



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 2614/2011

In the matter between:

HOAGEYS HANDICRAFT (PTY) LTD

Applicant

and

ROSE MARSHALL VILANE

Respondent

Neutral citation: *Hoageys Handicraft (Pty) Ltd vs Rose Marshall Vilane*
2614/2011 SZ HC 32 (9 March 2012)

Coram: MAPHALALA PJ

Heard: 13 JANUARY 2012

Delivered: 9 MARCH 2012

Summary: The question for decision is whether a failure to respect an order of the Supreme Court on appeal renders a subsequent application on the same subject matter in contravention of the doctrine of clean hands.

The Application

[1] The Applicant has filed an Application under a Certificate of Urgency for an order in the following terms:

- “1. Dispensing with the normal procedures and time limits relating to service and enrolling the matter as one of urgency.
2. Condoning Applicant’s non-compliance with the said procedures and time limits relating to instituting proceedings and allowing the matter to be heard on the basis of urgency.
3. Ejecting the Respondent, her privies and all those holding title through her from the premises described as the remaining extent of Farm No.261, situate in the District of Lubombo, Swaziland.
4. Interdicting and/or restraining the Respondent from carrying out any farming activities, ploughing and/or ancilliary activities on the remaining extent of Farm No.261, Lubombo District, other than on the portion of land where the Respondent’s dwelling structure was situate.
5. That prayers 3 and 4 above operate as an interim order with immediate effect pending the finalization of this matter.
6. Further and/or alternative relief.”

[2] The Founding Affidavit of one Moses Boy Motsa a Director of the Applicant is filed outlining the background of the matter. In the said affidavit pertinent annexure are filed in support thereto.

- [3] The Respondent opposes the orders sought by the Applicant and has filed an Answering Affidavit advancing the case for the Respondent. Pertinent annexures are also filed in support thereto.
- [4] The Applicant then filed a Replying Affidavit in accordance with the Rules of this Court.
- [5] In the Respondent's Answering Affidavit a number of points *in limine* are raised in paragraph [3] thereof. The gist of these submissions *in limine* is that the Applicant is approaching this court with "dirty hands" in contravention of the doctrine of clean hands.
- [6] That on the 31 May 2011 the Supreme Court, under case *Civil Appeal Case No.52/2011* dismissed the Applicant's appeal and confirmed the High Court judgment that the Applicant should restore possession of the property being Farm No.261 situated in the Lubombo region.
- [7] That during the month of July 2011 the Applicant deliberately violated the said orders and entered into the said immovable property and destroyed vegetation using a Caterpillar. Applicant's attorneys were advised that the Applicant was acting in contempt of the said order.

[8] The Applicant's argument is that the doctrine of "*clean hands*" does not apply in the present matter because it has not breached the said court order. Its first argument is that the court never directed it to restore possession of the whole farm but only that portion where the Respondent's structure was situate which (according to Applicant) is about 1 hectare.

[9] The court heard arguments of the parties to and fro on this subject and I shall outline the parties' contentions in the following paragraphs.

[10] Advocate Maziya advanced comprehensive arguments and filed Heads of Arguments on the issue in contention. Mr. Maziya contends that the Applicant is disqualified from touching the pure fountains of justice until it fully comply with the judgment of the Supreme Court handed down on 31 May 2011. That the said judgment confirmed that of the High Court handed down by *Mabuza J* on the 22 October 2010 which had the following order:

“...The Respondents are directed to restore possession of the remaining extent of Farm No.261 situated in the Lubombo Region to the Applicant and such restoration to include the re-erection of all structures and fencing demolished by the Respondent on the 19th July, 2010. The Respondents are directed to pay the costs of this application on the ordinary scale together with the certified costs of Counsel in terms of Rule 68(2) of the High Court Rules.”

[11] Counsel for the Respondent has cited a plethora of decided cases at paragraph 4 of his Heads of Arguments to the general legal proposition that a litigant who has not complied with a Court order is not entitled to be heard unless he first purges the contempt. These cases include that of *Di Bona vs Di Bona & Another* 1953(2) SA 682 (C); *Milligan vs Milligan* 1925 WLD 164; *Hadkinson vs Hadkinson* (1952) 2 411 ER 571; *Photo Agencies (Pty) Ltd vs The Royal Swaziland Police & Another* 1970-76 SLR 398 and that of *Attorney General vs Ray Gwebu & Lucky Nhlanhla Bhembe Case No.3699/202* (unreported).

