SUPREME COURT OF SWAZILAND

APPEAL CASE NO. 16/07

In the matter between:

JOHANNES NKWANYANA **APPELLANT**

VS

TOTAL SWAZILAND LIMITED **RESPONDENT**

CORAM **BROWDEJA**

TEBBUTTJA

RAMODIBEDIJA

FOR THE APPELLANT **MR. L.MAMBA**

FOR THE RESPONDENT **ADVOCATE FLYNN**

JUDGMENT

TebbuttJA

The course of events in this case has been a strange one indeed. It all started with an application brought by the appellant in the High Court arising out of an agreement of lease between him and the respondent.

In 1973 the appellant and a company, Total South Africa (Pty) Ltd, entered into a written agreement of lease commencing on 1st July 1973 for premises known as Lavumisa Filling Station, on Stand 830, Golela, for the purpose of conducting a public motor garage, filling and service station.

The agreement was for an initial period of one year and, as far as material to this judgment, went on to provide as follows:

> "*That either party shall be entitled to terminate it or if not previously terminated, to renew it at the end of the initial period by written notice given to the other party at least three calendar months prior to the expiration of the initial period. In the event of renewal, this lease shall continue consecutively after the initial period on the same terms and conditions (unless amended hereafter) for an indefinite period, terminable by either party giving to the other at least three calendar months written notice of termination*".

Although no written notice of renewal of the lease was produced by either party, it is common cause that the lease was renewed after the initial period and that the appellant continued to occupy the premises and conduct a filling station there until 1993. It is also common cause that Total South Africa (Pty) Ltd assigned its rights and obligations under the lease to the respondent in 1978.

In 1992 the respondent gave the appellant three months notice of cancellation of the lease from 30th April 1992. Despite this, and clearly with the concurrence of the respondent, the appellant continued to occupy the premises. However, he ceased conducting a filling station in 1993 but carried on other businesses there, in buildings erected by him, until 1999.

In 1997 the respondent sold the property to the Swaziland Government and agreed to pay the appellant the sum of E460 *000-00* for improvements made by him to the property. It, however, deducted from that sum an amount of E77 671-10 which, it averred, was in respect of arrear unpaid rental from 1993 to 2001 when the appellant vacated the property and which it contended it was entitled to set off against the E460 000-00.

The appellant denied the respondent's averments in this regard and in July 2001 he brought an application by way of notice of motion in Case 1956/01 in the High Court, which was amended on 23rd November 2006, for an order directing the respondent to pay to him the said sum of E77 671-10 together with interest thereon and costs. The respondent opposed the application. This is the application to which I referred at the start of this judgment.

It is unnecessary in this judgment to deal with the details of the application or the opposition to it, because, prior to the hearing of the application, the appellant raised a point of law, as a preliminary point, in the following terms:

> ***"The agreement upon which the respondent relies in its answering affidavit being a lease*** in longum tempus ***and not having been registered against the title deed of the property, is invalid and of no force and effect in terms of Section 30 of the TransferDutyActNo.8 of1902".***

Section 30(1) of the Act provides as follows:

> ***"30(1) …no lease of any land for a period of not less than ten years or for the natural life of any person mentioned therein or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period thereof amount to not less than ten years, shall be of any force and effect… unless executed before a notary public".***

It also provides that to be of force and effect against creditors or any subsequent ***bona fide*** purchaser or lessee, the lease must be registered against the title deeds of the property.

It is apparent that the Section in question requires for the validity of a long lease, for that is what it deals with (a lease ***in longum tempus*** or a long lease being one for ten years or more), that it be notarially executed in four classes of lease:

(i) one for ten years or more;
(ii) for the natural life of any person mentioned in the lease;
(iii) one renewable from time to time at the will of the lessee; and
(iv) one for periods which together with the first period thereof total not
less than ten years.

