IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 480/2022**

In the matter between:

CAR POINT (PTY) LTD **APPLICANT**

And

INTAMAKUPHILA TRANSPORT (PTY) LTD **FIRST RESPONDENT**

KHANN JAPAN INVESTMENTS (PTY) LTD **SECOND RESPONDENT**

Neutral citation : *Car Point (Pty) Ltd v Intamakuphila Transport (Pty) Ltd & Another (480/2022) [2023] SZHC 158 (23/06/2023)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 31 May 2023

DATE DELIVERED: 23 June 2023

Summary: *Lease Agreement-Parties entering into written lease agreement. First Respondent arguing that signatory to lease agreement was misled into signing same and/or was not aware that she was signing agreement for longer period of more than 5 years. First Respondent further arguing that second lease agreement invalid and unenforceable due to existence of earlier lease agreement on the same property.*

Held; *The lease agreement entered into between the parties is lawful and enforceable. The reasons advanced on behalf of First Respondent of reneging on the terms of the written agreement are*

rejected and dismissed. The Court grants the order sought by Applicant with costs.

JUDGMENT

INTRODUCTION

[1] On or around the 18th March 2022, the Applicant instituted motion proceedings against the Respondents in which the following relief is sought;

> "**1. Directing that the 1st Respondent restores possession and control of the property to wit; Lot 681, 7th Street, Matsapha to the Applicant forthwith.**
>
> **2. Directing the 2nd Respondent to pay to the Applicant the sum of E 90,000.00 (Ninety Thousand Emalangeni) being the amount of rental owed to the Applicant.**
>
> **2.1 Directing the 2nd Respondent to pay interest on the sum of E 90,000.00 (Ninety Thousand Emalangeni) at a rate of 10% per annum.**

3. **Directing the 1st and 2nd Respondent to pay costs of suit at Attorney and own client scale."**

[2] After exchanging pleadings and when the matter was ripe for arguments, the parties, by consent, settled prayers 2, 2.1 and 3 of the Notice of Motion. Only prayer 1 remained unsettled. The parties duly filed their respective heads of arguments and the matter was argued on the 31st May 2023.

[3] It is common cause that during or around the 11th February 2017, a lease agreement in respect of Lot 681 situate at Matsapha, was entered into between the First Respondent (Intamakuphila Transport (Pty) Ltd) and one Zubair Chaudhry in his personal capacity. That lease provided *inter alia* that;

(i) *The lessor, Intamakuphila Transport (Pty) Ltd, leases the property, to wit, Lot 681, situate at Matsapha to the lessee, Zubair Chaudhry for a period of 5 years commencing on the 11th February 2017.*

(ii) The lessee is granted a period of 5 months' rent free to develop the place and was to commence paying rentals at the beginning of July 2017.

(iii) The rental was to be the sum of E 5,000.00 (Five Thousand Emalangeni) payable before the 7th of each calendar month.

(iv) The rent shall increase annually by 10%.

(v) The lease shall be renewable after 5 years.

[4] It is not clear from the written agreement as to who represented the lessor when the initial 2017 agreement was entered into between the parties. Subsequent to this agreement and, in the same year 2017, another lease agreement was concluded between the First Respondent herein, Intamakuphila Transport (Pty) Ltd as lessor, and the Applicant, Car Point (Pty) Ltd as lessee. The subject of the lease was the same property, to wit, Lot 681 situate in 7th Street, Matsapha. In terms of the second lease agreement, the parties agreed *inter alia* as follows;

(a) *Commencement of the second lease agreement shall be the 23rd May 2017.*

(b) In lieu of rental for the first four (4) years and Six (6) months of occupation of the premises, the lessee shall be required to make the following improvements upon the property, which is currently vacant;

Land clearing, ground levelling, fencing up the land, build an office in accordance with approved standards from the Matsapga Town Board.

(c) On expiry of the four (4) years and Six (6) months, the lessee shall pay rental in the amount of E 5,000.00 per month.

(d) Rental shall escalate by 10% each year.

(e) The lease is for purposes of motor vehicle and spares sales.

[5] In paragraph 10.1 of the Founding Affidavit, the Applicant contends that the First Respondent has unilaterally cancelled the lease

agreement and has unlawfully taken possession of the property which is the subject of the lease. The First Respondent on the other hand concedes that it has taken back to its possession the property in question but argues that it did so after it found the property vacant, having been abandoned by the Applicant. The Court is thus required to determine the validity of the second lease agreement and whether its terms and conditions are enforceable as between the parties.

APPLICANT'S SUBMISSIONS

[6] In paragraph 3.1 of the Applicant's heads argument, it is submitted on behalf of the Applicant that;

> *"**Nicholas J** in Glen **Comeragh v Colibri 1979 (3) SA 210 (T)** held that it is not open for a party disputing a contract to escape liability "merely because he was unaware of the terms of the contract..." at the time of signing. In His Lordship's words;*
>
> ***"If he chooses not to read what he is signing, he takes the risk, with his eyes open, of being bound by it and he cannot be heard to say that his ignorance of what was in it was Justus error."***

[7] The Applicant disputes that there was any form of misrepresentation during the signing of the second lease agreement. The Applicant places its reliance in the case of **Poole v Mchennan v Nomse 1918 AD at 404** in which the Court held;

"If, when contracted, the representee was in possession of the true facts and in a position to appreciate them he has no remedy on the misrepresentation."

