IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 75/2015

In the matter between:

ZULU INVESTMENTS (SWD) (PTY) LTD
t/a SWANKS **Appellant**

And

PLAZA PARK (PTY) LTD **Respondent**

Neutral citation: *Zulu Investments (Swaziland) (Pty) Ltd t/a Swanks vs Plaza Park (75/2015) [SZSC]48 [2016] (30 June, 2016)*

Coram: **J. S. MAGAGULA AJA**
C. MAPHANGA AJA
M. J. MANZINI AJA

Heard: 20th May, 2016
Delivered: 30th June, 2016

Summary: *Civil Practice and Procedure – application to perfect landlords hypothec and indicatory relief and action for claim for arrear rental; practice not establishing hybrid founding by way of application.*

Civil – application to perfect landlords hypothec and attachment of movables brought into premises by tenant – whether extends to claim other than arrear rental where arrear rental debt has been paid- payment of outstanding rent conceded by landlord- appeal against order confirming rule and interim order for sale of movables by public auction not competent- order set aside.

Civil law and Procedure – landlord and tenant; whether default notice in terms of lease serving as effective notice of cancellation by lessor – whether institution of proceedings by summons serving as sufficient notice of cancellation

JUDGMENT

MAPHANGA AJA

[1] This is an appeal against a judgment of the court *a quo* handed down of the 5th October 2015.

[2] A brief sketch of the background is called for. The parties (the Appellant and the Respondent) entered into a written lease on the 19th July 2013 in whose terms certain commercial retail premises described as Shop 4 situate in a shopping centre under the control of the Respondent were leased to the former.

[3] It is common cause that at some point during the course of the lease the Appellant fell into arrears in the payment of the rent; which arrears became considerable in terms of the amounts involved.

[4] In light of the series of instances of Appellant's default in the due payment of the rental, the Respondent on divers occasion addressed various

correspondence putting the Appellant on notice and calling upon it to make good on the debt.

[5] Consequent upon Appellant's default and unpaid rental arrears, the Respondent invoked certain clauses and took remedial action by launching an *ex-parte* application in the court *a quo* under a certificate of urgency for security in the form of orders to perfect a claim for landlords hypothec pending payment of the sums standing in arrears, cancellation of the lease and ancillary ejectment relief and other claims.

[6] In its notice of application dated 15th May 2015, apart from the dispensation from the normal procedures as to conduct of applications on grounds of urgency, the Respondent detailed the for the following orders in its prayers:

> **"3 Pending payment of the arrear rental in the amount of E40 721.34 claimed by the Applicant from the Respondent in respect of the premises being Portion 638, Farm 2 at Shop 4 of the Mall building, Mbabane in the District of Hhohho, the removal of any movables from the said premises is hereby interdicted;**
>
> **4. On confirmation of the *rule nisi*, the Applicant be allowed to sell the movable assets through public auction and or private treaty;**
>
> **5. Cancellation of the Lease.**
>
> **6. Ejectment of the Respondent from the premises being Portion 638, Farm 2, at Shop No.4 at the Mall building, Mbabane in the District of Hhohho, on the basis that there is no dispute of fact;**
>
> **7. Costs of suit on attorney own client scale and collection commission against the Respondent;**

8. The Deputy Sheriff is hereby directed and required

8.1 Forthwith to serve this order, the notice of motion and the founding affidavit upon the Respondent and to explain the full nature and exigency thereof;

8.2 attach and resume all the movables upon the premises by locking them inside;

8.3 Make an inventory thereof; and

8.4 Make a return to the Applicant or its attorney and the Registrar of what he has done in the execution of this order."

