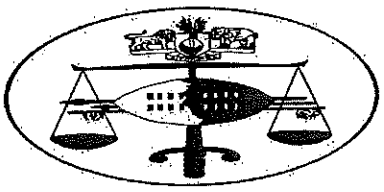

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE Case No. 1198/2022

In the matter between:

WAFA WAFA INVESTMENT (PTY) LTD Applicant

And

RODGERS MABHOYANA DU PONT 1st Respondent

MHHAMUZA NTUTHU INVESTMENTS (PTY) LTD 2nd Respondents

Neutral citation : ***Wafa Wafa Investments (Pty) Ltd versus Rodgers Mabhoyana Du Pont (1198/2022) [2022] SZHC* 250 (8th November, 2022)**

Coram : **M. Dlamini J**

Heard : **3rd November, 2022**

Delivered : **8th November, 2022**

Freedom of contract and doctrine of election:

This doctrine clearly points out that the injured party to a contract that has been repudiated by the other party has a right to insist on its specific performance and obtain an order. He cannot be compelled to sue for damages if he opts to insist on specific performance in as much as that option to sue for loss of income is available to him. [27]

EX TEMPORE JUDGMENT

Summary: By means of motion proceedings, the applicant seeks for both a declaratory order to the effect that a lease agreement between it and 1st respondent be held valid. It also seeks for ejectment of any occupant from the premises. The 1st respondent is opposed to the application on the main ground that the applicant should sue for damages.

The Parties

[1] The applicant is a company duly registered in terms of the company laws of the Kingdom. Its main place of business is at Mankayane, district of Manzini.

[2] The 1st respondent is an adult male of Croydon, district of Manzini. He is the Director of 2nd respondent.

The Parties' Depositions

The applicant

[3] Around 7th October, 2016, the applicant and 1st respondent concluded a lease agreement. The applicant, as lessee, was to lease the premises from the 1st respondent, as lessor. The lessee was to run a filling station at the lessor's premises situate at Croydon, Manzini district. The duration of the lease agreement was five (5) years. There was a renewal option for a further three (3) years. 1st respondent was represented by his wife.

[4] After the lapse of the initial lease agreement, the parties concluded a new lease agreement for a further five (5) year term. This lease agreement commenced on 1st November, 2021 and was to end on 30th October, 2026. Again, a clause for an option to renew was provided. This lease was signed by 1st respondent and the deponent to the founding affidavit as director of applicant. The applicant then paid a sum of E20 000 as security and rentals in terms of the second lease agreement. The applicant continued to do business for a period of two months under the new lease agreement.

[5] Having taken occupation under the new lease agreement, the parties, viz. 1st respondent and applicant decided to change fuel suppliers from Puma Energy Swaziland to Total Energies Eswatini. This meant that there would be a face lift from Puma to Total including change of pumps. Eswatini Revenue Commission (former SERA) needed an environmental report and a supply agreement between 1st respondent and Total before it could issue the retail licence. As a result, the

operations of the filling station had to be halted. During the non-operation of the filling station, applicant continued to pay its rentals under the new lease agreement.

[6] The applicant had to pay a number of expenses such as fuel licence with SERA and other expenses to secure certain reports towards the retail licence. Applicant spent over and above the rental fees a sum of about E110 000. Total demanded 1st respondent to register a company as it did not deal with natural persons. Further, Total pointed out that it deals with landlords and not tenants. It is then that 2nd respondent was registered. All registration costs of 2nd respondent, a company whose director is 1st respondent, were bone by applicant. The parties agreed that such expenses would be set off against rentals.

[7] Total and 2nd respondent then concluded the supply agreement. However, 1st respondent submitted this agreement to SERA under 2nd respondent. To applicants' surprise, the filling station started operating.

Respondents

[8] The respondents have raised a non-joinder point of law. They further contended:

> *"3.2.1. In the circumstances of this matter, the relief of a declaration of rights is an incompetent relief in that the Applicant's interest is merely academic and the circumstances do not justify the Order.*

3.2.2 *The Lease which Applicant is seeking to have this Court declare valid was purportedly signed on an unspecified date in October 2021.*

3.2.3. *There are foreseeable disputes of facts in that the current Lessee possesses a Lease concluded in December 2020, whilst the Applicant has annexed one dated October 2021."*[1]

[9] The above averments were repeated as follows:

"3.3.3. *An event that has occurred cannot be interdicted. The relief sought herein is now academic and has become moot. An event that has passed cannot be interdicted."*[2]

[10] Turning to the second lease agreement, the respondents contended:

"7. ***Ad paragraph 7***

I admit this lease, but contend that the same was concluded in error with the Applicant. In December 2020, I had already concluded a Lease with another tenant. A copy of the lease is attached hereto marked ***"A"****. To that extent, I served Applicant in December 2020 with a Notice of cancellation of the Lease as the new tenant was going*

