



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1899/2023

In the matter between:

PASADAS RESTAURANT & BAR (PTY) LTD

Appellant

And

BOBCAR HOLDINGS (PTY) LTD

First Respondent

SMS (PTY) LTD t/a VJR ESTATE AGENTS

Second Respondent

Neutral Citation: *Pasadas Restaurant and Bar (Pty) Ltd v Bob Car Holdings (Pty) Ltd and 2 Others (1899/2025) [2023] SZHC ... (18 December 2023)*

CORAM:

Q.M. MABUZA PJ

FOR THE APPELLANT:

MR N. NXUMALO

FOR THE RESPONDENT:

MR H. MDLADLA

HEARD: 10/11/2023

DELIVERED: 18/12/2023

Summary

Practice and Procedure: Appeal from Magistrates Court – Respondent sued the Appellant for payment of rent – Appellant raised the issue of disputes of fact viz that the amount of rent claimed not owed – Resolution of this fact essential to matter – Appellant

succeeds and matter is referred back to the Magistrate Court for oral evidence to be led.

Held: Appeal succeeds with costs.

JUDGMENT

MABUZA PJ

- [1] This is an appeal of a judgment emanating from the Magistrate's Court sitting in Mbabane.
- [2] The Appellant operates a restaurant and Bar on premises owned by the Respondents at a shop premises situated on portion Q and remainder K on Farm No. 2, West Street Mbabane, Hhohho District. The Appellant leases these premises from the Respondent.
- [3] The lease agreement between the parties and filed off record provides that the lease shall commence on the 1 September 2015 and shall continue for a period of three years two months certain to wit up to the 31 October 2018 with an option for the Lessee to renew for a further period of one year at a rental to be agreed. The Appellant has been on a month to month lease on the same terms and conditions.
- [4] The Respondents launched an application in the Court a quo on the 12th April, 2023 against the Appellant due to an alleged breach of the lease agreement by the Appellant. The Respondents sought payment in the following terms:

- (a) Payment of the arrear rentals and other charges in the amount of E193, 866.95 (One Hundred and Ninety-Three Thousand Eight Hundred and Sixty-Six Emalangeni Ninety-Five Cents).
- (b) Cancellation of the Lease Agreement.
- (c) Ejectment of the Appellant and all those holding through or under it from the said premises.
- (d) Interest on the arrear rentals owed *supra* at the rate of 6% per annum a *temporae morae*.
- (c) Ejectment of the Appellant and all those holding through or under it from the said premises.
- (d) Interest on the arrear rentals owed *supra* at the rate of 6% per annum a *temporae morae*.
- (e) Costs of suit at the Attorney and Own Client Scale including Collection Commission.
- (f) Further and/or alternative relief.

[5] The application was for a *rule nisi* which the Court *a quo* had granted on the 12th April 2023. The Appellant opposed its confirmation but the Court *a quo* confirmed the *rule nisi*.

[6] The application *a quo* was supported by a Founding Affidavit deposed to by one Winnie Malinga. She described herself as the Managing Director of the 2nd Respondent and the agent of the 1st Respondent and duly authorised to depose to the affidavit on behalf of the 1st Respondent in terms of Clause 32 of the lease agreement. Clause 32 of the lease agreement provides as follows:-

"The Lessee hereby acknowledges the said VJR Agencies to be the fully authorised agents of the Lessor and that they may exercise on behalf of the Lessor all the Lessor's legal rights and claims in terms of this agreement. All process for the recovery of rent or ejectment or the fulfilment of any of the conditions of the lease agreement or for the recovery of any damages or loss suffered through the Lessee's breach of any of the conditions hereof or through the Lessee's failure to vacate the premises timeously on termination of this agreement may be taken by VJR Agencies."

- [7] In the Founding Affidavit the said Winnie Malinga sets out the events leading up to the rental arrears claimed. This is what she states:-

4.2.1 The lease yearly would escalate from 2015 to E7 427-19 (Seven Thousand Four Hundred and Twenty-Seven Emalangen ten Cents)

4.2.2 The lease would escalate from 2016 to E7 985-79 (Seven Thousand Nine Hundred and Eighty-Five Emalangen Seventy Cents).

