CASE NO. 299/88

IN THE COURT OF APPEAL OF SWAZILAND HELD AT MBABANE

In the matter between:

TONKWANE ESTATES LIMITED Appellant

and

BANK OF CREDIT AND COMMERCE
INTERNATIONAL (SWAZILAND) LIMITED First Respondent

DAVID ASHWORTH CRABTREE Second Respondent

Coram: Welsh,
Kotze
Schreiner, JJA.
Counsel for the Appellant: W. H. Trengove,
S.C. (with him R. W. Nugent)

Counsel for the First Respondent: R. H. Zulman,
S.C. (with him B. E. Doctor)

JUDGMENT

WELSH, JA:

The second respondent (to whom I shall refer as "Crabtree Senior") is the registered owner of the remaining extent of Portion 4 of Farm No. 73, situate in the District of Hhohho, Swaziland, measuring 614,5031 hectares, and the remaining extent of Portion 2 of the same farm, measuring 375,1211 hectares. The first respondent (to which I shall refer/...

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refer as "the Bank") holds two mortgage bonds over the land, which were registered respectively on 25th August, 1981, and 15th September, 1981. On 7th March, 1988, the High Court granted judgement in favour of the Bank by consent against Crabtree Senior for El 835 000, and also against the appellant (to which I shall refer as "Tonkwane Estates") for E570 000 and against another company called Tonkwane Sawmill Company Limited for E2 712 361.87. Each of these judgements was to bear interest at the rates and for the periods specified in para. l.(b) of the order of the High Court; and each of the defendants was ordered to pay costs of suit on an attorney and client scale to include the wasted costs of the postponement granted on 29th February, 1988, such costs to include the costs of one counsel only. The order of the High Court states that the judgements are "to be against the Defendants jointly and severally, the one paying, the others to be absolved." Crabtree Senior's property, which was mortgaged in favour of the Bank, was declared to be executable and was attached by the Deputy Sheriff on 8th March, 1988.

On 7th April,1988, a meeting took place at the offices of Tonkwane Estates. The persons present at that meeting were Mr Raza (the manager of the head office of the Bank), Mr John Hayter (the liquidator of Tonkwane Sawmill Company Limited), Mr R. D. Friedlander (the Bank's attorney), Mr Crabtree Senior and his son Robert and Mr Glaubitz (who was apparently the manager of Tonkwane Estates). It is

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common cause that at that meeting Crabtree Senior contended that Tonkwane Estates was entitled to

fell trees on and remove trees from the mortgaged property. Mr Raza says Crabtree Senior furnished no details as to the reasons why he so contended. The main affidavit on behalf of Tonkwane Estates was made by Crabtree Senior's son Robert (to whom I shall refer as "Crabtree Junior"). It is supported by brief confirmatory affidavits made by Crabtree Senior and Glaubitz. Crabtree Junior says that it was put to the meeting that "the timber on [Crabtree Senior's] property is the lawful property and is owned by [Tonkwane Estates] by virtue of the land registered in the name of [Crabtree Senior] having been leased to [Tonkwane Estates] for the purpose of growing trees thereon for almost the past thirty (30) years". He produces, as Annexure "E", what he says is "a copy of the agreement of lease entered into between [Tonkwane Estates] and [Crabtree Senior] on October 1961"; and he says: "I am attempting to obtain the original of this agreement". Mr Raza, in the replying affidavit, on the other hand, says that no mention was made of the existence of a lease at the meeting on 7th April, 1988; and there are supporting affidavits to the same effect by Mr Friedlander and Mr Hayter. Be that as it may, in para. 26 of his replying affidavit, Mr Raza says this:-
"The understanding which was reached at the end of the meeting on 7 April 1988 was that the respective

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"rights of the parties would have to be determined by the Court before [the Bank] could be in a position to put up the land for sale by execution so that when it did so it would be able to advise prospective buyers as to the limitations of the rights, if any, when they bid for the property."

