IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held in Mbabane **Case No. 45/21**

In the matter between

MNDENI PATRICK SIMELANE **Appellant**

AND

ESWATINI ELECTRICITY COMPANY **Respondent**

Neutral citation: ***Mndeni Patrick Simelane vs Eswatini Electricity Company (45/2021)[2022] SZSC48.(28 September 2022.)***

Coram: **MJ Dlamini JA, RJ Cloete JA, SB Maphalala JA**

Heard: **7 June 2022**

Delivered: **28 September 2022**

Summary: *Civil law and Practice – Lease agreement on immovable property – Variation of the lease prohibited – Validity of alleged oral agreement varying the lease – Validity of rights and liabilities of parties following the expiry of the lease – Costs at punitive scale in court a quo – Appeal dismissed with costs.*

JUDGMENT

MJ Dlamini JA

[1] The judgment in this matter in the Court *a quo* was delivered extemporarily on 7 October 2021 and the written judgment handed down on 13 October 2021. Inexplicably, in his heads of argument, Appellant wrote:

> "2. The said written judgment was pursuant to an ex-temporal judgment delivered by the Learned Judge *a quo* on the 13th day of September 2021, and this was on the 14th day of September 2021, which Notice of Appeal Appellant amended on the 17th day of September 2021, and after which the Appellant noted the present appeal with the caveat for leave to amend the grounds thereof upon receipt of the written reasons for judgment."

[2] Apparently, Appellant filed his amended notice of appeal on Friday 17 September 2021. That notice was received by the Registrar on Monday 20 September 2021 as shown by the Registrar's stamp of office. Seemingly, the noting of the appeal was done on the basis of the extempore judgment of 13 September 2021. The written judgment was only handed down on 7 October 2021. *Ex facie* the written judgment, the matter was before the court a quo on 2, 13 and 17 September 2021. It is inexplicable therefore how Appellant would have noted an appeal on 13 September 2021 and had it amended on 17 September 2021. The extempore judgment allegedly delivered on 13 September 2021 by the court a quo has not been clearly identified by the Appellant. The earliest date on which the extempore judgment

would have been delivered was 17 September 2021, the apparent last day of the hearing. Advocate M. Mabila, counsel appearing for the Appellant, needed to explain this rather confusing presentation.

[3] The Record on Appeal, dubbed the Record of Proceedings, was lodged on 10 December 2021, as shown by the stamp of the Registrar. That Record had been certified by the Registrar of the High Court on the 10th December 2021 as a 'true and correct' record of Case Number 1565/2021.

[4] The lodging of the Record was challenged by the Respondent as not compliant with the rules of court. In its heads of argument, the Respondent states that by letter to the Registrar dated 13 December 2021, "the Respondent duly protested the acceptance of the record by the Registrar....where the appeal was deemed abandoned merely on the failure of the Applicant (sic) to file the record of appeal on or before 14 November 2021". Thus, according to Respondent the record should have been lodged on or before 14 November 2021. The Respondent, in its heads of argument asserts that the 10th December 2021 was "almost one (1) month after [the Record] was due." On the other hand, according to the Appellant the due date for lodging the Record was "13th December 2021." It is of course the duty of an appellant "in consultation with the opposite party" to prepare and lodge the record. This is to be done within two months of the noting of the appeal. That is, the counting of the *dies* begins the day after the noting of the appeal. The reckoning of the dies is to be adjusted depending on whether or not a written judgment is delivered, in which case the dies begins from the date of the written judgment and not the extempore judgment. It would appear then that, *in casu,* Appellant based his calculation of the *dies* on the date of the written judgment, that is, 13 October 2021, and assuming that a month is a month. The Respondent also proceeded on this assumption as paragraphs 7.1 and 7.2 of its heads show, citing the Interpretation Act 21 of 1970 and the Concise Oxford Dictionary, 10th edition, p. 923.

