



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No.1862/2013

In the matter between:

**DILYS DLAMINI**

**1<sup>st</sup> Applicant**

**THEMBISILE DLAMINI**

**2<sup>nd</sup> Applicant**

vs

**MANZINI MEAT MARKET (PTY) LTD**

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

**PIMENTAS KFC (PTY) LTD t/a KFC**

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

**DUPS FUNERAL HOME &**

**UNDERTAKES (PTY) LTD**

**3<sup>rd</sup> Respondent**

In re:

**MANZINI MEAT MARKET (PTY) LTD**

**1<sup>st</sup> Applicant**

**PIMENTAS KFC (PTY) LTD t/a KFC**

**2<sup>nd</sup> Applicant**

and

**DUPS FUNERAL HOME & UNDERTAKERS**

**(PTY) LTD**

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

**MANZINI CITY COUNCIL**

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

**Neutral citation:**

*Dilys Dlamini & Another vs Manzini Meat Market (Pty) Ltd vs 2 Others (1862/2013) [SZHC 15] [2014] (21<sup>st</sup> February 2014)*

**Coram:**

**MAPHALALA PJ**

**Heard:**

**6<sup>th</sup> December 2013**

**Delivered:** 21<sup>st</sup> February 2014

**For Applicant:** Mr. M. Jele

**For Respondent:** Mr. Z. Magagula

- Summary:
- (i) The Application before court was brought under a Certificate of Urgency for rescission of the order by *Mamba J* on the 29<sup>th</sup> November 2013 in terms of Rule 42(1) of the High Court Rules, alternatively under the common law;
  - (ii) The Respondents oppose the Application contending that the Applicants have no direct and substantial interest in this matter. That they merely have a financial interest in the matter;
  - (iii) The Respondents further contends that Applicants have introduced new matter which was not before *Mamba J* on the 29<sup>th</sup> November 2013. That the instant Application is akin to an appeal of a judgment of a judge in the same division which is not permitted by law.
  - (iv) The court agrees with the arguments of the Respondents that Applicant have only proved financial interest as opposed to a direct and substantial interest. Therefore the Application is dismissed with costs.

**Decided cases referred to in the judgment**

1. **Nyingwa vs Woolman NO 1993(2) SA 508 at 510;**
2. **Amalgamated Engineering Union vs Minister of Labour 1949(3) SA 637 (AD) at 659;**
3. **Mefika Matsebula vs Mandla Ngwenya (unreported) High Court Case No.4306/2010;**
4. **Herbstein & von Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition at page 172.**

## JUDGMENT

### **The Application**

- [1] The Applicant seeks that the order granted by *Mamba J* on the 29 November, 2013 in terms of Rule 42(1) of the High Court Rules alternatively under the common law be rescinded.
- [2] The Applicant filed a Notice of Motion on 4 December, 2013 under a Certificate of Urgency for orders in the following terms:
- “1. *Dispensing with the usual forms and procedure relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*
  2. *Condoning Applicant’s non-compliance with rule of this Honourable Court.*
  3. *That pending the finalization of this Application the execution of the Order of Court dated 29<sup>th</sup> November 2013 be stayed.*
  4. *Rescinding and/or setting aside the order issued by this Honourable Court or Friday the 29<sup>th</sup> November 2013.*
  5. *Granting leave for 1<sup>st</sup> and 2<sup>nd</sup> Applicants to be joined as 3<sup>rd</sup> and 4<sup>th</sup> Respondents in the main action.*
    - 5.1 *Granting leave for 1<sup>st</sup> and 2<sup>nd</sup> Applicants to file their opposing affidavits within 14 days of grant of the Order for Rescission of Judgment.*
  6. *Granting costs on the ordinary scale against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally.*

7. *Further and/or alternative relief.*”

[3] The Founding Affidavit of one Dilys Dlamini representing the 1<sup>st</sup> Applicant with pertinent annexures is filed thereto.

[4] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents oppose the Application and have filed an Answering Affidavit of one Maria Bettencourt Pimenta advancing a defence to the Application. A further Supporting Affidavit of one Mr. Corne Bateman is also filed thereto.

**A short overview**

[5] The matter appeared before me on the 6<sup>th</sup> December 2013 where I heard submissions of the attorneys of the parties and I reserved judgment. However, in the meantime I was approached by attorneys of the parties with a report that Applicant was interfering with the trucks coming into the premises. I called the attorneys into my Chambers to resolve the matter. The attorney for the Applicant insisted that his client will continue to block the said truck. It was then when I issued a ruling in favour of the Respondent and stated that the reasons for that ruling will be delivered later on. This therefore is that ruling with reasons thereof.

