn from the chaff, so to speak. Much of the material placed before court is irrelevant and superfluous, tending to shift the focus away from the real issues at stake. There is also alleged misjoinder of the applicant, pursued as a point *in limine*, as well as various other "technical points", over and above the real merits.

[3] To cut a long story short, the latter aspect of misjoinder might well be meritorious but in the event that it be upheld and resulting in a dismissal of the application, without deciding the merits, reliance on a technical legal issue alone will be a disservice to both parties and it will not resolve the dispute between them. All will then be back to square one and litigation will be commenced afresh, with large amounts of wasted costs already incurred by the litigants**.** Misjoinder will be considered as only one facet of this matter.

[4] A further option to readily dispose of the matter would be to decide it on a different "technicality", again bypassing the merits. In actual fact, there is no more interim relief, since the initial temporary relief has long gone past its return date, without it being extended until finalisation of the application. Accordingly, the Respondents could simply have gone ahead with whatever they were initially interdicted from doing once the return date had passed, with no application to revive it or to have it extended. Again, it would be an avoidance of doing justice to the real issues which underly the dispute.

[5] The Applicant came to Court, on a basis of urgency at the end of October 2013, to seek a *rule nisi* until the following relief comes to be determined:

"2.1 Interdicting and restraining the first respondent from cutting off the water supply to the premises, from demolishing the toilet block of the leased premises and from interfering in any way with the applicant's use of the premises;"

2.2 Restraining the second respondent from coming onto the leased premises;

2.3. Declaring the respondent's purported cancellation of the lease to be of no force and effect.

3. That prayers 2.1 and 2.2 operate with immediate and interim effect pending the finalisation of this application.

4. Costs

5. Further and/or alternative relief."

[6] In its supporting affidavit, Khabo Dlamini, a director of the legal entity "One Circle (Pty) Ltd", trading as Khazimula's Restaurant, sets out to motivate and justify the relief prayed for. Now, it is trite that anyone with knowledge of the facts may depose to an affidavit in support of an application, but it is also trite that it is not just anybody who is also authorised to institute legal proceedings on

behalf of a legal entity. Dlamini does not aver that she is so authorised, nor did she file a resolution which mandates her to litigate on behalf of the company. Furthermore, she did not file a confirmatory affidavit of the person she refers to, at the time when the lease agreement was discussed and concluded. This only came into being ancilliary to her replying affidavit, when Grenoble (junior) filed a confirmatory affidavit.

[7] Again, to dispose of the matter on this "technical" issue of law would not do justice to the dispute. However, this court does not relegate this further issue to be also one of "mere technicality" and of no consequence, but if full and proper regard is to be given to such issues, it yet again would only serve to get the matter out of court, to be re-instituted properly, but with the litigants put out of pocket and with no resolve to their differences.

[8] It needs to be emphasised that less than properly correct pleadings, citations, authorities to litigate *etcetera*, which are not elevated to be decisive in this particular matter, does not give licence to careless legal practitioners to do as they please. It is only in this particular application on motion that I find it apposite to decide the case on the real and substantive merits, to bring closure and finality to a dispute which adversely impacts on commercial undertakings and leased

business property in the Kingdom. This judgment does not provide authority and precedent for other matters with similar shortcomings, to be condoned.

[9] In her founding affidavit, Dlamini says that the applicant and first respondent entered into a verbal lease agreement in June 2011. Each entity was represented by its respective directors, Robert Grenoble for the applicant and Darren Shaw for the respondents. The property is situate at number 2, Mantenga Falls Road, and was to be used to conduct a restaurant business. The lease period was to be for a period of three years, renewable at the end thereof. She adds that the agreed (monthly) rental of E3 500 was to be reduced to E1 750 to set off future improvements to the property by the applicant.

[10] Dlamini declares that the applicant obtained trading and liquor licences, which licences are reverted to below.

