

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 1018/21

In Matter between:

INTERPARK SWAZILAND (PTY) LTD

APPLICANT

And

OKUMHLOPHE INVESTMENT (PTY) LTD

1ST RESPONDENT

JAMESON LINDA GIDI MATSEBULA

2ND RESPONDENT

Neutral citation:

Interpark Swaziland (Pty) Ltd V Okumhlophe Investment (PTY) LTD and Jameson Linda Gidi Matsebula (1018/21) SZHC 277 [2021] (15th December 2022)

CORUM: Z. Magagula J

Dates heard: 05.04.22

Date delivered: 15.12.22

JUDGMENT

- [1] The applicant made application to this court seeking orders to perfect the landlord's hypothec, cancellation of the lease agreement between the parties and payment of sum of E 729 615.65 in respect of arrear rentals and other ancillary relief.
- [2] On the 4th of June 2021, the court, granted interim orders, as it is wont to do in such cases and on the 11th June 2021, the interim orders were confirmed. On the 16th June 2021, the respondent, as applicant instituted urgent proceedings seeking, in the main that the order of this court of the 11th June 2021 be rescinded and/ or set aside and that respondent be granted leave to oppose the main application. On the 4th august 2021 the court rescinded and set aside the final orders and re-instated the interim order. The parties having filed the complete set of affidavits, filed a paginated book of pleadings with heads of argument, the matter was then called before me, for argument on the main application.
- [3] During arguments, it transpired that the premises were still under the control of the Deputy Sherriff as movables attached by virtue of the order of the 4th June 2021 were still kept therein. Having ascertained from Mr. Mabuza, attorney for the respondents that in respective of the outcome of the matter, the respondents did not- wish to trade in the premises, I ordered that the premises be, forthwith delivered to applicant, that the deputy sheriff prepare on inventory of the goods attached and remove them from the premises and that this exercise be done in the pressure of both counsel.

Pleadings

- [4] In its founding affidavit, the applicant contended that the parties entered into a lease agreement on the 13th September 2017 in respect of shop no: CD 101, the Gables Galleria Shopping Center, portion 119 (a portion of portion 60 of portion 21) of farm no. 51 Hhohho, Ezulwini. The terms of the said lease agreement were, *inter alia* that the cease would endure for an initial period of 3 years commencing from 1st November 2019. The monthly rental would be the sum of E 51 825.33 escalating yearly at the rate of 8%. Another term of the lease agreement was that the respondent was to pay the sum of E 155 484.99 as security for the due performance of

its obligations in terms of the lease. Rental was to be paid monthly in advance before the 1st day of the month.

- [5] In terms of the agreement, the respondent, as lessee, would be responsible for settling all utility bills, such as water and electricity which were to be paid the applicant. I take this to mean that the bills would be included in the monthly rental statement. The respondent would also be liable to a 2% interest above the prime interest rate on all outstanding payments. Should the respondent fail to comply the terms of the lease agreement on two or more occasions and fail to remedy the breach, the applicant, without prejudice to any other rights that it may have, may alter the terms of the lease such that the lease may become terminable by giving a month's notice.
- [6] The applicant alleged that the respondent took occupation of the premises on the 1st November 2019 and immediately failed to comply with the terms of the lease agreement in that he failed to pay rentals timeously or at all such that as at the date of the institution of the proceedings, the total areas amounted the sum of E 729 615.65.
- [7] In its answering affidavit, deposed to Jameson Linda Gidi Matsebula, the director of the respondent, the respondent raised a point in *limine*. The respondent argued that the application was fatally defective because in the founding affidavit the applicant had failed to demonstrate how the sum claimed in respect of the arrear rental had accumulated. There was no indication of which months had rentals not been paid.

On the merits, the respondent argued that it has always paid its rentals faithfully, until the onset of the Covid-19 pandemic in March 2020 when the Government imposed a lock-down. The respondent argued that it sought for a "Covid cushion" or rent reduction on account that its business was closed. This it was promised by the applicant but never given. At some point applicant made a verbal promise that the May 2021 statement would reflect the relief but this did not happen. However, the respondent discovered that the applicant had afforded it relief of E 224 437.16 and this only in June 2021 when applicant filed an answering affidavit in the application for rescission of judgement instituted earlier in these proceedings by the respondent.

