IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 119/13

In the matter between

SWAZILAND THEATRE CLUB	**APPLICANT**

and

ZODWA TSHABALALA	**1ST RESPONDENT**
ZANDILE TSHABALALA	**2ND RESPONDENT**
PHUMZILE ECKERD	**3RD RESPONDENT**
PRO-TECH HOLDINGS	**4TH RESPONDENT**

Neutral citation	***Swaziland Theatre Club vs Zodwa Tshabalala and three others (1119/13)*** **August 2013[2013]SZHC 163**
Coram:	**Ota J.**
Heard:	**1 August 2013**
Delivered:	**8 August 2013**
Summary:	**Civil procedure; Final interdict; Principles thereof.**

OTA J.

[1] INTRODUCTION

The Applicant commenced this application on the premises of urgency claiming for the following substantive reliefs:

"3.1 That the 1st, 2nd and 3rd Respondents be hereby evicted and ordered to vacate the Applicant's kitchen premises and the property of the Applicant situated at the Theatre Club in Mbabane.

3.2 That the 1st, 2nd and 3rd Respondents be restrained from interfering with the staff, business and affairs of the Applicant forthwith.

3.3 That the 1st, 2nd and 3rd Respondents surrender the keys of the property of the Applicant forthwith to the interim Chairperson of the Applicant, Khethabahle Mthethwa.

3.4 Restitution of the 4th Respondent back to the premises of the Applicant as the lawful tenant with a valid lease agreement of such occupancy of the kitchen facilities.

4. That pending finalization of this matter, the 1st, 2nd and 3rd Respondents be ordered not to interfere with the affairs of the

Applicant in whatever manner, and vacate the Applicant's premises".

[2] The application is founded on the affidavit of one Castello Vilakati, described in that process as a Trustee of the Applicant. The Applicant also filed a replying affidavit sworn to by the same deponent. The 1st, 2nd and 3rd Respondents opposed this application via the answering affidavit deposed to by the 1st Respondent, Zodwa Tshabalala.

[3] PARTIES

It is important for a proper understanding of the issues arising, that I describe the parties right at the outset.

[4] The Applicant is the Swaziland Theatre Club. It is a legal entity with its principal place of business at Dzeliwe Street Mbabane, Hhohho District.

[5] The 1st, 2nd and 3rd Respondents are all adult female Swazis resident in Mbabane Hhohho District.

[6] The 4th Respondent is Pro-Tech Holdings a company duly incorporated in terms of the company laws of Swaziland.

[7] DRAMATIS PERNONAE

It is common cause that at all material times and prior to 10th July 2013, the 1st to 3rd Respondents were members of the elected Executive Committee of the Applicant.

[8] It is common cause that prior to the 5th of April 2013, the 4th Respondent, pursuant to a lease agreement with the Applicant, was operating a catering service at the Applicant's kitchen in its premises in Mbabane.

[9] Also common cause is the fact that on the 5th of April 2013, the 1st to 3rd Respondents acting as members of the Executive Committee of the Applicant terminated the lease agreement between the Applicant and the 4th Respondent.

[10] It is common cause that after terminating the 4th Respondent's lease agreement, the 1st to 3rd Respondents took over the running of the Applicant's kitchen.

[11] It is common cause that in the wake of these activities of 1st to 3rd Respondents, the Trustees of the Applicant, viewing same as illegal and

invalid, sought to intervene to compel the 1st to 3rd Respondents to vacate the Applicant's kitchen and to re-instate the 4th Respondent therein. All their efforts proved abortive as the 1st to 3rd Respondents refused to budge.

[12] It is common cause that in the face of this intransigent position of the 1st to 3rd Respondents, the Trustees purported to dissolved the Executive Committee and removed its members viz 1st to 3rd Respondents from office, pending the appointment of an interim Executive Committee by the general membership of the Applicant. This action of the Trustees was alleged to have been subsequently endorsed by the members of the Applicant at an extra-ordinary general meeting of the general membership held on 10th July 2013, wherein an interim Executive Committee was appointed to take over the affairs of the Applicant and the Trustees mandated to institute proceedings against the 1st to 3rd Respondents on these issues.

[13] It is on the strength of this mandate that Castello Vilakati a Trustee of the Applicant commenced these proceedings and deposed to the affidavits in pursuit of same.