4.2.3 The lease would escalate from 2017 to E8 584-62 (Eight Thousand Five Hundred and Eighty-Four Emalangen Sixty-Two Cents).

4.2.4 The lease would escalate from 2018 to E9 234-00 (Nine Thousand Two Hundred and Thirty-Four Emalangen).

4.3 It was further a term of the agreement that the rent would be the amount of E9 234-00 (Nine Thousand Two Hundred and Thirty-four Emalangen) inclusive of VAT in 2018 and currently due to escalation to the sum of E8 910-00 (Eight

Thousand Nine Hundred and Ten Emalangeneni), as at March 2023 per month as per the agreement. It was further agreed that same rental shall be payable monthly in advance without deduction on time being the first day of each succeeding month.

4.4 The rentals would escalate and currently are the sum of E8 910-00 (Eight Thousand Nine Hundred and Ten Emalangeneni).

5. The Appellant has been in occupation of the said premises in terms of the agreement since 1st day of September 2015 to present day.
6. From the 1st day of September 2015 up to present day, the Appellant is in total breach of the said Lease Agreement has failed to pay the monthly rent amounting in arrears in the sum of E193 966-95 (One Hundred and Ninety-Three Thousand Eight Hundred and Sixty-Six Emalangeneni Ninety-five Cents). The Appellant is therefore currently in arrears as at 1st March 2023 with the rentals in the sum of E193 866-95 (One Hundred and Ninety-Three Thousand Eight Hundred and Sixty-Six Emalangeneni Ninety-Five Cents) being rentals due, owing and payable in advance for the months of January 2018 to March 2023."

[8] The Court *a quo* confirmed the *rule nisi* and granted the following prayers:-

- "1.1 Payment of the arrear rentals and other charges in the amount of One Hundred and Ninety-Three Thousand Eight Hundred and Sixty-Six Emalangeneni Ninety-Five Cents.
- 1.2 Cancellation of the lease agreement is hereby confirmed;

- 1.3 Ejectment of the Respondent and all those holding through or under it from the said premises;
- 1.4 Interest on the arrear rentals owed at the rate of 6% per annum *a tempore morae*;
- 1.5 Costs of suit at attorney and own client scale including collection commission."

[9] The Appellant opposed the application. The Answering Affidavit is deposed to by Zandile Nsimbini a director of the Appellant.

[10] The Appellant denied the claim by the Respondent.

[11] The Appellant further had this to say:-

'The requirements of an interdict had clearly not been satisfied. The application has clearly been void of a course of action and a blatant still born from inception. There has further been no need for utilising the ex parte procedure under the circumstances. The Applicant thereby wanted to gain tactical advantage of the Respondent. The Applicant is fully aware, regard being had to the period from which our tenancy began to-date that we harbour no intentions of vacating the premises anytime soon and as such pose not even the slightest chance of being a flight risk."

[12] Having stated the above, the Appellant requested the Court *a quo* to dismiss the application with costs on a punitive scale.

- [13] In the Replying Affidavit the deponent Winnie Malinga denies that there was a meeting held to reconcile outstanding amounts. She states that upon service of the letter of demand for the sum of E153 697-50 (One Hundred and Fifty-Three Thousand Six Hundred and Ninety-Seven Emalangeneni Fifty Cents) in March 2022 the Appellant merely approached Respondent to request that she be invoiced for a shorter period between January 2022 to April 2022 as Eswatini Bank was her financier and Appellant could only be financed up to and around E42 000-00 (Forty-Two Thousand Emalangeneni). The Respondent merely assisted her to acquire the loan to part settle the arrear rentals as they were at the time in excess of E150 000-00 (One Hundred and Fifty Thousand Emalangeneni).
- [14] Upon such oral request Respondent invoiced for the period of January 2022 to April 2022. It is averred that Applicant was successful and obtained the loan facility and as appears the balance statement paid the sum of E35 950-00 (Thirty-Five Thousand Nine Hundred and Fifty Emalangeneni) in May 2022 upon securing the finance.
- [15] It is averred that during such periods from November 2018 to March 2022, Appellant would intentionally and persistently short pay the rentals and during such periods as at March 2022 has also short paid by E33 997-95 (Thirty-Three Thousand Nine Hundred and Ninety-Seven Emalangeneni Ninety-Five Cents) from the claimed sum of E153 697-50 (One Hundred and Fifty-three Thousand, Six Hundred and Ninety-Seven Emalangeneni Fifty Cents. Hence, as at March 2022 the actual balance was E187 695-45 as appears the balance statement attached to the Founding Affidavit. (A copy of the short fall payment breakdown is annexed hereto marked "X1") and the rental escalation letter to

