IN THE SUPREME COURT OF ESWATINI

Case No.84/2021

HELD AT MBABANE

In the matter between:

DIESEL SERVICES (PTY) LTD **Appellant**

And

MNDENI PATRICK SIMELANE **Respondent**

Neutral Citation: *Diesel Services (PTY) LTD v Mndeni Patrick Simelane (84/2021) [2022] SZSC64 (8th December 2022).*

Coram: **S.B.MAPHALALA JA, M.D. MAMBA JA AND S.M. MASUKU AJA**

Date Heard: **03rd OCTOBER 2022.**

Date handed down: **8th DECEMBER 2022.**

Summary: *Landlord and Tenant – lease – Tenant sued for rent accrued – Tenant claimed to have been deprived of beneficial occupation that resulted in the vacation of the business premises. Test for tenant's liability for rent considered.*

Held: *The test for tenant's liability for rent is whether he was in occupation or in possession of the leased premises and not whether such occupation or possession was beneficial or not.*

Held further that: *Appeal dismissed with costs on the ordinary scale in favour of the Respondent.*

JUDGMENT

S.M. MASUKU AJA

INTRODUCTION

[1] The Appellant sued the Respondent for accrued rentals by way of combined summons for the sum of E106 238.00 (One Hundred and Six Thousand Two Hundred Thirty Eight Emalangeni) and a further E4 338.24 (Four Thousand Three Hundred and Thirty Eight Emalangeni Twenty Four Cents) in respect of unpaid water bills. Regrettably, the drafting of the particulars of claim reflects a lack of savvy in that *ex facie* the particulars *inter alia* does not show how the total amount of E106 438.00 (One Hundred and six Thousand Four Hundred and Thirty Eight Emalangeni) was made of, which specific amounts were in the arrears or had accrued and how was the E4 338.24 (Four Thousand Three Hundred and thirty Eight Emalangeni Twenty Four Cents) made of. It is also unclear why the Respondent paid E17 000.00 (Seventeen Thousand Emalangeni) per month and sometimes 17 200.00 (Seventeen Thousand Two Hundred Emalangeni) per month when clause 5.1.1 of the lease required E15 000.00 per month for the year. A lot of the material facts were pieced together in evidence at the trial.

[2] The facts common to the parties are that the Appellant and the Respondent had entered into a written lease agreement for certain premises described as shop No.1/2/3 lot 201 Matsapha Township

comprising of a Bottle Store, disco and a butchery for a period of two years at a rental fee of E15 000.00 (Fifteen Thousand emalangeni) per month. The Respondent however paid rentals of E17 000.00 (Seventeen Thousand Emalangeni) per month and sometimes E17 200.00 (Seventeen Thousand Two Hundred Emalangeni) per month.

[3] The Respondent took occupation of the premises in August 2015 and paid in full all his rentals up until 31st December 2015. The record showed that on the 5th January 2016 (as confirmed by the Court *a quo)*, the Respondent was locked out of the premises by the chief security officer of the Appellant. The Respondent stated in his evidence in chief that the Appellant locked him out of the premises by putting a padlock on top of his official padlock which he had been given to him by Appellant's director Mr Tommy Kirk.

[4] The Court *a quo* concluded from these facts that the Respondent was locked out of the premises without due process and without a Court Order authorizing the Appellant to lock him out or to eject him from the premises. I have no reason to reject the Court *a quo's* conclusion from the facts as they appear on the transcript of the Court proceedings.

[5] The pleadings and the evidence led at trial showed that the Appellant's claim was for breach of a written lease agreement between the parties and for accrued rentals that the Appellant claimed the Respondent was liable to pay under the lease. The appellant said the rentals became due as a result of the Respondent's occupancy of the leased premises for the period of January 2016 to May 2016.

[6] The Appellant claimed in its particulars of claim that the Respondent continued to occupy the premises until and/or up to the month of January 2016, from that period the Respondent physically abandoned the premises. The Appellant alleged that notwithstanding such abandonment, the Respondent retained the keys to the leased premises and by virtue of which the Respondent remained liable for rentals for the said period for retaining the keys and by extension, the premises. The retention of the keys by the Respondent carried on until the 3rd May 2016 and therefore the Appellant argued that the Respondent was liable for accrued rentals in the sum of E102 100.00 (One Hundred and Two Thousand One Hundred Emalangeni), which sums remained due and unpaid.

