IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 2458/2005

In the matter between:

DOGAR GENERAL INTERNATIONAL INVESTMENTS t/a NASHUA SWAZILAND Applicant

and

MATSAPHA COMMERCIAL CENTRE TWO (Pty) Ltd 1st Respondent

MELUSI QWABE N.O. 2nd Respondent

Coram Annandale, AC J

For the applicant	Mr. M. Simelane of Waring Simelane Attorneys, Mbabane

For the 1st Respondent	Mr. A.M. Lukhele of Dunseith Attorneys Mbabane

2nd Respondent No Appearance

JUDGMENT
05 AUGUST 2005

[1] As urgent application, the applicant seeks an interdict, with immediate interim effect, to restrain and interdict the first respondent from proceeding with service of a warrant of eviction and also to set the warrant aside. Costs are sought on the punitive scale of attorney and own client. Over and above the usual prayers for further and/or alternative relief, this is the full extent of the applicant's prayers.

[2] This matter has a history that first has to be looked at before the present application can be contextualised, the facts of which are not set out in the present application as such, but incorporated through a previous application brought by the same applicant in the same matter.

[3] The present applicant (the lessee) noted an appeal against a decision of the High court wherein summary judgment was granted against it. The present first respondent (the lessor) obtained an order ejecting the lessee from the leased premises at portion 2 of Lot No. 178 situate at Fifth (Simunye) street in Matsapha. In the judgment of the Court of Appeal, having carefully considered the possibility whether the allegations made by the appellant (now applicant) at the application for summary judgment, if proved, would constitute a valid defence to the claim for ejectment, it was unanimously found that it did not disclose a defence. The appeal was accordingly dismissed. The court held that the lease that the appellant/applicant contended for could not be held to be a valid and enforceable lease. (Unreported Civil Appeal Case No. 44/2004).

[4] Notably, the court did not stipulate any period within which the premises had to be vacated. The appeal judgment was delivered on the 24th June 2005.

[5] Soon afterwards, the applicant wanted to move an application on the 1st July, to seek a stay of the appeal judgment for a period of 30 days. It also sought all steps in execution of the judgment to be stayed pending finalisation of the application.

[6] In its founding affidavit, the applicant stated that it is prepared to abide by the judgment of the Appeal Court and that it has made arrangements for alternative premises. It also set out in detail what problems it had to vacate the premises on very short notice, stating it was effectively given 72 hours to vacate.

[7] Apparently, its business operations are "huge and complex", with a workshop which has delicate machinery and it requires expert services to dismantle and remove it, skills not possessed by a deputy sheriff. It contended that it would suffer huge losses if improperly dismantled and that losses by the lessor would be well covered by continued rental payments during the time it vacated on own volition.

[8] Further, the applicant stated that despite efforts by the attorneys of both parties, its legitimate expectation of a reasonable time to vacate were dashed by the lessor's unrelenting insistence on virtual immediate vacating of the leased premises. It also brought in issue a counterclaim for damages, said to have been raised in its affidavit resisting summary judgment. It therefore sought under Rule 32 (4) (b) that the High Court should exercise its discretion to stay execution.

[9] This subrule reads:-

> "*34(b) The court may order, and subject to such conditions, if any, as may be just, stay of execution of any judgment given against a defendant under this rule until after the trial of any claim in reconvention made or raised by the defendant in the action.*"

[10] From the evidence of the applicant on affidavit and from a scrutiny of the judgment on appeal, it does not seem at all that either the High court in the initial action or the Court of Appeal dealt with the issue of either a counterclaim or a stay of execution of the ejectment, pending the outcome of a counterclaim. If the applicant raised such counterclaim in its resisting affidavit, it would have been at liberty to argue that point on appeal and further to seek a stay of execution of the ejectment until the determination of a counterclaim. As said, the appeal judgment is tacit on any such aspect and it seems to me as if the applicant belatedly tries to clutch at such a straw.

[11] The applicant remains at liberty to seek advice on the institution of a claim for damages against the lessor but the time to raise it before court as an excuse to stay the summary judgment, which has already run the gauntlet of an appeal, has come and gone. The applicant cannot now at this belated stage seek a stay on the back of a

counterclaim which it did not do at the opportune times that it had at its disposal, in both the High Court and the Court of Appeal.

[12] On the date that the aforesaid application was to be made, both parties were represented in court and it was recorded that by mutual agreement, the matter was postponed to the 5th July 2005.

[13] On the latter date, the court file reflects that only the respondent's attorney was before court, that the applicant's name was called three times without response and that the court then, at the respondent attorney's request, ordered that in the circumstances the application be dismissed, with costs.