- [8] Respondent further argued that despite that the lease agreement was signed on the 13th September 2019, occupation was taken on 1st November 2019 as the premises were being renovated. The respondent averred that the necessary improvements made by it to the premises amount to the sum of E 333, 454.79 and went on to give precise details on what improvements were made. The respondent averred that it had paid a total of E 428 000.00 towards rent plus the sum of E 155 484.99 paid as deposit. The respondent contends that it is only indebted to the applicant in the sum of E 88 820.34, which sum it tendered to pay.
- [9] In its replying affidavit, the applicant sought to clarify the issues by stating the following at paragraph 9.1:

ANALYSIS

9.1 I wish to state that the 1st Respondents monthly rental charges would vary from month to month as they would include utility charges (as reflected in the statement). The summarized transaction between the parties can be tabulated as follows;

Total rentals to be paid between the period Nov 2019 to June 2021	Less total monies paid by the 1 st Respondent	Less COVID allowance	Less rental Credit Waiver	Total (arrear rentals)
E 1, 506, 655.39	(E 493, 000.00	(E 224, 437.16)	(E 59,602.58)	E 729,615.65

It is a trite principle of the law in this jurisdiction that a party stands or falls on the allegation in the founding affidavit, this was affirmed by **Ebersohn AJ** (as he then was) in **Shell Oil Swaziland (pty) LTD v Motor World (pty) LTD t/a Sir Motors civil case no. 04/2006**.

"It was held on innumerable occasions that an applicant must stand or fall by the founding affidavit"

Essentially this means a litigant instituting motion proceeding must set out all the facts that he relies on for relief.

Rule 6 sub rule (11) of the Rules of this court provides:

"Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit or affidavits as to the facts upon which the applicant relies for relief" So the founding affidavit must contain inter alia facts that fully demonstrate the cause of action on which the party relies.

- [10] But it was held in **Baeck and co. S.A (pty) LTD v Zummeren and another 1982 (2) S.A 112 (w)** that;

"Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit the approach of the court should nevertheless always be to attempt to consider substance rather than form in the absence to prejudice to the other party"

This case was quoted with approval by **Tebbat J.A in Shell oil Swaziland (pty) LTD v Motor world t/a Sir Motors Civil Appeal case no.23/2006.**

- [11] I am persuaded to consider the applicants replying affidavit-adhere to substance rather than form. No prejudice is occasioned on the respondent by merely expanding on the computation.
- [12] In *casu* the applicant's cause of action is arrear rental. It is therefore incumbent upon the plaintiff to set out in the founding affidavit, in a clear and concise manner. The applicant ought to indicate in the founding affidavit (a) the amount claimed in respect of arrear rentals (b) the months in respect of which such rentals are claimed and (c) where such rentals include utility charges such as water, electricity, and the like, the amount claimed for such ought to be stated separately.
- [13] It is clearly not enough for the applicant to annex to its founding affidavit a long and often complex statement and expect the court to do the math. A failure to comply with the above renders the application defective. But in the particular circumstances of this matter, I would slow to hold that such a defect is fatal to the application. This I say because the respondent concedes that it was in areas as at the date the proceedings were instituted.

Now in the terms of the lease agreement, the monthly rental was the sum of E 51 828.33 plus utilities such as electricity, water and diesel for the stand- by generator. The lease further provides that where a separate meter

has been installed for either electricity or water, the respondent would pay directly to the supplier, but where a sub-metre has been installed then the respondent would pay to the applicant on demand. The court has not been told whether meters were installed or not. A simple arithmetic would show:

Payments from November 2019 to 31 October 2020 should have been $12 \times 51\,8284.33 = \text{E } 621\,939.96$.

Payments between 1 November 2020 to June 2021 8 months $\times \text{E } 55\,974$ [inclusive of 8% escalation] = $\text{E } 44 = \text{E } 447\,792.00$

- [14] Total due from respondent to applicant for the entire period respondent was occupation of the premises in the sum of E 1 069 731.96. The respondent apparently paid the sum of E 493 000.00 during his period; was given covid relief in the sum of E 224 437.16 and a further E 59 602.58 as a rental credit waiver. The outstanding rental then due by respondent in my reckoning should be calculated in this manner.

Total rental due for the period	E 1 069 731.96
Less payments	E 493 000.00
Less covid relief	E 224 437.16
Less rental credit waiver	E 59 602.58
	<hr/>
	<u>E 292 692.22</u>


- [15] According to the lease agreement and confirmed in the founding affidavit, the respondent was required to pay a deposit in the sum of E 155 484.99. it would appear that this amount was not paid and it cannot be claimed at this stage. What the applicant also could claim but there was no proof of such, is the payment in respect of the utilities. It behooves repeating that in a claim for arrear rental the claimant is obliged to set out succinctly the heads or the various amounts which make up the claim. The court cannot rubber stamp a globular figure presented by the applicant.

- [16] It follows that the claim for any improvements made on the premises by the respondent may be determined by another court wherein evidence of such expenditure, the necessity for same and its value to the applicant can be determined. I do not think it to be correct that in the absence of a specific

agreement the lessee may offset arrear rental against the value of improvements that it made to the premises in order to carry out its own business thereon.

[17] In the premise I make the following such

1. The landlords hypothec is hereby confirmed
2. Respondents is liable to pay the sum of E 292 692.22 to the applicant.
3. Interest thereon at the rate of 9% per annum.
4. Cost of suit.

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Z. Magagula
Judge of the High Court