THE HIGH COURT OF SWAZILAND

KHARAFA TRADING (PTY) LIMITED
Applicant

And

ZODVWA GCEBILE MAZIYA
DUMISANI MAPHALALA N.O
FIRST NATIONAL BANK OF SWAZILAND
Respondents

Coram	S.B. MAPHALALA – J
For the Applicant	MR.MOTSA
For the Respondents	MR. MDLADLA

JUDGEMENTS
(18/07/2002)

The Background

The applicant moved an application under a certificate of urgency on the 12th December 2001, for *inter alia* that the 1st and 2nd respondents be hereby interdicted from effecting any withdrawals on any of the 1st respondent banking account pending finalisation of institution of an action to be instituted by the applicant.

The applicant was granted an order *ex parte* and a rule nisi was issued on the 14th December 2001 in terms of prayers 1, 2, 3, 4 and 5 of the notice of motion returnable on the 25th January 2002. The rule has been extended a number of times until the matter came for arguments before me on the merits of the dispute on the 4th July 2002,

where I reserved my judgement to this date. The central issue is whether or not the said rule ought to be confirmed. Following is my judgement in this matter.

The Facts

The application is based on the affidavit of one Graham Keith Mills who is a Director of the applicant Kharafa Trading (Pty) Limited. The respondent has filed a notice of intention to defend together with the answering affidavit of the 1st respondent Zodvwa Gcebile Maphalala which is further supported by the confirmatory affidavit of her husband one Dumsani Maphalala. The applicant then filed a replying affidavit of one Richard John Culver who is employed by Management Services as a Business Consultant. The said Mr. Culver is currently working with the applicant on a short-term contract to assist the organisation's operations and accounting practices.

The applicant's application is for the attachment of [a pre-judgment interdict] of certain funds held by the 1st respondent in certain accounts within the 3rd respondent's Manzini, pending an action to be instituted by the applicant against the 1st respondent for recovery of approximately E79, 000-00, which has been defrauded from it by the 1st respondent.

At all material times hereto, the 1st respondent was employed as the Depot Sales Manager of the applicant at its branch in Lomahasha. The applicant's prime business at Lomahasha involves the sale of day old chicks and chicken products to local farmers in that area.

The applicant avers in its founding affidavit that from the 10th December 2001, a massive fraud within the applicant's operations at Lomahasha was discovered. As Depot Sales Manager, the 1st respondent was responsible for the entire operation therefore including the receipt of money and stock. As a result of an internal audit it has been discovered that certain stock and money although reflected as having been received at the Lomahasha branch could not be accounted for.

Upon this discovery, it is alleged by the applicant, the 1st respondent realising that fraud has been uncovered, she simply absconded from work and had not attended since Wednesday 12 December 2001.

The applicant then reported the matter to the Royal Swaziland Police (Fraud Department) and the police are at present investigating the matter.

The applicant has ascertained that the applicant's mother is operating a chicken business exactly the same as that of the applicant. The applicant avers that although it has no concrete proof therefore, it has reason to believe that many of the applicant's day old chicks which were for sale at its Lomahasha branch, could well have been stolen and whittled away to the 1st respondent's mother business.

The applicant avers at paragraphs 12, 13, 14 and 15 of the founding affidavit of Mr. Mills facts establishing urgency.

On the other side of the coin the 1st respondent addresses *au contraire* arguments to applicant's allegations. First and foremost she contends that the applicant was not entitled to the rule *nisi* issued on the 14th December 2001 as there is and has never been any need for such an attachment. She denies in the strongest terms that she ever defrauded the applicant. She alleges that the applicant is clearly out to undo her image and reputation.

Her version of events is that for no apparent reason Mr. Wills detained her in his office on the 11th December 2001 accusing her of stealing money. She was detained from 10.00am in the morning to 6.15pm in the afternoon. She was only released when her husband arrived. At paragraph 7, she gave a graphic description of how Mr. Mills subjected her to degrading and insulting treatment. That she had always done her job well up until the month when the applicant constructively dismissed her.

As to the allegation that her mother operates a chicken business that this is indeed the position and that this fact was brought to the knowledge of the applicant as far back as July 2001. The fact of the matter is that on the 9th July 2001, the applicant circulated a memorandum to the staff members. (annexure"B").

The said memorandum annexure "B" reads in *extenso* as follows:

MEMORANDUM

To: All staff C/L & KT
From: Mr. Mills
Date: 09/07/01
Re: Misappropriation of Funds

In the past the company did not forbid employees to be personally involved in Poultry Production. Indeed in most cases those staff members that did want to grown chickens of their own requested my consent.

