# IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1589/2016

In the matter between

**MACHINES LIMITED** **1st Applicant**

And

**BACETH INVESTMENTS t/a BACETH HARDWARE** **Respondent**

**Neutral Citation:** *Machines Limited Vs Baceth Hardware (1589/2016) [2017] SZHC 86 (10th May 2017)*

**Coram:** Hlophe J.

**For the Applicant**: Mr J. Waring

**For the Respondent:** Mr N.D. Jele

**Date Delivered:** 10th May 2017

***Summary***

***Civil Law – Landlord and Tenant –Tenant allegedly causes nuisance, inconvenience to applicant and other tenants, disturbs the place of Applicant and other tenants and does acts which detract from the general neatness of the property –Conduct allegedly amounts to breach of the lease agreement – Whether Applicant in the circumstances entitled to cancellation of the lease agreement –Whether Applicant entitled to eject the Respondent from the premises in the circumstances.***

## JUDGMENT

[1] The Applicant instituted these proceedings seeking an order of court in the form of a rule nisi inter alia cancelling the lease agreement between the parties and ejecting the respondent from the premises forming the subject matter of these proceedings. There was also sought an order immediately locking the premises and keeping them under the possession of the Deputy Sheriff pending finalization of the matter.

[2] The prayer that the premises be kept under lock and key pending finalization merits an immediate comment. This is because a sound basis for such a prayer does not seem to have been laid in the circumstances of the matter. Firstly there is no disclosure of the prejudice of such a magnitude as to require this court to exercise its discretion and grant an interim remedy of

that nature. It is a fact that the nature of the complaint is that the breaches complained of had been in place from inception of the agreement which was months before these proceedings were instituted in court making it unreal therefore that it may be accorded a special remedy in the form of an interim relief in the circumstances.

[3] There is an even more compelling reason why a comment has to be made. Generally, where leases are enforced on the basis of a breach in the form of failure to pay rentals, there is often a need for an interim order in the form of the perfection of a Landlord's hypothec. Although in such applications there is often a temptation on the part of the Applicant as the Landlord to seek among the reliefs an order that the premises be kept under lock and key, it has been stated in text books and numerous judgements of this Court and courts from beyond this one that such a relief is improper. The locking of the premises is not generally part of the remedies for perfecting a Landlords hypothec, which is all about confirming the Landlord's security consisting of all the movable assets as are found on the premises. See in this regard the case of **Webster Vs Ellison 1911 AD 73 at Pages 86 and 89** as well as the unreported judgement of **Early Harvest Farming (PTY) LTD And EI Ranch (PTY) LTD Civil Case No.454/2015**.

[4] The point being made is simply that in proceedings like the present, where there is no complaint of area rentals that are accumulating, it is too far fetched to fathom why the applicant would by any stretch of imagination be entitled to lock the premises pending finalization of the matter. In any event it should be apparent that an order locking the premises on an interim basis as a result of an exparte application amounts to the lessee being evicted from the premises without it having been heard. It is further supported by no known modern authority; with the available ones pointing to the contrary. For instance, **W.E. Cooper in his book, Landlord And Tenant, 2nd Edition, Juta and Company, 1994** puts the position as follows:

> *"Under Roman – Dutch Law the lessor could perfect his hypothec over the invecta et illata by attachment (praeclusio). The attachment was made by a public official entering the premises at the lessor's request, making an inventory of the movables, affixing his seal to them, and then closing the doors of the premises.*
>
> *The Roman – Dutch procedure is unknown to South African Civil Law. In Modern Law a lessor perfects his hypothec by*

*applying to court for an order of attachment or an interdict restraining the lessee from disposing off or removing the movables from the hired premises pending payment of the rent or the determination of proceedings for the recovery of the rent.*

*A lessor also perfects his hypothec when, pursuant to obtaining a judgement for arrear rent, movables on the hired premises are attached in execution by the Sheriff or Messenger of the Court (emphasis are added).”*

[5] It is otherwise not in dispute from the circumstances of this matter that whereas an ejectment because of alleged breaches is sought, such is not sought on allegations of failure at any point to pay rentals by the lessee. The ejectment is in this matter sought on allegations that the Respondent as the lessee has breached the agreement by allegedly causing nuisance on the premises in question, allegedly causing an inconvenience to the applicant and the other tenants of the applicant’s premises, allegedly disturbing the peace of the Applicant and the other tenants of the premises concerned and allegedly performing certain acts or doing certain things which generally detract from the neatness expected of the property or premises in question.