[14] It is this order that gives rise to the application at hand.

[15] On the same day, the 5th July, the applicant filed a second notice of appeal in the already protracted matter. It erroneously refers to the date of the dismissal of its application as the 4th July, not the 5th. It goes on to state the grounds of appeal as follows:-

> "*1. The learned Judge erred in law and in fact in dismissing the application without hearing the*

applicant's case when the matter was clearly contested (sic).

2. *The learned judge erred in law and in fact in refusing to have the matter re-argued (sic) as both counsel were in attendance.*"

[16] I deliberately refrain from making any remarks about the contents of the notice as it is not for this court to do so and also not to entertain the merits of prospects of success on appeal.

[17] I now turn to deal with the present application, brought as one of urgency. Urgency itself is not in contention.

[18] The applicant formulates the further prayers it seeks as follows:-

"*2 Ordering that a Rule Nisi do hereby issue calling upon the Respondent to appear and show cause, if any, to this Honourable Court at a time and date to be determined by the above Honourable Court why an Order in the following terms should not be made final;*

2.1 *That the Respondent he and is hereby restrained and interdicted from proceeding with service of the Warrant of Eviction.*

2.2 *That the warrant of eviction be and is hereby set aside.*

3. *Directing that the* Rule Nisi *referred to in paragraph 2 above operate with immediate effect pending the outcome of these proceedings.*

4. *Directing that the Respondent pays costs of suit on a scale as between attorney and own client.*

5. *Granting the applicant such further and/or alternative relief as the above Honourable Court seem meef'(sic).*

What the applicant effectively seeks is a restraining interdict to prevent the execution of the judgment of the Court of Appeal, which adversely affects it. The basis on which this application is to be decided is whether the requirements for such an interdict have been met by the applicant. Some further issues are also raised in the sideline.

In the founding affidavit, the applicant refers to the first application to follow the appeal judgment, referred to above, where a stay of execution was sought. He states in paragraph 6(page 7 of the record):

> "*Pursuant to the dismissal of the application for non appearance by our attorney, and late arrival at Court. Though he told me that reasonable effort was made to have the matter enrolled by consent, Mr. Lukhele for the 1st respondent did not agree. The effect of the refusal was that the matter remained as one that is dismissed. An affidavit of applicant's attorney is annexed hereto marked 'B'*".

[21] The applicant goes on to refer to the Notice of Appeal and then turns the focus to the warrant of eviction that was served on it by the second respondent, with full knowledge of the noted appeal.

[22] In a recent judgment of this court it has been held that the execution of a judgment is *ipso facto* suspended upon the noting of an appeal and that until such time that the appeal has been finalised, the judgment cannot be executed without leave to do so. (Unreported Civil Case No. 2265/2004 of the 10th June 2005: **MATER DOLOROSA HIGH SCHOOL VS NEDBANK AND TWO OTHERS: IN RE: RMJ STATIONARY (PTY) LTD VS MATER DOLOROSA HIGH SCHOOL,** at para . 27).

That matter is distinguished from the present application in that no determination of the right to defend a cause had yet been made by a final judgment on appeal, as has been the case in the present matter. Both cases follow on an application for summary judgment. In **MATER DOLOROSA** the applicant, as it is the position in the instant matter, noted an appeal against the summary judgment granted against it. In **MATER DOLOROSA,** the outcome of the determination of the appeal was held to be good cause for ordering a stay of execution. In this case, a final determination has already been made by the Court of Appeal, whereby the defence that the present applicant, the lessee raised, was held to be of no merit. The lessee was ordered by the High Court to vacate, the order being confirmed on appeal.

MATER DOLOROSA thus cannot sustain the argument of the applicant that it yet again has an *ipso facto* right to a stay of execution pending the outcome of its second appeal.

The applicant further relies on the absence of his attorney in court as a ground to stay execution. To do so flies in the face of the consistent refusal by the courts to rescind where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney. **(BRISTOW V HILL** 1975(2) SA 505(N); **DE WET V WESTERN BANK LIMITED** 1979(4) SA 27 (T); **TSHABALALA V PEER**

1979(4) SA 27(T); ATHMARAM V SINGH 1989(3) SA 953(D); **BAKOVEN LIMITED V GJ HOWES (PTY) LTD** 1992(2) SA 467(E)). These same principles equally apply where, as in the present application that was dismissed, the applicant's attorney did not appear in court to prosecute the opposed application while the opposing party was before court, ready to be heard.

