# IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 899/16

In the matter between:

**4 STAR INVESTMENTS (PTY) LTD** **Applicant**

**And**

**SHIRAZ KHAN** **1st Respondent**

**FARHANA KHAN** **2nd Respondent**

**Neutral citation:** *4 Star Investments (PTY) LTD vs Shiraz Khan and Farhana Khan (899/16) 2016 SZHC 117(12 July 2016)*

**Coram:** Hlophe J

**For the Applicant:** Mr. N. Piliso

**For the Respondent:** Mr. S. C. Simelane

**Date Heard:** 17 June 2016

**Date Handed Down:** 12 July 2016

***Summary***

***Application Proceedings – Landlord and tenant – Applicant alleges verbal sublease between it and the Respondents – Respondent allegedly breaches the sub lease through its failure to pay rentals as well as using the property for a purpose other than that agreed upon – Sub-lease allegedly terminated as Respondents are asked to vacate premises – Respondents deny sublease but contend a verbal lease between it and owner of the premises which the Applicant is not – Respondent avers that when the lease between Applicant and landlords was concluded, it already had one with the landlord which could not be affected by the one between the landlord and the Applicant — Termination of a lease agreement as a result of a breach – What notice should entail – Whether the so called Plascon' Evans rule applicable to the circumstances of the matter – Whether there are disputes of fact necessitating referral of matter to oral evidence – Court convinced Respondents are in breach of the lease agreement and grants application.***

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**JUDGMENT**

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[1] The Applicant, a company that is in the business of sale of motor vehicles or cars in Matsapha approached this court under a Certificate of Urgency seeking an order *inter alia* directing the Applicant and those

holding under it to forthwith vacate the premises described as Lot 782, Matsapha Industrial Area, Manzini District. Failing this relief there is also sought an order directing the Deputy Sheriff for the Manzini District to eject the Respondents and those holding under them from the aforementioned premises. There was also a prayer for costs which was prayed for to include what has been termed the costs of the ejectment.

[2] The background facts to the application are stated by the Applicant to be that it concluded a four year definite written lease agreement with the owner of the abovementioned premises in Matsapha. Thereafter, the Applicant claims to have concluded a sublease with the Respondents on the premises referred to. While on its portion of the premises Applicant claims to be conducting the business of sale of motor vehicles or cars; the Respondent allegedly engaged on the business of car repairs and sale of motor vehicle spares on its part of the premises.

[3] The Applicant avers further that the sublease it concluded with the Respondent was verbal or oral and was allegedly for an indefinite period, which means that it was what is known as a month – to – month lease agreement. Included among its terms according to the Applicant, the Respondent as lessee was going to pay E10, 000.00 per month as rentals to it and the leased premises were not to be utilized for any purpose other

than that agreed upon between the parties themselves and was further not to be used for any venture or exercise not agreeable to the owner of the premises.

[4] In direct breach of the said sublease, the Respondent allegedly failed to pay the rentals as and when they fell due. This allegedly resulted in the Respondent being in arrears of over E70 000.00 which the Respondent is allegedly failing to pay. Further still, the Respondents have allegedly failed to meet the requirements placed on them by the terms of the sublease allegedly concluded between them and the Applicant. These breaches by the Respondents have allegedly forced the Applicant and the owner of the premises to call upon the Respondents to vacate the premises on a certain date. Because of the alleged failure by the Respondents to abide by the terms of the agreement, the Applicant has instituted the current application for the reliefs mentioned above. It is also prayed that the Respondents should be ejected from the premises because they were given a Notice by the owner of the premises and the Applicant to vacate the premises as early as January 2016, which notice they have failed to honour to this day. This was because of the Applicant having noted that they were operating their motor vehicle repairs business without a licence which had prompted the government offices responsible for the grant of Trading Licences to threaten to close down business

operating on the said premises. Although allegations of previous correspondence between the parties cancelling the agreement as well as verbal notices having been given to the Respondents have been made, only one letter has been annexed, being that of the 28th April 2016. After recording what the alleged terms of the sublease were, and that the said terms had been breached through a failure to pay rentals together with a threat by the Ministry of Commerce and Trade to close the premises, as a result of the Respondents conducting some illegal business therein, the Respondent was ordered to vacate the premises on a certain date, the 3rd May 2016.

[5] Without denying the written lease agreement between the owner of the premises, Yakha Properties (PTY) LTD as represented by a certain Jorge De Carees and the Applicant, the Respondents deny having concluded a sublease agreement with the Applicant. Instead it claims to have a lease agreement with the owner of the premises, Yakha Properties (PTY) LTD as represented by Jorge De Carees. This lease, the Respondent contended, was concluded prior to the one concluded by the Applicant and the owner of the premises. The Respondents further contend that they pay rentals, which are not a sum of E10 000.00 per month as alleged by Applicant which it said they paid, but that of E8000.00 which they claimed to pay directly to the owner of the property, as its landlord. They

claimed further that they do not share the same property with the Applicant. Instead they claimed to occupy Lot 783 and not Lot 782 which they alleged forms the subject matter of the Applicant's lease.

