

**IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE**

Civil Case No. 4454/10

In the matter between:

Tisuka Taka Ngwane

First Applicant

Vusumuzi Simelane

Second Applicant

And

Congress Vusi Mkhweli

First Respondent

**Sibusiso Gwebu
Respondent**

Second

In re:

Congress Vusi Mkhweli

Gugu Precious Mkhweli

And

Joseph Swane Dlamini Mandla
Ndlangamandla

CORAM

MCB MAPHALALA, J

For Applicants
For Respondents

Mr. M. Xaba
Mr. S. Simelane

Judgment
24th February 2011

[1] The First Respondent initially lodged an application in this Court against Joseph Swane Dlamini and Mandla Ndlangamandla on the 3rd September 2010 seeking the following relief:

(a) That the rules of Court be dispensed with in so far as they relate to forms, service and time limits and that the matter be heard as one of urgency.

(b) That the Respondents restore possession of the premises namely; Mahamba Bottle Store, situate at Mahamba, next to the border gate to the applicants, *ante omnia*

(c) That in the event that the Respondents fail to restore possession of the premises as prayed for herein, the applicants, with the assistance of the Sheriff or her lawful Deputy be entitled to retake possession of the premises.

(d) That the Royal Swaziland Police assist in the execution of any order issued in these proceedings.

(e) That the First Respondent pays costs of this application on the scale as between attorney and own client and that the Second Respondent pays the costs only in the event he opposes the application.

(f) Further and/ or alternative relief.

[2] The said Joseph Dlamini was leasing premises from the First Applicant in which he conducted a bottle store business; he fell in arrears with his rental in the sum of E26 000.00 (twenty six Thousand Emalangeni), and he then concluded a written agreement with the Respondents on the 6th April 2010 in terms of which they took over the business. They were required to pay half the arrear rental of E13 000.00 (Thirteen thousand Emalangeni) on behalf of the said Joseph Dlamini in respect of the premises. They were further required to pay E1 000.00 (One Thousand Emalangeni) rental to Joseph Dlamini in respect of the business.

[3] The Respondents paid a deposit of E3 000.00 (Three Thousand Emalangeni) towards the arrear rental and the balance was payable in three months; they commenced operating the business, however, the business was closed in June 2010 by the Department of Commerce after the said Joseph Dlamini failed to pay for the renewal of the liquor licence. The Respondents paid for the renewal of liquor licence in July 2010 inclusive of penalties, and the total amount of paid was E3 256.00 (Three Thousand two hundred and fifty six Emalangeni).

[4] On the 1st September 2010 the said Joseph Dlamini cancelled the agreement with the Respondents without notice and handed the business over to Mandla Ndlangamandla. He evicted the Respondents from the premises without a Court Order, removed their stock and took the keys to the premises; subsequently, a spoliation order was granted against Joseph Dlamini and Mandla Ndlangamandla at the instance of the Respondents on the 3rd September 2010.

[5] Inturn, the Applicants instituted the present proceedings against the Respondents for the following relief:

(a) Dispensing with the usual time limits procedure and format for bringing applications before court and hearing this matter as one of urgency.

(b) That pending finalization of this matter, the execution of the Court Order granted on the 3rd September 2010 by this Honourable Court in the main matter be and is hereby stayed

(c) That the execution of the Court Order referred to in prayer 2 herein above be and is hereby set aside by virtue of the fact that it has been overtaken by events because a new tenant has occupied the premises under a valid lease agreement issued by the First Applicant.

(d) That the Second Applicant be and is hereby allowed and/or permitted to operate his bottle store business on the premises situate at Mahamba Bottles Store next to the border gate without any interference pending finalization of this matter.

(e) That a Rule Nisi do hereby issue to operate with immediate effect, in terms of prayers 1, 2, 3 and 4 herein returnable on a date to be fixed by this Honourable Court calling upon the First and Second Respondents to show cause why the Rule Nisi should not be made final.

(f) Granting the First and Second Applicants costs of suit at Attorney and own client scale in the event the matter is opposed.

(g) Further and / or alterative relief.

[6] The basis of this application is that the First Applicant leased the premises to the Second Applicant on the 26th August 2010 before the Spoliation Order was issued on the 3rd September 2010; that the Second Applicant is currently trading on the premises; and, that if the application is not granted, he stands to suffer irreparable financial harm. In addition, the First Applicant submitted that the Court Order is affecting the rights of the Second Applicant who was not a party to the initial proceedings; and, that only his employee Mandla

Ndlangamandla was cited in his personal capacity in the initial application notwithstanding that the Second Applicant had a direct and substantial interest in the matter. It is further alleged that the Order is not legally enforceable because Joseph Dlamini is no longer in possession of the premises after he surrendered them voluntarily to the First Applicant on the 18th August 2010.

[7] The Respondents raised the following Points of Law, which were argued together with the merits:

7.1 That the Applicants have not satisfied the requirements of an interim interdict by not stating that they have no alternative satisfactory remedy. However, on the papers as they stand, the application is not for an interdict as alleged but for a 'stay of execution" as well as the 'setting aside of the Court Order" granted on the 3rd September 2010. **Herbstein and Van Winsen** in their text "The Civil Practice of the Supreme Court of South Africa, fourth edition at page 1063 defines an interdict as follows:

"An interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm. Most interdicts are prohibitory in nature, ordering the respondent to desist or refrain from doing a particular act. A mandatory interdict on the other hand orders the respondent to perform an act. When such an order is made against a public official it is called a "Mandamus". A common form of mandatory interdict is an order directing that possession or occupation of property be restored to a person. This type is known as a *mandament*

van spolie.... Interdicts may be temporary or final. A temporary interdict is one granted pending the outcome of further proceeding between the parties..."

7.2. That the application is not urgent; however, the Applicants did not pursue this point during the hearing; they said it was now academic and a moot point. It was argued that the matter was set down for hearing on the 22nd November 2010; but, it was postponed by the Court *mero motu* to the 26th November 2010; on the latter date, it was removed from the roll.

7.3. That the application does not disclose a cause of action because it does not state how the Second Applicant acquired possession of the premises from the Respondents. I will deal with this point later in my judgment. —

7.4. That the Applicants have approached the court with dirty hands; it is argued that the premises were lawfully in the possession of the Respondents up to 1st September 2010; Joseph Dlamini and Mandla Ndlangamandla unlawfully dispossessed the Respondents of possession on the 1st September 2010. It is further argued that the said Mandla Ndlangamandla was acting during the course and within the scope of his employment with the Second Applicant; and, that it is on the basis of the spoliation that the court issued the Order on the 3rd September 2010.

7.5 It is common cause that when the spoliation Order was served upon the said Joseph Dlamini and Mandla Ndlangamandla, they refused

to comply with it. The Deputy Sheriff confirms the contempt in his confirmatory affidavit at paragraphs 7-9 as follows:

"I had just finished taking the stock when Mandla Ndlangamandla arrived at the premises. I served him with the Court Order and explained the nature and exigency thereof to him. I told him that the stock on the shelves would be removed and put aside and the premises locked and the keys given to Mr. Mkhweli in execution of the Order and in restoration of possession of the premises to him and his wife. Ndlangamandla became violent and pushed me outside the bottle store. He stated further that he did not care about the Court Order as he would only vacate the premises upon the instructions of Tisuka TakaNgwane. He refused to let me continue with the execution and he threatened me with violence if I insisted on proceeding. In so doing he was suddenly supported by Joseph Swane Dlamini and they both stated that Ndlangamandla had a right to refuse to vacate. It was then that I advised Ndlangamandla that he would be cited for Contempt of Court and arrested. He stated that I should proceed and cite him but he would not give possession of the premises to the

Mkhwelis." He stated that he had a lease agreement with the landlord."

[8] It is worth- mentioning that the Replying Affidavit does not address the Confirmatory Affidavit of the Deputy Sheriff.

