IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 517/15

In the matter between:

G.S. TRADERS (PTY) LTD t/a LADIES AND GENTS FASHION	**Applicant**

And

TWAHIRWA PROPERTIES	**1st Respondent**
BILAL INVESTMENTS (PTY) LTD	**2nd Respondent**
THE COMMISSIONER	**3rd Respondent**
ATTORNEY GENERAL	**4th Respondent**

Neutral citation: *G.S. Traders (Pty) Ltd t/a Ladies and Gents Fashion vs Twahirwa Properties and Three Others (517/15) [SZHC 43] 4th March, 2016)*

Coram: **MAPHALALA PJ**

Heard: **.....**

Delivered: **4th March, 2016**

For Applicant: **Mr. S. Dlamini**
(of Robinson Bertram Attorneys)

For Respondent: **Mr. M. Ndlovu**
(of Masina Ndlovu Attorneys)

Summary: Civil Procedure – Urgent Application for **inter alia** – lease agreement between 1st Respondent and 3rd Respondent be declared invalid – for order for specific performance – that 1st Respondent acted **mala fides** were 2nd Respondent acted against Applicant's interest – court rules in favour of the Applicant – grants and order for specific performance – court also grants Applicant cost against the 1st and 2nd Respondent on a punitive scale.

JUDGMENT

Introduction

[1] This judgment is a sequel to a judgment of this court of the 12June, 2015 where I ruled that 2nd Respondent be joined in the Application and to file the required Answering Affidavit within 14 days of the issuing of that order.

[2] To recap the Applicant launched the present Application under a Certificate of Urgency dated the 7th April, 2015 for the following orders:

1.1 **Dispensing with the time limits and manner of service and enrolling this matter to be heard as a matter of urgency.**

1.2 **Condoning the applicant's non-compliance with the Rules of Court and manner of service enrolling this matter to be heard as a matter of urgency.**

1.3 **That a Rule nisi is hereby issued calling upon the first respondent to show cause on a date to be fixed by the Honourable Court why an order in the following terms should not be made final.**

1.4 **An order declaring that a valid lease agreement does exist between the applicant company and the first respondent for the lease of the premises known as shop No. 3 Ngwane Street, formerly Kai Kai Center, Manzini.**

1.5 **The first respondent is ordered and compelled to surrender to the applicant the premises know as:**

Ngwane Street Eagle House

Shop No. 3, Kai Kai Center

Manzini

Swaziland

As per the lease agreement concluded between the parties on or about March 2015.

1.6 **The first respondent be interdicted and restrained from leasing out the premises known as shop No. 3 Ngwane Street, formerly Kai Kai Center, Manzini to any other person and/ or tenant; Alternatively.**

1.7 **That the second respondent be evicted from the premises known as shop N. 3, Ngwane Street, formerly Kai kai Center, Manzini.**

1.8 That pending finalisation of the present matter in court the premises known as shop No. 3, Ngwane Street, formerly Kai Kai Center, Manzini, remain unoccupied and/ or alternatively locked.

1.9 That the third respondent represented by the Station Commander and / or his subordinates for the Manzini Police Station are ordered to ensure compliance of the Court Order by the first and second respondent and to maintain peace.

1.10 The first respondent is ordered to pay the costs of this application at the scale of attorney and own client.

1.11 Pending the final determination of the matter prayer 6 to operate with interim and immediate effect

1.12 Further and / or alternative relief.

[3] The 1st Respondent opposed the Application filing an Answering Affidavit raising the following points **in limine**:

i) Cession;

ii) Misjoinder and / or Non-joinder;

iii) Requirement of an interdict not met; and

iv) Disputes of facts.

[4] This court after hearing arguments of the attorneys of the parties issued an order on the 12th June, 2015 to the following effect:

"that the company Bilal Investments (Pty) Ltd be joined as the second Respondent in the matter."