This as shall be later seen is covered under clause 4.2 of the lease agreement signed between the parties herein.

[6] In terms of the background information, the Applicant and the Respondent as lessee and lessor respectively concluded a lease agreement in May 2016, in terms of which the Respondent as lessee was leased certain premises fully described as shop numbers 3 and 4 obtainable at the Applicant's premises known as Machines Building in Manzini.

[7] Clause 17.1 of the lease agreement prohibits the doing of certain acts or the causing of certain situations by the lessee. Verbatim it reads as follows:

> *"17.1. The tenant shall not do or permit or cause anything to be done which, in the reasonable opinion of the Landlord, constitutes a nuisance or may cause inconvenience to, or in any way disturb the peace of the Landlord or the other Tenants in the property or which may detract from the general meat appearance of the leased premises."*

[8] Clause 17.3 on the other hand provides as follows with regards the keeping of assets or articles on the premises:

> *"17.3. The tenant may not exhibit, store or leave goods or articles on the pavements or the stairs or landing or on passages or entrances or entrance – halls or arcades of the property."*

[9] On the other hand clauses 12.1 to 12.3, which as shall later become apparent are relevant, provide as follows with regards the keeping of goods or articles on the premises:

> *"12.1. The Tenant or his directors, employees, clients, servants, invitees and visitors (hereinafter called invitees) together with the other Tenants of the property shall be entitled to use the toilet conveniences, escalators, lifts, loading zones, kitchen, malls and passages, service corridors, stair cases and other conveniences which are indicated by the Landlord for common use, subject to 12.2.*
>
> *12.2 The Tenant shall comply with the rules laid down from time to time by the Landlord for the use of the above amenities and shall procure that his invitees shall not break such rules. Should there be an interruption in any of the common services, facilities or amenities*

*or should any such services, conveniences, amenities or equipment become unusable, the Tenant shall not reduce the rental or withhold or defer payment of rental or any other amounts payable by him in terms of this lease, or terminate the lease.*

*12.3. Common areas such as the backyard loading zones, passages, malls and service corridors shall not be used by the tenant for storage, display or sale of goods, supply of services, the parking of vehicles or for any other purpose not permitted by the Landlord. The Landlord shall procure that the common areas shall not be misused by his invitees in any way."*

[10] Clause 4 of the agreement provides what could happen in the event of any of the terms of the lease agreement being breached outside of say, failure to pay outstanding rentals. In fact clause 4.2, specifically talks to a breach different from that manifested in the failure by the Applicant to pay rentals but one as envisaged in terms of clauses 17.1, 17.3 as well as 12.1 to 12.3 referred to above. It says:

*"Should the tenant breach any other conditions of this lease, (excluding the non – payment of rent, additional charges and any*

*other amount) or be liquidated, sequestrated, placed under judicial management or similar sanction or compromise its creditors or fail to satisfy a judgement within 14 (fourteen) days of such judgement being granted, the Landlord may, notwithstanding any previous waiver, relaxation or concession which he may have granted, cancel the lease and enter and occupy the leased premises provided the tenant has been given 14 days written notice to rectify such infringement and the Tenant had failed to do so."*

[11] The question for determination is simply whether the breach complained of did occur and if it did, whether the Respondent was given a 14 days written notice to rectify such an infringement together with a determination whether the Respondent as the tenant failed to rectify the breach within the said period.

[12] At Paragraph 5.6.1. of the founding affidavit the applicant alleged that the lease agreement was materially breached by the Respondent through storing its stock comprising planks, cement, steel containers etc, on the common areas and pavements outside the leased premises, thus blocking common

access to the guard house, refuse area and passage ways. A further complaint in paragraph 5.6.2, of the founding affidavit was that the Respondent as the tenant used a fork lift in the conduct of its business which was prejudicial to the other tenants as it had a beeping sound which used to disturb the other tenants.

[13] It was also contended in Paragraph 5.6.3 that the Respondent used abusive language against the applicant's security personnel on the premises. At Paragraph 5.6.4 it was contended that the Respondent had appropriated to itself the whole of the common parking area as its own delivery area. This it was alleged was prejudicial to the applicant's other tenants on the premises.

[14] At paragraph 5.6.5 the applicant alleged that the Respondent as a tenant, caused dust and thereby dirtied the otherwise common areas. It was also argued that several other breaches of the lease agreement had occurred as a result of which various verbal and written engagements ensued.

[15] It should therefore be noted that for the applicant to succeed in relying on the alleged breaches set out in Paragraph 5 to 5.6.5 of the founding affidavit to cancel the lease agreement, the Respondent should have been issued the 14 days notice envisaged in terms of clause 4.2 of the agreement calling upon the latter to remedy the breach within the said period, failing which a cancellation shall be applied for. The obvious corollary to this is that a cancellation would only ensue where it can be shown that the Respondent failed to comply with the notice by not remedying the breach within that 14 days period. A further corollary is that it is not enough that there has been a breach of this nature by the Respondent than it should be shown that same was not remedied within the 14 days period from the date of effective service of the notice.

[16] It is not in dispute that on the 8th August 2016, the Applicant wrote a letter to the Respondent allegedly confirming certain breaches that had formed part of previous correspondence and a site inspection of the alleged breaches. Distinct from the previous correspondence and engagement, this letter advised Respondent to remedy the alleged breaches by a specific date the 25th August 2016. The obvious intention was that this period would be within fourteen (14) days from the date of its service upon the Respondent.

The Applicant's apparent intention was to make this letter symbolize the notice envisaged in terms of clause 4.2 of the lease agreement authorizing the cancellation of the lease agreement and the subsequent ejectment of the Respondent as tenant from the premises if the said notice was not heeded. It is important to quote this letter verbatim which reads as follows:

*"8th August 2016*

*Baceth Investments (Pty) Limited*

*T/A Baceth Hardware*

*P.O.Box 1869*

*MANZINI*

*Swaziland*

*Attention: Mr Mduduzi Mabuza*

*Dear Sir,*

***RE: Lease Agreement Ncamase Investments (PTY) LTD And Baceth Investments (PTY) LTD T/A Baceth Hardware***

*Our letter dated the 10th July, 2016 and our recent site meeting on the 3rd August, 2016 refers.*

*We note with great concern that despite our letter sent to you on 10th July, 2016 and our numerous verbal communications with you requesting you to cease storing your materials (Planks, steel and cement) on the pavement and to stop the beeping noise coming from the fork lift your materials are still stored on the common areas and that the fork lift beeping noise is still not disconnected.*

*We refer you to the "Clauses" of the lease agreement (Clauses 12.3, 12.5, 17.1 and 17.3 of the Lease Agreement are then quoted in full).*

*We advise that should the materials and the beeping noise not be removed by 25th August 2016, we will have no option but to handover this matter to our lawyers.*

*Should we decide to take this cause of action, all legal costs will be for your account.*

*We trust you find the above in order.*

*Yours Faithfully*

*Theo Hlophe Group Property Director*

[17] A brief analysis of this letter is that it notified Respondent against storing materials such as planks, steel and cement on the pavement and to stop the beeping sound emitted from the fork lift. All these had to be stopped by the 25th August 2016. Failing to heed this warning or notice would obviously result in the cancellation of the agreement with the matter being referred to the applicant's attorneys; obviously for ejectment proceedings of the Respondent It otherwise also notified the Respondent on what paragraphs of the lease agreement were being violated, which were namely clauses 12.3, 12.5, 17.1 and 17.3 of the lease agreement.

[18] It is further not in dispute that on the 16th August 2016, the other tenants of the Applicant wrote a letter to it complaining generally about the Respondent and how it conducted its business. Of significance in this letter is that it registered a complaint about some materialize such as cement, planks, frames (steel) being stored around the pavements and or the common areas. It also recorded a complaint about the beeping sound emitted from the fork lift. It is otherwise true that the complaints were generally wide ranging including the usage of security officers and perhaps what can be termed as the general unsuitability of the Respondent's business on the premises in question in the eyes of the authors of the letter. They actually

made certain insinuations against the Applicant if it continued to allow the Respondent to remain on the premises.

[19] The Respondent reacted to this letter and in particular to the accusations of leaving its stock on the premises. This it did by a letter dated the 23rd August 2016. It effectively acknowledged leaving stock in the form of the items mentioned in the letters on the pavements in front of the shop and said it had a problem with space for storage of their it's stock at the time and clarified it was working on the matter with a view to resolving same, clarifying it was to do so soon. As for the beeping sound from the Fork lift, it clarified same was a challenge because it was in built on the fork lift to act as a warning to the driver. It was also necessary because still under the motor plan and the insurance as a term and condition for its continued cover. Both of these commitments to it were explained and they required it to have the beeping sound complained of. They were however, still negotiating with the supplier towards removing the sound complained of.

[20] With regards the alleged dust from the cement, they clarified that they were trying to calm same through sprinkling water and as far as they were

concerned that particular problem was now overcome. On the problem of the Landlord's guards now concentrating on the Respondent's cars or only those of its invitees, it clarified it had since employed its own security personnel to take over the controlling of their cars and did not quibble the contention that the security guards by the applicant were meant for only the old Swaki tenants. It also undertook to address all the problems raised soon.

[21] It is clear from the letter of the 8th August 2016, by the Applicant that the breaches the Respondent was being asked to remedy in terms of the notice embodied in the said letter and in terms of clause 4.2 of the agreement were only the items left on the pavements and the other common areas together with eliminating the beeping sound from the forklift. Any other concern raised anywhere else as a breach which however could not be covered in the notice embodied in the letter of the 8th August 2016 should be viewed as a concern that had not yet matured to get to the level of leading to a cancellation of the lease agreement because it can only do so, in terms of the lease agreement itself and line with of the notice envisaged in terms of clause 4.2.

[22] It is for this reason that whereas there are other complaints by the Respondent's other tenants on the premises, they can only be noted for what they are. They cannot ground a cancellation of the agreement unless the Respondent had been notified to remedy them within a specified period and it had failed to do so. Again the only effective issues therefore from the letter by said other tenants which formed part of the warning as contained in the notice were that relating to the storing of items on the pavements and the beeping sound from the fork lift.

[23] It is a fact that the case by either of the parties as concerns items on the pavements was bolstered by certain photographs. Indeed those filed by the applicant, which were obviously taken prior to those by the Respondent, indicated same items as complained of lying on the pavement. It is however not being divulged when exactly these photographs were taken. Those photographs by the Respondent only suggested that they were taken after those by the Applicant. They also do not clarify however when they were taken. These were however not made issues when the matter was argued before me. They were merely taken to have been issued in the manner and sequence observed above in this paragraph.

[24] As indicated above the agreement between the parties herein did not envisage a situation where once there were such items on the pavements, and therefore a breach of the agreement there ipso facto had to be a cancellation of the lease agreement. Instead it envisaged a situation where once those were there, that is where such a breach had occurred, the items or that breach had to be removed within 14 days of a written notice issued to the Respondent to remove them or remedy the breach.

