

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 826 /2022

In the matter between:

CUSONS INVESTMENTS (PTY) LTD

PLAINTIFF

And

BULLBA LIFESTYLE (PTY) LTD

FIRST DEFENDANT

BONGISWA MHLANGA

SECOND DEFENDANT

Neutral citation : *Cusons Investments (Pty) Ltd v Bullba Lifestyle
& Another* (826/2022) [2022] SZHS 173
(08/08/2022)

CORAM:

B.S. DLAMINI J

DATE HEARD: 28 July 2022

DATE DELIVERED 08 August 2022

Summary: *Civil Procedure-Application to intervene in summary judgment proceedings-Third party applying to intervene and to be joined as second Defendant in main proceedings. Application to intervene not opposed by Plaintiff. Intervening party alleging that he is the one lawfully occupying the premises based on a lawful lease agreement.*

Held; *Application for summary judgment against the First Defendant is proper and competent and is accordingly granted. Application for summary judgment against intervening party or Second Defendant to be determined at a later stage. The issue of costs reserved.*

JUDGMENT

INTRODUCTION

- [1] The Plaintiff is Cusons Investments (Pty) Ltd, a company duly registered as such in accordance with the company laws of the Kingdom of Eswatini and has its principal place of business in Manzini, District of Manzini.
- [2] The First Defendant is Bullba Lifestle (Pty) Ltd, a company duly registered and incorporated as such in accordance with the company laws of the Kingdom of Eswatini with its principal place of business at Erf 254, Mhlakuvane Street, District of Manzini.
- [3] The Second Defendant is Bongiswa Mhlanga, an adult Liswati Businessman of Manzini, District of Manzini. The Second Defendant is the party who applied to intervene and to be joined as a party ("Second Defendant") in the main matter involving the Plaintiff and the Defendant). After the joinder was granted, the Defendant in the main matter became the First Defendant and the intervening party became the Second Defendant.

[4] During or around the 6th May 2022, the Plaintiff issued combined summons against the Defendant and sought orders as follows;

“(a) Ejectment of the Defendant and all those claiming occupation through or under it from the said premises.

(b) Costs of suit at Attorney and Own Client Scale.

(c) Further and/or alternative relief.”

[5] A Notice of Intention to Defend was filed and served by the Defendant on the 13th May 2022. The Plaintiff in turn filed an application for summary judgment on the 19th May 2022. The Defendant's Attorneys filed a Notice of Withdrawal as Attorneys of Record for the Defendant on the 2nd June 2022. A Notice of Substitution and Appointment was filed on behalf of the Defendant by *Martin N. Dlamini Attorneys* on the 8th June 2022. On the following day, namely 9th June 2022, the Defendant's Attorneys filed “a notice to defend by third party”. At almost the same time, an Affidavit Resisting Summary Judgment was filed and served by the Defendant's attorneys on the 10th June 2022.

- [6] When the matter came to Court on the 1st July 2022, The Defendant's attorney informed the Court that he is acting for both the main Defendant and the third party. At that point the Court informed Mr. Dlamini for the Defendant that there was no third party before Court and that if any party wished to join or to intervene in the proceedings, that party needed to follow the procedure as outlined in Rule 12 of the High Court Rules.
- [7] The Court granted the intervening party leave to file the necessary papers for joinder, and, even though the application for joinder was initially opposed by the Plaintiff, the latter later withdrew its opposition to the application. The Defendant's attorney informed the Court that he would be moving an application for joinder of the intervening party as Second Defendant and this was on the 1st July 2022. The application for joinder was eventually made on the 4th July 2022. The matter was allocated the 28th July 2022 for arguments after it could not be heard on the initial date of hearing namely, 21st July 2022.

- [8] On the 28th July 2022, the Plaintiff withdrew its opposition to the application for joinder of the third party as Second Defendant but insisted on summary judgment being entered against the First Defendant.

FACTUAL BACKGROUND

- [9] In the main matter, the Plaintiff alleges in its combined summons that it entered into a written lease agreement with the Defendant (now First Defendant) in terms of which it was agreed between the parties that;

(a) The Plaintiff leases its property described as Erf 254, Mhlakuvane Street, Manzini, District of Manzini to the First Defendant.

(b) The lease shall be for a period of two (2) years commencing from the 1st September 2020 and ending on the 30th October 2022.

- (c) The First Defendant is to pay to the Plaintiff monthly rentals of E 24,000.00 payable in advance on each calendar month.

[10] It is further alleged by the Plaintiff in its Particulars of Claim that;

“8. Defendant by correspondence dated the 4th January 2021, and as per Clause 4.1 of the parties’ agreement, owing to financial constraints, duly gave notice and did thereby exercise its right to cancel the written lease agreement and which cancellation was duly accepted by the plaintiff. A copy of the defendant’s cancellation is herein attached and marked “CJ2”.

9. Despite having lawfully cancelled the parties’ written agreement, the Defendant continued to hold over and or exercise possession and occupation over the property thereby lawfully assuming the status of a common law tenant and/or month to month tenant, and on the terms as previously expressed in the cancelled agreement. As a month to month tenant, the plaintiff is entitled, on a months’ notice, to seek the defendant’s vacation/eviction from its property.

