IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL TRIAL NO. 2881/08

In the matter between:

Mnengwase Handicrafts and Weaver (PTY) Ltd Appellant

Vs

Deokee Kanhiya Respondent

CORAM: MONAGENG, J

FOR Plaintiff: Mr. D. Madau

FOR Defendant: Mr. J. Rodrigues

JUDGMENT

22nd AUGUST 2008

[1] In this matter, the applicant, Mnengwase

Handicrafts and Weavers (PTY) Ltd and the Respondent Deokee Kanhiyi hereinafter referred to as Seller and Purchaser respectively, entered into an agreement of sale "DK3" on the 8th January 2008 or at least signed an agreement for the sale of a business including goodwill on that date.

[2] The business known as Shiba Rugs, including all the assets of the business, was to be bought for the sum of E55,000.00. The buyer was to pay the some of E5,000.00 on or before the 30th November 2007. The balance was to be paid over a period to be mutually agreed by the parties.

[3] It was a further condition of the agreement that failure by the purchaser to pay the stipulated purchase price, on the stipulated terms, shall lead to the automatic cancellation of the agreement, with or without notice to the purchaser.

[4] The agreement further stipulates that, in the event of the purchaser failing to make payment of any installment by the due date thereof, or in the event of the purchaser

committing any act of insolvency, then the whole of the balance would be payable forthwith.

[5] The respondent avers that he has paid E 17,000.00 in respect of the said business and that there is a balance of E38,594.55 that is outstanding, although it appears that the balance is in dispute.

[6] On the 8th August 2008, the applicant obtained an interim order on urgency, from the High Court, against the respondent, ***inter alia:***

1. restraining and interdicting the respondent from disposing of the business sold, including all assets of the business, pending finalization of proceedings to be instituted against respondent.
2. authorizing the deputy sheriff, Sandile Dlamini, to attach all the assets of the business and to retain same under his custody pending further direction by this Court.
3. costs of the application.

[7] The applicant in its application and in support of the granting of the interim order alleged that:

1. the nationality of the respondent is not known to the applicant thus raising a risk that he may abscond anytime.
2. the respondent, despite having been given more than sufficient time to settle the balance of the purchase

price, has failed and has neglected to pay and currently owes the sum of E38,594.55, which amount includes interest.

3. there is a strong likelihood that if the respondent were to be given notice of the application, he may either dispose of the goods forming the subject matter therein, or that he may abscond, to the prejudice of the applicant.

[8] The present proceedings are brought to Court in anticipation of the return date and for confirmation of the ***rule nisi,*** and the respondent opposes the application. The respondent filed papers wherein he refutes the allegation that he is disposing of the assets of the business. He further avers that he is not leaving Swaziland, nor does he have the intention to. The respondent has been resident in Swaziland since 1984 and is lawfully resident in Swaziland.

[9] He is also married to a Swazi woman and he produced a marriage certificate in proof and avered that the union has produced a child who goes to school in Swaziland. The respondent is apparently a Mauritian national who is in Swaziland on an entry permit.

[10] The respondent raised points of law, pursuant to Rule 6 (25) (b) of the High Court Rules, which reads "In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent, and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

Rule 6 (25) (b) provides:
"In urgent applications, the Court or judge may dispense with the forms and service provided for in these rules, and may

dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as the Court or judge as the case may be, deems fit". I will come back to this later on in the judgment.

[11] The respondent, in the further response to the allegations made by the applicant, submits that the applicant makes bare allegations and raises suspicions that are not borne out by any evidence. He says there is no evidence that he is selling he assets, and that he is about to leave or intends leaving Swaziland.

[12] Regarding the issue of default in payment, the respondent argues the he has paid the requisite deposit and that the two of them that is applicant and respondent have not agreed on the terms of liquidating the balance, and he relies on the Agreement of Sale "DK 3". He argues that he has not been placed in ***mora.***

[13] He further argues that the matter is urgent for him, since the Deputy Sheriff has attached all the goods and locked the respondent out of the building, therefore putting him into a critical financial state, where he is unable to generate income to meet the obligations of the company, including staff wages .

[14] The respondent further avers that the applicant has failed to satisfy the requirements of an interdict, in that it has not shown that it has a ***prima facie*** legal right to be paid the balance owing, in terms of the payment clause of the agreement. Further that the applicant has also not shown that he has no other legal remedy available to it, on the contrary, the respondent says that the applicant should have brought an action to claim what it thinks is due to it. Further, the respondent says that the applicant has not shown that it has suffered irreparable harm, the enable to Court to confirm the interim order.

[15] The applicant in response raised a few issues viz:

1. that despite the agreement DK 3, having been signed on the 8th January 2008, the agreement states that it shall take effect on the 30th November 2007, so that this raises a dispute of facts.
2. as the papers stand, there is no proof that the respondent paid the E15,000.00 deposit, hence the fear that respondent may run away.
3. the Agreement does not state when the balance should be paid, but the applicant says that to show reasonableness, the respondent has not indicated any goodwill to liquidate the balance, expect to offer a monthly repayment of E3000.00, which applicant has not yet accepted, and that this is an acknowledgement by him that he owes applicant the E38,594.55.

[16] The applicant raised issues of the date of expiry of the respondent's entry permit, DK 1 which is 8th December 2008 and which is in the name of a company NAGIN S Transport, and said that the respondent cannot rely on it to demonstrate some permanency of residence.

[17] Regarding the respondent's marital status, applicant avers that respondent's marriage to a Swazi woman does not make him a Swazi, and that he should have applied for citizenship, further that having a child who goes to school in Swaziland is neither here not there.

[18] The applicant avers that, given the above, it has prima facie established, though open to some doubt, its fears. The applicant further says that, regardless of existing remedies, its fears that respondent might abscond or dispose of the property are real and should be condoned by the Court, and that after all the goods are being held safely by the Deputy Sheriff, and asks the Court to confirm the interim rule.

[19] In considering the merits of this case, I wish to note that for whatever reason, the agreement DK3 was signed on

the 8th January 2008 and was to take effect from 30th November 2007. The applicant says that the latter date is the date it starts running, while the respondent says it takes effect from 8th January 2008. I agree with the applicant that this introduces a dispute of fact, which cannot be resolved at these proceedings.

[20] The payment clause is very clear, there was to be paid a deposit, the respondent says he paid the deposit, the applicant says he does not know whether the deposit was paid. One wonders why the applicant would say this when it claims only E38,594,55 out of the original E55,000.00. This is another dispute of fact to be settled elsewhere. I have strenuously tried to appreciate why, given the clear payment provision, the responsibility of effecting this provision has shifted to the respondent alone, when both parties have agreed to agree on the payment terms for the outstanding balance. There is no basis whatsoever, for the applicant, who is also to blame, in the event that there is anybody to blame, which I do not find, to act in such bad faith and misinterpret a clear provision of the agreement. The parties have not agreed on the payment terms and it was upon both of them to implement this provision.

[21] Failure to do so cannot be blamed on any party, in fact if blame has to be put on anyone, it should be on the applicant who is owed the money. I have also been surprised by the claim made by the applicant that it does not know the nationality of the respondent, I find this unbelievable. There is no way applicant could have handed over business assets worth over 50,000.00 to someone whose nationality it does not know, and again I find this very unfair on the respondent.

[22] The respondent is in Swaziland on a valid permit and remains lawfully resident in Swaziland and I do not believe that I need go any further with his residential status.

[23] The applicant says that respondent is about to dispose of the assets, surely if this is the case, the applicant should say to the Court, the respondent offered the goods to so

and so. The allegation that the respondent is about to abscond similarly should be backed by some action on the

part of the respondent. These cannot be feelings that the applicant has.

[24] A proper reading of the allegations raised by the applicant reveals a situation where it seems that the applicant has not been forthright with the Court, if at all it has anything cogent. Otherwise my view is that the fears that have been expressed are borne out of a misinterpretation of the agreement of sale. I am minded to agree with the respondent that what we have are mere fears and bare allegations that are not backed by facts, or evidence. This leads me to the consideration of the law.

[25] The law regulating this application is set out in Rule 6 (25) (b) as reproduced above. The question that begs to be answered is whether the applicant has satisfied this Rule. As mentioned above, there is nothing to back the fears that the applicant has expressed, the fears and apprehensions that led to applicant getting the interim order in the first place. These are mere speculations, and misunderstandings that cannot, on the face of it, be substantiated.

[26] In the case of ***H.P. Enterprises (PTY) Ltd v Nedbank (Swaziland) Ltd*** case No. 788/99 (unreported) cited in ***Megalith Holdings v Runs Tibiyo*** 199/2000, by Masuku J, Saphire CJ had this to say "a litigant seeking to invoke the urgency procedures, must make specific allegations of fact, which demonstrate the observance of the normal procedures and time limits prescribed by the Rules, will result in irreparable loss or irreversible deterioration to his prejudice, in the situation

giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow. In ***Bricktec (PTY) Ltd v Portland*** 1977 (2) SA 489 (T), the Court held "further on the balance of probabilities, the applicant had failed to show that the respondent intended to dispose of the properties concerned".

[27] These cases fall squarely into the circumstances of the present case. None of these requirements can be said to have been met, and there is no evidence to show, even on a balance of probabilities, that the respondent intended selling the assets.

[28] On the basis of the payment clause or provision of the Agreement of Sale, DK 3, as of now, the applicant cannot be said to have a prima facie legal right to be paid the balance of the money owing, for the reason that the parties have not agreed on the payment terms.

[29] In ***Megaith Holdings v Rims Tibiyo*** supra the Court sets out the four requirements that applicant has to satisfy before it can be granted an interim order, and which should be alleged in its papers as:

> a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief, is clear or, if not clear, is prima facie established though open to some doubt.
> b) that if the right is only prima facie established, there is a well grounded apprehension of irreparable harm to the appellant if the interim relief is not granted and he ultimately succeeds in establishing the right;
> c) that the balance of convenience favours the granting of interim relief; and
> d) that the applicant has no other satisfactory remedy.

[30] As a matter of fact, the greater prejudice is suffered

by the respondent in this matter. He is not conducting any business, the stock is not being sold, the business is closed, he is losing income etc. I agree with the respondent that the matter has become urgent for him for these reasons. I find that the four requirements as articulated above have not been satisfied.

[31] In the result I reach the following decision:

1. That the Rule Nisi be discharged.

2. That the business Shiba Rugs and assets thereof be restored to the respondent forthwith.

3. That the merits of the applicant's case be dealt with in other proceedings.

4. That the applicant be ordered to pay costs of this application on attorney and own client scale.

SM MONAGENG
JUDGE