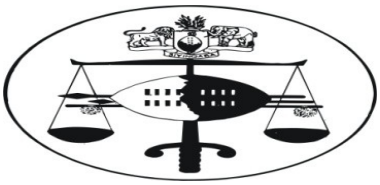

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between: Case No. 1861/2019

ESWATINI NATIONAL PROVIDENT FUND BOARD Applicant

And

LUCAS M. MAZIYA Respondent

Neutral citation : ***Eswatini National Provident Fund Board v Lucas M. Maziya (1861/2019) [2020] SZHC (13th March, 2020)***

Coram : **M. Dlamini J**

Heard : **13th March, 2020**

Delivered : **13th March, 2020**

Landlord-tenant : ***landlord claiming arrear rentals in motion proceedings – is this competent - legal principles - there is nothing sacrosanct about summons - question is, are there any bona fide material dispute of facts – facts that cannot be resolved on pleadings - claim by lessor liquid in the face of deed of settlement signed by lessee - lessee does not dispute deed of settlement - lessee admits being in***

arrear rentals - lessee disputed letter of demand and laments failure to be given one month's notice of cancellation of new lease - such are irrelevant evidence - material facts not disputed.

Court : granted applicant's prayers.

Summary: By motion proceedings, applicant (lessor) seeks an order to exercise its rights of a lien over respondent's (lessee) household goods currently within its leased premises. It also calls upon the lessee to show cause why an interim order calling upon him to pay arrear rentals should not be made final. The lessee does not deny arrear rentals due but contends that the lessor has no cause of action and that arrear rentals in law cannot result in cancellation of a lease contract.

EX – TEMPORE JUDGMENT

The Parties

[1] The lessor is a legal person, duly incorporated and established in terms of section 4 of the King's Order-in-Council No. 23 of 1974. The lessee is an adult male residing at Unit 9, 27 Executive Houses, Extension 6, district of Manzini.

[2] The lessor's application came before my brother **Maseko J**. He granted the interim orders as prayed by the lessor. On the return date, the matter was opposed. The *rule nisi* was extended by my brother **Mlangeni J** and the matter was to take its normal cause. The matter

returned to my brother **Maseko J** who recused himself on the ground that the lessee was personally known to him over two decades and a half. It found its way into my court.

The Parties' contentions

The Lessor

[3] The lessor deposed that on 26th October 2016, it concluded a lease agreement with the lessee in respect of its premises Unit 9, Executive House, Extension 6, district of Manzini. The duration of the lease was from 1st November, 2016 to 30th September 2017 with monthly rentals of **E8848.36.** After expiry of the said written lease, the lessee continued to occupy the premises on a month to month lease agreement. The lessee took occupation of the premises on 1st November 2016. The lessor then pleaded:

> *"7.2 From the period commencing from November 2016 to date, the Respondent has failed to pay monthly rentals timeously or at all. In that regard rentals have been paid intermittently and not on a regular basis. The Respondent is currently in arrears with its rentals in the sum of* ***E131, 000.96 (One Hundred and Thirty One Thousand Emalangeni Ninety Six Cents****) for* ***Unit 9, 27 Executive Houses, Extension 6, Manzini, in the District of Manzini."***[1]

[1] Page 8 paragraph 7.4 of the book of pleadings

[4] The lessor contended further that despite numerous demands, the lessee has failed to pay. Instead, the lessee by a number of correspondences has requested the lessor to grant him indulgencies. The lessee failed to honour the indulgencies granted to him at his request. The lessor has attached the said correspondences alleged to have been authored by the lessee. The lessor then averred:

> *"7.4 The Applicant approached its attorneys to collect the arrear rentals. The Applicant's attorneys sent a letter of demand, which the Respondent replied to by making payment of* ***E10,000.00*** *thus leaving a sum of* ***E121,000.96*** *(****One Hundred and Twenty One Thousand Emalangeni Ninety Sic Cents****) asking to yet again settle in instalments. Thereafter the parties concluded an agreement of settlement. On or about the 16th October 2019 the Respondent attended to payment in the sum of* ***E23,000.00*** *leaving a balance of* ***E103,750.96****."*[2]

[5] The lessor concluded as its prayers as follows:

> *"1.1 The removal of any movables from the said premises be and is hereby interdicted;*
>
> *1.2 That the Messenger for the District of Manzini be and is hereby authorised and directed to:*

[2] Page 9 paragraph 7.4 of the book of pleadings

a) *Forthwith to serve the Notice of Motion and this Order upon the Respondent and to explain the full* nature and *exigency thereof to it;*
b) *Attach all movables upon the premises;*
c) *Make an inventory thereof; and*
d) *Make a return to the Applicant's Attorney and the Registrar of what he has done in execution of this order.*

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

2. The Respondent is further called upon to show cause why the Orders below should not be made final;

2.1 confirming the cancellation of the lease agreement between the Applicant and the Respondent;