10. *Despite numerous other correspondence, attached hereto and marked "CJ3", the plaintiff and by letter dated the 12th April 2022 gave notice of the cancellation of the parties' month to month tenancy to Defendant and demanded defendant's vacation /eviction from the property. A copy is herein attached and marked "CJ5". This was as well after the defendant had itself demanded "refund of its deposit" as per correspondence attached hereto and marked "CJ4".*

11. *Defendant to date has failed to vacate plaintiff's premises. Plaintiff is since desirous of the immediate enjoyment and possession of its property to further its own interests. Plaintiff is legally entitled to the free and undisturbed enjoyment and possession of its property... "*

[11] After filing a notice to defend, the First Defendant did not file a Plea to Plaintiff's Particulars of Claim but did file an affidavit resisting summary judgment. In the affidavit resisting summary judgment, it is stated on behalf of the First Defendant that;

"5. I wish to state that in as much as the Defendant had an agreement with the Plaintiff for a lease of the aforesaid

property that was to expire in October 2022, the Defendant resigned themselves from occupation and trading in the said property due to the no business [sic] that resulted from the closure of liquor operation due to Covid 19 pandemic.

5.1. I wish to aver that the parties amicably agreed to the said closure and Defendant upon closure handed all locks and keys to Plaintiff with no outstanding rentals but only the security monies paid as double deposit amounting to E 24,000.00 which Plaintiff still owes to the Defendant even despite demand.

*6. I wish to state that around the month of October 2021, the Defendant was approached [by] one Bongiswa Mhlanga who claimed to have been leased the aforementioned premises by the Plaintiff and required to be afforded the Trading License of the Defendant for purposes of running the same business and or trading in his name but using the style name of **Bullba Night Club** which the Defendant agreed.*

7. I further wish to aver that the said Bongiswa Mhlanga was directed by the Managing Director of Plaintiff at the time being

one Eric Cuter since the initial Managing Director had passed on by the time.”

[12] In the application to intervene by one Bongiswa Mhlanga (Second Defendant), it is stated by the latter that he concluded an agreement in October 2021 with the Plaintiff to take over the premises allegedly previously occupied by the First Defendant and that such lease was for a period of four years not exceeding the 30th September 2025.

[13] In answer to the application for joinder, the Plaintiff, through an affidavit deposed to by one Eric Cuter (same person who allegedly signed the lease agreement between the Plaintiff and the Intervening Party), denies have offered the premises to the Second Defendant and in particular denied that the signature in the alleged lease agreement between the Intervening Party and the Plaintiff is his signature. In essence, the Plaintiff denied the existence of a lease agreement between itself and the Second Defendant.

ANALYSIS AND CONCLUSION

[14] On the 28th July 2022 the Court was seized with an application for summary application against the First Defendant, namely Bullba Lifestyle (Pty) Ltd as well as the application for joinder by the intervening party. It is important to note that the previous attorney, Mr. Martin N. Dlamini represented both the First Defendant and the Second Defendant (Intervening Party). On the 21st July 2022, a new attorney appeared in the matter and informed the Court that he was the new attorney of record for the Second Defendant. There was therefore no appearance on behalf of the First Defendant. On this day, namely 21st July 2022, the Court directed the new attorney of record to inform the previous attorney to file a notice of withdrawal and that he (new attorney) was also required to file and serve a notice of appointment as the new attorney of record for the Second Defendant. The Notice of Appointment and Substitution was only filed on the 28th July 2022 which was the date allocated for arguments in the matter. This notice indicates that the new attorneys are representing the Applicant (Second Defendant) in the application for joinder.

[15] There was therefore no appearance on behalf of the First Defendant on the 21st and 28th July 2022. When the Plaintiff's attorney made an

application for summary judgement against the First Defendant, the Second Defendant's Attorney, who had, on record informed the Court that he is only appearing for the Second Defendant, stood up and sought to oppose the application for summary judgment against the First Defendant. The Court enquired several times from the Second Defendant's attorney on his authority or *locus standi* to oppose the application against First Defendant given that he was mandated to act only for Second Defendant and the Court could not get a clear answer. The only response given by the Second Defendant's attorney was that if the Court were to grant summary judgment against the First Defendant, then Second Defendant's case would be rendered hollow or academic.

- [16] The Second Defendant's attorney was again probed several times by the Court on how exactly the Second Defendant's opposition to the application will be rendered academic if summary judgment is granted only against the First Defendant and, similarly, there was no forthcoming and clear response to that enquiry by the Court. The First and Second Defendants are two separate and distinct legal persons. The Court was not informed of any relationship between the two

except that the allegation that Second Defendant requested from the First Defendant to utilize the latter's trading license and also its' trading business style. Whether this arrangement is legally permissible was not an issue before Court. The Court can only express the view that this arrangement between the First and Second Respondent may not permissible within the laws of the country.

