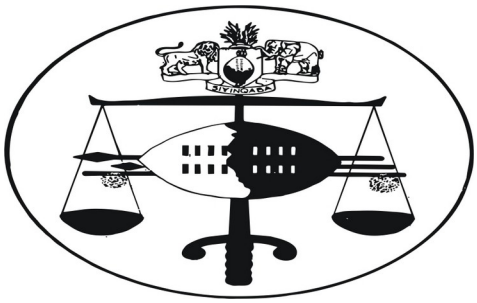

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 20/2012

In the matter between

ORION HOTELS & RESORT SWAZILAND (PTY) LIMITED **Appellant**

And

PIGGS PEAK & CASINO (PTY) LIMITED **Respondent**

Neutral citation:	*Orion Hotels & Resort Swaziland (Pty) Limited and Piggs Peak & Casino (Pty) Limited (20/2012) [2012] SZSC 55 (30 November 2012)*
Coram:	RAMODIBEDI CJ, MOORE JA and DR TWUM JA
Heard:	**16 NOVEMBER 2012**
Delivered:	**30 NOVEMBER 2012**
Summary:	**Landlord and tenant – Non – notarial lease – Section 30 of the Transfer Duty Act – The appellant taking occupation and paying rentals but subsequently**

falling into arrears – Monthly tenancy – The respondent successfully suing for, *inter* alia, arrears of rentals in the sum of E2,400,819.46 – Appeal dismissed with costs.

RAMODIBEDI CJ

[1] The present respondent, as applicant, obtained judgment against the appellant in the High Court (Hlophe J) for payment of arrear rentals in the sum of E 2, 400,819.46.

[2] The background facts giving rise to the dispute between the parties are largely common cause. On 1 December 2002, the parties entered into a written lease agreement in respect of Piggs Peak Hotel situate at Portion 1 of Farm No. 825, Piggs Peak in Hhohho District ("the premises"). In terms of the agreement, the respondent (as lessor) let the premises to the appellant (as lessee) for a period of 15 years, commencing on 1 December 2002 and terminating on 30 November 2017. The rental was by agreement fixed at E 100,000.00 per month.

[3] It is significant to record at the outset that the appellant duly took occupation of the premises on 1 December 2002. It was still in possession of the premises 9 years later, namely, on 7 January 2012, when the respondent launched these proceedings in the High Court. Significantly, the parties are on common

ground that during all those years the appellant duly paid rentals to the respondent.

[4] It is further common cause between the parties that since March 2011 to January 2012 the appellant accumulated rental arrears in a staggering sum of E 2, 400,819.46 forming the subject matter of this dispute. Initially, as appears in its letter, annexure "NM4", dated 28 July 2011, it blamed this state of affairs on "poor trading conditions" and the "world economic crisis, Tsunami in Japan, Greece and the political crisis in Swaziland". But through a sheer piece of ingenuity, it has now taken up the attitude that it is not bound by the lease agreement since it was not notarially executed, contrary to s 30 of the Transfer Duty Act. ("the Act").

[5] Basically, the appellant admits that it entered into the written lease agreement with the respondent. It contends, however, that the agreement is null and void because it was neither "notarially prepared and certified" nor was it registered against the title deed.

[6] Section 30 (1) of the Act on which the appellant relies provides as follows:-

> *"30. (1) No lease of any mynpacht, claim or right to minerals and no lease of any land or any stand for a period 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 in all to not less than ten years, ***shall be of any force or effect*** *if executed after the taking effect of this Act unless executed before a notary public, nor shall it be of any force or effect against creditors or any subsequent bona fide purchaser or lessee of the property leased or any portion thereof unless it must be registered against the title deeds of such property." (Emphasis added.)*

[7] I have underlined the words "shall be of any force or effect" appearing in s 30 of the Act to indicate my view that it does not render "void" or "illegal" lease agreements of ten years or more. It merely renders such agreements unenforceable and of no effect. Had the Legislature intended them to be void or illegal, I have no doubt that it would have said so in clear and unambiguous terms. Indeed, I should be surprised if the Legislature would interfere with people's freedom, let alone business people's freedom for that matter, to enter into contracts of lease as they pleased, subject of course to the risk of their lack of enforceability. It is for that reason that there is a thing called a "gentlemen's agreement". As **Mr Jele** for the respondent correctly submitted, in my view, s 30 of the Act does not prohibit oral agreements. Nor, does it, in my view, prohibit contracts by conduct as has happened here. It is difficult to conceive

of any reason why the Legislature would prohibit such innocuous business conduct. After all, there is a presumption that the Legislature did not intended to be unreasonable or to cause injustice as the appellant effectively advocates for in this appeal.

[8] It is important to stress that the parties had a normal and cordial landlord and tenant relationship for a period spanning more than 9 years. The fact that the lease agreement in question had not been notarially executed was never an issue at any time. The appellant, as the occupant of the premises, always paid rentals until it was hit by the economic downturn as it alleged in its letter, annexure "NM4", referred to in paragraph [4] above. The letter was in these terms:-

"Ms Nelly De sousa
The Chairperson
Piggs Peak Hotel & Casino (Pty) Ltd

Dear Ms De Sousa

Lease Agreement between Orion Hotels (Swaziland) and Piggs Peak Hotel & Casino.

The recent meeting between the board members and our Mr Franz Gmelner, CEO, Dino Urbani, Operations director and Julius Mkhatshwa, General manager on 15 July 2011

As discussed at the meeting there are a number of legacy issues plus the current economic climate to deal with.

Listed below are the various issues and we are confident that they can be resolved amicably.

1) *Orion wishes to settle the outstanding equipment lease payments with one full & final payment. In conjunction with Mr Julius Mkhatshwa please calculate this payment in order for Orion Group Head Office to make the funds available to Orion Piggs Peak.*

2) *The original lease signed in 2002 could not contemplate the unfolding of events (world economic crisis, Tsunami in Japan, Greece and the political and economic crisis in Swaziland). The current lease expires in 2017. We propose signing a new revised lease agreement for 10 years ending in 2021 (10 years)*

3) *The current poor trading condition is placing a severe burden on the hotel's cash flow. If this continues we will have to retrench 50 workers and also introduce short working hours.*

Consequently we are requesting the Board's assistance with a Nine (9) month rent holiday.

This will go a long way to stabilize the hotel's financial position

Your urgent deliberation and assistance is appreciated.

Kind Regards

(signed)
ORION HOTEL PIGGS PEAK".

[9] As can be seen, the appellant did not at that stage seek to cling on to the legal technicalities that the lease agreement had not been notarially executed. Instead, it pleaded for a 9 month holiday. By letter, annexure "NM5", dated

19 August 2011, the respondent rejected the request in question in the following terms:-

"The Chief Executive Officer

Orion Hotels & Resorts

P.O. Box 45

Pigg's Peak

Dear Sir,

RE: Lease Agreement between Orion Hotels (Swaziland) and Piggs Peak Hotel and Casino

The above captured matter refers.

Response is made in reference to your letter dated 28th July 2011 with the following to be noted:

1. *The amount outstanding on the furniture to the account has been calculated and emailed to the General Manager. Kindly liase with the General Manager and forward payment in that regard.*

2. *In reference to paragraph 2 of your letter, we advise that we are not in possession of your financial statements. This is in contravention of clause 6.2 of the lease agreement. In that end we do not have any basis of facts to support the proposition made therein.*

3. *We advise that your request for a nine month holiday is refused. The board is unable to grant such permission without the authority of the shareholders. We accordingly request that you settle the arrear rentals and further pay your monthly rentals in terms of clause 6.1.1. of the lease agreement. We note with great concern that you have failed to pay rentals for the past 2 months. This letter serves as a notice in terms of clause 21 of the lease agreement.*

4. *The above should not be interpreted to mean the board is not willing to entertain your request. It is our respective view that in order for the parties to negotiate a new lease agreement terms and holiday rental, the*

atmosphere must be conducive that is, your rental account must be in good standing. Kindly attend to same.

5. *In conclusion, your attention is drawn to clause 6.2 of the lease agreement. We have not received any performance rental in terms of the above clause. Further, please be advised in terms of the same clause in particular clause 6.4 that you are liable to pay interest on all over due amounts payable at the price rate per annum.*

6. *We hope the above is in order and we consider the matter settled in view of our advise in paragraph 5 above.*

Yours faithfully

(signed)
Nobuhle Motsa
Administrator"

In these circumstances, the conclusion is inescapable in my view, that by suddenly switching horses midstream, and now seeking to rely on s 30 of the Act for the contention that the lease agreement in question is void, the appellant is being dishonest to the extreme.

