

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 1019/2021

In the matter between

Tshepo Lloyd Mazibuko

Plaintiff

And

Jared Nissiotis

Defendant

Neutral citation: *Tshepo Lloyd Mazibuko v Jared Nissiotis (1019/21) SZHC 113 [2022] (3rd June, 2022).*

Coram : D Tshabalala J

Heard : 30/05/2022

Delivered : 03/06/2022

Summary: Civil law and procedure: Default judgment in an action for damages arising from repudiation, unpaid rentals, in breach of lease agreement terms.

Held: Damages proved, but must exclude replacement of items due to fair wear and tear.

DEFAULT JUDGMENT

[1] The Plaintiff issued summons against defendant on the 04 July 2020 for relief stated in the particulars of claim as follows:

(a) Payment of E116,808.55 (One Hundred and Sixteen Thousand Eight Hundred and Eight Emalangeni, Fifty-Five Cents) being the total damages for breach of Contract ranging from repudiation of contract, arrear rentals and total damage of the leased premises.

(b) Interest on the said amount at the rate of 9% per annum from the date of issue of summons to date of payment.

(c) Costs of suit; and

(d) Further and/or alternative relief.

[2] The Plaintiff and defendant entered into a lease agreement in terms of which the former leased his premises to the defendant, to wit, immovable property comprising a dwelling house located at Lot 1016, Hlanganani Street Dalrich West Mbabane Township, Hohho region.

[3] Plaintiff's case is that defendant breached the lease agreement terms. The lease commenced on the 1st May 2018 and was due to expire on the 2nd anniversary of the commencement date. Defendant took occupation accordingly. Subsequently defendant vacated the said premises on or about January 2020, and informed the plaintiff by phone. This happened prematurely as in terms of Clause 1 of the lease agreement, expiry date of the agreement was on 01/05/2020. The second breach was that termination of the lease was done without giving two months' notice envisaged by clause 1.1 of the lease agreement.

- [4] It is further alleged by the Plaintiff that the defendant is in arrears of payment of rentals to the tune of E40, 660. This amount is based on monthly rentals of E9,500.00¹ to which is added annual escalation of 7% per annum.²
- [5] Plaintiff alleges that defendant did not completely vacate the premises in that he left some of his items in the house. Defendant obtained Plaintiff's permission to keep the items which he eventually removed on the 10 February 2020.
- [6] Plaintiff avers that defendant's conduct amounted to repudiation of the contract rendering him liable to pay damages incurred by the Plaintiff, which computed thus:

Rentals:

As at May 2018: - 9, 500

As at May 2019: - 9, 500 + 7% = E10, 165

4 months premature termination:

E10, 165 x 4 = **E40. 660.00**

Arrear Rentals for November 2019, December 2019 and January 2020:

E10, 165 x 3 months = **E30, 495**

Total rental and arrears: E40, 660 + E30, 495 = **E71, 155**

¹ Clause 2.

² See Clause 3.2

- 1) Allowing pet dogs into the house leading it to be infested with pests and or bugs, and that this necessitated three rounds of fumigation. The Plaintiff alleges that he engaged fumigating specialists at the cost of E1, 265 per round, at the total of E3, 795. Only the first round has been paid for by plaintiff, he still owes payment for the other two.
- 2) Cost for replacement of carpet, at the cost of E12, 130.66 necessitated by among other things, the keeping of the said dogs on carpeted floors.
- 3) Re-painting of house walls dirtied by defendant's dogs, at the cost of E12, 294.

[8] Plaintiff makes further claim of E15, 816.30 for damage alleged to arise from repairs effected by Home Developers, comprising of broken floor tiles to main hallway, repainting kids' bedroom walls,³ master bedroom walls, fallen toilet paper holder, fixing flushing toilet cistern to main bedroom, replacing broken wardrobe shelf, aligning wardrobe doors, re-sanding and re vanishing TV stand, fixing main gate motor, cutting overgrown lawn, replacing missing toilet tap knob, broken towel rail, broken interior door, burglar door lock, fixing sliding door latch/lock system.

The fixing of all these items in ordinary course of living in a rented house would fall under fair wear and tear which falls under lessor maintenance,

³This is one of problematic claims in that there is also a lump sum already claimed under re-painting of walls said to be dirtied by dogs improperly allowed into the house, further re-painting of dwelling house interior wall often fall under fair wear and tear.

unless it was agreed otherwise, or there is proof of malicious or deliberate/negligent damage outside ordinary usage.

- [9] Defendant confirms in his plea that he was obliged to vacate the leased premises subject to two months' notice, per the provisions of signed lease agreement, but claims that he was forced to vacate without such notice to avoid embarrassment of eviction threatened by the Plaintiff for unpaid rent. Defendant asserts that he tendered to pay two months rentals in lieu of notice. It does not come out clear whether the promised payment was made. It is not clear why defendant would feel threatened for non-payment of rent if he had indeed paid. Defendant must provide proof of the 3 month's payment he claims was made.
- [10] Defendant disputes liability for E40, 660 in respect for rentals and alleges that he paid the rentals claimed for November, December 2019 and January 2020.
- [11] Defendant denies that his dogs caused the alleged infestation, maintaining that pest infestation occurred weeks after his departure. He therefore disputes liability for fumigation expense of E3, 795.00.
- [12] Defendant denies that his dogs caused damage to the carpet, alleging that the carpet was old when he took occupation. He therefore denies liability for cost of the new carpet installed by Plaintiff. Defendant seems to say he has no obligation to pay for E12, 130.66 reflected on a quotation for carpet replacement in the absence of proof that Plaintiff paid the amount.
- [13] Defendant disputes liability for the cost of repainting the house, alleging that the walls were soiled as part of fair wear and tear. Plaintiff claims E12, 294

as painting cost blamed on dogs, and painting cost under general repairs by Home Developers. Defendant avers that when he took occupation, painting on walls was already old.