[17] Even though there was no appearance on behalf of the First Defendant on the 21st and 28th July 2022, the Court is, nonetheless required to carefully scrutinize the papers filed on behalf of this entity, in particular the affidavit resisting summary judgment filed by it.

[18] The Court noted that the First Defendant did not file a Plea to Plaintiff's Particulars of Claim. In its Particulars of Claim, the Plaintiff alleged that despite issuing notices to vacate the premises, the First Defendant had nonetheless continued to occupy the premises and had done so despite the Plaintiff issuing several notices and reminders for it to vacate from the premises. These averments made by the Plaintiff in the particulars of claim have not been disputed by the First Defendant in the form of a Plea.

[19] In the affidavit resisting summary judgment, it is contended by the First Defendant that upon it shutting down operations, it handed all locks and keys in respect of the premises to the Plaintiff. There is however no mention of the name or official who received the keys and locks on behalf of the Plaintiff and when and where exactly this was done. On the other hand, the Court notes that the Plaintiff itself was required to do more than merely allege that the First Defendant is still in occupation of the premises. A full disclosure of the facts and evidence of presence or continued occupation by the First Defendant was required to be made by the Plaintiff, for instance, presence of goods and equipment; presence of activity and personnel on the premises or failure to surrender the locks and keys are but some of the examples.

[20] In the particulars of claim, the Plaintiff referred the Court to at least two letters written to the First Defendant in terms of which the latter is requested to vacate the premises. The letter written by the Plaintiff on the 12th April 2022 addressed to the First Defendant was giving the latter a period of 30 days to vacate the premises. This letter was

received and signed for on behalf of the First Defendant by one Phindile Mabuza on the same day. As already indicated herein above, this assertion has not been disputed by the First Defendant.

[21] Despite all the letters written to the First Defendant by the Plaintiff, there are no counter-letters or other form of communication in which the First Defendant expresses the position that it vacated the premises or that the Plaintiff is mistaken in its belief that it (First Defendant) is still in occupation of the premises. This fact, in addition to what has already been alluded to above, tips the scale of justice in favour of the Plaintiff in terms of the latter's assertion that First Defendant is still in occupation of the premises.

[22] In the Supreme Court case of **Pots Construction and Technical Services vs Kukhanya (Pty) Ltd/Gabriel Couto JV and 2 Others (38/2020) [2020] SZSC 10 (3rd June 2021)**, it was held as follows by the Court;

“[35] This Court has had to pronounce itself on the essential elements for application [for] summary judgment. In this regard see DULUX PRINTERS (PTY) LTD vs APOLLO

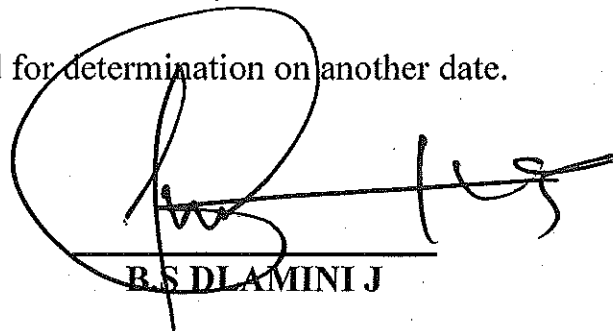
SERVICES (PTY) LTD (72/12) [2013] SZSC 19 (31 MAY 2013); SWAZILAND NATIONAL ASSOCIATION OF TEACHERS vs EXPROP INVESTMENTS (PTY) LTD (43/2014) [2014] SZSC 79 (03 DECEMBER 2014) and GODFREY KHETHO SIBANDZE vs SALIGNA DEVELOPMENT CO. (PTY) LTD (59/2016) [2017] SZSC 33 (09th OCTOBER 2017), to mention but a few.

[36] In the present proceedings I single out only one requirement as the matter rests on it alone namely the requirement that in an affidavit resisting Summary Judgment the Respondent has to demonstrate a bona fide defence to the claim and not a mere denial (see DULUX PRINTERS (PTY) LTD (supra)."

[23] The First Defendant was, in line with the myriad of authorities required to disclose a valid and solid defence to the allegation that it is still in occupation of the premises despite its notice to voluntarily vacate same. It would indeed be absurd and surprising for the Plaintiff to write letters to the First Defendant and further enlist the services of attorneys to obtain an order for the ejectment of the First Defendant

when in fact the latter was no longer in occupation of the premises. It is highly improbable that the Plaintiff would engage in all these processes when in fact the First Defendant vacated the premises.

[24] It is on these grounds that on the 28th July 2022, the Court granted summary judgment against the First Defendant. The summary judgment was entered into only against the First Defendant. The Second Defendant still has a right to file and serve opposition papers as an independent party in the proceedings in line with the Rules of Court. The issue of costs is, in line with the order of the 28th July 2022, reserved for determination on another date.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by 'S' and 'Dlamini J'. The signature is written over a horizontal line.

THE HIGH COURT OF ESWATINI

For Plaintiff: *Mr. MTM Ndlovu (MTM Ndlovu Attorneys)*

For First Defendant: *No Appearance*

For Second Defendant: *Mr. S.M Jele (S.M Jele Attorneys)*