



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal Case No. 31/2014

In the matter between:

SYNERGY CHARTERED ACCOUNTANTS
KERRY SMITH

1st Appellant

2nd Appellant

And

WBD INVESTMNETS (PTY) LTD

Respondent

Neutral citation: *Synergy Chartered Accountants & Another v WBD Investments (Pty) Ltd (31/2014 [2014] SZSC 82 (3rd December 2014)*

Coram: **DR. S. TWUM JA, M.C.B. MAPHALALA J.A. and E.A. OTA JA.**

Heard: 14th November 2014

Delivered: 3rd December 2014

Summary: Lease of premises; appellant originally moved into premises to conduct audit of accounts previously undertaken by deceased Accountant. Stayed indefinitely and later conceded liability to pay rental. Held arrangement constituted lease.

JUDGMENT

DR S. TWUM J.A.

[1] This is an appeal from the judgment of Mamba J. sitting at the High Court, Mbabane, dated 1st July 2014, whereby he confirmed the respondent's landlord hypothec over the appellant's movables on premises situate at Portion 3 of Lot 97, Manzini for arrears of rental in the amount of E1062,720.00.

Background facts

[2] The respondent company, WBD Investment (Pty) Ltd owned the premises described in paragraph 1 above, (hereinafter referred to as "the premises".) Until his demise, Brian John Watkins was a director of the company. He held 50% of its shares. The remaining shares were held by Kerry Smith, who was also a director of the company.

- [3] By profession, Brian Watkins was a Chartered Accountant. He practised as an Auditor in part of the premises. He also carried on other business there not connected to the accountancy profession. The remaining part of the premises was used by Kerry Smith, her common law husband, called Neville Houarean and their employees.
- [4] Brian John Watkins died on 9th July 2010. Elaine Patricia Welch who was the personal partner of Watkins applied for and obtained Letters of Administration to administer the estate of Brian John Watkins. By virtue of that authority she was also appointed a director of WBD Investment (Pty) Ltd.
- [5] The record shows that by Notice of Motion, WBD Investments (Pty) Ltd, applied to the court below for confirmation of its landlord's hypothec, which application was based on its claim that it owned the premises and that it was being leased by the appellants herein who have failed or refused to pay the required or agreed rent.
- [6] The application was supported by the Founding Affidavit of Patricia Welch in her capacity as a director of the company. In the affidavit, she stated that

the appellant occupied 492 square meters of the premises and that the agreed rental was E80.00 per square meter, payable from July 2011. She added that the rentals were due monthly and in advance, payable to the respondent. She explained that the total rent arrears came to E1,062,720.00.

[7] The Notice of Motion was opposed by the first appellant, Synergy Chartered Accountants and the second appellant, Kerry Smith, in her capacity as a director of the respondent company. Ms Kerry Smith was a Chartered Accountant/Auditor. She claimed to have practised using the name of the 1st appellant. However, it subsequently transpired that there was no company registered at the Company Registry under the name. In effect, it meant that Ms Kerry Smith was the only appellant. She claimed that “in law Elaine Welch, the Executrix of Brian Watkins and a director of the respondent company could not purport to act on behalf of the Company in circumstances where she was not duly authorised by the Board of Directors.” The learned judge effectively dismissed this ground.

[8] The evidence shows that upon the death of Brian Watkins on 9th July 2010 the appellant moved into the premises the following month at the request of the respondent in order to continue and complete some of the unfinished

audit work then being carried out by the deceased for his clients. At this time, after the death of Watkins part of the premises was being occupied by the Estate of Watkins and his company called FHAM. Following court actions against FHAM and the Estate of the late Brian Watkins, some of the assets under the control of the Estate and the company then in the premises were attached by order of the court and removed. This and other reasons stated below caused Welch to vacate the premises altogether, leaving it to be occupied solely by Kerry Smith.