[7] The notice then sets out a statement the Respondent its claims ostensibly for substantive final relief as follows:

"9 The Applicant's claim is for;

9.1 Payment of the arrear rental in the amount of E40 721.34;

9.2 Interest thereon at the rate of 9% per annum *a temporae morae*;

9.3 Collection commission;

9.4 Cancellation of the lease;

9.5 Ejectment of the Respondent from the premises at Shop No.4, Portion 638, Farm 2, at the Mall building, Mbabane in the District of Hhohho;

9.6 Costs of suit on Attorney own-client scale----."

[8] This application appears to take an innovative variation to the established common law procedures for the perfection of a landlords hypothec to secure a claim for arrear rental pending a parallel, separate but fully - fledged action for the recovery of substantive claims including a claim for the arrear rental debt or

damages giving rise to the landlords hypothec and other ancillary relief including cancellation and or ejectment order as the case may be.

[9] This departure appears to be sanctioned by a practice note issued by his **Lordship Justice Sappire CJ** the effect of which was to prescribe a hybrid procedure that rolled up the summary application for security (brought *ex-parte*) and the claim for arrear rental without the burden of the more cumbersome dual common law application and action procedures. The copy that I have had sight of bears no reference number. It reads:

"THE HIGH COURT OF SWAZILAND

PRACTICE NOTE

Combined claim for attachment to perfect landlord's hypothec and for payment of arrear rental ejectment etc.

1. Where relief of this nature is sought, proceedings may be ex-parte application claiming relief on the form set forth in annexure A hereto

2. The application is to be supported by a founding affidavit in which is set forth.

2.1 The identities and citation of the parties.

2.2 The date the lease commenced and its terms. Where practical a copy of the lease is to be attached.

2.3 The period in respect of which the respondent lessee is said to be in arrear.

2.4 The date on which the last rental payment was made.

2.5 Where possible a full statement of the lessee's account demonstrating how the amount claimed in respect of arrear rental is computed.

2.6 Particulars of any demand(s) made and the response thereto.

2.7 Where ejectment is claimed, the full grounds justifying cancellation or other facts indicating that the lease and the respondent's rights to occupation of the premises, is at an end.

2.8 A statement as to the existence on the premises of movables subject to the landlord's hypothec, and the estimated value thereof.

2.9 Any other facts or circumstances relevant to the claim.

3. If the application is found to be in order and the relief claimed is granted the court will make an order in terms of Annexure B.

4. This directive is advisory and not peremptory and is to be applied with discretion, having regard to special circumstances in any case. The rule regarding complete disclosure in *ex parte* applications is to be strictly observed.

Annexe A

Suggested form of prayer in ex parte application:

To:
Registrar
High Court of Swaziland
Mbabane

Take notice that the above named Applicant will apply *ex parte* on Friday ..... at 09H30 or so soon thereafter as the matter may be heard, for an order

(a) Interdicting the removal by any person, of any of the movables there situate, from premises at (*here described the premises*). (" the Premises") pending payment by the respondent of arrear rental in an amount of (*here state the amounts claimed in respect of each period*) owing by the Respondent to the Applicant in respect of the said premises.

(b) Directing the Sheriff or his lawful deputy to serve this order on the Respondent and to attach the said movables to secure the Applicants tacit hypothec in respect of the said arrear rentals.

(c) Directing that Applicant's claim for arrear rental and other relief be heard and adjudicated upon at such time and in accordance with such procedures as the Court may deem fit.

(d) Further or alternative relief.

And take further notice that the affidavit(s) hereunto attached will be used in support of the application.

Annexe B

Typical form of order

THE HIGH COURT OF SWAZILAND

Applicant

v

Respondent

Case no……..

ORDER OF COURT

1. Pending payment of the arrear rental in the amount of (*here state amount*) claimed by the Applicant from the Respondent in respect of the premises at (*here describe premises*), the premises), for the period (*here state period for which rental is unpaid)* the removal of any movables from the said premises is hereby interdicted.

2. The sheriff or his lawful deputy is hereby directed and required

(a) forthwith to serve this order, the notice of motion, and the founding affidavits upon the Respondent and to explain the full nature and exigency thereof to him.

(b) attach all the movables upon the premises and

(c) make an inventory thereof.

