IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1957/2017

In the matter between

ARLINDO DE SOUZA **1ST Applicant**

VINCELUX SOLUTIONS INVESTMENTS (PTY) LTD **2ND Applicant**

And

SPARTAN WHOLESALERS (PTY) LTD **Respondent**

Neutral Citation: *Arlindo De Souza & Another vs Spartan Wholesalers (PTY) Ltd 1957/2017; [2018] SZHC 63 (4th April 2018)*

Coram: Hlophe J.

For the Applicant: Mr B.M. Dlamini

For the Respondent: Mr N.B. Mabuza

Date Heard: 02nd March 2018

Date Judgement Delivered: 4th April 2018

Summary

Application Proceedings –Application to perfect the Landlord's hypothec – Nature of application including how such applications are prosecuted in Court – Whether any facts that should have been disclosed were not disclosed –Whether any material facts are shown to have been misrepresented –Whether a case has been made for the reliefs sought.

JUDGMENT

[1] The Applicant instituted proceedings under a certificate of urgency effectively seeking orders inter alia perfecting the Landlords hypothec as well as compelling payment of a sum of E197 728-00 said to be arrear rentals, to the Applicant. There was also sought an order ejecting the Respondent from the premises described as Shop No.5, Plot 213, Tenbergen Street, Manzini. Typical of an application for perfecting a landlord's hypothec there were several ancilliary orders to the main ones sought. These included the one directing how service and execution of the order was going to be carried out. There was also sought a costs order.

[2] The founding affidavit in support of the application was deposed to by one Wandile Sihlongonyane, who described himself as a Director of the Second

Applicant. This latter applicant was itself described as a company that carries on business as an Estate Agent at office 106, Bhunu Mall, Nkoseluhlaza Street, Manzini.

[3] It is averred on behalf of the Applicants that the parties to the matter concluded a written lease agreement on the 24th June 2014 in Manzini. The lease in question is said to have been for 3years beginning from the 1st January 2014 to the 31st December 2016. It is not in dispute that when the lease expired, it was not renewed but there ensued a month to month lease agreement. Although the initially agreed rental was a sum of E10, 000-00 per month, it was supposed to escalate at the rate of 12.5 percent per annum according to the Applicant.

[4] It is contended on behalf of the Applicants that the Respondent as lessee, breached the agreement by not paying the yearly escalations as and when they fell due. It only paid the initially agreed rent of E10,000-00 per month. This state of affairs persisted for months after the month to month lease agreement had taken effect. It in fact remained in place until March 2017. At that time, there ensued a different type of breach by the Respondent. It

ceased paying rentals at all. This persisted from March 2017 to October 2018. This means that from March 2017 the Repondent failed to pay both the yearly escalation applicable as of that date and the actual montly rentals applicable as at that print.

[5] It is the applicants' case that the Respondent is in breach of the lease agreement and that this court is requested to grant the reliefs sought by the Respondent, which include the payment of the sum of E197, 728-00 being the arrear rentals due together with the ejectment of the Respondent from the premises concerned. There was further sought an order laying under attachment the movable goods as were found on the premises together with interdicting the Respondent from removing any of the said assets pending payment of the sum claimed and or finalization of the matter. This latter prayer was sought in the form of a rule nisi operating with immediate and interim effect.

[6] Among the ancilliary orders sought was one directing how the service of the order and application was going to be effected. It stated that the order was to be served immediately upon the Respondent by the Deputy Sheriff who

was to explain the nature and exigencies of the order to the Respondent. There was a rider attached to the order for the attachment of the movables in question, it being that they be kept under lock and key and that Applicant was to be authorised to do whatever was necessary to prevent the Respondent from removing the goods from the premises in the interim.

[7] The riders that sought to have the movable goods found on the premises attached as mentioned above merit a comment. Modern law does not allow the locking of premises than that the movable goods therein found be laid under attachment with the Lessee not being allowed to remove them once so attached until the application was determined. I had occasion to deal with this question in **Machines LTD VS Baceth Investments (PTY) LTD T/A Baceth Hardware, High Court Civil Case No. 1589/2016 [2017] SZHC 86** as well as in **Early Harvest Farming (PTY) LTD VS EI Ranches (PTY) LTD Civil Case No.454/2015**. See also **Webster Vs Ellison 1911 AD 73 at Pages 86 and 89** on the same question.

