

IN THE HIGH COURT OF SWAZILAND

CIVIL Case No. 2265/2007

NGAJANE DLAMINI

Applicant

And

**LOMAFA INVESTMENTS (PTY) LTD DEPUTY
SHERIFF FOR THE DISTRICT OF
SHISELWENI PAT JELE N.O.**

1st Respondent

2nd Respondent

In Re:

LOMAFA INVESTMENTS (PTY) LTD

Applicant

And

NGAJANE DLAMINI

Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. Z. JELE

For the Respondent

MR. T. MLANGENI

JUDGMENT

8th August 2007

[1]The Applicant has raised a point of law to the effect that the 1ST
 Respondent's application for amendment of the judgment dated the 20 July 2007, as
 well as the addition of an addendum to the judgment be stayed on the basis that
 the 1st and 2nd Respondents have failed notwithstanding the
 service of the order to comply with the judgment of court dated the 20 July 2007.

[2] In arguments before me last Friday *Mr. Jele* for the Applicant premised the
 arguments of the Applicant on the *dictum* in the local judgment in the matter of
Photo Agencies (Pty) Ltd vs Commissioner of the Swaziland Police 1970 - 76 S.L.R. 398
 where the following statement of the law was said by the learned Chief Justice
 Nathan:

"The nearest analogy I have been able to find is that of the fugitive offender who in the cases
 of *Mulligan vs Mulligan 1925 WLD 164* and *S v Nkosi 1963 (4) SA 87 (T)* was held to have
 forfeited the right to seek assistance in court. Before a person seeks to establish his rights in a
 court of law he must approach the court with clean hands: where he himself through his own
 account makes it impossible for the processes of the court (whether criminal/civil to be given
 effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and
 interests ... were the court to entertain a suit at the instance of such a litigant it would be
 stultifying its own processes and it would, moreover, be conniving at and condoning the
 conduct of a person who through his flight from justice sets law and order in defiance".

[3] Counsel for the Applicant contended that since the cattle have not been delivered
 to the Applicant as directed by the court order of the 20th July 2007 both the 1st and
 2nd Respondent cannot be heard by this court until they have purged their contempt.

[4] Counsel for the 1st Respondent agreed with the statement of law as stated by *Mr.*
Jele when he cited the case of *Photo Agencies* but said his client the 1st Respondent
 Lomafa Investments (Pty) Ltd is not in contempt of the order of court dated 20th July

2007 as it is the 2nd Respondent as the Deputy Sheriff of this court who should execute the orders of court.

[5] *Mr. Jele* for the Applicant in reply cited the case of *Butchart vs Butchart 1997 (4) S.A. 108* where it was held that the Plaintiff remains liable for the consequences of the writ of execution being set aside. In his supplementary Heads of Arguments which I received yesterday the 7th August 2007, *Mr. Jele* referred the court to the provisions of Rule 45 (1) of the High Court Rules which provides that "**the party in whose favour any judgment of the court has been pronounced may at his own risk, sue out the office of the Registrar one or more writs for execution thereof as near as may be in accordance with form 20 of the First Schedule**".

[6] It appears to me that *Mr. Jele* is correct that where the Plaintiff issues the writ at his own risk, it has been held that if the attachment causes damage to the judgment debtor or third party, the judgment creditor, and not the sheriff is liable therefore. I further agree with the Respondent's contention that the operative words for purposes of this matter are that, the Applicant may **at his own risk** sue out.... Furthermore, it appears that the judgment creditor is not liable, if the sheriff has acted outside the scope of his authority.

[7] The writ was issued and an interim order set aside the writ directing the return of the attached goods. The order has been served on the attorney, who is responsible for issuing out the writ at his own risk out of the office of the Registrar. I further agree with *Mr Jele* that the attorney cannot ignore the order of court nor can they distance themselves and contend that this is now an issue for the Deputy Sheriff only.



S.B. MAPHALALA

JUDGE

[8] In the result, for the afore-going reasons the point of law by the Applicant succeeds and the 1st Respondent's application for amendment of the judgment dated the 20th July 2007 is stayed as well as the addition of an addendum. Costs reserved to the merits of the case.