[25] From the facts of the matter, it is unequivocal that whereas a letter was written on the 8th August 2016, there is completely neither an averment nor proof of when it was served on the Respondent. As I understand the clause it is not enough that same was written on the 8th August 2016 calling for remedying of the breach in question by the 25th August 2016. The fourteen days envisaged in terms of the agreement is not one indicating the letter had been in existence for fourteen days but it is that the Applicant should have given a 14 days period to the Respondent to remedy the alleged breaches. In that sense the date when the Respondent received the letter in question is crucial in order to determine whether or not he has been afforded the notice

he is entitled to. This is thus an evidential matter it would be difficult for this Court to speculate when the alleged notice was served on the Respondent. Ofcourse the onus was on the Applicant as the party seeking the remedy in question to prove this. If Applicant has not done so, it then has not discharged its onus.

[26] It is also a fact that actually the period between the 8th and 25th August 2016, as reckoned from the 9th August 2016, is not fourteen days but 13 such days. The effect of this is that the Respondent was not given the notice it was entitled to. It further cannot be assumed that as at the end of the 14th days, the items had still not been removed from the pavements. This is all the moreso because whilst acknowledging that the items were on the said pavements when three days of the notice were still remaining on the 23rd August 2016, there is no evidence it was still there as at the end of the actual 14 days. It should be borne in mind that the Respondent had undertaken to correct the breaches referred to and there is no doubt it had gone on to do so when considering the photographs filed of record by the Respondent and annexed to its papers.

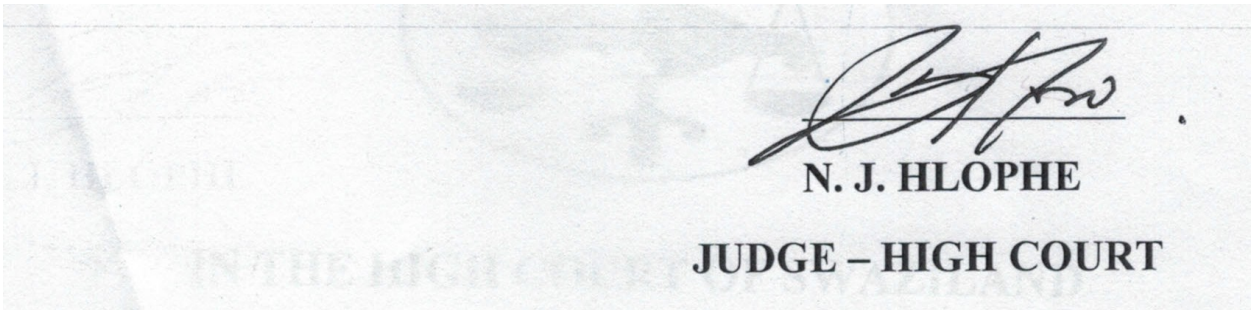
[27] The effect of this is that a case has not been made with regards the items kept on the premises whether a sufficient period to remedy the breach had been given as required in terms of the agreement and also whether the notice was not heeded by the Respondent. In other words the Applicant had not discharged its onus.

[28] The beeping sound from the fork lift should therefore suffer the same fate as the items left on the premises with regards the sufficiency of the notice period given the Respondent. There may however be a more compelling reason against the Applicant even on the obviously irritating beeping sound. This is an issue I am only opining upon without deciding in the circumstances. It is the fact that a fork lift may be forming an integral part of a modern day hardware business so much so that it may not be used to cancel a lease agreement concluded with a tenant who was known as at the time an agreement was concluded that he intended to operate such a business.

[29] It may therefore be apparent that the Applicant was under pressure from the other tenants who did not approve the nature of the Respondent's business

and felt obliged to yield to them by ejecting Respondent. Clearly our law upholds the sanctity of contracts which means that during the duration of the lease agreement, the Respondent be protected by law, unless it demonstrably violates the lease and fails to remedy the breach within the period stipulated in their agreement. In the current matter I have failed to find such demonstrable breach of the contract on the part of the Respondent so as to call for a cancellation of the lease.

[30] Having said all that I have above, I have come to the conclusion that the Applicant's application cannot succeed and I dismiss it with costs having to be borne by the Applicant at the ordinary scale.



**N. J. HLOPHE**

**JUDGE – HIGH COURT**