[14] IN LIMINE

The 1st to 3rd Respondents raised the following legal points in a bid to defeat this application *in limine;* viz:

(1) Urgency

(2) Interdict

(3) Locus standi

(4) Disputes of fact

[15] I have no wish to belabor these issues. The point on lack of urgency in my view lacks merits. A close reading of the papers will reveal the palpable fact that the entire affairs of the Applicant is in a near quagmire. A resolution of this matter is thus of paramountcy, to restore some sanity. It is also obvious from the papers that between 29th June 2013 when 1st to 3rd Respondents took over the Applicant's kitchen, and 23rd July when these proceedings were instituted, that the Applicant was engaged in an internal house keeping procedure. These are antecedents to the present proceedings. The 24 odd calendar days interval between when 1st to 3rd Respondents took over the kitchen and when the application was launched, can therefore hardly be urged as a factor to defeat the urgency in these premises.

[16] Similarly, the point taken on disputes of fact must extinguish. The 1st to 3rd Respondents enumerated the alleged disputes of fact in paragraph [11] of the answering affidavit as follows:-

> **"11. The application is fraught with a lot of material disputes of fact which were foreseeable at the institution of the proceedings. The said disputes of fact may be summarized as follows:-**
>
> **11.1 The duration of the lease agreement between Applicant and the 4th Respondent.**
> **11.2 The manner of the termination of the said lease between the Applicant and the 4th Respondent.**
> **11.3 The purported dissolution of the Applicant's executive committee particularly the date thereof"**

[17] I am at pain to comprehend how these issues could remotely be canvassed as material disputes of fact within the context of this application, where the only question for determination, as correctly identified by Mr. N. Fakudze in Applicant's heads of argument, is whether or not the extraordinary general meeting of the general membership of the Applicant which held on 10th July 2013 was properly convened within the terms of the Constitution of the Applicant. This, I say in view of the fact that 1st to 3rd Respondents do not dispute that the meeting held, all they allege is that it did not conform

with the Applicant's Constitution. I am thus inclined to agree with Mr Fakudze that the purported disputes of the fact are a figment of 1st to 3rd Respondents' imagination.

[18] It is convenient for me to decide the point on *locus standi* and the requisites for a final interdict with the merits of this application.

[19] MERITS

Now, since the order sought by the Applicant is in the nature of a final interdict, it is pertinent for me to detail the salutary legal principles that hold sway in such an application.

[20] Speaking about these principles in the celebrated case of **Setlogelo v Setlogelo 1914 AD 221 at 227,** the Court declared as follows:-

> **"It is well established that the pre-requisite for an interdict are a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by another remedy"**

[21] It is inexorable from the aforegoing, that the victory of an Applicant for a final interdict is predicated on his demonstrating the following factors via his affidavit:-

1. A clear right
2. Injury actually committed or reasonably apprehended and
3. The absence of similar protection by any other remedy or irreparable harm.

See **Daniel Didabantu Khumalo v The Attorney General Civil Appeal No. 31/2010, Mhlatsi Howard Dlamini V Mlatsi Civil Appeal No. 15/2010.**

[22] Let us now test the facts urged *in casu* against the rigours of these laid down principles, to ascertain the substantiality of the reliefs sought.

[23] 1. <u>CLEAR RIGHT</u>

In **Minister of Law and Order v Committee of the Church Summit 1994 (3) SA 89 at 98,** the Court said the following on this question:-

"Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probabilities the facts and evidence which he has a clear and definitive right in terms of substantive law. The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common Law or Statutory Law".

[24] The Applicant must therefore show a legal right to the interdict sought. What then are the facts of this case?

[25] The 1st to 3rd Respondents whilst admitting that the property in question belongs to the Applicant, however allege that by virtue of clause 20 of the Applicant's Constitution the power to administer the affairs of the Applicant vests in its Executive Committee of which the 1st to 3rd Respondents are still members. They have the power to institute and / or defend legal proceedings on behalf of the Applicant as well as generally manage its affairs, including hiring and firing its staff. The power of the Trustees of the Applicant detailed in clause 27 of its Constitution, gives them no control over these issues or the activities of the Executive Committee, therefore, clearly, the Trustees lack the *locus standi* to institute these proceedings.

[26] The alleged extraordinary general meeting of the general members of the Applicant in which the Executive Committee was purportedly dissolved and the Trustees given the mandate to institute these proceedings, did not conform with the laid down mandatory procedure for such in terms of sub-clause 22.11 of the Applicant's Constitution. In that event, the extraordinary general meeting is unconstitutional and the resolution emanating therefrom null and void.

[27] It is by reason of the aforegoing that Mr. Mabila who appeared for the 1st to 3rd Respondents contended, that the Applicant lacks the *locus standi* to institute these proceedings which fact deprives it of the clear right to the interdict sought.

