



# IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.597/2013

In the matter between:

**DUPS PROPERTIES (PTY) LTD**

**Applicant**

and

**ROBERT LOBI ZWANE**

**Respondent**

**Neutral citation:** *Dups Properties (PTY) LTD and Robert Lobi Zwane*  
*(597/2013) [2014] SZHC196 (08 August 2014)*

**Coram:** Hlophe J

**For Applicant:** Mr. Z. W. Magagula

**For Respondent:** Mr. S. Mnisi

**Date Heard:** 24 July 2014

**Date Delivered:** 08<sup>th</sup> August 2014

**Summary**

*Application proceedings – Applicant owner of certain Lot 72, Matsapha, Manzini District – Property in question purchased from previous owner who was involved in a dispute with the Respondent – Applicant holder of a Title Deed in the property registered in its own name – Respondent locking up premises without either a court order or the consent of the owner – Applicant’s tenant locked out as well and caused to leave the premises – Applicant seeking an order directing Respondent to remove locking devices from gates of the property as well as restraining Respondent from interfering with Applicant, its agents or tenants on the property or from preventing them from gaining entry thereto – Whether there are disputes of fact which prevent determination of matter from the papers – Whether these proceedings amount to piece-meal litigation and therefore warrant that they be stayed pending the outcome of an appeal on a dispute between Respondent and the seller of the property to the Applicant – Applicant owner of the property in question and there being no order to stay the transfer of the property to Applicant, application should succeed – Costs to follow the event at the ordinary scale.*

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**JUDGMENT**

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- [1] The Applicant is the current owner of a certain property known as Lot 72 Matsapha, District of Manzini. This piece of land was purchased by the Applicant from one Andries Stephanus Du Plessis sometime in December 2012. The property in question was subsequently transferred to the Applicant who is now the title holder of the property in question.
- [2] It is not in dispute that the said Andries Stephanus Du Plessis acquired ownership of the property in question from a company called Lot 72 (PTY) LTD which has as one of its directors, the respondent. This was by means of a court order which authorized the Registrar of this court as the Sheriff of Swaziland to sign all documents necessary to transfer the property in question to the said Mr. Du Plessis. The order in question was granted in action proceedings instituted for the said relief among others by Mr. Andries Du Plessis under Case No. 1082/09. The order in question was granted by default as the Respondent had not filed any opposing papers and it was granted in the absence of the Respondent or his attorneys.
- [3] It is common cause that when he got to know about the transfer of the property in question to the said Mr. Du Plessis, the Respondent instituted proceedings seeking inter alia an order of this court rescinding the order

authorising the transfer of the property into the name of the said Mr. Du Plessis. This application was however unsuccessful as it was dismissed. The Respondent was allegedly not satisfied with the judgment of this court in that regard and noted an appeal. This appeal is pending before the Supreme Court.

[4] It is imperative I mention that as at the time the Respondent sought to rescind the order transferring the property in question to Mr. Du Plessis; the latter had long transferred same to the Applicant. There being no court order reversing the transfer of the property to the Applicant as there is no order as well suspending the Applicant's enjoyment of the property as an owner, the said property remains under the ownership of the Applicant, who is entitled in law to exercise all such rights in the property as are associated with being an owner.

[5] It would appear that when Applicant took over ownership of the property there was a tenant on the property one Michael Soko, who it transpires had initially been leased the same property by the Respondent when he was still an owner of the property concerned. The Applicant contends that when he took over the property he leased same to the same tenant he found thereon following an arrangement between the two of them. This

led to the tenant ceasing to pay rentals to the respondent as he now paid same to the Applicant as the new owner of the property.

[6] It would appear that around March 2013, the Respondent became aware that the property had now been transferred to the Applicant. He apparently got to know about this from the said tenant, Michael Soko. In reaction to this development, the Respondent literally locked the premises, particularly the gates leading thereto. There is a dispute whether he went on to eject the said tenant from the property or the tenant left of his own accord as the versions of the parties differ. Although I doubt he would have left voluntarily in the circumstances particularly if the gate was being locked, I must say I find it not necessary for purposes of determining the current matter whether the tenant was ejected or left voluntarily. It suffices that this action led to his having to stay away from the premises in question. It is however common cause that when the Applicant locked the premises he had not obtained an order of court to do so nor had he obtained the consent of the owner of the premises or even that of the person in possession thereof.