On 10th April, 1988, Tonkwane Estates wrote to the Bank's attorneys as follows:-
"Further to the meeting held in our offices last Thursday, attended inter alia by yourselves and our Mr R. A. Crabtree, I confirm that it is our contention that Tonkwane Estates Limited is entitled to fell and remove all trees which the company has planted and/or tended on the property known as remainder of Portion 2 and remainder of Portion 4 of Farm No. 73, Hhohho District.

"We hereby give you notice of our intention to commence felling the said trees as from Monday April 25th. While we are under no obligation to give such notice, we wish to afford you an opportunity to bring such interdict proceedings as you believe your client is entitled to, on adequate notice to ourselves."

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The Bank's attorneys acknowledged this letter on 22nd April, 1988, stating that the Bank intended "applying to the High Court for an interdict to restrain you from cutting and removing any of the trees from the property in question pending the outcome of the sale in execution." On 26th April, 1988, a Notice of Motion was filed by the Bank, in terms of which an urgent application was made to the High Court on 29th April, 1988, for a rule nisi, returnable on 6th May, 1988, calling upon Tonkwane Estates to show cause why -
"(i) it should not be interdicted and restrained from felling any trees on or removing any trees from the property situate at Remainder of Portion 2 and Remainder of Portion 4 of Farm No. 73, District of Hhohho, Swaziland ('the property'), pending the sale in execution of the property by the Applicant;
"(ii) it should not pay the costs of this application."

The rule was granted and the Court also granted an interim interdict pending the outcome of the application. Further affidavits were filed (including a further affidavit which was sworn to by Crabtree Junior on 26th July, 1988, and in which he sought to deal with "new matter" which he contended was contained in the replying affidavit of Mr Raza on behalf

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of the Bank). The matter came before Rooney J., who delivered judgement in favour of the Bank on 23rd September, 1988. The concluding words of his judgement are these:-
"I therefore interdict and restrain Tonkwane [Estates] from felling any trees on or removing any trees from the property described in the Notice of Motion pending the sale in execution of the property. I

order Tonkwane to pay the costs of this application."

Early in his judgement, Rooney J. said this:-
"What is sought here is a final interdict pending the sale of the mortgaged land by the Deputy Sheriff."

It seems to me that this is a correct characterization of the nature of the relief which was sought by the Bank and granted by the learned judge. In this Court, counsel for the Bank attempted to persuade us that the relief granted by the Court below was "in effect no more than interim relief"; but the interdict for which the Bank applied and which the Bank was granted was certainly not an interlocutory interdict, which is correctly described in Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa, 7th ed., vol. 1, p. 67, as follows:-

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"An interlocutory interdict is one which is granted pendente lite. It is a provisional order designed to protect the rights of the complainant party pending an action to be brought by him to establish the respective rights of the parties. Its effect is to 'freeze' the position until the Court decides where the right lies, at which point it ceases to operate: it thus does not continue if an appeal is noted."

The only sense in which the order granted by the Court below can properly be described as an "interim" order is that its duration is limited until the sale in execution has taken place. That circumstance, however, does not prevent the order from being a final or an absolute interdict: as the learned authors point out at p. 68, a final or absolute interdict need not necessarily be a perpetual one, and the case of Zuurbekom Ltd. v. Union Corporation Ltd., 1947 (1) S.A. 514 (A.D.), is an illustration of a final interdict granted for a limited time. In my opinion, that is also a correct description of the interdict which the Bank sought and obtained in the present matter. And it seems to me that the crucial question which this Court has to decide is whether the Court below should have granted a final interdict on the papers or whether there are issues which can only be resolved after the hearing of oral evidence. It is common cause that if there are such issues, an interim interdict in favour of

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the Bank should be granted pending the resolution of those issues.

