

THE HIGH COURT OF SWAZILAND

FIRST NATIONAL BANK T/A (WESBANK)

Applicant

And

SIBONGILE DLAMINI N.O

1<sup>st</sup> Respondent

MASTER OF THE HIGH COURT

2<sup>nd</sup> Respondent

Civil Case No. 202/2005

Coram: S.B. MAPI IA I. A LA J

For the Applicant: MR. M. MABILA

For the Respondents: MR. J. MASEKO

RULING

(On points of law in limine) (02/02/2005)

[1] Serving before court is an application brought under a Certificate of Urgency for an order inter alia, declaring the instalment Lease agreement between the Applicant and the late Austin Sangoma Vanda Dlamini cancelled; directing the 1<sup>st</sup> Respondent to forthwith deliver to the Applicant described in prayer 4 thereof and further forms of relief are sought in prayers 5, 6, 7 and 8 thereof.

[2] The Founding affidavit of one Jerry Dlamini (he supervisor at Wesbank, a division of First National Bank of Swaziland Limited, Mbabane is filed in support thereto. Various annexures are also filed.

[3] The Respondents oppose the granting of this application and has filed a Notice to raise points of law // limine, for the time being. These are the subject matter of this ruling.

[4] These points read ipssisima verba as follows:

1. The Applicant is estopped and or barred from approaching the above court for the relief they seek pending compliance with the courts order under Mbabane Magistrate Court Case No. 1368/04 and payment of" costs thereof. The Applicant has approached the court with "dirty" hands. 4
2. The Applicant's papers are fatally defective in that it seeks to rely on a contract of Lease (written) yet same is not annexed.
3. Should the said agreement not be available action proceedings would be the most appropriate - a claim for damages.
4. The Applicant's papers are fatally defective in that they do not meet the requirements of Rule 6 (25)

(b) of the Rules of the above Honourable Court.

5. The Applicant has failed to set out explicitly the circumstances which it avers renders the matter urgent and the reasons why it claims it cannot be afforded substantial redress at a hearing in due course.

6. The Applicant's papers are fatally defective in that in respect of the 1<sup>st</sup> Respondent has not been established whether she has the necessary capacity to sue and be sued (i.e. age and marital status).

[5] I heard arguments in this matter on the 28<sup>th</sup> January 2005, and reserved judgment.

[6] I shall proceed to address the issues ad seriatim as they appear in Respondents Notice to raise points of law in limine, thus:

a) The doctrine of "clean hands".

[7] It is contended on behalf of the Respondent that the Applicant has approached the court with "dirty" hands in that it has not complied with the order of the Mbabane Magistrate Court Under Case No. 1368/04 to return the said motor vehicle to the Respondents. However, on perusal of the record from the Magistrate Court there is no definitive ruling by the learned Magistrate that the motor vehicle be returned to the Respondent. In this regard I agree with the submissions by Mr. Mabila that this point is without merit on the facts before me.

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b) Lease agreement not annexed.

[8] The contention in this regard is that the Applicant's papers are fatally defective in that it seeks to rely on a contract of lease (written) yet same is not annexed.

[9] Mr. Mabila answers this contention by the 1<sup>st</sup> Respondent by citing paragraph 10 of the Applicant's affidavit which offers an explanation for not annexing the lease agreement, thus:

"Under suspicious circumstances, and due to the fact that the Applicant is a big institution with a lot of employees who have access to the Applicant's records at its premises, the file containing the written agreement, and all other documents pertaining thereto, between the Applicant and the deceased has mysteriously disappeared, and despite a diligent search cannot be located, hence a true copy of the agreement between the parties has not been annexed hereto".

[11] It appears to me that the above explanation suffices in the present case and also on perusal of the papers filed of record one can conclude that there was indeed an agreement over the said motor vehicle between the Applicant and the deceased.

[1.2] I rule therefore that this point of law in limine cannot be sustained.

[13] Point of law in limine no. 3 viz "should the said agreement not be available action proceedings would be the most appropriate - a claim for damages" is not clear. In this regard I agree with the submission made by Mr. Mabila that the Applicant in casu in applying for a return of its motor vehicle and the question of damages does not arise in any of the prayers sought. Therefore this point of law in

limine cannot be sustained.

c) Requirements of Rule 6 (25) (a) and (b) of the High Court Rules.

[14] I proposed to deal with point 4 and 5 thereof together. Under point 4 it is contended for the Respondents that the Applicant's papers are fatally defective in that they do not meet the requirements of Rule 6 (25) (b) of the Rules of this Court. Under point 5 the argument is that Applicant has failed to set out explicitly circumstances which it avers renders the matter urgent and the reasons why it claims it cannot be afforded substantial redress at a hearing in due course.

