



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 594/13

In the matter between:

**MIKKA SWAZILAND (PTY) LTD**

**Applicant**

**And**

**THOMAS INVESTMENTS CORPORATION  
(PTY) LTD**

**Respondent**

**Neutral citation:** *Mikka Swaziland (PTY) LTD vs Thomas Investments Corporation (PTY) LTD (594/16) 2016 SZHC 126 (21 July 2016)*

**Coram:** Hlophe J

**For the Applicant:** Mr. S. C. Simelane

**For the Respondent:** Mr. J. Warring

**Date Heard:** 17 June 2016

**Date Handed Down:** 21 July 2016

### Summary

*Application proceedings – Orders sought declaring the lease agreement between the parties to be renewed despite Respondent issuing a notice terminating it – Whether there was a basis in law to justify the refusal to renew the lease agreement – Before matter could be finalized in court, Respondent brings a counter application seeking an order confirming that the lease agreement had terminated by effluxion of time and that the applicant be ejected from the premises – Whether a basis does exist for the declaratory order sought to the effect the Lease was renewed – Whether from the facts it can be said that the lease terminated by effluxion of time – Court of the view disputes of fact relied upon neither genuine nor real – Lease agreement not renewed – Lease terminated by effluxion of time – Application dismissed with costs.*

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### JUDGMENT

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[1] The parties in this matter concluded a lease agreement in terms of which the applicant as lessor, leased to the Respondent as lessee, certain premises fully described as Shop No. G22, Riverstone Mall, Plot No. 1206, Manzini. In fact the Applicant assumed tenancy in the Respondent's premises as a result of the former occupier and tenant of the

Respondent on the same premises, Carver (PTY) LTD, having ceded its rights as a tenant therein, to the applicant.

[2] The dispute culminating in these proceedings is over the renewal or otherwise of the lease agreement between the current parties. Whereas the agreement per the renewal clause provides that it may be renewed, it is not in dispute that such renewal is not automatic but is dependent on the fulfillment of certain conditions. The central question for determination in the final analysis is whether the said conditions were met.

[3] These conditions entail among others, the lessee having to notify the Landlord of his intention to renew the lease agreement in writing at least some six months before the expiration of the initial agreement. They further entail the parties agreeing on the new terms including the rental and the conditions which must be met at least some three months prior to the termination of the initial agreement. More importantly the renewal would be allowed where the tenant would be found not to have breached the current lease “so frequently or in such (a) manner (so) as to justify the Landlord holding the tenant’s behaviour to be inconsistent with the ability or intention to comply with its obligations in terms of the lease”.

- [4] It is not in dispute that the lease agreement between the Applicant and the Respondent was concluded on the 16<sup>th</sup> July 2013. At that point 3 years of the ceded lease agreement were left to run.
- [5] The correspondence exchanged between the parties as can be seen from the papers filed of record indicates that the relationship between the two parties was not peaceful but tenuous, with the Respondent accusing the Applicant of failing to neatly and properly display its merchandise so as to meet the required standards. In fact the Respondent complained that the applicant's shop was untidy and looked overstocked. It was contended that there were also displayed and sold items that were not to be sold thereat in terms of the lease agreement. Correspondence exchanged between the parties and making reference to such a situation was among others that dated the 4<sup>th</sup> November 2014 followed by a response thereto dated the 31<sup>st</sup> August 2015 and several others.
- [6] In terms of the latter letter, applicant advised the Respondent, after having refuted that her shop was untidy and overstocked, of his desire to renew the Lease Agreement at the end of the current lease. This was put in the following words in the last but one paragraph:

**“We further wish to notify yourselves that we still intend carrying on business in your premises. We shall therefore be**

**taking up the renewal option of three years as per the lease agreement”.**

[7] It was argued during the hearing of the matter that the foregoing excerpt indicated a notification to the Landlord of an intention to have the lease renewed. The Respondent disputes this letter and denies having received it. It challenged the Applicant to produce proof of service of the said letter on it, which bore no fruits as none was produced per the Replying Affidavit, without any explanation for such failure being availed. According to the Respondent it was the first one to write to the Applicant and advised it that the lease agreement was not going to be renewed including the reasons for that decision.