[12] The Respondent contends that the Applicant's argument that the "clean hands" doctrine does not apply in the present case because it has not breached the said court order is not correct. Its first argument is that the court never directed it to restore possession of the whole farm but only that portion where the Respondent's structure was situate which (according to Applicant) is about 1 hectare. That the Applicant is now deliberately distorting the Court Order in order to suit its own selfish ends aimed at not complying with the Court Order.

[13] That right from the outset the Respondent made it very clear in her Notice of Motion that she sought an order for restoration of possession of "the remaining extent of Farm No.26" this property which she said she was in possession of according to the Title Deed filed by the Applicant measuring 19,0664 hectares.

[14] The Respondent further contends that not only did she obtain an order directing the Applicant to restore possession of this entire immovable property in fact it is common cause throughout the proceedings both in the High Court and the Supreme Court that she had been in possession of this entire immovable property. In the High Court the Applicant's only basis for opposition was that the dispossession was justified by *Agyemang J's* order evicting the Respondent from the property (which order turned out to be non-existent). This was the position even in the Supreme Court. In this regard Respondent's Counsel referred this Court to the judgment in *Frederick S vs Stellenbosch Divisional Council 1977 (3) SA 113 (C)* cited by *Mabuza J* in the High Court.

[15] The Respondent contends that to show that the Applicant's intentions were mischievous it did not even bother to approach the Supreme Court to seek for directions in light of what it perceived as "practical difficulties" regarding compliance. All in all Respondents contends that what the Applicant is now doing is tantamount to "jumping the gun" since it is seeking the Court to determine the parties respective rights over the piece of land even before restoring the *status quo* as directed by the Supreme Court.

[16] The Applicant on the other hand contends that the present matter falls outside the rubric of cases wherein the doctrine of clean hands is applied

in that there was no willful, intentional and *mala fide* intention to act contemptuously and bring the administration of justice to disrepute by the Applicant. Such an Applicant cannot be said to have acted contemptuously and in paragraphs 4.5.1 to 4.8.1 of the Heads of Arguments of Counsel for the Applicant concludes with the submission that the Applicant has done all that is reasonably could but challenges emerged that made it not possible to re-erect the Respondent's dwelling structure. That Applicant can thus not be said to be approaching the Court with unclean hands nor can it be said that Applicant is in contempt for non-compliance.

[17] Having considered the arguments of the parties to and fro I am not convinced by the arguments of the Applicant that there were practical difficulties regarding compliance. I agree with the submissions of the Respondents that Applicant should to have approached the Supreme Court to seek for directions in light of what it perceived as "practical difficulties" regarding compliance. In this regard I agree with the legal authorities cited by Counsel for the Respondent that of *Madeli Fakudze vs The Commissioner of Police & 2 Others Civil Case No.1935/2002* at page 13 and the remarks of *Leon JP* in the case of *Johannes Nkwanyana vs The Attorney General & Another Civil Appeal Case No.36/2004*.

[18] In this regard I am in agreement with the Respondent's arguments that as long as the Supreme Court has not been approached as to why the order

has not been complied with the Applicant's hands are unclean and is not entitled to be heard.

[19] It would appear to me and in this regard I agree *in toto* with the Respondent's contention that the subject matter in the case before the Supreme Court has an uncanny resemblance with the present case. It is without question that the same matter as the matter before the Supreme Court is presently before this Court.

[20] I am fortified in coming to this decision by the remarks made by a former Chief Justice *Nathan* in the case of *Photo Agencies (Pty) Ltd vs The Royal Swaziland Police & Another 1970-76 SA SLR 398* where he quoted with approval the *Mulligan case (supra)* to the following proposition.

“...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 (which civil or criminal) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests. Where 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 the law and order in defiance.”

[21] I find on these facts that this Court “would be stultifying its own processes” to hear the Applicant on this Application.

[22] In the result, for the foregoing reasons the points *in limine* of clean hands succeeds with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE

For Applicant: Mr. Shabangu

For Respondent: Mr. L. Maziya