IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL APPEAL CASE NO: 1844/17

In the matter between:

LAKHA INVESTMENT (PTY) LTD **APPELLANT**

And

REAP INVESTMENTS (PTY) LTD **RESPONDENT**

Neutral Citation: *Lakha Investments (Pty) Ltd vs. Reap Investments (Pty) Ltd (1844/17) [2018] SZHC (132) 20th June 2018*

Coram: **MLANGENI J.**

Heard: **7th June 2018**

Delivered: **20th June 2018**

Flynote: *Civil procedure – judgments and orders – in a claim for arrear rental and ancillary relief the court ordered that the parties should calculate the amount of arrear rental due – whether such order is competent.*

Civil procedure – rule nisi granted ex parte, Applicant not disclosing that prior to application the premises were locked without court order – Respondent raising point of law of dirty hands and failure to disclose material facts – court-a-quo dismissing the point of law on the alleged basis that arrear rental was not denied.

On appeal –

Held: *An order that the parties should calculate the amount of the judgment debt is incompetent and cannot stand.*

Held, further, court-a-quo was in fact incorrect in holding that amount of rental claimed was not disputed.

Held, further, court-a-quo erred in not upholding point of law on dirty hands and failure to disclose material facts.

Appeal upheld, with costs.

JUDGMENT

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[1] This appeal is a sequel to the judgment of Her Lordship X. Nxumalo in the Magistrates' Court, Manzini. The judgment is undated, but I see on the notice of appeal that it was handed down on the 23rd November2017, in respect of an application for confirmation of the landlord's hypothec for arrear rental and ancillary relief.

[2] The judgment appealed against is not the best pieces of work. One thing that is clear is that no effort was made to proof read it and make corrections before it was handed down. It is therefore not surprising that even the orders that were made by the Honourable Court are to be deciphered from the long paragraph which is the last one at page 6 of the judgement. I quote this paragraph in full below:-

> **"In the circumstances, the court concludes that as a result of the unlawful lock out by Applicant, he is not entitled to rental arrears accruing for the period wherein it unlawfully locked out the respondent from running its business in the premises. Without a court order the locking of the premises was self-help which the courts cannot condone. The court further concludes that the point raised by the Respondent cannot however assist him as a defence, he has not disputed his indebtedness to the Applicant and the fact that he breached the lease agreement. The correct amount of arrear rental due and owing (sic) to the Applicant is to be calculated by the parties excluding those months on which Respondent had unlawfully locked out the Applicant. Applicant's application to have the lease agreement cancelled and Respondent ejected from the premises is hereby granted. The order shall include accruing rentals from Respondent obtained (sic) the order to have the premises re-opened**

to them till finalization of the matter. Costs of suit as prayed for".

[3] It must occasion enormous hardship to litigants who spend considerable resources in pursuit of justice to end up with a judgment of this quality. An appeal from this judgment was as inevitable as sunrise. Clearly, the grounds of appeal are a reflection of the Appellant's understanding of the judgment. It is conceivable that someone else might understand certain aspects of it differently. Such is the extent of the difficulty I was alluding to when I euphemistically said the judgment is not one of the best pieces of work.

[4] The grounds of appeal appear below:-

"1. The *court-a-quo* erred in law and in fact in finding that the Appellant must pay for arrear rentals from the period the interim court order was granted till finalization of the matter when this was not an issue (for) determination before court;

2. The *court-a-quo* erred in law in failing to uphold the preliminary points of dirty hands and non-disclosure after having found that the Respondent locked unlawfully the premises that were leased to the Appellant without a court order; and

3. The *court-a-quo* erred in law and in fact in making an adverse court order against the Appellant without having found any basis for such an order, thereby exercising its discretion capriciously and out of touch with established facts in the matter."

[5] One conspicuous aspect of the judgment is not a subject of this appeal. It is to the effect that the litigants must calculate the correct amount of arrear rental due and owing. (My emphasis). It is, in my view, extra-

ordinary that parties who have brought a dispute to court, at the centre of which is the amount of arrear rental, are ordered to go and calculate the amount on their own, period. What if they are again unable to agree? This aspect of the judgment is clearly ill-conceived, unworkable and demonstrates dereliction of responsibility on the part of the Honorable *court-a-quo*. A judgment must make a definitive and unequivocal pronouncement on the issues that are canvassed in the matter, certainly on those that are relevant to the outcome of the proceedings. Otherwise the effort and expense of the litigants goes to waste.

BRIEF BACKGROUND

[6] To enable a good understanding of this matter I capture herein the background in brief. A landlord was allegedly owed arrear rental by its tenant. It proceeded to lock the tenant out of the premises, without a court order, the tenant's movable assets remaining within the premises. Some months later the landlord approached court, *ex parte*, seeking to perfect its hypothec in terms of the common law. In its papers it did not disclose the fact that it had taken the law into its own hands and locked the tenant out. The landlord routinely obtained an interim order, confirmation was opposed and the resultant judgment is the subject of this appeal. At a certain point there was an application for rescission of judgment which was granted. It is not relevant to this appeal.

[7] The Appellant in this matter is the Respondent in the *court-a-quo*, and the Respondent is the Applicant in the *court-a-quo*. I will refer to the parties as the Appellant and Respondent respectively, alternatively as the landlord and the tenant.

