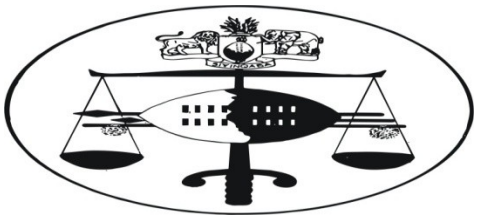

**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**CIVIL CASE NO: 212/17**

In the matter between:

**THE GABLES (PTY) LTD** **APPLICANT**

AND

**ARMILDA LAIDAS T/A JUST KIDS** **RESPONDENT**

**Neutral Citation:** *The Gables (Pty) Ltd vs. Armilda Laidas t/a Just Kids Case No. (212/17) 2017 SZHC (144) 30th June 2017*

**Coram:** **MLANGENI J.**

**Heard:** **30th June 2017**

**Order made:** **30th June 2017**

**Judgement:** **19th July 2017**

*Summary*: *Law of property, tenant moving spoliation application against landlord following execution of an eviction order that was subject of a pending appeal in the Supreme Court.*

*Tenant arguing that landlord ought to have sought leave of court to execute the order notwithstanding the appeal and the landlord, to the contrary, arguing that the onus was upon the tenant to apply for stay of the eviction order pending determination of the appeal.*

*Common Law rule is that noting an appeal automatically stays execution, but Supreme Court Rule 40 places the onus upon the Appellant to apply for stay of execution.*

*Apparent conflict between the Common Law rule and the Supreme Court rule 40 requires proper ventilation and resolution.*

*Application granted with attorney – client costs.*

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**JUDGMENT**

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[1] The Applicant seeks a spoliation order against the first Respondent. As usual in such proceedings she approached this court on grounds of urgency and prays for an order directing the Respondent **"to restore possession of shop No.15, The Gables/Galleria Shopping Centre REM 60 (a portion of portion 60 of portion 21) of farm 51, Ezulwini Hhohho and such restoration to include the unlocking of the entrance thereto**." She also wants costs at the punitive scale. I must note from the onset that the simplicity and effectiveness of the prayers reflects a clear understanding of this remedy, and this gives a measure of hope in a jurisdiction where prolixity of prayers has

become more important than brevity and precision. The Applicant does not seek interim relief, and in such matters there is no need to do so because the remedy is summary in nature.

[2] The brief history of the matter is that the Applicant is a tenant of the First Respondent in terms of a written lease agreement whose duration was to end in September 2017. The premises are used for purposes of commercial business. On the 21st April 2017 the First Respondent obtained an eviction order against the Applicant on the basis of alleged breach by the Applicant. On the 26th April 2017 the Applicant noted an appeal against the eviction order, and the Notice of Appeal is attached to this application as **Annexure "AL1**". The Applicant alleges that this appeal is currently pending before the Supreme Court under Appeal Case No. 36/2017. In the normal course of events it will take some time before this appeal is heard, due to the backlog of cases.

[3] The Applicant alleges that on the 28th June 2017 a deputy sheriff came to the rented business premises, demanded the keys thereto from the attendant and locked the premises. The deputy sheriff had in his possession a final order of court in terms of which the lease agreement between the parties was cancelled and the Applicant evicted from the premises. This order is attached to the application as **Annexure "AL4"** From the contents of the order it is apparent that at the time the matter was finalized in court there were no arrears in the lease account. The Applicant has come to this court one day after the dramatic events of the 28th June 2017 and avers in part, as a basis of urgency, that she needs the premises "**for the business to survive so as to pay employees, rent and earn a living".** In any event,

spoliation proceedings are by their nature urgent as they seek to restore the *status quo ante* and discourage self-help.

[4] The matter came before me in the afternoon of the 29th June 2017. On this occasion I reluctantly acceded to the First Respondent's request for time to file opposing papers, the reason being that in such matters it is settled in our jurisdiction that the court does not need to go into the merits of the matter. The court only needs to be satisfied that the Applicant was in peaceful and undisturbed possession at the time they were dispossessed, in this case the eviction from the premises. I ordered the First Respondent to file papers by close of business on the same day and postponed the matter to 8:30 am on the following day, the 30th June 2017. First Respondent's counsel, Mr. W. Maseko, is to be commended for meeting the stringent time line and legal arguments proceeded as scheduled.

[5] The first Respondent has raised a point of law that this court is *functus officio* in this matter, and therefore has no jurisdiction to hear the spoliation application. This point is predicated upon the fact that the court heard the eviction application and granted final judgment. This point is obviously misguided and demonstrates a lack of understanding of when and under what circumstances it can be raised. I only need to mention that the present application relates to new matter that was not part of the earlier *lis* that was finalized per the judgment of the 21st April 2017. I dismissed this point of law instantly. To hold otherwise would have led to an untenable situation where the Applicant would be required to approach the Supreme Court for restoration of possession. Counsel should always be aware that there is nothing fashionable about raising points of law and this should be done where there is a

real prospect that the matter can be put to rest on the basis of the point raised.

[6] One aspect of the First Respondent's opposition is that the Applicant failed to file the record on appeal within two months after noting the appeal, such record having been filed, according to the First Respondent, on the 28th June 2017. To the contrary, the applicant avers that the record was presented to the Registrar of the High Court for certification much earlier, on the 10th May 2017 and this is confirmed by **Annexure "AL3"** which bears the Registrar's Stamp of that date. If there was delay in the process of certification this cannot be attributed to the Applicant.

