IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE | CIVIL CASE NO.495/91

In the matter between:

JULIUS HLOPHE — Applicant

and

CHARLES SACOLO — 1st Respondent

PATRICIA NHLEBELA — 2nd Respondent

CORAM : DUNN J.

FOR THE APPLICANT : DUNSEITH

FOR THE RESPONDENTS : SHABANGU

JUDGMENT

6th March 1992

The applicant is the owner of a house situated at Lot 1254, Thembelihle Township, Mbabane. The house was leased to the 1st respondent at a monthly rental of E550.00 commencing on the 1st October 1990. The first respondent did not pay the rental for the months of February through to June 1991. He was, as at the end of June 1991, in arrears in the sum of E2,750.00.

The 2nd respondent who is the 1st respondent's girlfriend moved into the house to live with the 1st respondent on the 2nd April 1991. She brought with her the following movable property -

(i) a lounge suite

(ii) a wardrobe

(iii) a wall unit

(iv) a kitchen unit

(v) a carpet

(vi) a bedroom suite

(vii) a television set and

(viii) personal clothing.

The landlord was not informed of the 2nd respondent's move into the house.

On the 15th of May 1991 the landlord's agents, V.J.R. Agencies locked up the house in order to "secure the lien" they believed they had over the movable property in the house. On the 31st May 1991 the 2nd respondent successfully applied to the magistrate's court for an order allowing the 2nd respondent access to her property in the house. The 2nd respondent set out in her affidavit in support of her application that she moved into the house in order to "stay" with her boyfriend. The landlord's agents sought legal advice and were duly advised that their conduct in locking up the house was unlawful. The application in the magistrate's court was not opposed and a letter was addressed to the 2nd respondent's attorneys. The letter reads in part -

> My client instructs me to tender access to your client to her properties at Lot 1254, Thembelihle Township, in view of the Court Order of the subordinate court.
>
> However, since your client is not a tenant in the house, she will have to come with Charles Sacolo to collect the keys from my client's office and obtain entry to the house.

Thereafter and on the 4th June 1991 the applicant moved an application in this court for an order directing the deputy sheriff to attach all the movable goods situate in the house, pending an action to be instituted by the applicant against the 1st respondent for payment of arrear rental amounting to E2,750.00. The applicant obtained the order and a rule nisi was issued calling upon the respondents to show cause on the 14th June 1991 why the attachment should not be made final pending the outcome of the action for the recovery of the arrear rental. Before the attachment was made, an agreement was reached between the parties. The agreement is evident in two letters between the attorneys for the parties. The first letter is from the 2nd respondent's attorneys dated 4th June 1991 and reads -

> Reference is made to your Mr Dunseith's verbal conversation with our Mr Simelane at your offices. Our client has paid an amount of E2,000.00 into our trust account and we are now prepared to stand surety for her should you prove that the landlord has a lien of the property belonging to our client.
>
> Kindly arrange that the listed goods in our application in the Magistrate's Court be released to client. Our costs for the application in the Magistrate's Court would be about E250.00 which we consider reasonable in the circumstances.

The second letter is from the applicant's attorney. The letter is dated 10th June 1991 and reads -

/Your ....

Your letter dated 4th June 1991 and my telephone conversation with your Mr Simelane refer. Confirm our agreement as follows:

1. You shall send me the E2,000 to be held in trust.

2. Your firm guarantees payment of the balance of arrear rentals in the sum of E750.00.

3. If the High Court holds in case no.495/91 that my client has a lien over the property of your client, then the E2,000 shall be paid to my client, and your firm shall pay the balance forthwith.

4. If the High Court holds that there is no lien, the E2,000 shall be repaid to your client.

5. I shall in the meantime stay the issue of summons in the main action.

6. My client V.J.R. Agencies agrees to pay the taxed costs of the Magistrate's Court application and the rule nisi in that matter should be discharged on the 12th June 1991 (subject to an order for costs).

7. Your client can arrange to collect her properties in the presence of Charles Sacolo.

The 2nd respondent filed affidavits in opposition to confirmation of the rule nisi. All I am called upon to decide is whether or not the applicant had a lien over the 2nd applicant's goods on

/the leased ....

the leased premises at the time the application for attachment was launched.

Every landlord has a tacit hypothec for his rent over all goods of the tenant on his leased premises at the time when the rent is in arrear. The hypothec extends to the goods of persons, other than the tenant, which may be on the premises if the following conditions are satisfied -

(a) such goods are on the leased premises with the knowledge and consent of the owner of the goods;

(b) that the goods are brought onto the premises in order that they should remain there for other than temporary purposes;

(c) the goods are brought onto the premises for the use of the tenant; and

(d) the landlord has not been notified that such goods do not belong to the tenant.

See **BLOEMFONTEIN MUNICIPALITY vs JACKSONS LTD 1929 AD 266.**

There is no doubt on the affidavits before me that these four requirements have been satisfied in this case.

The submission on behalf of the 2nd respondent is that the order of the Magistrate's Court of the 31st May 1991 restored possession of the goods to the 2nd applicant, terminating whatever rights the applicant might have had over the goods arising from the failure by the 1st respondent to pay the rent.

6/ ... ...

The landlord's hypothec exists only while the goods are actually on the premises or while they are actually in the process of being removed, but once they are removed from the premises the lien is lost. See **WEBSTER vs ELLISON 1911 AD 74** and **ELLIOT BROS. (EL) PTY LTD vs SMITH 1958(3) SA 858 (E).**

The position in this case is that the applicant initially misconceived his remedy. He took the law into his own hands and locked up the leased premises when the 1st respondent failed to pay the rent. The applicant subsequently realised that his conduct was unlawful and did not oppose the 2nd respondent's application in the Magistrate's Court. The order obtained in the Magistrate's Court on the 31st May 1991 was as follows -

1. The respondent is ordered to be restrained and interdicted from interferring with applicant's access and control over her personal property being a lounge suite, a wardrobe, a wall unit, kitchen unit, carpet, television set, personal clothing and a bedroom suite, presently in a house leased by respondent to one Charles Sacolo, at Thembelihle Township.

2. The respondent should immediately grant access and without fail to the applicant to the property mentioned in paragraph 1.

3. Paragraphs (1), (2) and (3) operate as an interim order and a rule nisi returnable on 12th June,1991 calling upon the respondent to show cause why an

/interim ....

interim order in terms of paragraph (1), (2) and (3) should not be made final.

The Magistrate's Court order was confined to the 2nd respondent's rights of access to her property. The 2nd respondent did not in exercising such rights, remove the property from the leased premises. The first notice which the applicant received that the goods did not belong to the 1st respondent, was the application in the Magistrate's Court. That notice, however, came after the 1st respondent had fallen into arrears. The 2nd respondent's property had by then become subject to the lessor's hypothec. See **NOBLE vs HEATLEY 1905 TS 433.**

I accordingly find in favour of the applicant that the 2nd respondent's goods were subject to the landlord's hypothec at the time the application for attachment of the goods was launched.

I make no order as to costs.

B. DUNN
JUDGE