



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 1584/2013

In the matter between

**WBD INVESTMENTS (PTY) LTD**

**Applicant**

In re:

**WBD INVESTMENTS (PTY) LTD**

**Applicant**

and

**SYNERGY CHARTERED ACCOUNTS  
SWAZILAND LTD  
KERRY A. SMITH**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent**

**Neutral citation:** *WBD Investments (Pty) Lt, In re: WBD Investments (Pty) Ltd v Synergy Chartered Accounts Swd Ltd & another* (1584/2013) [2014] SZHC 148 (01 July 2014)

**Coram:** **MAMBA J**

**Heard:** **20 June, 2014**

**Delivered:** **01 July, 2014**

**Reasons Handed  
Down:**

**09 July, 2014**

[1] On 11 October 2013, the applicant approached this court on an urgent and Ex parte basis for a rule nisi, inter alia, that:

- '1. That Respondent and all persons and /or entities claiming title under the Respondents are hereby interdicted from removing, disposing, alienating all or any movables situate at the premises namely; Portion 3 of Lt 97, situate on the corner of Masalesikhundleni and Mbabha Street, in Manzini in the Manzini District pending finalization of these proceedings.
2. That applicant's landlord hypothec be and is hereby confirmed over respondents' movables on premises situated at Portion 3 of Lot 97, situate on the corner of Masalesikhundleni and Mbabha Street, in Manzini in the Manzini District for arrear rentals in the amount of **E1,062,720.00 (One Million, and Sixty Two Thousand, Seven Hundred and Twenty Emalangeni).**
3. That the Deputy Sheriff for the District of Manzini or any other duly authorized person of the above Honourable Court be and is hereby directed and authorized to attach and remove the movable goods of the Respondent at Portion 3 of Lot 97, situate

on the corner of Masalesikhundleni and Mbhabha Street, in Manzini in the Manzini District.

4. That the Deputy Sheriff for the District of Manzini or any other duly authorized person be and is hereby authorized to hold the said goods in their custody pending finalization of the proceedings instituted by applicant against the Respondent for arrear rents amounting to **E1,062,720.00 (One Million, and Sixty Two Thousand, Seven Hundred and Twenty Emlangeni)** and to do the following:-

- 4.1 Serve this Order and the Notice of Application and founding affidavit forthwith upon the Respondents and explain the full nature and exigency thereof to it. In the absence of any individual representing the Respondents the documents may be affixed prominently and securely at the premises,

- 4.2 to make an inventory thereof,

- 4.3 to make a return to the applicant or its attorney and by the Deputy Sheriff for the District of Manzini or any other duly authorized person on the execution of this order.'

- [2] As would appear from prayers 2 and 3 above, the applicant's claim is based on its ownership of the property concerned which it further claims is being leased or rented by the respondents who have failed to pay the required or agreed rentals.
- [3] The application was launched by one Elaine Welch in her capacity as a director of the applicant by virtue of being the Executrix in the Estate of the late Brian Watkins. The applicant stated in its founding affidavit that the respondents were in occupation of 492 square metres of the said property at an agreed rental of E80.00 per square metre since July 2011 and had failed to pay the agreed rentals which are due monthly and in advance to the applicant. Based principally on these allegations, the court granted the rule nisi applied for but ordered that the property to be attached must not be removed from the possession of the respondents. The rule nisi was made returnable on 18 October, 2013.
- [4] It has to be noted herein that in her founding affidavit Elaine Welch stated that 'the first respondent [is] ..a Company duly incorporated in accordance with the company laws of Swaziland trading as such at Portion 3 of Lot 97

situate on the Corner of Masalesikhundleni and Mbhabha Street, in Manzini in the Manzini District whose fuller or better particulars are unknown to the applicant. She further stated that the second respondent is Kerry A. Smith, an adult female chartered Accountant/Auditor practicing as such at the said property 'ostensibly in the name of the first respondent Company'.

[5] It is now common cause that there is no legal entity which bears the name or appellation of the first respondent herein. Instead the second respondent operates or practices under the name and style Synergy Chartered Accountants (Swaziland). Because of this fact that has become common cause in this application, I do not think that any legal or useful purpose would be served by any further reference to the first respondent. Indeed no order may be issued against a non-existent entity.

[6] In her opposition to the application, Kerry A. Smith (to whom I shall hereinafter refer to as the respondent), raises, in essence three points. First, she avers that Elaine Welch '...cannot in law unilaterally act purportedly on behalf of the applicant in circumstances where she is not duly authorized. ... No board meeting or shareholders meeting was either called or requisitioned and no resolution authorizing the present proceedings were passed by the

Company.’ The respondent alleges that as the other director of the Applicant, she did not authorize Welch to bring these proceedings on behalf of the applicant. She therefore argues that Welch is on a frolic of her own and her actions in bringing this application are an abuse of the court process. She states further that if this Court had known this fact when Welch applied for the rule nisi, it would not have granted that rule and perforce, the rule must be discharged.

- [7] The above contention or submission by the respondent ignores in my judgment, at least two very fundamental legal principles. First, as an interested party to the issue pertaining her occupation of the premises and the rentals due by her to the applicant, she was disqualified to sit at a meeting of the Board of Directors of the applicant to deliberate on that issue. Her position was certainly not made easier by the fact that this involved potential legal proceedings against her for her alleged failure to pay rentals to the applicant of whom she is a director. She could not in law be a judge in her own cause. That left Welch as the only neutral or disinterested director to act. In so acting of course, she is enjoined by her fiduciary duties to act in the best interests of the Company. She cannot act *carte blanche*. She has not been shown to have so acted in this application. If such had

been shown or proven, however, her actions would be censored by the Court; she would be unsuited.

[8] Secondly, the respondent's averments do not take into account that in concluding the agreement of lease, the company was represented by the very Elaine Welch whom she now submits has no authority to act on behalf of the applicant. She, the respondent represented herself. I shall deal with the existence or otherwise of this lease later in this judgment. The submission by Counsel for the respondent that the apparent split in directorship of the company could only be resolved by an act to liquidate the company or an intervention by its shareholders appears to me to be rather unsound and extreme.

[9] It is common cause that Brian Watkins died on 9 July 2010 and the respondent moved into the premises the following month in order to continue and complete some of the work that Brian Watkins had been doing as a Chartered Accountant/Auditor. At this time part of the premises was occupied, so to speak, by the Estate of the late Brian Watkins and a company known as FHAM. Again, the evidence herein is clear and not disputed that following court actions against FHAM and Estate Late Brian Watkins,

certain assets of these entities which were in the premises were attached and removed therefrom. This caused Welch to leave or vacate the premises altogether, leaving it to be solely occupied by the respondent. This was on 21 April 2011.

[10] It is not clear what took place between the parties in the next two months after Welch vacated the premises. What is significant though for purposes of these proceedings is that on 26 July 2011, the respondent, through her attorneys wrote to the attorneys of the late Brian Watkins in the following terms:

‘6. In respect of our client’s occupation of the building, our client concedes that she is liable to pay rental for the occupation at the rate of E80 per meter square. However such rental will be calculated from the 9<sup>th</sup> July 2011 being the date whereupon office furniture and equipment belonging to the Estate were removed by the Executrix.’

It is common ground that the ‘building’ referred to in this excerpt is the property in question. Plainly and unequivocally the respondent ‘concedes’ or admits ‘liability’ to pay rental for the building, not just a part thereof at a specified amount per square metre. As stated above, the entire building is



492 square metres and the rentals were to be paid monthly and in advance. For these reasons, I reject the respondent's objection that there was no agreement of lease or there was no agreement on the rental payment thereof. That the applicant company had no bank account is totally irrelevant for purposes of these proceedings. I would of course understand this averments if the defence by the respondent was that it was a material term of the agreement of lease that the rentals would be deposited into the applicant's bank account. This is not the case in the present matter.

[11] The respondent has stated that she has a claim against the Estate of Brian Watkins. That is, however, a separate entity from the applicant company. This claim, whatever its merits, cannot constitute a bar or defence to the applicant's application herein.

[12] I hold that the respondent has no defence to this application and for the foregoing reasons, the application is granted as prayed in terms of prayers 1,2,3,4,5.1,5.2,5.3 and 5.4; such costs are to include the costs of counsel to be duly certified in terms of the applicable rule of this Court; (rule 68(2)).

**MAMBA J**

**For the Applicant : Advocate P.E. Flynn**

**For the Respondent : Mr E.J. Henwood**