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THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1768/02

In the matter between:

ELMON MASILELA	**Applicant**
AND	
WRENNING INVESTMENT (PTY) LTD	**1st Respondent**
THOMAS MOORE CARL KIRK	**2nd Respondent**

CORAM : **MASUKU J.**

For Applicant : **Mr W.E. Mkhatshwa**
For Respondents : **Advocate P.E. Flynn (Instructed by Robinson Bertram)**

JUDGEMENT
5th August 2002

This is an application which was initially filed as one of urgency in which the following relief was sought: -

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and permitting this application to be heard as one of urgency.

2. Directing and authorising the Deputy Sheriff for the District of Lubombo to forthwith eject the First and/or Second Respondents from the butchery business premises situate at Lomahasha in the District of Lubombo, and all such persons

holding title thereunder, and to restore to the Applicant, vacant occupation of the said premises.

3. Directing and authorising the Deputy Sheriff for the District of Lubombo to employ all lawful means in the performance of his duties in giving effect to an order in terms of 2 herein before.

4. Directing the Respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

5. Granting the Applicant such further and/or alternative relief as to this Honourable Court may seem meet.

I need only mention that in proceedings where ejectment is sought, the premises must be fully described in the Notice of Motion with such particularity that the Deputy Sheriff will know the exact location. If it is situate in Swazi Nation Land, the place where it is situate, together with the style of the business should be included. Deficient descriptions like those in prayer 2 will not do.

The Applicant claims in his Founding Affidavit that he is the landlord through ownership by *Khonta* rights under Swazi law and custom of the undescribed premises in Lomahasha. He let these premises to Yulnick (Pty) Ltd and has attached the copy of a lease agreement marked "A" in that regard. He contends further that the tenancy of the said premises was later ceded to the 1st Respondent by operation of a sale of business agreement, a copy of which was annexed to the papers and marked "B". The Applicant alleges further that he thereafter did not enter into any lease agreement with the 1st Respondent save and except to allow it to remain in occupation of the premises as a monthly tenant in or about March 2001. In terms of this tenancy, the 1st Respondent was to pay rental in the sum of E1, 000.00 monthly.

The Applicant alleges further that 1st Respondent remained in occupation on the aforesaid terms until January 2002, when it ceased to conduct any business on the premises, but remained in occupation. In February 2002, Mr Magalela Maphalala, representing the 1st Respondent, introduced the Applicant to Mr Ray Douglas Fanourakis as a potential

purchaser of the butchery business in question. This arrangement culminated in the drawing up and signature of annexure "C" being the copy of a lease agreement between the Applicant and Fanourakis. The Applicant contends that he is now unable to deliver the premises to Fanourakis because the 1st Respondent has refused to restore the keys of the premises to the Applicant. Furthermore, he is prejudiced in that he derives no benefit from the 1st Respondent's continued occupation of the premises since January 2002.

It would appear that at some stage, the Applicant in a bid to eject the 1st Respondent, removed the 1st Respondent's locks and replaced them with his own. This led to an application for a *mandement van spolie* by the 2nd Respondent, who claims that he had purchased the business as a going concern from the 1st Respondent and was therefor entitled to remain in occupation of the premises.

The Respondents, in opposition filed comprehensive affidavits, which in part raised a point *in limine,* namely that the Applicant has adopted a wrong procedure in seeking relief by motion proceedings when, to his knowledge, there are serious and substantial disputes of fact.

The question whether there are real and substantial disputes of fact is the subject of this Ruling, together with a directive as to the course the proceedings should assume henceforth.

Mr Flynn argued that the following constituted serious disputes of fact and which would require the aid of oral evidence for resolution:-

(i) that it is clear on a reading of the Applicant's papers that there is a dispute regarding the Applicant's entitlement to have access to the premises in view of the allegations by the 2nd Respondent which saw the Court granting the latter relief in terms of the *mandament van spolie* when the Applicant resorted to self-help in order to remove the 2nd Respondent from the premises;

(ii) there is a dispute regarding the Applicant's allegation that the 2nd Respondent has no lease agreement with the 2nd Respondent.