The papers which were filed on behalf of Tonkwane Estates are defective in certain respects. They reveal a mistaken belief on the part of certain deponents and/or the person who drafted the affidavits that a lessee of land is the owner of the standing timber on the land. They do not adduce admissible evidence of the written lease on which Tonkwane Estates relies; and they are oblique and unspecific in regard to the precise manner in which Tonkwane Estates is alleged to have occupied the mortgaged property at the material times and in which the Bank is alleged to have acquired knowledge of the lease (if there was one) at the material times. Despite all this, I am not convinced that this Court would do substantial justice between the parties if it merely dismissed the appeal on the ground that Tonkwane Estates had failed to adduce legally admissible evidence of the alleged lease. To do this would leave the whole matter in the air and leave the way open for further litigation between the parties. It seems to me to be desirable that this issue should be settled before and not after the property is sold in execution. The contention which was put forward in the Bank's founding affidavit that "once the property has been sold the First Respondent [Tonkwane Estates] can seek whatever redress it wishes from the new owner" does not find favour with me, either as a matter of practicality or as a

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matter of equity. Rule 46(10) of the Rules of the High Court provides that -
"Where property subject to a real right of any third person is sold in execution such sale shall be subject to the rights of such third person unless he otherwise agrees."

If Tonkwane Estates had a valid lease, and if it was in occupation of the leased property at the time when the mortgage bonds were registered, and if it is still in occupation of the property, it seems that

the property may well have to be sold subject to the lease. Likewise, if Tonkwane had a lease, and if the Bank knew of that lease at the time when the mortgage bonds were registered, it seems that the property may well have to be sold subject to the lease.

The Court below sought to deal with these difficulties by holding that if Tonkwane Estates did have a lease in the terms set out in Annexure "E", that was merely an annual lease and conferred merely personal rights upon Tonkwane Estates. That finding does not seem to me to be consistent with the express finding that Tonkwane Estates "is at present in occupation of the property where it carries on the business of planting and harvesting trees" or with the apparent assumption by the Court below that Tonkwane Estates has been in

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occupation of the property for about thirty years in pursuance of an annual lease. We were referred to certain authorities dealing with the rights of a lessee who is in occupation against an onerous successor of the lessor: see Wille on Landlord and Tenant, 5th ed., pp. 94-100; Kessoopersadh en 'n Ander v. Essop en 'n Ander, 1970 (1) S.A. 265 (A.D.), at pp, 273-274 and 285. These authorities seem to me to show that the right of a lessee, even under a short lease, who is in occupation cannot be dismissed as a purely personal right.

I am especially influenced by the agreement or understanding which was reached between the parties at the meeting on 7th April, 1988, namely, that (I quote again from para. 26 of Mr Raza's affidavit) "the respective rights of the parties would have to be determined by the Court before Applicant [the Bank] could be in a position to put up the land for sale by execution so that when it did so it would be able to advise prospective buyers as to the limitations of the rights, if any, when they bid for the property".

Crabtree Junior says that it was put to that meeting that Crabtree Senior's land had been leased to Tonkwane Estates. That, no doubt, is one of the matters in dispute; but for present purposes this Court must assume that that contention was put forward. The fact that that contention was subsequently inadequately advanced in the affidavits which were filed on behalf of Tonkwane Estates does not

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seem to me to be conclusive. The overriding factor, in my opinion, is that this dispute ought to be determined, and finally determined, without resort to further litigation, before the mortgaged property is sold in execution. Viewing the matter broadly, I think it may be said that the following issues emerge from the papers before us: (1) Did Crabtree Senior let the mortgaged property to Tonkwane Estates? (2) If so, when, how and on what terms? (3) If the answer to (1) is Yes, did the lease still subsist when the Bank granted the facilities and registered the mortgage bonds and does the lease still subsist? (4) If there was and is a lease, when and in what manner did Tonkwane Estates take occupation of the property and for how long and in what manner did it remain in occupation thereof? (5) If there was and is a lease, did the Bank know of its existence when it granted the facilities and when the mortgage bonds were registered and, if so, how did it come to know of the lease? (6) Is Tonkwane Estates estopped from contending, as against the Bank, that it had and has a lease of the property? I do not wish to be understood as saying that this is an exhaustive or even an accurate formulation of the issues between the parties: all I suggest is that some such issues as these seem to arise from the papers as they stand. Issues of this kind cannot, in my opinion, be resolved unless oral evidence is heard.