[11] The catalyst which gives rise to this matter is a letter of the landlord, dated the 30th August 2013, in which the lease was "purported" to be cancelled. This letter is addressed for the attention of Robert Grenoble, Khazimula's Restaurant, written by the director of the first respondent. The contents reads as follows:

"Dear Robert

Notice of Termination of Lease - African Excursions Tourism (Pty)Ltd

Kindly receive notice that "Mantenga Craft Centre" will cease to operate from the property of African Excursions Tourism (Pty) Ltd as of the 31st October 2013.

We hereby provide you with notice that your current lease with African Excursions Tourism (Pty) Ltd. will similarly terminate on this same day.

As certain aspects of your tenancy have varied from the original agreements that were structured, we recommend a meeting in the week of the 9th September 2013, at a date and time to be mutually agreed, such that a smooth hand-over of the premises can be facilitated.

We would however wish to make it clear that there is no opportunity for Khazimula's Restaurant to continue operating within this premises and that you are required to vacate by latest the 31st October 2013.

We will expect the premises to be left in a fair condition, the details of which will be agreed in our forthcoming meeting.

We thank you for being a tenant of Mantenga Craft Centre and we wish you well for the future."

[12] It is patently obvious that the lessor gives notice to the lessee of early termination of the lease, and ancillary issues, requiring Grenoble to vacate the premises at Mantenga Craft Centre by the 31st October 2013, on two months written notice.

[13] On the 5th September 2013, the applicant's attorney wrote to the first respondent as follows:

*" **RE: KHAZIMULA'S RESTAURANT LEASE***

We act for One Circle [Pty] Ltd t/a Khazimula's Restaurant hereinafter referred to as client. Client has instructed us to reply as follows to your letter dated 30th August 2013, addressed to Robert Grenoble:

1. *The lease in question is between African Excursions Tourism([Pty) Ltd and One Circle (Pty) Ltd;*
2. *It is verbal three year renewable lease;*
3. *The current lease will expire on the 30th June 2014, and client intends to exercise the option to renew same;*
4. *Client has effected improvements on the property currently valued at E113 300.00 and will require prompt*

compensation when the lease is finally lawfully terminated;

5. *Client currently has a valid lease and will continue to conduct its business on the premises."*

[14] It is again patently obvious that termination of the lease is vigorously rejected. The lessee reminds that it has a three year renewable lease which will only expire at the end of June 2014, that it not only will continue to occupy the premises under the present lease but that it also intends to renew it. The lessor is also reminded of the costs of improvements, which it wants refunded once the lease is finally "lawfully terminated."

[15] I will soon revert to the implied "unlawful" termination of the lease and the applicant's persistent insistence on renewal of the lease, or relocation of the property against the wishes of the landlord.

[16] Further correspondence in mid October 2013 highlights a difference of opinion as to the amount of outstanding rental monies and off - setting it against food supplied to the landlord's business, over and above compensation for improvements.

[17] Ms Khabo Dlamini then goes on to describe the applicant's day of doom. On the 27th October 2013, almost the day when it was to

have vacated the premises, a meeting was held between Robert Grenoble and Darren Raw. Thereat, the director of the applicant was told by the director of the first respondent that as from the 1st November 2013, the premises concerned would be let to the second respondent, which she takes to be a "sister company" of the first respondent, with the same management and shareholders.

[18] The disaster that was to befall the applicant was that on the same day, water supply to the premises was to be cut off and the toilet block was to be demolished. Construction works in the vicinity would render access to the restaurant and occupation thereof hazardous.

[19] She states that there is a valid lease between the parties, which does not entitle the first respondent to terminate the lease before it has run its full course and that if the landlord has its way, the applicant will have to close down its operations. She further seeks to bolster the application for an interdict by saying that their employees will lose their jobs and that the applicant will suffer irreparable harm, as it will become insolvent, being unable to pay its suppliers, meet financial commitments and service its bank overdraft.

[20] It is trite that an applicant must make its case in the founding affidavit. Where an interim interdict is sought, the requirements

are almost as old as the mountains. It has developed from old Roman Law refined in Holland and is now firmly established in this jurisdiction as well, via common law and South African jurisprudence such as Setlogelo v Setlogelo 1914 A.D 221 at 227, the *locus classicus*. In L.F. Boshaff Investments (Pty)Ltd v Cape Town Municipality 1969(2) SA 256(c) at 267 A-F, Corbett J (as he then was) formulated the requirements for an interim interdict succinctly:

> *"Briefly, these requisites are that the applicant for such temporary relief must show-*
>
> *(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;*
>
> *(b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
>
> *(c) that the balance of convenience favours the granting of interim relief; and*

(c) that the applicant has no other satisfactory remedy"

[21] Whether the applicant has properly met the requirements for an interlocutory or interim interdict may remain moot for the moment, especially with regard to the balance of convenience and the absence of any other satisfactory remedy, when regard is given to the founding affidavit. She does not canvass these points, and as shown below, the right which she wants protected is ill-founded – a misapprehension that a lessor is not entitled to cancel a lease, worse still, her counsel argues that the lessor is obliged to renew the lease, or agree to relocation of the property, i.e to enter into a new contract of lease of the same property between lessor and lease, commencing immediately upon expiry of the erstwhile lessee, whether the landlord wants to do so or not.

[22] It seems to me that the application is essentially based on both these errors in law, the inability to cancel a running lease and an obligation to renew it.

[23] The applicant makes no mention at all with regard to the absence of any other satisfactory remedies, the existence of which undeniably remains available should the landlord have been wrong in its conduct. The balance of convenience is also left to

the court to extract "between the lines", without even an attempt at a vague suggestion of it.

[24] Be that as it may, a rule *nisi* was issued as prayed for, returnable on the 7th November 2013. Thereafter, it was extended to the following day, then to the 22nd November 2013. There is no indication on record that it was ever extended to a further date, which then deems the interim relief to have lapsed by effluction of time in November 2013.

[25] The next occasion when the matter was enrolled, the 2nd March 2014, it resulted in it being removed from the roll, for unstated and unknown reasons. It was thereafter set down for hearing on the 21st March 2014, by the respondents, "to enable the plaintiff to lead oral evidence". No order to seek leave to lead oral evidence was made by the Court, nor was such application recorded or made. At the hearing of the matter, no mention of oral evidence was made by applicants counsel, nor referred to by the respondents counsel. No *viva voce* evidence was heard and the matter was argued, both regarding points *in limine* as well as on the merits.

[26] The director of both respondents, Mr Darron Raw, filed an answering affidavit in opposition of the application for an

interdict. He commences by stating that he has been "duly authorised to oppose these proceedings".

[27] He instantly raises objections *in limine,* firstly with the identity of the applicant. He motivates mis-joinder on the basis that the applicant was not a party to the verbal lease agreement hence it has no legally recognized interest in the matter. Also, that the applicant has no right to bring the matter to court.

[28] He further avers that since the lease agreement was concluded between Mr Robert Grenoble and the first respondent, no irreparable harm could befall the applicant which was no party in the lease agreement. In addition, various factual disputes are stated to exist, such as the legal standing of the applicant, when the lease was concluded and between who, the amount owing to the first respondent and also the terms of the lease agreement.

[29] Issue is also taken with the identity of the deponent of the founding affidavit, who he says is firstly not a party to the lease agreement and secondly that she had no first hand knowledge of its terms, hence hearsay, as she did not attach a confirmatory affidavit of Mr Robert Grenoble.

[30] Some of these aspects have already been referred to above, and I will again revert to it below, more meaningful once the evidence has more fully been canvassed.

[31] On the merits of the matter, he queries the absence of evidence to show that Khabo Dlamini is the managing director of the applicant. However, if what goes for the goose also goes for the gander, so to speak, Raw equally omitted such evidence insofar as his own position goes, and he also did not attach a company resolution to oppose the application on behalf of a legal entity.