[10] The court *a quo* took a simple, practical and common sense view of the matter. Relying on the case of **Raner and Berstein v Armitage 1919 WLD 58**, it treated the lease agreement as being a month to month lease since the appellant took occupation of the premises and proceeded to pay rentals until it fell into arrears. Hence, the court confirmed the rule nisi which had been

issued on 7 January 2012, excluding ejectment because the appellant had already vacated the premises at that stage.

[11] **Mr Wise SC** for the appellant argued forcefully in this Court that the *court a quo's* decision was wrong. In a nutshell, he contended that the lease agreement in question was void and of no force or effect in law because it was not notarially executed in terms of s 30 of the Act. Accordingly, so the argument went, the respondent was not entitled to payment of rentals based on the lease agreement. Counsel sought to rely heavily on **Ruben v Botha 1911 AD 568**. That case, however, did not deal with a similar situation in the present case, namely, a claim for payment of rentals arising from a monthly tenancy between a landlord and tenant after due occupation has taken place and after the tenant has previously been paying monthly rentals. Ruben had erected certain buildings on Botha's land in the belief that he would have the use and occupation of the buildings for a period of ten years as agreed between the parties in terms of their agreement of lease. He had duly taken occupation for three years. At that stage, and as in the present case, Botha subsequently became aware that the agreement was null and void because it had not been notarially executed. He gave Rubin notice to vacate the premises. The latter accepted the notice on condition he received compensation for the buildings he had erected on the land. Botha tendered £300 which Ruben considered insufficient and accordingly sued for £700.

Smith J in **Ruben v Botha 1911 WLD 99** considered Rubin's legal position as that of a tenant at will and that he was entitled to compensation "upon the same basis as that of a tenant who has effected improvements upon the lessor's property with his consent." The Judge then dismissed Rubin's claim. Hence his appeal.

[12] It is instructive to note that the learned Judges in the Appellate Division in Ruben's case were unanimous that Ruben was a *bona fide* occupier. And so, too, they were unanimous that the principle of equity was applicable, in the matter, namely, that no man should be enriched at the expense of another. A proper reading of the judgment will show that the Court there felt that Botha, as the lessor, was entitled to compensation by virtue of lost rent. This can be gleaned from the following passage in the judgment of Lord de Villiers CJ at p 577:-

> *On the other hand the plantiff (Ruben) had the use and occupation of the premises for three years without payment of any rent, and the value of such use and occupation should be deducted from the amount of his useful expenses." (Emphasis added.)*

[13] The remarks of Innes J in **Ruben's** case at p582 are decidedly apposite, namely:-

"Although the contract as such was void, we cannot shut our eyes to the facts which led to the erection of these buildings if we would assess an equitable compensation in respect of them. The circumstances are unique, and the inquiry is not covered by definite authority. But the owner of the soil (Botha), when he elected to enforce his newly discovered rights in spite of the fact that he had allowed the buildings to go up with the knowledge that the plaintiff (Ruben) relied upon the promised enjoyment of their use for a term of years, did undoubtedly enrich himself at the expense of another."

[14] It must be stressed, however, that unlike Botha in **Ruben's** case, the respondent in the present matter did not cancel the lease agreement between the parties. On the contrary, it continued to treat the appellant as a monthly tenant. The latter continued to pay monthly rentals until it encountered financial difficulties. By their conduct, therefore, the two parties concluded a month to month lease. There was an offer and acceptance in full compliance with the principles of the law of contract. See, **Morrison v Standard Building Society 1932 AD 229**; **Variety Investments (Pty) Ltd v Motsa - 1982 – 1986 SLR 77 (CA)** (majority decision).

[15] In light of these considerations I am prepared to accept the principle of a month to month lease or tenancy as a correct legal position in the Kingdom

of Swaziland in order to prevent injustice as the case may be as well as to satisfy the requirements of public policy. See, **Swaziland Polypack (Pty) Ltd v Swaziland Government and Another, Case No. 44/2012**.

[16] In the result, the appeal is dismissed with costs including costs consequent upon the employment of two counsel.

_____

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

_____

S.A. MOORE

JUSTICE OF APPEAL

I agree

_____

DR S. TWUM

JUSTICE OF APPEAL

For Appellant : **Mr R.M. Wise SC**

For Respondent : **Mr N.D. Jele**

(With Him Mr S.P. Mamba)