`

IN THE HIGH COURT OF SWAZILAND

CASE NO. 09/2010

HELD AT MBABANE

BETWEEN

ZIDLEKHAYA INVESTMENTS
(PTY) LIMITED... APPLICANT

AND

ABSA INVESTMENTS
(PTY) LIMITED... RESPONDENT

CORAM
AGYEMANG J
FOR THE APPLICANT: S. DLAMINI ESQ.

FOR THE RESPONDENT: A.M. LUKHELE ESQ.

DATED THE 24TH DAY OF MAY 2010

JUDGMENT

In this application brought on urgency, the applicant herein prayed the court for the grant of its prayers, thereby making orders for the ejectment of the respondent and all those holding occupation or under it at Lot 10 Buhleni Shopping Complex, Northern Hhohho; the payment by the applicant of damages at the rate of E4933.60 per month for unlawful occupation until the respondent's ejectment from the said premises, costs of the application and the grant of further and/or alternative reliefs deemed fit by the court.

By reason of matters that were found to be disputes of fact and which raised issues for determination, this court at the hearing of the application, set the matter down for *viva voce* evidence to be adduced.

Certain amendments were also granted by the court. These included a claim for the holding over of the respondent's occupation of the premises in place for the claim for unlawful occupation the applicant, and for the respondent, an inclusion of a counterclaim in the sum of E500,000 for improvements done on the premises.

The matters of common cause are these: the applicant is a company incorporated under the laws of Swaziland carrying on its business at Pigg's Peak. In this suit, it seeks the said reliefs as lessor of the premises described as Lot 10 Buhleni Shopping Complex, Pigg's Peak. The said premises

comprises a supermarket, a hardware store, a chemist shop, and a filling station.

The respondent is a company also incorporated under the laws of Swaziland carrying on the business of operating a petrol filling station at the Buhleni shopping complex. In this suit it has been cited as lessee of the aforesaid premises.

The matters giving rise to the application are these:

In or about AD 2004, the applicant company entered into an agreement with another company referred to as Buzzby Services (Pty) Ltd for the running of the aforesaid shopping complex inclusive of the filling station operated by the respondent. That agreement (which was described as one conferring the right to manage the premises) provided for the rental of the entire premises by the applicant company. Under the agreement, the applicant collected rents from occupiers of the premises and paid same to Buzzby Services.

The applicant also kept the premises clean and in good order including the conduct of minor repair works (major repair works for damage remained the responsibility of Buzzby Services). Yet the relationship did not appear to be one of agency, for the applicant's duty to pay rent did not appear to be affected by whether or not there were tenants occupying the premises. In the circumstance where a store or shop was unoccupied, the applicant company's duty to pay rental for the entire premises did not abate but continued regardless. Indeed, on the showing of the Director of Buzzby Services who on a subpoena gave evidence on behalf of the respondent, the

agreement between Buzzby Services and the applicant was for the grant of a lease by the former to the latter and furthermore, had in its contemplation, the subletting of the shopping complex by the applicant to others in order to pay the rent charged for the entire premises. The sub-lessees thus held their places and dealt exclusively with the applicant company regarding the payment of rentals and refunds for minor repairs carried out with the permission of the applicants. Such charges for repairs were passed onto the applicant which in turn passed same onto Buzzby Services.

It was not clear which tenants in the premises were placed thereat by the applicants pursuant to this agreement or whether they simply attorned tenant to the applicant when the latter took over the running/management of the premises. Regarding the respondent herein however, the uncontroverted evidence was that it was placed in occupation of the premises from AD 1993 up to the time the applicants took over the running of the premises in 2004. The circumstances in which the respondent went into occupation and operation of the filling station was that it did so in 1993 upon an arrangement reached between Mr. Ndlovu, the Director of KK Investments (a company which held the lease of the premises and run/managed the premises until the applicant took over the said business and role), and the respondent's Director, one Absalom Ndlovu who was the son of the said Mr. Ndlovu.

