# IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No. 1985/15

In the matter between:

**VUYO CUTBERT HLATSHWAYO N. O.** **Applicant**

**And**

**SISANA ALICE SIBANDZE** **Respondent**

**Neutral citation:** *Vuyo Cutbert Hlatshwayo N. O. Vs Sisana Alice Sibandze (1985/15) 2016 SZHC 69 (08th April 2016)*

**Coram:** Hlophe J

**For Applicant:** Mr. M. S. Dlamini

**For Respondent:** Mr. N. M. Manana

**Date Heard:** 23rd March 2016

**Date Handed Down:** 08th April 2016

***Summary***

***Application proceedings – Application to perfect Landlord's Hypothec – When such an application is appropriate – Whether application appropriate in circumstances where the occupier of premises does not do so pursuant to a lessor/lessee relationship.***

***Application for ejectment – Application founded on Respondent's failure to pay alleged rentals which turns out to be incorrect – Whether it is appropriate for this court in such circumstances to grant an order for the eviction of the Respondent on a different basis than that initially prayed for, that is, her now being allegedly an unlawful occupier – Whether evidence establishes that Applicant is an unlawful occupier – A party stands or falls by his papers – Application for ejectment on the basis of the Respondent now being an unlawfully occupier not properly motivated and accordingly dismissed.***

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**JUDGMENT**

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[1] The Applicant, acting in his official capacity as the Executor dative in the estate of the late Samuel Shelele Sibandze, brought these proceedings under a certificate of urgency, seeking orders inter alia, perfecting the

Landlord's hypothec as well as ejecting the Respondent from certain business premises situate at Hluthi Town in the Shiselweni District belonging to the above stated deceased person's estate.

[2] It is not in dispute that the late Samuel Shelele Sibandze died way back in 1999 and his Estate has remained not wound up since then. According to a report filed by the previous Executor, the Estate comprised of a home on Swazi Nation Land and another one based on a concession farm on which there was also built some business premises at Hluthi town. The initial Executor stated that although he did collect rentals from a certain tenant occupying the said business premises for the benefit of the estate during his term, he could not realistically wind up the Estate as it comprised mainly of the home on Swazi Nation Land and the concession property, which in his could not be wind up.

[3] It would appear that this failure to wind up the Estate led to some disgruntlement in some family members and/or beneficiaries from the deceased person's Estate. It was apparently this disgruntlement which led to the eventual resignation of the former Executor and the appointment in his stead, of the current Applicant as the new Executor.

[4] It is common cause that in the same building where some premises were leased to the tenant referred to above, whose full particulars are said to be Muna Wwar Enterprises (PTY) LTD t/a Choice Supermarket, from whom the rentals referred to above were collected, there was a shop occupied by the Respondent allegedly as a tenant. Save for the Applicant's bare assertion, there is no proof of a lease agreement having been concluded at any stage between the Respondent and any title holder of the premises in question at anytime.

[5] The Applicant's aforesaid bare assertion that the Respondent was a tenant in the said premises seems to be based on the fact that she was occupying them, and that since she was doing so, it necessarily followed that she was a tenant therein. That this is the Applicant's understanding can be deciphered, not only from his say so in his papers but also from the amount he says is due as arrear rentals; that is, an amount in the sum of E994, 400.00; which he says started accruing in the year 2000, when the Respondent, he alleges, commenced occupation of the premises in question. It is a fact that the Applicant does not disclose the source of his assertion about the Respondent being a tenant in the said premises than that she was in occupation of the said premises, having commenced way back then.

[6] These allegations about the Respondent being a tenant in the said premises as were denied specifically by the Respondent whose contentions on how she came to occupy the premises seem to derive support from the report filed by the initial executor. According to the Respondent, while it is true she started occupying the said premises at about the same time alleged by the Applicant in 2000, such was not as a result of a lessor/lessee relationship between her and the Estate but it was as a result of an "arrangement" between her and her mother in law, who was wife to the late Samuel Shelele Sibandze, who she alleges allowed her to occupy the premises concerned in order for her to be able to maintain her from the proceeds of the Restaurant business she was meant to run there. This must have had the sanction of the Executor of the time who does not seem to have had a problem with the said arrangement, considering that he allowed her.

[7] Somewhat rendering credence to these allegations, the former Executor states the following in his report as regards his role as such and the occupation of the premises belonging to the Estate:-

> **"My role as executor effectively came to an end in about 2006 when it was resolved by the parties concerned that there was effectively nothing to liquidate and distribute as the property concerned comprised a home on Swazi Nation land and**

**another one on concession land. The other immovable property is a shop on concession land as well and these could not be passed to anyone.**

**It was decided that their respective occupants must remain in occupation…"**

[8] These contentions in my view put paid to the Applicant's allegations that the Respondent had breached a lease agreement between her and the estate and that he was therefore entitled to an order perfecting the Landlord's hypothec in the terms sought and also to the ejectment of the Respondent from the premises for the reasons of failure to pay the alleged outstanding arrear rentals and violation of alleged lease agreement.

[9] It is now obvious there was no lease agreement between the Estate and the Respondent. The question for determination in this matter is, therefore, whether there having been no lease agreement between the parties herein, it would be fathomable for the Applicant to talk of perfecting the Landlord's hypothec and by extension to ask for the eviction of the Respondent from the premises on the basis of her alleged

failure to comply with a non-existent lease agreement. As this is the question for determination in this matter, I shall revert to it later on.

[10] It suffices for me to point out that these were the facts when the application proceedings were instituted by the Applicant. Although this court had issued a rule nisi effectively granting the application to perfect the Landlord's hypothec and calling upon the Respondent to show cause why she should not be evicted from the said premises among other reliefs, this could not be sustained after the Respondent anticipated the rule nisi and moved for the discharge of the interim order that had been granted exparte.