[5] The 2nd Respondent then filed an Answering Affidavit and has raised similar points **in limine** as the 1st Respondent. The Applicant then filed a reply to this affidavit by the 2nd Respondent that it was not open to the 2nd Respondent to file such an affidavit. The attorney for the Applicant further contended in this arguments that the attorney for the Respondents is having a second bite of the cherry in raising the same points which were raised and decided earlier on.

The arguments of the parties

[6] I shall in brief outline the arguments of the parties in this second sought of the case in the following paragraphs:

(i) The Applicant's arguments

[7] The attorneys for the Applicant Mr. S. Dlamini filed brief Heads of Arguments supported by decided case on the remaining issue of specific performance and costs. In this regard the attorney for Applicant contended that it is common cause that, that specific performance is part of our law and has been applied and exercised by the courts in variety of cases. That this court is also implored to follow other judgments on specific performance as shown at paragraphs 2.1 to 12 of his Heads of Arguments.

[8] The essence of the argument for the Applicant in this regard is captured in paragraph 7.1 thereof that it is not in dispute that a party either to a contract on any other form of legal instrument that entitles him to a right and / or an title to a thing, has a right to hold the other contracting party to his contract and to claim performance of what he had bound himself to do.

[9] The attorney for the Applicant relied on the dicta in case of **Swaziland National Sports Council vs Minister of Sports, Culture and Youth Affairs and Others, High Court case No. 11455/13** on the principles of law were performance was impossible.

[10] That from the above judgment contends the attorney for the Applicant restoration is not impossible simply because a third party is in control. If the third party is a **mala fide** transferee who was aware of the spoliation the **mandament van spolie** against **bona fide** third parties, the Respondents were of the present Application and in fact has set the motion conduct, which is **mala fide** for purpose of attempting to mislead the court, so as to suggest that performance is now impossible.

[11] Further arguments are advanced in paragraphs 9 to 11 where the attorney for the Applicant implores the court look beyond that the defence of impossibility of performance as stated by the Respondents in this matter, but look at the **mala fides** of their action an apply the reasoning at paragraph 60 and 61 of the **Swaziland National Sports Council (supra)** in the following:

> "**lastly the cumulative effect of the facts in this cases is that the respondents took the law into their hands and resorted to self-help as described by the learned authors Olivier et al (supra) at page 183 paragraph (b) of the said legal text ...1 which to comment en passant...that a person in this country should not be deprived of his properties and existence in this fashion... I do not think so, this courts are created to <u>give justice between man and man without fear or favour</u>."** (underlining our own emphasis)

[12] That similarly in this matter, whilst the mater was pending in court, the Respondents have conducted themselves in a manner, to advance their defence of impossibility of performance. The court should therefore give justice between man and man without fear or favour and grant an order of specific performance.

[13] The court was further referred to the High Court case of **Smile B. Dlamini vs Noma Nkambule High Court case No. 613/2012** where the court granted an order for specific performance, wherein the Respondent had cancelled the lease between the parties.

[14] On the question of costs, it is contended for the Applicant that costs be on the punitive scale on account of the Respondent's conduct who unilaterally decided not to honour its obligations towards the Applicant. Furthermore that the court grants an orders in terms of the Notice of Motion.

(ii) Respondents' arguments

[15] The attorney for the Respondent Mr. Ndlovu also filed comprehensive Heads of Arguments detailing at some length the issue of impossibility of performance that the 2nd Respondent to this question states the following:

> **"As stated above, we are bona fide 3rd party possessors of the premises now and for an initial period of 3 years renewable. There is now clearly an impossibility of performance of the prayers sought by the applicants. We have taken full physical occupation and have erected fixtures and fittings of our own which are in a semi-permanent state of attachment to the building itself and their removal can clearly not be carried out at this point without causing substantial damage to the building itself. The application has effectively been overtaken by events. The orders sought**

by the applicant would therefore occasion us untold hardship and harshness. I beg leave of the court to refer to photographic pictures of the store attached herein marked BL2;

a. **We have also had to invest a sum of over E1 5000 000.00 (One and a half Million Emalangeni) herein and the funds to which have been attained largely through loan facilities from fellow business acquaintances that we are repaying and servicing on a monthly basis. To take away the shop right now would occasion us untold hardship and would literally cripple us financially while totally exposing us to a host of legal suits form our suppliers as well;**

b. **We also now have 6 Swazi hired, namely Nothando Vilane, Nosipho Vilane, Mthokozisi Dlamini, Ntombifuthi Dlamini, Bongiwe Dlamini and Nonfundo Mabuza and who are all bread winners in their respect homes and are entirely solely dependent on the wage that we provide to them to make a living. They have no source of income apart from the wage that we furnish them. They too are hired on a permanent basis and given the state of such, they as well have entered into financial obligations dependent on their remuneration. To take away the shop from us right now would also affect these employees adversely and would be extremely hard on them. This is therefore one of those instances where for the court to order specific performance would be to cause untold hardship to the innocent bona fide 3rd party possessor.**

c. **Furthermore, the 2nd respondent, and with the 1st respondents permission, has sublet a portion of the property, for service diversification purposes, to a cell-phone sales dealership company by the name of Selam Investments (Pty) Ltd. A copy of our sublease is herein attached and marked SL3. The said company is also therefore a necessary party herein and should be joined since the order sought is going to affect them as well.**

d. The said Selam Investments (Pty) Ltd further has two employees of its own, namely Phindile Maphalala and Tanah Matsinhe and who as well are bread winners solely dependent for their livelihood and that of their respective families on the remuneration that they receive from their employment within Selam Investments (Pty) Ltd. To therefore grant the specific performance would be adversely harsh and unjust on them as well. I beg leave to refer to their irrespective affidavits herein attached.

e. I am advised and which advice I accept as true that the court has a discretion to grant or refuse an order for specific performance, and such discretion is aimed at preventing an injustice – for cases may arise where justice demands that a plaintiff be denied his right of performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case if the order will operate unduly harshly on the respondents.

[16] It is contended for the Respondents that the Applicant seeks therein an order for specific performance of its alleged agreement to the 1st Respondent. That it is trite that a contracting party has a right to hold the other contracting party to his contract and to claim performance of what he had bound himself to do citing the case of **Haynes vs King Williams Town Municipality 1951 92) SA 371 at 378** and the other contracting party cannot claim to be allowed to pay damages to prevent an order for specific performance being entered against him held in the case of **Farmers Co-operative Society vs Berry 1912 AD 343, 350.**

[17] That the court has a discretion to grant or refuse an order for specific performance which discretion must be exercised judicially and not "capriciously nor upon a wrong principle".

[18] In support of the above legal principle this court was refereed to the cases of **Mavimbela vs Sedcom Swazi Estate Late Darrington and Others (Consolidated with Others) 27/08 [2008] SZSC 6) (24 November 2008)** and that of **Benson vs SA Mutual Life Assurance Society 1986 (1) SA 776 (A)** to the following dictum:

> **"It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg. if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy (cf De Wet and Yeats kontraktereg en Handelsreg 4th ed at 189). Furthermore, the Court will not decree specific performance where performance has become impossible."**

[19] It is contended for the Respondent that in the present case, impossibility of performance is apparent there has been sustainable allegations that the Respondent and sub holders have acted in collusion to defraud the Applicant of its alleged right to the property. Performance is clearly impossible. According, it would not be a proper exercise of a judicial discretion by this court to grant an order sought by the Applicant with costs at a punitive scale.