[8] Consistent with the foregoing assertion by the Respondent, it on the 29<sup>th</sup> September 2015, addressed a letter to the Applicant which read as follows:

***“Termination Of Lease Agreement Thomas Investments Corporation (PTY) LTD And Mikka Swaziland (PTY) LTD T/A Kyles.***

**This letter serves to notify you that the current Lease Agreement for shop No. G.22 will expire on 31 March 2016, and the owners have decided that this lease will not be renewed. Further there will be no option for a month – to month tenancy following the expiry date.**

**You will be required to surrender the premises to the Landlord upon lease expiration. Please return the premises to the same condition as you found them on occupation, normal wear and tear excepted. You will be required to return all keys to the Centre Management office when vacating the premises.**

**I trust that you find the above in order”.**

- [9] The Applicant reacted thereto by means of a letter dated 12 December 2015. In this letter, the Applicant tried to explain the situation complained of at the shop, attributing it to the stock it had inherited plus that it had brought in which tended to cause congestion. It clarified that the situation of the shop being untidy had been overcome. Perhaps the upshot of this letter is what Applicant said at the 3<sup>rd</sup> and 4<sup>th</sup> paragraphs which are in my view necessary to mention at this stage. In fact the following was therein stated:-

- “3. As I was served with the notice to vacate the shop within 6 months without any reason stated in the letter, but I think that the reason was overstocking but now we have rectified it (sic) have brought some nice fittings to make it look nicer and so beautiful high bay light, which have increased our sales also, now we have understood the movement of our stock also in this two years, for e.g. wat (sic) is the requirement of the customs and what kind of clientel we have.**
- 4. We were in baby stage in the first two years, now we have learned a lot and we (sic) stocking only those staff what (sic) our clients wants (sic) and hence there is no overstocking.**

**If there is any recommendation from you we are ready to fulfil that.**

**Please revive the termination as we have also ordered our future stock up to dec. 16 (sic) with sketches, puma, vans, etc...”**

[10] In my view the essence of this particular letter was an acceptance by the Applicant that up until that date the situation in its shop did amount to an

untidy display there and that there had been overstocking which he was however promising to address by stopping it. Whether that happened or not is unclear because in a response to the said letter dated the 11<sup>th</sup> February 2016, the Respondent wrote to the Applicant and in essence said that there was no discernible improvement in the condition at the shop except that it had worsened.

It was also stated that the lease agreement had spoken of a notice to renew being issued at least six months prior to the termination of the lease agreement indicating that intention, failing which the renewal option would have lapsed and would be of no force or effect. It was once again emphasized that the lease would not be renewable on its termination on the 31<sup>st</sup> March 2016. It was reiterated that the issue was closed and was no longer subject to discussion.

[11] It is notable that there was no further communication from the Applicant if anything clarifying that a notice for the renewal of the lease had already been made in August 2015 and that the Respondent had no basis for not renewing it. It is true that all the letters exchanged after the 31<sup>st</sup> August 2015, seemed to ignore the alleged notice of renewal, particularly the



emphasis thereon that the lease agreement was to be considered as renewed or that since the notice of renewal had already been made there in law existed no reason not to renew it. In this regard I have in mind the Applicant's letter dated the 12<sup>th</sup> December 2015, which stated the opposite of what it probably should have stated if the renewal notice had been issued or if it had been issued with a belief it had the effect of renewing the lease. This letter was written after the Respondent had advised the lessee that the lease was not going to be renewed and that it was in fact to be terminated at the end of its term. I refer to this aspect of the matter so as to underscore the fact that it is consistent with what Respondent alleges in his papers namely that it did not receive MEG 3, the letter dated 31<sup>st</sup> August 2015 which sought to notify it of an intended renewal of the lease agreement. It cements this consistency, that despite Applicant being challenged to produce the proof of receipt of same by the Lessor or the Respondent none could be produced nor could an explanation be provided why it was not being produced.

[12] At page 40 of the lease agreement annexed to the Founding Affidavit as Annexure MEG1, the renewal clause of the Lease Agreement provides as follows:

**“Subject to the tenant not having breached this lease so frequently or in a manner (so) as to justify the Landlord in holding that the Tenant’s behaviour is inconsistent with the ability and/or or intention to comply with its obligations in terms of this Lease, the Landlord is prepared to lease the leased premises to the Tenant for a further period (herein referred to as the Renewal Period) as set out on page 1 of this lease as from the first day following the termination of the initial period, provided that the parties agree in writing on the rent, conditions and provisions of the proposed lease at least 3 (three) months before the expiry of the initial period.**

**If the Tenant is interested in extending the lease in terms of the preceding proviso, he must notify the Landlord of his intention to do so in writing 6 (six) months before the expiry of the initial period”.**

[13] Annexure B to the Lease Agreement is dedicated to an “Option To Renew”, if the title to the said annexure is anything to go by. In my view paragraphs 1-4 of the said annexure simply reiterate the terms of the renewal clause as set out above. Paragraph 5 and its subparagraphs is

different. It talks about the rental under the renewed lease agreement.