When such occasion arises, and an appeal is noted in respect to the dismissal for a failure to be present in court to move the application, it is a different matter altogether as was the position when the first appeal was noted against the granting of summary judgment. It is under circumstances such as the first appeal that **MATER DOLOROSA** *(supra)* can be relied upon as authority that a pending appeal stays execution of a judgment.

A secondary ruse which was referred to above concerns the alleged incapacity of the deputy sheriff entrusted with the writ of eviction in execution of the appeal judgment.

The applicant holds forth that the deputy sheriff did not produce an identification card to the lessee to prove his appointment, further that he allegedly did not have indemnity insurance. This, it is contended, invalidates whatever the deputy sheriff tried to do in consequence of the appeal judgment.

Much time was spent in court at the hearing of argument about this issue. Mr. Simelane harped upon this point, arguing that whatever the deputy purported to do was of no legal effect, in line with his instructions and as set out in the applicant's founding affidavit.

To cut a long story short, there is no legal requirement in the antiquated Sheriff's Act of 1902 or in the High Court Rules that make these aspects a *sine qua non* for lawful execution of a writ. The sheriff of Swaziland, who appoints deputies, may well have the ability to require certain conditions for appointment to be in place and in conjunction with the Association of Deputy Sheriffs and messengers of court, require adherence to a professional Code of Conduct. These are domestic requirements, not legal prerequisites. Until such time, which I agree is long overdue, that such aspects are incorporated into legislation, non-compliance cannot be a legal impediment to the execution of a writ of ejectment, provided that the further aspects have been complied with.

The second respondent, cited *nomine officio,* filed a copy of his letter of appointment by the Sheriff. This document was inadvertently omitted from the answering affidavit, but filed by consent, from the bar, as page "62B" of the Book of Pleadings. *Ex facie* the document, the second respondent was appointed

with effect from the 1st July 2005. The writ was served thereafter. This argument cannot stand.

As an aside, the Sheriff is encouraged to use this aspect as further motivation to persuade the relevant authorities to make haste in the preparation of a draft bill encompassing the Sheriffs profession, it being the effective arms and feet of the court in especially civil matters.

I now turn to the determinative issue, namely whether the applicant has a right to the relief it applies for.

[34] In paragraphs 13 - 16 of the founding affidavit (record p.9) the applicant states:-

> "*13. The Applicant has a clear right to the relief it is seeking in that it is unlawful for the Respondents to continue with eviction when clearly an appeal has been noted. And also when the person purporting to act as Deputy sheriff has not fulfilled all the requirements of his appointment. The rules are clear as to the persons entitled to serve Court process.*
>
> *14.From the aforegoing it is clear that an apprehension of harm has occurred as the 2nd Respondent has threatened to return in the*

morning of 8th July 2005 at 6.30 am.. If he does return as threatened clearly the harm suffered by the Applicant will continue in that the business premises will be shut to the inconvenience of customers and employees.

15.The balance of convenience favours the grant of the interdict. In that if the interdict is refused, the applicant will suffer more prejudice than the respondents would if it be granted. The applicant has tendered payment for July rental. The 1st Respondent is in the business of letting and hiring out of property, clearly the rental payment is all that the Respondent wants.

16. The applicant has no other satisfactory remedy at its disposal other than the interdict. The respondents have ignored all lawful means to resolve the impasse created by the noting of the appeal, and no results have been achieved, hence the application for the interdict."

[35] The contention of the applicant that it has a clear right to an interdict, must be viewed from two different angles. Firstly, it does not automatically have a clear right to

suspension of execution of an order of the Court of Appeal, vis-a-vis **MATER DOLOROSA** *(supra)* insofar as it follows the noting of an appeal, as has been held above.

[36] Secondly, when this view is focussed on a right to remain on the leased premises, therefore having a purported clear right to an interdict preventing it from being ejected, any misconception that it may have had was clearly dispelled by the *ratio* of the outcome of its appeal against the summary judgment.

[37] The interdict that the applicant wants against the respondents is to stop them from executing the warrant of eviction and to set aside the warrant. For this to be done, in the case of an interlocutory or interim interdict, it must at minimum have a *prima facie* right.

[38] On appeal, it was held that it had no right to resist an eviction order, primarily because it did not have an enforceable valid lease to occupy the premises. Presently, the applicant again wants to resist eviction, from a different angle, but still it remains the same issue.

[39] The applicant does not have either a *prima facie* or a clear right to remain in occupation of the premises. In the often referred to authority of **SETLOGELO V SETLOGELO,** 1914 AD 221 and numerous decisions thereafter, it has

repeatedly been held that the irreparable harm that an applicant seeks to prevent, it having no other remedy, must be predicated by a *prima facie* right to the interim interdict it seeks. Such a right was compellingly dispelled by the Court of Appeal.