Court's analysis and conclusions thereon

[20] Having considered all the arguments of the parties and the papers on this aspect of matter that of impossibility of performance is common cause between the attorneys of the parties that a contractive party has a right to hold the contracting party to his contract and claim performance of what he had bound himself to do (see the case of **Haynes vs King Williams Town Municipality**

(supra) and the other contracting party cannot claim to be allowed to pay damages to prevent an order for specific performance being entered against him (see the **dictum** in the case of **Farmers Co-operative Society v Berry 1912 AD 343 at 350).** The Applicant contends that an order for specific performance ought to be granted on the facts of the matter. In this regard the court was referred to High Court case of **Swaziland National Sports Council vs Minister of Sports, Culture and Youth Affairs and Others (supra).**

[21] The attorney for the Applicant further contended on this regard restoration is not impossible simply because a third party is in control. If the third party is a **mala fade** transferee who was aware of the spoliation against **bona fide** third party.

[22] On the other hand, it contended for the Respondents that in the present case impossibility of performance is apparent, there has been no sustainable allegations that the Respondents and the sublease holders have acted in collusion to defraud the Applicant of its alleged right to the property.

[23] It is contended for the Respondents that in **casu** performance is clearly impossible.

[24] Having considered the competing arguments of the parties and the probabilities as mentioned in the South African case of **Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd 1982 (1) SA 389 (A) at 443 C-E** where **Miller JA** said:

> **"In a case in which the defendant requires the consent of a third party to enable him to perform effectively, and at the end of the case, the defence of impossibility having been raised and canvassed, the probabilities in**

regard to that issue appear to be evenly balanced, the Court, it appears to me, might justifiably take the view that refusal of specific performance was preferable to the grant of an order which as likely not would prove to be ineffectual. A rule that a defendant pleading impossibility as answer to a claim for specific performance must necessarily discharged the onus of proving it if he is to avoid such a decree might hamper and inhibit the Court in the exercise of its discretion".

[25] On the facts of the present case I ought to balance the probabilities in an exercise of my discretion whether to order specific performance.

[26] In my assessment of the papers and the arguments of the parties it would appear to me that the impossibility of performance alleged by the 1st and 2nd Respondent is self created as averred by the Applicant in its replying affidavit in paragraph 7 to the following:

7.1 I am advised that the impossibility of performance alleged in this paragraph is self created by the first and second defendant acting jointly to defeat the ends of justice.

7.2 The second respondent has not brought the court into their confidence, in respect to the sum of One and Half Million which is alleged as there is no proof attached to their affidavit it is mere bald allegations with nothing to support it.

7.3 It is unfortunate that the second respondent in an attempt to defeat justice, whilst the matter is in court, they have continued to hire these individuals, as the deponent to the affidavit was personally served with application and was aware of the competing right in respect to the property in question.

7.4 The sub lease agreement to Selam Investments (Pty) Ltd is just one way to illustrate the desire by the first and second respondent to defeat the course of justice. Further arguments on these points will be advanced during the hearing of the matter ad also on their joinder as the sub lease has been entered into after the institution of the present proceedings.

7.5 Contents of my founding affidavit are herein incorporated as herein pleaded.

7.6 I am advised and verily believe that the conduct of the respondents, shows disrespect to the court, and / or the integrity of the court as they have purposely and intentionally set in motion conduct in one way or the other to appear in the court's eyes a situation to suit themselves and to prevent the performance of the court order and I am advised that the court should frown upon such allegations by imposing an order for costs at attorney and own client scale against the respondents for their conduct. Further legal argument on this point will be advanced during the hearing of this matter.

[27] It is abundantly clear from the above that the 1st and 2nd Respondents are acting in tandem with **mala fides** for the purpose of misleading the court, so as to say that performance is impossible.

[28] I wish to comment **en passant** that the complicity of the 1st and 2nd Respondents of impossibility of performance is contrived and cannot be countenanced by this court.

[29] In this regard, for the aforegoing reasons the Application is granted in terms of the Notice of Motion. Further on the question of costs I find the conduct of both the 1st and 2nd Respondent to be questionable in the circumstances and I would in then levy costs on the punitive scale, it is so ordered.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE