



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 231/2014

In the matter between:

BUSINESS 100 & PICTURE FRAMES

1st Appellant

BENNY NDLANGAMANDLA

2nd Appellant

And

DICKSON MASEKO

Respondent

Neutral citation: *Business 100 & Picture Frames and Another v Dickson Maseko (231/2014) [2015] SZHC 204 (20 December 2015)*

Coram: **T. DLAMINI J.**

Heard: 15 October 2015

Delivered: 20 November 2015

Summary: Civil Procedure – Appeal against ejectment – Lease agreement – Failure to pay rent – termination of lease agreement.

JUDGEMENT

1. This is an appeal from a decision of the Magistrate’s court. In the *court a quo* the Respondent was the Plaintiff whereas the Appellants were the Defendants.
2. In January 2014 the Respondent issued summons against the Appellants for ejectment from premises that were leased to the 1st Appellant. The reason for the sought ejectment is that the Appellants, according to the Respondent, were defaulting in the payment of rent such that the relationship between the Respondent and the 2nd Appellant who owned the 1st Appellant had deteriorated to the point that they were disrespecting each other. The Respondent also sought the payment of arrear rentals in the sum of One Thousand Four Hundred Emalangeneni (E1400.00) and costs of suit at attorney and own client scale.
3. As a result of the above mentioned reason, the Respondent sought to terminate the lease agreement. The Appellants defended the action and also filed a counter

application. They argued that they have an existing lease agreement with the Respondent that lapses in 2016.

4. When the matter came before court after the issuance of the summons on or about the month of February 2014, as per the Respondent's attorney's submission that was not controverted, the attorneys for the parties agreed in court that whilst the matter is pending for determination, rentals shall be paid through the attorneys for the Respondent.
5. According to the record of proceedings of the Magistrate's court, the trial commenced on the 16th May 2014. Evidence was given by five (5) witnesses, namely; Dickson Maseko who is the Respondent herein, Maggie Bethusile Maseko, Batholoma Mdlazi, Daniel Lion Dlundlu and Mr Ndlangamandla who is the 2nd Appellant in this appeal.
6. After having considered the evidence of the witnesses and the submissions that were made by the attorneys for the parties, the court ruled in favour of the Plaintiff (Respondent) and ordered the Appellants to vacate the leased premises by 31st December 2014, and to pay all arrear rentals within fourteen days from the date of the judgment. Each party was ordered to pay its own costs.

7. The Appellants noted an appeal to this court against the decision of the Magistrates court. Five grounds of appeal were stated and are set out hereunder.

i) *“The court a quo erred in law and in fact in reaching a finding that the appellants had breached the material terms of the five (5) year lease agreement by failing to pay rentals. The court failed to put into consideration the uncontroverted evidence of the appellants that the respondent was the one who was refusing to receive and/or accept rentals from the appellants.*

ii) *The court a quo erred in law and in fact in reaching a finding that the appellants had been afforded an opportunity to pay rentals through the respondent’s attorneys. The court a quo failed to put into consideration the fact that there was no prior arrangement that the appellants would pay rentals through the respondent’s attorneys.*

iii) *The court a quo erred in fact by reaching a finding that the 2nd appellant told the court that he did not have money for rentals. To date the appellate has paid all the rentals in full through the respondent’s attorneys.*

iv) *The court a quo erred in law and in fact in failing to consider the fact that the respondent was the one who had breached the material terms of the five (5) year lease agreement. The evidence of the respondent was to the effect that he did not recognize the five (5) year lease agreement and therefore he considered himself not bound by it. The material breach of the lease agreement by the respondent was manifest when the respondent unilaterally cut off electricity and water supply to the appellants' workshop. The respondent also deprived the 2nd appellant unlimited access to the premises.*

v) *The court a quo erred in law and in fact in failing to order the respondent to comply with the terms and conditions of the five (5) year lease agreement that is existing between the parties. Whereas the court a quo stated in its ruling that the five (5) year lease agreement between the parties is sacred and must be respected by all the parties in all its terms.”*

8. Breach of the lease agreement is the reason that prompted the Respondent to issue the summons for ejectment of the Appellants from the leased premises. AJ Kerr

in his book “**The Principles of the Law of Contract, 6thed**, discusses the legal position following a breach of contract. At page 602 he states that

“A breach of contract does not in itself bring the contract to an end. It gives the aggrieved party a choice of remedies, the option varying with the nature of the breach. In the case of a major breach the aggrieved party may terminate the contract by cancelling it.”