(iii) whether the Applicant cancelled the agreement entered into with the 1st and now 2nd Respondent. If so, whether that cancellation was lawful.

In the course of reading the full set of papers, I also discovered certain disputes of fact as follows:-

(a) whether the 1st and/or 2nd Respondents were in breach of the lease agreement, in view of their assertion in paragraph 12 of the Answering Affidavit that they were up to date with the rentals of the premises, and whether the 1st Respondent continued paying rental after ceasing to conduct business;

(b) whether there was an oral agreement between the 1st Respondent and the Applicant after the business was purchased by the former from Yulnick (Pty) Ltd. If so, what the status of the agreement is at present;

© whether the Applicant sold the business operation, including the lease agreement with its option to the 2nd Respondent in terms of a deed of sale marked "MP1". If so, the effect thereof.

All these in my view constitute disputes of fact and law, which clearly cannot be resolved without recourse to oral evidence.

In **ROOMHIRE CO. (PTY) LTD VS JEPPE STREET MANSIONS (PTY) LTD 1949 (3) SA 1155 (T.P.D)** at **1162**, Murrary A.J.P. stated the following:-

> *"It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated **infra**) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling **viva voce** evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his*

application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action."

The above excerpt is accurately reflective of the provisions of Rule 6 (17) and (18) of Rules of Court as amended. Contrary to Mr Mkhatshwa's contentions, it is my view that there are serious disputes of fact *in casu.* I may mention that Mr Mkhatshwa informed the Court that the other proceedings referred to in the papers have been finalised in his client's favour by the Chief Justice. That may be so but the copy of the relevant judgement was not placed before me to consider the effect, if any, that it has on the disputes of fact presently before me. Whatever its scope and effect, it is my view that it does not serve to resolve the numerous disputes of fact outlined above. Practitioners who make reference to judgement or orders of Court must place them before Court for consideration. It is not the duty of the Judge to run helter – skelter searching for orders or judgements referred to in Court and whose effect, identity and location is not easily ascertainable.

The only question is how the discretion of the Court ought to be exercised in the premises. Mr Flynn urged this Court to dismiss the application with costs. My view is that it would be proper to adopt the course urged by Mr Flynn where it is shown that notwithstanding knowledge or a realisation that a dispute was bound to arise, the Applicant persisted in motion proceedings.

It is my view that this is a proper case for the dismissal of the Application as from the previous relationship and dealings between the parties, as evidenced in part by previous litigation and disputed oral, written agreements of sale and lease, it was evident that any attempt to eject the Respondents would inevitably be opposed, raising serious disputes of fact and questions of law in the process. I note adversely to the Applicant that notwithstanding the realisation that serious disputes would inevitably arise, he chose to launch these proceedings, not only on motion but under a certificate of urgency, in which case the time limits afforded Respondents to fully place their case before Court is greatly curtailed.

In **GARMENT WORKERS UNION VS DE VRIES AND OTHERS 1949 (1) SA 1110 (W)** at **1133,** Price J. made lapidary observations which practitioners in this Court would do well to consider and strictly adhere to. The learned Judge stated the following:-

> *"It is becoming a habit to bring applications to Court on controversial issues and then to endeavour to turn them into trial actions. Applicants thereby obtain a great advantage over litigants who have proceeded by way of action and who may have to wait for many months to get their cases before the Court. Such applications – cum-trials interpose themselves, occupying the time of Judges and still further delaying the hearing of legitimate trials. Applications for the hearing of* ***viva voce*** *evidence in motion proceedings should be granted only where it is essential in the interests of justice."*

See also **SELOABI AND OTHERS VS SUN INTERNATIONAL (BOPHUTHATSWANA) LTD 1993 (2) SA 174 (BGD)** and **MAGAGULA VS TOWN COUNCIL OF MANZINI AND OTHERS 1979 – 81 SLR 291** at **293** (per Nathan C.J.).

In view of the foregoing, the proper order would be that the application be and is hereby dismissed with costs.

T.S. MASUKU
JUDGE