2.2 payment of the arrear rentals and other charges in the amount of ***E103, 750.96 (One Hundred and Three Thousand Seven Hundred and Fifty Emalangeni Ninty Six Cents);***

*2.3 Ejecting Respondent from the premises owned by the Applicant on at **Unit 9, 27 Executive Houses, Extension 6, Manzini, in the District of Manzini**;*

*2.4 Interest on the sum of **E103, 750.96** at the rate of 9% per annum a tempore morae; and*

2.5 Costs of suit."[3]

The Lessee

[6] In his defence, the lessee raised a number of points of law. During the hearing, his Counsel contended that the lessor's cause of action was not clear. Justifying why it was not clear, Counsel pointed out that at lessor's paragraph 7.1, it was not correct that the lessee was on a month to month lease. Further, in law, failure to pay rentals does not result in cancellation of a lease agreement. He then asked for the court to discharge the *rule nisi* and dismiss the entire application.

[7] In his answering affidavit, the lessee attached a document purported to be a lease agreement and stated that its duration was from 1st October 2019 to 30th September 2020. At the time of instituting the proceedings, i.e. November 2019, the said lease agreement had just commenced. The deponent disputed any letter of demand from the lessor. He pointed out that he went to the lessor's offices to request for further indulgencies. He was told that his matter had been referred to the lessor's lawyers. He lamented the nature of the proceedings stating that it ought to have been brought by means of action proceedings so as to clarify his point on the letter of demand as well.

[3] Page 1-3 of book of pleadings

[8] The lessee continues to attack the lessor's prayer for terminating the lease agreement on ground that there was no letter of demand for arrear rentals in respect of the new lease agreement and that applicant failed to give it a month's notice before cancellation. Further, that the lessor could not cancel the old lease as it lapsed by effluxion of a time. Similarly, ejectment orders were not competent as the lessor had failed to state which lease agreement was breached. He deposed further that the *rule nisi* stands to be "*rescinded*"[4] as it was in complete violation of the *audi alterum partem principle.*

Determination

Issue

[9] Were the lessor's prayers competent under motion proceedings?

Legal principles

[10] The lessee as already alluded, despises lessor's claim sounding in money based on motion proceedings. He deposed that the lessor ought to have instituted action proceedings. Is this view correct?

[11] On the question on which form of procedure was a litigant expected to adopt, in **Williams case**[5] where the claimant brought proceedings claiming the sum of £**1, 292, 2s 6d**, by means of motion proceedings and the court *a quo* having dismissed the claim on ground that

[4] See para 12 page 34 (II) of book of pleadings
[5] **Williams v Tunstall 1949(3) 835**

application proceedings were disallowed in such claims sounding in money, **Maritz JP**[6] stated:

> ***"Now there is nothing sacrosanct about a summons and so, if the facts are not in dispute, there seems to be no logical reason for insisting on procedure by way of summons, if there is a more expeditious method of bringing the dispute to finality."*** (my emphasis)

[12] The learned Judge then referred to **E.Hlinger AJ**[7] as follows:

> *"I think it is clear that whatever the practice may have been many years ago, the present practice of this Court is to grant final orders whether for the payment of money or for any other relief where the facts are clear and are not really disputed."*[8]

[13] **Maritz JP** then concluded after quoting from a number of authorities on this subject:

> *"I find myself in complete agreement with the remarks of* ***Dowling J*** *subject to this qualification that I consider the safeguard that motion proceedings may be dismissed with costs if the applicant should have foreseen* ***an irresoluble dispute on fact*** *and adequate safeguard."* (my emphasis)

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[6] **Supra Page 836**
[7] **In Afrimeric Distributors (Pty) Ltd v E.I. Rogoff (Pty)Ltd 1948 (1) S.A.L.R. 569 at 574**
[8] **Supra at Page 837 of 1949 (3) SA**

[14] In the *classicus* case of **Room Hire,**[9] **Murray AJP** mentioned cases expressly sanctioned by statute such as insolvency matters that they are to be brought on motion proceedings. On the other hand matrimonial and illiquid claims should be by action proceedings. The learned Judge proceeded to point out that in ejectment orders, motion proceeding are permissible for their moreless expensive and expeditious. In the present matter, the lessor seeks for ejectment orders as well. The learned Judge's observation that motion proceedings are in order is therefore on fours in this regard.