Indeed it was uncontroverted evidence of Absalom Ndlovu, that the occupation of the filling station was in the nature of a reward for his role in securing the lease/management agreement of the premises with Buzzby

Services for KK Investments. The respondent's occupation was free of rental charge and remained so until KK investment's position as manager/lessee of the shopping complex ceased.

It appears that after the death of the said Mr. Ndlovu the said Director of KK Investments, that company was no longer in its position with regard to the premises in or about AD 2004, Thus did the applicant company, incorporated in AD 2004, take over the running of the shopping complex under an oral agreement reached between Mrs. Siphiwe Ndlovu, one of the applicant's two directors, and Mr. Walter Bennett, the aforesaid Director of Buzzby Services.
It was the evidence of the applicant's Director who gave evidence in support of its case that when the applicant took over the running of premises, being required to pay rental for the entire premises to Buzzby Services, it entered into a lease agreement with the occupiers of the premises for their occupation of the premises.

Thus did the applicant by letter exhibit 1, dated 1st September 2004 call upon the respondent, already in occupation, to pay rental for the premises. This new arrangement was accepted by the respondent who having written to Buzzby Services inquiring of the status of the applicant regarding the shopping complex, received no reply to his letter exhibit A. Evidence of this state of affairs is found in a letter exhibit 8 written under the hand of Absalom Ndlovu, Director of the respondent in which as tenant, he claimed monies in reimbursement of expenses for repair work effected by the respondent on the premises. The respondent in that letter addressed to Mrs. Siphiwe Ndlovu of

the applicant company, described the works for which it sought compensation as “repairs the landlord was supposed to do” on the rented premises.

In December 2007, the applicant called upon the respondent to enter into a lease agreement for one calendar year ending 31 December 2008. Thus did the parties enter into a lease agreement. In that lease agreement, the applicant company was recited to be lessor and the respondent, lessee. The contract made no reference or mention of Buzzby Services as the landlord.
In the calendar year following, the said relationship continued between the parties although no lease agreement was executed by the parties.

It was the case of the applicant that in accordance with the terms of the lease agreement, the applicant exercised its right not to renew the lease for the premises after the expiration of the lease on 31st December 2009. This decision was communicated by the applicant to the respondent by letter of 1st September 2009. The respondent who felt aggrieved by the decision failed to deliver up the premises on the due date and simply held over, continuing to pay rental at the same rate. Thus did the applicant commence this suit by way of application seeking the prayers aforesaid.

Absalom Ndlovu, Director of the respondent testifying on behalf of the respondent relied and expatiated on allegations contained in the respondent’s answering affidavit. These were: that the respondent which had entered into the lease agreement had done so having been requested so to do by the applicant although the respondent had been placed in occupation of the

premises in 1993 free of charge by the Director of KK Investments and father of the said. He alleged that in line with the policy of the oil company that supplied products to the filling station: Caltex, which was to be responsible for improvements made on the premises for the proper conduct of the business of retailing oil products, the respondent was required to hold a long term lease. Being a lessee of the premises for a period of one calendar year only upon the applicant's lease, the respondent had sought a ten year lease from Buzzby Services per letter exhibit B.

He alleged that by a letter exhibit 4, Buzzby Services commenced negotiations with the respondent for the grant of a lease to it, for the respondent complied with the request in the letter to furnish inter alia, its company documents, and a refundable amount of E5,000. The payment was made by a cheque a copy of which was admitted in evidence as exhibit C. He maintained that as the said sum of money remained with Buzzby Services, the negotiations were not at an end.

Regarding the notice of non-renewal of its tenancy (referred to as the applicant's notice of termination), and the consequent ejectment from the premises by the applicant, the respondent's case was that it remained in lawful occupation of the premises having been so kept by Buzzby Services the landlord of the premises whose Managing Director Walter Bennett had instructed the respondent to remain thereat. He alleged that this was because that organisation intended, and was in fact in the process of giving a direct lease to the respondent. The defence of the respondent to the applicant's

claim was thus, that it remained in occupation upon the licence of one superior in title to the applicant.

The witness also alleged that the respondent had borrowed monies from the bank and used same in its business carried out from the premises. Alleging the capital outlay to be in the sum of E1,000,000, from a loan of E1,200000 evidenced by the loan agreement exhibit D, the respondent claimed that it had expended the sum of E500,000 on improvements to the premises. This sum the respondent counterclaimed for in the present proceedings.

The respondent's other witness, the said Walter Bennett, Director of the landlord company Buzzby Services, corroborated the evidence of the applicant's first witness regarding the applicant's right of occupation, management and control over the premises, granted by Buzzby Services. Confirming the existence of a ten-year lease agreement between Buzzby Services and the applicant, the witness testified that it followed upon the demise of Mr. Ndlovu and was on terms similar to the one held by KK Investments. The said terms were the payment of rent, the right to sublet without reference to Buzzby and to evict tenants and the management of shopping complex. The rental payable by the applicant to Buzzby Services he acknowledged, was for the entire premises including the filling station and that same was payable for the applicant whether or not any part of the shopping complex was occupied.

Corroborating the story of Absalom Ndlovu regarding how the respondent went into occupation and use of the filling station, that is, upon the sufferance of his father and co-Director of KK investments, the witness testified that when Buzzby Services he gave the lease to the applicant, he believed that the terms being similar to the terms of KK Investments, the respondent would occupy the filling station rent free. He testified that it was only after the respondent contacted him for a direct lease of the filling station that he became aware that the respondent no longer occupied and operated the filling station rent-free.

According to the witness, he had become aware of a dispute between the parties and the instant application proceedings and had sought to get the parties with the help of their lawyers, to settle the matter amicably without success. Although the witness admitted that in the several discussions he had with the respondent's Director Absalom Ndlovu, he may have encouraged him to remain in occupation of the filling station, it was his evidence that he had had no intention of making a challenge thereby against the applicant but that he only sought to give Absalom peace while he looked for a way to get Mrs. Siphiwe Ndlovu, Director of the applicant and Absalom Ndlovu her stepson and Director of the respondent, to the negotiating table. It was his evidence also that when the respondent wrote to Buzzby Services seeking a direct lease from it, he informed the respondent of Buzzby Services' agreement in principle but that the discussion had not gone further because of the present dispute.

In spite of his obvious displeasure at the turn of events and his vehemently voiced opposition to the applicant's decision not to renew the lease between it and the respondent, which would have the effect of the latter's eviction from the filling station, this witness consistently stated that his reaction thereto should the applicant persist in its determination to evict the respondent, to part ways with the applicant after its ten year lease was up.

It was clear then that the testimony of this witness which brought clarity to the rights, obligations and powers of the applicant as well as the relationship between the parties herein, stopped short of supporting the case of the respondent regarding the matters he was called upon to corroborate.

These were: an alleged involvement of Buzzby Services in the running and management of the premises which gave it a right over tenants on the premises superior to the applicants; an alleged permission granted by Buzzby Services to the respondent to remain on the premises in spite of the applicant's expressed intention of non-renewal of the respondent's lease; the applicants' alleged lack of authority to evict tenants, or even that Buzzby Service's acknowledged dealings with the respondent regarding the grant of a direct lease had in any way derogated from the right of the applicant to terminate the lease of the respondent and to evict it from the premises.

At the close of the pleadings and after evidence was led, the following stood out as issues for determination:

1. Whether or not the plaintiff has the right to evict the respondent from the premises**;**
2. Whether or not the respondent has the right to remain on the premises in spite of the letter of non-renewal of lease;
3. Whether or not the applicant is liable for the improvements claimed by the respondent;
4. Whether or not the plaintiff is entitled to its claim;
5. Whether or not the defendant is entitled to its counterclaim.