[32] More to the point is his evidence about the conclusion of the lease agreement. He says that the verbal agreement was between the first respondent and "Robert Grenoble, trading as Khazimula's Restaurant", with reference to the letter dated the 30th August 2013, already quoted above in paragraph 11.

[33] To support his rejection of the applicant's version that the lease is between applicant and first respondent, two companies, and to bolster his own assertion that Mr Robert Grenoble trading as the restaurant is the lessee, Raw discloses a startling discovery.

[34] In order for the restaurant to be allowed to sell liquor, it requires a liquor licence. On a visit to the Liquor Licencing section of the

Ministry of Enterprise and Employment in Mbabane, he discovered that the licence expired in December 2012. Moreover, on perusal of the relevant files, he discovered two written lease agreements which were used to obtain the liquor licence, such written leases being a requirement to apply for a liquor licence.

[35] However, the lease agreement is not between the first respondent *qua* landlord and Robert Grenoble, but between one Doyle Grenoble, the father of Robert, and the applicant. Copies of both written lease agreements between Doyle Grenoble (senior) and the applicant are attached to the opposing affidavit.

[36] This immediately raises a suspicion about the *bona fides* of the applicant, if not of outright allegation of fraudulent behaviour. It begs the question as to how if came about that Robert Grenoble, who concluded the lease agreement with the first respondent, could authorise his father to now become the lessor who leases the same premises to the applicant company.

[37] In tandem with the problematic liquor licence, with its supporting lease agreements raising more than mere suspicion, the first respondent also filed a copy of a restaurant trading licence for the year 2011. It is issued to: “One Circle (Pty) Ltd,” trading as “Khazimula Restaurant”. However, the premises are not the same

as that which feature in this application, namely number 2, Mantenga Falls Road Ezulwini. Instead, it authorises trade at "Plot No. 99999, Mbabane, in the private area Mantenga, Hhohho". Apparently, the first respondent refers to a different trading licence, one for the year 2013 instead of 2011, but with the same place of conducting business.

[38] Issue is also taken with the averred date on which the lease was agreed to. Applicant has it as June 2011 whereas the first respondent says that Robert Grenoble was to take occupation in March 2011 and that rent payments were to commence in July that year. It evidences a clear factual dispute, just as it is with the identity of the tenant and the terms of the lease agreement.

[39] Rather than the allegations by the applicant, that the lease was between One Circle (Pty) Ltd and the first Respondent, with rent reduced from E3500 per month reduced to E1750 per month as set off for improvements, for a period of three years, renewable, a most contradictory picture is pointed by the landlord.

[40] Darren Raw says he concluded the agreement with Robert Grenoble in his personal capacity and not as representative of One Circle (Pty) Ltd. The terms were to be the same as for all other tenants of the premises, in the form of a standard written contract,

with Grenoble being well aware of the terms. He says that they agreed on the 7th April 2011 regarding the standard lease agreement, of which an unsigned blank is attached to his affidavit. It remains a mystery as to why the standard lease agreement was not completed and signed by the different parties.

[41] In short, contrary to the rental stated by the applicant, the lessor has it as a full E3500 per month for the first year, with an annual 10% escalation. Three months grace, free of rental, was to be indulged to enable the restaurant to get established, with the first rent due in July 2011. Half of the itemised capital cost in respect of permanent fittings and fixtures would be off set against rent and a two month period, mutually, would apply to termination before expiry of the lease and renewal would only be allowed if no rent was outstanding.

[42] Accordingly, he gave notice to Grenoble on 30th August 2013, to vacate two months later. All other tenants at the premises were also given similar notices of termination, the reason being that the second respondent was to take over the entire premises as a single tenant to establish a backpackers lodge and ancillary business opportunities. All tenants, save for Robert Grenoble with his

Khazimula Restaurant, have since vacated, with some of the others relocating to premises adjacent to number 2, Mantenga Falls Road.