[7] It is this action of the Respondent which prompted the Applicant to institute the current proceedings. In these proceedings the Applicant seeks an order of this court in the following terms:-

1. Directing the Applicant to remove any further padlocks, chains or any other locking mechanisms affixed on the gate or entrance way into Lot 72 Matsapha Town, Manzini District.
2. Alternatively, that the Deputy Sheriff for the Manzini District be authorized to remove any padlocks, chains or any other locking mechanisms affixed to the gate or entrance way into Lot 72, Matsapha Town, Manzini District.
3. Restraining and interdicting the Respondent from interfering with Applicant, its agents or employees or tenants or preventing them from gaining entry or using in any other manner whatsoever or for whatever purpose, Lot 72, Matsapha Town, Manzini District.
4. Granting costs of this application on the punitive scale against the Respondent.
5. Granting such further or alternative relief.

[8] Although emphasis are placed on the Respondent's having taken the law into his own hands and locked the premises without an order of court, it is clear when one considers the prayers sought that in reality the Applicant seeks an interdict in the form of both a mandatory and a prohibitory interdict as opposed to a spoliation order. This becomes clear when considering that the orders sought are mainly the one compelling the

Respondent to remove the impediments and the other locking mechanisms blocking entrance or access to the Applicant's property in Matsapha as well as another one restraining and interdicting the Respondent from interfering with Applicant's agents or tenants from entering the property or even from preventing such tenants and or agents of the Applicant from entering the property or even from using it.

- [9] The position is now settled that in order to succeed in such reliefs the Applicant should establish or prove that he has a clear right; that there is an injury which is continuing or is about to occur and that he does not have an alternative relief. See in this regard Herbstein and Van Winsen's *The Civil Practice of the Supreme Court of South Africa* at page 1064 to page 1065. See also *Sethlogelo v Sethlogelo 1914 AD 221 at 227*. It hardly matters therefore in my view whether the person applying for the reliefs was in possession when the locking of the premises occurred. This is because in my view these are more vindicatory proceedings as opposed to spoliation ones. The position is settled in our law that vindication protects ownership or the rights of an owner whereas Spoliation protects possession or the rights of the possessor. See this in regard Silberberg and Schoeman's *The Law of Property; Second Edition, Butterworth, 1983* at pages 289 – 294 and 135-143 respectively. Clearly, in this

matter the Applicant as the owner seeks to protect his ownership of the premises.

[10] In view of the relief sought the first question is whether the facts as pleaded do establish a clear right. Considering the fact that the Applicant is the holder of a Title Deed which confirms the transfer of the property in question to him, does it entitle him to protect his right of ownership to the property? A property owner is entitled to protect his ownership of any property he owns in law. There can therefore never be a doubt that the Applicant is entitled to interdict the Respondent in the manner set out in the Notice of Motion, where the latter's conduct seeks to undermine his right of ownership of the property.

[11] The Applicant and his agent and/or tenants are prevented from accessing the property in question as a result of the Respondent's conduct. This is prejudicial to the Applicant who is prevented from enjoying his property as he wishes is entitled to in law. The Applicant as the owner of the property is therefore entitled to an order compelling the Respondent to remove the impediments or locking devices preventing him or his agents and tenants from entering his property.



[12] It has not been suggested that the Applicant has an alternative remedy. Indeed no such alternative remedy is established by the evidence when considering the circumstances of the matter.

[13] In an endeavour to show that the Applicant is not entitled to the reliefs sought, the Respondent averred that the Applicant's application is attended by disputes of facts which were allegedly foreseeable as at the time the application was moved or instituted. Because of the alleged disputes it is submitted that the application ought to be dismissed on this point alone. The dispute were allegedly in that there were conflicting versions on who was in occupation and who the rightful owner of the property was.