[5] In the present matter, without further contestation, the two months duration for lodging the record is to be reckoned from the 14th October 2021 and not any earlier date in line with the delivery of the extempore judgment. This is what the proviso to Rule 8 (1) prescribes. The 17th or 20th September 2021, when the amended notice of appeal was filed is, as it were, suspended until the 14th October 2021. In that respect, the Record was lodged and duly accepted within the period of two months. In the result, there was no need for the Appellant to also apply for condonation which was also challenged by the Respondent. On the declarator that the filing of the record was not late or out of time, the Appellant succeeds with costs against the Respondent. If anything, this aspect of the appeal warns against ex tempore judgments unless a written judgment is not necessary or there is an emergency on the offing such as an (industrial) strike or an execution.

[6] By a written fixed single term leasehold agreement dated 30 July 2014, the Respondent (as Lessor) leased its premises at eDwaleni, being a staff club house and a staff house, to the Appellant (as Lessee). The agreement set forth the essential terms of the lease and conditions regulating the lease. The lease commenced on 1 November 2014 for a period of 5 years in terminating on 30 August 2019 (?). Rental was fixed at E4000-00 per month for the first year, thereafter escalating at 10% per year. The rental was spread out as follows: E2500-00 for the club house and E1500 for the staff house, to be paid in arrears not later than 5th day of every month. A material term of the lease was contained in Clause 3.7 to the effect that the premises were to be renovated/rehabilitated to "meet high industry standards". The outlay for this purpose was limited at E257, 776.00 (presumably for the duration of the lease). In terms of a proviso to the Clause 3.7, the rehabilitation expenditure shall be in addition to the rental, and the premises shall at all times remain the property of the lessor. Another material term of the lease was a 'non-variation' clause disallowing any variation, cancellation or novation of the lease unless reduced to writing and signed by both parties. And by Clause 11 the lease was constituted as the whole and sole memorial of the agreement. Rental due was not to be withheld as a result of any dispute between the parties

(clause 17.3). By clause 18.2, on termination of the lease normally or otherwise earned rights of the parties were not to be affected.

[7] The lease having lapsed by effluxion of time on 31 October 2019, Respondent wrote to Appellant on 20 July 2020 demanding Appellant to vacate the premises and restore vacant possession by no later than 30 September 2020. The notice was a year later than the date of effluxion of the lease. Throughout the period of the leasehold, the Appellant had not made a single rental payment. That was the state of affairs at the time of the notice i.e. 20 July 2020. The Appellant did not vacate as demanded. On 14 July 2021 Respondent served a final notice to Appellant to vacate by 16 August 2021, failing which eviction proceedings would be instituted. The Appellant had objected and resisted the notice to vacate resulting in these ejectment and hypothec proceedings in which amount of E183, 305-00 was claimed as accumulated rentals.

[8] The Appellant had opposed the application for the eviction and rentals, and filed a contestation of the Respondent's claim for a tacit hypothec over the movables as security for the rent owing. Appellant had prayed for costs at a punitive scale. For his case, Appellant had contended, *inter alia*: That the terms of the written lease were somehow varied or relaxed by way of an oral agreement entered between the parties resulting (a) in the extension of the lease or renewal of the lease for another five years; (b) a further oral agreement in which the parties agreed that Respondent would undertake further and additional renovations of certain parts of the premises leased but outside the scope of the original lease and subject to separate valuation.

[9] The Appellant had also alleged that Respondent had misled the court by concealing some important facts and circumstances pertinent to the matter. Appellant also objected to the *ex parte* proceedings and the *rule nisi* on the basis that Respondent ought to have been aware of irresoluble disputes of facts affecting the matter. That Respondent had not shown the good faith and candour expected in *ex parte* proceedings and had failed to take the court

in its confidence. In effect Appellant had presented a different version of the contract with Respondent.

