

IN THE HIGH COURT OF SWAZILAND

CASE NO.2053/99

IN THE MATTER BETWEEN:

CARGO CARRIERS (PTY) LIMITED

APPLICANT

AND

JERRY DLAMINI

RESPONDENT

CORAM

: MASUKU J.

FOR APPLICANT

: MR Z.D. JELE

FOR RESPONDENT

: MR T.M. SIMELANE

JUDGEMENT 9/9/1999

This is an application brought under a Certificate of Urgency and in which the Applicant seeks an Order inter alia:

1. That the Court dispense with the usual and normal rules relating to service and permit this matter to be heard as one of urgency.
2. That the Respondent together with all those in occupation under his authority be ejected from the premises known as House No.4 Umfula Road, Ubombo Village Big Bend.
3. The Respondent pay the costs of this application.

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The matter came for hearing on the 27th August, 1999 and was postponed by Maphalala J. to the Contested Roll of the 3rd September, 1999, to enable the Respondent to file its answering affidavits.

The gravamen of the Applicant's claim, as contained in the Founding Affidavit is that it is the owner of the premises described as House No.4, Umfula Road, Ubombo Village, Big Bend. Pursuant to an employment agreement entered between the parties on the 20th January, 1999, the Applicant afforded the Respondent accommodation at the above described premises. The offer of accommodation which was accepted was part of the Respondent's terms and conditions of employment with the Applicant,

On or about the 31st May, 1999, the Applicant terminated the Respondent's services due to what is referred to as poor work performance and a letter to that effect is annexed to the Founding Affidavit and marked "CC 1". In compliance with the requirements of the Employment Act 1980, the Respondent was afforded a period of thirty days within which to vacate the premises i.e. the 30th June, 1999.

The 30th June, 1999 came and passed without the Respondent vacating the premises. It is the Applicant's contention that as from the 30th June, 1999 the Respondent's occupation of the premises became unlawful as the Respondent's right to occupy the premises ceased on that date.

The Respondent filed a Notice to oppose and proceeded to file an Affidavit challenging the urgency of the matter only. The Respondent has not challenged the rest of the allegations contained in the Applicant's Affidavit and they therefor remain uncontradicted, save in regard to urgency. That being the case, the Court has no alternative but to accept the Applicant's uncontroverted allegations of fact as true (see EBRAHIM v GEORGOULAS 1992 (2) SA 151 AND PHILLIP DLAMMI V CHAIRMAN, ROAD TRANSPORTATION BOARD & ANOTHER, APPEAL CASE NO.29/97).

In the light of the foregoing, I am required to decide whether or not the matter is urgent and if I come to the conclusion that it is, I am compelled to grant the prayers

sought in the Notice of Motion. If I hold otherwise, I will have to refuse to grant prayer 1 of the Notice of Motion.

The Respondents allegations regarding the attack on the urgency are to the effect that the Applicant has failed to set out any facts whatsoever which prevented the Applicant from instituting the application immediately upon the expiry of the 30 days notice. The Respondent further contends that the Applicant was content to let matters ride and then suddenly decided that the matter was urgent and sought urgent relief. This, the Respondent argued, amounts to an abuse of the Court's process. The Court was referred to the case of HUMPHREY H. HENWOOD v MALOMA COLLIERY (PTY) LTD and ANOTHER CASE NO. 1623/94 (unreported).

In support of the urgency, the Applicant stated that it has since entered into a contract of employment with another employee to succeed the Respondent and is therefor obliged to deliver the house to the new employee as part of his terms and conditions of employment. As a result of the Respondent's failure to vacate the premises, the Applicant has secured alternative and costly accommodation for the new employee in the interim. The Applicant further contends that it no longer benefits from the Respondent since the termination of his services and the Respondent's continued occupation is occasioning serious financial loss to the Applicant. It is further contended that the Applicant has no hope of recovering losses from the Respondent in terms of rental as there is no agreement of lease with the Respondent.

Having listened to arguments by Counsel on both sides, it must be stated that whether or not a matter is declared as one of urgency is a discretion vested in the Court and to be decided judicially, regard being had to the particular circumstances of the matter.

I have formed the view that this is a matter that ought to be dealt with on an urgent basis. The Applicant has stated that it is continuing to suffer as a result of the Respondent's continued occupation of the premises and that it has employed somebody to take over the Respondent's position. That person, due to the Respondent's continued unlawful occupation of the premises has had to be accommodated by the Applicant at an extra expense and which it may not claim from the Respondent.

The Applicant has further stated that it will suffer irreparable harm if the Respondent continues to occupy the house in question as there is no lease agreement between them and that it is, by moving this application mitigating its losses as it were.

Mr Simelane argued, correctly in my view that the Applicant has failed to state the date when the Applicant employed the Respondent's successor and has not accounted for the time between the 30th June and August when the application was moved. These are issues that should have been specifically included and would fortify not found the urgency.

I have considered that the Applicant has a good case and I have also considered that the Respondent has failed to set out any defence on the merits and it appears that the attack on the urgency is raised as a dilatory tactic. This is moreso because the Respondent was given an opportunity to file his papers on the merits. The arguments by Mr Simelane are off set by the failure to file a substantive defence on the merits.

Having declared the matter sufficiently urgent I am compelled, due to the Respondent's failure to file an opposing affidavit on the merits, to grant the Orders prayed. There are numerous decisions of this Court to the effect that an erstwhile employee may not continue to occupy the former employer's house, given to him as part of the employment contract once the employment contract has been terminated. This is so, notwithstanding that there may be pending issues relating to unfair dismissal.

I say this contemplating that the Respondent would have raised such a defence. He however did not. The cases which set out this principle are the following:- ROYAL SWAZILAND NATIONAL AIRWAYS

CORPORATION LIMITED vs LYNETTE DLAMINI CIV CASE NO.201/90: MAUREEN HABEDI CIV. CASE NO. 212/90 (unreported judgement by DUNN J); and ROYAL SWAZILAND SUGAR CORPORATION LIMITED vs SIMON NHLEKO and 9 OTHERS CASE NO. 2785/98 to 2794/98 (per SAPIRE C.J.)

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It is my considered view that the matter is one of urgency and due to the Respondent's failure to file an Affidavit on the merits, no defence to the ejectment has been disclosed.

In the premises, I grant prayer 1,2 and 3 as set out in the Notice of Motion.

T.S. MASUKU

JUDGE