[43] Both parties refer to a meeting that was held on the 27th October 2013, both with contrasting_versions. The applicant has it that it was represented by its managing director, and that the 1st respondent then informed it that the premises were to be leased to the 2nd respondent as from the 1st November. Also, water supply was to be cut off and that the toilet block was to be demolished.

[44] On the other hand, the first respondent says that Khabo Dlamini did attend the meeting, representing Robert Grenoble, not the applicant company. Raw reiterates that he told her that the lease was between Robert Grenoble and the first respondent, which she did not dispute, and that the water supply had to be cut off to renovate the toilet block, not in order to "spite" Grenoble.

[45] A major dispute remains focussed on the identity of the lessee- Robert Grenoble or One Circle (Pty) Ltd., in tandem with the lessor's ability to terminate the lease agreement.

[46] In reply to the first respondent's opposition to the present application, the applicant *inter alia* annexed numerous statement of accounts, issued to "Swazi Trails" by "One Circle Khazimulas". The

purpose is twofold- to show that the applicant is as per the citation of this matter and also to place into dispute the amount of money that is alleged to be outstanding.

[47] This application for an interdict is not based on alleged arrear payments for either rental or food delivered to affiliates of the respondents. The secondary purpose of the account statements is to indicate that the applicant company charged, in its own name, costs of meals (pizzas) which were provided to the respondent's subsidiary, without issue being taken as to the identity which issued the statements.

[48] Furthermore, copies of cashed cheques drawn by the applicant company in favour of the first respondent, to settle rental payments due to it, are also attached to the replying affidavit.

Whatever the motivation is, it serves to show that at least on a number of occasions, the applicant company paid rentals that were due to first respondent.

[49] In perspective, when X pays monies owed by Y to Z, X it merely absolves Y from its obligations to Z, without also moving into the shoes of Y. Otherwise put, when One Circle (Pty) Ltd pays the lease due to African Excursions Tourism (Pty) Ltd trading as Mantenga Craft and Leisure Centre, the former trading as

Khazimula's Restaurant, it does not also follow that in doing so, and by receiving such payments "on behalf of another", the identity of the lessee changes as well.

[50] The only connotation which is properly to follow is that certain payments were made to the lessor with regard to rental monies, not made by Grenoble or Khazimula Restaurant but by One Circle (Pty) Ltd.

[51] As already stated above, even though the differences of opinion as to the identity of the lessee is sought to be elevated to form the crux of the matter, it does not put the issue at rest. Without relegating it to be of no consequence, it still would not serve to do justice to the parties in this suit, by basing the decision of this court squarely on the shoulders of who is who. Instead, to avoid a decision based on technicalities, even though the importance of it could very well be different in a different suit between the lessor and lessee, this court must remain conscious of the fact that in reality, it is the restaurant business which complains about alleged interference by the landlord.

[52] Whether the restaurant business is owner based, Robert Grenoble trading as Khazimula or One Circle (Pty) Ltd trading as Khazimula, it is still the restaurant business which has it against

the landlord foreclosing its activities. For now, the issue is to seek a prohibitory interdict, which could as well have been prosecuted as spoliation in the making. Spoliation has not (yet) occurred, but it is anticipated by the tenant, hence to pray for an interdict.

[53] Despite the issues as to who the lessee is, who paid for its occupation of the premises and between who and who a lease agreement came into existence and who represented who at the time, it still remains for an applicant who seeks a prohibitory interdict to pass the hurdle which rests upon it to satisfy the court that it is entitled to obtain such relief.

[54] Earlier, the requirements for an interdict has been alluded to, but now, it forms one leg of the matter, the other being the entitlement of the lessor to terminate the lease agreement.