[28] Mr Fakudze for his part contended, that the extraordinary general meeting was called in terms of sub-clause 27.11 of the Applicant's Constitution and therefore, the resolution taken thereat is valid and binding on all the parties.

[29] Now, there is no doubt that in terms of clause 20 of the Applicant's Constitution the day to day operation of the Applicant lies with the Executive Committee. Sub-clause 20.4 confers the Committee with the

power to appoint and employ such persons as it thinks fit, pay them such remuneration and allowance as it think fit, grant them such leave as it thinks fit, and dismiss them, subject however to the provisions of the laws of Swaziland and in particular the employment Act. By sub-clause 20.9 of the Constitution, the Executive Committee has the power to institute and defend any legal actions, processes or applications in any Court of competent jurisdiction. The Executive Committee also has the additional power to call general meetings and extraordinary general meetings, in terms of sub-clause 22.9., which mandates them to adopt the procedure laid down in sub-clause (22.2), (22.3) and (22.4)

[30] The Trustees for their part do not exercise any of the powers of the Executive Committee nor do they exercise control over the Executive Committee. However, the Constitution via sub-clause 27.6 confers on the Trustees the right to call an extraordinary general meeting in the same manner as such may be called by the Executive Committee.

[31] It is also important to note that sub-clause 22.11 provides that an extraordinary general meeting may be called by members by submission of a memorandum under the following conditions:-

"22.11.1 The memorandum shall be submitted to the Committee in writing and shall be signed by not less than 20 (twenty) members of the club.

22.11.2 The memorandum shall be submitted not less than 3 (three) weeks before it is desired to hold an extraordinary general meeting.

22.11.3 The memorandum shall state the precise purpose of the extraordinary general meeting and the proposers may be called upon to appear before the Committee to elaborate on the memorandum.

22.11.4 On receipt of such a memorandum presented in accordance with this clause, the Committee shall forthwith notify the members of an extraordinary general meeting to be held upon the date stipulated in the memorandum, which notice shall enclose a copy of the memorandum, and include such other matters as the Committee may consider appropriate"

[32] These are the steps which the 1st to 3rd Respondents complain were mandatory for the Applicant to take in convening the extraordinary general meeting of the 10th of July 2013.

[33] I must say that I am disinclined to agree with the 1st to 3rd Respondents that the Applicant was obliged to take these steps in convening the said extraordinary general meeting. This, I say in view of the impasse that had been imposed by the fued between the Executive Committee and the Trustees over the operation of the kitchen. To my mind, the provision of the Applicant's Constitution under which the extraordinary general meeting could be convened in these circumstances is sub-clause 27.11, which provides as follows:-

> **"In the event of the Trustees being unable to agree on any matter affecting the assets and / or liabilities of the club / or in the event of the Trustees refusing to carry out any direction or recommendation of the Committee, or should the Committee refuse to approve of any decision or recommendation of the Trustees, then the matter shall, within 30 (thirty) days of any such disagreement or refusal, be refereed to a General meeting and <u>the decision of such meeting shall be final and shall be binding upon the Trustees, the Committee and all concerned, until the decision of such extraordinary general meeting</u> has been given, nothing shall be done or carried out in respect of the matter or matters referred to such meeting for its decision"**. (emphasis added)

[34] The inescapable fact of the total breakdown of relations between the Trustees and the Executive Committee over the operation of Applicant's

kitchen is tailor made for the sub-clause 27.11 procedure. This breakdown of relations and the factors leading up to same are demonstrated in the Applicant's founding affidavit as follows:-

> **"8. At all times material hereto, prior to the 10th July 2013, the 1st to the 3rd Respondents have been members of the elected Executive Committee of the Applicant.**
>
> **8.1 Another member of the Executive Committee, who was also the chairperson, was one Vusi Sibisi who has since resigned.**
>
> **9. On or about the 5th April 2013 the 1st to 3rd Respondents acting as members of the Executive of the Applicant, unlawfully and without good reason and cause, terminated the lease agreement of the 4th Respondent.**
>
> **10. When the action of the then Executive Committee came to the attention of the Trustees of the Applicant, the Trustees, by letter dated the 26th April 2013 notified the Executive Committee that its act of terminating the lease agreement of the 4th Respondent was invalid and illegal, and the Trustees instructed the then Executive Committee to reinstate the 4th Respondent as a lawful tenant of the Applicant, whose lease agreement was still valid and enforceable.**

"A copy of the letter of the trustees is attached hereto and marked "C2".

11. The then Executive Committee did not respond and or act on the letter of the Trustees, and continued to evict the 4th Respondent from the premises of the Applicant.

12. On the 26th May, the Trustees made yet another follow up by letter to the Executive Committee in an effort of convening a meeting with the Executive Committee to resolve the issue of the 4th Respondent's terminated lease agreement.

"A copy of the letter is attached hereto and marked "C3".

13. However, the efforts of the Trustees to convene a meeting did not materialize as the Executive Committee did not respond and honour the invitation.

14. Upon realizing that the Executive Committee was no longer acting in good faith and in the interest of the Applicant, the Trustees decided to dissolve the Executive Committee pending the appointment of an interim committee by the General membership of the Applicant, at an appointed meeting.

"A copy of the letter is attached herein and marked "C4".

14.1 The then Executive Committee was acting against the interests of the Applicant as mandated.

14.2 The 1st, 2nd and 3rd Respondents after terminating the lease agreement of the 4th Respondent and unlawfully evicting her from the premises, they then personally took over the Applicants kitchen premises, which were used by the 4th Respondent for food and catering business.

14.3 The conduct of the 1st, 2nd and 3rd Respondents was a clear conflict of interest from their role as Executive Committee members of the Applicant without proper sanction of the Applicant.

15. The trustees attempted to restore the position to its previous state by reinstating the 4th Respondent back into the premises by letter dated the 29th June 2013. However, 4th Respondent could not take back possession of the premises as the 1st, 2nd and 3rd Respondents had assumed occupancy unlawfully and began running the food catering business for themselves.

Copy of letter attached hereto marked "C5".

16. I humbly which to state the 1st, 2nd and 3rd Respondents are not in lawful occupation, and have not done so with the consent and or knowledge of the Applicant or the consent of the 4th Respondent, who is the lawful tenant.

16.1 The 1st, 2nd and 3rd Respondents have abused their powers and position while in office as Executive Committee members to unlawfully evict the 4th Respondent and take over the premises

of the kitchen premises for their own personal use and gain, with complete disregard of the interest of the Applicant.

17. On or about the 10th July 2013, an Extra Ordinary Meeting was called and convened for the general membership of the Applicant to deal with the impasse between the Trustees, the Executive Committee and the issue of the alleged terminated lease agreement of the 4th Respondent.

17.1 At the meeting the membership of the Applicant, endorsed the decision of the Trustees to dissolve the Executive Committee, which consisted of the 1st, 2nd and 3rd Respondents.

17.2 The membership then appointed an interim committee to take over all the affairs of the Applicant, and the running of the day-to-day affairs of the Applicant.

17.3 The membership further endorsed the decision of the Trustees to reinstate the 4th Respondent back into the Applicant's premises at the kitchen to continue its operations under its existing lease agreement".

See attached extract of minutes attached hereto marked "C 1"."

[35] The aforegoing depicts an insurmountable situation borne out of the wrangling over the operation of the Applicant's kitchen. It is this impasse that led to the extraordinary general meeting detailed in paragraph [17] ante

and the Concomitant resolution. By sub-clause 27.11 such an extraordinary general meeting could be summoned by anybody, Executive Committee, Trustee or member of the Applicant desirous of tabling an irreconcilable disagreement between the Executive Committee and the Trustees before a general meeting for its resolution. In these circumstances sub-clause 27.11 must be interpreted purposively. The procedure for convening the meeting pursuant thereto is not subject to the procedure laid down in sub-clause 22.11, which I have detailed above. I say this because, by this sub-clause the entire procedure of summoning such a meeting is at the mercy of the Executive Committee. In the context of the sub-clause 27.11 procedure, which is invoked in the face of an impasse between the Executive Committee and the Trustees, to revert back to sub-clause 22.11, will to my mind fan the embers of an already blazing situation. It will give the Executive Committee an undue advantage and a platform to hold the entire process to ransom because they have already disagreed with the agenda of the meeting. They will have the weapon to exploit it and override the entire process.

[36] It appears to me that, it is in appreciation of this fact, that sub-clause 27.11 does not prescribe any particular procedure to be followed in convening such

an extraordinary general meeting, save that the matter be referred to the general meeting within 30 (thirty) days of such disagreement. This is in contradistinction with the power of the members, Executive Committee or Trustees to call an extraordinary general meeting pursuant to sub-clauses 22.1, 22.9 and 27.6 respectively. Sub-clause 27.11 addresses a completely different set of facts and circumstances and must be applied in a way and manner as not to render it futile and absurd. The sub-clause 22.11 procedure is clearly unattainable in these circumstances on the basis of the grounds stated therein.

[37] It is by reason of the totality of the aforegoing, that I find that the extraordinary general meeting of the 10th July 2013, which was called for the general membership of the Applicant to resolve the impasse between the Executive Committee and Trustees on the termination of the lease agreement of the 4th Respondent, was properly convened. The procedure that was followed has support in sub-clause 27.11. It suffices that the disagreement was referred to a general meeting for resolution.

[38] The *ipsissima verba* of the extract of minutes resolution taken at the extraordinary general meeting which is contained in annexure "C1" to these proceedings, is as follows:-

> **"1. The current Club's Executive Committee is forthwith dissolved and herewith replaced with an interim committee in the person of Khethabahle Mthethwa, Nancy Mavuso and Dave Bennett.**
>
> **2. That the Trustees are authorized to institute legal action for and on behalf of the Club for relief against the following persons namely, Vusi Sibisi, Zodwa Tshabalala, Zandile Tshabalala, and Phumzile Eckerd.**
>
> **3. The authority given above to the Trustees, is to ensure that the above named persons, their agent and anyone who holds tittle through them are**
>
> **a) Evicted, restrained and interdicted from using the Club's Kitchen and other Club property;**
> **b) Restrained and interdicted from interfering and giving any orders to the staff and tenants of the club;**
> **c) Ordered to surrender the keys of the Club, Kitchen and all other property of the Club in their possession;**
>
> **4. The Trustees acting in their given authority are to ensure that as a matter of urgency, the lawful tenant of the Club's Kitchen,**

Pro-Tech Holdings are reinstated back to their position as tenants".

[39] In terms of sub-clause 27.11 the above resolution is final and binding on the Executive Committee, Trustees and members of the Applicant.

[40] It follows from the above, that not only has the previous Executive Committee been dissolved and the 1st to 3rd Respondents removed as its members, but the Trustees indeed have the mandate of the Applicant to institute these proceedings. The Applicant has thus established a clear right to the interdict sought.

[41] The question of injury lies in the breach or infraction of the right of the Applicant by the 1st to 3rd Respondents, who inspite of the resolution of 10th July 2013 continue to occupy and operate the Applicant's kitchen. See **Prince Mahlaba Dlamini v Mhlatsi Dlamini and 2 others (Supra).** The Applicant has alleged in paragraph [25] of the founding affidavit that this action of the 1st to 3rd Respondents is to its prejudice as it deteriorates its facility. There is also the palpable apprehension of injury which might

emanate from a suit in damages against the Applicant by the 4th Respondent due to the activities of 1st to 3rd Respondents.

[42] Finally, from the papers filed of record, I see no alternative avenue open to the Applicant to enforce the resolution of the 10th of July 2013, other than to approach this court for redress. The papers exhibit an adamant position by 1st to 3rd Respondents who bluntly refuse to honour the said resolution.

[43] As **CB Prest** elucidated in the text **Interlocutory interdicts** pages 49 – 52:-

> **"A final interdict is a drastic remedy and (probably largely for that reason) in the Court's discretion. The Court will not in general grant an interdict when the applicant can obtain ordinary relief---- It has been held, correctly it is submitted, that the discretion of the Court, apart from the position relating to the grant of interlocutory interdicts, where considerations of prejudice and convenience are important, is bound up with the question whether the right of the party complaining can be protected by any other ordinary remedy"**
>
> See **Swaziland Electricity Company v John Young and Another, Civil Case No. 2382/11.**

[44] In the result of the aforegoing, this application has merits. It succeeds. I hereby order as follows:-

1. The 1st, 2nd and 3rd Respondents be and are hereby evicted and ordered to vacate the Applicant's kitchen premises and the property of the Applicant situate at Theatre Club in Mbabane.

2. The 1st, 2nd and 3rd Respondents be and are hereby restrained from interfering with the staff, business and affairs of the Applicant.

3. The 1st, 2nd and 3rd Respondents be and are hereby ordered to surrender the keys of the property of the Applicant forthwith to the interim chairperson of the Applicant. Khethabahle Mthethwa.

4. The 4th Respondent be and is hereby restituted back to the premises of the Applicant as a lawful tenant with a valid lease agreement for such occupancy of the kitchen facilities.

5. Costs against the 1st, 2nd and 3rd Respondents.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE ..... DAY OF 2013

OTA J.

JUDGE OF THE HIGH COURT

For the Applicant: **N. Fakudze**

For the 1st to 3rd Respondents: **M. Mabila**