(d) make a return to the Applicant or his attorney and the Registrar, of what he has done in the execution of this order.

3. **The Applicant's claim, based on the allegation in the founding affidavit, for**

(a) **Payment of rental in amount of**

(b) **Ejectment of the Respondent from the premises.**

(c) **Costs of the suit.**

Will be heard on Friday (*here insert date*) at 09H30 or so soon thereafter at the matter may be reached.

N.B. **If the Respondent wishes to oppose the claim he shall**

(1) **Within three days of the service of this order given notice in the manner prescribed by the Rules of Court of his intention so to do.**

(2) **Not less that two days before the date of hearing serve and file such affidavits as he may wish in support of his opposition, and in answer to the Applicant's founding affidavits.**

(3) **Appear in attendance at court at the time stated for the hearing.**

4. **If the Respondent is prejudiced by the interdict and/or attachment and contends that no rental is owing or that some or all of the movable attached are not subject to the hypothec he may on 24 hours notice to the applicant anticipate the date of hearing provided for and apply to court for the recession or variation of this order.**

(ends)
(SGD) REGISTRAR.

High Court of Swaziland

(added parenthesis)

[10] That this procedure and the practice note directing its requirements and forms are now well entrenched remedies in our civil procedure seems adequately supported if regard is to be had to the dictum of his **Lordship Maphalala PJ** in the case of ***Swaziland Polypack (Pty) Ltd vs The Swaziland Government And Another*** **(44/2011) SZSC at page 7** where he says:

> **"In addition the court a quo correctly held that there is now a practice in this jurisdiction for granting an interim order for attachment or interim interdict against removal of the goods in terms of an ex parte application. Ancillary orders call upon the Lessee to show cause why it cannot be ordered to pay the arrear rentals, and, why it cannot be ejected from the premises. However, the applicant should present prima facie proof that there are reasonable grounds for apprehending that the goods will be removed or disposed of."**

[11] Again, in the case of ***Swaziland National Provident Fund Board v Vikela Legal Consultancy (Pty)*** **Ltd (03/2012) [2013] SZHC 181 (3rd May 2013)**

the High Court has, following the Polypack case, reaffirmed the existence of this hybrid summary procedure and confirmed the existence of the innovative practice note wherein guidelines as to the essential elements and directory specifications of the form of the notice as well as a precedent of the form is given subject to the caveat therein that such a form is illustrative and directory in nature as opposed to a mandatory rule. The court goes on to reproduce the practice note in part at page 15 of the judgment.

[12] The Respondents notice *a quo* appears to have adopted the specimen order as illustrated in the practice directive and followed its form to the letter.

[13] The court *a quo* having heard Respondent granted the orders as prayed in the Notice of Motion.

[14] In retrospect it appears however that orders on the writ (Court Order) that was procured by the Respondent's attorney differ in one material respect – they omitted to include the relative order based on the prayer for "cancellation" which appeared in the text of the original Notice of Motion. The Appellant's counsel of the materiality of this omission made much capital.

[15] It is conceivable how in the rush attendant on the prosecution drastic proceedings; albeit hastily by way of urgency, such clerical errors could occur.

[16] However the level of diligence that is expected of a litigant may be best described as *exacta diligent* (with utmost or extra-ordinary diligence). This approximates the degree of fidelity that his Lordship **Mamba J** *a quo* refers to in the judgment giving rise to this appeal. The legal practitioner is best advised to tread ever so warily especially where such proceedings are conducted on an *ex-parte* basis.

[17] Having said that, despite the omission, it appears the Appellant had due notice of the prayer for cancellation being germane in the proceedings. Some degree of effort and content in the averments by the Appellant is dedicated to this aspect in its answering affidavit.

[18] For this reason the flaw which occurred in the order by way of omission although serious on the face of it, is of no moment and as such not fatal. I am prepared to respectfully accept, on the strength of the remarks; albeit *obiter* made in the judgment by the court a quo, wherein it is confirmed that at the conclusion of the ex-parte application the court granted the orders sought in the Respondents Notice of Motion, that the Court in its order included the orders as prayed. To that end I am satisfied the order issued by the court after hearing the applicant in the initial *ex parte* hearing, in effect included the cancellation order.