[7] The Applicant's further submission is that even if the time for filing the record on appeal had elapsed, the consequences of that are not automatic; the First Respondent would need to make a formal approach to the Supreme Court to have the appeal declared to be abandoned. It is needless to mention that legal consequences cannot be left to speculation and uncertainty, hence there is a lot to be said in support of the argument that application should have been made to the Supreme Court to have the appeal declared abandoned. This, in fact, has been settled practice. A reading of Rule 30 of the Supreme Court Rules of procedure appears to me to be in line with this practice, especially when one considers that the record may be submitted and resubmitted, at a certain stage only by leave of court. The only way in which such particular facts would be canvassed is in an application to declare the appeal abandoned. The Applicant would need to inform the court what has transpired in the particular case. And the Respondent would have a chance to put forward its side of the story.

[8] There is no doubt that the rules of procedure in the Supreme Court urgently need to be up-dated in line with the present dispensation. With an almost fully local Supreme Court bench that sits in three sessions per year, there is no reason why an Appellant should have two months to file the record, a process that is merely clerical rather than technical or professional. The time lines need to be revised and abridged as a tonic for the speedy dispensation of appellate relief. In this way the frequency of dilatory appeals would be significantly reduced.

[9] What remains for consideration is the Applicant's contention that the First Respondent was required in law to apply to court for leave to execute the eviction order notwithstanding the appeal. This argument is based on the salutary rule of the common law that lodging of an appeal against a civil order or judgement has the effect of staying the judgement or order appealled against. The learned authors in the Civil Practice of the Supreme Court of South Africa[1] make reference to one leading Appellate Division case[2] and proceed to say the following:-

> **"….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, with the result that pending the appeal, the judgment cannot be carried out ….except with the leave of the court which granted**

[1] Herbstein and Van Winsen, 4th Ed, Juta & Co. (1997)
[2] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, 1977 (3) SA 534

**the judgment. To obtain such leave, the party in whose favour the judgment was given must make special application."**[3]

[10] The rationale behind this common law rule bears no elaboration. It is based on the understanding that in many cases an appeal would become academic once the judgement appealed against is executed before the determination of the appeal, and in some cases the consequences of the judgment could be irreversible or incompensible. Per contra, the First Respondent argues that there is no need to obtain leave to execute a judgment pending appeal; that it is upon the Appellant to seek a stay of execution pending determination of the appeal. This argument is based on Rule 40 of the Supreme Court rules of procedure which provides that:-

"**An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the High Court or Court of Appeal may order on application,"**

and Mamba A.J.A has stated in the case of **THANDA MNGWENGWE v NOMFUNDO SIBANDZE AND ANOTHER**[4] that there was "**no need to apply for leave to execute the judgement."**

[11] I am bound by judgments of the Supreme Court, and the case of THANDA MNGWENGWE is no exception. However, my reading of the judgment is that the issue of the common law rule versus the Supreme Court rule of procedure was not canvassed in that matter, as a subject, and the Honourable Judge's comment, without more, must be taken as *obiter dictum.* It appears to me that a major conflict between a rule of law and a rule of procedure require more than a passing comment, and

[3] See Note , (1) supra, at p889
[4] (09/2015 [2015] SZSC 37 at page 10, para 11.

that the conclusion must flow from proper discourse. There is no doubt in my mind that there are sound arguments for and against this common law rule which has stood the test of time, and this is the reason why this conflict deserves full attention. This need is demonstrated by the fact that on a regular basis the High Court is called upon to deal with applications for leave to execute, some of which are granted and others declined[5].

[12] In the particular case before me, I came to the conclusion that I was bound by the common law rule and I granted the spoliation application with costs at punitive scale.

[13] Clearly, if the First Respondent was entitled in law to execute the eviction order that would be a complete defence to spoliation and, in my view, until this conflict is effectively resolved the conclusion could go either way.

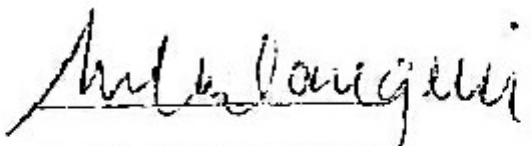
[14] In my further readings I have since come across an old judgment in this jurisdiction, in the case of **KARAMITSO v MKHABELA**[6] , where Nathan C.J. as he then was had this to say: -

> "**In regard to prospects of success in the appeal it appears to me that it may fairly be arguable that I erred in not entertaining the defendant's applications which were put forward yesterday and that I consequently erred in granting the judgment which I did.**

[5] Swaziland Development and Savings Bank v Mchepa Chemical Industries and Others, H/C Case No. 1661.2011
[6] 1982-1986 SLR, 130-132

**Bearing in mind that in Swaziland under Appeal Rule of court 40 the onus is on the Applicant to show that execution should be stayed pending appeal…..”**

[15] It is possible that this might be an interesting subject of an appeal in future, and that would hopefully settle the apparent conflict between the common law rule and the rule of procedure in the Supreme Court.



**T.M. MLANGENI**

**JUDGE OF THE HIGH COURT**

**For: The Applicant: S.C. Dlamini**

**For the First Respondent: W. Maseko**