**(i) Applicant's arguments**

[6] The attorney for the Applicant, Mr. Z. Magagula advanced arguments and filed comprehensive Heads of Arguments for which I am grateful. The attorney for the Applicant in his Heads of Arguments outlined a useful background to the case between the parties as follows:

“2. APPLICATION

2.1 *The two Applicants are registered owners of ERF No.106 variously referred to as Lot 106 and their Deed of Title is annexed to the founding affidavit.*

2.2 *The Applicants entered onto a lease agreement with the 3<sup>rd</sup> Respondent “Dups” for a period of 24 months with the right to renew for a further 24 months.*

*After entering into the lease agreement, Dups fenced off Erf No.106 leaving an access road that connects 1<sup>st</sup> and 2<sup>nd</sup> Respondents' premises to the main street.*

*The access road is outside Erf No.106 but runs along it for almost the entire length. The access road allows motor vehicular traffic and wishing to access the service part of 1<sup>st</sup> and 2<sup>nd</sup> Respondents' premises including ordinary members of the public wishing to take a “short cut” from one part of the city into the main city centre.*

2.2.1 *There is no servitude on Erf 106 in favour of Portion 10 and 11 of Erf 368 and none is claimed; not even by acquisitive presumption.*

2.3 *The Applicants have now made Application to this Honourable Court for the rescission of the order granted by Mamba J on the grounds that they were not joined as parties in the application yet they have a direct substantial interest in the litigation and the Order granted by Mamba J affects their interests.*

*Rule 42(1) 'The Court may, in addition to any powers it may have mero mutuo or upon the Application of any party affected, rescind or vary;*

*(a) An order or judgment erroneously granted in the absence of any party affected thereby.'*

*In terms of this Rules any person affected by an order granted in his absence may apply for a rescission of that order.*

*Per Corbett J in United Watch and Diamond Company (Pty) Ltd and Another vs Disa Hotels Limited and Another 1972(4) 409 at 415 –*

*'In my opinion an applicant for an order setting aside or varying a judgment or Order of Court must show, in order to establish locus standi, that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application which the judgment was given or order granted...'*

*According to the learned Judge; the requirements are the same whether a party approaches the Court in terms of Rules 42(1) or the common law.*

### 3. **DIRECT AND SUBSTANTIAL INTEREST**

3.1 *HERBSTEIN & VAN WINSEN VOL 9 page 217*

*‘A direct and substantial interest has been held to be an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.’*

*Erasmus J. VRYSTAASTE LEWENDE HAWE KOOP BPR V OLDEWAGE 1965(4) SA 16 at 19*

*‘Indeed it seems to me that the Court has consistently refrained from dealing with issues in which third parties may have a direct and substantial interest without having that 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 interest.’*

3.2 *To argue that the Applicants merely have a financial interest in the matter is to cut the ribbon very narrow. There is no prohibition against having a financial interest per se in fact in casu, the Applicants’ interest is not only in the rentals that the 3<sup>rd</sup> Respondent pay but they own the property. They have a proprietary interest in the subject matter.*

3.3 *This is particularly clear if one looks at the relief that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought and obtained i.e.*

*‘...to restore to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants’ peaceful and undisturbed possession and use of the right of way over Lot 106 in favour of Portion 10 and 11 of Erf No.369 to a width of not less than three metres into Lot 106.’*

*The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are seeking relief that will in effect burden Applicant’s property in favour of the Respondents and/or their properties. Clearly this Honourable Court should be interested to hear what the owners of the property have to say if the Court creates a legally binding “right of way” over their property in favour of another property.”*

[7] The attorney for the Applicant cited the relevant rule being Rule 42(1) of the High Court Rules which provides that “**the court may in addition...upon Application of any party affected, rescind or vary**”:

(a) *an order or judgment erroneously granted in the absence of any party affected thereby.*”

[8] That on the facts of the present case the order was granted in the absence of the Applicants and that it has been established that the Applicants are affected by the said order. That the order granted by *Mamba J* was erroneously sought and erroneously granted for the following reasons:

“4.1 *It is trite that the order was granted in the absence of the Applicants; it has been established that the Applicants are affected by the order.*

*Now the order granted by Mamba J was erroneously sought and erroneously granted for the following reasons:*

(a) *It was not demonstrated to the Court that there was an access road that was set aside for the use by inter alia the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

(b) *The effect of the order sought was to create servitude against a piece of land owned by the Applicant in their absence.*

(c) *That servitude can be only created by agreement of the property owners; servitude of necessity can be created only here there is no other possible access to the main road.*



- (d) *The effect of the order is also to limit the use to which Applicant could put their land to without them being heard by the Court.*
- (e) *The piece of land in question was never in the possession of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as even the access road is not for their exclusive use but it available to ordinary members of the public for use.”*

[9] The attorney for the Applicant further advanced arguments in terms of the common law at paragraphs 5.1, 5.2, 5.3, 5.4, 5.5 of his Heads of Arguments and cited a *plethora* of decided cases including the case of *Nyingwa vs Woolman NO 1993(2) SA 508* at 510.