[55] It is common cause that the restaurant business at the leased premises has been operative for almost three years. It is that business which the landlord wants to vacate from the premises and it is that same business which wants to remain, unhindered. As stated above, misjoinder is not irrelevant. However, whether the restaurant is owned and operated by Robert Grenoble or One Circle (Pty)Ltd, when applied to this particular matter, should not

be given such importance that it becomes decisive and result in the disposal of the application on that basis alone. It will not bring justice to the matter between the landlord and tenant with any proper finality.

[56] In reply, the applicant also deals with the matter of the liquor licence. Dlamini lays the blame on the shoulders of her attorneys, who do not confirm what she says by way of confirmatory affidavit. Nevertheless, she says that the written lease agreements filed in support for the liquor licence produced by the first respondent relates to different premises, situate at Sheba Estates, not Mantenga Falls Road number 2.

[57] She filed a copy of a 2011 Restaurant Liquor Licence. It is issued to Nonhlanhla Dlamini, Khazimula Restaurant to trade at Farm 51, Ezulwini in the private area Mantenga. In perspective, the deponent to the founding affidavit is Khabo Dlamini, not Nonhlanhla and the applicant is One Circle (Pty) Ltd, not Nonhlanhla Dlamini. Also, the leased premises is situated at Mantenga Falls Road number 2, not Farm 51, Ezulwini in the private area of Mantenga, Hhohho.

[58] Whatever else may be deduced or concluded from the liquor licence, it does not serve to advance and bolster the application for

an interdict. Nor does the difference of opinions in respect of escalation of rent, the amount payable or by who it was paid.

[59] Of more significance is the applicant's contention in reply that the lease is of three year duration, renewable at the end thereof and especially that "...it cannot be terminated before it has run its course save for a material breach thereof" (paragraph 25).

[60] There remains a serious factual dispute over the terms of the lease agreement. The applicant avers it to be on the simplest of terms, verbal, for three years, to be extended whether the lessor is amenable to it or not. The lessor, to the contrary, has it between different parties, for three years, renewable if it agrees to it, but that it is entirely based on its standard lease agreements, the contents of which is well known to the lessee.

[61] The "standard" written lease agreement, of which a blank copy was filed by the landlord, does provide for renewal of a three year lease, under certain conditions. It further provides for a two months period to terminate the lease before its expiry, applicable to both parties.

[62] This is what the lessor did at the end of August 2013 – It gave notice to vacate by the end of October 2013, two months onwards.

[63] Meanwhile, the lessor seems to have wanted to enter the premises in order to effect repairs, maintenance and renovations to the ablution facilities, which it is entitled to do if the repairs are reasonably necessary. This court is not required to determine if it is the position or not as it is not so pleaded.

[64] Under our common-law, both landlords and tenants are entitled to terminate a periodic lease on reasonable notice without 'let or hindrance' The right is absolute and the motive for terminating is irrelevant. See Maphango vs Aengus Lifestyle Properties (Pty) Ltd 2012 (3) SA 531 (CC)[29] and Principles of the Law of Sale and Lease by Bradford & Lehman, 3rd Edition Juta 2013, at page 126.

[65] A two month period of written notice of termination is a reasonable period with regard to a three year lease, over and above the period being included in the disputed "standard" lease agreement.

[66] In its application for a prohibitory interdict, the applicant's complaint is against the stated intention of the lessor to commence with its operations, with reference to cutting off of water supply, demolishing the ablution block and to effect construction works, which he said would commence on the 1st November 2013. It is

one day after the date on which the lessee was given notice to have vacated the premises, two months earlier.

[67] It needs to be considered that at this stage of the proceedings, it is not anymore to decide whether an interlocutory interdict has to be ordered or not. That has already been done on the 31st October 2013 and the *rule nisi* has lapsed by effluction of time. The initial order herein is non-determinative of final relief, issued on the basis of one-side alleged facts and without consideration of the contrary version of the respondents, at that time. Different considerations apply when an interlocutory order is sought, with a far less burdensome onus on the applicant.