[9] The respondent complained of disagreements about the fee which the appellant claimed from the Estate of Watkins without any explanation. Further, she complained in her Founding Affidavit, in support of the Notice of Motion paragraph 18, that the appellant surreptitiously moved into the premises on the pretext of completing the audit and in effect edged the respondent out of the premises. She deposed further that the appellant since then had taken full possession of the premises including where the deceased carried on his various businesses.

[10] In sum, the respondent said the appellant made her presence at the premises difficult, unbearable and uncomfortable to the extent that she felt unsafe.

What was worse, the respondent claimed that the appellant changed the electronic access of the gate to the premises, changed the locks to the building and the code of the alarm system. She stated that the appellant and her common law husband, Neville Houarean, informed her that she was not allowed on the premises without one of them being present thereon. She stated that her every movement in the premises was monitored, her access to e-mails and telephone lines was sabotaged and, indeed, her access to the premises was regulated.

[11] In my view, the learned Judge a quo put the situation correctly when he stated in paragraph 10 of the judgment that it is not clear what took place between the Executrix Welch and the appellant, Kerry Smith. As the learned Judge so aptly put it in paragraph 10, “what is significant though, for purposes of these proceedings, is that on 26th July 2011, the appellant, through her attorneys wrote to the attorneys of the late Brian Watkins as follows:-

“In respect of our client’s occupation of the building, our client concedes that she is liable to pay rental for the occupation at the rate of E80.00 per square meter. However, such rental will be calculated

from the 9th July 2011 being the date whereupon office furniture and equipment belonging to the Estate were removed by the Executrix.”

[12] Surely, there can be no equivocation by the appellant that she conceded or admitted ‘liability’ to pay rental for the premises, not just a part thereof. The entire premises measured 492 square metres and the rentals were to be paid monthly and in advance.

[13] In the result, the court a quo held that the appellant had no defence to the application and granted it in the terms prayed.

[14] **The Appeal**

On 15th July 2014, the appellant appealed against the judgment of His Lordship, Mr Justice Mamba, delivered on 1st July 2014. The following grounds were noted:-

“1. The Appellants contend that the Court a quo erred in law and in fact by coming to the decision that the Applicant was properly before Court and that it was duly authorised to institute the proceedings that it did against the respondent a quo, in the

absence of a resolution of the Directors authorising it to institute such proceedings.

2. The Court a quo erred in law and in fact in allowing the Applicant to institute the proceedings as it did without being clothed with the requisite authority in terms of a Resolution of the Board on the basis that it was not necessary to hold such a meeting of the Board simply because the Applicant was a Director.
3. The Court a quo erred in law and in fact in finding that Elaine Welch had the authority to represent the company even though there was no meeting of the Board and no Resolution of the Board authorising the institution of the legal proceedings against the Appellant.
4. The Court a quo failed to have regard to the provisions of Section 228 and 229 of the Companies Act.
5. The Court a quo erred in law and in fact in determining that the rental outstanding was the sum of E1,062,720 (One million and sixty two thousand seven hundred and seventy two Emalangeni) by having regard to the hearsay evidence of a valuation report which evidence was not supported by an

affidavit of the Author thereof and only provided an estimate of the square metres or area of space.

6. The Court a quo erred in law and in fact in finding that the valid lease agreement had been entered into in isolation and without due regard to the respective obligations of the Estate late Brian Watkins and the Appellants which rights are inextricably intertwined.
7. The Court a quo erred in law and in fact in coming into the conclusion that valid lease agreement had been entered into between the Appellant and the Respondent, when it was unclear as to the amount of space that was actually occupied by the Appellant and without due regard to the space that was previously occupied by Elaine Welch in her capacity as Executrix in the estate of the late Brian Watkins.
8. The Court a quo misconstrued the Appellants contention that she had a claim against the Estate of the late Brian Watkins and that the Respondent had a claim of outstanding rentals against the Estate of the late Brian Watkins. In misconstruing this contention the Court a quo found at paragraph 11 of the Judgment that the Appellants claim against the Estate of the late

Brian Watkins was not a defence to the Respondents application yet never considered Respondents concomitant claim against the Estate.”