9. At page 727 the author discusses about how cancellation is effected and when it takes effect. He states as follows:-

“An aggrieved party, however, has a right to approach the court, and unless the contract, properly interpreted, requires extrajudicial notification, if he does so without previously giving notice of his election to cancel the contract, service of his summons is itself an announcement of his election to cancel.”(own emphasis)

10. I propose to deal with the grounds of appeal *ad seriatim*. Before dealing with the first ground I wish to mention that it is an accepted principle of our law that an appeal court is generally reluctant to interfere with the decision of a lower court

in the exercise of its discretionary power, unless the decision of the lower court is shown to have been arrived at capriciously, is based on a wrong principle or it manifest biasness.

11. **Herbstein and Van Winsen, “The Civil Practice of the Superior Courts in South Africa”, 3rd edition** at page 740, states as follows:-

“Where a lower court had given a decision on a matter within the discretion of the court, the Appellate Division will interfere only if it comes to the conclusion that the court a quo has not exercised a judicial discretion, i.e., it has exercised its discretion capriciously or upon a wrong principle, it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons.”

12. **Herbstein and Van Winsen (supra) 4th edition** at page 916 state that

“... the advantages enjoyed by the trial court in seeing and hearing witnesses and in being steeped in the atmosphere of the trial, an appeal court is in general reluctant to disturb the findings of a trial court on questions of fact.”

13. I now turn to deal with the grounds of appeal as they are set out in paragraph 7 above. On the first ground of appeal, it is my considered view and finding that this ground of appeal, with respect to counsel for the Appellants, has no merit. When one reads the ruling of the *court a quo* which is at page 96 of the Book of Pleadings, the learned Magistrate states as follows:-

“However it appears to me that the defendant has breached the contract by not paying rent despite being given the opportunity to pay through the Plaintiff’s attorneys. In his evidence he told the court that he did not have money. This is a serious breach of the terms of the contract and does warrant eviction.”

14. It is common cause that when the Respondent issued summons in the *court a quo* the matter appeared before the Magistrate on or about the month of February 2014. It is also common cause that the attorneys representing the parties agreed before court that rent should be paid through the attorney for the Plaintiff (Respondent herein) pending the determination of the ejection proceedings. These facts were submitted and remained unchallenged during the hearing of the appeal.

15. The ruling of the Magistrate clearly and unequivocally states that “*the defendant has breached the contract by not paying rent despite being given an opportunity to pay through the plaintiff’s attorneys.*” (own emphasis) For the Appellants to now state that the court a quo failed to put into consideration the evidence of the Appellants that the Respondent was the one who was refusing to receive and/or accept rentals from the Appellants has no merit at all.
16. The record of the proceedings of the *court a quo* also shows at page 125 of the book of pleadings that when the trial was proceeding at the Magistrate’s court on May 27, 2014, the Appellants were still in arrears despite that an arrangement was made in February 2014 that rent would be paid through the Appellants’ attorneys. This is confirmed by the examination in chief where the 2nd Appellant was led in evidence by his attorney. I will quote an extract from that evidence. DC stands for defendant’s counsel while D stands for defendant.

“DC: When are you settling the arrears in rentals.

D: I can pay the arrears in two (2) months, my business is now making a loss because Maseko locks the gate from 17:00 hours to 08:00 hours and my customers are inconvenienced.”

