IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 212/2017

In the matter between:

THE GABLES (PTY) LTD **Applicant**

And

ARMILDA LAIDAS T/A JUST KIDS **Respondent**

Neutral citation: ***The Gables (Pty) Ltd v Armilda Laidas t/a Just Kids (212 /2017) [2017] SZHC 79 (21st* April *2017)***

Coram: **M. Dlamini J.**

Heard: **18th April 2017**

Delivered: **21st April 2017**

Landlord – tenant: Tenant claiming that it has paid full arrear rentals – landlord is still entitled to cancellation of lease agreement.

Summary: The applicant obtained *ex parte* a *rule nisi* following an application to perfect a landlord hypothec. On the return date, the respondent strenuously opposed confirmation of the order for cancellation of the lease agreement and ejectment on the basis that arrear rentals have since been settled in full.

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 Armilda Laidas t/a Just Kids, a company duly registered in accordance with the Company laws of Swaziland and has its principal place of business at the Gables, Ezulwini area (Just Kids). It is the tenant of the applicant

Parties' case

The Gables

[3] The Gables has deposed that on or about 16th March 2015, it concluded a lease agreement with Just Kids. The initial period of the lease agreement was three years, dating from 1st October 2014. Rentals were set at E5,832.00 exclusive of value added tax. Rentals would escalate at the rate of 8% per annum and payable in advance every month.

[4] The Gables contends that despite that rentals were payable every month in advance, Just Kids failed to discharge its obligation. Rentals were paid intermittently. The Gables then asserts:[1]

> "*14. From the month of December 2016 the Respondent has defaulted in paying its monthly rentals regularly or has not paid them at all for the premises it occupies. The Respondent is currently in arrears with its rentals in the sum of E61,114.96 ...*"

[5] It also highlights:[2]

> "*15. Despite the applicant having brought this fact on several occasions to the attention of the Respondent, the said Respondent has however failed to remedy the breach. Attached herein and marked "G3" is a copy of arrear rental notice to the Respondent sent via electronic mail.*"

[6] It then prayed:[3]

> "*Present application*
>
> *18.1 The purpose of the present Application is to seek an Order confirming the cancellation of the lease agreement between the Applicant and the Respondent. The Applicant further seeks payment from the Respondent of all amounts to the Applicant in respect of arrear rentals for the leased premises.*
>
> *18.2 The Applicant further seeks an Order ejecting the Respondent from the leased premises forthwith*."

Just Kids

[7] Just Kids strongly refutes any arrear rentals. It attests:[4]

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[1] see page 14 para 14 of the book of pleadings
[2] at page 14 para 15 of book of pleadings
[3] at page 15 para 18.1 and 18.2 of book of pleadings
[4] at page 49 para 2 of book of pleadings

> *"2. Since service of the ejectment application I have paid the applicant an amount of E30,000.00 in respect of the arrears. I have also paid the February and March, 2017 rent in advance which applicant has accepted. I hereby tender payment of the balance outstanding plus costs amounting to E4,000.00 within three days of the plaintiff's acceptance of the offer."*

[8] It then prays:

> *"3. On the basis that the breach has been remedied and the contract novated I apply that the court refrain from ordering the ejectment on condition that the terms are complied with upon acceptance by the applicant."*

Determination

[9] On the return date it was common cause that all arrear rentals had been settled by Just Kids. The Gables, however, insisted that the court confirms the *rule nisi* in so far as the orders for confirmation of the cancellation of the contract and ejectment are concerned.

[10] Just kids urged this court to consider that firstly, by it tendering payment albeit after service of the interim order following an application to perfect a landlord's hypothec, it remedied the breach alleged under the lease. Secondly, by the Gables accepting the arrear rentals and also up to date rentals, (as it was contended that Just Kids paid rentals for March at the beginning of month) there was novation.

Remedy of breach

[11] It is common cause that Just Kids breached the lease agreement by failing to pay rentals whenever they fell due. This led to arrear rentals accumulating to E61,114.

[12] The lease agreement concluded by the parties does provide for one party to remedy a breach. It states as follows:[5]

> *"29. Breach*
> *This Agreement of Lease shall be governed in all respects by the Law of Swaziland.*
>
> *29.1.1 the rental, the Service Charge or any other amount due in terms hereof not be paid on due date (and remain unpaid for seven (7) days after notice requiring such payment has been given to the Lessee);*
>
> *29.1.5.2 then the Lessor shall be entitled to cancel this lease and retake possession of the Premises, without prejudice to any of its other rights under this Lease or in Law*."