[8] In summary, it is argued by the Applicant that;

"6.2 **The 1st Respondent does not deny that it was given the contract to sign. It does not say that it did not have an opportunity to read the contract before signing nor that the Applicant's director represented to her that the terms of the second contract were identical to the first."**

FIRST RESPONDENT'S SUBMISSIONS

[9] There are two principal points relied upon by the First Respondent in seeking to resile from the terms of the lease agreement and these are;

(a) The two lease agreements were not between the same parties. The first agreement was between Intamakuphila Transport (Pty) Ltd as lessor, and one Zabair Chaudhry in his personal capacity, as lessee. The second lease agreement could therefore not have been valid and enforceable given that the same property, was, in terms of the first lease agreement, given to the said Zabair Chaudhry for lease.

(b) When the parties entered into the second lease agreement, they were not of the same mind as regards the duration of the lease period. The First Respondent's director was thinking that she was signing for a 5 year lease as opposed to the 9 years, 11 months reflected in the lease agreement.

[10] The First Respondent referred the Court to the case of **Sarah B Dlamini v Martha Nokukhula Makhanya & Others (722/14) [2016] SZHC 112 (8th July 2016)** in which the Court held;

"The *classicus* case of Pascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd (53/84) SZSCA 51; [1984] (2) SA 366 (A); [1984] (3) SA 623; [1984] (3) SA 620 (21 May 1984) which led to the Plascon-Evans Rule is very apposite to the issue at hand. The Court cited de Villiers JP and Rosenon J in Stellenbosch Farmers Winery (Pty) Ltd v Stellenbosch Farmers Winery (Pty) Ltd 1957 (4) SA 234 at paragraph J as follows;

"...where there is a dispute as to the facts, final interdict should only be granted in the notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order...Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

ANALYSIS AND FINDINGS-THE POINT ON INVAILIDTY OF SECOND LEASE AGREEMENT

[11] The initial agreement was indeed signed between the First Respondent as Lessor, and one Zabair Chaudhry as Lessee. The said Zabair Chaudhry is a director of Car Point (Pty) Ltd, the latter being the lessee in the second lease agreement. The distinction is, for all intents

and purposes, artificial and cannot have a bearing to the outcome of this matter. The First Respondent knew at all material times that it was dealing with Mr. Zabair Chaudhry who is a director of the Applicant.

[12] In paragraph 5 of the Answering Affidavit, it is stated by the deponent thereto that;

> "...**In February 2017 [in reference to first lease agreement] Mr. [Mrs] Bessie Dlamini and the Applicant's Director had signed a lease for five years. When Mrs Bessie Dlamini signed the lease agreement in May 2017 she was laboring under the belief that the lease period had not been changed...**"

[13] It is clear therefore that the First Respondent knew that they were dealing with Mr. Zubair Chaudhry in his capacity as director for the Applicant. In the case of **Structra Group (Pty) Ltd V Van Niekerk and Others (06923/2019) [2022] ZAGPJHC 219 (11 April 2022)** (hereinafter referred to as the "Structra Group Case"), the Court

explained the principle relating to contracts in simple but emphatic language as follows;

> **"[11] It is a trite principle of our law that the privity and sanctity of a contract should prevail and the Courts have been enjoined in a number of decisions to enforce such contracts. Parties are to observe and perform in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that the contract is tainted with fraud or a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy."**

[14] In the local High Court Case of **Simile B. Dlamini v Noah Nkambule (613/2012) [2012] SZHC 48 (6TH July 2012), Hlophe J** (as he then was) cemented the foundation on the sanctity of contracts by stating the law as follows;

> **"[16] In my view this case is about the sanctity of contracts. Once concluded, a contract should be enforced as it embodies the rules agreed upon by the parties themselves**

subject to it being lawful. It is for this reason that *Visser and Others* in their book, *Gibson South African Mercantile and Company Law, Seventh Edition at page 9* had the following to say:

"It has been well said that the law of contract differs from all the other branches of the law in one remarkable respect...generally speaking, [the parties} are free to make their own rules".

[17] I have not been referred to any aspect of the contract concerned being unlawful and indeed the parties seek to rely on it except differing on what it means. As indicated above I have come to the conclusion that the contract reached by the parties provides that the Respondent sold the land concerned to the Applicant, to whom it should be transferred unless it were to be shown that he had breached same as alleged by the Respondent. The alleged breach cannot however be relied upon given that the Respondent himself did not notify the Applicant of the alleged breach within the specified period..."

[15] In this case, the parties agreed that for four years and six months, the Applicant would not be required to pay rentals on the property as it was expected that it (Applicant) should clear the land, level the ground, fence the land and build an office in accordance with approved standards. According to the Applicant, it expended a sum in excess of E 500,000.00 on the property in compliance with its obligations in terms of the lease agreement. When the Applicant was expecting to recoup its expenses, the First Respondent turned around and argued that it did not agree to 9 years and 11 months but agreed to only five years.

