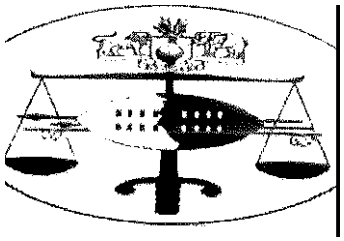

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE CASE NO.26/2021

In the matter between:

ESPERANZA INVESTMENTS (PTY) LTD	Appellant
And	
FLORENCE FALABO BENNETT N. 0.	First Respondent
EUNINCE BENNETT N. 0.	Second Respondent
PUMA ENEHGY ESWATINI (PTY) LTD	Third Respondent
THE NATIONAL COMMISSIONER OF THE ROYAL ESWATINI POLICE SERVICES (MANZINI DISTRICT) N. 0.	Fourth Respondent
THE ATTORENY GENERAL	Fifth Respondent

Neutral Citation:	*Esperanza investments (Pty) Ltd vs Florence Falabo Bennett N.O. and Four Others (26/2021)* [2021] **SZSC** 19 (26th October 2021)
Coram:	**M.J. DLAMINI JA, N.J. HLOPHE JA AND J.M. CURRIE AJA.**
Date Heard	**25 th August 2021**
Date Handed Down	**26th October 2021**

Summary

Appeal - Lease - Renewal of lease - Effect of no agreement on fixed rental for a renewed lease - Whether a lease can be taken to be renewed in instances where there was no agreement on the amount of the rental/or the option period - Lis pendens - Nature of plea of !is pendens and when same is applicable - Whether principle applicable in the present matter - Right of retention or lien raised as an objection to the eviction - Evidence and circumstances met to establish right of retention or lien tenuous and/or nebulous so as not to pass the test/or the establishment of the said right on a balance of probabilities.

.JUDGEMENT

HLOPHEJA

(1J This is an appeal against a judgn1ent of the High Court per Mlangeni J in which he had granted an order ejecting or evicting the Appellant from its occupation of ce1iain business premises which had hitherto been leased to it situated at the Luve Business Center and comprising a shop and a Filling Station.

[2] It is not in dispute that the Appellant came to occupy the pren1ises in question pursuant to a lease agreement it concluded with the executrix of the estate of the late owner of the premises one Gregory Bennett. The executrix in the estate concerned is the First Respondent herein. The initial period of the said lease was five (5) years, with an option to renew. The said period (initial) was to run from the 1st April 2016 to 31st March 2021. Thereafter the lessee had an option to renew the

lease for a period of three years. The dispute in the 1natter is over the purported exercise of that option by the lessee.

[3] The renewal clause of the agree111ent in question was couched in the following tenns: -

> *"3. Options*
>
> 3.1 *The tenant shall have an option to renew the lease of the premises for a further period of three (3) years from the termination of the initial period.*
>
> 3.2 *The tenant shall exercise the option by written notice to the Landlord not less than two (2) months prior to the expiry of the initial period. Such notice shall be given to the Landlord at its domicilium citandi et executandi, for the time·being.*

3.3 *The option shall be upon the same terms and conditions as are set out herein, save that there shall be no further option to renew.*

3.4 *ff the Tenant does not exercise any option as provided in this clause, then its right to do so shall lapse.*

[4] Clauses 4.1 and 4.2 of the lease which although relating to rental, also impact on the question of renewal of the same lease agreement in law, are couched in the following terms: -

"4. <u>Rental</u>

4.1 *The monthly rental payable by the Tenant to the Landlord shall be El 5 000.00 (Fifteen Thousand Emalangeni) per month during the initial period.*

4.2 *The rental to be paid by the tenant to the Landlord <u>during the option period shall be the amount agreed upon between the parties, provided that if they are</u>*

unable to agree one month before the co111111ence111ent of the option period concerned the Tenant shall be deemed not to have exercised the option"

(underlining added).

[5] There cannot possibly be a dispute that owing to the special relationship that exists in law between the renewal of a lease and the rental amount applicable, the clause on the options available to the lessee (which includes the renewal of the lease) has to be read together with that on the rentals. These are clauses 3 and 4 in the lease under consideration herein. Otherwise the position of our law is now settled that the renewal of a lease agreement amounts to the conclusion of a new lease.