[10] In assessing the defence presented by the Appellant the court *a quo* stated the following and telling observation:

> "[27] ....There are glaring inherent inconsistencies between these novel allegations as to oral agreements and novations to the lease agreement as alleged by the [Appellant] and the contents of the letter [dated 10th August 2020] as well as the document which was handed in by the [Appellant] to the court as Annexure MPS3 and MPS 4 (a) to (g). The latter annexures are subsumed under a document titled " 'EVALUATION DOCUMENTS' (FOR WORK DONE) January 2016".(sic) It lists so-called variation bills of quantities as well as photographs of the buildings involved in the said projects.
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> "[28] I find it inconceivable that a document predating the said letter under reference could have been contemplated as late as August 2020 and refer to a prospective report which was already published, let alone the claimed compensation and relative value of the works 'to be agreed' as alluded to in this document, when the very valuation report gives a figure captioned 'TOTAL ESTIMATE OF E604, 375.85' as far back as 2016.
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> "It is very apparent that what this document is, is not a 'valuation' as alleged but appears to be what the [Appellant] has concocted and fabricated for purposes of trying to deflect its contractual liabilities and make up a claim for certain alleged claims for the alleged improvements. (Underlining added)
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> "Its title belies the very appellation . . . namely, that it is a 'valuation report on the work done. ... I therefore reject the [Appellant's] version as false.

"[29] Likewise the [Appellant's] alleged defences fall to be rejected as false as the version he tenders for these reasons. There is no way these allegations can be reasonably probable in light of these inconsistencies and the lack of cogency to the facts tendered by the [Appellant]".

[11] The court *a quo* found for the applicant [Respondent] (by confirming the interim interdicts and rules nisi) and awarded punitive costs on an attorney and client scale.

[12] Dissatisfied with the judgment the Appellant filed four grounds of appeal as follows –

"1. The Court *a quo* erred in fact and in law by finding and holding that the Respondent was entitled to rely on a lease agreement which had expired for the relief it was seeking.

"2. The Court *a quo* erred both in fact and in law by determining the matter on the basis of the application proceedings in the face of glaring material disputes of fact.

"3. The Court *a quo* misdirected itself in law by failing to appreciate that an oral agreement is enforceable in law.

"4. The Court *a quo* erred both in fact and in law by awarding costs at the scale of attorney and own client when the facts did not permit; consequently, the court *a quo* misdirected itself in the application of its discretion with regard to the award of costs in the matter".

[13] In his heads of argument, paragraphs 28 to 53 inclusive, Appellant presents his contentions on the appeal. Unfortunately, the presentation does not follow an orderly approach for an orderly response to the grounds of appeal filed. As it is, one is unable to

say which paragraph (s) covers which grounds of appeal. Such unstructured presentation makes for incoherent judgment.

[14] Appellant accepts the five-year lease agreement which purportedly terminated "during August 2019". Appellant contended that on expiry "there was none ever written lease agreement extended by the parties", notwithstanding that "the lessor/lessee situation between the parties prevailed as Appellant remained in occupation of the premises up until he was evicted by the Respondent on the 2nd day of September 2021". In the result, the Appellant argued that the Judge *a quo* was wrong to rely on the lease that had expired and had run its course. In passing, I note that Appellant does not say on what grounds he continued to occupy the premises after the expiry of the lease agreement nor does he say that he continued to pay the rental (if he had been doing so). Be it noted that the lease is said to have expired on 30 August 2019 (although elsewhere represented as '31 October 2019'). As stated above, Appellant had been given notice to vacate the premises by 16 August 2021 as early as 14 July 2021, but did not comply. Generally, where a lease has run its course but lessee continues in occupation, the presumption is that the leasehold continues but reckoned on a month to month basis. In the specific instance of the present case, the learned Judge *a quo* relied on clause 18.2 in dealing with the situation post expiry of the lease regarding rights of the parties.

[15] The Appellant further contended, partly in agreement with the Respondent, that after the set off leaving a balance of E183, 305-00 for the period from 1st November 2019 to 31st August 2021, "there was no longer any written Lease Agreement in existence between the parties" with the result that "there were no arrears pending in so far as the written Lease Agreement was concerned..." According to Appellant: "It then boggles the mind as to how the Learned Judge *a quo* sought to rely on a non-existent Lease Agreement in arriving at his judgment", unless the Appellant continued to occupy the premises "on the basis of an oral agreement."

