



**IN THE HIGH**

**COURT OF ESWATINI**

**JUDGMENT**

CASE NO.1588/2018

In the matter between:

**BHUNU MALL PARTNERSHIP T/A BHUNU MALL**

**Applicant**

And

**UNITED KING PIE (PTY) LIMITED T/A KING PIE**

**Respondent**

In Re:

**BHUNU MALL PARTNERSHIP T/A BHUNU MALL**

**Plaintiff**

And

**UNITED KING PIE (PTY) LIMITED T/A KING PIE**

**Defendant**

**Neutral citation:** *Bhunu Mall Partnership t/a Bhunu Mall v United King Pie (Pty) Limited t/a King Pie In re: Bhunu Mall Partnership t/a Bhunu Mall v United King Pie (Pty) Limited t/a King Pie (1588/2018) [2019] SZHC 18 (06 February 2023)*

**Coram** : **T. Dlamini J**

**Delivered** : 06 February 2023

[1] *Law of contract – Lease agreement – Failure to pay agreed rental amounts – Ejection from leased premises*

**Summary:** *The applicant leased premises at the Manzini Mall to the respondent – At a later stage of the lease agreement the respondent held the view that the 10% agreed annual rental escalation amount made the monthly rentals exorbitant and unaffordable – The respondent then engaged the applicant and proposed a revision of the monthly rentals – Letters were exchanged between the applicant and respondent concerning the proposed revision but no consensus was reached – The respondent then started paying the rentals as per the proposal it made to the applicant and this resulted in shortfalls of the agreed monthly rental payments – The applicant then filed an application before this court seeking payment of the arrear rentals, and ejection of the respondent from the leased premises.*

**Held:** *That the respondent is bound by the agreed monthly rentals as per the signed lease agreement, and that it could not unilaterally review and change the monthly agreed rentals – Interim orders confirmed.*

---

## JUDGMENT

---

[1] On the 12<sup>th</sup> October 2018 His Lordship Maphanga J. granted an interim order in terms of which the following orders were issued in favour of the applicant:

- (i) The Deputy Sheriff for the Manzini district is hereby directed and authorized to attach and prepare an inventory of the movable goods which are at shop No.L10 and U43 A, Bhunu Mall building, cnr of Ngwane and Louw street, Manzini (Swaziland) pending the institution and conclusion of an action by the Applicant against the defendant for arrear rentals amounting **to E740, 034.60 (Seven Hundred and Forty Thousand, Thirty Four Emalangeni and Sixty Cents)** and ejection from the said premises;
- (ii) The action referred to in paragraph (i) above be instituted within fourteen days from date of final order.
- (iii) The respondent pay costs of suit at an Attorney and own client scale;

- (iv) The Respondent is to show cause on or before the 26<sup>th</sup> October 2018, why a final order should not be granted in terms of prayers (i), (ii), and (iii) of the Notice of Application.

[2] I find it apposite to mention that the citation as it appears from the papers filed in these proceedings is inappropriate and incorrect. The proceedings before me are simply a Notice of Application which, on account of the citation, purports to be an interlocutory application yet it is not. The action proceedings to be instituted in terms of the second order above has not been instituted yet but will be instituted once a final order has been granted in these proceedings. The application cannot therefore be interlocutory because it is not premised on any matter that is already before court but pending finalization.

[3] Coming back to the facts of the case, the applicant contends that it entered into two identical lease agreements in July 2009 with the respondent in respect of two different shops. The lease period was for a period of five (5) years with an option to renew when it expires on 31 May 2014. At commencement of the lease the monthly rentals were E20, 740.00 and E13, 975.00 respectively, with an agreed escalation rate of 10% per annum. At the time when the lease expired, the rentals stood at E30, 365.43 and E20, 460.80 respectively.

[4] The applicant stated that it had other previous leases with the respondent and later on the respondent negotiated a review and reduction of the rentals, alleging that the annual escalation has rendered the rentals exorbitant and unaffordable. This was turned down by the Management Committee of the applicant, according to the founding affidavit.

- [5] The applicant contends that in the month of April 2014, a new lease agreement was delivered to the respondent for signature but the respondent did not sign it. Another lease agreement was delivered in June 2016 but the respondent still did not sign it either. The parties however continued with the lessor-lessee relationship on a verbal month to month basis, with an escalation rate of 8%. The alleged verbal month to month lease agreement and the reduction of the escalation rate to 8% is however denied by the respondent in its answering affidavit.
- [6] The applicant further contends that it issued the respondent with monthly statements of account but the respondent would pay insufficient monthly rentals, depending on whatever amount it suited it. Due to the inconsistent monthly payments paid by the respondent, the applicant alleges that the arrear rentals stood at E740, 034.60 in respect of both shops.
- [7] In answering the applicant's contentions, the respondent first raised points *in limine* on jurisdiction; non-disclosure of material facts; and pleading in a manner that offends the rules of the court.
- [8] On the merits, the respondent disclosed that it has been a tenant of the applicant for 22 years and that there has never been a problem with payment of the rentals, and that the rentals have been escalating by 10% every calendar year. The problem however, according to the respondent, is that the applicant charges the rent amount based on a square metre. It contends that this method of calculating the rental amount is not in line with market rates.
- [9] The current practice of charging rentals in Malls, according to the respondent, is to calculate the rental amount based on a percentage of the annual income of the tenant. The respondent further contends that it therefore made a

proposal that the rental amount be based on 10% of its annual turnover because the method being used was not sustainable for business in general, and for the respondent in particular. Letters were written to the Management of the applicant and follow ups were made but “*no one wanted to take responsibility and respond to our grievances*”, contends the respondent at paragraph 7 of the answering affidavit.

[10] In reply, the applicant stated that it rejected the respondent’s proposal because it could be prejudicial to it as it was not in control of the performance of the respondent’s business yet it stood to be disadvantaged by their poor performance.

[11] The respondent further stated that it continued to engage the applicant but received no response to the proposal it made. It is then that in April 2017 it started to pay the rentals according to the method it proposed. That is, it paid 10% of its turnover beginning in April 2017. These payments, according to the respondent, were accepted and no complaints about them were ever made by the applicant. It paid using this method for a period of over twelve (12) months, and therefore pleaded that the applicant is estopped from denying such rental payments.

[12] The respondent states that it was surprised to receive a letter, dated 27 June 2018, terminating the lease agreement and directing that the premises be vacated by 31 October 2018 yet the lease was to expire in May 2019.

[13] I now proceed to determine the issues involved in the matter, starting with the points raised *in limine*. First, the respondent raised the issue of jurisdiction. It submitted that in terms of clause 37 of the lease agreement, the forum chosen by the parties is the Magistrates Court having jurisdiction over the Lessee,

notwithstanding that the amount involved exceeds the jurisdiction of the Magistrates Court. The clause is reproduced below:

37. JURISDICTION OF MAGISTRATE'S COURT

At the option of the Lessor, any action or application arising out of this Agreement may be brought before the Magistrate's Court having jurisdiction in respect of the Lessee, notwithstanding that the amount in issue may exceed the jurisdiction of such Court.

[14] The respondent's attorney submitted that notwithstanding the words used, viz., "*At the option of the Lessor,*" authorities are to the effect that a party must explain to the court the reasons that led to the choice of the other forum than the one agreed upon. The clause, according to the respondent, does not give to the lessor the right to unilaterally decide the forum as the parties have agreed upon a specific forum. If the applicant elects another forum, it must give reasons why it chose the forum than the one expressed in the lease agreement.

[15] The respondent further submitted that the court should apply the *expressio unius est exclusion alterius* principle. It's a Latin canon of construction which means that the express mention of one thing is intended to exclude the other. He argued that the court should give precedence to the agreed forum and direct that the matter should be heard by the Magistrates Court.

[16] The applicant, on the other hand, submitted that the words '*At the option of the Lessor*' and '*may be brought before the Magistrate's Court*' used in the clause signify that the lessor has an option to exercise and may bring the matter before another court than the one mentioned. It argued that the word '*may*' is discretionary and not mandatory. The clause therefore, does not exclude, according to the argument, the jurisdiction of the High Court.

[17] A proper interpretation of the words mentioned in the paragraph above, in the context of clause 37 of the lease agreement, in my considered view, is that in the event the lessor decides to bring an action or application based on issues arising out of the lease agreement, that action or application should be brought before a Magistrate's Court having jurisdiction over the lessee.