[6] That being the case, a rental relating to the option period has to be agreed upon before one can talk of a renewal of a lease agree1nent. This is because in law there can be no lease agreement without an

agreement on the rental amount. A rental is one of the essential elen1ents of a lease agree1nent. In other words without a rental amount having been fixed and or agreed upon, one cannot talk of a lease agreement. See **W.E. Cooper, The South African Law of Landlord and Tenant, 2nd Edition, Juta and Company, page 345; R V Mohamed 1924 NPD 407 at 409** as well as **BLP Investments V Angels' Precision Works 1987 (4) SA 308 at 311 B** on the effect of renewal on a lease agreement. On the effect of the absence of an agreement on rent payable in a lease, see **Biden Properties V Wilson 1946 NPD 736 at 739** and also **SA Reserve Bank V Photocraft 1969**

(1) SA 610 (c) at 612.

[7] The facts before the Court *a quo* revealed that whilst the term of the lease agreement was meant to end on the 31st March 2021, the First Respondent, on the 11th January 2021, sent a letter by registered mail to the Appellant. By means of the said letter, the First Respondent

sought to notify the Appellant that when the term of the lease can1e to

an end, she was not going to renew it. First Respondent referred to that notice as one of cancellation or non-renewal. This notice was not provided for in the lease agreen1ent.

[8] I 111ust add that the Court *a quo* correctly found that the said notice was of no force or effect and set it aside. None of the parties challenged this aspect of the 1natter. For the sake of completeness, that purported notice of cancellation or non-renewal by the First Respondent had, as stated above, been issued outside the lease agreen1ent. It ignored the fact that the lease agreement had granted the lessee (Appellant), an option to renew the lease provided it met ce1iain conditions, one of which was an agreement on the rental amount within a specified period before the expiry date of the lease.

[9] Ignoring the notice found by the Court *a quo* to be of no force or effect, the Appellant, on the 22nd January 2021 and whilst acting through its attorneys, issued its own notice to the First Respondent, in

which it advised of its decision to exercise the option to renew the lease agreement availed it by clause 3.2 of the lease agreernenl. Perhaps because of the fact that the lease agreement had, in terms of clause 4.2, provided that the rental amount for the option period of the lease had to be agreed upon between the parties and that if they were unable to agree on same, at least one month before the comn1ence1nent of the option period, the tenant was to be deemed not to have exercised the said option, the Appellant requested in the same letter a meeting to discuss the issue of the renewal of the lease agreement. I say this was "perhaps" the motivation for the request to meet because the letter on its face did not say what exactly was to be discussed in the requested meeting.

[10] One does not hear of any effort taken particularly by the First Respondent to meet the Appellant. What one sees from the facts of the matter is that when First Respondent issued the notice of cancellation or non-renewal of the lease agreement subsequently

found to be of no force or effect by the Court *a quo*, it had advised that one of its motivating factors for the non-renewal or supposed cancellation of the lease agreen1ent was the fact that it intended to construct a 111odern shopping 111all or complex on the saine site where the premises forn1ing the subject of the lease under consideration herein were situated. Indeed, drawings for the intended develop111ent including an environmental impact and assessment repo1i for the development concerned were annexed to the papers filed of record in the Cou1t *a quo.*

[11] The Court *a quo* came to the conclusion that although the Appellant was legally entitled to exercise the option to renew, and that it had indeed purported to do so, it however did not follow that the renewal of the lease agreement had taken effect. The Court explained that for the renewal to be found to have taken effect, there had to be an agreen1ent on the rent payable during the option period. This

agreement was not there; which means that the purported exercise of the option to renew was of no force or effect.

[12] Mlangeni J eloquently stated the position when he said the following at paragraphs 23 to 27 of the Court *a quo's* judgn1ent: -

> *"23. At the heart of this matter is the question whether or not there is a valid lease agreement that obtains between the parties at this point in time. If there isn't, the First Respondent stands to be evicted from the premises unless it advances other legitimate grounds to remain in the premises. It is common cause that the tenant has an option to renew the lease for a further period of three years. I have already held that the Landlord's letter of the 1 JI" January 2021 is inconsequential. It remains to ask this question; what is the legal effect of the tenant's letter dated 22nd*

January 2021? Does it create a valid lease agreement between the parties?