[15] The learned Judge proceeded to outline the considerations on whether a party should proceed by motion or action proceedings:

> *"Inasmuch as the ascertainment of the true facts is effected by the trial Judge on considerations not only of probability but also of credibility of witnesses giving evidence* ***viva voce****, it has been emphasised repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of* ***viva voce*** *evidence, and the tendency of resorting to affidavits is deprecated* <u>*inter alia*</u> *by* ***Tindall, J.,*** *in* ***Saperstein v. Venter's Assignee (1929, T.P.D. 14, P.H. A. 71).*** ***<u>But where no real dispute of fact exists, there is no reason for the incurrence of the delay and expense recognized as permissible</u>.***"[10] (my emphasis)

[9] **Room Hire Co. (Pty) Ltd V Jeppe Street Mansions (Pty) Ltd 1949 (3) SA**
[10] Page 1162 of 1949 (3) SA

[16] Now the question serving before me is whether there are any *bona fide* material dispute of facts raised on behalf of the lessee to warrant a dismissal of the lessor's application in *toto*.

Dispute of facts raised on behalf of the lessee

[17] The lessee attached the lease agreement under which he stated that the lessor had based the claim sounding in money. He deposed that he had a new lease agreement and that the old lease agreement had expired. He also raised as an issue to be determined on trial through summons that the lessor never dispatched to it a letter of demand.

[18] On the other hand, the lessor had contended that arrear rentals since November 2016 to date of deposing to founding affidavit were **E131 000.96**. On a deed of settlement, the lessee paid the sum of **E10 000** and **E23 000.** This reduced the sum to **E103 750.96.** This is the sum claimed by applicant in the present application.

Adjudication

[19] The lessee does not dispute such payment. i.e. payment of **E10 000** and **E23 000.** In fact, the lessee does not dispute that there was a subsequent deed of settlement signed by him where he undertook to settle the balance of **E103 750.96** claimed in the present proceedings. What he disputes is that such deed of settlement had not been preceded by a letter of demand but was as a result of him under the direction of the lessor visiting the lessor's lawyers. That is neither

here nor there for purposes of enquiring whether an order is granted in favour of the lessor.

[20] What is relevant is that the lessee does not dispute firstly that he has been in breach of the lease agreement since 2016 by either failing to pay timeously or at all. Secondly, he does not dispute that he concluded a deed of settlement where he undertook to liquidate the arrear rentals. Thirdly, he himself deposed that he did visit the lessor's offices and later the lessor's lawyers to seek *"a further indulgence"* and this was *"after the expiry of the period"* he had *"undertaken to make payment"* of arrear rentals. The lessee further does not dispute the payments of **E10 000** and **E23 000.** The sum of **E23 000** was paid after the deed of settlement. It is reflected in the deed of settlement as follows:

> *"2.1 By way of payment in monthly installment of **E23,000.00** on or before Friday the 27th September 2019 and thereafter the outstanding balance shall be paid on or before Friday the 4th October 2019.*
>
> *2.2 All payment must be made at Waring Attorneys, The Office Park, Lot 324 Mahala Street, Mbabane."*

[21] It is the above payment that reduced the initial debt to **E103 750.96.** To the sum of **E10 000** paid prior to the deed of settlement, the lessee decided to raise:

*"**AD PARAGRAPH 7.4***

*I deny that the payment of **E10, 000.00** had anything to do with a letter of demand. What I know is that it was the deponent (Nomanini) who referred me to Waring Attorneys when I had come to her office to seek a further indulgence after the expiry of the period I had undertaken to make payment without me having received payment from my instructing attorneys. She told me that the matter was now beyond her and that I could consult attorney Wandile Maseko who had been instructed to recover the rentals from me on behalf of the Applicant. That was in mid-August, 2019.*

*7.1 The payment of **E10, 000.00** was the product of some informal negotiations between myself and attorney Maseko. It was during those talks that I made mention inter alia, of my desire to pay the rentals in respect of the new lease directly to Applicant's account as the attorneys had only been mandated to collect arrear rentals in relation to the expired lease."*[11]

[22] The lessor attached in its founding affidavit a number of correspondences authored by the lessee seeking for indulgencies to pay arrear rentals at later dates. It is therefore not surprising that the lessee did not dispute that he was in arrears and confirmed in his answer that he had asked for indulgencies.

[11] Page 31 – 32 paragraph 7 of the book of pleadings

[23] All the non-disputed averments were material facts to the enquiry on whether the lessee should be ordered to pay the lessor's liquidated claim and have the subsisting lease agreement cancelled. It is immaterial whether the lease is one as attached by the lessee or one of a month-to- month basis as contended by the lessor. What is paramount is that the lessee appreciates that he was in breach of both the 2016 lease agreement and the current agreement. The lessee chose therefore to dispute irrelevant evidence and admit material facts.

[24] Lastly, the lessee stated that the lessor could not cancel the lease agreement as its claim for arrear rentals was based on an expired lease agreement. He had not breached the new lease agreement. These averments are defeated by the lessee's attempts in liquidating the sum of **E131 000.96**. As already alluded, he paid firstly the sum of **E10 000** towards this debt. This is not denied by the lessee as demonstrated above.

