



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 213/2017

In the matter between:

**THE GABLES (PTY) LTD**

**Applicant**

**And**

**FAITH BUCKHAM t/a EZULWINI PHARMACY**

**Respondent**

**Neutral citation:** *The Gables (Pty) Ltd v Faith Buckham t/a Ezulwini Pharmacy (213 /2017) [2017] SZHC 78 (21<sup>st</sup> April 2017)*

**Coram:** M. Dlamini J.

**Heard:** 19<sup>th</sup> April 2017

**Delivered:** 21<sup>st</sup> April 2017

**-landlord – tenant: - “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.”**

Summary: The respondent is opposed to the confirmation of the *rule nisi* for confirming cancellation of lease agreement and ejection orders. Its ground for opposition is that it is not in arrears. The applicant contends that respondent failed to remedy the breach in accordance with the lease agreement.

### The parties

[1] The applicant is Gables (Pty) Ltd, a company duly registered in terms of the company laws of Swaziland and having its principal place of business at the Gables, Ezulwini area (the Gables). It lets and hires premises to tenants.

[2] The respondent is Faith Buckham t/a as Ezulwini Pharmacy and carries on its business at Shop No.S025 Ezulwini area, herein referred to as Ezulwini Pharmacy.

### Contention of the Parties

#### The Gables

[3] The Gables has asserted that on or about 1<sup>st</sup> December 2010, it entered into a lease agreement with Ezulwini Pharmacy. The lease agreement was for a period of two years. Monthly rentals payable in advance were set at E4,500 and would increase by 7% per annum. The said lease, having expired in December, 2012, the parties are now on a month to month lease agreement on similar terms as the 2010 written lease.

[4] From the month of July 2016, Ezulwini Pharmacy defaulted in its payment of rentals. Arrear rentals accumulated to the sum of E84,523.84 at the

time of the present application. The Gables subsequently issued a notice of demand as reflected in FB3 correspondence. The Gables seeks for confirmation of the *rule nisi* issued on 16<sup>th</sup> February 2017 and ejection.

### Ezulwini Pharmacy

[5] Ezulwini Pharmacy contends that “*when the present application was moved, I was not indebted to the applicant in the manner alleged.*”<sup>1</sup> It then asserts:

*“I am not in arrears at all.”*<sup>2</sup>

[6] Although in its answer, Ezulwini Pharmacy raised other technical points, it did not pursue same during the hearing.

### Adjudication

[7] **M.C.B. Maphalala J<sup>3</sup>**, as he then was, cited the case of **R.M.S. Tibiyo (Pty) Ltd t/a Bhunu Mall v Bridge Finance (Pty) Ltd Civil Case No. 3446/2000 (HC)** at para 7 quoted as follows:

“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 moving the movables from the leased premises pending payment of the rent or the determination of proceedings for the recovery of the rent...*”

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<sup>1</sup> see page 47 of the book of pleadings paragraph 2

<sup>2</sup> see page 47 of the book of pleadings paragraph 3

<sup>3</sup> In *S & T Properties (Pty) Ltd t/a Fashion World Ltd v Simunye Plaza (Pty) Ltd & Others* (1388/2012) [2013] SZHC (2013 at page 12 para 34

Issue

[8] The question for determination is whether Ezulwini Pharmacy was in arrears in order to warrant the Gables to approach this court.

Determination

[9] Ezulwini Pharmacy contends that it was not in arrears. To demonstrate this position, it set out in its answer on how rentals were paid and the period of payment as follows:<sup>4</sup>

DATE	AMOUNT (E)
01-02-2017	700-00
02-02-2017	700-00
03-02-2017	700-00
04-02-2017	700-00
09-02-2017	15,000-00
09-02-2017	5,000-00
10-02-2017	50,000-00
10-02-2017	700-00
11-02-2017	800-00
13-02-2017	2,400-00
14-02-2017	2,000-00
15-02-2017	1,000-00
16-02-2017	1,000-00
17-02-2017	1,000-00
18-02-2017	1,000-00
20-02-2017	1,000-00
21-02-2017	1,000-00
23-02-2017	2,000-00
<b>Total</b>	<b>87,700-00</b>