[19] Equally it also becomes academic that the orders relating to the perfection of the landlords hypothec security were not included in the form of the *rules nisi* as should have been the case. The orders were indeed treated as *rules nisi* and were accordingly responded to in turn by the Appellant's answering and supplementary answering affidavits. To this extent it seems the Notice of Motion conforms to the Practice Note.

[20] We now turn to merits of the appeal itself and examine the Appellant's grounds *ad seriatim*.

Appellants First Ground – re: Hypothec

Appellants first line in challenging the judgment of the court *a quo* is that the Court erred in confirming the sale of Appellants *invecta et illata.*

Appellant's submissions

[21] The upshot of Appellant's submission in this regard appears to be that in as much as the Respondent's claim to the security of tacit hypothec over the Appellant's movables was predicated on a debt for arrear rental and as such was contingent on and existed only pending payment of arrear rental, it was therefore liable to discharge upon payment of the claimed rental; and in light of the Respondent's admissions, and this fact being common cause, that the debt had in the intervening period after the execution of the attachment orders, been settled in full by payment of the outstanding rent then the rule in respect of the hypothec was liable to discharge.

[22] To buttress this point, Mr S. Dlamini for the Appellant, urges that given the clear and unequivocal concessions made by the Respondent on affidavit in the proceedings *a quo* it was not competent for the court *a quo* to confirm the interim order of attachment of the Appellants movables let alone the prayer for

sale in execution without an antecedent proof and award of the sums claimed in *lieu* of arrear rental.

[23] It relies on an excerpt in the affidavit deposed by and on behalf of the Respondent to wit:

> **"It is common cause that the respondent has since made payment of the full debt amount as in accordance with the rental payment for the month of June."**

[24] This point appears to be conceded by Miss Boxshall–Smith for the Respondent in her arguments but in rebuttal she contends that the attachment of the movables was also to cover for legal costs including sheriffs fees and interest attendant on the execution of the writ of attachment; these being specifically foreshadowed in the lease agreement and accruing to the landlord upon breach of the lease agreement.

[25] The crisp question that arises is whether the right to the security claimed by Respondents in the form of its tacit hypothec is limited only to cover arrear rental and is therefore automatically terminated as soon as the arrear rental is paid. In other words does it extend to and also cover other debts owed to the lesser under the lease?

[26] There is a welter of authorities in support of the legal proposition that the security that inures to the landlord by attachment order over a tenants movable is co-extensive with a claim for arrear rental. Its purpose is to cover the landlord's claim for arrears rental. This much is stated in the **Polypack v Swaziland Government case.** It is stated thus at paragraph [11] of the judgment:

"The legal basis for perfecting the hypothec by obtaining a court order for attachment or interdict restraining the movable property from the leased premises is to prevent the lessee from disposing of and removing the movable property from the leased premises <u>pending payment of the rent or the determination of proceedings for the recovery of the rent"</u> (added emphasis)

See also **Van Der Walt and G.J. Pienaar, *Introduction to the Law and Property*, Third Edition at page 302; *Webster vs Ellison* 1911 AD 73 at 79 – 80; Barclays Western Bank vs Dekker 1984 (3) SA 220 (D) at 224 (A).**

[27] In **Woodrow and Co v Rothman 1884 (4) EDC 201** the court had to deal with the question whether the lessor's tacit hypothec also covered damages or a claim for expenses for remedial repairs due to deterioration in the property caused by the tenant. The court held that the hypothec covered the rental only and does not extend to the debt due for repairs for which the lessee was liable.

[28] This question has recently come to be dealt with more recently in the case of **New Life Commercial Property Association vs Draigi Broedery Bpk (2007) ZAECHC 101** where the court held that the hypothec <u>only</u> secures outstanding rent.

