IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1154/12

In the matter between:-

SWAZI SPA HOLDINGS LTD	**Applicant**

and

STANDARD BANK SWAZILAND LTD	**1st Respondent**
FIRST NATIONAL BANK SWAZILAND LTD	**2nd Respondent**
THEMBI DLAMINI	**3rd Respondent**
GUGU DLAMINI	**4th Respondent**
AKANI INVESTMENTS (PTY) LTD	**5th Respondent**

Neutral citation: *Swazi Spa Holdings LTD v Standard Bank Swaziland LTD & 4 others* (1154/12) [2012] SZHC185(3rd August 2012)

Coram: HLOPHE J

For the Applicant: Mr. M. Sibandze.

For the Respondent: Mr. S. Bhembe

Heard: 6th July 2012

Delivered: 3rd August 2012

JUDGMENT

[1] The Applicant instituted proceedings under a certificate of urgency seeking orders of this court in the following terms:-

1. Dispensing with the usual forms, procedures and time limits relating to the bringing of Application proceedings and hearing this matter as one of Urgency.

2. That a *rule nisi* do issue with immediate and interim effect calling upon the Respondents to show cause, why an Order in the following terms should not be made final:

2.1 That the 1st Respondent be and is hereby interdicted from allowing the accounts of the 3rd and 5th Respondents, accounts numbered **0140083423501** and **0140042628501** respectively to perform any withdrawals or transfers from the said accounts pending the issuing and finalization of legal proceedings in the High Court of Swaziland for the recovery of the said amounts against the 3rd and 5th Respondents.

2.2 That the 2nd Respondent be and is hereby interdicted from allowing the account of the 4th Respondent, account number **62205168843** to perform any withdrawals or transfers from the said account pending the issuing and finalization of legal proceedings in the

High Court of Swaziland for the recovery of the said amount against the 4th Respondent.

2.3 That the 1st and 2nd Respondents disclose the amounts of monies held in the accounts referred to in prayers 2.1 and 2.2 above.

3. That prayers 2.1, 2.2 and 2.3 above operate with immediate and interim effect pending the finalization of this Application.

4. Granting costs of this Application.

5. Further and / or alternative relief.

[2] The application is founded on the affidavit of one Dumsani Dlamini, who describes himself as the General Manager of one of the Applicant's three hotel units situate at Ezulwini area, trading as Ezulwini Sun Hotel and goes on to allege that he has the authority to institute the proceedings on behalf of the Applicant Company.

[3] It is alleged in the said affidavit that the 3rd and 4th Respondents, whilst in the employ of the Applicant at one of the said three hotel units, colluded with an employee of the fifth Respondent known as Gcebile Dlamini and defrauded the Applicant of large sums of money amounting to a total of E 1, 533, 743.47 (one million five hundred and thirty three thousand, seven hundred and forty three Emalangeni forty seven cents).

[4] It is alleged that the Respondents aforesaid perfected the fraud through misrepresenting that the fourth Respondent who had a contract to supply the Applicant with fresh fruits and vegetables had done so on various occasions when he had in fact not done so. Under the guise that such goods had been delivered to the Applicant, the third and fourth Respondents are said to have facilitated various payments to the fifth Respondent where the employee they colluded with would ensure they are paid back the said amounts.

[5] It is not in dispute that the third and fourth Respondents were subsequently subjected to a disciplinary process and eventually dismissed from the employ of the applicant.

[6] The basis for the guilt of the third and fourth Respondents at the Disciplinary process was a report compiled by the deponent, to the Founding Affidavit herein who avers that he had been tasked by his superiors to investigate certain fraudulent activities complained of. The said Dumsani Dlamini's report contends that several invoices were double captured in the system resulting in double payments whilst others are shown as having been randomly created in the system for purposes of defrauding the Applicant and as such did not follow the sequence they were required to follow. The third and fourth Respondents were implicated in the alleged fraud and were subsequently subjected to the disciplinary process as alleged.

[7] With the third and fourth Respondents having been dismissed from the Applicant's employ the latter got to know that the third Respondent had just received payment from her pension fund, which is said to have

occurred on the 26th June 2012. By this time a decision or resolution had already been taken that the Applicant institutes action proceedings to recover the amounts it was allegedly defrauded of by the third and fourth Respondents.

[8] As regards the third Respondent, the money received as her pension payout was a sum of E64 781.40 (Sixty four thousands, seven hundred and eighty one Emalangeni and forty cents). This amount it is alleged was deposited into the said Respondent's bank account held with the first Respondent – Standard Bank Swaziland – under Account no. 0140083423501 at its Mbabane Branch.

[9] In its intended action proceedings, (a summons of which was issued simultaneously with this application), the Applicant contemplates attaching the amount deposited into the third Respondent's account because it contends it knows of no other assets the third Respondent has to settle the judgment it anticipates to obtain against the third Respondent particularly now that the latter has no income.