- [14] Plaintiff alleges that defendant caused water to be disconnected to the property. Plaintiff paid reconnection penalties to the tune of E1, 617.34 which defendant is liable to pay. Defendant's response to this allegation is that he has no knowledge of it. He neither admits nor denies whether he caused water disconnection to the property, giving rise to re-connection fees paid by the Plaintiff.
- [15] Defendant denies liability for the total sum of E116, 808.55 alleged to be the result of repudiation of contract and breaching of lease terms by the defendant.
- [16] After close of the pleadings and when the matter was ripe for oral evidence, Counsel for defendant filed a notice of withdrawal as defendant's attorney of record. Thereafter the matter was postponed on many occasions pending proper service of defence Counsel's withdrawal notice on his client. Eventually a proof of service by registered mail was filed.
- [17] After more than 10 days since the mailing of the Notice of withdrawal, Plaintiff was eventually granted leave to proceed with trial in default of attendance by defendant who had not instructed another attorney nor appeared in court in person.
- [18] Plaintiff was also granted leave to file affidavit in prove of damages, which he filed on Monday 30 May 2022. The Plaintiff prays that the court grants

default judgment against defendant per the particulars of claim.⁴ the onus lies on the Plaintiff to prove alleged damages for all aspects of the claim. The first issue whether there was repudiation and breach of lease agreement it appears that the Plaintiff has made sufficient case. This is because defendant's excuse that he vacated the premises prematurely before expiry date without due notice of 2 months, to avoid eviction embarrassment is lame and constitutes no valid defence. Defendant does not deny the fact that he was threatened with eviction for non-payment of rent. Failure to pay rent in itself ran against lease agreement key terms. Defendant's bare allegation that he paid the owing rent arrears for November, December 2019 and January 2020 is not substantiated in any way.

- [19] In the circumstances, it is evident that defendant breached the lease agreement terms pertaining to rent payment as well as failed to give requisite notice of termination of the lease prior to leaving the premises.
- [20] Regarding damages for repudiation and breach of material lease agreement terms the Plaintiff is entitled to damages as proved in the amount of E30, 495 in respect of 3 months arrears and E40, 660 for premature termination of the lease in January which lease ought to have continued up to May 2019. There has been prove of damages to the total amount of E71, 155 under arrear rentals and for repudiation or early termination without due notice.
- [21] Plaintiff's claims for painting and general repairs are tainted with inconsistencies. It has not been shown how cutting overgrown law, for instance should form part of damages in this case. The court is unable to allow recovery for costs incurred for restoring what appears to be due to fair wear and tear. No evidence has been tendered to show that the broken

⁴ See para [1] of this judgement for details.

handles and knobs, alignment of doors etc were caused by negligence. There is no evidence that items were new and could not have worn out within the time they required to be replaced.

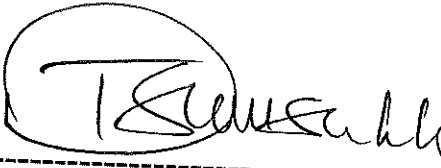
- [22] Painting of the walls that is blamed on dogs has been denied in defendant's plea. Re-painting that is not attributed to the dogs could have been due to time lapse since the last coats. There is no allegation that the walls had recently been painted and that they were negligently dirtied.
- [23] The need for replacement of carpets has not been shown to be due to undue damage by the tenant. Defendant states in his plea that the carpet was old and worn-out when he took occupation. There is no evidence to the contrary.
- [23] Water disconnection which gave rise to reconnection fees has not been denied by defendant. No justification was advanced, therefore it can only be assumed that water disconnection was as a result of defendant's fault. Plaintiff is awarded payment for the stated cost of E1, 617.34.
- [24] In conclusion, default judgment is granted against defendant, and damages are awarded to the plaintiff for the following:
- 1) E30, 449 arrear rentals.
 - 2) E40, 660 damages for 4 months premature termination of lease without notice, in breach of lease terms.
 - 3) E1, 617.34 for cost of restoring water connection to leased premises.

[25] In summary, defendant is therefore ordered to pay the following:

[25.1] E72, 726.34 (Emalangeneni Seventy-Two Thousand Seven Hundred and Twenty-six, and Thirty - Four Cents).

[25.2] Interest on the said amount at the rate of 9% per annum calculated from the date of this judgment until payment is made.

[25.3] Costs of suit.

A handwritten signature in black ink, appearing to read 'D Tshabalala', is written over a horizontal dashed line.

D Tshabalala
Judge

For Plaintiff: E Shabangu (Robinson Bertram Attorneys)

For Defendant: In default