



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 266/2012

In the matter between:

MPHISI COMFORT DLAMINI & OTHERS

APPLICANT

AND

WILLIES SHABANGU

1ST RESPONDENT

ROYAL SWAZILAND SUGAR CORPORATION

2ND RESPONDENT

VIF LIMITED [IN LIQUIDATION]

3RD RESPONDENT

REGIONAL ADMINISTRATOR [LUBOMBO DISTRICT]

4TH RESPONDENT

MASTER OF THE HIGH COURT

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

Neutral Citation: Mphisi Comfort Dlamini & Others and Willies Shabangu & Others (266/2012) [2012] SZHC 28 (11th April 2012)

CORAM: SEY J.

Heard: 9 March 2012

Delivered : 11 April 2012

JUDGMENT

SEY J.

[1] On 8th February, 2012, and upon the application of the Applicant, under a Certificate of Urgency, my brother **S. B. Maphalala PJ** issued a rule nisi returnable on 17th February, 2012, in the following terms, inter alia:

- “1. Dispensing with the rules of this Honourable Court, regarding time, form and manner of service, and to hear this application as one of urgency.
2. Directing the First Respondent to forthwith vacate his occupation of the offices of the Third Respondent and to hand over the keys thereto, to the office of the Fifth Respondent, pending the appointment of a new Liquidator to the Third Respondent.
3. Directing and authorising the Deputy Sheriff of the District of Lubombo to break open, and enter into the said offices, in the event that the same have been locked, denying him/her access thereto.
4. Restraining and/or preventing the First Respondent, and any other person under his authority, from entering into and/or gaining access to the said offices and all documents stored therein, pending the appointment of a new Liquidator to the Third Respondent.
5. Ordering and directing the First Respondent to restore custody and/or possession of whatsoever assets of the Third Respondent to which he has gained custodianship over, by virtue of his position as the appointed caretaker of the latter, by the previous Liquidator of the former.
6. Directing the First Respondent to account for all rentals that he has collected, subsequent to the removal of the former Liquidator, dating from December, 2011, to the present date.”

[2] The Founding Affidavit in support of the application was sworn to by **Mphisi Comfort Dlamini**. The 1st and 3rd Respondents have

opposed the application and the 1st Respondent filed an Answering Affidavit sworn to by **Willies Shabangu** in which he raised certain points *in limine* on the issues of locus standi and the establishment of the requirements of a final interdict, particularly as the issues of a clear right are concerned.

[3] In regard to the issue of *locus standi*, the 1st and 3rd Respondents contend that the Applicant does not have *locus standi* to seek the relief he is seeking in that:

3.1 the 3rd Respondent, whose affairs are the subject of the orders being sought, is a company in liquidation;

3.2 the Applicant is neither a creditor, shareholder nor a director of the company in liquidation. As such, the Applicant has no interest in the business of the 3rd Respondent.

[4] Furthermore, in the 1st and 3rd Respondents' Heads of Argument filed and also in his oral submissions to the Court, Mr. Szikalala submitted that the Applicant is a debtor to the 3rd Respondent and does not have the *locus standi* to institute the proceedings.

[5] On the second point raised in *limine* as to the Applicant's failure to satisfy the requirements for the granting of a final interdict, the 1st and 3rd Respondents contend that the Applicant has not established a clear right and is as such not entitled to the relief sought, it being a final interdict.

- [6] For his part, Mr. Mkhathshwa, argued that the specific relief sought by the Applicants does not emanate from their relationship with the liquidation, or the company in liquidation, but as farm plot Title holders at Farm 860, Vuvulane and 'Nucleus Estate' Farms, for which the 3rd Respondent merely provided resources to assist and enable the farmers to engage in productive and environmentally safe sugar cane farming, the 3rd Respondent being just the co-ordinator. It is submitted, in the alternative, that the first Applicant does have the *locus standi* to bring the present application in his personal capacity, provided he can show that the interest he has herein, although shared by others, is also personal to him. Counsel further argued that the Applicant's right is a direct right which emanates from the fact that the proceeds of the farms form his livelihood.
- [7] It is also submitted on behalf of the Applicant that the interdict being sought in the present application is an interlocutory interdict to protect the status quo ante pending the appointment of a new liquidator.
- [8] It is clear to me, from the various averments and submissions made in this application, that what the Applicant seeks, primarily, is an order interdicting the 1st Respondent from dealing with the affairs of the 3rd Respondent by whom he, the 1st Respondent, is employed. The question that calls for the determination of the Court is whether the Applicant has the necessary *locus standi* in judicio to seek the relief sought in the Notice of Motion filed on the 8th day of February

2012.

- [9] It is trite that, in all cases, the institutor of proceedings must allege facts to indicate that he has the necessary *locus standi* to institute the proceedings and he must show a direct and substantial interest in the relief sought and this interest must be based on a legally enforceable right. In **Dairymple and Others v Colonial Treasurer 1910 TS 372 at 390 Wessels J** stated that:

“The person who sues must have an interest in the subject-matter of the suit, and that interest must be a direct interest.”

See also **Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87 at 101** where **Wessels CJ** again referred to the requirement that a plaintiff has to show a direct interest in the matter in issue in the following terms:

“.....(B)y our law any person can bring an action to vindicate a right which he possesses whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.....”

See **Wilson v Zondi 1967 (4) SA 713 (n)**; and also **Herbstein and Van Winsten “The Civil Practice of the High Courts of South Africa”** 5th Edition Juta, 2009 at page 185 and the authorities cited therein, viz, **United Watch and Diamond Co. (Pty) Ltd And Others v Disa Hotels Ltd And Another 1972 (4)**

SA 409 (c); Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388B.