24. *A poignant answer is zn the judgment in* ***Bobcar Holdings (Pty) Ltd v Hla(iwayo 1982- 1986 SLR 226-227.*** *The head note expresses the position in a manner that is as clear as a crystal, and I quote it below:-*

"An option to renew a lease which does not specify the rent but stipulates that the lease will be renewable at a rent to be 111utually agreed upon, will not result in a lease because agree111ent on rent is an essential element of a lease and until agree1nent has been reached on it, no lease is concluded. "

25. *Quoting from the writings of WE Cooper in his book* ***'South African Law of Landlord and Tenant, Dunn J,*** *as he then was, observed that an option to renew*

a lease must contain the essential elements of a lease

"so that if the lessee exercises the option a lease is concluded" ***(See paragraph C of' the Bobcar Holdings (Pty) Ltd judg111ent at page 227).*** *This position is echoed by Hlophe Jin the more recent case of* ***Mikka Swaziland (Pty) Ltd v Tho111as I11vest111ents Corporation (Pty) Ltd (594/16) [2016] SZHC 126.***

26 *The effect of the above is clear. In the absence of an agreement on the rental amount there is no lease agreement. In its letter dated 22nd January 2021 the First Respondent requested a meeting with the landlord, presumably to discuss rental and possibly other things. The meeting did not happen and has still not happened At page 409 - 412 of the book of pleadings there is correspondence between the parties which demonstrates the extent of polarization between them, a sure sign that there is no prospect of an agreement that would create a*

lease.

27 *The First Respondent argues that an agreement over rental was thwarted by the Landlord's purported cancellation of the option. That may be so. But thefact of the matter is that an agreement can only result_fi"om the voluntary actions of the contracting parties. In this case the parties have not agreed on the amount of rental. I therefore come to the conclusion that the First Respondent's purported renewal per the letter dated 22nd January 2021 is inconsequential just like that of the Landlord which was posted on the I J th January 2021. The result of this i9 that there is no lease agreement between them. In the absence of some other basis upon which the right of occupation may be claimed, the First respondent is liable to be evicted fi'om the premises. "*

[13] Before discussing what the Appellant's reaction is to the foregoing aspect of the matter including what I find to be the applicable position of the law in such a situation, I need to point out that it was not the only aspect on which the eviction there sought was being challenged, including the grounds to which the appeal argued before us extended to as well. This other aspect relied upon by the Appellant there and now is the contention that it had a right of retention of the premises against the First Respondent as the landlord arising from an unpaid debt it had against the Appellant. This is also known as a right of lien.

[14] This debt upon which a right of a lien is being clahned is said to amount to a sum of E2 155 460-00. It allegedly arises from renovations and repairs allegedly carried out on the same premises by the Appellant. It is in that sense an illiquid claim. At the heaii of the Appellant's contention is that it should be allowed to re1nain in the pren1ises in question until what was allegedly owed to it was paid. It is worth noting that on the date that the said lease terminated, the 31st

March 2021, the Appellant issued out a summons claiming the extent of the outstanding a111ount allegedly owed it by the First Respondent. This is under Case No. 620/2021. It appears that this 111atter is still pending before the Court *a quo* awaiting detern1ination.

[15] The Court *a quo* did not accept that the Appellant had established a lien or the right of retention against the First Respondent, stating *inter alia* that the foundations of the right of lien were shaky. It said that same was hanging on a thread. It found further that some aspects of the lien claimed appeared to be contrary to the law and the lease agreement. In Justice Mlangeni's own words, the position was stated as follows from paragraphs 29 to 31: -

> *"29: ... it appears to me to be axiomatic that the party who claims a lien must substantiate the claim on a balance of probabilities.*
>
> 30. *This lien that the First Respondent claims hangs on*

a thread, at best. I say this for the reasons that follow.