The matter came before Maphalala J where the issue argued was whether the lease fell within the third requirement of Section 30(1) i.e. that execution of it before a notary public and registration against the title deeds of the property was required where the lease ***"was renewable from time to time at the will of the lessee indefinitely".*** The appellant contended that the lease ***in casu*** did and, as it had not been notarially executed, which is common cause, the lease was void ***ab initio.*** The respondent contended it did not and that the lease was perfectly valid.

Maphalala J held that the clause in respect of the renewal of the lease provided that the lease would continue for an indefinite period but could be terminated by either the lessor or lessee giving three months notice of termination. It was therefore not a lease which was renewal ***"at the will of the lessee indefinitely"*** Relying on the cases of **COHEN v VAN DER WESTHUIZEN 1912 A.D. 519** at 532 and **COMMISSIONER FOR INLAND REVENUE v BEERS CONSOLIDATED MINES 1943 GWLD**

23, he also held that Section 30(1) does not require that a lease for an uncertain or indefinite period should be executed before a notary but only when the third and fourth requirements in Section 30 might require it.

At this point the course of events took an odd turn.

The judgment of Maphalala J was handed down on 2nd February 2007. On 8th June 2007 the matter came before the High Court again, this time before Mabuza J. In an order made by her on 11th June 2007 the following appears.

> ***"The applicant concedes to point of law on disputes of fact and hence application is dismissed with costs".***

It is common cause that the application referred to is that brought by the appellant in Case 1956.01, Mabuza J's order also being in Case 1956/01.

This court was informed from the Bar by Mr. Mamba for the appellant that the respondent had taken a point of law in opposition to appellant's application that, as there were obvious conflicts of fact on the papers, the matter should have been brought by way of summons and not by notice of motion. It was this point of law, said Mr. Mamba, that the appellant was conceding.

But what of the order that the application is dismissed with costs?
This, submitted Mr. Mamba, was a ***"provisional order".***
I can find nothing to suggest that the order was a provisional one. It is in clear and explicit terms. Mabuza J dismissed the application with costs.

Things then got even stranger. Two days after Mabuza J's order of 11th June *2007,* the appellant on 13th June 2007 noted an appeal against the judgment of Maphalala J.

In his notice of appeal the appellant did not, however, seek to challenge the decision of the court ***a quo*** that the lease was not one renewable at the will of the lessee indefinitely. Nor, in my view, could he. Maphalala J was clearly correct in finding as he did. What the appellant sought to do was to rely on the fourth requirement of Section 30. He avers that ***"the learnedJudge misdirected himself in not holding that the lease in question was one"*** for periods which together with the first period thereof amounted in all to not less than ten years - ***"... and thus required execution before a notary public and registration in terms of Section 30(1).***

It was also what Mr. Mamba wished to argue before us.

This Court queried Mr. Mamba as to whether the judgment of Maphalala J was appealable at all as -

(a) it was not a final and definitive judgment but one given on an interlocutory aspect of the matter and because;
(b) the application had been dismissed by Mabuza J. Mr. Mamba argued in the light of Mabuza J's dismissal of the application, Maphalala J's judgment holding that the lease was not invalid had become a final one. I find this argument incomprehensible and completely untenable.

This Court is of the view that Maphalala J's judgment is not appealable without leave of this Court, which has not been sought, as it is an

interlocutory one and, secondly, because of the application having been dismissed, it is now purely academic.

Despite this, however, and despite the issue having neither been raised nor argued in the court ***a quo,*** the Court permitted counsel to make their submissions on whether the fourth requirement set out in Section 30(1) of the Act applied to the lease in the present case.

Relying on a passage in the judgment of Innes CJ in the case in the South African Appellate Division of **COHEN v VAN DER WESTHUIZEN** supra at 524 where the learned Chief Justice opined that the requirement as to notarial execution and registration of long leases fell into four separate classes of which two were those relating to the renewal of leases (see also per Solomon JA in Cohen's case at 532 and per de Villiers JA at 543), Mr. Mamba submitted that the fourth class of lease was separate and distinct from the third and did not depend on the will of the lessee as the third one did. Some argument can be made that it does - which is what appears to be suggested by Dr. W.E. Cooper in his work, The South African Law of Landlord and Tenant 2nd edition at page 66 - but it is unnecessary to come to any decision on this because this Court is of the firm view that the lease in the present case does not fall into the fourth class requiring notarial execution and registration.