[8] Concerning the rider that the Applicant be authorized to do whatever is necessary to ensure that the goods laid under attachment, are not removed, I

have always found it difficult to accede thereto. It is too general in its meaning and effect and it is potentially dangerous as it is susceptible to abuse. It is difficult for a Court to allow a party to do 'anything' to ensure compliance with an order of court because the court itself can only order what is lawful. It for instance cannot allow the Applicant to assault the Respondent in order to protect its order, yet the general nature of the prayer suggests that this is possible, confirming my reluctance in granting such a prayer. I must say that on the books and judgements I have read on the subject I have not found any reference to it let alone its application or its forming a part of our law. See in this regard, **W.E. Cooper, Landlord and Tenant Second Edition, Juta and Company, 1994** at **pagers 179-200** and **Silberg and Schoeman, The Law of Property, Second Edition, Butterwortth, 1983 at pages 510-513. See also Webster V Ellison 1911 AD 73 at pagers 86-89**.

I am strengthened in the view I hold by the fact that once a rule has issued perfecting the Landlord's hypothec it is completely unnecessary for anyone to require the Court to grant him the power to do anything to protect the hypothecated movable property given that the rule nisi does just that as anyone who ignores such an order by acting contrary to it can be dealt with

through the use of contempt of Court proceedings as he or she would be violating an order of Court.

[9] I am also obligated to comment about the form of the Notice of Motion used by the applicant. It deviates drastically from the usual one and as such it brings with it some confusion. The proper form which introduced the hybrid procedure followed in this Jurisdiction on the enforcement of a Landlord's hypothec was restated by the **Supreme Court in Zulu Investments (Swd) (PTY) LTD t/a Swanks V Plaza Park (PTY) LTD Civil Appeal Case No.75/2016 [2016]SZSC 48 (delivered on the 30th June 2016)**. This form is the one to be followed without hurstles in matters of this nature and cannot bring with it confusion as the forms do from time, including the current one. Practitioners are urged to acquaint themselves with that form.

[10] Otherwise the current matter came to Court on the 29th December 2017, as an exparte application seeking to perfect the landlord's hypothec among the other related orders. I granted the order interdicting the removal of any of the movable goods found on the premises pending payment of the arrear rentals or the finalization of the matter.. I further issued a rule nisi calling

upon the Respondent to show cause why it should not be ordered to pay the amount claimed as arrear rentals as well as why it should not be evicted from the premises. There was granted the other ancilliary orders referred to above as well.

[11] Although the Respondent did not file opposing papers qua, it is a fact that it filed, after several weeks of its having been served with the order, an application in terms of which it sought to anticipate the orders issued exparte by this Court. This it sought to do on the following grounds:-

> "1. Dismissing the Rule Nisi issued by the above Honourable Court on the 29th day of December 2017, by Justice Hlophe N. on the following basis;
>
> 1.1. That the Applicant appeared exparte before the Honourable Court without lawful merit.
>
> 1.2. That the Applicant is guilty of non-disclosure of material facts to the matter which he had a legal obligation to disclose to the Court since he was appearing exparte.
>
> 1.3. That he has made a misrepresentation of facts to obtain an order of the above Honourable Court.

[12] The facts in support of this application were contained in the affidavit of Thabiso Tsabedze who described himself as a Director of the Respondent, who he described as a registered company carrying on the business of sale of motor spares at Plot 213. Tenbergen Street, Manzini.

[13] The Respondent's case as revealed in its application is that whilst approaching this court exparte, the Applicant failed to disclose all the facts he needed to and that he misrepresented certain facts in order to obtain an order of Court. It was denied that the Respondent had failed to pay the 12.5% rental escalation from the conclusion of the lease agreement to the day of the application. It was in fact contended that the agreement had no such a term. It was argued further that the lease agreement concluded between the First Applicant and Spartan Wholesalers (PTY) LTD was terminated when a new lease over the same premises was concluded between the Applicants and the company called Xtreme Auto Engineering (PTY) LTD of which the deponent to the affidavit in support of the application to anticipate the rule nisi, is a Director and Shareholder. In fact on the initial lease agreement, the Respondent contended that same was

fraudulent. Proof of this, it was contended was the difference in the types of font used when typing the agreement on the different parts of it. The applicant was thus challenged to produce the original agreement as that attached to the application was a copy.

[14] Accordingg to Mr Tsabedze, although his company, referred to as Xtreme Auto Engineering (PTY) LTD took over the premises following the conclusion of a new lease agreement, its businesses continued to trade as Spartan Wholesalers. He contended further that although a new lease agreement had subsequently ensued between his company and the applicants, he had joined the Respondent company in October 2017 as a co-director to its hitherto director Mr Rose.