30. J The Lease agreement that is the main subject of this litigation was entered into on the 2?11 January 2016. it has express provisions that do not envisage that the landlord can carry expenses for alterations, structural or otherwise. It also provides that in the absence of the prior written consent of the landlord such can only be done "at the tenant's costs under the supervision and control of the landlord .... The fees of any architect employed by the landlord shall be borne and paid by the tenant" (see clause 14.1).

30.2 *In terms of clause 13.1 the First Respondent accepted that the premises were in good condition upon occupation, and the interior thereof was to be maintained by it at its own expense. (See clause 13.2)*

30.3 *Clause 24.2 provides that "the lease previouslv signed by the parties on the 24th August 2008 is hereby cancelled". That lease is between the present lessor and a company registered as Daryali Investments (Pty) Ltd I need not go into the difference in name of the tenant in that lease and that of the tenant in the lease that is the subject of this litigation, but it does have legal implications. I make the passing observation that the averment by the First Respondent's deponent Shadat Hussein at paragraph I 9 of the answering affidavit that Daryali Investments (Pty) Ltd was never a tenant of the First Applicant is preposterous. The front cover of the Lease agreement "BGB9" in block letters, and the person who singed on its behalf is one Arif Urmaji. If Urmaji pwported to contract on behalf of a non- existent entity, as averred by*

l\/Jichael Steenkamp in his co11firmatory Affidavit in support of the First Respondent, that says a lot about the manner in which Urmaji does business and those who deal with him better beware. (underlining added).

30.4 *Annexure "BGB8" which is at page 109 to 112 of the book of pleadings is between· the present lessor and one Urmaji. That lease was for one year, effective 1'[1] August 2006 to 31st July 2007. In that agreement the lease was in respect of the Filling Station, which was leased as "Voetstoots" with "no warranties regarding the upgrading conditions or otherwise. See clause 3"* (underlining has been added).

30.5 *The issues canvassed in paragraph 30 above demonstrated in my view that [the} First Respondent's claim of the lien for renovations*

and or improvements is nothing short of stratagem. To this 1 add the legal position which is settled, that any claim by the tenant for repairs and or renovations arises at the end of the lease period. ***(See BOBCAR HOLDINGS (Pty) Ltd V HLATSHWAYO,*** *(supra). Between the year 2006 and 2021 there has been at least four lease agreements over the premises, ranging in durationfi•om one year to five years. If there was substance in the First Respondent's claim it does not make sense that throughout this long period of time it was not pursued and I cannot ignore the fact that this was not at all mentioned in the Frist Respondent's letter dated 22[11]d January 2021 when there was ample indication that the business relationship was ending.*

31. *On the basis of the foregoing I find that the First Respondent's claim for a lien on the premises has no legal basis.*

[16] The Appellant also sought to contend that the Court *a quo* had erroneously ignored its point on the plea of *!is pendens* it had raised or words to that effect. Although the Cou1i *a quo* does not appear to have dealt with this paiiicular point in any detail, it is a fact that same was argued in detail before us particularly by the Appellant's Counsel. The reality is that the proceedings that resulted in the conception of this paiiicular claim were filed on the last day of the lease after the First Respondent had already advised it was bringing proceedings to have the Appellant ejected on the grounds that there was no agreement to remain in those premises in so far as the lease agreement had not been renewed, owing to there being no agree1nent

on the a1 11ount of the rental payable. I will deal in detail shortly with this aspect although I have here alluded to 1ny decision on it.

[17] It suffices for now to say that the filing of the said action had all the halln1arks of a stratagen1 to gain ti1ne by the Appellant with no realistic merit in it. I say this because the central question to that action having the effect of deciding the matter once and for all is one of law namely whether in the absence of a rental amount agreed upon there could in law be a renewal of a lease. Placing reliance on a long line of cases as alluded to above, the Cou1i *a quo* came to the conclusion that there was no such agreement; necessitating in the process that the Appellant be evicted or ejected from the pre1nises in question. If the matter turned on such a crisp point of law, one wonders therefore why the matter would have had to be brought to Cou1i by way of action proceedings and have the crisp issue of law subjected to trial as the Appellant suggests. The application was about a determination of that point and the Appellant had every opportunity to deal with whatever aspect ofit he wanted to raise during the hearing of the application. There would have been no merit in having that

crisp point made lo await an unwarranted future trial. The reliance on the plea of *!is pendens* does not seen1 to be genuine therefore. The raising of it was apparently 1nore about buying tin1e in these circmnstances and the Court *a quo* was correct in not upholding it.