[18] Both attorneys seem to be unaware that an agreement which is in breach of the law is unenforceable. The parties cannot grant jurisdiction to a Magistrate's Court if in terms of the statutory laws, the Magistrate Court does not have that jurisdiction and is expressly denied the jurisdiction. In other words, agreements which are contrary to law are not enforceable. *See: Ganie v Ishmail 1957 (2) SA 132 and Eland Boerdery (Edms) Bpk v Anderson 1966 (4) SA 400 at 404.*

[19] In terms of s16 of the **Magistrates Court (Amendment) Act, 2/2011**, the jurisdiction of a Principal Magistrate does not exceed claims of **E30, 000.00 (thirty thousand emalangeni)** or the value of the subject matter in dispute exceeds E30, 000.00, whilst that of a Senior Magistrate and Magistrate is **E20, 000.00 (twenty thousand emalangeni)** and **E10, 000.00 (ten thousand emalangeni)** respectively. A magistrate cannot therefore deal with matters involving claims of money above E30, 000.00 because it does not have the jurisdiction over the matter. What the parties agreed to in terms of clause 37 of the lease agreement is in breach and contravention of the law and therefore unenforceable. The point *in limine* on jurisdiction is accordingly dismissed.

[20] The second point raised is that of an exception. The respondent submitted that the applicant's pleadings are divided into paragraphs that are not consecutively numbered as required by Rule 18) (3) of the High Court

(Amendment) Rules. It argued that there is paragraph 12 which is followed by paragraph 13, and another paragraph 12 (after paragraph 13) which is followed by another paragraph 13. According to paragraph 4.2 of the answering affidavit, this has embarrassed the respondent in that it has been *'confused... and has not been able to plead properly.*

[21] In reply, the applicant submitted that this was a typing error on the numbering of the paragraphs, and that the error is not fatal and requested the court to condone it. It argued that the pleadings are divided into paragraphs with clear and concise statements as required by the rule, and that the respondent is to respond to the averments made therein and not to the numbering.

[22] It is my view and finding that the numbering error is one of the not unusual mistakes that people commit, and that it has not prejudiced the respondent in any way. I note that the respondent has, on the other hand, answered the averments made in those paragraphs. The respondent's submission that the rules of the court must be respected by every party so as to define and clarify the issues for the court flies against what the respondent has itself done. Sub-rule (12) of Rule 18 provides that *'If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.'*

[23] The respondent has not acted as provided by sub-rule (12) of Rule 18. He is equally at fault as the applicant is. The applicant, in my opinion, committed a less fatal mistake than that committed by the respondent. The respondent ought to have filed an application in accordance with rule 30 of the rules of the court if he is honest that parties must always comply with rules of the court. The point on exception is therefore not upheld but dismissed.



[24] The third point raised is that of failure to disclose material facts. The respondent submitted that the applicant did not disclose to the court that the parties were engaged in negotiations on the issue of the rentals at the time when the present proceedings were instituted. It also submitted that it was not in arrears because of any failure to pay the rentals but has rather been put in this position by the applicant's failure to conclude the negotiations, and the lack of response to the respondent's proposals.

[25] In response, the applicant cited the case of ***Swaziland Polypack (Pty) Ltd v The Swaziland Government and Another (44/2011) [2012] SZSC 30 (31 May 2012)*** and submitted that the test for a tenant's liability when sued for arrear rentals is whether the tenant is in occupation or possession of the leased premises and not whether such occupation or possession was beneficial to it or not. It therefore argued that the point is without merit and should be dismissed.

[26] It is trite law that in *ex parte* applications the applicant must make a full disclosure of all the material facts that might affect the granting or otherwise of the order being sought. ***See: De Jager v Heilbron & Others 1947 (2) SA 415*** and ***Hall & Another v Heyns & Others 1991 (1) SA 381 at 397***. When placing the material facts before court, the principle of utmost good faith must be observed by the applicant. Where material facts have not been disclosed, whether willfully and *mala fide*, or negligently, the court has the discretion to set aside with costs the interim order granted, on the ground of non-disclosure. ***See: De Jager (supra)*** and ***Schlesinger v Schlesinger 1979 (4) SA 342 at 353***.