[7] The statement of account produced by the Respondent to the Appellant, annexed in support of the claim also bears testimony by reflecting that, the claim was for the period from the 1st December 2015 to 3rd May 2016. The Appellant confirmed as much under cross - examination when Mr Kirk clarified to the Court *a quo* that he had approached the Court for rent, for a period of six (6) months including December 2015 because the rentals were due and payable in advance.

[8] It was established at trial that;

(a) the written lease agreement was to let a portion of the property which operated the liquor outlet, the discotheque and a butchery;

(b) that the property leased out consisted of shop 1/2/3 lot 201 Matsapha Town;

(c) all three licences to operate the business were in the name of the Appellant's director Mr Kirk; and

(d) that there was no clause in the lease that dealt with the transfer of the licences to the Respondent during the leased period.

[9] It was established further at trial that, with regards to the disco and the butchery licence, the Appellant's director facilitated the transfer of the licences to Respondent's name but refused to transfer the bottle store licence and claimed that he had leased the premises and not the licences. He testified that there was therefore no obligation that required him to transfer the licences to the Respondent. The Respondent was to get his own licences to operate the business on the premises.

[10] The Court raised its concern to both counsel on how the business of the disco, butchery and liquor operated from August 2015 until end of November 2015 without valid licences because they only got to be renewed in the name of the Respondent and later the Appellant in November 2015 and December 2015 respectively. The operation of the businesses without licences constituted a criminal offence in - terms of the respective Trading Licensing order and the Liquor Licence Act. The Court gave the parties a stern warning that it could not rubber stamp any practices of criminal nature in contravention of the laws of Kingdom.

[11] Be that as it may, it was clear from the particulars of claim and the judgment of the Court *a quo* that the Appellant was claiming

accrued rentals for the period of January 2016 to 5th May 2016 and that during this period all the licences had been renewed. The trading licences were renewed in the name of the Respondent and the liquor licence in the name of the Appellant. This Court will therefore not take the enquiry on the illegal operations of the business beyond this point.

[12] The Court *a quo* in answering the question as to whether or not the Respondent was liable to pay the Appellant accrued rentals for the period of January 2016 to 5th May 2016, had this to say;

> *"I have no doubt in my mind that the plaintiff breached the material terms of the agreement of lease by locking out the defendant from the premises without due process. PW 1 should have obtained a Court Order to lock out or eject the defendant from the premises, as it were, his actions were unlawful and constituted a breach of the lease agreement. It defeats logic how the defendant is expected to pay rentals for the period January 2016 to 5th May 2016 when he was not in occupation of the premises, not by his own accord for that matter but at the instance of the unlawful action of the plaintiff's director PW1 of locking out the defendant from the premises. I am in agreement with Mr Mdluli that the plaintiff seeks to benefit*

from the defendant from the unlawful conduct of its director PW1. This Court will not allow that claim as it would amount to unjust enrichment."

[13] The Court *a quo* consequently held that there was no merit on the plaintiff's case as articulated in the particulars of claim and it dismissed the claim with costs.

[14] The Appellant filed this appeal and articulated several grounds of appeal of which in essence can be summarized into three grounds of appeal. These are that;

[14.1] the Court *a quo* erred in law and in fact when it held that the failure by the Appellant to hand over the trading licences and in particular the liquor licence amounted to a failure by the Appellant to give beneficial occupation of the premises to the Respondent;

[14.2] the Court *a quo* erred in law and in fact to have held that the Appellant's failure to hand over the renewed liquor licence to the Respondent was a

breach of the lease agreement and thus relieving the Respondent of his obligation to pay rent;

[14.3] that the Court *a quo* erred in law and in fact to have held that the Respondent had proven on a balance of probabilities that the Appellant had locked the Respondent out of the premises on the 5th January 2016 and was therefore precluded from claiming rentals for the period between January 2016 to May 2016.

[15] The two grounds of appeal in paragraph 14.1 and 14.2 can further be subsumed under a single ground, that the Court *a quo* erred in law and in fact to have held that the Appellant's failure to hand over the trading licences and in particular the renewed liquor licence amounted to the Appellant's failure to give the respondent beneficial occupation or *vacua possessio*, thus relieving the Respondent all of his obligations to pay rent.

[16] In this regard, the Appellant argued at the hearing of the matter that it had carried out its obligation in - terms of the lease. Its obligation under the lease (it was submitted) was to deliver to the

Respondent premises which were suitable for the operation of the liquor outlet, the disco and butchery and not to deliver trading licences or a liquor licence for operating the businesses. That it was the duty of Respondent who wished to operate the businesses to acquire the relevant licences at the relevant time, and that obligation was his alone.

[17] On the other hand the Respondent argued that it was a fundamental legal obligation of the landlord/ lessor to deliver to the tenant free and undisturbed use and enjoyment of the leased property. It was argued therefore that Mr Kirk was under a legal obligation to deliver everything necessary including the renewed liquor licence to enable the Respondent to conduct the business per the terms and conditions of the lease agreement. His refusal to deliver the licences constituted a fundamental breach of the lease agreement.

[18] The Court *a quo* held that and I quote;

> *"In casu, I have no doubt in my mind that the refusal to hand over the licence immediately after its renewal and the subsequent lock out of defendant from the premises are fundamental breaches of the agreement of lease by Mr Kirk on behalf of the plaintiff. Clause 4 of the agreement of lease*

provides that the duration of the lease shall be for a period of two (2) years from date of the coming into operation of the lease on the 1st July 2015."

[19] I deal with the question of whether or not the judgment of the *Court a quo* can be assailed later on in this judgment.

[20] In support of its last ground of appeal (in 14.3) above, that the Court *a quo* erred in holding that the Respondent had been locked out of the premises on the 5th January 2016 thus precluding him from paying the claimed rentals, the Appellant argued at the hearing of the appeal that the defence even though very crucial was never pleaded.

[21] This assertion is not correct because in paragraphs 4.2, 4.3 and 5.1 of the plea, the Respondent pleaded that the Appellant's director harassed him by locking him out of the business on the 5th January 2016. The Appellant argued further in support of this ground that the appellant's director, though cross-examined at length on the issue, remained adamant that he never locked out the premises and that he was never shaken in his evidence in that regard. It was argued he was credible and unmoved on this issue.

[22] To the contrary, I found no support on record for the contention that the Appellant's director (Mr Kirk) was never shaken on his evidence or that he was credible and unmoved on the issue or other issues that were raised as material to his claim. For example, he had made a bold statement that the amount of E34 000.00 (Thirty Four Thousand Emalangeni) which was paid as a deposit at the start of the lease had not paid. There was another E17 200.00 (Seventeen Thousand Two Hundred Emalangeni) which the Respondent had paid in cash directly to Mr Kirk who was in the habit of collecting cash without issuing receipts. That amount was initially a part of the claim he had made until the Respondent proved that he had paid him.

[23] There is also the payment of E119 700.00 (One Hundred and Nineteen Thousand Seven Hundred Emalangeni) calculated from the Respondent's bank statements from 26th August 2015 to 31st December 2015 which amounts were only admitted by the Appellant's director during cross- examination. The director was somewhat surprised by these payments which he had received and had not accounted. The Court *a quo* and the record showed that at first he testified that he was unaware of the payments and it was only later at the trial that he admitted the payments. I agree with the Court *a quo's* conclusion in its judgment that the director made general

statements that the Respondent was in arrear without substantiating those claims. For example Mr Kirk could not deny the contents of the ledger in exhibit "**E**" which was a bank statement showing the credit payments to his company.

[24] The Appellant had also claimed for payment of water bills in the amount of E4 338.24 (Four Thousand Three Hundred and Thirty-Eight Emalangeni Twenty-Four Cents). The director conceded under cross examination that the water bills were actually for a property called Mshayazafe which was never leased to the Respondent.

[25] The director had also not disclosed during the exchange of the pleadings, until at trial that he had actually renewed and kept the liquor licence for himself instead of handing it over to the Respondent for operation.