[6] Respondents acknowledge that the written lease agreement signed between the Landlord and the Applicant refers to the property actually occupied, but that this was done deliberately to mislead the licensing officers so that they could approve a trading licence as the premises they occupied were the ones that could be issued with a favourable health report. The Respondents denied owing any rentals to the Applicant and therefore prayed that the application be dismissed.

[7] In his Replying Affidavit the Applicant maintained its contents in the Founding Affidavit and noted in particular that the Respondents had not annexed any document in support of their allegations particularly as relate to any correspondence between it and the Landlord proving any lease between the two of them. There was also no trading licence by the Respondents confirming they were occupying a different part of the premises or even that they were operating a lawful business and therefore that the Applicant and the Landlord had no reason to claim its occupation was impacting adversely on the Applicant's business. There was also filed a confirmatory affidavit by a representative of the owner of the

premises, one Jorge De Carees, who denied the existence of any independent lease between the owner of the premises and the Respondents. Instead he confirmed that the Respondents were sublet premises by the Applicant with whom he had a principal lease agreement. He further confirmed that the Respondent's conduct of an unlicensed business on those premises was causing the licensing officers from the Ministry of Commerce to threaten to close down the business premises. The Landlord also confirmed it had no business collecting rentals from the Respondents as there was no lease agreement between the two. Whatever monies received from the Respondents the Landlord considered such to be part payment of the rentals owed to it by the Applicant with whom it had a lease with and never as rentals with regards an independent lease agreement with the Respondent.

[8] It cannot be denied that there is a written lease agreement between the Landlord and the Applicant, which is a four year lease agreement ending in 2019. It is however denied, not only by the Applicant that the Respondents have a different lease with the Landlord, but by the Landlord as well. The Applicant has not placed any tangible evidence before court establishing this independent lease between itself and the Landlord, who is on record as having confirmed a sublease between the

Applicant and the Respondents. To this extent its claim of a lease between it and the Landlord is bare and can at best be said not to be genuine or real.

[9] From the facts as pleaded and or revealed in the papers, it is clear that the Respondents have a difficulty sustaining their case. This I say because whilst they claim to be running a business and despite their awareness one cannot lawfully run an unlicenced business which factor is clearly the one that in their own words prompted the Applicant to obtain a trading licence through fraudulent means. It is surprising they do not disclose their own, nor allege that they have a, trading licence.

[10] They fail to do this notwithstanding the fact that one of the breaches they are alleged to have committed is operating an unlawful or unlicenced business and thereby violate the alleged verbal lease between them and the Applicant. It shall be noted that of the two breaches relied upon for the ejectment of the Respondent from the premises, (these being the failure to pay the agreed rentals and operating their business in such a way as to adversely impact on the Applicant's and the landlord's business premises) – the latter breach is a result of the failure by the Respondents

to obtain a trading licence or put differently, to run a lawful business. It seems to me that by not being able to dispute the issue of running an unlawful business, that is, a business without a licence, the Respondents cannot dispute that they are in breach of the lease agreement.

[11] The Respondents' story is still flawed if one considers the fact that it claims to have a lease agreement with the Landlord, a property company, for purposes of operating the business it does. It is not difficult to understand that the Respondent would be more unlikely to run an illegal business if they had a lease agreement with the landlord who would, no doubt enable them run an orthodox business by first giving them a written lease agreement as that is the only thing they need to regularize their business and obtain a trading licence. The Respondents' contentions run contrary to this convectional way of operating a business on such premises. The conventional method or expectation being that if they occupy certain business premises in order to operate a business, particularly at an Industrial Urban area like Matsapha, they would be required to obtain a trading licence, the obtainment of which is dependent on the written lease agreement. I am therefore convinced the dispute raised by them in this regard is conjured and or continued to defeat or frustrate Applicant's claim.

[12] Even on the other ground relied upon, that of failure to pay rentals, it is clear that all the probabilities are heavily loaded against the Respondents. Whilst it is contended they owe about E70 000.00 rentals, which they dispute claiming to be up to date with their rentals or that they do not owe anything, they do not annex a single receipt to support their contention. It from all the probabilities and reality seems to me that they are in rental arrears even though I may for now not determine how much their arrears are, which would be best left for a trial procedure.