[27] The respondent seems to be clutching at straws. On the one hand it submits that it paid the rentals according to the proposal it made of the 10% turnover since April 2017, and that this payment has been accepted for a period over 12 months (*'about 12 months has passed*, per respondent in paragraph 12 of answering affidavit) without revocation and the landlord (applicant) is therefore estopped from denying such rentals. On the other hand, it submits that there are still ongoing negotiations which the applicant did not disclose to this court.

[28] In my view, it is a contradiction to plead that the reduced rental payments were accepted for a period of over 12 months without revocation and therefore the applicant is estopped from denying them as the accepted payments whilst also pleading that there are still ongoing negotiations about the rental payments. There is no evidence of ongoing negotiations. Annexures '**BMP 5**' to '**BMP 8**' show that the applicant persistently insisted on payment by the respondent of the monthly rentals as per the signed lease agreement. The point *in limine* that the applicant did not disclose that the parties were in negotiations when the application was instituted fails and is accordingly dismissed.

[29] On the merits, the respondent submitted that since April 2017 it has paid the rentals according to the proposal it made to the applicant, *viz.*, that of paying 10% of its turnover. This went on without revocation or challenge for a period, according to the respondent, of about over 12 months.

[30] Evidence placed before court however, prove to be an untruth that payment of the rentals was made by the respondent as per its proposal from April 2017 for a period over 12 months without a revocation by the applicant. Annexure

‘**BMP 5**’ (email from Musa Lee Dlamini of Bhunu Mall) dated 17 August 2017 speaks a different tune from that pleaded by the respondent (underlining is for emphasis). The content of the email is quoted below:

Mike

We have noted with concern that u are short-paying on your rentals. In essence that means you are already implementing what we had said we will table to our Board. This is unacceptable as you are supposed to adhere to the signed lease. The lease is a binding document which cannot be overruled except when both parties have agreed on whatever change. U are in total breach of our agreement and please make right of this situation otherwise we will be forced to hand over your account to our legal people. We give you seven days to rectify this “mistake”.

[31] The above content of the email puts beyond any doubt that the applicant cannot be said to have accepted without any reservation the short-payments that the respondent made from April 2017 as the respondent allege.

[32] Again annexures ‘**BMP 6**’ to ‘**BMP 8**’ which are dated 6 June 2018 and 31 July 2018 (dated before these proceedings were instituted on 10 October 2018) support the applicant’s position as depicted by Annexure ‘**BMP 5**’ quoted in paragraph [30]. The applicant cannot therefore be estopped from demanding full payment of the arrear rentals because it never accepted the short-payments without revocation or challenge.

[33] In the case of **Swaziland Polypack (Pty) Ltd (supra)**, **M.C.B. Maphalala JA** (as he then was) with **A.M. Ebrahim** and **A.E. Agim JJA** stated that the test for a tenant’s liability for rent is whether he was in occupation or possession of the leased premises and not whether such occupation or possession was beneficial or not. When sued for rent, the tenant cannot plead that he had been deprived of the beneficial occupation of the premises. The tenant cannot remain in occupation but refuse to pay rent.

[34] There is no dispute that the agreed and due rental amount is the one in the signed agreement of lease. The short-payments which the respondent made as per its own proposal is the cause of the the arrear rentals now being claimed. It is my finding that the respondent is liable for payment of the arrear rentals.

[35] Coming to the issue of costs, the order for costs at attorney and own client has not been motivated and justified to the court's satisfaction. Such costs are granted in instances, the list not being exhaustive, where a party for instance, is guilty of dishonesty or fraud, or that his motives have been reckless and malicious or frivolous, or has conducted himself gravely in the conduct of the case. *See: Makhuva & Others v Lukoto Bus Service (Pty) Ltd & Others 1987 (3) SA 376 at 399 and Van Dyk v Conradie & Another 1963 (2) SA 413 at 418.* No such conduct has been alleged and proved *in casu*.

[36] For the foregoing, judgment is granted in favour of the applicant and the following order is made:

[36.1] The interim order granted on 12 October 2018 is hereby confirmed.

[36.2] Costs are however granted at the ordinary scale.

---

**T. DLAMINI**  
**JUDGE – HIGH COURT**

For the applicant : Mr. S.B. Motsa

For the Respondent : Mr. S. Maseko