[9] The First Applicant allege that Joseph Swane Dlamini "Voluntarily and personally" returned the premises to it on the 18th August 2010, and, it in turn leased the premises to the Second Applicant on the 26th August 2010. The said Joseph Dlamini denies this allegation in his affidavit and states that his Lease with the First Respondent was terminated on the strength of a Court Order issued by this Court on the 10th July 2009. His evidence is supported by that of the First Respondent who states that possession of the premises was not returned to the First Applicant on the 18th August 2010, and, that possession of the premises was given to the Respondents on the 6th April 2010 pursuant to an agreement prepared and approved by the First Applicant through its present Attorneys.

[10] In Replying Affidavit, the First Applicant does not deny that its present attorneys gave possession of the premises to the Respondents on the 6th April 2010, and, that they further prepared an agreement being Annexure "CMY". It is apparent from the pleadings that the Respondents were in possession of the premises lawfully from that

date until they were unlawfully evicted on the 1st September 2009. In the main application, the Respondents stated that on the 1st September 2010, they went to the offices of First Respondent's Attorneys to pay the balance due in terms of their agreement with Joseph Dlamini; the latter told the Lawyers not to accept the money as he had cancelled the agreement; on their return to the premises, their employees advised that they that their stock had been removed from the shelves and replaced with that of the Second Applicant. The said Joseph Dlamini in his affidavit does not deny this save to confirm showing the premises to the Second Applicant and not removing Respondents' stock. It is on that basis that the Court issued the spoliation order; clearly, the Respondents were in possession of the premises and trading as of the 1st September 2010.

[11] It is therefore not correct as alleged by the Applicants that Joseph Dlamini Voluntarily returned the premises to the First Applicant on the 18th August 2010. Furthermore, Joseph Dlamini concedes bringing the Second Applicant to the premises on the 1st September 2010; it is on that date when the Respondents were allegedly evicted and their stock removed from the premises. It is also on that date that the Second Applicant with the assistance of his employee Mandla Ndlangamandla and Joseph Dlamini took over the premises and put his trading stock. When the spoliation Order was issued on the 3rd September 2010, Joseph Dlamini and Mandla Ndlangamandla refused to comply with it.

[12] It is against this background that the Second Applicant cannot be regarded as an innocent third party acting in good faith. When the Second Applicant took over the premises, he was aware that the Respondents were in possession of the premises; by extension the First Applicant through its Attorneys was also aware that the Respondents were in possession of the premises. Furthermore, the First Applicant's Attorneys drew the agreement in terms of which the Respondents gained possession of the premises; the First Applicant's Attorneys received moneys from the Respondents liquidating the arrear rental incurred by Joseph Dlamini, and, the money was eventually received by the First Applicant. The First Applicant cannot deny knowledge of the Respondents in the circumstances. It is not open to the First Applicant to allege that the Respondents failed to pay the balance of the arrears as agreed because their Attorneys refused to accept the balance of the arrear rental on the 1st September 2010. It is also not open to the First Applicant to allege that the agreement with Joseph Dlamini did not confer any premises to the Respondents; the Respondents were in lawful possession of the premises as from the 6th April 2010 until they were unlawfully evicted on the 1st September 2010.

[13] In the circumstances, there is no basis in law for staying execution of the Court Order, let alone setting it aside. The Respondents have proved on a balance of probability that the Applicants have approached this Court with dirty hands. Whilst they seek to stay and set aside the Order of this Court, they contemptuously refuse to comply with it.

[14] In the case of **Photo Agency (PTY) Ltd v The Commissioner of Police and the Government of Swaziland** 1970-1976 SLR 398 at 407 (HC), **His Lordship Chief Justice Nathan** had this to say:

"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 conduct makes it impossible for the processes of the Court to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interest... 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."

[15] The present application is dismissed. The Applicants are to pay costs at Attorney and client scale on the basis that they contemptuously refused to comply with the Order of this Court issued on the 3rd September 2010.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