[13] An inescapable conclusion from the Respondents' case is that, whereas an attempt has been made to create disputes of fact, this attempt has fallen far too short of meeting the required standards. The legal position is now settled that it is not every dispute in a matter that would render application proceedings inappropriate. The starting point is that the dispute must be on a material fact or relevant and should be genuine or real. I cannot put this better than it was put by the Supreme Court in ***Nokuthula N. Dlamini vs Goodwill Tsela Supreme Court Civil Case No. 11/2012*** (Unreported) at paragraphs 29 and 30 of the said Judgment, where the following was stated:-

> **"29. …It will amount to an improper exercise of discretion and an abdication of Judicial responsibility for a court to rely on**

**any kind of dispute of fact to conclude that an application cannot properly be decided on the affidavits. The court has a duty to carefully scrutinize the nature of the dispute with (a) microscopic lense to find out –**

**(i) If the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it in a way, that the determination of such an issue is dependent on or influenced by it.**

**(ii) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the term of the affidavits.**

**(iii) If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits.**

**(iv) If the dispute as to a material fact is a genuine or real dispute.**

**30. A fact is material or relevant where the determination of a claim is dependent on or influenced fundamentally by it. Not all facts in a case are material. So it is only those that have a bearing on the primary claim or issue for determination in a**

**way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application can be decided on affidavits. If the conflict or dispute is not on a material fact, the application can be decided on the affidavits. If the dispute or conflict is on a material fact but the dispute is of such a nature that it is reconcilable or resolvable on the affidavits, then the court will decide the application on the affidavits. If the dispute on a material fact is of such a nature that it cannot prevent the proper determination of the application on the affidavits, then the court will decide the application on the affidavits. If the disputed on a material fact is not genuine or real, then the application can be decided on the affidavit. This can arise where the denial of fact is vague, evasive or barren or made in bad faith to abuse the process of court and vex or oppress the other party. A frivolous denial raised for the purpose of preventing a determination of the application on the affidavits or to instigate a dismissal of the application or cause a trial by oral evidence or other evidence thereby delaying and protracting the trial as a stratagem to discourage or frustrate the Applicant is a gross abuse of process. We cannot close our eyes to the high incidence of**

**abuse of court process. Parties often times do not show a readiness to admit liability even when it is obvious that they have no defence to an application or a claim. Such a party, if he or she is a Defendant or Respondent, tries to foist on the Plaintiff or Applicant and the court a wasteful trial process or a dismissal of the application through frivolous denials. The objective of Rule 6 is to avoid a full trial when there is no basis for it and avoid delay and protracted trial in such cases. It is the duty of a court to ensure that a law meant to facilitate quicker access to justice through the expeditions and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claims".**

[14] This excerpt from the said judgment and with which I fully associate myself with was actually restating a long established principle which was expressed in the following words in ***Plascon – Evans Paints Ltd v Van Riebeeck paints (PTY) LTD 1984 (3) SA 623 A at 634L – 635B***:-

**"Where in proceedings on Notice of Motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been**

**admitted by the Respondent, together with the facts alleged by the Respondent justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact".**

[15] The fate of such a denial is in that it cannot be used to prevent the grant of the relief if the court is satisfied of the inherent credibility of the Applicant's factual averment.

[16] I am convinced that the disputes raised by the Respondents in this matter, relevant as they may be, are such that the matter may be easily resolved within the terms of the papers filed or where they are not so resolved such disputes do not prevent a determination of the matter. I am above all more particularly I am convinced that they are neither genuine nor real as disputes.

[17] Accordingly I am convinced that the Respondents had been subleased the premises they occupy by the Applicant and that they have breached the said sublease in two ways namely by failing to pay rentals and by conducting their business in such a manner that their conduct of it adversely affects the Applicant's conduct of its own business and did not have the approval of the Landlord as it attracted the possible closure of the premises by the licensing authority. I must however make myself clear that on how much is exactly owed as arrear rentals that should be a matter for action proceedings claiming the outstanding amount if it cannot be amicably be resolved between the parties. It suffices for me to say that I am convinced that the agreement has been breached through a non-consistent payment of rentals have not been paid consistently.

[18] A serious breach of a lease agreement entitles the lessor to have the lessee ejected from the leased premises. It is one of the Common Law duties of a lessee to use the property in a proper manner. A tenant who does not use the leased property in a proper manner falls to be ejected therefrom if such a breach is considered serious by the court. See in this regard ***Burns vs D and G (PTY) LTD 1949 (4) SA 135 (T).*** I am convinced that when the Respondents decided to use the premises for an unlicenced business with the result that the lessor was adversely affected when the licensing

authority threatened to close down the premises, such amounts to not using the leased premises properly and given the seriousness of its effect, the respondents fall to be ejected from the premises.

[19] I am therefore convinced that in the circumstances of the matter, the Applicant's application should succeed. Accordingly, I issue the following order:

19.1 The Applicant's application succeeds

19.2 The Respondents and those holding under them, be and are hereby ordered to forthwith vacate the premises forming the subject matter of these proceedings.

19.3 Failing order 19.2 above, the Sheriff or his lawful Deputy be and is hereby empowered to eject the Respondents and those holding under them from the premises forming the subject matter of these proceedings.

19.4 The Respondents be and are hereby ordered to pay the costs of these proceedings at the ordinary scale.

**N. J. HLOPHE**
**JUDGE - HIGH COURT**