[1] Page 37 paragraphs 3.2.1, 3.2.2,&3.2.3 of the Book
[2] Page 38 paragraph 3.3.3 of the Book

to pump in the required capital to revitalize the place and in turn clear bond amounts. A copy of the Notice is annexed hereto marked ***"MD1".***[3]

[11] On the rentals paid by applicant it was asserted:

> *"8.1 I deny that the Applicant paid me* ***E20, 000.00*** *rental. The total sum paid by the Applicant which I tendered through my attorney to refund was the sum of* ***E40, 000.00****.*
>
> *8.2 The filling station was not operational. But the deponent offered to (as he was operating a bottle store and bar on the Farm) if he could assist me with the sum of E10, 000.00 monthly so I could continue paying my son's school fees in Ukraine. And once the filling station was operational, I will refund him.*
>
> *8.3. Perhaps, owing to my level of education, I may have been misunderstood by the Applicant. It would not make sense to continue paying rental for a place that was undergoing refurbishment. Although I did Notice that the deponent was not eager to leave the place. I did not suspect anything. We had grown to be close to each other."*[4]

[3] Paragraph 7 page 41 of the Book
[4] Page 41 paragraphs 8.1, 8.2, 8,3 of the Book
[5] Page 42 paragraph 8.5 of the Book

[12] It was also averred:

> *"8.5 In good faith, I entrusted my attorney to engage with Applicant's Attorneys for purposes of refunding him all his money. I therefore expect that the Applicant would be suing me for same and nothing to do with the filling station and interdicts. We are passed that stage now. Sadly his application falls short of the requirements of establishing either a declaration of rights or an interdict."*[5]

[13] On the payment for the registration of the 2nd respondent by the applicant, respondents answered:

> *"12.* ***Ad Paragraph 14***
>
> *These allegations are denied. Applicant is using personal information I shared with him in confidence to twist the facts.* ***I also agreed to refund him the sum of E2, 500.00.***"[6]

[14] The respondent further contended that applicant made an offer to be paid compensation and that was accepted. On this however the respondent pointed out that the figure claimed as compensation was too high. Respondents then offered applicant half of that figure which was under no prejudice.

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[6] Page 44 paragraph 14 of the Book

Adjudication

[15] The respondents raised a number of technical points in disputing the applicant's prayers. He first raised that the applicant failed to join the present lessee. The applicant deposed in its founding affidavit:

> *"I was therefore surprised to learn that, after the 1st respondent was furnished with the supply agreement by Total, he went behind our backs and filed another application with ESERA for a retail licence in favour of the 2nd respondent Company."*[7]

[16] Applicant further deposed:

> *"However, on or about the 17th June, 2022, I discovered that the Filling Station on the premises in question was not operational. I have no further details with regards thereto, save to assume that the application for the retail licence for the 2nd respondent was successful and now the Respondents are operating the filling station."*[8]

[17] It is therefore not clear why respondents are challenging the applicant for a non-joinder of a third party when the applicant states clearly that

[7] See para. 16 page 7 of the book
[8] See para 17 at page 8 of the book

he believes that the 2nd respondent holds licence and is operating in the premises. The applicant has cited the 2nd respondent whom it believes is operating the filling station. Applicant did not assert that there was a third party operating the filling station thereby giving the need for it to cite this third party. This point has no basis therefore in law.

[18] Another point of law raised on behalf of the respondents is that following that the filling station is operational, applicant's interest is academic. This point is totally devoid of law and only points that respondents are grasping at straws.

[19] The respondents did not dispute the expenses paid by the applicant but only the sum paid. A lesser sum was admitted by respondents. This is not an application for refund or claim for monies paid but one for specific performance, enforcing the terms of the lease agreement. On this ground, this is not an issue to be referred to trial as so contended by respondents.

[20] There are foreseeable disputes of facts in that applicant's lease agreement was signed after the lease that is operational. The operational lease was signed in December, 2020 while applicant's lease in October, 2021. This statement is again a total distortion of the applicant's founding affidavit. Firstly, the applicant did not depose that there was a lease signed in December, 2020. Clearly these are averments privy to the respondents and not the applicant. A dispute of fact cannot arise from facts that are not privy to the other party. Applicant, as pointed above, contended that the 2nd applicant was running the filling station despite a lease in its favour.

[21] Secondly, the litmus paper test on the question of disputes of facts was well established under the **Plascon-Evans Rule**. The court must consider the material issue and decide if it is challenged. In the present case, the main question is whether the respondents disputed the averments by applicant that in October, 2021, it concluded a second lease agreement which was to expire in 2026. If such is not challenged, then there is no dispute of facts. That the operational lease pre-dates the applicant's lease does not go to the core question, more specifically considering the background tabulated by the applicant that a lease

agreement which was to lapse in 2021 was concluded between the 1st respondent and the applicant in 2016. By their very admission that the applicant's lease was concluded albeit in 2021, this demonstrates that there are no disputes of facts herein.