The Bank contends, however, that even if there were a subsisting lease in the terms set out in Annexure "E",

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it would be invalid for a number of reasons. I think it necessary for this Court to consider these contentions.

Annexure "E" is a typed document headed "Agreement between David Crabtree and Tonkwane Estates Limited". The preamble reads as follows:-
"Whereas the parties have agreed that the company has and shall continue to establish a commercial Forestry operation on portions two and four of Farm 73 in Mbabane District."

Clause 1 of the operative part of the agreement fixes the rental. Clause 2 provides that- -
"The company pay for all costs of establishing and maintaining and operating the plantations on the land and shall have full control of all such activities and shall be entitled to harvest all timber on the land for its exclusive benefit."

Clause 3 provides that -
"The parties hereto agree that the company shall have no right to demand renewal of this agreement for a period exceeding one financial year, provided

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"that the agreement shall be deemed to renew in the absence of written notice from Crabtree to the contrary."

Clause 4 provides that -
"In the event of the said notice being received, by the company, Crabtree shall be obliged to pay the auditor's valuation of the timber remaining and the improvements made by the company as at the end of the financial year commencing next after the receipt of the said notice at the registered office."

The document appears to have been signed by Crabtree Senior on his own behalf and by S. Crabtree for Tonkwane Estates and is dated October 9th, 1961. It was not notarially executed.

The first contention on behalf of the Bank is that the "lease" is indefinite but determinable at the will of the lessor (Crabtree Senior). There is no requirement that he must give a period of notice to bring the lease to an end. He can give notice of termination at any time. If he does so, the lessee (Tonkwane Estates) would have the right (but not the obligation) to demand renewal of the agreement for a period not exceeding one financial year. On this basis the Bank contends that "in essence, the lease

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"is one for the lifetime of the lessor" and is, as such, void for want of execution before a notary public as required by section 30(1) of the Transfer Duty Act, 1902. The Bank also contends that section 30(1) renders the lease of no force and effect against creditors of the lessor unless it was registered against the title deeds of the property, which it was not.

Section 30(1), in so far as it is material, provides that -
"... No lease of any land ... for a period not less than ten years or for the natural life of any person mentioned therein, or which is renewable from time to time at the will of the lessee indefinitely, or for periods which together with the first period thereof amount in all to not less than ten years, shall be of any force or effect if executed after the taking effect of this Act unless executed before a notary public, nor shall it be of any force or effect against creditors or any subsequent bona fide purchaser or lessee of the property leased or any portion thereof unless it be registered against the title deeds of such property."

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Counsel for the Bank relied, upon the case of Thomas v. Guirguis, 1953 (2) S.A. 36 (w) , where Clayden J. said this (at p. 37):-
"That a right to occupy at the will of the person giving the right comes to an end on the death of that person is made clear by the Digest, 19.2.4, by Grotius Inleiding, 3.19.9, and Voet, 19.2.9."

The Court was not concerned with the interpretation of the expression "no lease of any land ... for the natural life of any person mentioned therein" in the corresponding section 29 of the Transvaal

Transfer Duty Proclamation, 1902. In the passage which is cited in the judgement, Voet says that the parties to a contract of letting and hiring may either agree that the contract should run for a definite fixed time or they may leave its duration undefined. He gives, as an example of a lease of indefinite duration, a lease "as long as the lessor should be willing" and says that "it comes to an end both on the death of the lessor and on the announcement of an adverse intention being made by the lessor in his lifetime" (Gane's translation, vol. 3, p. 413). Thus a lease at the will of the lessor is terminable by him during his lifetime and it is only in the absence of such termination that it continues until his death.

A lease "for the natural life of any person mentioned therein", on the

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other hand, is a lease for a defined period which cannot be determined by the giving of notice during that period: cf. Tiopaizi v. Bulawayo Municipality, 1923 A.D. 317, at p. 325. It seems to me to be clear that a lease at the will of the lessor is not the same thing as a lease for the natural life of the lessor, since the former may be terminated by notice given by the lessor during his lifetime and the latter may not. I accordingly consider that there is no substance in the Bank's contention based on section 30(1) of the Transfer Duty Act.