[29] There has been no authoritative departure from this legal proposition although it also appears that the debate has lingered among some expert commentators in academia on the subject. The debate and the respective academic discourse is touched on briefly by the learned authors **Klein D.G and A. Boraine in Silberberg and Schoeman *The Law of Property* Third Edition of (1992) Butterworths.**

[30] On the facts as established before the court *a quo,* which facts are conceded by the Respondent, the claim for the relief of attachment of the Applicants goods

as security was on the papers only predicated on and was limited to the Respondent's claim for outstanding rental as articulated in the notice of motion and founding affidavit. This is borne out in the averments set out in the Respondent founding affidavit where it deals specifically with the hypothec point. The following averments are made in support of the Respondents case.

> **"18.1 The amount currently owed by the Respondent (the Appellant presently) is an excessive amount being a sum E40,721.34 …… and the Applicant has no security other than any movables that may be in the premises. The Applicant does not know the size and quantum of the goods in the premises which constitutes the landlords hypothec."**

[31] It was contended by Ms Boxshall Smith that, notwithstanding this concession and the unequivocal statement in the founding affidavit of the arrear rental being the only basis for the sought security, the Respondents were entitled to retain the goods attached originally to cover the hypothec and to seek the same to cover legal costs.

[32] The Appellant in rebuttal, contends that the order for the sale by public auction of the attached goods was not a competent order for the court *a quo* to make especially in view of the fact that no allegations were made out by the Respondent for this relief in its founding affidavit in the first place. I agree. The averments in the founding affidavit cited by Ms Boxshall-Smith do not advance the Respondents position as it is merely a restatement of a clause in the lease agreement and has nothing to do with the jurisdictional basis for the relief claimed. The recited clause generally deals with the remedies accruing to the lessor as a consequence to breach and does not relate to the question of a landlords hypothec at all.

[33] In my view there is merit for the Appellants position on this point for the reasons above but more especially in light of the Respondents concessions that

the debt on the basis of which the attachment of the Appellants movables as remedy had been settled when the matter was argued before the court.

[34] It is our view that accordingly the attachment order to found security ought to have been discharged as the Respondents tacit hypothec over the said goods had been automatically extinguished upon the payment of the balance or arrear rental due.

[35] With the arrear rental having been settled and the landlords hypothec having thereby been terminated there was no basis for the attachment order to subsist. With the debt cleared the hypothec simply expired. The right to attachment or restraint by the interdict came to an end. Therefore it follows that there could be no basis for the sale of goods without the underlying debt it was meant to secure.

[36] There is no reason why any judgment for any costs awarded or any other claims arising could not be recovered through the normal writ of execution following the event in the normal way that writs for the security of judgment debts are executed.

[37] Accordingly it is our determination that this ground of appeal ought to succeed and the order of the court *a quo* confirming the order prayed for at prayer 4 of the Respondent as notice of motion ought and is hereby set aside.

Appellant's second ground on cancellation

[38] One plank in the Appellant's second ground is that the interim orders issued by the court *a quo,* which was were confirmed in the final judgment, did not include an order for cancellation. This is premised on the fact that the interim court writ that was issued under the Registrar of the court *a quo's* hand did not include the prayer for cancellation in the *rule nisi* issued. I have already dealt earlier with that omission. It is of no consequence and therefore this aspect of this ground of appeal cannot be sustained.

[39] This then leaves the second leg in the cancellation ground, which is in two parts: - namely

39.1 That an order for cancellation was not competent relief before the court a quo in that in terms of the lease it was the appellant which had the exclusive power to cancel the lease; and

39.2 The Respondents right to cancel the lease rested on the fulfilment of condition precedent being the issuing of notices in terms of clause 29 of the lease agreement prerequisite.

[40] Clause 29 of the lease reads as follows:

"29.1 The rental, the service charge or any other amount due in terms hereof not be paid on due date (and remain important for seven--- days after notice requiring such payment has been given to the lessee or……."