[10] It then attaches proof of payment marked CJ 1 to CJ 18. From the table above, it is clear that within the period commencing 1<sup>st</sup> February to 23<sup>rd</sup> February, Ezulwini Pharmacy had made payment in respect of rental to the

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<sup>4</sup> see page 48 of book of pleadings

total tune of E87,700.00. It is common cause that these payments made within nineteen days were not payment in terms of the lease agreement, that is, payment in advance. They were payment for arrear rentals. If one compares the figure E87,700.00 to that claimed in the application (E84,523.84) it is clear that Ezulwini Pharmacy was paying arrear rentals. The assertion by the Gables, in its reply therefore, that “*what is clear is that respondent as from the 10<sup>th</sup> February 2017, made a mad rush to make as much payment towards the arrear rentals as possible to avert the then impending legal proceedings*” cannot be controverted as it finds support from Ezulwini Pharmacy’s own assertion in the form of the table quoted above.

[11] Ezulwini Pharmacy’s case is exacerbated by the evidence flowing from its table that upon service of the interim court order obtained on the 16<sup>th</sup> February 2017, it was still in arrears in so far as the sum of 84,523.84 alleged by the Gables is concerned.

[12] During the hearing, it was submitted on behalf of Ezulwini Pharmacy that it did not receive the notice as contended by the Gables in its founding affidavit. The court was referred to paragraph 5 of the answering affidavit. Paragraph 5 of Ezulwini Pharmacy’s answer reads:<sup>5</sup>

*“Ad paragraphs 7.3 to 7.4*

*5. Contents thereof are denied as totally misleading. As demonstrated above, I am not in any arrears. I beg leave to refer to my preceding paragraphs above as if specifically pleaded herein as well.”*

[13] I must point out that as the quoted answer shows, Ezulwini Pharmacy did not specifically deny service of the notice marked PB3. It merely made a bare denial which in our law is as good as not a denial at all. What is worse

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<sup>5</sup> see page 50 para 5 of the book of pleadings

is that its answer at paragraph 5 denies assertion which refer to the month to month lease agreement and yet at the same time it opposes its cancellation. That as it may, I am duty bound to accept the version by the Gables that it served Ezulwini Pharmacy with a notice on or about 15<sup>th</sup> December 2016 in terms of Clause 29.1.1 of the lease agreement and Ezulwini Pharmacy failed to remedy the breach within seven days of notice. It follows therefore that the Gables is entitled to confirm cancellation of the lease agreement.

[14] Turning to our common law principle, it is clear as propounded by **Franklin J**<sup>6</sup> that:

*“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.”*

[15] **J. F. Coaker et al** in **Wille and Millin, Mercantile Law of South Africa** at 323 wrote:

*“If the tenant has failed to pay rent by the day fixed in the forfeiture clause, the landlord acquires a vested right to cancel the lease, he cannot be deprived of this right by an act on the part of the tenant such as a subsequent tender of the rent ...”*

[16] I note that by the time the matter was heard, Ezulwini Pharmacy had paid the total arrear rentals. There is therefore no need to order it to pay the arrear rentals. In the result, I enter the following orders:

1. The *rule nisi* granted by this court on 16<sup>th</sup> February 2017 is hereby confirmed in the following:

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<sup>6</sup> in *Greenberg v Meds Veterinary Laboratories* 1977 (2) SA 277 at 286

- 1.1 Cancellation of the lease agreement between the applicant and the respondent is hereby confirmed;
- 1.2 The respondent is hereby ejected from Shop No.S025, the Gables, Galeria Shopping Centre;
- 1.3 Respondent is ordered to pay interest of the sum of E84,523.84 at the rate of 9% per annum *a tempore more*;
- 1.4 Respondent is ordered to pay costs of suit.



**M. DLAMINI  
JUDGE**

**For Applicant:**            **W. Maseko of Waring Attorneys**  
**For Respondents:**      **T. M. Ndlovu of MTM Ndlovu Attorneys**