An alternative submission on behalf of the Bank was that the lease was one renewable every year and that there was therefore a new lease every year. Any such renewal after the coming into force of the Land Speculation Control Act, No. 8 of 1972, on 1st December,'1972, would, according to counsel for the Bank, be void in terms of section 8(1), read with the definition of "controlled transaction" in section 2. The flimsy foundation for this argument is the provision in clause 3 of Annexure "E" that "the agreement shall be deemed to renew in the absence of written notice from Crabtree to the contrary".

A "deemed renewal" in terms of this clause would clearly not involve the conclusion of a new lease: the renewal would be automatic and there would be no new agreement and no new "controlled transaction". Even the exercise of a contractual right of renewal has been held not to result in the conclusion

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of a new agreement: see Barker v. Beckett & Company Ltd., 1911 T.P.D. 151, at p. 156; Bellville-Inry (Edms.) Bpk. v. Continental China (Pty.) Ltd., 1976 (3) S.A. 583 (C), at pp. 590-591. I therefore consider that there is no substance in the Bank's contention based on the Land Speculation Control Act, 1972.

Counsel for the Bank also contended (although without much enthusiasm) that any renewal after 25th August, 1981, when the first of the two mortgage bonds was registered, would have been void as against the mortgagee in terms of the bond. He referred to a provision in that bond (which has no counterpart in the second bond which was registered on 15th September, 1981) whereby "the Appearer further undertook that his constituent should not and would not lease the said property ... without the consent of the Bank first obtained". It seems to me to be quite clear that this provision does not apply to any "deemed renewal" in terms of clause 3 of Annexure "E". I mention this because, although counsel did not press his argument on the point, the learned judge in the Court below thought that the clause in the bond to which I have referred imposed upon Crabtree Senior an obligation "not to renew any lease from year to year granted to Tonkwane without first obtaining [the Bank's] consent" and that Crabtree Senior had not fulfilled that obligation.

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For the reasons which I have given, I do not think that the provision in question went as far as the learned judge considered; nor do I think that Crabtree Senior was in any breach of his obligations to the Bank in this respect.

Since I consider that there is no substance in the legal contentions which have been advanced by the Bank concerning the validity of the alleged written lease in the terms set out in Annexure "E", it follows

from what I have said earlier in this Judgment that the Court below ought not to have granted a final order in favour of the Bank. Counsel were agreed that in the event of our arriving at this conclusion, we should make an order in the following terms:-
"(1) The matter is referred to trial in the High Court;
"(2) The first respondent is to serve and file its statement of claim within fifteen days of the date of judgment ('days' means days other than Saturdays and Sundays when used in this order) ;
"(3) The appellant and/or second respondent is to file and serve its/his plea within fifteen days of service of the statement of claim;

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"(4) The first respondent is to serve and file its replication (if any) within fifteen days of the service of the plea;
"(5) Discovery by all parties (including the second respondent) is to be made within twenty-one days after the last date for the filing of the replication;
"(6) The matter is to be set down for trial on a date to be arranged;
"(7) The costs incurred in the Court a quo are to be reserved for the trial Court to decide;
"(8) An interdict in the terms made by Mr Justice Rooney on 23rd September, 1988, is to be issued, save that it is to endure only until the outcome of the trial (including any appeal)."

This draft order contains no provision dealing with the costs of the appeal. Tonkwane Estates contends that they should be paid by the Bank; and the Bank contends that they should be costs in the cause of the trial. In my opinion they should be treated on the same footing as the costs which were incurred in the Court below and should be reserved for the decision of the trial Court.

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The order of this Court is therefore as follows:-
A. The appeal is allowed and the order of the Court below is set aside;
B. There will be an order in terms of paragraphs (1) to (8) inclusive of counsels' draft as set out above;
C. The costs of the appeal are reserved for the decision of the trial Court.

R. S. WELSH JUDGE OF APPEAL
I agree. G. P. C. KOTZE
JUDGE OF APPEAL
I agree. W. H. R. SCHREINER
JUDGE OF APPEAL