For the sake of certainty it provides as follows:-

**“The rental payable during the renewal period of this lease shall be the gross fair market rentals (inclusive of operating costs and additional provisions set out elsewhere in this agreement) as may be mutually agreed between the parties at least 9 (nine) months prior to the termination of the initial period of the Lease and failing such agreement the gross fair market rentals for the premises to be determined as follows:-“**

[14] The subparagraphs that follow spell out that such rentals shall be determined by a Chartered Accountant as appointed by the parties and that failing such agreement, it shall be determined by such Chartered Accountant as appointed by the Chairman of the Swaziland Institute of Accountants. It also goes on to spell out how the Chartered Accountant in determining the said rental amount shall go about including the period of notification of such a decision and such like terms.

[15] It cannot possibly be in dispute that the renewed clause of the lease agreement does not envisage an automatic renewal of the lease agreement

upon the lessee notifying the lessor that it desired to have it renewed. Instead the lease agreement envisaged an independent agreement being reached on the renewal including what its terms would be or even what the rentals would be. It can never be in dispute that such an agreement which should have been reached at least some three months before the expiry of the agreement was never concluded.

[16] Despite the fact that the Lessor indicated at the commencement of the six months before expiry of the lease that it was not going to be renewed, the Applicant never really made a move for there to be the meeting to discuss the new terms so as to even invoke the assistance of the courts before the expiry of the current lease if that became necessary. It is difficult from this point to fathom how it can realistically be contended that the lease agreement was renewed. I say this bearing in mind that in law a renewal of a lease agreement amounts to the conclusion of a new agreement. In his book, LandLord and Tenant the Second Edition, Juta, W. E. Cooper puts the position as follows at page 345:-

**“A lease is renewed when immediately upon its expiration the lessee continues to hire the same property from the same lessor. Although the parties and the subject-matter must be the same for renewal, there may be a variation of the terms of the**

**original agreement. Renewal of a lease brings into existence a new lease”.**

See also *R v Mohamed* 1924 NPD 407 at 409 *Shell SA v Bezuidenhout* 1987 (3) SA 981 (N) at 985 C. *BLP Investments v Angels’ Precision Works* 1987 (4) SA 308 at 311 B.

[17] Other than the 12<sup>th</sup> December 2015 letter which firstly recognized that the lease agreement had been terminated and begged that it be revised, there has been placed no correspondence before court confirming that a new lease agreement (and therefore a renewal) had been concluded. If anything the letter of the 11<sup>th</sup> February 2016 by the Respondent confirmed that there was no new lease agreement or renewal concluded between the parties. The basis of a contention that such an agreement had been renewed therefore is unclear and does not accord with the conceptual requirements of a renewed lease as envisaged in the existing one which apparently envisaged an engagement on new terms so as to come up with the renewed lease.

[18] It is further clear that the parties herein had not at any stage agreed on the rentals that would be payable during the tenancy of a renewed lease. The

position is now settled that an agreement on the amount payable as rent is an essential term of a lease agreement. This is to say that where there has not been an agreement on the rent payable, one cannot talk of a lease agreement. This agreement envisaged a new rental to be fixed prior to the renewal. It cannot be denied none was ever fixed for determining the amount of the rentals. The required process had not been embarked upon to determine the said amount. Notwithstanding a very unequivocal letter some six or so months before the lapse of the main lease agreement that it was to not to be renewed the Applicant did not stand up there and then to challenge the Respondent's contention and as such none of the pretermination processes contained in the old lease for the renewed one could be put in place until it expired. When it so expired the Applicant approached this court and sought an order inter alia declaring the lease to have been renewed. It is a fact it could not be so renewed if one of its essential requirements such as the determination of the renewed lease rentals had not been agreed upon or determined. Writing on this subject W-E Cooper, Landlord and Tenant, at page 347, put the position as follows:-

**“An option to renew must contain the essential elements of a lease so that if the lessee exercises the option, a lease is concluded. Thus an option to renew which does not specify the**

**rent, but stipulates that the Lease will be renewable at a rent to be mutually agreed upon if exercised by the lessee will not result in a lease agreement because rent is an essential element of a lease, and until agreement has been reached on it, no lease is concluded. A fortiori an option entitling a lessee to renew upon terms to be arranged, if not exercised by the lessee, will not result in a lease”.**

The following cases are also instructive on the subject:-

***Biloden Properties v Wilson 1946 NPD 736 at 739; South African Reserve Bank v Photocraft 1969 (1) SA 610 (c ) @ 612 – 613 as well as Duff and Fitzgerald v Duff’s Continental Hotel 1973 (4) SA 792 (T).***

[19] I am therefore convinced that on this point as well, it is not possible to declare the lease between the parties in this matter as having been renewed owing to the fact that not all the essential requirements of it, including the rentals to be paid, had been agreed.

[20] Even I was not correct in the view I have taken of the matter, it seems to me that the Applicant’s application cannot succeed for other equally important reasons. This is as concerns the requirement for the lessee to

comply with the conditions of the lease. It is common cause from the analysis of the facts as set out above that the Applicant admitted on its own that it had not complied with the terms of the lease agreement and had failed to avoid overstocking and to keep the premises neat.

[21] In the present matter, not only was the Applicant's supposed notice for renewal subject to determination by the Respondent if the former had not so frequently breached same, but it is a settled position of our law on the subject that a renewal is subject to observance by the lessee of the terms and conditions of the lease. At page 347 of W. E. Cooper's, Landlord and Tenant, (Supra), the position is expressed in the following words:-

**“An option to renew is often made subject to regular payment of rent and/or the observance by the lessee of the terms and conditions of the lease. A lessee who fails to comply with such a condition loses his right to renew the lease, and the lessor's failure to exercise his right to terminate the lease does not revive the right to renew which the lessee has lost through failing to perform his obligations under the lease”.**

[22] The declaratory order sought by the Applicant cannot be made in my view for the foregoing reasons. As for the interdiction of the Respondent from evicting the Applicant from the premises concerned, it seems to me



that the relief sought is not competent if put in the manner it was by the Applicant. Clearly, one cannot realistically be entitled to an order preventing a lawful eviction where there is no lease agreement or where the lease agreement has been breached. It would be understood though if the interdict was sought against an unlawful eviction, which has not been alleged let alone being established from the facts of the matter. Instead there has been established the opposite which favours the contrary remedy ejection being granted against the Applicant.

[23] From the facts as established above it is clear that an interdict as sought by the Applicant cannot succeed on the grounds that the requirements of an interdict have not been met. In fact the Applicant has not established a clear right. If as stated above the applicant had violated the lease agreement so as not to obtain a renewal, it follows that he cannot talk of a right to be protected if a natural and legal consequence of violating a lease agreement is triggered.

[24] Insisting that the lease agreement had not been renewed and that because it had not been renewed, it has terminated by effluxion of time, the Respondent filed a counter application in which it sought an order

confirming or declaring that the lease agreement between the parties herein had terminated due to effluxion of time as well as an order ejecting the Applicant from the premises together with another one for costs.

[25] Having concluded that the lease agreement was not renewed for the various reasons stated above, which are namely, the admitted frequent violations of the lease agreement (when viewed against the repeated warnings), the fact that there was no agreed rentals on the renewed lease and the fact that there was no conclusion of the prior terms to the renewal and therefore noting that there is nothing lawfully preventing the grant of the reliefs sought by the Respondent in the counter application, I am convinced that the latter's application should succeed.

[26] In summary, I have therefore come to the conclusion that the Applicant's application should fail while the counter application succeeds. I accordingly order as follows:-

26.1 The Applicant's application be and is hereby dismissed.

26.2 The Respondent's counter application succeeds.

26.3 The Applicant and all those holding under it, be and are hereby ordered to forthwith vacate the premises fully described in the Notice of Motion.

26.4 Failing order 3 above, the Sheriff or her Lawful Deputy be and are hereby ordered to eject the applicant and all those holding under it from the premises described in the Notice of Motion.

26.5 The Applicant be and is hereby ordered to pay the costs of these proceedings at the ordinary scale.

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**N. J. HLOPHE**  
**JUDGE - HIGH COURT**