What then follows is a catalogue of other specified instances of breach then the lease agreement further states**:**

"then the lessor shall be entitled to cancel this Lease and retake possession of the premises without prejudice to any of its other rights under this Lease or in law"

29.2 Notwithstanding the aforegoing, <u>if, within any one period of twelve months, the lessor shall have duly given the lessee notice in terms of 29.1.1 in respect two</u> failures to make payment on due date, the lessee shall not thereafter be entitled to any notice in respect of any further failure to make payment on due date and <u>the lessors rights of cancellation and any other relief in terms of this clause shall ..... forthwith upon any further failure to pay.</u>" (added emphasis)

[41] For completeness and in order to locate the discourse and frame the construction of this pertinent clause in the lease, it is important to consider other key clauses founding on cancellation.

[42] Firstly clause 28 of the lease does seem to envisage a scenario where the lessor's exercise of its right to cancel the lease may be deferred. This clause recognises the right of the lesser to receive any sums paid in lieu of rental post-cancellation (the holding over period) to accrue and be applied as (compensation) damages for holding over.

[43] It seems to be without doubt that in terms of Clauses 28 and 29.1, the lessor is entitled to and has the option to itself cancel the lease. Consequently having terminated the lease the lessee's rights to occupation of the premises would come to an end. All the lessor would seek to do is enforce its vindicatory rights to and retake possession of the premises. That is the scenario that can be inferred from the provision of this clause.

[44] To trigger the lessors rights to itself cancel the lease, all that is necessary is the event of breach on account of (*inter alia)* the lessees failure to pay any debt for arrear rental within 7 days after delivery of notice for default (default notice in terms of clause 29.1.1) calling for such payment.

[45] All the clause does is confirm the lessors right (or gives the lessor the option) to cancel the lease. In our view this is not the only course open to the lessor to effect cancellation of the lease

[46] A careful reading of Clause 29.2 suggests that the landlord would also be entitled to take a different course of abiding the default but elect to give the lessee default notices in terms of 29.1.1 and reserve the right to seek cancellation and ejectment and in the event of further defaults, he could at that

time elect to issue summons invoking his "rights of cancellation and other relief in terms of this clause" to use the wording of clause 28(2).

[47] From the clear language of that having reserved this right its exercise by the landlord would "arise forthwith upon any further failure to pay."

[48] Implicit from the said clause 29 of the lease are two scenarios in the options open to the lessor in the event of a breach:

> **48.1 He has the option to have and then exercise his power, on notice to the lessee, to immediately cancel the lease (clause 29.1); or alternatively.**
>
> **48.2 He may render default notice to the lessee and abide the default and in the event of further default (within the 12 months time frame where upon 2 default notices have issued) institute proceedings to**
>
> **a) seek cancellation of the lease ; and**
>
> **b) ejectment of the lessee**

[49] From the facts it is common cause that there was a breach of the lease by the Appellant arising from the instances of its failure to pay rent in due date and that the Respondent elected not to itself cancel the lease but to seek cancellation by order of court.

[50] In our view clause 29 (2) dispense with the obligation to give notice of an intention to cancel where it says:

> **"The lessee shall be entitled to cancel this lease and retake possession of the Premises, without prejudice to any of its rights under this Lease or in Law.**

29.2 Notwithstanding the a foregoing, if within any one period of twelve months, the Lessor shall have duly given the Lessee notice in terms of 29.1.1 in respect of the failures to make payment on due date, the Lessee shall not thereafter be entitled to any notice in respect of any further failure to make payment on due date, and the Lessor's rights of cancellation and other relief in terms of this clause shall arise forthwith upon any further failure to pay."

[51] For this reason the Appellant's line of attack questioning the competence of the court *a quo* to order cancellation of the Respondent's right to seek such relief fails to take into account the provision of clause 29.2 in the forfeiture clause and as such is untenable in the light of the clear wording of the lease.

[52] I am satisfied that the Appellants recourse was not to invoke clause 29.1 but rather it relied in the operation of clause 29.2.