**(ii) Respondents’ arguments**

[10] The attorney for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Mr. Jele also filed useful Heads of Arguments for which I am grateful. In the said Heads of Arguments a useful background is outlined in paragraphs 4 to 14 of the said Heads of Arguments and from paragraphs 14 to 17.2 dealt with the arguments that Applicant had no direct and substantial interest in the matter. At paragraph 14 therefore the attorney for the Respondents made the following submissions:

“14. *It must be noted at the outset that;*

14.1 *No specific order was sought by the first and second Respondents against the Applicants in the Notice of Motion;*

14.2 *The first and second Respondents never sought any vindication claim against the Applicants;*

- 14.3 *The order the first and second Respondents sought against the third Respondents was for the removal of the fence which was erected by the third Respondent;*
- 14.4 *The erection of the fence by the third Respondent was not at the instruction of the Applicants;*
- 14.5 *The fence was only erected by the third Respondent only; and*
- 14.6 *Plot 106 was and/or is not being used by the Applicants but it is only used by the third Respondent under a lease agreement from the Applicants. The Applicants do not even intend to use the said property at this stage.”*

[11] The attorney for the Respondent further advanced arguments on the test for a “direct and substantial interest” in paragraphs 16 to 18 of his Heads of Arguments and cited the case of *Amalgamated Engineering Union vs Minister of Labour 1949(3) SA 637 (AD)* at 659.

[12] At paragraph 18 the attorney for the Respondents made submissions on when is a spoliation order granted and cited relevant cases on the subject.

[13] The final argument advanced for the Respondents concerns the issue of non-joinder of Dilys Dlamini and Thembi Dlamini. That Applicants have dismally failed to prove that they have a direct and financial interest in the Application. That Application has only been made in order to frustrate the process of court and to prevent the execution of the court order.

### **The court's analysis and conclusion thereon**

[14] Having considered the able arguments of attorneys of the parties it appears to me that the arguments of the Respondents are correct on all fronts. I say so firstly on the basis of the facts stated in paragraph 11. Applicants had no direct and substantial interest in the matter. These facts are those outlined at paragraph [10] of page 4 of this judgment. Applicant had no interest in the right which was the subject matter of the litigation but merely had a financial interest in the right which was the subject matter of the Application. In this regard I refer to what is stated by the learned author *Herbstein and van Winsen*, 4<sup>th</sup> Edition *The Civil Practice of the Supreme Court of South Africa* at page 172.

[15] The test for a “direct and substantial interest” was formulated by the learned *Falam AJA* in the case of *Amalgamated Engineering Union vs Minister of Labour 1949(3) SA 637 (AD)* at page 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 interests or that he submits to judgment. 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 judgment binding on his as res judicata. There may be further circumstances present which would support an allegation of waiver or estoppels against him.”*

[16] Secondly, in my reading of the above cited decided cases on the two tests enunciated therein that the second test is applicable to the facts of the present case. The second test 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. In this case the order that the first Respondent was only against the third Respondent to remove the fence which was erected without its consent. The order does not burden the property in any way. The order merely seeks to reinforce the principles of our law that no one should take the law into his or her own hands. It does not do anything more than that.”*

[17] I find the following cases to be apposite being the cases of *Mefika Matsebula vs Mandla Ngwenya (unreported) High Court Case No.4306/2010* and that of *Thoko Ivy Mkhabela vs Bonginkosi Mkhabela, Civil Appeal Case No.28/2007* when a spoliation order granted.

[18] Lastly, I wish to point out an uncanny aspect of this Application which is mentioned in the Heads of Arguments of the attorney for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

at paragraph 3 thereof that when the order was granted by *Mamba J* the 3<sup>rd</sup> Respondent then wrote a letter to the present Applicant that they are cancelling the lease agreement on the basis of the court order by *Mamba J*. In this regard I agree with the arguments of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that the present Application is therefore moved on the basis of the letter and not on the basis of the court order. Put differently, if the letter had not been written by the 3<sup>rd</sup> Respondent to the Applicant this matter would not have been brought to this court.

[19] Furthermore, Applicants have in fact wrongly introduced new evidence in a matter which has already been decided through annexures “D17” which was not before court when the order was granted by *Mamba J*. In my assessment of this aspect of the matter I have come to the considered view that the Applicants are abusing the court process.

[20] In the result, for the foregoing reasons. The Application is dismissed with costs. I further rule that in exercise of my discretion costs to be on the ordinary scale.

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