IN THE HIGH COURT OF SWAZILAND VIRTIL INVESTMENTS

(PTY) LTD

Plaintiff

[1] Plaintiff seeks an ejectment of the Defendant from the premises known as Lot No. 119 situate in the town of Mbabane, Hhohho district, Swaziland, held under Deed of Transfer no. 643/1990. At the commencement of trial the name of Defendant was amended to "Phangothi Investments (Pty) Ltd" by consent. According to the pre-trial minute the parties agreed that the premises belong to the Plaintiff and that:

And

PHANGOTHI (PTY) LTD

Defendant Civil Case **No.** 2238/2005

Coram

For the Plaintiff For the

Defendant

S.B. MAPHALALA **- J** MR. P.

SHILUBANE MR. **J.** HENWOOD

JUDGMENT 27th April 2007

"Given that the *onus* is on the Defendant to prove the oral lease, the Defendant has the right to begin with the leading of evidence"

[2] The Plaintiff is the landlord of the Defendant who is a tenant in the above cited property and the issue for decision by the court is whether there existed a verbal agreement between the parties confirming a landlord and tenant relationship between them. Only two witnesses gave evidence for the parties namely, Mr. Vernon Steinberg for the Plaintiff and Mr. Musa Mabhulangoyezi Magongo for the Defendant.

[3] In order for the Plaintiff to succeed it need only allege and prove:

(a) **ownership of the thing**

(b) **that the Defendant is in possession of the property at the time of the institution of the proceedings, (see** *Amler's Precedents of Pleadings 6th Edition* **at page** *350* **and the authorities there cited) proved the above cited requirements.**

[4] In terms of the pre-trial notice the *onus* **to lead evidence laid with the Defendant and indeed the court heard the evidence of the Defendant's director Musa Magongo. He told the court that in the year 2002 his company entered the premises of the Defendant under a lease agreement which was entered as exhibit "A" in the evidence. The lease expired in June 2004. Before the lease expired there were vacant offices on the top floor of the premises. He was asked by the Plaintiffs director Mr. Steinberg if his company was interested in these offices. He told him that they were interested and they agreed that the Defendant occupy these offices. It was also agreed that the Defendant was to pay rental of El, 800-00 for the first year. This was in addition to the offices the Defendant was already occupying. The Plaintiff gave Mr. Magongo a lease agreement which he duly signed and kept a copy and gave one copy to the**

Plaintiff.

[5] After some time Plaintiff informed him that he wanted to combine the lease for the shop and the offices and Plaintiff gave him a lease for a period of 5 years. This second lease agreement was entered as exhibit "B". They agreed that the two leases be combined because this would make business sense. This lease expired in 2008. The rent for the shop was E2, 310-00 and the other office was El, *800-00* **and that it will escalate by 10%. His understanding was that the two leases were to be combined not that there was a verbal agreement. The Defendant then testified that he then** *waited* **for a long time for Plaintiff to furnish him with the lease agreement. He followed the Plaintiffs director for a response but to no avail. At some point he complained about the water in the** *toilet* **where Plaintiff told him that he should relieve himself in a bucket. The Defendant asked to continue occupying the offices until the end of 2008.**

[6] The Defendant was then cross-examined by *Mr. Shilubane* **for the Plaintiff and I shall revert to his pertinent answers in due course.**

[7] The court then heard the evidence of the Plaintiffs director Mr. Steinberg who related the Plaintiffs version of events. He testified that in July 2002, he signed a lease agreement with the Defendant and that this lease had an option for renewal. When the said lease expired, in June 2004 that Defendant did not sign an option to renew. He testified that it was completely incorrect that there was a verbal lease between the parties. He testified further that they entered into another lease from the 10 April 2003, and 31st March 2005 and this was a 2 years lease.

[8] **This witness was also cross-examined searchingly by Counsel for the Defendant and I shall revert back to his answers later on in the course of this judgment.**

[9] In arguments before me *Mr. Henwood* **for the Defendant relied on what is stated by** *Aimer's Precedents of Pleadings, 4th Edition* **at page** *18* **on the essential elements of a landlord and tenant and contended that the version of the Defendant is more plausible than that of the Plaintiff. He contended further that the court cannot put any weight on the lease agreements because they are not evidence as the agreement does not conform to the provisions of Section 13 of the Stamp Duty Act No. 35 of 1970.**

[10] On the other hand, *Mr. Shilubane* **for the Plaintiff contended that the Defendant has not discharged its** *onus* **as provided by the learned author** *Amler's (supra)* **at page** *350.* **Further that the Defendant has not applied for amendment and therefore the Plaintiff has proved its case. The Defendant had to prove that it had the right to possess the Plaintiffs property in this case by way of a lease, (see** *Amler's* **referred to** *supra* **relying on** *Woerman N.O. vs Masondo 2002 (1) S.A. 811 (SCA)).*

[11] I have considered the evidence of the parties in this case and the submissions by the learned Counsel and I have come to the considered view that the Defendant has failed to discharge the ***onus*** **that lay on it on a balance of probabilities on the following grounds :**

(i) ***Mr. Magongo*** **for the Defendant could not tell the court what rent, if any, was payable given that the issue of the rent is an essential element of the contract of lease.**

(ii) **He was not certain when such rent was to be paid and evidence was led which was not contradicted that the rent was paid only when it suited the Defendant.**

(iii) **More importantly, there is a direct contradiction between the**

instructions which *Mr. Magongo* gave to his attorney when he drew Defendant's plea and evidence given in court. *Mr. Magongo* specifically stated that the oral agreement was entered into in "April 2003" whereas the plea states that it was in June 2004.

(iv) The leases which were provided by both parties are not relevant to the Plaintiffs case because the basis of its claim is on *"rei vindicatio"* and not based on the leases in question which expired before the dispute which gave rise to his action arose.

[12] In the result, for the afore-going reasons the Defendant and all persons occupying or holding the property under it be ejected from Lot No. 119 in the town of Mbabane, Hhohho district, measuring 495 square metres, held under Deed of Transfer No. 643/1990 with costs.

S.B.MAPHALALA

JUDGE