[25] If there is a new lease, then clearly by the lessee depositing the sum of **E10 000** into lessor's lawyer's account was acknowledging that he was in arrears even in respect of the new lease as he admits that the lessor's lawyers were instructed to collect arrear rentals. This lends credence to the undisputed averment by the lessor that:

> "*From the period commencing from November 2016 to date,* (i.e. 7 November, 2019) *date of deposing founding affidavit the*

respondent has failed to pay monthly rentals timeously or at all."

*(*brackets and underlined my emphasis)

[26] In brief, if the lessee was paying the sum of **E10 000** and **E23 000** under the new lease agreement where he alleges he was not in arrears, he would not have deposited the two sums into lessor's lawyers accounts as he deposed to the effect that he was fully aware that the lessor's lawyers had been instructed to collect area rentals.

[27] Further, the arrear rentals which summed to **E131, 000.96** were reduced to **E121, 000.96.** The lessee acknowledged this fact when he later signed the deed of settlement with the lessor's lawyers. The deed of settlement reflected that the capital debt was then **E121, 000.96,** a clear indication that he acknowledged that the sum of **E10 000** partly liquidated his arrear rentals.

[28] It is folly of the lessee to claim that when he paid the sum of **E23 000** it was in respect of the November 2019 rentals. The question is then what of his undertaking to pay the sum of **E23 000** in terms of the deed of settlement? Is the lessee telling the court that he decided to breach the terms of his deed of settlement he had just signed i.e. September 2019, hardly two months ago? The answer is clear. Just like the undenied sum of **E10 000** paid to the lessor's lawyer, the lessee paid the sum of **E23 000** not distinguishing between old and new lease but in terms of the deed of settlement. That is the reason he failed to dispute the deponent's averment that "*from the period*

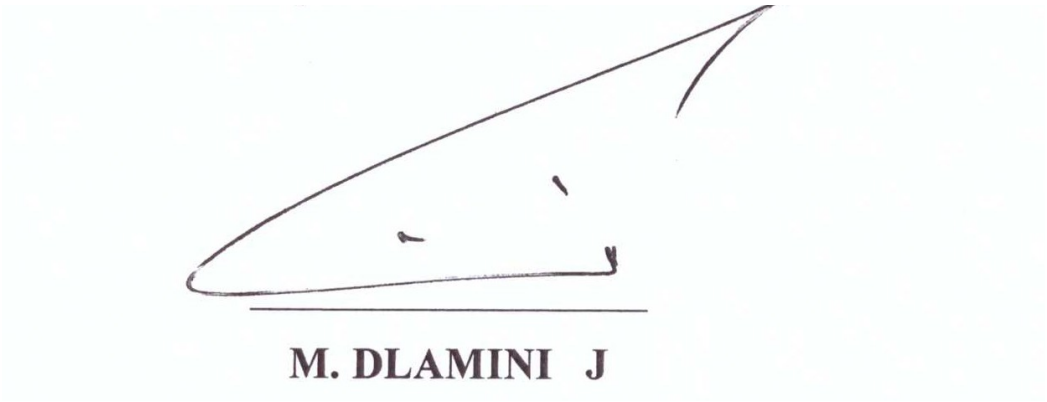
commencing from November 2016 to date i.e. 7th November 2019 (date of attesting to the affidavit*) the respondent has failed to pay monthly rentals timeously or at all."* In brief, to say that he has not breached the new lease agreement as he paid **E23 000** flies at his face in light of the aforegoing.

[29] Worse still, the rentals for October, November 2019 were not **E23 000.** They were in terms of the lease as can be deduced from the 2016 lease, **E8 848.36**. He further ought to have paid in October **E8 848.36**. Even if therefore, for a second, one were to accept that the sum of **E23 000** was paid for under the new lease, the lessee was already in breach of that lease in November 2019 when he paid the **E23 000** as already pointed out that he ought to have paid **E8 848.36** in October 2019 and **E8 848.36** in November 2019. To pay a lump sum of **E23 000** in November was a breach of the new lease if the lessee's averments are anything to go by. It is therefore not surprising that the lessee did not dispute that since inception of the lease to date (7th November 2019) he has either failed to pay rentals in time or at all.

[30] In terms of the **Plascon-Evans Rule**, taking the matter to trial in light of the above circumstances would have not disturbed the preponderance unless he intended to sing a new song on trial which even that, the law cannot contenance. The submission that the lessor ought to have given the lessee a one month's notice in the face of the glaring evidence of breach of the lease agreements are without merit in law. So is the lessee's contention that violation of a lease agreement does not result in cancellation of a lease agreement. To

further contend that the *audi alterum partem* principle was violated in the face of an answering affidavit at the instance of the lessee is tantamount to grasping at straws.

[31] In the results, I confirmed the rule and granted applicant his prayers.



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

For Respondent : **A.C. Hlatshwayo of T. L. Dlamini Attorneys**