MISREPRESENTATION AND/OR LACK OF CONSENSUS

[16] The First Respondent has also sought to opt out of the contract by advancing three different grounds which are not related. These points are raise simultaneously and not in the alternative. It is not clear to the Court whether the First Respondent is relying on lack of consensus on the terms of the agreement or misrepresentation or that the matter is fraught with disputes of fact which cannot be resolved on the papers. The *Sarah B. Dlamini case* relied upon by the First Respondent and

the reference to the *Plascon-Evans* judgment in the heads of argument is clearly in reference to dispute of facts.

[17] The Court will focus its attention on the allegation made in the Answering Affidavit in dealing with the First Respondent's contention that the agreement is invalid. It is stated by the First Respondent in paragraph 5 of the Founding Affidavit that;

"...The lease agreement was prepared by the Applicant's Director. He then brought it to Mrs Bessie Dlamini and tricked her to sign without drawing her attention to the clause that had the lease period..." [underlining my emphasis].

[18] When the matter was being argued in Court, I requested several times from the First Respondent's representative to assist the Court with more facts showing and/or substantiating how the said Mrs Bessie Dlamini was 'tricked' into signing the lease agreement. The Court could not get a clear answer. Instead, the First Respondent's representative kept insisting that the parties were not *ad idem* insofar as the issue of the duration of the lease is concerned. The First Respondent's erstwhile Attorney insisted that Mrs Bessie Dlamini

thought she was signing for five years, being the period initially agreed upon in the first lease agreement.

[19] Is it reasonably true that Mrs Bessie Dlamini thought she was entering into a five year lease agreement? This cannot be true and appears to be contrary to common sense and logic. This is because from one of the terms of agreement between the parties, it was specifically agreed that for four years and six months, the Applicant would not be required to pay rental on the premises on the understanding that Applicant was required to first develop the property. The First Respondent has not disputed this term of the contract. The period of four years and six months was given as latitude for the Applicant within which to develop the property according to the specifications agreed upon between the parties. After the period of four years and six months (which is almost five years), it was then that the Applicant would be expected to start paying rentals of E 5,000.00 per month, obviously because the Applicant would now be utilizing the premises for business.

[20] The contention by the First Respondent to the effect that it was tricked into signing the agreement or that it labored under the impression that the lease was for five years is misdirected and false as it is not supported by the facts. In the case of **George v Fairmead 1958 (2) SA 465 (A) 471 A-D** it was held by the Court that;

"When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read decisions, our Courts, in applying the test, have taken into account the fact there is another party involved and have considered his position. They have, in effect said: Has the first party- the one who is trying to resile-been to blame in the sense that by his conduct he has led the other, as a reasonable man, to believe that he was binding himself?...if his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

[21] In the *Structra Group case* (supra) the Court referred to another case of **Wells v South African Alumenite Company 1927 AD 69 at 73** in which the Court held as follows:

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

[22] In the same case (Structra Group Case), the Court held that:

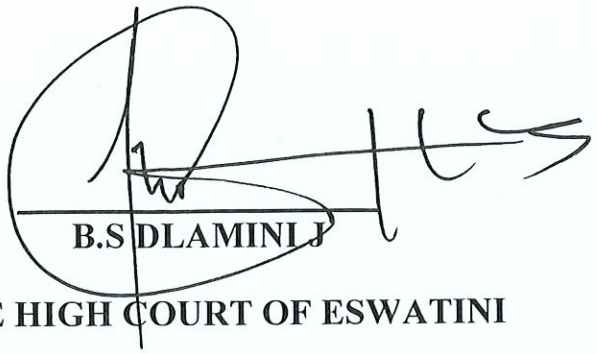
> **"[21] It is now settled that a contract tainted by fraud or fraudulent misrepresentation made knowingly that it was false or made recklessly to induce the other party to enter into a contract, can be voided by the injured party and it (the injured party) may proceed to recover damages from the other party. However, the onus of proof is on the party alleging that there was misrepresentation and that such misrepresentation induced it to enter into the contract. Had it known the exact facts, it would not have concluded the contract. Once the injured party has proven the existence of the fraudulent misrepresentation, then it has to make an e election whether to resile from the contract or to continue with the contract."**

[23] The First Respondent has failed to discharge the onus resting on it in terms of which it was required to prove that there was misrepresentation or that it was tricked into signing the lease agreement. By the same standard, there are no disputes of fact which would require the Court to invoke the principles articulated in the *Plascon-Evans* case.

[24] In the final result, the Court accordingly grants orders as follows;

(a) The First Respondent is directed to restore possession and control of the property described as Lot 681, 7th Street, Matsapha, to the Applicant forthwith.

(b) The First Respondent is ordered to pay costs of this application at the ordinary scale.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant: *Mr. M. Magagula (Zonke Magagula & Co.)*

For 1st Respondent: *Mr. M. Nkomondze (Nkomondze Attorneys)*