[16] The short and simple answer to the above is again a reference to Clause 18.2. The Appellant says that "the interpretation of Clause 18.2 by the learned Judge *a quo* is very unfortunate". In this regard Appellant refers to paragraphs of the judgment *a quo*, that is, 6, 22, 26 and 32. In the said para [6] the learned Judge spoke of a 'non-variation' clause of the lease provided under Clause 11, which in part reads "no addition or variation, consensual cancellation or novation of this Contract and no waiver of any right arising from the Contract or its reach or termination shall be of any force or effect unless reduced to writing and signed by all the parties. . . ." In para [22], the Judge referred to the alleged lack of candour on the part of the Applicant in ex parte proceedings and the alleged failure to disclose the "oral variation or renewal renegotiation of the lease agreement terms" purported by the Appellant; in para [25] the learned Judge criticised Appellant's allegations as to "variations to the lease and an alleged oral agreement varying or supplementing the written lease agreement" without particulars as to his alleged claims. The problem faced by Appellant is that for some inexplicable reason he refers in paragraph 41 of his heads of argument to "the variation clause contained in the expired Lease Agreement". The simple truth is that the lease agreement prohibits 'variations' in very clear terms. In effect, if anything, clause 11 is a 'no-variation' rather than a 'variations' clause. This is pointed out by Respondent's counsel in *footnote 23* of his heads where reference is made to paragraph [8] of the judgment *a quo* which speaks to Clause 18.2, which reads:

> "On termination of this agreement, through the normal effluxion of time or by whatever other mechanism, the provisions thereof in respect to already accrued rights of the parties shall not be affected by such termination".

[17] The simple meaning of this clause is that as far as the rights of the parties are concerned nothing will change by the mere termination of the lease agreement. Accordingly, the fact that the lease has terminated does not mean that rights and outstanding liabilities such as the rental balance of E183, 305-00 automatically cease or disappear into thin air. Clause 18.2 complements Clauses 11 and 21 in that the Lease

Agreement is "the sole and whole memorial of the agreement between the parties'. On the contrary, counsel for the Appellant has simply misconstrued Clause 18.2 if I correctly understand his argument in paragraphs 43 and 44 of his heads. I do not understand how counsel fails to understand that the lease agreement being in respect of immovable property if change were to occur to the lease, only a written agreement would be effective and not an oral agreement as Appellant seems to imply. Accordingly, if nothing changes as a result of the termination, it means things continue as before the termination. Hence, the liability of Appellant to pay the said post lease-expiry rentals remains effective.

[18] The issues have thus far been duly canvassed and determined. I do not see any room for alleged disputed facts. Rarely do matters come before the courts without any disputes of facts. Special attention such as a trial becomes necessary where the dispute on the facts is sufficiently serious. That is not the case in this matter. The so-called Plascon-Evans Rule may conveniently be invoked here.

[19] The counter-claim by the Appellant, set out under paragraphs 10, 11, 12, and 13 of his answering affidavit, purportedly based on an alleged "oral agreement" between the parties, should be dismissed without much ado, for the simple reason that there is no proof or evidence of such an agreement. The Appellant merely alleges as follows:

> "10. Pursuant to the execution of the written lease agreement between ourselves, . . . the Applicant approached me and requested that I further improve a shop (. . .) and a VIP lounge and thereafter assume occupation and operation of same, and the improvements add up on my claim for compensation.
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> "11. The Applicant is fully aware that our subsequent oral agreement resulted in an increment on the costs of improvements as stated in the written lease agreement. . . .
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> "12. During the engagement on the oral agreement, I informed the Applicant that to be able to finance the said further improvements I would have to sell my

immovable property in Fairview, Manzini, . . and I accordingly sold my property and got further finance from the First Finance Corporation . . .

"13. Pursuant to the conclusion of the oral agreement between ourselves and my discharging of my obligations in terms thereof, the total costs for improvements was sum of E604, 375.85 (. . .)"

[20] Be that as it may, the requisite proof or evidence would have to be in writing as Clause 11 of the Lease Agreement provides. No such evidence in writing signed by the parties has been presented by the Appellant. Even if Respondent actually consented to the alleged improvements culminating in the counter-claim of E604, 375-00, that consent would be worthless if it did not comply with clause 11, by being in writing. Appellant's reliance on paragraphs 11 to 15 of his answering affidavit does not take the matter any further. The annexures referred to by the Appellant, namely EE3, EE4, EE5 and EE6, individually and collectively do not constitute an agreement signed by both parties as Clause 11 requires. At any rate, the alleged oral agreement does not meet the provisions of High Court Rule 18 (6).

