IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.1566/96

In the matter between:

MZWANDILE MABUZA APPLICANT

VS

LUCKY G. MAHLALELA RESPONDENT

CORAM : J.M. MATSEBULA J

FOR THE APPLICANT : MR. D. JELE

FOR THE RESPONDENT : MR. MAGAGULA

JUDGMENT

23/07/96

The court wishes to give judgment in the matter of Mzwandile Mabuza versus Lucky G. Mahlalela.

This is an application brought under a Certificate of Urgency dated 5th July 1996 under Case No.1566/96.

In the court's file is a Notice of Withdrawal, of a matter being application, the Notice of Withdrawal refers to have been dated 1st July 1996 and the Applicant tendering wasted costs. No such application is in the file.

On the 2nd July 1996 the Respondent apparently responding to some application by the Applicant filed a Notice in terms of Rule 6(12)(c) and referred to Rule 6(25)(b).

I have consulted Rule 6(12)(c) of the Rules of Court but because the application said to have been withdrawn by the Applicant is not in the file and I do not know whether infact it was ever placed before the court, therefore, I was unable to deal with that matter.

Whilst it is allowed of litigants and litigants are given indulgence to dispense with the normal and usual requirements of the Rules of the Court other requirements in any application must still be adhered to.

On the 3rd May 1996 the present Respondent obtained judgment against the Mbabane Highlander's Football Club and subsequently obtained a writ dated 3rd July 1996 which has been referred to by the parties as 'R1'. The said writ refers to the premises which are the subject of the present application. I'll come back to the contents of 'R1' when I deal with the affidavits of the litigants.

On the 5th July 1996 the Applicant filed a Notice of Application under a Certificate of Urgency as I have said, for the following relief:

2. That the Respondent restores ante omnia to the possession of Applicant the following items:

2.1 white Toyota Hilux vehicle SD811YM;

2.2 a lavish bedroom suite comprising of a headboard and double bed;

2.3 a coloured television set;

2.4 2 small radio systems:

2.5 kitohenware and utensils;

2.6 and all clothes and linen belonging to the Applicant which are kept by the Respondent.

3. That Respondent pays the costs of the application.

On 5th July 1996 the Respondent entered a Notice of Intention to Oppose. Answering Affidavits by Respondent were filed on 10th May 1996 opposing the Applicant's Founding Affidavits. On the 7th July 1996 the Applicant filed its Replying Affidavit and the matter was set down for argument on the 19th July 1996. When the matter came before me, Mr. Jele who appeared for the Applicant stated that he was dispensing with Paragraph 2.1 of the Notice of Application which was to the effect that a certain motor vehicle be restored to the Applicant. He stated that the reason for this approach was that he would have to draft a fresh application in which the Deputy Sheriff will be cited as being the person who had had the motor vehicle. Mr. Jele then confined his submissions to Paragraphs 2.2 to

2.6 as set out above.

I have been referred by Mr. Magagula to Cooper the "South African Law of Landlord and Tenant.." dealing with the question of invecta et illata which fully translated means

'things brought and carried onto the premises'.

According to these maxim the landlord has a hypothec in security of rent due not only where things belong to the Lessee but also where they belong to others and have been brought onto the premises with the consent of the owner and with the object of their remaining not only temporarily but for the period of the lease or indefinitely. See in this regard of Volt Commentary 20.2.5. In our modern law the Lessor perfects his hypothec by applying to court for an order of attachment or restraining the Lessee from disposing of or removing the movables from the hired premises pending payment of the rent or determination of proceedings for the recovery of the arrear rental. Pursuant to obtaining a judgment to arrear rental movables on the hired premises are attached in execution by the Sheriff or hi Deputy. See this respect Page 174 of Cooper's book.

As it will be readily be observed the Sheriff or his Deputy need not determine the value of the invecta et illata that it attaches. All that he does he attaches movables brought onto the premises.

The movables mentioned under 2.2 to 2.6 were brought onto the premises and the Respondent had obtained judgment against the Lessee and subsequently obtained a writ referred to as 'R1'. The writ is a legally obtained document in

respect of the leased premises and what is indicated in the notice of attachment as having been attached is one of the movables which were brought onto the leased premises.

The items listed under 2.2 to 2.6 are some of the items which were brought and are on the premises.

The value of the already attached and those mentioned in 2.2 to 2.6 is totally irrelevant' and the court is not prepared to speculate and assume there is a possibility that those in 2.2 to 2.6 have not been attached when this application was moved. Only the Sheriff and his Deputy would know what happened to the items mentioned under 2.2 to 2.6. There is a valid judgment and a valid lease in this respect, in the hands of the Sheriff or his Deputy.

The court was of the view that the application was brought rather prematurely and the Deputy Sheriff ought to have been cited so that he does state that he has infact attached all the invecta et illata or only the motor vehicle and the court is not going to speculate what happened since the obtaining of the judgment and the writ.

In the circumstances the court dismisses the application with costs.

J.M MATSEBULA

JUDGE