Has the applicant the power to evict the respondent form the filling station at Lot 10 Buhleni Shopping Complex, Northern Hhohho? It seems to me that it has. Contrary to the submissions of learned counsel for the respondent, there is nothing in the relationship between the parties which derogates or detracts from a simple landlord-tenant relationship. Although per the uncontroverted evidence led, the respondent was placed on the premises of the filling station by KK Investment in 1993 on rent-free terms, the said terms were not in any way binding on even a successor-in title to KK Investments unless there was an agreement to that effect.

Mr. Walter Bennett of Buzzby Services who informed the court that he had held the belief that the said term of rent-free occupancy for the respondent would be such as it was under KK Investments, also testified that as landlord,

the rents Buzzby Services collected from the applicant as lessee of the shopping complex, included rent for the filling station. It seems to me that for whatever reason, whether as reward for good services or otherwise, the right of occupancy given the respondent by KK Investment, was the decision and act of that company.

In my view, no one, not the respondent, or the Mr. Bennett as representative of the landlord, had any right or reason to demand the same from the applicant which was a company distinct form KK Investments and which took up an entirely new lease of the entire premises under an agreement distinct from the one upon which KK Investment held its lease/management contract. The applicant who asked for, and received rent from the respondent, from 2004 until 2007, entered into a formal lease agreement with the respondent. The said lease agreement for the 2008 calendar year did not recite the title of Buzzby Services.

The applicant signed as lessor and same was accepted by the respondent who signed as lessee. Although in 1993, no lease agreement was signed, it is evident that a tacit agreement to continue the lease upon the same terms as the agreement of 2008 came into being and the respondent occupied the said premises of the filling station under this arrangement. The applicant continued to receive rent from the respondent who apparently did not complain, challenge or resist the right of the applicant thereto. Indeed, in letter exhibit 7, the respondent's Director Absalom Ndlovu writing on behalf of the respondent in reply to the applicant's notice of non-renewal of the lease

for the filling station, clearly accepted the existence of such lease in his appeal for a review of the applicant's decision. It seems to me that it does not in these circumstances, now lie in the mouth of the respondent to be hold up the superior title of Buzzby Services upon this arrangement and to allege that it was Buzzby Services and not the applicant that had the right to evict it from the premises.

It is my view that just as under the 2008 lease, the applicant could refuse to renew the lease upon the expiration thereof, so it was under the tacit continuing agreement of 2009. Furthermore, it seems to me that even if the parties could not be held strictly to the terms of the 2008 lease, The evidence of Mr. Walter Bennett who did not at any time challenge the applicant's right to evict the respondent confirmed that the applicant, like its predecessor KK Investments, could place tenants in occupation and also evict tenants on its own terms.

The applicant's position as sublessor in these circumstances conferred upon it the right to renew the lease, or refuse to do so as it had chosen to do in the present instance. That right of a sublessor could not be tampered with by the landlord of the head lease as long as the sublease was regularly entered into and was not in violation of its lease with the landlord, see: ***First Cons Leasing Corporation v. Theron 1976 SA (T) 180H.***

Indeed, despite his obvious displeasure at the turn of events and consternation over the applicants' decision to evict the respondent, the said Director of Buzzby Services in obvious acknowledgment of the plaintiff's right as lessor to evict the respondent as lessee from the premises, could only remark that if the applicant persisted in it, then Buzzby Services would terminate its relationship with the applicant but only at the expiration of the latter's ten-year lease.

The said gentlemen did not corroborate the respondent's case that Buzzby Services, with its superior title had kept the respondent in the premises because it intended to give it a direct lease. In fact, his evidence was that the discussion regarding the grant of a direct lease by Buzzby Services to the respondent was stalled because of the dispute between the parties.

In my view the relationship between the parties was purely landlord and tenant. In that circumstance the right of the applicant as lessor to terminate the occupancy of the respondent as lessee of the filling station is unquestionable and I hold the same to be a fact. I so hold in spite of the submissions of learned counsel for the respondent in that regard. Indeed, the resources on the landlord-tenant relationship contained in Joubert's: The Law of South Africa 9th Ed. At 98, and 99 pp 107, quoted for my persuasion were wholly irrelevant, and the submissions/arguments based on them, misconceived.

