



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No: 2392/2011

In the matter between:

**THOMAS INVESTMENTS CORPORATION  
(PTY) LTD**

**Applicant**

VS

**GREANS INVESTMENTS (PTY) LTD**

**Respondent**

**Neutral citation:** *Thomas Investments Corporation (Pty) Ltd vs  
Greans Investments (Pty) Ltd 2392/2011 SZHC  
89[2012] (26 April 2012)*

**Coram:** **MAPHALALA PJ**

**Heard:** **DECEMBER 2011**

**Delivered:** **26 APRIL 2012**

**Summary:** **The Applicant contravened the doctrine of clean hands by taking the law into its hands in chasing a tenant away without a Court Order.**

[1] The Applicant *Thomas Investments Corporation* who is a landlord of the Respondent *Greans Investments (Pty) (Ltd)*

seeks an order *inter alia*, confirming an order of this Court of 17 November 2011 whereupon the Respondent has been ordered to show cause why:

“1.1 It should not be ejected from the premises described as Shop No.G11, Riverstone Mall, Plot 106, Manzini;

1.2 Authorising the Deputy Sheriff to take such lawful steps to eject the Defendant;

1.3 Judgment in respect of arrear rental and utilities in the sum of E140,755.44 (one hundred and forty thousand seven hundred and fifty five Emalangeni forty four cents);

1.4 Costs of suit.”

[2] The Application was brought to court under a Certificate of Urgency founded on the affidavit of its Managing Director one Percy Thomas who has related therein all the material facts in the dispute between the parties. Annexures pertinent to the Applicant’s case are also filed in support thereto.

[3] The Respondent oppose the orders sought in paragraph [17] of this judgment and has filed the Answering Affidavit of one Christo Odendaal who is the Director of the Respondent company. Pertinent papers are also filed in support of the Respondent’s contentions in opposition and more importantly in

the said Answering Affidavit points *in limine* are raised as follows:

“5.1 Respondent submits that the Applicant is not entitled to the relief it seeks because it has approached the Court with dirty hands. This is evidenced by the fact that it took the law into its own hands by unlawfully switching off electricity, water and gas supplying the leased premises as well as locking out Respondent from the leased premises without a Court Order or lawful instrument authorizing it to do so. Respondent submits that on this point alone the application ought to be dismissed.

5.2 Respondent further submits that the Applicant is not entitled to the relief sought because it has failed to disclose material facts of the matter in an *ex parte* application. One important fact that Applicant has conveniently not disclosed is that it locked the premises it now seeks a landlord’s hypothec towards. Respondent is advised and humbly submits that in *ex parte* applications a party is obliged to disclose all material facts even those that are detrimental to its case. Respondent submits that on this point alone the application ought to be dismissed.”

[4] On the 17 February 2012 I heard arguments of the lawyers for the parties who filed very comprehensive Heads of Arguments. I heard both the arguments on the points *in limine* and the merits of the case. I shall proceed to outline in summary from

the arguments of the attorneys for the parties and thereafter analyse them in my judgment on these issues.

**(i) Applicant's arguments**

- [5] On the merits of the case the attorney for the Applicant filed brief Heads of Arguments to the general proposition that the Application was served upon the Respondent at its chosen *domicillium citadi et executandi* in terms of clause 34 at page 35 of annexure "PT2" (the lease agreement) the Respondent chose as its *domicillium citadi et executandi* the leased premises being shop No.611, Riverside Mall, Manzini.
- [6] That it is common cause that when the Application was served, the Applicant had leased supplying gas and electricity and other utilities to the Respondent and as such, it is not operating (see paragraph [16] of the Founding Affidavit).
- [7] That after obtaining the order, the Deputy Sheriff for the District of Manzini, Nolisi Qwabe served the order at the chosen *domicillium* and effected an attachment of all the goods thereat on the 7 November 2011.
- [8] The Applicant contends that on these facts that service of legal process at chosen *domicilium* is good and proper service even in circumstances where the party to be served is not present.

The attorney for the Applicant cited the case of *Loryan (Pty) Limited vs Solarsh Tea and Coffee (Pty) Limited 1984 (3) SA* at page 847 D-F to the following proposition:

“The choice of a *domicilium citandi et executandi* is primarily related to the service of process in judicial proceedings ....service of any process may be effected by delivery or leaving a copy thereof at the *domicilium* chosen by the party concerned. Such service is then good even if the process may not be received, for the very purpose of requiring the choice of a *domicilium* is to relieve the party causing service of the process from the burden of providing actual receipt. Hence the decisions in which service at a *domicilium* has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad, or had abandoned the property, or could not be found. See the case cited in the *Muller vs Mulbarton Gardens (Pty) Limited 1972(1) SA 328 (W)* at 331 and in *Herbstein and van Winsen : The Civil Practice of the Supreme Court of South Africa, 3<sup>rd</sup> Edition* at 210, notes 80 to 84.”