[10] As a general rule, a person who claims relief from a Court in respect of any matter must establish that he has a direct interest in that matter in order to acquire the necessary *locus standi* to seek the relief sought. In paragraph 16 of the Founding Affidavit, the Applicant avers as follows:

“I further submit that, it is a concern to ourselves, as creditors to the liquidation, that the First Respondent should remain in office under no direct supervision by any person representing the liquidation process, given that the said person is among the lengthy list of former employees of the Third Respondent who are yet to be paid their terminal benefits.”

[12] It appears to me that the Applicant has merely alleged that he is a creditor of the 3rd Respondent, but he has not attached any claim submitted by him to the 5th Respondent, and which has been accepted by the latter, in respect of monies owed to him by the 3rd Respondent, thus making him a creditor thereof. Moreover, the Applicant has brought no evidence to show that he has filed a claim against the 3rd Respondent in the manner set out in Section 44 (1) of the Insolvency Act 81 of 1955 which provides that:

“Any person or the representative of any person who has a liquidated claim against an insolvent estate,...may, at any time before the final distribution of that estate in terms of Section 113, but subject to the provision of Section 114, prove that

claim in the manner hereinafter provided...”

[13] Au contraire to the Applicant’s claim that he is a creditor, the 1st Respondent has strongly contended that the Applicant is a debtor. In paragraph 16.1 of the 1st Respondent’s Answering Affidavit, Willies Shabangu states as follows:

“As stated above, Applicant is a debtor to 3rd Respondent. Unfortunately, due to the fact that I have, consequent to the granting of the rule nisi herein, been locked out of the premises, I am unable to annex hereto the most recent debtors list of the 3rd Respondent. I am, however, in possession of the 3rd Respondent’s debtors list as at 30th August 2006, which shows that, at that time, Applicant was indebted to 3rd Respondent in amount of E80 520.35 (Eighty Thousand Five Hundred and Twenty Emalangeneni Thirty-Five cents). The said debtors list is attached hereto and marked “**WS1**” and I pray that it be read as part of this affidavit.”

[14] In his reply to the points on *locus standi*, Mr. Mkhathshwa sought to rely on the case of **V I F Limited And Moses Mathungwa And Others, Appeal Case No. 31/2000** and he submitted that the Court therein recognised the Applicant’s *locus standi* in that case.

[15] I shall discountenance this argument at this late stage. It is also worthy of note that the very case counsel seeks to rely on is authority for the well established principle that an applicant must make the appropriate allegations in his launching or founding affidavit to establish his *locus standi* to bring an application and not

in the replying affidavits.

See also **Ben M. Zwane v The Deputy Prime Minister and Another, Swaziland High Court Case No. 624/2000.**

[16] The 3rd Respondent is a company in liquidation and the Applicant is neither a creditor, shareholder or Director of the company under liquidation. I entirely agree with Mr. Szikalala's submissions that if the Applicant is concerned about the absence of a liquidator then the relief he ought to seek is against the 5th Respondent to appoint such a liquidator. He has, however, not done so.

[17] In the light of all the foregoing, the conclusion I have arrived at is that the Applicant has failed to establish any *locus standi* in judicio or entitlement to the relief prayed for in the Notice of Motion.

[18] I am equally of the view that the application does not satisfy the requirements for the granting of a final interdict against any of the Respondents, in particular the 1st and 3rd Respondents. One of the requirements for a final interdict is that the applicant must establish a clear right in order to obtain the relief. See **Setlogelo v Setlogelo 1914 AD 221 at 227**. The right that forms the subject matter of a claim for an interdict must be a legal right and one that is enforceable in law. See **Lipchitz v Wattrus NO 1980 (1) SA 662 (T) at 673D**.

[19] In this present application, the clear right that ought to be

established by the Applicant, entitling him to an interdict as presently sought, is a right in the participation of the operations of the company in liquidation. A financial or commercial interest alone will not suffice. The thing to which the Applicant has to establish a right to is the operations of the 3rd Respondent, in order to have an order interdicting any person from entering its offices, and not a right to the proceeds of the harvest of his fields. The Applicant has not established a nexus between the harvesting of his fields and 3rd Respondent's business. In fact, the 1st Respondent has stated that there is no such connection. The only way the Applicant would establish a clear right, entitling him to an interdict as presently sought, is if he were either a shareholder, director or creditor of the 3rd Respondent, none of which he is.

[20] In paragraphs 5 and 18 of the Answering Affidavit, the 1st Respondent has averred that the Applicant does not have a clear right to the proceeds for the upcoming harvest because such harvest has not even been conducted yet and the 3rd Respondent is not even obliged to harvest the Applicant's fields. In **Celliers v Lehfeldt 1921 AD 509 at 513** it was held that no one can ask that another be interdicted from interfering with him in respect of acts that, as between themselves, he has no right to perform. In **Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W)** it was held that the applicant had not established a clear right because a restraint-of-trade clause on which it relied was unenforceable, since it was too wide. See also **Albert v Windsor**

**Hotel (East London) (Pty) Ltd (in liquidation) 1963 (2) SA237
(E) at 240 F.**

[21] The Applicant has in my view not established a clear right and in the absence of a clear right there can be no irreparable harm, either actual or apprehended. As such, no final interdict may be granted. Moreover, the Court will not, in general, grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief in due course, to at least recover the loss occasioned by the harm, being a claim for damages. See **The Law & Practice of Interdicts** by **CB Prest** (at page 45).

[22] In the premises, I would dismiss the application with costs and hereby discharge the rule nisi issued on 8th February, 2012.

For the Applicant
MKHATSHWA

MR.

For the 1st 2nd & 3rd Respondents
SZIKALALA

MR.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE.....DAY OF APRIL 2012.**

.....
M. M. SEY (MRS)

JUDGE OF THE HIGH COURT