[53] All that clause 29.2 requires as prerequisite to trigger the operation of the second option of the forfeiture clause is another event of default on the part of the Lessee where there has been 2 prior notices of default given in terms of clause 29.1.1.

[54] The notices envisaged by clause 29.1.1 have to merely call the lessees attention to the default and demand payment and if payment is not made after such notice is given, one of the conditions for an instance of breach by non-payment of rent on due date will have been met.

[55] Clause 29.2 envisages a scenario where more than one such instance of breach by non-payment of rent may occur within a 12 months cycle. In the initiation the conditions to trigger the operation of clause 29.2 would have come to force.

[56] For the reasons I find no merit in the Appellant submissions of the validity or otherwise of the letters relied on as notices in terms of clause 29.1. After all

what clause 29.1.1 requires the notices to communicate is demand for payment of the overdue rental. That is the effect of the contents of this correspondence.

[57] It has not been disputed by the Appellant that, on the occasions of the issuing of the various letters relied on as notices in terms of the forfeiture clause (29.1.1) these has been actuated by clear instances of default by non payment of due rental on the part of the Appellant. Nor has it been disputed that those notices constituted notice of default and demand for payment at each of the several instances of default. For that reason I find no fault in and respectfully agree with the finding of the court *a quo* when the learned Mamba J aptly says that:

> **'…I agree entirely with the contention by the applicant that since the respondent had defaulted in its payment for more than once and had been given the requisite notice on its first two defaults, there was no need for the applicant to sent yet another formal notification as per the terms or provisions of Clause 29.2 of the Lease Agreement. This clause states that:-**
>
> > **"Notwithstanding the aforegoing, if within any one period of twelve months the lessor shall duly given the Lessee notice in terms of 29.1.1 in respect of two failures to make payment on due date, the Lessee shall not thereafter be entitled to any notice in respect of any further failure to make payment on due date, and the Lessor's rights of cancellation and other relief in terms of this clause shall arise forthwith upon any further failure to pay."**
>
> **At the time of the institution of these proceedings the respondent had failed to make full payment for over two months. Likewise when the first notice was given in February 2015, the respondent had defaulted for at least two months; a failure to pay in full on each month constituting a separate and distinct breach"**

[58] I agree with the courts findings in this regard and therefore I am of the view that the courts rejection of the Appellants contentions on the construction of the clause was correct.

Waiver of Cancellation Right

[59] What remains to be dealt with is Appellants other ground in which it is untended as an alternative argument that the Respondent had by acceptance of 2 further payments tendered by the Appellant it had waved its right to cancellation.

[60] The matter of the proposition of waiver that is put up by the Appellant must be considered within the context of the forfeiture clause in its fullness. It is an inference that must be consistent especially with the provisions of clause 29.2 and the circumstances of the matter as pertains the state of mind of the landlord to properly found that inference.

[61] That is the principle that the judgment of **Hefer JA in Mahabeer v Sharma NO (474/83) [1985 SZSCA 30 [1985] 2 All SA 295 (A)** after consideration of the proposition in **Potgeiter and Another v Van Der Merwe 1949 (1) SA 361 at page 371/2.**

[62] This proposition in question is based on Pollock's statement in **"Principles of Contract (8th Ed) page 618)** to this effect.

> **"---To repudiate within a reasonable time is evidence, and may be conclusive evidence of an election to affirm the contract; and is in truth the only effect of the lapse of time"**

[63] Although this statement was accepted as correct in the Potgieter case (cited and relied on *in casu* by the Appellant) the learned Justice Hefer makes this important qualification:

"Unless it is read in context this statement and in particular the description of the lapse of time as its only effect is datable."