[11] The application for anticipating the rule nisi in question came before me in the cause of my dealing with urgent matters as Duty Judge on the 23rd December 2015. It being apparent that there was no proof of any lease agreement and no sound allegations establishing one between the Estate and the Respondent, and it also being obvious that one could not talk of perfecting a Landlord's hypothec in such circumstances, I ordered that the premises, which I was informed were now locked up; which was in

itself a misnomer when considering the law regarding the perfection of a Landlord's hypothec, be opened forthwith.

[12] This I ordered primarily for two reasons; firstly the law does not authorize the locking up of the premises at that stage than it does the laying of all movables in there under attachment and the taking of an inventory of same so as to ensure that the removal of the items so attached is interdicted. See in this regard, W.E. Cooper Landlord and Tenant at 2nd Edition, Juta and Company, page…where the position is put as follows;

> **"Under Roman-Dutch Law the Lessor could perfect his hypothec over *invecta et illata* by attachment (praeclusio). The attachment was made by a public official entering the premises, at the Lessor's request, making an inventory of the movables, affixing his seal to them, and then closing the doors of the hired premises. The Roman-Dutch procedure is unknown to South African Civil Law. In Morden Law a lessor perfects his hypothec by applying to court for an order of attachment or an interdict restraining the lessee from disposing of or removing the movables from the hired premises pending**

**payment of the rent or the determination of the proceedings for the recovery of the rent".**

See also ***Webster v Ellison 1911 AD 73*** and ***Greef v Pretorius 1895 12 SC 104***

[13] Secondly; a case for perfecting a landlord's hypothec, which is a relief aimed at enforcing a lease agreement for the failure to payment, had not been made as there was obviously no lease agreement between the parties. As I ordered that the premises be opened, I advised Applicant, who was appearing in person at the time, to consult attorneys for guidance on the applicable law seeing that he was dealing with what could be technical legal matters which may not be so obvious to a lay person.

[14] It is worth mentioning that at the hearing of the matter, which had as its backdrop, the facts captured above, nothing could be said or produced to establish a lease agreement between the estate of which the Applicant is an Executor and the Respondent.

[15] It cannot possibly be disputed that perfecting a Landlord's hypothec and the concomitant ejectment are remedies availed a landlord against a tenant or lessee failing to pay his rentals. In the book titled, **The Law of Property, Second Edition, Silberberg and Schoeman,** put the position as follows at page 510:-

> **"The hypothec serves to secure the rent due to the lessor from time to time…*In Woodraw & Co v Rothman (1884) 4 EDC9* it was held that the hypothec does not extend to debts due for repairs which the lessee was obliged, but had failed to carry out. Will (the writer) suggests that this is sufficient to conclude that in the modern law the hypothec covers only overdue rent and no other debts" (emphasis added).**

[16] It is also not in dispute that for a relationship to qualify to be referred to as a Landlord/Tenant relationship or a lessor/lessee relationship, there should in place be a lease agreement founded on the premise that the landlord hands over his property to the tenant for his use during the agreed term in exchange for the payment of rent by the tenant. Silberberg and Schoeman (ibid) put the position as follows on this point at page 501;

**"The essential terms of such a contract are an undertaking by the Landlord that the tenant shall have the use and enjoyment of the property thereby leased for a limited period of time in consideration for an undertaking by the tenant to pay a certain rent"**

[17] It follows that in view of there having been no lease agreement between the estate of the late Samuel Shelele Sibandze and the Respondent then no rentals could be payable and none could be owed. If no rent was payable or owed, then there could be no perfection of a landlord's hypothec.

[18] I acknowledge that when the merits of the matter were to be argued after all the pleadings had been exchanged between the parties, Mr. Dlamini for the Applicant admitted that it was not appropriate in the circumstances of the matter to talk of perfecting the landlord's hypothec in view of the fact that there was no lease agreement breached between the parties as there were no rentals owing. Instead Mr. Dlamini argued that his client would only insist on the ejectment of the respondent from the premises because she was allegedly an unlawful occupier in those

premises and she had allegedly refused to conclude a lease agreement with the Applicant.

[19] The case instituted by the Applicant in his papers was for enforcement of a lease agreement. In other words the ejectment was sought on the basis that the Respondent had breached the lease agreement by failing to pay outstanding rentals and not that she was an unlawful occupier. If there is a change in the foundations of the relief sought, I have no hesitation that proper allegations for the contention that she occupied the premises illegally which would justify an ejectment have to be properly pleaded to enable the Respondent respond fully to those allegations. As things stand, it does not seem that it would be fair to the Respondent to have her fate decided on a different case than that on which she was brought to court to face. Such an approach would in my view have for reaching ramifications or implications, which would include conclusions that she was not accorded a fair hearing as guaranteed by the common Law and the Constitution. Furtherstill, our Law is long settled that a party stands or falls by his papers.

[20] I do not propose to enter the realm of conjecture by beginning to assess what case the Applicant could possibly have against the Respondent if any, including what defences the Respondent could possibly raise, but decide to leave such issues to their legal advisors should they consider taking the matter forward. It suffices for me to observe that the parties herein seem to be relatives who perhaps could find a more amicable way of setting their disputes than the one adopted this far.

[21] I am only certain that this latter observation should have a bearing on the question of costs so as to try and preserve the little that remains of their relationship; even though costs should normally follow the event.

[22] For the foregoing considerations I have come to the conclusion that Applicant's application cannot succeed. Accordingly I make the following order:-

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

22.2 Owing to the peculiar circumstances of the matter, each party is to bear its costs.

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