[15] When he joined the Respondent Company, he said he had found arrear rentals dating from April 2017 to September 2017 amounting in all to E70 000-00. These arrears he said he had undertaken to pay to the First Applicant. He did not deny this amount was still outstanding. It is important to note that the amount of arrear rentals acknowledged by the Respondent for the months in question confirm that the rentals owing were

still fixed at E10,000.00 per month in his eyes and that the escalation referred to by the Applicant had indeed never been paid. If the agreement was later found to confirm the 12.5% escalation, it would indirectly be proved that indeed such escalation were never paid when they should have been and that they are due. I shall therefore revert to this point.

[16] Mr Tsabedze contends that after joining the Respondent company he negotiated a new lease agreement with what he terms the First Applicant's agent, Wandile Sihlongonyane. These negotiations he says culminated in a new lease agreement being signed between him acting for his company, Xtreme Auto Engineering (PTY) LTD and the said Wandile Sihlongonyane who allegedly represented the First Applicant. Ever since he took over the lease, the said Thabiso Tsabedze, claims to have paid the rentals due and that he is not in arrears in terms of the new lease agreement. The new lease agreement is annexed to the Respondent's application and is marked annuxure "SW3". It is worthy of note that despite the apparent shortcomings of the alleged new lease substituting the original one between the original parties, there is also no proof of the termination of the lease agreement between the initial parties nor is there any resolution by the

former lessee and the alleged new one that the latter was taking over the initial lessees rights which in law should have been assigned or ceded to it.

[17] The applicant's case to the application anticipating the rule nisi is that there is no basis for the application by the Respondent. It is denied that the applicant should not have approached the Court on an exparte basis. It is contended that this is how all lease agreements where there are arrear rentals are enforced. It is denied there are facts that have not been disclosed nor are there any facts that have been mispresented. It is denied that the lease agreement governing the current relationship between the two is a different one from the verbal month to month lease which took effect after the lapse of the initial written lease agreement between the First Applicant and Spartan Wholesalers (PTY) LTD. Otherwise the lease agreement described as annuxure "SW3" to the anticipation application was denied by the Applicant as one that is of any force or effect between the parties thereof because whilst signed by the said Wandile Sihlongonyane describing himself as an agent, the First Applicant (the real Landlord) whose slot to sign on the same agreement had been provided, he had never signed same and it was argued he had as a matter of fact, never approved of the new lease agreement with Xtreme Auto Engineering (PTY) LTD. I hasten to clarify

that there was indeed nothing placed before Court to confirm the First Applicant had ever recognized such a lease agreement as opposed to him treating Spartan Wholesalers as such a party to the proper lease over the premises.

[18] It is not in dispute in my understanding of the facts that Thabiso Tsabedze joined the Respondent' company (Spartan Wholesalers (PTY) LTD) as a Director during the tenancy of the lease agreement between the First Applicant and the said Spartan Wholesalers (PTY) LTD. It stands to reason that the relationship between the First Applicant and the Respondent company (Spartan Wholesalers (PTY) LTD had to be terminated by both parties for a new relationship to ensue between the First Applicant and the new company Xtreme Auto Engineering (PTY) LTD as represented by the deponent to the affidavit in support of the application for anticipation. The question is therefore whether there was this rupture in the relationship between the First applicant and the initial lessee, Spartan Wholesalers (PTY) LTD. It seems to me that a determination of this question is key to the determination of all the issues raised in the application to anticipate the rule nisi and even in the confirmation of the rule nisi for the perfection of the landlord's hypothec itself.

[19] Before determining the issues involved in the matter, it merits mention that there is a confusion from the papers filed by the different parties on who the real respondent is. I say this because whilst the respondent is described as Spartan Wholesalers (PTY) LTD, a duly registered company carrying on the business of sale of motor spares in Manzini at plot 213, Tenbergen Street in the founding affidavit; Thabiso Tsabedze in the affidavit supporting the application to anticipate the rule nisi claims to be also representing the Respondent company carrying on business on the same premises. The confusion arises however when in the body of the supporting affidavit to the application to anticipate the rule nisi, the same Thabiso Tsabedze claims that the party actually running the business in the premises forming the subject matter of these proceedings is not the Respondent as described in the founding affidavit but is a company known as Xtreme Auto Engineering (PTY) LTD. This is despite the fact the proceedings instituted by the Applicant, were brought against a Specific Respondent, described as Spartan Wholesalers (PTY) LTD. It baffles the mind therefore at what stage of the proceedings any other Respondent than that disclosed in the papers came to be a party without formal proceedings of intervention by that party having been heard and granted by the Court.