[15] The gravamen of the appellant’s case is that there was no lease agreement between the parties whereby the appellant was bound to pay to the respondent the sum of E1062 720.00 as rental. The appellant’s reason is that there was no offer by the respondents for a lease. Alternatively, the appellant argued that even though she conceded that she was bound to pay rental to the respondent at the rate of E80.00 per square meter per month payable from July 2011, that concession was ineffectual since it did not contain the area occupied by the appellant in the premises.

[16] The respondent’s answer was that the area was set out in paragraph 10 of the founding affidavit of Elaine Welch. In that paragraph, the Respondent therein stated that the present appellant occupied a total area of 492 square meters of the premises in terms of the Property Valuation annexed thereto, marked “WBD 4”. This is further elaborated at paragraphs 11.1 and 11.2 of the same affidavit at page 7 of the record. The Valuation schedule and Report, “WBD 4” starts at page 15 of the record. At page 20 of the record,

the Ground Floor is shown to contain 290 square meters and the area of the Upper Floor, also occupied by the appellant, is 202 square meters, bringing the total area to 492 square meters.

The appellant's letter clearly and unambiguously set out what she perceived to be her liability from 9th July 2011. After all, she is a part-owner of the company that owned the premises and would not be in any doubt about its size. That letter does not explain how the appellant fixed the rental rate of E80.00 per square metre. Obviously the respondent too had all the data out of which the rental could be calculated. She did not demur! The appellant had full occupation of the premises from the 9th of July 2011. This is why she remained in possession, having conceded liability for payment of rental. There can be no credible explanation for her occupation, particularly on account of the harassment she and her associates visited on the respondent. In my view it was unabashed euphemism for the appellant to say that the respondent "abandoned" the premises. The appellant never contended that the respondent's calculation was wrong. She simply tried to pull a fast one over the respondent by saying that there was no lease because one could not spew out "offer and acceptance" to herald in the lease. In my view, the explicit concession by the appellant which spelt-out all the relevant matters of rental rate, the commencement date for the rental payments and the

further information of the area of the premises occupied by the appellant stated in the Valuation Schedule Report at page 15 of the record, made any further search for the traditional synthesis of “offer and acceptance”, completely otiose. They were ad idem.

[17] Some half-hearted attempt was made by the appellant to disparage the Valuation Schedule Report, by saying that it was hearsay evidence. The valuation of the premises for sale may in strict legal analysis, be described as hearsay. But the areas of the various segments of the premises cannot be hearsay. The measurements are inherent parts of the premises. In any case, Kelly Smith was a director of the company. In a letter written by her legal advisors to the respondent annexed to the record as “WBD 3” at page 13, she gave a break-down of the deceased’s indebtedness to Elaine Welch, the Executrix. Paragraph 3.2 stated: “Rental in respect of Brian’s occupation of the building E886.785”. I am persuaded that the contents of paragraph 6, page 14 of the record, was informed by her personal knowledge of the various areas of the premises, just as she could calculate the deceased’s liability to pay rental.

[18] It remains for me to add that the various positions adumbrated in the record by appellant to argue that there was a real bona fide dispute of fact on the papers as to whether the parties concluded a lease agreement, goes to no issue. The reference to a letter dated 12th April 2011 is clearly irrelevant in relation to the concession she made in July 2011.

In the circumstances, I will dismiss the appeal and award costs on the ordinary scale to the respondent.

Ordered accordingly.

DR. S. TWUM
JUSTICE OF APPEAL

I agree.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I also agree.

E.A. OTA
JUSTICE OF APPEAL

For the Appellants : **Adv. Pye**

For the Respondent : **Adv. P.E. Flynn**