[68] A final prohibitory interdict, to secure a permanent cessation of an unlawful course of conduct or state of affairs has three requisites, all of which must be present (Setlogelo v Setlogelo (*supra*) at 227; Sanachem (Pty) Ltd v Farness Agri-Care (Pty) Ltd & others 1995 (2) SA 781 (A) at 788J -790C.)

[69] First and foremost, the applicant has to prove on a balance of the probabilities that it has a "clear right", or a "definite right", a right that has been clearly proven. It is not the same test which applies to interlocutory interdicts, where it is sufficient to show a *prima facie* right, which may be open to some doubt.

[70] In this matter, it is my considered view that the applicant has failed to establish a clear and unequivocal right to restrain the lessee from its stated intentions. The continued existence of a three year verbal lease on which it builds its entire case is vigorously and fundamentally disputed by the lessor. It is a factual dispute which was more than merely foreseeable – indeed incapable of being resolved on the papers filed of record.

[71] The landlord has clearly and unequivocally given written notice that the lease was to terminate at the end of October 2013. The lessee repudiates this and says that unless there is a serious breach of contract by the tenant, a lease cannot be terminated by the lessor until such time that it has not only run the full period of the lease, but also that by necessity it has to be extended and that period has also lapsed.

[72] A factual dispute of these proportions precludes the granting of a final interdict in motion proceedings. The stated, admitted and denied facts which relate to the lease of the premises and the early termination thereof by necessity disposes the notion of a clear right. The right which the applicant relies upon is so riddled with holes that it cannot hold water, on any interpretation of its position. It knew about it all along, at minimum on the 30th

August 2013, two months before it urgently came to court to apply for an interdict.

[73] Even though the applicant may well have a reasonable apprehension of injury, should the landlord demolish the toilets, which is denied, and have its water supply cut off, which the landlord says would only be temporary, there is yet a further hurdle.

[74] In its founding affidavit, the applicant has failed to even pay lip service to the third requirement for its relief, namely that it has no other satisfactory remedy available to it. If relief is to be ordered as prayed for, it would require this requirement to also be overlooked.

[75] In this matter, a number of issues plague the applicant, issues which have been dealt with above. Each of them, separately but also in combination, have been held to be of such nature that instead of relying upon it to dismiss the application, it could not serve to come to a final determination of the real and substantive issue, namely whether the lessor should be restrained and interdicted from utilising its own property as it chooses to do, or whether it should abide by the lessee's continued unhindered occupation of the property for as long as it wants.

[76] It is when the absence of compliance with the requisites for a final interdict is properly considered, based on the evidence which has been placed before this court, that the inevitable dismissal of the application for an interdict must follow.

[77] Regarding the further prayer, to nullify the respondent's "purported cancellation of the lease," it also falls under the fate of a factual dispute, which was well foreseen, which cannot be resolved on the papers of these motion proceedings. Also, it is the very basis on which the applicant sought to justify its application for an interdict, but brought in through the back door. It is a dispute of such proportions that it is wholly incapable of resolution in the present application.

[78] Of course, early termination of lease agreement may well come with certain unavoidable consequences. It would be wrong for this court to advise litigants as to how they should deal with such issues. They would best be advised to seek guidance from their counsel and be advised as to their options.

[79] It was argued that costs should be ordered on attorney and client scale. The applicant initially prayed for costs on an unqualified scale, only to come in its replying papers to ask for punitive costs. The respondents only did so in argument.

[80] It is my view that neither party should be burdened with costs of the other on the attorney and client scale. Even though this litigation has its own deficiencies and shortcomings, I do not find that it was frivolously or maliciously instituted or opposed. Accordingly, without sufficient justification to deviate from costs on the ordinary scale between party and party it shall remain on the normal and ordinary scale of costs.

[81] In the event, it is ordered that the application be dismissed in its entirety, with costs to follow the outcome. Insofar as it may be necessary, *ex abundanti cautela*, the interim order herein is also ordered to be set aside.

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JACOBUS P ANNANDALE
JUDGE OF THE HIGH COURT, SWAZILAND