[20] To clarify this point, whereas these proceedings are against the Respondent as described in the founding affidavit, the deponent to the affidavit to the application to anticipate the rule nisi seems to suggest eventually that the Respondent is now Xtreme Auto Engineering (PTY) LTD. Clearly this is causing confusion. It would appear that as the proceedings were initially between two identified persons in First Applicant and Spartan Wholesalers (PTY) LTD, it was encumbent upon Xtreme Auto Engineering (PTY) LTD, to apply to intervene as a party if it felt any of its rights were being violated so that its status in the matter can be easily appreciated and could clearly be identifiable.

[21] Be that as it may, the real question as indicated above is whether in the circumstances of this matter, the lease concluded between the First Applicant and The Spartan Wholesalers (PTY) LTS was ever terminated so that in its stead there ensued that concluded between the First applicant and Xtreme Auto Engineering (PTY) LTD.

[22] If it cannot be denied that the Landlord in the subsequent lease agreement did not sign on it despite his slot being provided for that purpose and that he today denies the existence of this agreement, I do not see how anyone can possibly claim the existence of a lease agreement with a party who has not signed same despite it being provided a space to sign it. Clearly the refusal by such a landlord to sign such an agreement can only mean that particular landlord did not want to conclude such an agreement with the potential lessee terms of that lease agreement which means that the lease as existed between the initial parties continued to prevail, albeit as a month to month lease. This position is strengthened by the fact that the initial agreement is not shown when and how it terminated nor even how the new lessee managed to substitute the initial lessee so as to himself become in its stead. Despite Mr Wandile Sihlongonyane signing as an agent of the Landlord who openly refused to sign the agreement prepared for him to sign alongside his said agent, there can be no doubt that the agent and the proposed new lessee were aware when they provided a slot for the landlord to sign alongside the agent that the latter had a limited mandate to bind the former. That is to say they were aware the Landlord would be bound to the new agreement with the new lessee upon signing that lease agreement.

[23] The effect of this is that the applicant is entitled to attach the iterms found on the premises in question to confirm the Landlord's hypothec. The problem here is minimized by the fact that Thabiso Tsabedze, the Director and shareholder in both Spartan Wholesalers (PTY) LTD and Xtreme Auto Engineering (PTY) LTD claims to have undertaken to pay the arrears for the period April 2017 to October 2017. The reality is that in so far as the Applicant is not shown approving a new tenant, then the tenant who contracted with it remained on the premises and is therefore liable to pay the arrear rentals. It is further real that tenant cannot avoid the payment of the rent escalations for the subsequent years after the first one. This becomes all the more so when one considers the fact that when it was confirmed in the original lease agreement that the lease was authentic and did provide for the 12.5% as shown herein below at paragraphs 31 and 32. Furtherstill, whatever articles would have been brought by the new company into the leased premises, such fell to be attached as part of the Applicant's hypothec, when considering that the Applicant had not allowed the change in the Lessee.

[24] There is another plausible reason in my view why the current occupant of the premises should be held responsible for paying the outstanding rentals.

This would be the piercing of the cooperate veil on the current occupant given that the latter was always aware that the premises in question had always been leased to Spartan Wholesalers (PTY) LTD and that, the change into some other tenant had clearly never been accepted or approved by the Applicant as the Landlord. Furtherstill, the said Thabiso Tsabedze is shown to be a shareholder in both Spartan Wholesalers (PTY) LTD and Xtreme Auto Engineering (PTY) LTD.

[25] Having said that, I now revert to the questions whether the applicant was entitled to institute the proceedings exparte as well as whether the applicant had failed to disclose all the relevant facts and also whether there was any misrepresentation of facts by the applicant so as to ensure it obtained an order it was otherwise not entitled to. On the question of the propriety or otherwise of exparte proceedings, I must say it is the practice in this jurisdiction that proceedings to perfect the landlord's hypothec and the other reliefs as set out in the current application, are commenced exparte. The obvious rationale is to ensure that the movables brought on to the leased premises can be identified and laid under attachment so as to protect the landlord from other possible creditors of the lessee and from having them removed from the premises.

[26] Since the relationship between the First Applicant and the Respondent was that of a Landlord and Tenant, and it not being disputed that the Respondent (as determined by this Court) was in arrears with his rentals, the applicant was entitled to institute the proceedings concerned exparte. The A be faulted, which means that there is no merit in the applicant's application.

