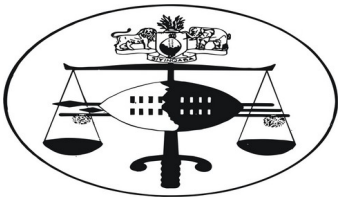

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 38/2017

In the matter between:

SIYAKHOKHA INVESTMENT APPELLANT

And

THE GABLES RESPONDENT

Neutral citation: *Siyakhokha Investment v The Gables (38/2017) [2018] SZHC 7(2018)*

Coram: **M. C. B. MAPHALALA, CJ**
DR. B. J. ODOKI, JA
S. P. DLAMINI, JA

Heard : 16 APRIL, 2018

Delivered : 02 MAY, 2018

SUMMARY

Civil Appeal – lease agreement – application for cancellation of lease, eviction from the premises as well as payment of arrear rental;

Court a quo **found that the original contract of lease lapsed, and, that the current lease which is the subject of litigation was a month to month contract concluded by the parties pursuant to the lapse of the original contract;**

Court a quo **held that the appellant was in arrear rental, and, it ordered the appellant to pay the arrear rental and eviction from the premises;**

On appeal held that the matter was res judicata; and, that the amount claimed was the balance of arrear rental in respect of an earlier Court order for the original lease agreement between the parties;

Appeal upheld with costs on the ordinary scale

JUDGMENT

JUSTICE M. C. B. MAPHALALA, CJ:

[1] The parties concluded a contract of lease on the 25th October, 2010 in terms of which the respondent leased premises to the appellant to conduct a pharmaceutical business. The leased premises are described as Shop No. 40, The Gables T/A Galleria Shopping Centre, Portion 119 (a Portion of Portion 60 of Portion 21) of Farm 51, Ezulwini, Hhohho region. The monthly rental was E80-00 (Eighty Emalangeni) per square metre.

[2] It is not disputed that the appellant failed to pay rental on a regular basis to the extent that the arrear rental accumulated to E179, 710-32 (One Hundred and Seventy- Nine Thousand Seven Hundred and Ten Emalangeni and Thirty-two cents). It is further not in dispute that on the 5th November, 2015 the respondent subsequently lodged an urgent application on ex parte basis to perfect the landlord's hypothec in respect of the arrear rental and evict the appellant from the premises. A rule nisi was issued on the 5th November, 2015; the *rule nisi* was confirmed on the 13th November, 2015. Subsequently, a writ of attachment was issued in terms of which the movable goods belonging

to the appellant were attached, and, the appellant was further evicted from the premises.

[3] On the 15th February, 2017 the respondent lodged another urgent application on an ex parte basis against the appellant for arrear rental in the amount of E122, 158-61 (One Hundred and Twenty-two Thousand One Hundred and Fifty-Eight Emalangeni and Sixty-one cents) in respect of the same premises. The respondent annexed the original lease agreement concluded between the parties on the 25th October, 2010. The *court a quo* granted a *rule nisi* on the 16th February, 2017; and, it was confirmed on the 21st April, 2017. The *court a quo* ordered that the lease agreement concluded by the parties should be cancelled. The appellant was further ordered to pay arrear rental of E122, 158-61 (One Hundred and Twenty-Two Thousand One Hundred and Fifty-Eight Emalangeni and Sixty-one cents), interest thereon of 9% per annum a tempore morae as well as costs of suit.

[4] The *court a quo* made a finding that the original contract between the parties had lapsed on the 30th September, 2015, and, that the parties

subsequently concluded a month to month lease on similar terms as the original lease. However, the *court a quo*, with due respect, misdirected itself in making this finding in the absence of evidence that the parties concluded a month to month lease agreement upon the cancellation of the original lease. It is further incorrect that the original contract expired on the 30th September, 2015; it was cancelled by the Court as stated on the 13th November, 2015.

[5] The appellant lodged an appeal on the 26th April, 2017 on two grounds of appeal. Firstly, that the matter was res judicata having been determined and finalized by the *court a quo.* Secondly, that the *court a quo* erred in finding that there was a month to month lease agreement between the parties.

[6] It is apparent from the evidence that the arrear rental of E122, 158.61 (One Hundred and Twenty-Two Thousand One Hundred and Fifty-eight Emalangeni and Sixty-one cents) which was ordered by the *court a quo* on the 21st April, 2017 is the balance of outstanding arrear rental ordered by the *court a quo* on the 13th November, 2015. There was no need for the respondent to lodge a second application;

what was required was for the respondent to execute the outstanding payment. In the circumstances this matter is res judicatae. Pursuant to the order aforesaid, the appellant had reduced the original debt by making periodic payments. Consequently, the appellant had vacated the premises pursuant to the order of the High Court made on the 13th November, 2015.

[7] It is trite law that a Court lacks jurisdiction to determine and pronounce itself upon a matter that is res judicata; the basis of the principle is that the Court which pronounced on the matter becomes functus officio. Trollip JA in Firestone South Africa (Pty) Ltd v. Genticuro A. G.[1] dealt with the principle of res judicata, and, he had this to say:

> **"The general principle, now well established in our law, is that, once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully**

[1] 1977 (4) SA 298 AD at 306

and finally exercised, its authority over the subject-matter has ceased. West Rand Estates Ltd v. New Zealand Insurance Co. Ltd 1926 AD 173 at pp 176, 178, 186 – 7 and 192; Estate Garlick v. Commissioner of Inland Revenue 1934 AD 499 at p. 502. See West Rand Estates Ltd v. New Zealand Insurance Co. Ltd 1926 AD 173 at pp 176, 178, 186 – 7 and 192; Estate Garlick v. Commissioner of Inland Revenue 1934 AD 499 at p. 502.

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court

overlooked or inadvertently omitted to grant (see the West Rand case, supra) . . . .

(ii) The Court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order (see the West Rand case, supra at pp 176, 186 – 7; Marks v. Kotze 1946 A.D. 29) . . . .

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see, for example, Wessels & Co. v. De Beer, 1919 A. D. 172; Randfontein Estates Ltd v. Robinson, 1921 AD 515 at p. 520; the West Rand case, supra at pp 186-7. This exception is confined to the mere correction of an error in expressing the

judgment or order; it does not extend to altering its intended sense or substance. Kotze J.A. made this distinction manifestly clear in the West Rand case, supra at pp. 186-7 when, with reference to the old authorities, he said:

> **'The Court can however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.'**

. . . .

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays

often happens since the question of costs may depend upon the ultimate decision on the merits) . . . but the Court, in granting judgment, also makes an order concerning costs, it may thereafter correct, alter or supplement that order (see Estate Garlick's case, supra, 1934 AD 499. The reason is (see pp. 503-5) that in such a case the Court is always regarded as having made its original order with the implied understanding that it is open to the mulcted party (or perhaps any party aggrieved by the order – see p. 505) to be subsequently heard on the appropriate order as to costs."

[8] The exceptions reflected in the Firestone South African case are not applicable to the present case; hence, the matter remains res judicata.

[9] Accordingly, the following order is made:

(a) The appeal is upheld

(b) The respondent will pay costs of suit on the ordinary scale

For Appellant : Attorney Macilongo Ndlovu

For Respondent : Attorney Wandile Maseko

I agree

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

DR. B. J. ODOKI, JA

S. P. DLAMINI, JA