I find also that Buzzby Services did not by reason of its ownership of the premises, exercise a superior right over the respondent which was the applicant's tenant under an agreement with the applicant. The respondent as sub-lessee of the applicant had no relationship with the landlord who was stranger to the lease agreement between the parties, see: ***United Watch and Diamond Company v. Disa Hotels 1972 (4) SA 409 (C) 417 A-B*** and I hold the same to be a fact.

Is the respondent entitled to recover the sum of E500,000 allegedly expended on improvements to the premises of the filling station? I think not. The respondent alleged this state of affairs in its answering affidavit and its Director Absalom Ndlovu repeated same in his testimony before the court elaborating, that the said sum of E500,000 was spent out of a total of E1000000 used up in the business, on alleged improvements. The said witness however presented no credible evidence of this capital outlay in the filling station in face of the denial and challenge by the applicant that there were no visible signs of improvement on the premises.

No receipts for such expenses or other relevant documentary evidence were tendered in evidence in support of the respondent's allegation, the only such evidence offered being documents evidencing the grant of banking facilities including an overdraft facility of E1.200.000 to the respondent company. In face of the admission during cross-examination that the respondent company was made up of nine businesses (details of which were provided on that company's letterhead), the said piece of evidence thus only served to

establish that a loan in the said sum of E1.200.000 was received by the respondent. As same could have been applied in any of the respondent's nine businesses, the respondent's case was not helped by the tendering of this document unaccompanied by receipts or other evidence regarding expenditure incurred specifically for the filling station, one of the respondent's businesses.

Moreover, the respondent's Director and witness appeared to be completely nonplussed when he was asked to state the improvements done on the premises. In spite of his best efforts, the items listed: provision of a generator, canopy et al, did not amount to more than E40,000 and even this was not supported by any documentary or other corroborative evidence. I must at this point state that until the applicant commenced this suit, the respondent never at any time made mention of this amount of E500,000 now claimed as used up for improvements on the premises. Yet the respondent which clearly recognised rights regarding a claim for reimbursement for expenditure on the premises, in February 2007, sent a claim for reimbursement for the sum of E9442.07 for such repair works to the applicant.

The inconsistency in the respondent's conduct of making a claim for reimbursement for slightly over E9000 and failing to even make mention of the enormous sum of E500,000 if same had been expended on the same premises, cannot be regarded as trifling. As aforesaid, the respondent adduced no evidence at all regarding this allegation that so much money had been spent on the premises which sum must be recovered from the

applicant. But I must add that even if evidence in support of such expenditure had been adduced, it would still be doubtful if the respondent could make a successful claim against the applicant when the said improvements had not been carried out with the written consent of the applicant. I have said before now, that the relationship between the parties in AD 2009, was a tacit agreement to continue on the terms stated in the lease of 2008.

That agreement doubtless determined the rent that was proffered by the respondent without dispute, and accepted by the applicant without question for that subsequent year of 2009. In the 2008 agreement, it was provided that works amounting to alterations and improvements could not be carried out without the written consent of the applicant. It seems to me that a capital outlay of such huge proportions as is now being alleged by the respondent, expended without such authorisation being a covenant provision, could result even in the cancellation of the contract. But all this is of no moment for as I have said before now, no cogent evidence was led regarding the said claim which must therefore fail.

The applicant's claim as amended must succeed for the reasons afore-discussed and the counterclaim of the respondent for monies allegedly used in improving the premises must fail.

Judgment is entered for the plaintiff for the ejectment of the respondent and all those holding occupation or under it at Lot 10 Buhleni Shopping Complex, Northern Hhohho; the payment by the respondent to the applicant of monies for holding over of its lawful occupation of the premises by way of damages at the rate of E4933.60 per month for every month that rental remained unpaid during the period January 1, 2010 till the present time. The applicant is awarded costs of the application.

The counterclaim is hereby dismissed.

MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE