

## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1244/2000

In the case between:

**PLB PROPERTIES (PTY) LTD**

**PLAINTIFF**

and

**MANUEL DOS SANTOS GONCALVES**

**DEFENDANT**

<u>CORAM</u>	:	Q.M. MABUZA-AJ
FOR PLAINTIFF	:	MR. MAGAGULA
FOR DEFENDANT	:	MR. S.V. MDLADLA

### JUDGMENT 7/12/06

[1] The particulars of claim set out the Plaintiffs cause of action. During or about 1994 the Plaintiff let out to the Defendant a residential flat situate on its property Plot 482 Farm No. 2 Malagwane Hill pursuant to an oral agreement of lease. The terms of the lease are set out from paragraphs 5 to paragraph 5.3. In fact the whole cause of action is based on the oral lease agreement between the Plaintiff and the Defendant.

[2] The prayers are set out as follows:

- (a) Ejectment of the Defendant from the premises known as Plot 482 situate on Farm No. 2 Malagwane Hill, Mbabane, district of HHohho Swaziland;

(b) Payment of the sum of E14,500.00 in respect of arrear rentals;

(c) Payment of the sum of E60,900.00 in respect of damages for the holding over of the premises from 12 November 1996 to 1 May 2000;

(d) Costs of suit.

(e) Further and/or alternative relief.

[3] The Defendant in its plea denies that the flat was let to him and states that the flat was let to Santo Pinto Construction. The Defendant in its plea further denies that he is in breach of any verbal agreement as there was no agreement entered between himself and the Plaintiff.

[4] A director of the Plaintiff Mr. Celso Pinto da Gama gave evidence on behalf of the Plaintiff. Mr. da Gama is also a shareholder of the Plaintiff.

[5] Mr. da Gama gave evidence to the effect that during the early 1990's the Plaintiff entered into an oral agreement of lease with another company called Santo Pinto Construction (Pty) Ltd. The agreement was to the effect that Santo Pinto Construction (Pty) Ltd would pay rent on behalf of its directors for accommodation which they occupied belonging to the Plaintiff. Mr. da Gama said that when he arrived in Swaziland during 1996 he found the above situation prevailing.

[6] However, due to financial difficulties Messrs Santo Pinto Construction (Pty) Ltd decided to stop paying rent on behalf of its directors. They wrote to the directors notifying them of this fact. The Defendant was a director of Santo Pinto Construction (Pty) Ltd and he also received a letter to this effect. The letter conveyed the decision that as from the 1/2/96 Santo Pinto Construction (Pty) Ltd would cease to pay rent on behalf of her directors.

[7] It was not until the 2<sup>nd</sup> August 1996 that the Plaintiff wrote to the directors of Messrs Santo Pinto Construction (Pty) Ltd advising them that if anyone was interested in renting PLB houses they should contact Mr. da Gama.

[8] According to Mr. da Gama he got a response from the Defendant to the effect that Messrs Santo Pinto Construction (Pty) Ltd was responsible for paying rent on his behalf and not him. Mr. da Gama took this letter and sought legal advice from his attorneys. The Defendant was removed as a director of Santo Pinto Construction (Pty) Ltd before the decision to stop paying rent for its directors was taken.

[9] Mr. da Gama also told this court that after he had received the letter from the Defendant he did not receive any rentals from him but prior to that he used to receive rent from Messrs Santo Pinto Construction (Pty) Ltd.

[10] Mr. da Gama also told this court that for the period that he was not receiving any rent the Defendant was in occupation of the said flat. This period was from August 1996 to October 2001, a period spanning over 5 years. He says he lost the sum of E95,750.00 therefore.

[11] The Defendant was eventually evicted during October 2001 after the Plaintiff had instructed his attorneys to evict the Defendant.

[12] Since the communication from Messrs Santo Pinto Construction (Pty) Ltd indicated that the company would stop paying rent for its directors as from the 1/2/96, it is not clear as to who paid rent from the 1/2/96 to August 1996 when the Plaintiff wrote to Messrs Santo Pinto Construction (Pty) Ltd. The parties did not belabour this point neither will I.

[13] Mr. da Gama further told this court that during the first year of occupation, the Plaintiff charged the sum of E1250.00 per month as rent and

during the second year the rent was increased to the sum of E1450.00. It is not clear whether the latter increment was on a year to year basis.

[14] Mr. da Gama further revealed that the verbal lease agreement was cancelled during August 1996. He also made the following claims in his oral evidence.

(a) He claimed the amount of E95,750.00 being in respect of the period August 1996 to October 2001.

(b) He claimed the sum of (+-) E15,000.00 being in respect of legal costs which he had expended with regard to this case.

(c) He also claimed costs of suit.