[8] One of the issues that were canvassed by the Respondent in the *court-a-quo*, now Appellant, was the doctrine of dirty hands on the part of the landlord, in that it took the law into its own hands by locking the premises without an order of court, and in failing to disclose this important fact it acted in breach of the duty of disclosure which is so well-entrenched in respect of *ex parte* applications in this jurisdiction. This two –prolonged argument was raised as a point of law in *limine,* and on this basis the tenant sought to have the application dismissed. The Learned Magistrate in the *court-a-quo* dismissed the point of law, apparently on the basis that the respondent **"has not disputed his indebtedness to the Applicant."**

[9] However, the finding by the *court-a-quo* that the indebtedness was not disputed is factually incorrect. The amount that was allegedly owing was the subject of a raging dispute between the parties. Part of the disagreement was whether or not the tenant was legally liable to pay rental for the period when it was unlawfully locked out of the premises, the period being February to June 2017, when a rule *nisi* was issued *ex parte*. The tenant consistently argued, in part, that it was not liable to pay rental for this period because it was effectively evicted from the premises[1]. I need only refer to paragraph 3.2.2 at page 50-51 of the Record of Appeal where the landlord's deponent states that the amount of arrear rental that was conceded by the tenant was E14, 200.00[2], and yet the amount claimed was E58, 140.00. So, clearly the amount of the debt as claimed by the landlord was in dispute.

[10] The Learned Magistrate sought to resolve this dispute by ordering the parties to go and calculate the amount owing. I have respectively stated above that this was absolutely erroneous.

[1] See Machines Ltd v Baceth Investments (Pty) Ltd t/a Baceth Hardware, Case No. (1589/16)[2017] SZHC 86.
[2] See also para 16.2 (a) at page 14 of the Record of Appeal.

DISMISSAL OF POINT OF LAW WAS ALSO ERRONEOUS

[11] As stated above, the point of law raised by the tenant was that the *ex parte* Applicant had come to court with dirty hands, having locked the premises without a court order, and failed to disclose this important fact in its papers when seeking confirmation of the common law hypothec. This application was moved about four (4) months after the unlawful lock-out. The Learned Magistrate appears to have been completely oblivious of the importance of this point in our law.

[12] In this jurisdiction it is settled that in *ex parte* applications the Applicant has a duty to disclose in its papers all facts that might influence the court in determining whether to grant the rule *nisi* or not[3]. This is in reference to facts that are in existence at the time the application is moved. So stringent is the duty that it is subject to utmost good faith,[4] and failure to disclose may lead to the order being set aside[5]. The Learned author Isaacs[6] has expressed the position in the following manner:-

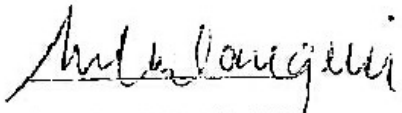
> **"In *ex parte* applications ……the Applicant must not conceal any material fact, the utmost good faith being necessary. If material facts are kept back the disclosure of which might have influenced the decision of the court, the court has a discretion to set the order aside. This is so even if the suppression of the material fact had not been done *mala fide.* In some cases the courts have penalized an Applicant on the question of costs if material facts are not disclosed."**

[3] Hart v Pinetown Drive – In Cinema (Pty) Ltd, 1972 (1) SA 464.
[4] De Jager v Heilbron & Others, 1947 (2) SA 415.
[5] Spilg v Walker, 1947(3) SA 495.
[6] Beck's Theory And Principles of Pleading In Civil Actions, 5th Ed (1982) Butterworths, at p228.

[13] Clearly, the Applicant came to court with dirty hands and its failure to make disclosure warrants censure. Had the *court-a-quo* properly reflected upon this aspect it would certainly have dismissed the application, with costs. And I daresay that there is a sound basis upon which punitive costs could have been awarded. The case of **Spilg v Walker**[7] illustrates the stringency of the duty of disclosure. In that case the parties were in a business partnership. The Applicant obtained a wide-ranging interdict, *ex parte*, against the Respondent, partly on the alleged basis that the Respondent had withdrawn partnership funds and used it for his personal purposes. The Applicant, in its papers, did not mention that the Respondent had strenuously disputed this prior to the application being moved, and had offered an explanation. The rule *nisi* was discharged, notwithstanding that the explanation was *ex facie* unsatisfactory, the court holding that the Applicant should have disclosed this aspect.

[14] Before concluding this exercise I mention that on the last few occasions that the matter was before me the Respondent was unrepresented. Initially, this occurred as a result of the situation of attorney Muzi Simelane and his firm, which had acted on its behalf at all material times. When this firm became unable to continue acting for the Respondent due to the ban, I postponed the matter twice in order to allow the Respondent an opportunity to make alternative arrangements. On the 2nd May 2018 I postponed it to the 7th June 2018 and ordered that the postponement order was to be served on the Respondent. This was done, but again there was no appearance by or on behalf of the Respondent. This notwithstanding, I did not deal with the appeal on the basis of default. I heard brief submissions by Mr. Maseko for the Appellant and upheld the appeal, with costs. The aforegoing are my reasons.

[7] See Note 5 above.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For Appellant: Mr. W. Maseko

For Respondent: No appearance