



IN THE HIGH COURT OF SWAZILAND

Civil case No: 50/2013

In the matter between:

BARBARA DLAMINI

FIRST APPLICANT

NESTER DUDU ZIKALALA

SECOND APPLICANT

AND

THAMSANQA DLAMINI

FIRST RESPONDENT

SINCEDILE DLAMINI

SECOND RESPONDENT

Neutral citation:

Barbara Dlamini And Another And Thamsanqa Dlamini And Another (50/2013)[2013]SZHC42 (2013)

Coram:

M.C.B. MAPHALALA J,

For Applicants
For Respondents

Attorney Ntobeko Piliso
Attorney Mzwandile Dlamini

Summary

Civil Procedure – *Mandament van spolie* – application to restore possession of leased premises and water supply - the requirements of spoliation discussed – held that the applicants were not in peaceful and undisturbed possession – application dismissed.

**JUDGMENT
28 FEBRUARY 2013**

- [1] This is an urgent application for an order directing the respondents to forthwith restore possession *ante omnia* of water supply in respect of a car wash business on land situated next to Lobamba filling station; they further sought an order directing the deputy sheriff for the Hhohho Region to break any locks in order to restore possession of the water supply; they also sought an order interdicting and/or restraining the respondents or anyone acting under their authority from unlawfully depriving them of the water supply; they further sought an order interdicting and /or restraining the respondents or anyone acting under their authority from in anyway harassing or threatening or interfering with the applicants in their possession and control of the car wash business situated at Lobamba area next to the Filling Station including the water supply thereto.
- [2] The first applicant deposed to the founding affidavit in which she stated that in 2009 Nkululeko Zikalala concluded an oral lease agreement with the mother of the respondents known as Gogo Ndwandwe in respect of a vacant piece of land at Lobamba Filling Station. The lease was in respect of a car wash business in which Nkululeko would erect such structures as are necessary for the business; the rental was E350.00 (three hundred and fifty emalangi) per month. Pursuant to the agreement Nkululeko took occupation of the premises and built a store-room, waiting room, a toilet as well as a carport.
- [3] In September 2012 Nkululeko emigrated to South Africa leaving the business in the control of the applicants; and, the second applicant is the mother to

Nkululeko. On the 5th October 2012 the applicants asked Gogo Ndwandwe to prepare a written lease agreement in respect of the premises; she refused, but in turn she increased the rental from E350.00 (three hundred and fifty emalangeneni) to E700.00 (seven hundred emalangeneni) per month. The applicants paid the increased rental in November 2012. Notwithstanding this Gogo Ndwandwe together with her son Mcebo Dlamini and her daughter the second respondent told the applicants that they intended cancelling the agreement. When the applicants asked the second respondent if they were prepared to compensate them for improvements made on the property, they refused.

[4] On the 27th December 2012 applicants' attorneys advised the respondents in writing that terminating the contract would be unlawful. This letter infuriated the first respondent who insulted the second applicant. On the 29th December 2012 the first respondent went to the premises and locked the water tap and inserted a padlock; thereby depriving them of the water supply. The first respondent did this in the presence of applicants' employees.

[5] The applicants argued that they were in peaceful and undisturbed possession of the water supply as well as the premises, and, that the respondents have unlawfully deprived them of possession without an order of court; and that by so doing, they took the law into their own hands. The applicants further argued that they were also entitled to an interdict restraining the respondents

from unlawfully depriving them of the water supply or interfering in their business.

[6] They argued that they have a clear right to the premises as well as to the water supply by virtue of the Lease agreement between Nkululeko Zikalala and Gogo Ndwandwe; they further argued that they stand to suffer irreparable harm by the closure of the business in terms of loss of income, damage to the structural improvements on the premises as well as the possibility of the premises being leased to another person. They also argued that they have no other alternative remedy. Similarly, they contended that the matter was urgent because the nature of the business is such that it cannot operate without water; and, that the structural improvements were bound to be damaged if the matter would take its normal course.

[7] The second applicant filed a supporting affidavit stating that he was present when the contract of Lease was concluded between Nkululeko Zikalala and Gogo Ndwandwe; she further confirmed the terms and conditions of the contract as alleged by the first applicant. She disclosed that the first applicant was the mother in-law of Nkululeko Zikalala and that the purpose of venturing into the business was to provide for her maintenance as Nkululeko's mother and that of his minor children. She further confirmed that when Nkululeko moved out of the country, he left the business under their control.

[8] The application is opposed by the respondents, and they raised the following points of law: firstly, that the applicants lack locus *standi in judicio* to litigate, that they have no direct and substantial interest in the right they claim to protect and that they were never at any point in possession of the premises and that only Nkululeko Zikalala was a party to the lease agreement. The second point in *limine* is misjoinder of the respondents and non-joinder of Gogo Ndwandwe and Nkululeko Zikalala who concluded the lease agreement. The third point in *limine* is that no lease agreement existed between Gogo Ndwandwe and Nkululeko Zikalala at the time of launching the proceedings; hence, the applicants were not in peaceful and undisturbed possession of the premises. The fourth point is *limine* is that there are foreseeable disputes of fact in the application which cannot be resolved on the papers; however, the respondents did not mention the said disputes of fact.

[9] On the merits the respondents admit that the lease agreement was concluded between Nkululeko Zikalala and Philipinah Dlamini also known as Gogo Ndwandwe; however, they denied that the lease was for an indefinite period of time. They contended that the lease was for a period of three years ending on the 31st December 2012; they further denied that the parties had agreed that Nkululeko was to erect structures on the premises other than a storeroom made of timber for keeping his equipment. They argued that such a structure was not permanent. They denied that Nkululeko installed water and electricity on the premises and contended that he only paid a reconnection fee for the water since

it had already been installed .According to the respondents there is no electricity installed on the premises.

[10] They further denied that Philipinah Dlamini knew that Nkululeko Zikalala had left the premises in the control of the applicants since September 2012; they argued that Nkululeko had no authority to transfer possession of the premises to a third party, and, that consequently, the applicants were not in peaceful and undisturbed possession of the premises.

[11] The respondents argued that the applicants had sought a new lease agreement in their names and had advised Philipinah Dlamini that Nkululeko Zikalala had abandoned the premises and emigrated to South Africa without an intention to return to the country since he was evading the police who were looking for him. They further contended that the applicants had been advised to negotiate their own lease on the expiry of the present lease on the 31st December 2012.

[12] According to the respondents, it was agreed between Nkululeko and Philipinah that improvements made on the premises will not be removed when the lease expired; and, that employees at the carwash were duly advised by them on the 28th December 2012 that the lease expired on the 31st December 2012, and, that they should not return to the premises thereafter. The respondents further denied locking the water supply as alleged and argued that they only put padlocks in January 2013 after the lease had lapsed. Similarly,

the respondents denied that the matter is urgent on basis that the applicants did not lodge this application until the 17th January 2013.

[13] The respondents further denied that the second applicant was present when the lease was concluded between Nkululeko and Philipinah Dlamini. However, the respondents explained that Philipinah was unable to file any confirmatory affidavit due to the urgency of the matter since she was bereaved.

[14] In their replying affidavit the applicants argued that they have a right to litigate because they were in possession of the premises and the business at the time they were dispossessed of the premises; they argued that Nkululeko's affidavit could not be obtained since he was in South Africa but they insisted that his confirmatory affidavit was not necessary for purposes of this application since they were in possession of the business as well as the premises. Similarly, they argued that the joinder of Nkululeko and Philipinah was not necessary since the cause of action was not based on the lease but their possession of the premises.

[15] They denied the existence of disputes of fact in the matter and argued that even if they did exist, they could be resolved by invoking Rule 6 (18) and lead oral evidence on specific issues. They insisted that Nkululeko installed both water and electricity on the premises both of which are of a permanent nature with concrete floors and a roofing with corrugated iron sheets. They reiterated

that the first respondent locked the premises in the presence of Sidwell Zikalala and Ndumiso Mdluli on the 29th December 2012; the second applicant and Sidwell Zikalala filed confirmatory affidavits in support thereof.

[16] They conceded that Philiphinah was bereaved due to the death of her son Mcebo Dlamini; however, they argued that this was not an excuse for not filing a confirmatory affidavit.

[17] It is worth mentioning that during the hearing both the points in *limine* and the merits were argued simultaneously. It is common cause that the applicants seek a *mandament van spolie* as well as a final interdict.

[18] In the case of *Swaziland Commercial Amadoda Road Transportation v Siteki Town Council and Others* Civil case No. 254/2012 [HC] at paragraphs 17 and 18 where I had occasion to say the following:

“[17] It is trite law that the essence of the ‘mandament van spoile’ is that the person who has been deprived of possession must first be restored to his former position before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order to restraining persons from taking the law into their hands and inducing them to submit the matter to the jurisdiction of the courts .In order for peace to prevail in a community and to be maintained every person who asserts a particular thing should not resort to self-help in order to gain possession of the thing. The motion proceedings are ideal and expedient for this remedy since it

is urgent in nature with a quest to restore the status *quo ante* before the equities and merits of the case are considered; any delay would defeat the unique and summary nature of the remedy.

[18] There are two essential requirements which the applicants must prove; firstly, that he was in peaceful and undisturbed possession of the thing; and secondly, that he was unlawfully deprived of such possession. It suffices for the applicant in the first requirement to show that he had factual control of the thing coupled with the intention to derive some benefit from the thing. Furthermore, he must prove an act of spoliation that he had been deprived of his possession of the thing without a court order or against his consent”

[19] It is common cause that the applicants took over the business in September 2012 after the lessee Nkululeko Zikalala had emigrated to South Africa leaving the business in their control .It is not denied that the second applicant is the mother of the Lessee and that the first applicant is the mother in-law of the Lessee. They were authorised by the Lessee to administer the business, pay for all expenses incurred including electricity, rental, water consumption, maintenance for the second applicant for her upkeep as well as for the upkeep of the lessee’s minor children .

[20] It is not in dispute that the lease between Nkululeko Zikalala and Philiphinah Dlamini was due to lapse on the 31st December 2012; and, the applicants alleged that they were dispossessed of the premises as well as the water supply on the 29th December 2012 , that is two days before the lease expired. It is also not in dispute that these proceedings were instituted on the 17th January 2013

and the dispossession was on the 29th December 2012; the applicants did not in the meantime institute the requisite proceedings. They waited for the lease to lapse on the 31st December 2012; hence, the restoration of possession is in the circumstances impossible in view of the expiry of the lease.

[21] The applicants did not have the necessary *locus standi in judicio*. The contract of lease was concluded between Philipinah Dlamini and Nkululeko Zikalala; hence, they have *locus standi in judicio*. Similarly, the applicants were obliged to join Nkululeko as the applicant and Philipinah Dlamini as the respondent.

[22] I agree with the respondent's attorneys that the applicants have no direct and substantial interest in the matter; this legal phrase has been defined to be an interest in the right which is the subject-matter of the litigation and not merely a financial interest in the right which is the subject-matter of the litigation. See *Hebstein & Van Winsen*, fourth edition, *The Civil Practice of the Supreme Court of South Africa* at page 172.

[23] The test for a 'direct and substantial interest' was formulated by *Fagan AJA* in the case of *Amalgamated Engineering Union v. Minister of Labour* 1949 (3) SA 637 (AD) at 659 as follows:

“Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that other party joined in the

suit or if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may of course be cases in which the Court can be satisfied with the third party's waiver of his right to be joined e.g. if the court is prepared, under all the circumstances of the case, to accept an intimation from him that disclaims any interest or that he submits to judgement. It must be borne in mind, however, that even on the allegation that a party has waived his right, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them or both.

Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgement binding on him as *res judicata*. There may be further circumstances present which would support an allegation of waiver or estoppel against him.

The principle that *res judicata* can be pleaded only when the parties between whom the plea is raised are the same as in the previous suit – or are deemed to be the same because certain persons are identified with another for this purpose ... may sometimes give valuable guidance as to whether a third party should be joined or not. The court will not for instance issue a decree which will be a *brumen fulmen* because some person who will have to co-operate in carrying it into effect will not be bound by it.”

[24] *Hebstein & Van Winsen* (supra) at page 172 summarises the legal position as follows:

“In *Amalgamated Engineering Union v. Minister of Labour* the Appellate Division employed two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the

third party would have *locus standi* to claim relief concerning the same subject-matter. The second was to examine whether a situation could arise in which because the third has not been joined any order the court might make would not be *res judicata* against him, entitling him to approach the court again concerning the same subject-matter and possibly obtain an order irreconcilable with the made order in the first instance.”

[25] In view of the conclusion to which I have arrived it becomes unnecessary to deal with the issue of the interdict. Suffice to say that the applicants do not have a clear legal right to the premises in view of the expiry of the lease agreement. It has been held that the right which forms the subject-matter for an interdict must be a legal right; a financial or commercial interest alone will not suffice, and, the right must be enforceable in law. See *Hebstein & Van Winsen* (supra) at page 1064-1065; in *Setlogelo v. Setlogelo* 1914 AD 221 AD at 227. In the absence of a clear right, it becomes academic to consider the other two essential requirements of an interdict, namely, an injury actually committed or reasonably apprehended as well as the absence of a similar protection by any other ordinary remedy.

[26] Accordingly the application is dismissed. No order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