**The Plaintiff did not amend its particulars of claim and prayers to harmonise with the evidence Mr. da Gama gave in respect of the cause of action as well as the prayers.**

[15] Mr. Mdladla who represented the Defendant cross-examined Mr. da Gama. The thrust of the cross-examination was to the effect that no oral agreement of lease between the Plaintiff and the Defendant and that the oral agreement of lease was entered into between the Plaintiff and Messrs Santo Pinto Construction (Pry) Ltd.

[16] Certain paragraphs composing of the Plaintiff's particulars of claim were put to Mr. da Gama for example Paragraph 4 of the Plaintiffs particulars which reads as follows was put to Mr. da Gama:

***"During or about 1994, the Plaintiff let to the Defendant a residential flat situate on Plot 482 Farm No. 2 Malagwane Hill upon an oral agreement of lease"***

Whereupon Mr. da Gama agreed that there was no oral agreement of lease between the Plaintiff and the Defendant. The agreement of lease was between the Plaintiff and Messrs Santo Pinto Construction (Pty) Ltd.

[17] Paragraph 6 of the Particulars of Claim which reads as follows was also put to Mr. da Gama

***"From or about February 1996, the Defendant ceased paying rentals on the property concerned and on 12 November 1996, the Plaintiff gave notice to the Defendant of its intention to institute legal proceedings against the Defendant for its failure to comply strictly with the agreement. Annexed hereto marked "B" is a copy of the letter of notification."***

Whereupon Mr. da Gama admitted that the Defendant did not cease to pay rent because he had never paid any rent to start with. It was Santo Pinto Construction (Pty) Ltd which had ceased to pay rent.

[18] After the conclusion of cross-examination of Mr. da Gama, the Plaintiff closed its case without amending its prayers to suit its evidence. Mr. Mdladla for the Defendant promptly moved an application for absolution from the instance in that the Plaintiff had failed to make out a prima facie case against the Defendant.

[19] Mr. Mdladla's supported his application by submitting ***inter alia*** that the Plaintiffs cause of action was based on a breach of an oral agreement of lease between the parties but that the Plaintiff had failed to prove the existent of such an agreement. Indeed Mr. da Gama had admitted that there was no oral agreement of lease between the parties. Instead he admitted that the lease was between the Plaintiff and Santo Pinto Construction (Pty) Ltd. Mr. Mdladla also submitted that the Plaintiff had made no application to

amend the particulars of claim and prayers to suit the oral evidence.

[20] Mr. Magagula in response referred this court to the case of **Gandy v Makhanya 1974 (4) SA 853** as well as **Gascoyne v Paul Hunter 1917 TPD 170**. These cases set out the test to be adopted by the court at the end of the Plaintiffs case when an application for absolution has been moved by a Defendant.

[21] The text in **Gamedze v Makhanya** is set out as follows: "**The court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the Plaintiff contends**"

[22] In casu what does the Plaintiff contend? The Plaintiff has contended that its claim is for rental that it lost while the Defendant occupied its premises.

The Plaintiff has also contended that its case is in respect of damages for rental arrears.

[23] These then are the inferences that the court is asked to draw. **Herbstein Van Winssen** states that "in the case of inferences it would appear that ... there is not in the case of an application for absolution at the end of the Plaintiff case a weighing up of different possible inferences but merely a determination whether one of the reasonable inferences is in favour of the Plaintiff ...absolution from the instance will be ... refused, (p. 682-3, 4<sup>th</sup> edition).

[24] Whether or not the court takes the above route will ultimately depend on upon the following formulation:

**"At the close of the case for the Plaintiff, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for**

**the Plaintiff?"** (see Herbstein and Van Winsen p. 681, 4<sup>th</sup> ed.)

The court is also enjoined to bring to bear the judgment of a reasonable man.

[25] In my view the cause of action is based on a breach of an oral agreement of lease which was ostensibly entered into by and between Plaintiff and the Defendant. The damages claimed would automatically flow from this alleged breach. However, there was no breach of any agreement by the Defendant because no such agreement existed.

[26] It follows from the above that there are no damages either. Even if there were any damages, these have not been proved. The amounts that Mr. da Gama claimed in his oral evidence are markedly different from those claimed in the summons. This too would have grounded a successful application for absolution from the instance.

[27] The question I now have to ask is: ***"Is there evidence before me upon which this court ought to give judgment in favour of the Plaintiff ? the answer is there is none"***.

[28] There were other submissions raised such as non joinder but I do not think that this submission is relevant herein. More so because at some time both Mr. da Gama and the Defendant were directors of the company known as Santo Pinto Construction (Pty) Ltd. and joining it would have served no meaningful purpose in these proceedings.

[29] In the event I find that the Plaintiff has failed to make out a prima facie case against the Defendant. The application for absolution from the instance is hereby granted with costs.

**Q.M. MABUZA-AJ**