[18] The Cou1i *a quo* ought to be commended for speedily dealing with a matter that on the face of it needed a quick decision and in the process to discourage points that are taken with no prospect of success being pursued than they being calculated to abuse the Court process and delay the finalization of matters.

[19] On the central question of the effect of a failure to conclude an agreement on the rental prior to a renewal, the position of our law as alluded to above is crisp and has been a subject of numerous judg1nents. It is that because a rental is an essential ele1nent of a lease agreement, failure to agree on same will result in a purported exercise of a renewal clause being rendered an exercise in futility.

That the

agreement talks of the parties having to agree on the rental amount before the renewal of the lease agreement 111akes it difficult to reach a different conclusion to that reached by Mlangeni J in the Court *a quo.*

[20] I agree that no renewal of a lease agreement can occur in law if no rental amount had been agreed upon. It has been found that such a clause if effected in the manner the Appellant suggests the Court that seeks to enforce it would be interfering with the parties' right to agree or disagree on material issues of the lease. Further still, the conclusion reached by Judge Mlangeni on whether or not there had been concluded a lease agreement cannot be faulted because the Judgments relied upon by him captured the correct position of our law as expressed in numerous Judgments . These include the **Bobcar Holdings (Pty) Ltd V Hlatshwayo 1982-86 vol. 1 SLR 226-227, Mikka Swaziland (Pty) Ltd V Thomas Investments Corporation (Pty) Ltd (594/2016) (2016] SZHC_l26** as well as that of **Rozar CC**

V The Falls Supermarket (232/2017).ZASCA 166 we were referred to by Appellant's Counsel.

[21] Of course the **Rozar CC V The Falls Supermarket** (supra) judge1nent introduces an aspect that it should also depend on whether the clause of the lease agreement relied upon does talk of a 3rd party being granted power to resolve a dispute with regards the rental a1nount. It suggests that if it does give such a third party the power to determine the dispute surrounding the amount of the rental, then the party relying on that clause can enforce it.

[22] The point is that the position envisaged in such cases as **Rozar CC V The Falls Supermarket (supra)** and **Shoprite Checkers (Pty) Ltd V Everfresh Mark Virginia case no. 6675/09** to the effect that there would be a duty on a lessee where there is envisaged a resolution of a dispute by a 3rd pmiy, does not arise herein and I do not have to decide a theoretical question.

[23] What is certain, with which I cannot fault the Court *a quo* is that the lease agreen1ent in this n1atter was not renewed and since that was the position, the Appellant has no protection to re1nain in the said pren1ises, hence the order that it be evicted or ejected therefro111 is appropriate in the circumstances of the matter.

[24] On the issue of the Appellant's alleged right of lien or retention, I have to agree with the conclusion the Court *a quo* came to. It is a fact that for it to find that there ever was such a right, it should be because the facts of the matter do establish it. In other words it should be because such a finding has to be made on a balance of probabilities. On the facts and circumstances of the matter, the Court *a quo* was conect in finding that a case proving that a lien or right of retention had not been made on the balance of the probabilities. I agree with the order the Court *a quo* 1nade in this regard.

l25] Consequenily and taking into account the foregoing considerations, I have come to the conclusion that the Appellant's Appeal cannot succeed.

Accordingly I 111ak:e the following order:-

[I] The Appellant's Appeal be and is hereby dis111issed.

[2] The Appellant and those holding under it be and are hereby ejected and evicted from the premises known as Luve Filling Station and Supermarket with immediate effect. In order to give effect to an orderly exit from the said premises the execution of this order shall be stayed for a period of 7 calendar days from the date of service of this order upon the Appellant.

[3] The Appellant be and is hereby ordered to pay the costs of the Appeal.

JUSTICE OF APPEAL

I Agree

'JUSTICE OF APPEAL

I Agree

M.J. CURRIE
ACTING JUSTICE OF APPEAL

For the Appellant — Nkomondze Attorneys

For the 18[1] Respondent — S.V. Mdladla