



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Case No. 1948/18

In the matter between:

**SWAZILAND NATIONAL PROVIDENT FUND**

**AND**

**FALLA INVESTMENTS (PTY) Ltd**

**Neutral citation:** *Swaziland National Provident Fund and Falla Investments (PTY) Ltd [1948/18] [2019] SZHC 186 (1<sup>st</sup> October, 2019)*

**Coram:** FAKUDZE, J

**Heard:** 6<sup>th</sup> June, 2019

**Delivered:** 1<sup>st</sup> October, 2019

**Summary:** *Civil Procedure – Applicant filed an Application for an Order for the cancellation of the lease agreement between the*

*sought an Order for payment by the Respondent of all arrears rentals in respect of the premises leased to the Respondent – Applicant sought for an Order rejecting the Respondent from the leased premises. Order granted as prayed for.*

## **JUDGMENT**

### **Background**

[1] On the 17<sup>th</sup> December, 2018, the Applicant filed an urgent Application based on the following:

1. *That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter is heard as one of urgency.*
2. *Condoning Applicant’s non-compliance with the Rules of the above Honourable Court relating to service and hearing the matter on an ex parte basis.*
3. *Pending payment of the arrear rentals and other charges in the amount of E47,005.59 claimed by the Applicant from the Respondent in respect of the offices No. G10 Estel House, Manzini, District of Manzini, eSwatini:-*
  - 3.1 *The removal of any movables from the said premises be and is hereby interdicted;*
  - 3.2 *That the Deputy Sheriff for the District of Manzini be and is hereby authorised and directed to:-*

and

- (a) Forth with service the Notice of Motion and the Order upon the Respondent and to explain the full nature exigency thereof to it.
- (b) Attach all movables on the premises.
- (c) Make an inventory thereof and
- (d) Make a return to the Applicant's Attorneys and the Registrar of what he has done in execution of this Order.

3.3 That the Rule Nisi referred to above operate with immediate and interim effect pending the determination of this Application;

4. The Respondent is called upon to show cause why the Orders below should not be made final:

4.1 Confirming the cancellation of the lease agreement between the Applicant and the Respondent.

4.2 Payment of the arrear rentals and other charges in the amount of E47,005,99.

4.3 Ejecting the 1<sup>st</sup> Respondent from the premises owned by the Applicant at offices No. G10 Estel House, Manzini, District of Manzini, eSwatini

4.4 Interest on the sum of E47,005.99 at the rate of 9% per annum a temporae marae.

4.5 Costs of suit at Attorney and own client scale including collection commission; and

5. Such further and/or alternative relief as the above Honourable Court may deem fit.

[2] The Respondent has filed a Notice of Intention to Oppose the Application.

### **The Parties' Contention**

#### **The Applicant**

[3] The Applicant states that the payment of rent is regulated by the lease agreement between the parties. Clause 4.2 of the lease Agreement states that "Rental shall be paid monthly in advance in the first day of each month to the lessor's agent or at an address chosen by the lessor."

[4] The Applicant further states that from May 2017, the Respondent has not been paying the exact amount of rent. In this regard there has been accumulation of arrear rentals by the Respondent. The Respondent has not been paying rent from May 2017 to December, 2018. "S6" of the Founding Affidavit clearly shows how the arrear rentals are made up amounting to E47,005.99. All rentals due and payment made by the Respondent towards the rent are all reflected in the tenant transaction. From the tenant's transaction it is clear that there has been an accumulation of the arrear rentals.

[5] It is the Applicant's contention that numerous demands to the Respondent in respect of the arrear rentals were made. On or about the 7<sup>th</sup> June, 2018 the Applicant issued a letter of demand against the Respondent for the outstanding rentals in the amount of E37,634.88. The Respondent thereafter acknowledged its indebtedness to the Applicant through its letter marked "S7" of the Applicant's Founding Affidavit. This letter was written freely and voluntarily by the deponent to the Answering Affidavit who is a Director of the Respondent. It is also worth noting that the Respondent

rented residential premises from the Applicant in addition to the business premises.

### **The Respondent**

- [6] The Respondent contends that it is trite that a landlord seeking to perfect his hypothec should establish on a balance of probabilities that the tenant is in arrears. Once this happens, the landlord becomes entitled to an order for attachment and an interdict restraining the tenant from the leased premises pending payment of the rent or the determination of proceedings for the recovery of the rent is issued by the court. The exact amount owing as well as the period for which the rent is claimed should be specified as well.
- [7] The Respondent further contends that the tenant/debtor account annexed to the Founding Affidavit falls short in helping the Applicant in its case. It is not proven how the arrears being claimed are arrived at; it is further not clear which months are in arrears, except for the vague allegation appearing at paragraph 8.1 of the Founding Affidavit. The drastic nature of this remedy sought by the Applicant requires that the landlord should establish on a balance of probabilities that the tenant is in arrears before the attachment or the interdict against removal of the movables assets is made. The court should be convinced that the tenant is in arrears and same should be alleged in the Founding Affidavit with the necessary allegations and annexures.
- [8] The Respondent submits that it has demonstrated that when the hypothec was instituted it was not in arrears and furthermore has overpaid the Applicant in excess of E24,000.00. The Applicant has never raised issue with the way the Respondent was making its payments over the years.

[9] The Respondent states that the excess payment arises from the fact that the amounts paid by it amount to E101, 227.84 whereas what is due to the Applicant is E76, 821.22.

### **The Applicant's Reply**

[10] The Applicant states that all rentals due and payment made by the Respondent towards rent are all reflected in the tenant's transaction. The Applicant further states that it does not owe the Respondent the sum of E24,406.42. Besides the Respondent renting the business premises from the Applicant, it was also renting residential premises. Part of the rent paid by the Respondent was appropriated towards the payment of rent. To demonstrate this point, the Respondent alleges that moneys were paid (which some do not appear in the tenant's transaction), and appropriated accordingly. Thus Annexure "F1" of the Respondent's Answering Affidavit shows that the Respondent paid E17,000.00. It was received on the 5<sup>th</sup> May, 2017. As per the Respondent's instruction a sum of E10,000.00 was allocated to a residential house that the Respondent was renting from the Applicant. A sum of E7,000.00 was allocated to the Respondent in respect of the business premises. Annexure "F2" relates to the payment of E16,000.00. It was received on the 15<sup>th</sup> August, 2017. As per the Respondent's instruction, a sum of E9,000.00 was allocated to a residential house that Mr. Falla was renting from the Applicant and a sum of E7,000.00 was allocated to the business premises that the Respondent rented from the Applicant. Annexure "F3" relates to a payment of E11,000.00. This payment was received by the Applicant on the 6<sup>th</sup> December, 2017. As per the Respondent's instruction, it was allocated to the rented house. Annexure "F 4" relates to a payment of E11,000.00. This payment was received on the

10<sup>th</sup> January, 2018. As per the Respondent's instruction, it was allocated to the rented house. The Respondent has therefore failed to prove its defence.

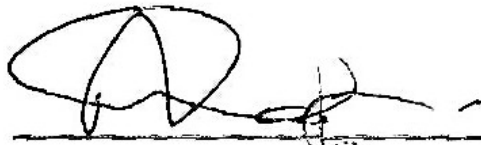
### **Court's analysis and conclusion**

[11] The tenant's statement/transaction read together with the statement pertaining to the house that the Respondent rented, clearly shows that the Applicant has made its case. The Respondent missed the first instalment in April 2017. By end of May, 2017, he was in arrears of E7,426.58 notwithstanding that he had paid E7,000.00 on the 5<sup>th</sup> May, 2017. The other E10,000.00 was deposited into the house rental account as reflected in page 128 of the Book of Pleadings (this is the statement pertaining to the house that the Respondent rented). In June and July, 2017, the Respondent paid the amount of E7,500.00 and E6,589.84 and the April rent remained outstanding. It increased to E8,619.27 because there were monthly payments for water, electricity and other amenities. The August 15, 2017 rent was paid. E7,000.00 was deposited into the Respondent's account and E9,000.00 was deposited into the Respondent's house rental account. (See page 128 of the house account). In September and October, 2017 payments of E7,000.00 for each month were received. The April, 2017 payment was still outstanding. There were no payments that were received in November, 2017 and the payment that was received in December 2017 amounting to E11,000.00 was paid towards the house rental. (See pages 128). The same thing happened with respect to the payment for the month of January, 2018. By end of January, 2018 rent owed was E32,184.33. The Respondent paid E15,000.00 towards the February, 2018 rental. Same was received on the 22<sup>nd</sup> February, 2018. This was after the February, 2018 had become due and payable. When you deduct the E15,000.00 from the E39,000.00 it leaves you with

E24,000.00. The Respondent did not pay the March and April 2018 rental. It then increased to E41294.36. The May, 2018 rental was paid on the 11/05/2018 and due to late payment, it increased to E49,000.00. The May 2018 rent amounted to E20,000.00. If you deduct the E20,000.00, from the E49,000.00, E29,000.00 remains due. There was no rent for June and July, 2019. The amount due became E45,000.00. Two payments were received in August, 2018 amounting to E13,000.00. They were paid on the 9<sup>th</sup> and 6<sup>th</sup> August after the due date. When you add the August 2018 rental to the E45,000.00, it goes up to around E54,000.00. If you deduct the E13,000.00, it comes down to E41,500.00. In September, 2018, two payments of E8500.00 and E5,000.00 were effected. The rental for September, 2018 had become due. It then increased the amount owed to around E49,000. If you deduct the E14,000.00 from the E49,000.00 it comes down to E35,000.00. Two payments were received for the month of October, 2018. They totalled to E13,500.00. The October 2018 rent increased the amount due to about E44,000.00. If you deduct the E13,500.00 it comes down to about E30,000.00. There was no rent for November, 2018 and December, 2018. If you add the November 2018 and the December 2018 due rent, it comes to about E47,000.00



[12] It is this court's view that the Applicant has ably demonstrated that arrear rentals amounting to E47,000.00 are due. The Order that has been prayed for in the Notice of Motion is hereby granted with costs and the Rule *nisi* issued on the 17<sup>th</sup> December, 2018 is hereby confirmed.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a surname, written over a horizontal line.

**FAKUDZE J.**

**JUDGE OF THE HIGH COURT**

Applicant: W. Maseko

Respondent: M. Mabuza