[21] In any case to Appellant's alleged oral agreement giving rise to the counterclaim of E604, 375-00, the Respondent in its replying affidavit 'categorically denied' the existence of any such oral agreement as alleged by Appellant, relating to improvements to a shop and VIP lounge. The only improvements were those contemplated in clause 3.7 and none oral. See paragraphs 10 to 13 of the reply. In paragraph 10 (8.3) Respondent aptly refers to Clause 11 pointing out the absence of a written agreement supporting the Appellant. Even the alleged oral agreement does not name the officer who represented the Respondent in concluding the alleged agreement. I agree with the position taken by the Respondent to the counter-claim, that is, that no such counterclaim has been proved. It is Appellant's business to prove his case and not the Respondent to assist Appellant prove his case, as Appellant seems to think.

[22] With respect, I do not know nor understand why the case of **John Boy Matsebula and Others v Chief Madzanga Ndwandwe and Others**, Court of Appeal Case No.15 of 2003 appears at the end of the Appellant's submission in regard of the counterclaim. It is wrong of Counsel or party to just through a judgment at the Court without any indication or direction where the Court should look or how to use or apply the case cited. Not just reference at large. A similar reference also happened involving **Beauty Pat Sihlongonyane NO v Xolile Sihlongonyane and Others**, Supreme Court Case No. 23/2016 and **Plascon – Evans Paints v Van Reibeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A). Judges have got no divining bones to find out where exactly a party wants the court to read. Parties must cite the page and or paragraph for their argument.

[23] In this matter I have found no 'real, genuine or *bona fide* dispute of facts.' If anything, the dispute was only a difference in understanding or interpreting certain clauses of the lease agreement. Even the alleged oral agreement supposedly varying the lease or the denial of the outstanding rental was due to a misunderstanding of the lease agreement. In the result, I find nothing wrong in the court a quo accepting Respondent's averments as the more credible and accordingly granting the final interdict in terms of the Plascon- Evans Rule.

[24] Appellant's last ground of appeal is with regards the punitive costs order, which Appellant alleges to be misdirected as the facts of the case do not permit. In this regard, the court *a quo* had stated as follows: "[38] The applicant has in the circumstances more than adequately set out clear basis for costs on a punitive scale. It [is] accordingly ordered …" The issue of costs *a quo* had been particularly considered by the court in a hearing assigned for the purpose. The court had accepted supplementary evidence by the parties. The issue had been exacerbated by the fact that Appellant had allegedly been in contempt of the court. The costs were then argued and considered on that background. The evidence assembled by the Respondent was found to be "more damning of the [Appellant's] conduct" and the Appellant was said to have displayed a "rather churlish attitude" to the

issue surrounding his contempt. The court also found that Appellant had at some point while the matter was pending "flagrantly sought to undermine and render an order of [the] court ineffective," an act to "be deprecated in the most serious way."

[25] Appellant's defence to the contempt charge was that "there was no order authorizing that the premises be locked up and Appellant be interdicted from operating the business." Further, Appellant argued that there was an appeal pending against the orders alleged to have been disobeyed. Because of the appeal Appellant contended that there was an 'automatic stay' of any execution. It is however clear that Appellant did not act in a reasonable manner. Finding his premises locked up, Appellant should have brought court proceedings against whosoever had (unlawfully) locked the premises or ignored the stay. Instead, Appellant took the law into his own hands and resorted to self-help by breaking the lock. In the result, I can find nothing wrong with the order of the court *a quo* in respect of the scale of the costs.

[26] In the result and in light of the foregoing the following order is made:

(a) The appeal is dismissed with costs.

(b) The challenge to the filing of the record is dismissed with costs.

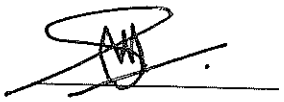
(c) The costs in the Court *a quo* to be on the scale of attorney and own client.

MJ Dlamini JA

RJ Cloete JA

I Agree

I Agree



SB Maphalala JA

For Appellant Adv. M Mabila

For Respondent SK Dlamini