[9] The learned Advocate for the Applicant further cited the case of *Judson Timber Company (Pty) Limited vs Ronnie Bass & Company (Pty) and Another 1985 (4) SA* page 531.

[10] The Applicant further contends that in the premises that the Application and the Order of Court have been properly served, the Applicant has set out sufficient grounds for an order confirming the *rule nisi* wherefore, the Applicant prays for an

Order of the Court granted on 17 November 2011 and granting the Application costs of the Application.

[11] The Applicant's counsel also replied on the points of law raised by the Respondent.

**(ii) The Respondent's arguments**

[12] The attorney for the Respondent filed comprehensive Heads of Arguments on the points *in limine* raised by the Respondent and the merits of the case.

[13] The first point *in limine* raised by the Respondent is that of dispute of fact. That clearly in this matter there are disputes of fact which cannot be resolved through the papers that have been filed of record. In this regard the attorney for the Respondent cited Rule 6 (17) and (18) to the effect that where there are disputes of fact in a matter that cannot be resolved on affidavit the court may either dismiss the application or refer the matter to oral evidence. In this regard the attorney for the Respondent cited the High Court case of *Swazi National Assemblies of God vs DS6 Investment and Two Others unreported High Court Case No.2472/2008; Room Hire Company (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155* and the case cited thereat.

[14] The second point *in limine* is that the Applicant has approached the court with unclean hands. That the reason Respondent alleges this is that prior to approaching the court for relief it actually locked the Respondent out of the rented premises. The Applicant has denied this and has alleged that it is the Respondent that brought the premises keys to it. Respondent however admits to having changed the locks of the premises. In this regard the attorney for the Respondent cited the case of *Photo Agencies (Pty) Ltd vs The Commissioner of Swaziland Royal Police and the Government of Swaziland 1970-76 SLR* at page 407 and that of *Mulligan vs Mulligan 1925 WLD 164*.

[15] On the merits of the case the Respondent advanced his arguments under a number of headings namely, landlord hypothec, cancellation of lease agreement, purpose of use of premises and lastly payment of E144,755.44.

### **The costs analysis and conclusions thereon.**

[16] I shall first deal with the point *in limine* regarding disputes of fact and the points about the doctrine of clean hands.

#### **(i) Disputes of fact**

[17] The Respondent contends that the Applicant is not entitled to the relief sought because it has failed to disclose material facts

of the matter in the *ex parte* Application. That one important fact that the Applicant has conveniently not disclosed is that it locked the premises and it now seeks a landlord's hypothec. That in *ex parte* applications a party is obliged to disclose all material facts even those that are detrimental to its case. That on this point alone the Application ought to be dismissed.

[18] In my assessment of the facts of the matter and the arguments of the parties to and fro I am in agreement with the arguments of the Respondent on this point that Applicant failed to disclose to the court in an *ex parte* application of a material dispute of fact. This point was conceded by the attorney for the Applicant and the most logical conclusion on the circumstances is to rule in favour of this point *in limine* that this Application ought to be dismissed on this point alone.

**(ii) Doctrine of clean hands**

[19] Under this Head the Respondent contends that the Applicant seeks to use the court to endorse its unlawful conduct of locking out the Respondent without a court order; or lawful instrument authorizing it to do so, the act of spoliation. That as we speak the Applicant has actually ejected the Respondent through the unlawful locking out. This essentially means that the question that one ought to ask himself is why the Applicant has instituted the present proceedings if it has engaged in self help measures



that have been alleged by the Respondent. That the reason for the institution of the present proceedings can only be inferred to be one. This is in order to endorse or legitimize the unlawful act of spoliation that this court should not allow this on the strength that the Applicant has approached it with dirty hands.

[20] I have considered the facts of the matter and all the arguments of the parties and I again agree with the Respondent's contentions. On the facts of the matter the Applicant took the law into its own hands by unlawful switching off electricity, water and gas supplying of the leased premises as well as locking out Respondent from the leased premises without a court order or lawful instrument authorizing it to do so.

[21] The Applicant is precluded in law as stated in the case of *Photo Agencies (Pty) Ltd (supra)* where the case of *Mulligan vs Mulligan (supra)* was cited to the following legal formulation:

“Before a person seeks to establish his right in a court of law he must approach the court with clean hands...”

[22] In view of my conclusion in respect of the above arguments I dismiss the Application on this point alone until the Applicant purges its contempt. In the result the Application is dismissed with costs on the basis of the two points *in limine*.

**STANLEY B. MAPHALALA**  
**PRINCIPAL JUDGE**

**For the Applicant: Advocate van der Walt  
Instructed by Cloete/Henwood &  
Associates**

**For the Respondent: Mr. L. Mzizi of Llyod Mzizi Attorneys.**