As a result of misappropriation of company funds and unexplained stock discrepancies, the company will be prohibiting all staff from becoming personally involved in Poultry Production as well as trading in a private capacity with any poultry inputs including the sale of finished in whatever form.

This measure is necessary to protect you individually from possibly being implicated and ensuring that the company is not further exposed to fraudulent activities.

It is a fact that a number of staff member's families are involved in poultry production and therefore understood that this cannot be prohibited. In order for all staff not to be falsely implicated in such activities all staff are requested to declare should they be involved in any such businesses.

1. Their personal involvement in any poultry production
   Their personal involvement in any other type of poultry business
2. Their involvement whether directly or indirectly in poultry business
   Through family members or the staff employee's place of residence.
   Their indirect involvement in any other type of poultry business.
3. Their either direct or indirect involvement in any other type of business act
   Activities.

Presently I am only aware of one staff member who is directly involved with poultry production. You are therefore requested to make written declaration to be submitted to Personnel or myself by Friday 13/07/01..."

She responded to the memorandum and declared her mother's business to the applicant and her involvement therein (in annexure "C"). Annexure "C" reads as follows:

"11th July 2001

Ms Zodvwa Maziya
C/O Kharafa Trading

Mr. Graham Mills
Kharafa Trading
Manzini

Dear Mr. Mills

SUBJECT: POULTRY BUSINESS – DECLARATION

As per your request of memo dated 9th July headed "misappropriation of funds", I have the following declaration to make:

My mother, Lomhlangano Maziya, a resident of Mliba, has been running a Poultry business since last year. She houses 500 day-old chicks at a time, right up to maturity (7 weeks) and thereafter sells them. This is her only was of earning a living since both my father and herself are no longer employed.

Please note that this is not my business, all I used to provide her with was expertise on how to care for them, nothing more than that. All proceeds go towards the running of the homestead. At Kharafa we only buy feed. Chicks are bought at SBB.

Yours sincerely,

Z. MAZIYA (MS)"

The applicant replied to annexure "C" in a handwritten note on annexure "C" to the following effect:

"Zodvwa,

Thank you for the information. My only concern is what is wrong with our chicken.
Please request Alson to open a cash account in your mother's name so as to record all transactions. We would like to help where we can.

(signed)" (My emphasis)"

The 1st respondent denies that any chicks were stolen. The chicks in her mother's business have always been bought. She attaches annexure "D" and "E". These being receipts for chicks bought by her mother from the applicant's company.

The 1st respondent at paragraphs 11, 12, 13, 14, 15 and 16 challenges the need for such an interdict, that the matter was urgent and that essentially this application is an abuse of the court process.

The Arguments by the Applicant

It was contended on behalf of the applicant by Mr. Motsa that in the present case the applicant was entitled to the confirmation of the rule *nisi* granted on the 14th December 2001. Mr. Motsa advanced a number of points in support of this contention.

First, that it is trite law that an applicant can obtain an order restraining a person from a bank account on fear that the drawer may attempt to withdraw the money pending the institution of action against the drawer. For this proposition the court's attention was directed to the case of ***Television and Electrical Distribution (Pty) Ltd vs Goodwin and another 1956 (1) S.A.*** at ***514***.

Secondly, that the question for this court to decide is whether the applicant has satisfied the requirements of a final interdict (see ***Lawsa Vol. II*** at page ***288***). On the requirements of a clear right the applicant has made a clear case of misappropriation of funds by the 1st respondent to the sum of E230, 280-00. The applicant delivered chicks to her in her capacity as Depot Manager. She has not accounted for their whereabouts of about E48, 990-00 notwithstanding that she accepted the chicks. She was the only one who prepared stock sheets and she received payment from the Lomahasha depot and did banking. Mr. Motsa argued that in the case of ***Lockie Bros Ltd vs Pezaro 1918 W.L.D. 60*** the court granted an interdict where a strong case had been made that the respondent had conspired with an employee of the applicant to

steal 10, 000-00 (ten thousand pounds) of their money and that the respondent paid this money into his current account. In *casu* the 1st respondent did not conspire with anyone, but she is the person who received the chicks' payment and did the banking and she cannot explain the shortages.

On the requirement of injury actually committed Mr. Motsa submitted that in cases of vindicatory or quasi-vindicatory actions an actual or well-grounded apprehension or irreparable loss is presumed until the contrary is shown (see ***Stern and Ruskin, NO. vs Appleson 1951 (3) S.A. at page 813***) and also the case of ***Hillman Bros (West Rand) (Pty) Ltd vs Van Den Hanvel 1937 W.L.P 41***). In the present case, 1st respondent has neither granted security for the debt nor has she shown that she will be able to satisfy the judgment if applicant succeeds.

On the third requirement that a final interdict will not be granted if there is another satisfactory remedy. Mr. Motsa contended that even where an injury may be capable of pecuniary evaluation and compensation the court will grant an interdict, if the respondent is a man of straw (see ***Lubbe vs Die Administration Grange Vrystaat 1968 (1) S.A. 111 (o)***. To buttress this point Mr. Motsa directed the court's attention to paragraph 11.1 of the applicant's replying affidavit which reads as follows:

> "9 paragraph 11.1
>
> 9.1 I submit that there is a need for the interdict as:
>
> 9.1.1 1st respondent has not provided applicant any other form of security to cover its claim of E230, 000-00 against her;
>
> 9.1.2 There is no guarantee that 1st respondent business which applicant assumes started after she left 1st respondent's employ can cover the amount claimed in the summons; and
>
> 9.1.3 A person can be resident in Swaziland and be penniless hence it is not a question of 1st respondent leaving Swaziland, and 1st respondent's husband was merely cited for procedural reasons so he cannot be liable for this claim".

The Respondent's Arguments

Mr. Mdladla for the 1st respondent advanced *per contra* arguments. His first salvo is that the applicant has not shown the presence of the requirements of interdict as outlined in the celebrated case of ***Setlogelo vs Setlogelo 1914 A.D. 211*** at *227* viz, i) that the applicant must alleged in his papers and prove that he has a clear right, ii) an injury actually committed or reasonably apprehended or an actual or threatened invasion of that right and iii) the absence of similar protection by any other ordinary or suitable remedy. To support this proposition Mr. Mdladla cited the work by **John Mayer, Interdicts and Related Orders at page 59.**

The second attack by Mr. Mdladla is that the applicant should especially in the case of an *ex parte* application place relevant facts before the court a *fortiori*, no incorrect information may be furnished. Even if this is done carelessly and not recklessly or deliberately. The court is entitled to discharge the rule *nisi* on the ground alone. For this submission Mr. Mdladla directed the court attention to the *dicta* in the case of ***Hall and another vs Heyns and others 1991 (1) S.A. 38.*** The applicant should disclose all material facts truthfully to the court. Failure to make disclosure which are revealed by the respondent is fatal to an application for an interdict. Mr. Mdladla directed the court's attention to the applicant's papers to show that certain material facts had not been disclosed to the court when it granted the rule *nisi* on the 14th December 2001.

The Issues for Determination

There are essentially two matters for determination in this matter. Firstly, whether or not there has been non-disclosure on the part of the applicant when the rule *nisi* was granted, and if so what effect does that have on the application. The second issue is whether the applicant has satisfied the requirements for a final interdict as outlined above.

I shall proceed to determine the issue *ad seriatim*:

a) **The issue of non-disclosure**

Having brought the proceedings *ex parte,* it is trite law that the applicant had an obligation to the court to disclose fully the true circumstances and facts pertaining to the application; Roper J in the case of ***De Jager vs Heibrow and others 1947 (2) S.A. 419 (w)*** said the follqwing, and I quote:

> "It has been laid down, however, in numerous decisions of our court that utmost good faith must be observed by litigants making *ex parte* applications, and that all material facts must be placed before the court (see R***e: Leysdorp and Pieterburg Estates Ltd 1903 T.S. 254; Crowley vs Crowley 1919 T.P.D. 426***). If any order has been made upon an *ex parte* application, and it appears that material facts have been kept back which might have influenced the decision of court whether to make the order or not, the court has a discretion to set aside the order on the ground of non-disclosure (***Venter vs Van Graan 1929 T.P.D. 435; Barclays Bank vs Gilfs 1931 T.P.D. 9; Hillman Bros vs Van Den Heuvel 1977 W.L.D. 41***). It is not necessary that the suppression of the material fact shall have been *wilful* or *malafide*" (my emphasis).

Margo J in the case of ***Cometal Nometal vs Corlana Enterprises 1981 (2) S.A. 412*** expressed the same sentiments at page 414 (G – H) in the following terms; and I quote:

> "It seems to me that, among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has breached the *uberima fides* rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure in the *ex parte* application, the consequences, from the point of doing justice between parties, of denying relief to the applicant on the *ex parte* order, and the interest of innocent third parties, such as minor children, for whom protection was sought in the *ex parte* application"

Further, authority can be found in the following: ***Herbstein at el The Civil Practice of the Supreme Court of South Africa (4th ED)*** at ***367; Nathan Barnett and Brink, Uniform Rules of Court, 1977 (2nd ED)*** at page ***58; Spieg vs Walker 1947 (3) S.A. 499*** and ***Stanley Matsebula vs Aaron Mavimbela Civil Appeal No. 54/1999***. that if there are any material facts that might have influenced the court's decision and such facts are wilfully, negligently or in bad faith withheld, the court will as a rule set aside or rescind its earlier order.

In *casu,* it is my considered view, that on the reading of applicant's founding affidavit the applicant has failed to make a full and frank disclosure of all the relevant facts which were within its knowledge at the time the application was launched on the 14th December 2001. At page 9 of the Book of Pleadings in applicant's founding affidavit at paragraph 11 the following appears:

> "11. I have also ascertained that the applicant's mother is operating a chicken business exactly the same as that of the applicant. Although I have no concrete (sic) proof therefore, I have reason to believe that many of the applicant's day old chicks which were for sale at its Lomahasha branch, could well have been stolen and whittled away to the 1st respondent's mother business" (my emphasis).

However, this statement is in sharp contrast to what appears in the correspondence between the applicant and the 1st respondent on the 9th July 2001, and 11th July 2001 viz, the memorandum to staff members and 1st respondent's response thereto, respectively. I have earlier on outlined these annexures *in extenso*, but what is of particular importance is the applicant's response to annexure "C" to the following effect:

> "Zodvwa,
>
> Thank you for the information. My only concern is what is wrong with our chicks. Please request Alson to open a cash account in your mother's name so as to record all transaction. We would like to help where we can ..."

This is completely at variance with applicant statement at paragraph 9 of its founding affidavit and it amount to a non-disclosure of a material facts which might have influenced the court not to have granted the rule *nisi,* on the 14th December, 2000.

The court was given the impression when it granted the rule *nisi* on the 14th December 2001 that the chicks were being stolen by the 1st respondent to stock her mother's business whereas the true position is that there was a well-established relationship between the applicant and the 1st respondent's mother as evidenced by annexures "B" and "C". Further annexure "D" being delivery notes fro the applicant to 1st respondent's mother Mavis Maziya of Mliba show clearly that the sale of chicks was

done legally and she paid in each instance. These run from pages 40 to page 55 of the Book of Pleadings.

I agree with Mr. Mdladla, on the strength of the *dicta* in the case of ***Hall and another vs Heyns (supra)*** that this court on this ground alone is entitled to discharge the rule *nisi* for non-disclosure of a material fact. Furthermore, on this point the applicant at paragraph 10 of the founding affidavit deposed that is had ascertained that between the time the fraud/theft was discovered to date the 1st respondent has already withdraw substantial amounts of monies out of her account and could well withdraw the remaining balance at any time. Yet the true position as reflected at paragraph 15 of the 1st respondent's answering affidavit show clearly in annexure "G" and "H" that in fact at the material time money was deposited into the account and there is no sign or indication that any monies were being withdrawn. This was a material fact if known by the court when it granted the rule *nisi* it might not have granted it.

In the instant case the applicant has not conformed to the principle of *uberima fides* required in *ex parte* applications and the rule granted on the 14th December 2001 ought to be discharged on this ground.

b) Requirements for a final interdict

For the sake of completeness I shall proceed to consider this aspect of the matter despite my view on (a) above which disposes of the matter.

It would appear to me that the applicant in the present case has not complied with the third requirement for a grant of a final interdict, viz the absence of similar protection by any other ordinary or suitable legal remedy (see ***John Mayer at 59 (supra)***. There has to be in the affidavits or even a suggestion of irreparable harm in the affidavit (see ***Setlogelo vs Setlogelo at page 221 (supra)***). No such averment appears *ex facie* the applicant's founding affidavit.

For the above reasons the application for a final interdict ought to fail.

c) The Court Order

In the result, the rule *nisi* granted by the court on the 14th December 2001, is discharged.

The costs to follow the event.

S.B. MAPHALALA

JUDGE