[22] The respondents cannot claim a dispute of fact in this matter as on the question of the lease upon which applicant seeks the orders, at paragraph 7 of the answering affidavit, the respondents deposed that they were admitting the lease agreement between 1st respondent and the applicant. They contend however, that 1st respondent signed the lease in error. The 1st respondent does not state how the applicant contributed to such an error or what circumstances which could be attributed to the applicant that caused him to commit such an error. The 1st respondent merely makes a blanket averment of an error without elaboration. With due respect, the court cannot accept such. The respondent ought to have demonstrated a genuine error precipitated by the applicant. This cannot be accepted. This is more so as the applicant deposed that having signed the said lease agreement and having operated for a period of two months under the second lease agreement, applicant and 1st respondent both agreed to change the supplier of the fuel. These was after the first

lease agreement between the same parties had run its full course from 2016 to 20221. These averments were not challenged. The question then is, where was the tenant of the lease agreement which was concluded in December, 2020? Worse, still, 1st respondent received the rentals. Further respondents do not dispute that the applicant paid for the registration of 2nd respondent and the expenses for securing the SERA's report. All it does is to dispute the figures expended. The question is, 'Why put the applicant into such process, if both parties were not working towards achieving the purpose of the lease agreement between applicant and 1st respondent' as averred by applicant? All these demonstrate clearly that there was no error committed by any of the parties.

[23] The parties further exchanged correspondences through their attorneys. None of the correspondences herein refers to an error in concluding the lease agreement. The averments on error stand to be rejected therefore.

[24] Respondents asserted that the applicant has failed to establish a *prima facie* right. The respondent has attached a copy of the said lease

agreement which is not denied by the respondents. The applicant has therefore established a *prima facie* right to the claim.

[25] The respondents have stated that the applicant made an offer which was accepted. They contend that the applicant offered to accept compensation. I doubt if the language used herein finds support in law. That as it may, the respondents, in terms of the correspondence to the applicant was that it shall pay a lessor sum as claimed by applicant. There was no correspondence showing that the applicant accepted to settle the matter by compensation of the sum offered by respondents. In brief, even if for a second, the court were to accept what the respondents stated as an offer that was accepted, the applicant did not accept to receive the suggested sum by respondents. In that regards, the court concludes that if there were any negotiations to settle the matter, they did not materialise. As pointed out by the respondents themselves, these were on a without prejudice basis. It is therefore not clear why the respondents have elected to divulge such information to the court. The rules of common law are clear as to when information classified as without prejudice can be offered as evidence. Certainly not when the parties minds did not meet on the issue.

[26] Respondents have asserted that the applicant should accept compensation and not insist on the terms of the lease agreement. This assertion by the respondents over-looks a cardinal point in our law. It is referred to as freedom of contract. Under it emanates the doctrine of election. Writing on this doctrine, **Nicholas AJA**[9] citing **Cohen JA** stated:

> *"Plainly, where a party elects to terminate the contract, he cannot thereafter change his mind: the contract is gone.* ***But if the injured party elects to abide by the contract and obtains a decree of specific performance,*** *and the defaulting party refuses or fails to comply with the order, what is the plaintiff to do with the property? Is he to hold it indefinitely at his disposal? The answer is no. In such a case it would be competent for the plaintiff to ask in another action in lieu of that decree, for cancellation of the contract and damages.* ***And there is no reason in law why the plaintiff in an action should not claim specific performance, and ask alternatively (should there not***

[9] Culverwell and Another v Brown 1990 (1) SA 7(A) at 17B-F

be performance within the time fixed by the Court) for an order cancelling the contract and directing the defaulting party to pay damages. *. . . And where the injured party refuses to accept the repudiation and thereby allows the defaulting party to repent of his repudiation and gives him an opportunity to carry out his portion of the bargain, and the defaulting party nevertheless persists in his repudiation, the injured party is entitled to change his mind and notify the other party that he would no longer treat the agreement as existing, but that he would now regard it as rescinded and sue for damages.'*

[27] This doctrine clearly points out that the injured party to a contract that has been repudiated by the other party has a right to insist on its specific performance and obtain an order. He cannot be compelled to sue for damages if he opts to insist on specific performance in as much as that option to sue for loss of income is available to him.

[28] Clearly, in the present case, the applicant is insisting on the terms of the lease agreement. The applicant has exercised its right of election. It is

in law entitled to do so. To say otherwise would interfere with the freedom of contract principle, as it were.

[29] In the result, I granted the declaratory order to the effect that applicant's lease agreement was valid and subsisting. It ought therefore to take occupation of the leased premises.

M. DLAMINI J

For applicant : **B. Phakathi from Phakathi, Jele Attorneys**

For respondents : **K.Q Magagula from Sithole Magagula Attorneys**