[26] I therefore reject the contention that the director's demeanour was credible and unmoved. To the contrary he was an evasive witness who at times volunteered bold assertions. Sometimes, bold denials with material information coming out only in drips under cross-examination. I cannot under the circumstance find fault in the

conclusions made by the Court *a quo* that he locked the Respondent out of the premises on the 5th January 2016.

[27] I now revert to the question of whether or not the Court *a quo's* conclusion that the Appellant's failure to hand over the liquor licence after its renewal was in breach of the lease agreement relieving the Respondent of his obligations in the lease.

[28] It should be borne in mind that the rentals claimed were for the months of January 2016 to May 2016. The Court *a quo* had established that there were no arrears for the months up to December 2015. This would then mean that if we were to accept that the Appellant locked the Respondent out of the business on the 5th January 2016, the liquor licence issue may as well be irrelevant.

[29] What is the test for the tenant's liability for rent? In the case of Swaziland Polypack (PTY) Ltd and The Swaziland Government And Another (44/11) [2012] - SZSC 30 (31May 2012) M.C.B Maphalala JA (as he then was), A.M Ebrahim and A.E Agim JJA at paragraph 40 citing the South African case of Arnold v Viljoen 1954 (3) SA 322 (C) at P. 330 stated that, "I think the test for the tenant's liability for rent is whether he was in occupation or

possession of the leased premises and not whether such occupation or possession was beneficial or not. This latter element will of course be a consideration when the tenant's counter – claim for damages comes to be considered. Accordingly, when the tenant is sued for rent he cannot plead as a defence that he had been deprived of the beneficial occupation of the premises by reasons of structural defects which the landlord fails to repair, the tenant cannot remain in occupation but refuse to pay rent."

[30] Justice Franklin, in the case of Greenberg v Meds Veterinary Laboratories (PTY) Ltd 1977 (2) SA. 277 (T) stated that "When a tenant, on being sued for rent, avers that he has been deprived of the beneficial occupation of the leased premises by reasons of structural defects which the landlord fails to repair, he cannot remain in occupation, thereby keeping the lease alive and refuse to pay rent" The dictum was cited with approval in Arnold (*supra*).

[31] Justice Franklin, in Greenberg (*supra*) had due regard to the criticism that had been advanced of the decision in Arnold (*supra*) but was unable to come to the conclusion that it was wrongly decided. He cited an even clearer case in which the principle stated in Arnold (*supra*) was applied that is the case of Marcuse v Cash

Wholesalers (PTY) Ltd 1962 (1) SA 705 (F.C). Clayden C.J at paragraph 708D – 709D said:

> *"In the case of the lease, the act on the part of the lessee which relieves him of his liability to pay rent, when defects render the premises unfit for the purpose for which they were leased, is actual vacation of the premises"*

[32] In Lipinski v Bezuidenhout 1902. T.H. 231, Smith J said, *"In such cases the tenant was justified in quitting the property and his liability for rent ceased".*

In Hunter v Cumnor Investments 1952 (1) SA. 735 (C) at p. 740, Van Winsen J, referring to authority, said;

> " *Depending upon the nature and extend of the lessor's breach, the lessee may treat it as a repudiation of the contract and quit the premises, or he may claim a proportionate deduction of rent."*

In Sapro V Schlinkman, 1948 (2) SA 637 (AD) Davis,A.J.A dealt fully with the authorities at pp. 644 - 646 and concluded:

> *"To sum up: the authorities show that the date that matters in regard to the termination of the lessee's' liability to pay*

rent in terms of the lease is not the date of the breach or the date on which the lessee purported to cancel the lease, but the date on which he actually quitted the premises" (*emphasis added*).

[33] In applying the principles enunciated in the authorities above Van Wisen J in the Arnold (*supra*) at page 322, after referring to Sapro (*supra*) said;

> "*On the evidence in this case it seems that in April, the month for which rent was claimed, the respondent had not given up occupation of the premises it had ceased to carry on business in them and had them unoccupied but it still had the key to the premises after it had left the premises it tried to sublet them. And in March, after its letter in which it said that it had vacated, it arranged for inspection of the premises by municipal officials in order to obtain another licence to trade there....There was some evidence indicating that goods had been left on the premise. On the pleadings there was no counter – claim for damages to be considered. The plea is that payment of rent was "excused" because of the defects. Whether there had been cancellation put in issue and cancellation was not shown. But, with or without cancellation,*

the respondent could only succeed in its claim to be relieved of the payment of rent if it had given up occupation or possession in April. And that it did not do or even plead it had done. The respondent was not excused from paying rent in that case. (*Emphasis added*).