[15] In this regard Mr. Mabila for the Applicant directed the court's attention to paragraphs 18 to 22 as averments founding urgency in this case.

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[ 16] The said paragraphs read as follows: URGENCY

18. There is no proof that the motor vehicle is insured against all insurance risks, all loss and damage hence in the event of any accident and/or unfavourable incident the Applicant stands to suffer in that its interests in the motor vehicle will be eroded if the same is released to the 1<sup>st</sup> Respondent thus the sooner the orders sought in the Notice of Motion are granted the better.

19. Furthermore, the fact that the 1<sup>st</sup> Respondent will use the motor vehicle on a daily basis will result in the Applicant's proprietary interests in the motor vehicle being eroded, and in any claim for damages the Applicant would have to prove deterioration in monetary terms which may be difficult or impossible to do in that this would not be a simple matter of assessing the value of the motor vehicle

alone as it would be further expected that (here be calculations, inter alia of interests and profits Applicant would have made had its proprietary interests been protected.

20. In any event, the 1<sup>st</sup> Respondent would not be in a position to reimburse the Applicant the loss which may be suffered as she is not in gainful employment and has no sustainable and/or proven source of income ever since the demise of the deceased.

21. It is worth mentioning the Applicant has indicated that it is willing to enter into an agreement with the 1<sup>st</sup> Respondent in respect of the motor vehicle and has, on several occasions, requested the 1<sup>st</sup> Respondent to present her financial statements for assessments by Applicant and has failed.

22. The foregoing fact, coupled with the non-payment of monthly instalments is indicative of her inability to pay the debts of the estate of the deceased, thus in all probability and reasonableness, she cannot afford to properly maintain the motor vehicle which will certainly result in the deterioration of its condition and depreciation.

[17] In my assessment of these paragraphs I find that the requirements of Rule 6 (25) (a) and (b) have been met. (see *Humphrey II. Henwood vs Maloma Colliery and another* - Civil Case No. 1623/93 (per Dunn J) and that *H.P. Enterprises (Pty) Limited vs Nedbank (Swaziland) Limited* Civil case No. 788/99 (per Sapire CD).

d) 1<sup>st</sup> Respondent's locus standi.

[18] The submission under this point is that the Applicant's papers are fatally defective in that the 1<sup>st</sup> Respondent has not been established whether she has the necessary capacity to sue and be sued (i.e. age

and marital status).

[19] In answer to this allegation Mr. Mabila directed the court's attention to paragraph 3.1 of the Founding affidavit where the following is averred: "the first Respondent was married to the deceased during his lifetime and as such is cited herein because she has taken charge of (the estate of the deceased in terms of Section 19 and/or Section 20 of the Administration of Estates Act 28/1902 (hereinafter referred to as the Act))".

[20] Section 19 and 20 thereof reads as follows:

Possession by survivor of estate in community of property.

19. When one of two spouses who have been married in community of property dies; the joint estate shall remain under the charge of the survivor, until the executor of the deceased, or the tutor testamentary or dative of the minor children of the marriage, or the Master or curator bonis lawfully appointed to such minor children, takes proceedings for the administration, distribution, and final settlement of the said joint estate;

Provided that nothing in this section shall prevent any such joint estate from being placed under sequestration as insolvent.

Custody of estate of persons not married in community.

20. On the death of a person, not being one of two spouses, married in community of property, the husband or wife of the deceased, or in default or absence of the husband or wife a child of the

deceased, or in default, absence or minority of a child the next of kin of the deceased, or in default, absence or minority of the next of kin, the person who at or immediately after the death has the chief charge of the house in, or of the place at which the death occurred shall secure and take charge of all goods and effects of whatever description belonging to the deceased, and in the house or upon the premises at the time of death, and shall retain them in his custody or possession until delivery thereof is demanded by the executor of the deceased or by any other person lawfully appointed by the High Court, or the Master to receive delivery thereof.

[21] The court was further referred to the legal authority in Herbststein et al, The Civil Practice of (lie Supreme Court of South Africa, 4<sup>th</sup> Eel at page 130 and that of Erasmus, Superior Court Practice (Juta) at B - 23.

[22] In view of the above-cited provisions of the Administration of Estates Act, and the legal authority referred to by Mr. Mabila I find that the 1<sup>st</sup> Respondent in the instant case has (he necessary locus standi in judicio. Therefore this point of law in limine ought to fail.

[23] In the totalily of what I have said above I am inclined to grant the order sought.

[24] In the result, a rule nisi to issue in terms of prayers 1, 2, 3, 4 and 5 of the Notice of Motion returnable on the 4<sup>th</sup> February 2005.

S.B. MAPHALALA



JUDGE