[40] The apprehension of harm, irreparably so, and the absence of any other alternative remedy has also been exhausted. Understandably, the applicant may face harm and losses if the deputy sheriff invades the premises with blundering incompetence, lawfully or otherwise. There remain however the ameliorating process in which eviction is to be effected, as ordered below. The bottom line, so to speak, remains that the applicant cannot claim a right to remain in occupation of the premises it leases from the first respondent.

[41] Finally, it was remarked in open court, prior to hearing of the matter at the second appearance on the 3rd August, that the parties should be able to settle the date of vacating the premises amicably. It thereafter seemed that the lessor retains an unrelenting and forbidding attitude, insistent on the strict and formal legal rights that it indeed has.

[42] I have considered, in light of this, to determine a period of grace during which the lessee could make haste and vacate the premises on own steam.

[43] However, this aspect was not argued or dealt with in the present application either. In the first application, which was dismissed by default of appearance by the applicant, the applicant sought a period of grace, against full payment of rental, to be given thirty days within which to vacate. It wanted the opportunity to bring in expert technicians to dismantle and pack delicate mechanical fixtures and equipment to prevent damage and losses.

In **BHYAT'S DEPARTMENTAL STORE LTD V DORKLERK INVESTMENTS LTD,** 1975(4) SA 881 (A.D.) this aspect was dealt with by Van Blerk, A.C.J, at p. 886, in the following terms:

> "*The appeal cannot succeed. At the close of his argument the appellant's counsel asked, in the event of the appeal not succeeding, that the appellant be allowed three months' time within which to vacate the premises. The court of first instance granted the order of ejectment simpliciter. No time within which to vacate was allowed. No argument was addressed to us on the question whether a court has a discretion to grant time within which to vacate. In*

LOVIUS AND SHTEIN V SUSSMAN, *1947(2) SA 241 (O) at p. 243, Van den Heever, J., found it difficult to appreciate how the Court can, in the absence of any statutory provision, delay the enforcement of a legal right which it has found a plaintiff is entitled to.*

In ***POTGIETER AND ANOTHER V VAN DER MERWE,*** *1949(1) SA 361 (A.D.) at p. 374,*

> *Centlivres, J.A., after referring to a number of cases, in some of which orders of ejectment were granted simpliciter and others in which time to vacate was allowed, concluded by saying:*
>
> > *'It is, however, unnecessary for me to decide whether a Court of law has the discretion referred to, but may I add that in my view, if it has that discretion, it must exercise it judicially. It is open to question whether, assuming there is such a discretion, an appellate tribunal should, save in exceptional circumstances, grant a defendant against whom an order of ejectment has been made by an inferior court, time within which to vacate the premises.*

(as followed in **E.P. du TOIT TRANSPORT LIMITED V WINDHOEK MUNICIPALITY,** 1976(3) SA 818 (S.W.A.) at 819G - 820A by Hart, J).

[45] I respectfully agree with the abovestated legal position. It is therefore not ordered that the applicant be given a specific period within which it must vacate. The ejectment order, confirmed on appeal, remains *simpliciter.*

[46] The first respondent's attorney convincingly argued that the applicant abused the legal process and that costs should be awarded on the punitive scale of attorney and client. I must however also consider, objectively and judicially, the predicament that the applicant has come to be placed in.

[47] At first, it had occupancy for as long as it pleased to have, but because it was not notarially executed it fell foul of the requirements of Section 30(1) of the Transfer Duty Act, 1902 (Act 8 of 1902), because it was (correctly) construed as a lease of not less than ten years.

[48] It is not to the knowledge of this court that the lessee failed to service its rental payments. The *causa causans* of the notice to vacate and a termination of the lease are not issues before this court. It seems to be common cause

that considerable expenditures were effected by the applicant to make the leased premises suitable for its specialised operations.

[49] Though the applicant does not succeed with its application and further, as has been adumbrated above, it grasped at straws of grass to preserve its untenable position, I do not find it conscionable to order punitive costs against it for trying every possible avenue to cut its losses.

[50] In the event, the application dated the 7th July 2005 is ordered to be dismissed, with costs (on the ordinary scale) to follow the event.

[51] It is further ordered, in order to ameliorate losses and damages by the applicant, that the deputy sheriff mandated to evict, shall have proper regard to the equipment installed in the leased premises, and allow the lessee to provide specialised technicians, to be available during normal working days and business hours, to effect dismantling and packing of equipment installations, under his direct supervision.

JACOBUS P. ANNANDALE
ACTING CHIEF JUSTICE