[27] On the question whether there was non-disclosure of facts, it does seem to me that whereas all the facts were not placed before Court as the applicant should have done to enable a better understanding of the facts, it seems to me that the non-disclosure was not that of material facts. The material facts namely that the lease was between the First Applicant and Spartan Wholesalers (PTY) LTD remained unconcealed together with the fact that the latter was in arrears with its rentals. That the facts to be disclosed must be the material ones was put as follows in **Herbstein and Van Winson's, The Civil Practice of The Supreme Court of South Africa, 4th Edition, Juta & Company, 1997 at page 367**:

> "*Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishement of his right, when he is bringing an exparte*

application in which relief is claimed against another party he must make full disclosure of all the material facts that might affect the granting or otherwise of an order exparte. The utmost good faith must be observed by litigants making exparte applications in placing material facts before the Court, so much so that if an order has been made upon an exparte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently, which might have influenced the decision of the Court whether to make an order or not, the Court has a discretion to set the order aside with costs on the ground of non-disclosure."

[28] On the contention that the applicant misrepresented facts to obtain the order, I could not be shown the misrepresented facts, which if applicant had not fabricated he would not have been granted the order. It remains a fact that although there was signed between the Lessee and the estate agent a lease agreement, the said agreement provided for the landlord to sign so much so that it is hard to fathorn how an agreement could be thought of as having been concluded if the landlord had openly not sanctioned same by withholding his signature in a case where he was required to. I therefore

cannot agree that any facts were misrepresented herein which influenced the grant of the interim order inter alia perfecting the landlord's hypothec.

[29] Lastly, there was the contention that the initial agreement between the First Applicant and the Respondent as described in the papers, was fraudulent because it was allegedly attended by the copy of the agreement entailing different typing fonts. When the production of the original was challenged, the applicant did produce same and it on the face of it indicates that it was signed by the same parties as those who signed the last page and had signed on all the pages including the first page.

[30] It seems to me that there was no merit at all in this contention. Whereas the font on the first page is different from that of the other pages, it does not seem fair for anyone to suggest that such depicts a fraudulent document. It worsens if for the Respondent's Mr Tsabedze that he admittedly was not there when the agreement was concluded which means that he is not qualified to deny such issues which would have only been placed in dispute by Mr Rose, who has done no such including not even deposing to a confirmatory affidavit to what Mr Tsabedze is saying. The same thing

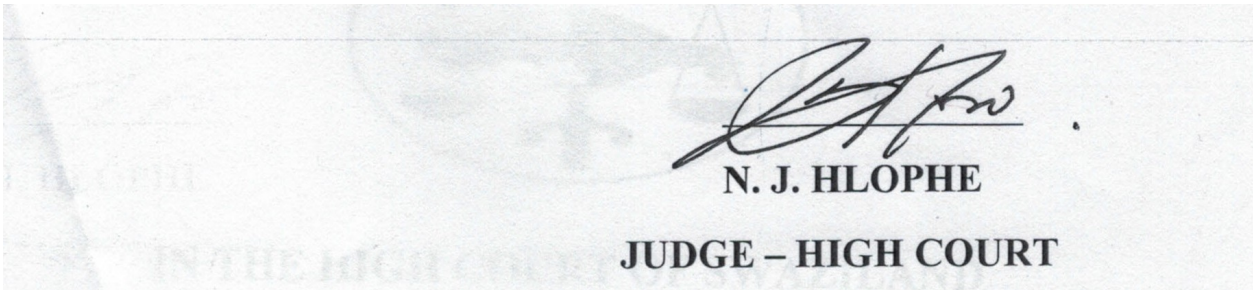
applies in my view to the contention being made over the fact that the 12.5% rentals was not being paid. Indeed Mr Tsabedze only joined the respondent company after the written agreement was long concluded which in fact was after the written agreement had lapsed and substituted by the mouth to mouth one. Whatever the position with regards the outstanding rentals it is clear that whereas for the better part of the tenancy of the written agreement what remained unpaid was the escalations, there is no denying that for the verbal tenure of the lease agreement, what was not paid for was both the escalation and the ordinary monthly rentals.

[31] I am therefore convinced that the Respondent is in breach of the lease agreement in the manner alleged by the applicant who is therefore entitled to the reliefs he seeks. For these reasons I have come to the conclusion that the applicant succeeds and I make the following order:

1. The rule nisi issued by this Court on the 29th day of December 2017, be and is hereby confirmed.

2. The Respondent is ordered to pay applicant the sum of E197, 728-00 being outstanding arrear rentals.

3. The Respondent and those holding under it be and are hereby ejected from the premises in question.



N. J. HLOPHE

JUDGE – HIGH COURT