As set out above, the lease provides that if it is renewed beyond the initial period of one year, it should ***"continue consecutively ...for an indefinite period"***terminable by either party on three months written notice. It is clear that the time at which a long lease must be notarially executed is when the written lease (for it is only a written lease and not an oral one that can be notarially executed and registered) is concluded and signed. Mr. Mamba agreed that this is so. The parties at the signing of this lease could not have known if the lease, together

with the initial period, would continue consecutively for a total of ten years because either one of them could have terminated the lease at any time before the ten years' period was reached.

Mr. Mamba seems to have been influenced in his submissions that this lease required notarial execution by the fact that in reality the lease continued for more than ten years after the initial period. However, this is irrelevant. The crucial issue is whether, when they signed the lease, the parties intended that it should continue, after the initial period, for periods totaling not less than ten years.

That Mr. Mamba was influenced by what happened in reality is reflected in an argument which he advanced that this lease would have been valid for a period of nine years and 364 days but that after ten years and one day - for ***"not less than ten years"*** means ten years and upwards (see Cohen supra at 526,532) - it would have become invalid. And not only invalid but void ***ab initio*** (See Cooper loc, sit and cases there cited). That, of course would lead to absurd results. It would mean that for ten years the rights of the parties would have been governed by a void lease. This is clearly untenable. It would also mean that the lessee's right of protection against creditors of the lessor and against subsequent ***bona fide*** purchasers, which is succinctly embodied in the legal principle of ***"huw gaat voor koop",*** which he had enjoyed for ten years, would abruptly terminate one day later.

This could never have been the intention of the Legislature in enacting Section **30** of the Act. It is also a long-established canon of construction of statutes that a court should always avoid an interpretation which would lead to an absurdity (see e.g. **VENTER v REX 1907 T.S. 910** at 919; **SHENKER v THE MASTER AND ANOTHER 1936 A.D. 136; ROBERT MAGONGO v THE KIND APPEAL CASE**

N0.2472/99 unreported; and **MFANZILE ISHMAEL MTSETFWA v REX APPEAL CASE NO.5/2007** unreported).

Mr. Mamba was driven to submit that in order to avoid the consequences of the lease being invalid after ten years, the parties could then enter into a new one. That, however, would not, on his argument, cure the previous void one and the consequences flowing from it and it would also defeat the purpose of the section to permit of renewals for periods exceeding ten years.

The type of lease for which the fourth class of lease requiring execution was designed to cater is one where, for example, the lease is for an initial period of say, seven years with a right of renewal for a further period of five years. An actual example of such a lease is to be found in the case of **HEYNES MATHEW LTD v GIBSON NO 1950(1) SA 15 (C)** where the lease was for initial period of three years and the lessees were entitled to renew it for further periods of three years each and were deemed to have done so automatically for a total of not more than **20** such renewals, unless they gave notice prior to the termination of any period of three years that they

did not want to continue. It was held that the lease in that case, being renewable for periods amounting in all to not less than ten years, required notorial execution and registration. The present is not one of those cases.

It follows that Mr. Mamba's contention that the present lease required notarial execution and registration cannot be upheld.

The appeal is therefore dismissed with *costs.*

This will also bring into effect the order of *Mabuza.* J dismissing the appellant's application in the High Court, with costs.

F. TEBBUTT

Judge of Appeal

I AGREE

T:BROWDE /.

Judge of Appeal

I AGREE

M.M. RAMODIBEDI

Judge of Appeal

DELIVERED IN OPEN COURT ON THIS DAY OF NOVEMBER 2007.