[64] In the **Mahabeer** case the court adopted as a more correct test for the application of the estoppel doctrine in the context of waiver forfeiture right to this submission:

"…….. what has to be established was that (the Lessor) with full know ledge of her right, decided to abandon it whether expressly or by conduct plainly inconsistent with an intention to enforce it"

[65] This proposition is in an extract from the dictum of **Innes CJ** in **Laws v Rutherford 1924 AD 261 at 263.**

[66] The overriding conditions that countervail the estoppel argument are those that are set in motion by the forfeiture clause. That clause, especially 29.2 precludes the inference that the Pollock proposition seeks to convey; This is so because, once you accept that the clause envisages that within a 12 months cycle a scenario where the landlord would have issued at least two default notices, it is not inconceivable that in that period, despite such notices having been given, the Respondent would have received and accepted sums tendered as 'rent' in the intervening period between the notices and thereafter. An intention by the landlord to waive or abandon its rights to the remedies for breach in the lease agreement does not follow as the only reasonable inference to be drawn from its acceptance of sums tendered as 'rental' by the lessee in the face of a series of previous breaches by non payment of rent.

[67] That is the context. For this reason the assertions relied on as a statement in support of the estoppel argument appearing on the Appellants papers *a quo* where it is suggested that condoned the Appellant's conduct of replenishing its

trading stock and that was evidence of waiver of its rights amounts to no more than self-serving contentions.

[68] Factually it has nothing to do with tender and expectance of rental on conduct on the part of the Respondent at all. It all has to do with the Appellants own attempts to anchor itself in regardless of its persistent breach of the lease.

[69] I therefore find the waiver argument equally has no merit.

[70] Finally there is one outstanding point pertaining to the proper interpretation of construction to be given to the forfeiture clause in regard to the operative 'time frame' of 12 months to confer the forfeiture rights in the Lessor.

[71] The Appellants argument is that the clause must be read to mean:

> **"The period of 12 months had to be exhausted in order for the contemplated two failures to give rise to the Respondents rights not to furnish further notices**.

[72] I assume that by the phrase 'further notices' what is meant the default notices contemplated in clause 29.2 of the lease.

[73] That in my view is a misconstrued reading of the words **"any one period of 12 months"** The phrase has to be given to plain meaning based on the ordinary grammatical setting and is my view clear and unambiguous.

[74] It is inconceivable that the phrase within any one period of twelve months could carry the meaning ascribed to denote that a 12 months period has "to be exhausted in order for the forfeiture clause to come into effect."

[75] This proposition bears no relation to a plain reading of the clause with respect.

[76] The notices of default relied on by the Respondent mere issued in a timescale of some 3 months during the early quarter of 2015 between February and April of that year. Clearly this was within a timeframe of 12 months.

[77] Letters which were annexed as AB3 -5 to the founding affidavit constitute sufficient notice in the terms contemplated in clause 29.1.1 of the Lease in so far as they express due notice of default and demand for payment in at least two instances.

[78] These notices were issued within the period contemplated in clause 29.2 and as such fulfilled the conditions precedent that entitled the Respondent to invoke its right to seek an order for cancellation and the ancillary relief of ejectment in terms of the forfeiture clause.

Conclusion

[79] In the final analysis but for the first ground of appeal which for the reasons set out above is upheld, the appeal in regard to the rest of the ground of appeal must fail and the appeal is substantially dismissed with costs.

[80] Accordingly it hereby ordered as follows:

81.1 The Appeal in regard to the first ground of appeal succeeds. The confirmation of the orders of the Court *a quo* (set out as in the relative prayers 3 and 4 of the Respondents original notice of motion *a quo*) for the attachment and sale in execution of the Appellant's movable assets by public auction is hereby set aside.

81.2 The appeal in respect of the ground 2 and 3 of the notice of appeal is dismissed with costs.

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C. MAPHANGA

ACTING JUSTICE OF APPEAL

I AGREE

_____

J. S. MAGAGULA

ACTING JUSTICE OF APPEAL

I ALSO AGREE

_____

M.J. MANZINI

ACTING JUSTICE OF APPEAL

For the Appellant: S.K Dlamini

For the Respondent: M. Boxshall-Smith