[10] It contends therefore that it be allowed to place the monies held in the third Respondent's said account under attachments so as to prevent the depletion of the said amounts whilst the anticipated judgment in its favour is still awaited. It seeks this order because it fears ending up with an empty judgment particularly because it was convinced that the manner in which the monies were being withdrawn from the third Respondent's account aforesaid were indicative of an intention to dissipate her assets so as to defeat whatever possible action the Applicant institutes. The deponent to the Founding Affidavit goes on to

aver the requirements of an interim interdict claiming among others to be having a prima facie right, that there was a likelihood of an irreparable harm, that there was no alternative remedy and lastly that a balance of convenience favoured it.

[11] The application was opposed by each one of the Respondents who however were each represented by a different attorney.

[12] In the understanding that the application was urgent, same was issued out of court on the 27th June 2012 for hearing on the same date and was being moved exparte. It was granted as prayed except that the prayer calling upon the 1st and 2nd Respondents to disclose how much was held in the accounts concerned, was not to operate with immediate effect. The *rule nisi* granted by this court per Mamba J was returnable on the 5th July 2012 which is when the matter was placed before me for my attention, on which date it was allocated a hearing date on which it did proceeded.

[13] I was informed from the onset that the Applicant and the other Respondents other than the third Respondent, were engaged in some discussions to amicably resolve the matter. The matter of the third Respondent who had already filed an Answering Affidavit and was eager to proceed with the matter that day, was separated from that of the other Respondents and dealt with then. This was motivated by the fact that the then existing order was prejudicially affecting her as it was frustrating her access to the monies held in her account with the Bank.

[14] The hearing of the matter proceeded on these basis on the 6th July 2012 when argument was heard.

[15] The case of the 3rd Respondent advanced in answer to that of the Applicant comprises certain points *in limine* which comprise a contention that the matter was urgent and that a *prima facie* right had not been established against the 3rd Respondent. As concerns urgency it was, contended that the matter was not urgent because the Applicant had not set out explicitly the grounds that showed that the matter was urgent and why it could not receive redress in due course. As concerns the point that no prima facie right had been established as regards the relief sought, it was contended and eventually agreed that this particular point was as good as the merits themselves. It was thus agreed during the hearing that same would be argued as the merits of the matter. This agreement also entailed the 3rd Respondent's decision not to pursue the point on urgency on the understanding that same had been overtaken by events, which in my view was a wise concession.

[16] In the merits of the 3rd Respondent's case the latter denied defrauding the Applicant in any manner including colluding with anyone to facilitate any fraud against the Applicant.

[17] The third Respondent went on to contend whilst referring to the report by Dumsani Dlamini, that same did not make any reference to her in the fraud committed against the Applicant, which meant that no *prima facie* case had been established against her which also meant that Applicant had not established a *prima facie* right to the relief sought.

[18] Given the allegation that she had committed the fraud in question when signing certain vouchers for payment without supporting invoices, the Respondent denied this and contended that all the vouchers she had signed payment for had been supported by the necessary invoices. She contended no voucher had been placed before court confirming her having signed them without supporting invoices, which she contended was proving that no *prima facie* case had been established against her to warrant the grant of the orders sought.

[19] In a Replying Affidavit the Applicant denied that there was no *prima facie* case established against the third Respondent as well as that the vouchers and invoices referred to did not exist as they were not attached to the Founding Affidavit. To drive its point home, the applicant annexed to the Replying Affidavit not only the vouchers and invoices referred to in the Founding Affidavit but also a statement allegedly prepared by the fourth Respondent fully implicating the third Respondent in the fraud complained of.

[20] In a nutshell the fourth Respondent alleges in the said statement that she had been called by the third Respondent who was in desperate need of money and asked her if they could not raise money by faking deliveries received from, and payments made to, any of the companies whose accounts the fourth Respondent was responsible for reconciling in a bid to pocket the money faked as payment to such a company. The fifth Respondent was accordingly identified as the company to be used. From there on they started carrying out the fraudulent activities where the payments to this company were inflated with a view to eventually

receiving the extent of the inflated amounts, through the assistance of the said Gcebile Dlamini.

[21] The third Respondent is said to have created some of the fictitious invoices and vouchers and caused those authorized to sign to facilitate a payment to do so, even though they were not part of the scheme.

[22] During argument before me, Mr. Bhembe contended that this court should ignore the invoices and vouchers together with the statement concerned because these were presented to court through a Replying Affidavit yet they should have been presented through the Founding Affidavit for any reliance to be placed on them. He contended further that a party stands or falls by founding papers and is not allowed to introduce a new matter through a Replying Affidavit.

[23] The general rule on this subject is that all the necessary allegations must appear in the founding affidavits because the court will not allow the Applicant to supplement his case in a Replying Affidavit. This is however not an absolute rule as the court may in appropriate circumstances allow an Applicant to file new material in a replying affidavit. Commenting on the this subject, ***Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa*** put the position as follows at ***page 365***:-

> *"If however, the new matter in the Replying Affidavits is in answer to a defence raised by the Respondent and is not such that it should have been included in the supporting affidavits in order to set out a Cause of action, the court will refuse an application to strike out."*

[24] Considering the circumstances of the matter, it does not seem to me that the Applicant was introducing a new cause of action through producing the statement of the fourth Respondent and the vouchers and invoices referred to. In fact I am convinced in producing these documents the Applicant was answering the denial by the third Respondent that there was no *prima facie* right established by the Applicant to the relief sought.

