IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 128/2023

HELD AT MBABANE
In the matter between:

ASIKHUTULISANE PROPERTIES (PTY) LTD	**Applicant**
And	
GOLIDE LASIKHOVA (PTY) LTD	**1st Respondent**
THE NATIONAL COMMISSIONER OF THE ESWATINI ROYAL POLICE	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral Citation: *Asikhutulisane Properties (Pty) Ltd vs Golide Lasikhova (Pty) Ltd and Others* (128/2023) [2023] *SZHC* 259 (21/09/2023)

Coram: **J. M. MAVUSO J**

Heard: 2nd August, 2023.

Delivered: 21st September, 2023.

SUMMARY: *Civil – Application for leave to execute judgment pending hearing of an appeal, of a matter pending before the Supreme Court of Eswatini – Factors to be considered by a Court, in such applications, set out – Application granted – 1st Respondent ordered to pay costs of suit at ordinary scale.*

JUDGMENT

J.M. MAVUSO - J

[1] Sometime on or about the 2nd of February, 2023, following an application to perfect a landlord's hypothec, instituted by Applicant herein for the recovery of arrear rentals amounting to E46, 223.76 (Forty Six Thousand, Two Hundred and Twenty Three Emalangeni, Seventy Six Cents), Applicant was granted an interim order, in which a *rule nisi* was issued, calling upon Respondent (now 1st Respondent) to show cause on the return date, why an order in the following terms should not be made final.

> *"3.1 **confirming cancellation of the lease agreement between Applicant and Respondent.***
>
> *3.2 **directing Respondent to pay arrear rentals and other charges (sic) amounting to E46, 223.76 (Forty Six Thousand, Two***

Hundred and Twenty Three Emalangeni, Seventy Six Cents) inclusive of VAT.

3.3 ***ejecting Respondent from the premises owned by Applicant at Bhunya in the district of Manzini.***

3.4 ***directing Respondent to pay interest on the sum of E46, 223.76 (Forty Six Thousand, Two Hundred and Twenty Three Emalangeni, Seventy Six Cents) at the rate of 9% per annum a temporae morae.***

3.5 ***directing Respondent to pay costs, at attorney own client, scale.***

3.6 ***further and/or alternative relief."***

[2] In addition to the above, the interim order also restrained Respondent from removing movable property from the premises and further authorised the Sheriff or her Deputy, for the district of Manzini, to:

(a) serve Respondent with the Notice of Motion together with the interim order, issued by the Court;

(b) attach movables upon the premises adequate to satisfy the amount owed;

(c) make an inventory of the attached goods;

(d) to file a return of service, with this Court and to provide the Attorney (who gave him instructions) with a copy of his return of service, detailing what he had done in executing the order.

[3] On the 3rd of April 2023, the Court confirmed the *rule nisi,* issued on the 2nd February 2023. On the said date, the Court handed down a written Judgment in which it detailed reasons for its findings. On the 5th day of April 2023 Applicant lodged an appeal. The lone ground of appeal is that:

"The Court a quo erred in law by applying the principle of pacta sunt servanda and insisting on the res ipsa loquitor regard had to the fact that the premises are owned by Usuthu Forest Products Company Limited, a company which leased same to Asikhutulisane Savings and

Credit Co-operative and not the Respondent considering the oral and written agreements entered into between Usuthu Forest Product Company Limited and Asikhutulisane Savings and Credit Co-operative before March 2022 and on 12th December 2022 respectively."

[4] Following lodgement of the appeal, Applicant has approached this Court for leave to execute the impugned Judgment on the basis that:

(i) 1st Respondent is in breach of the material terms of the contract between the parties as it now sells liquor on the premises much against the terms of the agreement between the parties.

(ii) the main lease with Usuthu Forest Products Company Limited *("Montigny")* is due to expire on the 31st August 2023.

(iii) an otherwise salient point in this matter comes to the fore upon reading paragraph 3.2 of the Founding Affidavit, where Applicant alleges that:

"there still remains a material breach of the lease agreement between First Respondent and the Applicant...."

The Court is of the considered view that Applicant's application is not only premised on 1st Respondent's alleged misdemeanour of selling alcohol on the premises but also on its failure to pay monthly rentals when due or at all.

In response to this allegation, the Court expected 1st Respondent to respond to this allegation, in particular, with regards to its standing on its payment of monthly rentals as this is the principal reason for the matter being before the Courts of the land. 1st Respondent's silence on this issue is worrisome, to say the least.

