IN THE HIGH COURT OF SWAZILAND

CASE NO: 822/00

In the matter between:

DUMISA M. DLAMINI	**1st APPLICANT**
SWAZI INN (PTY) LTD	**2nd APPLICANT**
DUMISA SUGAR CORPORATION (PTY) LTD	**3rd APPLICANT**
THE NEW GEORGE HOTEL (PTY) LTD	**4th APPLICANT**
MACKAY INVESTMENTS (PTY) LTD	**5th APPLICANT**
UNCLE CHARLIE (PTY) LTD	**6th APPLICANT**
THE PROPERTY COMPANY (PTY) LTD	**7th APPLICANT**

AND

PRICE WATERHOUSE COOPERS **Respondent**

CORAM : **MASUKU J.**

For applicants : **MR J.S. MAGAGULA**
For Respondent : **ADV. P.E. FLYNN (Instructed by Robinson Bertram)**

JUDGEMENT
13/04/00

This is an application brought under a Certificate of Urgency and in which the Applicants seek the following relief :-

1. That the time limits and forms prescribed by the Rules of Court be dispensed with and this matter dealt with as an urgent application.

2. Directing the Respondent to deliver to the Applicants all financial statements and balance sheets, paid cheques, bank statements, supporting vouchers as well as all documentation in the possession of the Respondents in respect of the Applicants' herein and particularly bank statements, cheques and vouchers in respect of accounts (which are fully set out in the Notice of Motion and I find unnecessary to enumerate for purposes of this judgement).

3. That the said documentation be delivered within 24 hours of the order hereby sought at the officers of J.S. Magagula and Company, Second Floor, Mbabane House, Mbabane.

4. That the Respondent pays the costs of this application.

In view of the drastic nature of the relief sought I postponed the matter and granted the Respondent time to file its Answering Affidavits, which it did.

The facts of the matter briefly stated are as follows: - The 1st Applicant who deposed to the Founding Affidavit on his behalf and for and on behalf of all the other Applicants alleged that the Applicants appointed Price Waterhouse as accountants in 1991. In performance of its accounting duties, Price Waterhouse was charged with preparation of all the Applicants financial statements which entailed in part, liasing with the Applicants' bankers, collection of all bank statements, paid cheques and other necessary documents.

It is further alleged that Price Waterhouse later changed its name to Price Waterhouse Coopers and that this change of name was merely cosmetic without affecting its relationship with the Applicants in any way. By letter dated 11th February, 1999, the Applicants requested the Respondent to avail to them all bank statements and paid cheques. The request was met with a refusal by the Respondent, which claimed that it exercised a *jus retentionis* in respect of the Applicants' documents then in its possession by virtue of outstanding professional fees due to it by the Applicants. The Applicants then paid the outstanding amount and as a result, the lien fell away. This notwithstanding, the Applicants allege that the Respondent only handed a handful of cheques and virtually no bank statements, financial statements or vouchers.

On the 2nd February, 2000, the 1st Applicant complained to the Respondent that very few of the documents required were availed, whereupon Mr P.R. Cooper of the Respondent undertook hand the outstanding documents to the 1st Applicant once the same were retrieved from the Respondent's archives. This was never done. This prompted the Applicants to instruct Messrs. De Wet and Fourie, their attorneys to make demand for the aforesaid documents by letter dated 21st February, 2000, which the Applicants stated were

required for purposes of amplifying a rescission application pending between the Applicants and the Swaziland Development and Savings Bank.

The Respondent replied on the 23rd February, 2000, indicating that the matter had been referred to its attorneys for an appropriate response. Indeed the Respondent's attorneys of record responded by letter dated 8th March, 2000. In this letter, the Respondent denied being appointed to act as auditors in respect of the 5th, 6th and 7th Applicants. The Respondent referred to a letter dated 15th February, 1999, in which it evinced its willingness, whilst the lien existed to allow the Applicant's attorneys or the 1st Applicant to inspect the documents in the Respondent's possession. This was done. The Respondents further pointed out that all the statements, supporting cheques and other documentation in its possession was transmitted to the 1st Applicant or the Applicants' auditors. They also mentioned that there were other documents deliberately left by the 1st Applicant on the 1st and 2nd February, 2000. The Respondent further reiterated that it did not have, apart from the documents left by the 1st Applicant, any further documentation belonging to the Applicants.

The Applicants then launched this application, contending that there were more documents in the Respondent's possession, which the Respondent denied in its letters and further denied in its Answering Affidavit. However, the Respondent in its Answering Affidavit embodied a tender of other documents which the Court was informed were in the Respondent's possession. These were brought in to Court.

In view of the aforegoing, I am of the view that granting prayer 2, in view of the fact that the information required by the Applicants has been delivered, any order compelling the Respondent to deliver the documents would be *brutum fulmen.* I therefor make no order on prayer 2.

The Respondent as cited contends that it did not have any of the documents in view of the merger between Price Waterhouse and Coopers and Lybrand. In my view, nothing much turns on this argument since the Respondent, as now constituted tendered and delivered the documents required by the relevant Applicants in Court.

The only outstanding question which only has a bearing on costs and which the Court is now called upon to answer is whether in the circumstances, the Applicants were justified in moving this application in the light of the Respondent's earlier willingness to co-operate as recorded in the letters referred to above. As earlier mentioned, Respondent's position was that it had handed over all the necessary documents to the Applicants and could not therefor be required to hand over what it did not have in its possession.

In early February, 2000, the 1st Applicant complained to the Respondent about the few documents handed over, Mr Cooper undertook to retrieve documents from the Respondent's archives and to advise the 1st Applicant about that. He never did. This prompted the Applicants to instruct Messrs. De Wet and Fourie, as aforesaid to demand the documents. This demand was met with the Respondent's response contained in the letter dated 8th March, 2000. Paragraphs 7 and 8 thereof record the following: -

7. "In the circumstances, we point out that all the statements, supporting cheques and other documentation which is in our client's possession relating to your client has been transmitted to either your client or their present auditors save the documents which were left by Mr Dlamini (1st Applicant) on the 1 and 2 February, 2000. These documents are available and can be collected at your convenience. Finally, we place on record that your client's repeated demands for documentation which our client does not have is not only unnecessary and unreasonable and as such we once again point out that our client does not have any further documentation belonging to your client.

8. In the light of the foregoing your client is at liberty to institute whatever proceedings he cares to institute however client will vigorously defend same and seek a special order for costs as it is clear our client has given yours all the documentation in its possession. In the interim, all our client's rights are specifically reserved."

In the light of the fact that notwithstanding the Respondent's protestations that it did not have any further documents as recorded hereinabove, the same Respondent tendered the documents into Court, which shows that the Applicant was justified in launching the Application. Had it not done so, the further documentation would not have been delivered.

The Respondent's willingness to co-operate must be considered in proper perspective. It was during the time that the lien obtained and was also in respect of the documents left by the 1st and 2nd Applicant. Its major and final contention was that it had no more documents in its possession. This application proved otherwise as more documents were delivered after it was instituted and these are likely to be the documents that Mr Cooper had mentioned were in the Respondent's archives.

In view of the foregoing, the Applicants' application was necessary and in Mr Magagula's words, it bore fruit. The Respondent in the circumstances be and is hereby ordered to pay the costs of this application in terms of prayer 4 of the Notice of Motion.

T.S. MASUKU
JUDGE