THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE Civil Appeal No. 36/2007

In the matter between

CELLULAR SERVICES LOGISTICS (PTY) LIMITED Appellant

and

SWAZILAND NATIONAL PROVIDENT FUND Respondent

Coram BANDA, CJ
FOXCROFT, JA
EBRAHIM, JA

For the Appellant Mbuso Simelane
For the Respondent Muzi Simelane

JUDGMENT

[1] This is an appeal against the judgment of Maphalala J when he confirmed the Rule Nisi which had been issued by the court on the 14th June 2007. The appellant, who was the respondent in that application, was ordered to pay costs on the ordinary scale.

[2] The respondent and the appellant had entered into a written Lease Agreement under which the respondent let to the appellant premises described as Shop No. G01, Pigg's Peak Building, Pigg's Peak. The lease was to endure for a period of one year renewable and commenced on the 15th April

2003 and was to end on the 14th April 2004. The monthly rental was to be in the sum of E2 130-00 per month for the first year and would increase by 10% every year.

[3] Among the pertinent terms of the lease were the following:

(1) Rental shall be paid monthly in advance on the first day of each month at the applicant's (respondent's) premises.

(2) The appellant shall not sublet the premises without the written consent of the respondent

(3) Breach of the Lease Agreement by the appellant shall entitle the respondent to cancel the Lease

Agreement and eject the appellant from the leased premises.

[4] It would appear that a Deed of Suretyship was executed on 28th April 2003 in favour of the respondent. It was the contention of the respondent that the appellant had failed to pay the rentals in terms of the Lease Agreement and that that fact had been brought to the attention of the appellant. It was also the contention of the respondent that such failure to pay the rentals entitled them to cancel the lease and eject the appellant from the leased premises. The respondent consequently proceeded to cancel the lease and demanded payment of all the amounts that were outstanding. It was under these circumstances that the respondent made the application, under a certificate of urgency, to perfect the hypothec against the appellant. The respondent obtained a Rule Nisi on the 15th June 2007 and it was confirmed on 13th December 2007. The appellant opposed the application.

[5] The appellant's Notice of Appeal gives the following as their grounds of appeal:-

(1) The learned judge erred in law by concluding that the Lease Agreement between the parties had come to an end.

(2) Alternatively the learned judge a *quo* erred in law by concluding that there were sufficient grounds for ejecting the appellant from the premises owned by the respondent.

(3) The learned judge *a quo* erred in law and in procedure by granting an ejectment order in application proceedings.

(4) The learned judge *a quo* erred in law by not considering that the application was for perfecting a landlord's hypothec and nothing more thus ejectment order was not competent and the application was replete with disputes of facts.

Grounds 2, 3 and 4 are all repeating the same ground on ejectment.

[6] It is important to observe that the Notice of Motion filed in court by the respondent included, in its prayers and, in paragraph 4 in particular the following orders:-

(a) Payment of the arrear rental and other charges in the amount of E8 520-00;

(b) Interest on the sum of E8 520-00 at the rate of 9% per annum *tempore morae;*

(c) Ejectment of the respondent and all those holding through or under him from the said premises.

(d) Costs of suit on an Attorney and own Client scale, including collection commission.

There can be no doubt, therefore, that the respondent did seek, in its application, an order for ejectment of the appellant from the leased premises.

[7] Mr. Mbuso Simelane, for the appellant, has submitted that there was no proper notice and that the court below was not entitled to grant the order for ejectment. Mr. Mbuso Simelane raised a number of issues which were never raised in the court below. This is an appellate court which can only decide the appeal according to the facts in existence at the time when the judgment appealed against was given. This court cannot be urged to consider new circumstances or matters which were not canvassed in the court below. See the case of WEBER-STEPHEN PRODUCTS COMPANY vs ALRITE ENGINEERING (PTY) LTD & OTHERS 1992(2) SA 489 at 507 where it was held as follows:-

> "*It has often been laid down that, in general, this court in deciding an appeal, decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards.*"

Mr. Simelane for the appellant contended that he had argued the issues he had advanced in this court in the court below and to support that contention he produced a copy of the Heads of Argument which he said had been argued in the court below. With respect the production of the Heads does not necessarily prove that he argued the points raised in his Heads. Mr. Muzi Simelane who appears for the respondent did not appear in the court below and he was,

therefore, not in a position to confirm or dispute whether the issues were raised in the court below.

[8] It is significant to note, however, that the judge in the court below specifically found that there was only one issue that came before him for determination namely that there had been no notice to terminate the lease agreement. That is the issue we have to deal with in this appeal because that is the issue on which the judgment appealed against was given. Indeed it is one of the two issues raised on the grounds of appeal in the Notice of Appeal. I am satisfied and find that if other issues had been raised the judge in the court below would have made some reference to them as being some of the issues which had been raised before him for determination and he did not do that.

[9] Mr. Muzi Simelane for the respondent submitted that there was no written lease between the parties and that the appellant occupied the premises on the basis of an oral lease which was for a period of one year from March 2003 to April 2004. The rental was paid monthly and the lease became a monthly lease. He submitted that after the proceedings were instituted there were a number of adjournments, and that some of those adjournments were at the instance of the appellant. He stated that the proceedings included a prayer for eviction. The point counsel for the respondent was making is that the appellant must have been aware for sometime that the respondent was seeking his eviction from the premises. Mr. Muzi Simelane further submitted that the matter had come to court in December 2007 and the appellant only filed his

answering papers in October 2008 when he was hopelessly out of time. He contended that notice in the form of institution of legal proceedings is sufficient notice and cited the case of THELMA COURT FLATS (PTY) LTD vs McSWIGIN 1954(3) **SA** 457and stated that there is no decided authority which has overruled the decision in this case.

[10] The sufficiency of notice to terminate the lease was the only issue dealt with by the learned judge in the court below. He considered the decision in the case of THELMA COURT FLATS (PTY) LTD vs McSWIGIN 1954(3) SA 457 which holds the proposition that the filing and service of a Notice of Motion by a lessor, claiming ejectment of a lessee from the leased premises, is sufficient notice of the intention of the lessor to cancel the lease. And as I have already found earlier in this judgment, the respondent had prayed, in the Notice of Motion, for the ejectment of the appellant from the leased premises. The appellant was, therefore, aware that the respondent was seeking his ejectment from the leased premises.

[11] It is now clear to us that this appeal is purely academic. We have been informed that the appellant vacated the leased premises a long time ago and it is difficult to understand what remedy the appellant was seeking in prosecuting this appeal. There is no right that he wishes to protect or enforce in this appeal. This is clearly an abuse of process and a waste of court's time. This appeal must, therefore, be dismissed with costs.

R.A. BANDA CHIEF
JUSTICE

I agree

J.G. FOXCROFT

JUDGE OF APPEAL

A.M. EBRAHIM

JUDGE OF APPEAL

Delivered in open court at Mbabane on 20 day of November

2008.