[5] In the case of **Zuba Ngihlale Investments (Pty) Limited & Another v Zodwa Mntshali (nee Dlamini) and 4 Others (74/2022) [2023] SZSC 02 (26/01/2023)** M.J. Manzini AJA on factors to be considered by a Court seized with an application for leave to execute relied on the case of, **South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited 1977 (3) SA 534 A**, where it was stated that:

> ***"The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and if leave be granted, to determine the conditions upon which the right to execute***

shall be exercised.... This discretion is part and parcel of the inherent jurisdiction which the Court has to control over its own judgments.... In exercising this discretion the Court should, in my view, determine what is just and equitable in all circumstances, and, in doing so, would normally have regard to the following factors:

(i) the potentiality of irreparable harm or prejudice being sustained by the Appellant on appeal (Respondent in the application) if leave to execute were to be granted;

(ii) the potentiality of irreparable harm or prejudice being sustained by the Respondent on appeal (Applicant in the application) if leave to execute were to be refused;

(iii) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted with bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or harass the other party; and

(iv) where there is potentiality of irreparable harm or prejudice to both Appellant and Respondent, the balance and hardship and inconvenience, as the case may be."

[6] Considering the factors set out above, in light of the present case, the Court is of the considered view that:

(i) no irreparable harm or prejudice will be suffered by Appellant, *in casu*, if leave to execute is granted, because, in any event, the lease agreement between Usuthu Forest Products Company Limited (the Landlord) expired on the 31st August 2023. As a sublease, the agreement between Applicant and 1st Respondent cannot endure beyond the main lease agreement which terminated on the 31st August 2023.

(ii) the potentiality of irreparable harm or prejudice to the 1st Respondent (Appellant on appeal) if leave to appeal, is granted, is non-existent as the matter is before Court by reason of 1st Respondent's failure to pay monthly rentals and its continued holding over of the premises. The Court finds that the appeal lodged by 1st Respondent is greatly prejudicial to Applicant, as the property cannot be leased out and with

each passing month of occupation the arrear rentals are increasing whilst same cannot be said of the value of the goods to be attached.

(iii) the appeal has not been noted with a *bona fide* intention to reverse the Judgment of this Court. From the lone, ground of appeal expressed in paragraph 3 of this Judgment, 1st Respondent's gripe is with the principle of *pacta sunt servanda*, namely why, Applicant should enforce the sublease which subsisted between the parties, when the landlord is Usuthu Forest Products Company. This argument is unlikely to succeed at the Supreme Court for the reason that, if 1st Respondent felt it was entering into the sublease, with the wrong or with an unauthorised entity, it should have from the onset, refused to enter into the sublease and not to raise such, after it had taken occupation of the premises and accumulated months of arrear rentals.

(iv) the balance, hardship and convenience in this case, favours Applicant being granted leave to execute as this will help Applicant, mitigate its financial losses.

[7] (i) In its heads of arguments, Respondent only raises points *in limine* and

does not address Applicant's application on the merits. On the points *in limine*, it is submitted that Applicant has no *locus standi* to institute the present proceedings. Respondent's argument as captioned in paragraph 2, of its heads, is as follows:

> ***".....it (Applicant) has not demonstrated that it has any relationship with the owner of the immovable property and failed to produce any written authority granted by Usuthu to the Co-operative to sub-let the premises to a third party like the applicant."***

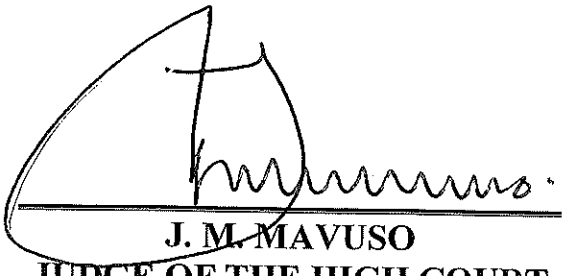
The Court will not discuss this issue any further but will refer to paragraph 6(iii) of its Judgment were same as adequately addressed. Same is true of the purported point on non-disclosure. If Applicant had no right to enter into the lease agreement with the Respondent, over the premises at Bhunya, the question is why did the Respondent enter into the sublease, knowing the aforegoing to be the position. The point on non-joinder suffers from the same shortfall as the other previously discussed purported points of law. On the purported point on urgency, Respondent at paragraph 8 of its heads of argument submits that:

"Applicant should not have waited for 6 (six) days to approach the court as it (sic) was aware that the negotiations between the litigants have failed."

On this point, the Court finds that the institution of the application on the 6th day of the failed negotiations, between the parties, was reasonable and that the urgency has not been self-created as alleged or at all. With regards to the point on abuse of court process, the Court also finds that Applicant has not abused the Court's process in instituting the current proceedings.

(ii) From the purported points of law raised and from the failure to address the merits of Applicant's case, it is clear that 1st Respondent is on a mission to delay, its ejectment from the premises and that there can be no other logical conclusion either than the fact that 1st Respondent's lodgement of the appeal is aimed at prolonging its occupation of the premises, whatever the outcome of the Supreme Court's decision.

[8] Accordingly, prayers, 2, 3, 4, 5 and 6 of Applicant's notice of application dated the 27th July 2023, are granted.



J. M. MAVUSO
JUDGE OF THE HIGH COURT
OF THE KINGDOM OF ESWATINI

For the Applicant: DYNASTY INC. ATTORNEYS

For the Respondent: MLK NDLANGAMANDLA ATTORNEYS