[13] The Gables deposed that it did comply with clause 29 by writing to Just Kids in terms of correspondence G3 which reads:[6]

> *"Dear Just Kids*
> *We have made every reasonable effort to resolve this matter amicably but are now running rapidly out of patience. Please consider this letter to be our final attempt to resolve the matter.*
>
> *Unless the outstanding amount of E53,887.77 is paid into our account within seven days, we will hand this matter over to our attorneys together with an instruction to recover the full amount without delay, and without regard to any possible embarrassment this may cause you, including listing as a bad credit risk. Naturally you will also be held liable for the considerable cost to recover outstanding amounts through the legal process and the involvement of collection agencies entail.*
>
> *Yours faithfully*
>
> *J. A. van Vyk*
> *Director"*

[5] at page 44 para 29, 29.1.1 and 29.1.5.2 of book of pleadings
[6] at page 48 of book of pleadings

[14] It further alleges that Just Kids failed to remedy the breach within seven days as prescribed by clause 29.1.1 of the lease agreement.

[15] From correspondence G3, it is clear that Just Kids failed to remedy the breach within the period stipulated in the lease agreement. Just Kids concede that it tendered part payment upon service of the Gables present application. This part payment was done on 17th February 2017 after service of the application on 15th February 2017. The sum paid was E8,000. In terms of the lease agreement, this was not remedy at all as it was out of time and worse still the full amount was not tendered.

[16] Just Kids has further contended that by the Gables accepting payment, albeit partly, it novated the agreement. The question for determination therefore at this stage is whether there was any novation. **De Villiers CJ**[7] stated of novation:

> *"The question whether or not novation has taken place is one of intention and in the absence of any express declaration of parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case."*

Do the circumstance of the case point to novation?

[17] Just Kids attached a bank statement slip as indication of payment of the sum of E8,000. This payment, as the Gables point out in its replying affidavit, was paid not as a tender but pursuant to the interim order granted by this court on 16th February 2017. It is upon service not of the application but of the interim order that compelled Just Kids to pay as it was served with it on the 16th February 2017. The submission on behalf of Gables that

[7] in Ewers v Resident Magistrate, Oudtshoon and Another (1880) Foord 32 at 35

Just Kids did not tender any payment but party obliged in terms of the interim order is therefore with merits. In the result the argument on novation must fail.

[18] Further the parties agreed that the laws of Swaziland shall govern the relationship as evident from clause 29 of the lease agreement quoted above. The applicable law in Swaziland was well canvassed by **Hart J**.[8] The learned Judge quoted with approval from **Wille and Millin**[9] as follows:

> ***"Leases usually contain a forfeiture clause, ie a clause entitling the landlord to cancel the lease if the rent is not paid on the due date, or within a fixed period after he has given notice to the tenant to pay the rent.***
>
> ***A forfeiture clause is strictly enforced by the court: Brown v Moosa 1917 WLD 22; even if the rent is tendered only one day after the due date; Lawley v Van Dyk (1888) 2 SAR 246. This is so even in the case of extreme hardship to the tenant, for the court has no power to grant what is styled in English law 'equitable relief against forfeiture of a lease': Human v Rieseberg 1922 TPD 157. Thus, the Court decreed a cancellation of a lease where the non-payment of the rent was due not to the fault of the lessee but landlord, to the credit of a third person who had the same name as the landlord: Venter v Venter 1949 (1) SA 768 (A)."***

[19] The honourable Justice further highlights with reference to **Cooper:**[10]

> ***"The mere acceptance of accrued rent, it is submitted, does not amount to waiver of a right to cancel since even if the lessor were to cancel the lease he would be entitled to claim arrear rent: his acceptance of accrued rent, therefore, is not an unequivocal act which is consistent 'only with the continuance of the lease.' The position may be different if the accrued rent is accepted a substantial time after the lessee's default. Then, it may be that a court will hold that the lessor has waived his rights to cancel."***[11] (my emphasis)

[8] In Whittaker Kiessling 1979 (2) SA 578 at 583:
[9] Mercantile Law of South Africa 16th Ed at 227
[10] The South African Law of Landlord and Tenant at 154
[11] *supra*

[20] In the circumstance of the present case, there was no acceptance and therefore waiver, as the intermittent payments were made pursuant to the interim order and deposited direct to the Gables account by Just Kids, without prior consultation and consent of the Gables.

[21] In the above, the following orders are entered:

1. The *rule nisi* granted on 16th February, 2017 is hereby confirmed in the following manner:

    1.1 Cancellation of the lease agreement is hereby confirmed;

    1.2 Ejecting respondent from the premises *viz.* The Gables / Galleria Shoping Centre, Rem 60 (a) Portion of Portion 60 of Portion 21) of Farm 51 Ezulwini, Hhohho district;

    1.3 Respondent is hereby ordered to pay interest of 9% per annum a *tempore mora* of the sum of E61,114.96

    1.4 Respondent is ordered to pay costs of suit.

M. DLAMINI
JUDGE

For Applicant: **W. Maseko of Waring Attorneys**

For Respondents: **S. C. Dlamini of SC Dlamini & Company**