demonstrate Appellant rentals increased. The sum owing had never been written off and reconciled to an agreed outstanding balance of E42 172-39 (Forty-Two Thousand One Hundred and Seventy-Two Hundred and Thirty-Nine Cents) from January 2022 to April 2022. The invoice for the four months was done as the Appellant sought finance and was struggling to pay rentals as all small businesses were being affected by the Covid-19 pandemic at the time.

[16] To add further, Clause 11 of the lease agreement states:-

“Any relaxation or indulgence which may be granted by the Lessor or any condonation by the Lessor of any breach of any terms of this lease shall not constitute a waiver by or to prejudice any of the rights of the Lessor in respect of any subsequent breach of the terms of this lease by the Lessee.”

[17] It is the Respondent's averment that as per the request by the Appellant to be invoiced from the period of January 2022 to April 2022 such indulgence for Appellant to secure a loan from Eswatini Bank to pay for that period did not amount to any waiver of Respondents rights to claim the full amount.

[18] The Respondent denied having approached the Court on an urgent basis but had instituted ex parte proceedings; they denied that there are disputes of facts as all payments have been duly accounted for, they state that the Appellant has been making short payments or no payments at all and that the 1st Respondent never waived any of its rights to claim the full rental due. That the Appellant is a flight risk.

[19] The matter was argued on the 13th May, 2023 and the learned Magistrate rendered her decision. An order was made in favour of the Respondents as follows:-

1. The rule nisi which was granted on the 12th April 2023 is hereby confirmed in the following manner:-
 - 1.1 Payment of the arrear rentals and other charges in the amount of One Hundred and Ninety-Three Thousand Eight Hundred and Sixty-Six Emalangenani Ninety-five Cents;
 - 1.2 Cancellation of the lease agreement is hereby confirmed;
 - 1.3 Ejectment of the Respondent and all those holding through or under it from the said premises;
 - 1.4 Interest on the arrear rentals owed at the rate of 6% per annum *a tempore morae*;
 - 1.5 Costs of suit at attorney and own client scale including collection commission.

[20] The Appellant being dissatisfied with the judgment noted an appeal against it. The grounds of appeal are as follows:-

1. The Court *a quo* erred in law and in fact in failing to hold that there existed material dispute of facts;
2. The Court *a quo* erred in law and in fact in failing to hold that the Applicant *a quo* had sought to make its case in reply;

3. The Court *a quo* erred in law and in fact in failing to hold that there was a meeting held to deal with the computation of the arrear rentals;
4. The Court *a quo* erred in law and in fact in holding that the Respondents *a quo* had to prove the existence of the meeting when it was the Applicant.
5. The Court *a quo* erred in law and in fact in holding that the letter (notice of breach) was just an indulgence extended to the Respondent *a quo*.


[21] The Respondents oppose the appeal.

[22] I heard arguments on the 10/11/23.

[23] Having heard arguments both orally and written, it is my considered opinion the matter is fraught with disputes of fact. There is no need to regurgitate the law in that area. Mr Nxumalo's heads do that ably.

[24] In the circumstances I order as follows:-

- (1) The appeal succeeds and the matter be and is hereby referred back to the learned Magistrate to hear oral evidence.
- (2) Each party is ordered to pay their own costs.


G.M. MABUZA
PRINCIPAL JUDGE