[25] In light of the foregoing, I cannot therefore answer the question whether or not a *prima facie* right to the relief sought had been made, in the negative. The question is whether it does follow that the order sought be granted?

[26] The order sought is in the form of an anti–dissipation interdict. This form of interdict is conceivable in situations where the Respondent in a given matter is believed to be deliberately arranging his affairs in such a manner so as to ensure that he will be without assets within the jurisdiction of the court when the Applicant shall have obtained a judgment he anticipates to obtain against the given Respondent. See in this regard ***Herbstein and Van Winsen's Civil Practice of the Supreme Court of South Africa at page 1087***.

This would be the case where the concerned Respondent (the intended defendant), is shown to be about to defeat the Plaintiff's claim by rendering it hollow through concealing or dissipating his assets before the judgment can be obtained or executed. The case of ***Knox D'Archy Ltd and others v Jameison and others 1994 (3) SA 700 (W) at 706 B–E at 709 I–J***.

[27] It is in law not essential that the Applicant presents proof that the Respondent (intended Defendant) intends to frustrate an anticipated judgment by dissipating the assets, but it is enough if the conduct of the Respondent is likely to have that effect. In this regard, ***Herbstein and Van Winsen***, in their book ***The Civil Practice of the Supreme Court of South Africa***, said the following at ***page 1088***:-

> *"It is not essential to establish an intention on the part of the Respondent to frustrate an anticipated judgment against himself if the conduct of the Respondent is likely to have that effect."*

[28] It is a fact that the third Respondent has not divulged what other assets she has other than the money sought to be frozen in the account of the third Respondent. It is not in dispute that the account in question indicates that the money from the third Respondent's pension fund was deposited into her account on the 26th June 2012 as a sum of E64 885.12 but by the 5th July 2012 when these proceedings were instituted, the account had a balance of only E 28 000.00.

[29] Whatever third Respondent's real intention on her spending the money in the manner she did, there can be no doubt that same is likely to have the effect of frustrating the judgment Applicant anticipates to obtain against the 3rd Respondent. I am saying the judgment is anticipated in a qualified sense in that from the action proceedings to claim the amounts concerned, the third Respondent could still prove that she was not a party to any fraud against the Applicant. It should however suffice for the Applicant to succeed at this stage given that what is being sought is

an interim interdict for which the Applicant only has to establish a *prima facie* right among the other requirements.

[30] The position on what the requirements of an interim interdict are is by now settled, as they are:-

1. A *Prima facie* right;
2. A well grounded apprehension of an irreparable harm to the Applicant.
3. That the balance of convenience favours the grant of the interim relief.
4. The Applicant has no other satisfactory remedy.

[31] I have already found that a *prima facie* right has been established. There can be no doubt in the circumstances of the matter that the apprehension of irreparable harm is well grounded in a case where the only asset disclosed as belonging to the Applicant is being dissipated with the likely effect that the anticipated judgment would be frustrated. Where there is no disclosure of any other assets in existence and those that are there are being depleted, then the balance of convenience should naturally favour the granting of the interim order sought so that the assets concerned can be kept safely pending finalization of the action proceedings. The same thing applies where alternative remedy has not been established as being in existence and none can be established from the facts of the matter.

[32] Given that the money sought to be attached amounts to pension proceeds from the Pension Fund, the conclusion to which I have come in this

matter seems to be favoured as well by section 32 (2) (a) and (3) of the Retirement Funds Act which provides as follows:-

> Section 32 (2) a retirement fund may deduct an amount from the members benefit in respect of,
>
> (a) An amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgment has been obtained against the member in a court or a written acknowledgement of culpability has been signed by the members and provided that the aforementioned written acknowledgement is witnessed by a person selected by the member and who has had no less than eight years of formal education.
>
> (3) If for any reason, except death, a member is unable or unwilling to acknowledge any debt contemplated in subsection (2) (a), then the employer shall apply to court for an order authorizing him to make a deduction from the member's benefit up to an amount equal to the debt.

[33] I can only say that these sections indicate that an employer alleging to have been defrauded or prejudiced by the actions of an employee, is entitled to recover from the employee's pension payout by means of court proceedings, particularly where there was no written acknowledgment of the employees' liability as in the present case.

[34] For the foregoing reasons I have come to the conclusion that Applicant's application should succeed as concerns the third Respondent with the

result that the rule nisi issued in terms of Prayers 2, 2.1, 2.3 and 4 of the Notice of motion is confirmed.

Delivered in open Court on this the ……day of August 2012.

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N. J. HLOPHE

JUDGE