[34] It is my considered view that the principles stated in the above cited authorities should by analogy extend to apply to this appeal. Notably in those cases, the underlying problem faced by the lessee was structural defects on the premises affecting beneficial occupation. *In casu* however the Respondent asserts that he had been deprived by the Appellant of beneficial occupation of the premises by reason of appellant's failure to hand over the liquor license to him.

[35] In accordance with the above cited authorities the Appellant's failure to handover the liquor licence to the Respondent could not relieve the Respondent from his obligation if he remained in occupation or possession of the premises. He would have kept the lease alive and his refusal to pay the rent during that period would not be "excused".

[36] *In casu* if we accept (as we should) that the Court *a quo* was correct in holding that the Appellant's refusal to hand over the liquor licence, was subsequently followed by the locking of the premises without an Order of Court, resulted in the Respondent quitting the premises, then his liability for rent ceased.

[37] Consequently, the notice to vacate the premises issued by the Respondent to the Appellant on the 4th December 2015 and the allegations that he had left the premises but still kept the keys are all irrelevant. The test for his liability to pay rent is whether he was in occupation or in possession of the leased premises for the months of January 2016 to May 2016 and not whether he was justified to quit the premises because it was no longer beneficial for him to remain there, for he did not have the licence to operate the premises.

[38] Accordingly, the date that matter in regard to the termination of the Respondent's liability to pay rent in terms of lease, is not the date of the breach by the Appellant or the date on which the Respondent purported to cancel the lease in the notice to vacate. It is the date on which he actually vacated the premises (that is on the 5th January 2016).

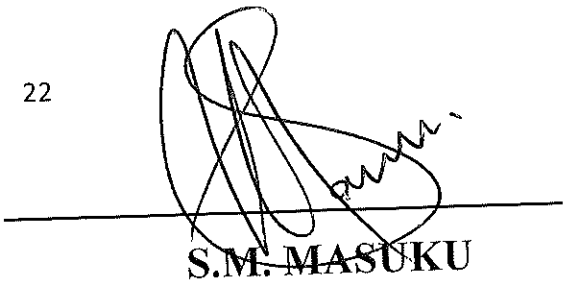
[39] Whilst, noting that part of the reasons for the judgment of the Court *a quo* are that the Appellant's director refused to hand over the bottle store licence (which I have demonstrated is not the test), I cannot find any compelling reasons to find fault on the overall conclusion made by the Court *a quo* on the facts regarding the events of the 5th January 2016 that lead to the Respondent quitting the premises. I agree that the Respondent was not obliged to pay rent after the 5th January 2016 when he was locked out of the premises.

[40] For the reasons set out in this judgment, the appeal has no merit and should fail.

[41] It is ordered that;

1. The appeal is dismissed.

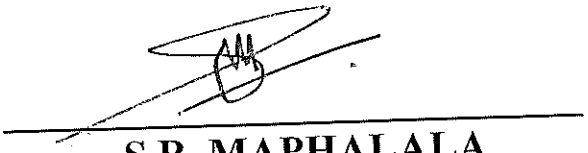
2. The appellant to pay the costs at an ordinary scale.



S.M. MASUKU

ACTING JUSTICE OF APPEAL

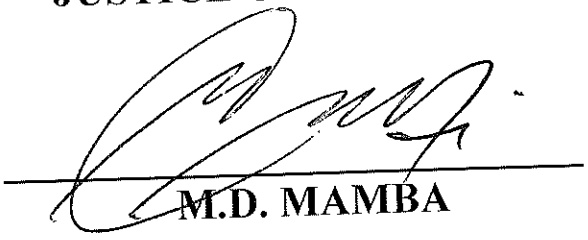
I Agree



S.B. MAPHALALA

JUSTICE OF APPEAL

I also Agree



M.D. MAMBA

JUSTICE OF APPEAL

For 1st Appellants: **MTM Ndlovu Attorneys.**

For the Respondent: **Bongani Mdluli Attorneys.**