17. It is therefore without any doubt that the Appellants continued to be in default of rental payment even after it had been agreed that rent would be paid through the Plaintiff's (Respondent's) attorneys.
18. During the hearing, the Appellants further submitted that the Respondent later on accepted the rentals when the ejectment proceedings had been instituted. These rentals are the ones that were paid through the Respondent's attorneys. As a result, it was submitted that the acceptance of the rental payments after instituting the action in court means that the Respondent waived his right to eject the Appellants from his premises.
19. My finding is that the Appellants are misdirected, in the circumstances of this case, to hold the view that the acceptance of the rent payments after the court action had been instituted constitutes a waiver or means that the Respondent waived his right to eject the Appellants from the rented premises.
20. As I have already mentioned above, the arrangement for the rentals to be made through the Respondent's attorneys was made pending determination of the ejectment action that was already before court. This was meant to preserve the status *quo ante* until the court had issued its judgment on the ejectment

proceedings. The acceptance of the rentals under those circumstances does not constitute a waiver of the right to eject the Appellants. This ground of appeal accordingly fails and is dismissed.

21. The second ground of appeal is that ***“The court a quo erred in law and in fact in reaching a finding that the appellants had been afforded an opportunity to pay rentals through the respondent’s attorneys. The court a quo failed to put into consideration the fact that there was no prior arrangement that the appellants would pay rentals through the respondent’s attorneys.”***

22. This ground of appeal has its answer in the Appellants heads of arguments dated 3rd June 2015 at paragraph 5.1.1. Below I quote what the Appellants themselves submit in their heads of arguments.

“It is submitted on behalf of the Appellants that the Respondent later on accepted the rentals. The Respondent accepted the rentals when the ejectment action had been instituted in Court. Arrangements were made that the rentals would be payable through the Respondent’s attorneys.”(own emphasis)

23. In my determination of this ground of appeal, I also wish to reiterate what I have stated in paragraph 14 above. I therefore find no merit on the second ground of appeal and I accordingly dismiss it.

24. The third ground of appeal is that ***“The court a quo erred in fact by reaching a finding that the 2nd appellant told the court that he did not have money for rentals. To date the appellate has paid all the rentals in full through the respondent’s attorneys.”***

25. On this ground I wish to reiterate what I have already mentioned in paragraphs 16 & 17 above. The 2nd Appellant was asked by his attorney during the hearing in the *court a quo* about when he will settle the arrear rentals and he answered as quoted below:-

“I can pay the arrears in two (2) months, my business is now making a loss because Maseko locks the gate from 17:00 hours to 08:00 and my customers are inconvenienced” (This quotation is extracted from the record of proceeding at page 125 of Book of Pleadings)

26. It is therefore inconceivable how the 2nd Appellant can base his appeal on the ground that the *court a quo* erred in fact by reaching a finding that the 2nd Appellant told the court that he did not have money for rentals. As a fact the *court a quo* did not even reach a finding about that but the 2nd Appellant himself told the court that he can settle his arrear rentals in two (2) months because his business was not making profit. This ground of appeal is therefore dismissed.

27. The fourth ground of appeal is that ***“The court a quo erred in law and in fact in failing to consider the fact that the respondent was the one who had breached the material terms of the five (5) year lease agreement. The evidence of the respondent was to the effect that he did not recognize the five (5) year lease agreement and therefore he considered himself not bound by it. The material breach of the lease agreement by the respondent was manifest when the respondent unilaterally cut off electricity and water supply to the appellants’ workshop. The respondent also deprived the 2nd appellant unlimited access to the premises.”***

28. I wish to bring to light the evidence as it appears in the record of proceedings of the *court a quo*. In those proceedings the Respondent was the Plaintiff, and PC stands for Plaintiff’s Counsel while P stands for Plaintiff. Quoted below is an

extract of part of the Plaintiff's examination in chief. This extract is found at page 105 of the Book of Pleadings.

“PC: Does he pay rent timeously?

P: No, he is already in arrears for seven months. However I was told that last week he paid rentals to my lawyers for only a period of three months. Which means he still owes the rent for four months.He started defaulting from November 2013. From the aforementioned date till to date he has never paid rentals to me, that is why I have decided to approach this Honourable Court.” (own emphasis)

29. Now I quote an extract of part of the evidence of the 2nd Appellant who was referred to as 2nd Defendant in the *court a quo*. The extract is found at page 125 of the Book of Pleadings. DC stands for Defendant's counsel while D stands for Defendant.

“DC: Are you up to date with your rentals?