[14] Having gone through the papers filed of record I must say I struggle to find the disputes alleged by the respondent or even their materiality to the issues for determination. This I say because the question on who is in occupation of the property is not so material when I consider the reliefs sought. What is certain is that the Respondent, without being authorized by a court order or the consent of the Applicant, went and locked the

premises in question, which are owned by the Applicant as signified by the Title Deed in his possession and thereby prevented the latter or his agents from having access thereto. At the time there was in occupation the Applicant's tenant one Michael Soko who ended up either being evicted or leaving the premises after being locked out of them.

[15] I am therefore convinced that the disputes alleged by the Respondent are not real. If as stated, the Applicant is an owner of the concerned premises, then he is entitled to legal protection in the enjoyment of his property rights. The Respondent's actions in the circumstances adversely and unlawfully interfere with the Applicant's enjoyment of his said rights. Perhaps the position would have been different if the Applicant was not an owner of the property concerned or if he could not prove his said ownership. This however is not the case herein. Whether or not the interdicts sought could or could not be granted is in my view not dependent on who is in occupation of the property concerned than on who the owner is who is in law entitled to have his rights to the property protected.

[16] It was contended as well that determining the current application would be tantamount to allowing one matter to be decided on a piecemeal basis. This was allegedly because the same matter for decision before this court

was allegedly pending before the Supreme Court. It was argued that it was prudent for this court to await the outcome of the Supreme Court on who the owner of the property was. I frankly cannot claim to understand fully the Respondent's contention in this regard. Firstly the matter pending before the Supreme Court concerns different parties to the current ones when considering that the Applicant is not a party to the proceedings pending before the said court.

[17] Secondly there is currently no court order suspending the Applicant's ownership of the property in question pending the outcome of the appeal. The noted appeal does not affect the Applicant at all. Even if the appeal was to have the common law effect of suspending execution or in other words of maintaining the status quo; it is very clear that the status quo to have been maintained would have been the one in terms of which the property was already under the ownership of the Applicant when considering that the proceedings now pending before the Supreme Court were instituted after the property had already been transferred to the Applicant, which act was independent at the time it was done; there being neither contention nor suggestion of the opposite.

[18] On what the effect of an appeal is to a judgment including when the operation of the judgment ought to be suspended, see Herbstein and Van Winsen's; *The Civil Practice of the Supreme Court of South Africa, Fourth Edition, page 88-880* where the position was expressed as follows:-

*“At common law, the noting of an appeal suspends execution of the judgment appealed against unless the court otherwise directs; in fact, the operation of an order, such as an interim or final interdict, or an order authorizing the reduction of the capital of a company, is suspended by the noting of an appeal, not merely the process of execution. In the leading case of **South Cape Corporation (PTY) LTD v Engineering Management Services (PTY) LTD 1977 (3) SA 534 (A)** the Appellate Division held that, whatever the true position may have been in the Dutch Courts, it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, the judgment cannot be carried out and no effect can be given to it, except with the leave of the court which granted the judgment.*

*To obtain such leave, the party in whose favour the judgment was given must make special application”.*

See also the judgments of *South Cape Corporation (PTY) LTD v Engineering Management Services (PTY) LTD (Supra)* at 544H – 545B as well as **Du Randt vs Du Randt 1992 (3) SA 281 at 286A**

[19] In view of the foregoing I am convinced that there is no sound opposition to the grant of the order sought in these proceedings, which do not just seek to underscore the importance of dealing with matters according to law but also acknowledges the fact that no one is in law allowed to enhance his position by illegal means through calling upon the court to come to his rescue by blessing an otherwise illegal act done by him for his benefit.

[20] Consequently I have come to the conclusion that Applicant's application should succeed as prayed for together with costs, which should be at the ordinary scale though.

**Delivered in open court on the 08<sup>th</sup> day of August 2014**

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**N. J. HLOPHE**  
**JUDGE – HIGH COURT**