D: No, on the 3rd December 2013 when I brought rent to Maseko he refused to take it, he said it was because I had not attended a

meeting he had called. He did invite me to the meeting but I was held up by other duties. He wanted me out of the premises for that reason, the lease agreement does not cover any meetings. I attended prior meetings out of respect. In April 2014 I started paying rent through his lawyer. I fell in arrears because he refused to take the rentals from me and I am now paying through his lawyer. I could not have given him the rent money forcefully.

30. In response to the summons for ejectment that were issued against the Appellants, the Appellants filed a counter claim and pleaded as follows in paragraphs 4.3 and 4.5. These paragraphs are at page 35 of the Book of Pleadings.

4.3

“The Plaintiff, as at from the 2nd December 2013, cut electricity supply to the Defendant without any justifiable reason.

4.5

The Plaintiff has denied the Defendants access to use and enjoy water within the premises.”

31. At this point I wish to refer to the quotation from the author AJ Kerr (supra) which is set out in paragraph 8 above. It is my finding that the Appellants were already in breach by failing to pay rent when the electricity and water were cut off by the Respondent.

32. JTR Gibson in his book **“South African Mercantile and Company Law, 5thed** at page 205 states as follows:-

“On non-fulfilment by either landlord or tenant of any of his duties the other party has his ordinary remedies on breach of contract. If the breach is of a material term he has an election. He may abide by the contract, sue for specific performance, and claim such damages as he has suffered; or he may treat the contract as cancelled and sue for damages.” (own emphasis)

33. It is a fact that in a lease agreement for the hiring and occupation of premises, payment of rent in respect of those leased premises is a material term of that lease agreement. The Appellants were accordingly in breach of a material term of the lease agreement and the Respondent had the option of terminating the

agreement. The Respondent was also entitled to treat the lease agreement as cancelled. This fourth ground of appeal therefore fails and is dismissed.

34. The fifth ground of appeal is that ***“The court a quo erred in law and in fact in failing to order the respondent to comply with the terms and conditions of the five (5) year lease agreement that is existing between the parties. Whereas the court a quo stated in its ruling that the five (5) year lease agreement between the parties is sacred and must be respected by all the parties in all its terms.”***

35. This ground of appeal gives me the impression that the Appellants did not read the ruling or decision of the Magistrate with understanding. The ruling of the Magistrate read as follows:-

“If there is one thing which, more than any other, public policy requires, it is that all men of full age and competent understanding shall have the utmost liberty of contracting and that all their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice:

The wise words are a quote from Jessel J, in Printing Registering Co. v Samson, and quoted with approval by Masuku J in Swazi Bank v Diversa Holdings (3624/05).

Such words are decisive in dealing with some aspects of this case. Without getting into details, I will hold that the five year lease agreement between the parties is sacred and must be respected by all parties in all its terms.

However it appears that the defendant has breached the contract by not paying rent despite being given the opportunity to pay through the plaintiff's attorneys. In his evidence he told the court that he did not have money. This is a material breach of the terms of the contract and does warrant eviction."

36. It is clear that the ruling of the *court a quo* is that the five year lease agreement is binding between the parties. It was necessary, in my view, for the court to pronounce this aspect of the ruling clearly because the Respondent stated in his evidence in chief that the five year lease agreement was only meant for purposes of obtaining a trading licence and not to govern their lease agreement

relationship. The court therefore pronounced itself clear about the status of the five year lease agreement.

37. Notwithstanding the ruling of the Magistrates court about the binding nature of the five year lease agreement between the parties, the court went on to find that by failing to pay rent as agreed, that failure constitutes a breach of a material term of the lease agreement. As mentioned earlier on, a breach of a material term of a contract entitles the other party (aggrieved party) to cancel the contract. The *court a quo*, therefore and rightly so, granted the order for the ejection of the Appellants from the rented premises.

38. It is the considered view and decision of this court that the appeal against the decision of the *court a quo* fails. The appeal is accordingly dismissed with costs. The decision of the *court a quo* is confirmed. The Appellants are ordered to vacate the Respondent's premises on or before 30th November 2015, and are to also pay rent up to 30th November 2015 if they are still in occupation of the leased premises.

T. DLAMINI
JUDGE OF THE HIGH COURT

For Appellants: **C. Bhembe**

For Respondent: **M. Mtshali**