



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 1551/2012

In the matter between

VUSIE KHOZA

1st Applicant

REF And AIR INVESTMENTS (PTY) LTD

2nd Applicant

And

FAUSTINE DLAMINI

Respondent

Neutral Citation:

*Vusie Khoza & Another Vs Faustine Dlamini
(1551/2012) [2017] SZHC 55 (23rd March 2017)*

Coram:

Hlophe J.

For the Applicant:

Mr O. Nzima

For the Respondent:

Mr B.J. Simelane

Date Delivered:

23 March 2017

Summary

Civil Law –Company assets allegedly taken from Director and shareholder of a Company without an order of Court and without his consent –Whether taking of goods or assets from 1st Applicant amounts to spoliation in the circumstances of the matter –Dispute of fact encountered on how assets were taken from First Applicant –Dispute referred to oral evidence –Court of the view that from the evidence led, circumstances do not depict volition in concluding the agreement that resulted in the Applicant’s deprivation of possession –Application succeeds, costs are to be costs in the course.

JUDGMENT

[1] Nothing in my view can best depict a relationship that has irretrievably broken down between shareholders of a company than does the circumstances of this matter. I must at the outset apologise for the time it has taken to prepare this judgement, which was caused by the lengthy matters this Court had to deal with resulting in this one remaining in the background.

[2] The first Applicant, who describes himself as the shareholder and Director of the Second Applicant Company instituted these proceedings seeking in effect a rule nisi operating with immediate effect, compelling the

Respondent to return certain movable assets allegedly taken forcefully from his possession by the Respondent. He moved the application as the First Applicant.

[3] The Second applicant is the company. It is unclear how the company got joined as the second Applicant. There is neither an explanation ex facie the papers nor is there any resolution annexed. It is taken for granted to be having the locus standi at the mere citation of it as a party. Given that no issue has been taken with regards this aspect of the matter, it will not be made an issue in this judgement. It will be treated as though the parties were properly cited.

[4] The Respondent on the other hand, and as cited in the papers is neither a shareholder nor a Director in the company concerned. He is only a husband to the other shareholder and Director of the Second Applicant called Nelsiwe Dlamini. Worthy of mention is the fact that the actual other shareholder and Director of the Second Applicant has been left out of citation in the proceedings against the company. There is no doubt this is irregular particularly when considering what the Respondent and his witnesses say in their opposition to the application, namely that the items were not taken

from applicant's possession by him but were actually surrendered by Applicant to his co – shareholder and Director namely Nelsiwe Dlamini. Seeing that the parties have in their papers dealt with the said Nelsiwe Dlamini as a party to the proceedings, the matter will be dealt with as if she was indeed a party, suffice it to say no precedent is being created by so doing as this approach is necessitated by the peculiar circumstances of the matter. It also matters that in the circumstances, the issue of the citation is more technical than real as all the issues surrounding this point were covered such that no prejudice ensued and none of the parties raised same.

- [5] The uncontroverted facts of the matter are that the First Applicant and the wife to the Respondent, one Nelsiwe Dlamini, are both shareholders and directors of the Second Applicant company. Realizing the abilities of the First Applicant in the repairs of both refrigerators and air conditioners, it was agreed between the aforementioned shareholders that they register the second Applicant company. Although there is a dispute on what the shareholding was initially agreed to be like – the First Applicant claims it was supposed to be 50% each whilst the other shareholder claims it was to be 70% for the said Nelsiwe Dlamini and 30% for the Applicant - it is common cause that the shareholding eventually reflected in the founding

documents of the company is in line with what is contended by the other shareholder, Nelsiwe Dlamini and it has remained as such despite the Applicant's open dissatisfaction with it.

[6] It was otherwise allegedly agreed that unlike the First Applicant, Nelsiwe Dlamini was to contribute the resources for establishing the business. In fact her husband the Second Applicant allegedly loaned the company a sum of E60,000.00, to enable it operate the intended business. Part of the said sum – a sum of E25,000.00 to be precise – was allegedly used to purchase a motor vehicle; a Ford Bantam for the company. It was to transpire that the car was however not registered in the name of the company but in that of the First Applicant, which appears to have later fueled the misunderstanding that later ensued between the parties.

[7] As time went on, there developed a dispute between the shareholders. The Respondent and his wife suspected that the First Applicant was using the tools meant for the company business and the car concerned to run a secret business of his own under the auspices of his company called Vuyo & Phiwa Investments (PTY) LTD.

[8] It was apparently as a result of this suspicion that the applicant claims to have been called by the Respondent to his house where he alleges he was told by the latter to hand over to him all the assets of the company in his possession for an alleged safe keeping and protection from being attached in execution by a certain company called Gree Airconditioners which had allegedly supplied it with certain spares. The debt arising therefrom had not been settled. According to the Applicant his refusal to agree to that request led to the hardening of attitudes with the Respondent now demanding the assets concerned. He said he was later forced to go with the two to his house then used as a workshop to handover the assets to the Respondent.

[9] The Applicant, instead of handing over the assets concerned, is alleged to have simply locked himself in the house and called the Police from there for protection. The Applicant does not give detail on what really transpired from this point except to say that he was eventually forced by the Police and the Respondent to handover the company assets used for the company business held by him to the Respondent. These included the company motor vehicle which had hitherto been kept and driven by the Applicant. Still with

the involvement of the Police, particularly a certain 6134 Constable Thembinkosi Mabuza, an attempt was allegedly made to force him to effect a change of ownership of the vehicle to the name of the company from his name.

[10] Claiming an unlawful deprivation of possession of the company assets in his possession, the Applicant instituted the current proceedings for the reliefs set out in the notice of motion, which entailed an order of this Court directing that the company assets concerned be returned to him as an interim measure pending finalization of the matter. A rule nisi in these terms operating with immediate effect did issue as prayed for and the assets aforesaid were returned to the Applicants, where they currently are.

[11] The Application was opposed by the Respondent who sought to prove that firstly the allegations by the Applicant on how he had lost possession of the assets were not accurate and that as a matter of fact it was not him as the Respondent who had taken the company assets as alleged but that they were handed over to his wife as the majority shareholder for safe keeping by the Applicant himself following an agreement reached at the Police Station. He

further disclosed that whereas he had met the Applicant at his home and told him about the assets of the company being threatened by an attachment by Gree Aircon, he had done so at the request of his wife, the other shareholder and Director of the company.

[12] He clarified having observed how the assets were handed over to his wife. He said all this followed an agreement between the Applicant and his wife. In his papers he contends that when the assets were eventually handed over to the other company shareholder, who happened to be his wife, it was the Applicant together with the company employee, Njabuliso Kunene, who did so. He clarified that in actual fact as the assets were handed over, the Applicant stated that the company was then being dissolved. Rather surprisingly, and besides these words having allegedly been uttered, the Respondent and his witnesses wanted to paint a picture of the Applicant having happily handed over the possession of the assets to the Respondent's wife.

[13] The Respondent's version was supported by several witnesses by means of supporting or confirmatory affidavits, all referred to as opposing affidavits.

I take this description of the affidavits that people like Nelsiwe Dlamini who filed one such affidavit were in the mind of the Respondent were more than mere witnesses but were in fact parties in the proceedings. These affidavits included that of Thembinkosi Mabuza, Nelsiwe Dlamini and Njabuliso Kunene. These affidavits, give the insight of an irretrievably broken down relationship between the two shareholders and Directors of the company. The tension and mistrust between them is clearly palpable from the allegations and counter allegations made. It was in line with this observation in my view that allegations of a shareholding depicted in the Memorandum and Articles of Association is alleged to have been fixed surreptitiously outside what had been agreed upon while on the other hand allegations of the company assets having been used for the Applicant's personal business than the one agreed upon have taken ground.

[14] It therefore seems to me that what is really at the heart of this matter is more a shareholder dispute which merely disguises itself as a matter of enforcing possession, which however cannot resolve the real dispute between the parties. This dispute cannot disappear or vanish into thin air simply because the parties do not want to acknowledge it and then apply the appropriate laws to resolve it permanently. I therefore see the determination

of this aspect of the matter as merely a temporary measure to keep the assets pending the institution of proper proceedings to address the root cause of the problem. It is for this reason I will have to issue an order that is not adverse to either of the parties as far as costs are concerned, whatever the conduct exhibited on each side of the matter.

[15] Owing to the apparent dispute of fact on how the Applicant came to lose possession of the assets of the company, I directed that this aspect of the matter be referred to oral evidence.

[16] The Applicant led the evidence of the Applicant as the only witness on this point whilst the Respondent led two such witnesses namely Constable Thembinkosi Mabuza and Nelsiwe Dlamini. Testifying on how he had lost possession of the company assets in his possession, the Applicant restated the story captured above with the following emphasis:

16.1. He refused to handover the assets to the Respondent when they met at the latter's house

where he was told they were to be kept safely by the latter saving them from being attached in execution by Gree Airconditioners.

16.2. He was allegedly forced to go with the respondent to his house to collect the assets. Once there he locked himself in the house and managed to call Constable Mabuza who responded swiftly. As he was in the house, threats were allegedly being made by the Respondent against him and his children.

16.3. According to him the matter was not resolved that day. On a later day he was once again caused to meet with the Respondent and Nelsiwe Dlamini at the Police Station. He says he was in that meeting forced to handover the assets in question to his co – shareholder and Director. They thus left immediately to his house where the assets were actually removed from his house and loaded into the company car by the company employee one Njabuliso Kunene as he claimed to have watched.

16.4. A list of the items was drawn to which he was asked to append his signature as did the others who included the two Police Officers there. His reason for appending his signature was allegedly in confirmation of the fact that the items listed thereon had been given to his co – shareholder and not that they were being handed over by agreement. He clarified that the document itself does not say it was depicting any agreement on its face, he contended.

16.5. At the end of the list, there is recorded the following sentence by hand, “Babe Khoza says the company dissolves today 23/07/2012. This sentence is the last inscription on the piece of paper containing the listed items. It is even below the signatures themselves. Otherwise at the top, and as a heading it reads “list of the tools” The list itself reads: oxygen afrosc black; Asseline Merun (should possibly read maroon); Horse pipe (red and green) about 6 metres each; welding torch,

freeling tools (red box), blower, vacuum pump syliver (should possibly read silver), car Mazda Bantam KSD 740 AL”. At the end of the list of the items there are signatures of Vusie Khoza (the applicant), Nelsiwe Dlamini and that of two witnesses who are apparently Police Officers as there are numbers next to each signature which read 6376 const. and 6134 const.

16.6. Applicant denied under cross examination that he had agreed to the taking or removal of the assets from his possession to that of Nelsiwe Dlamini and maintained same were taken forcefully from him.

[17] Testifying on behalf of the Respondent on how the assets ended up with her, Constable Thembinkosi Mabuza testified, adding the following emphasis to the allegations stated above with regards the removal of the assets from the Applicant’s possession:

17.1. He was called by the Applicant by phone who told him he was being attacked by two people who wanted to

deprive him of company assets. These people turned out to be the Respondent and Njabuliso Kunene.

17.2. He upon arrival found the Applicant locked up inside his house and the two gentlemen standing outside the house.

17.3. After enquiring about the status of the assets and ascertaining that they belonged to the company and that the Respondent was actually neither a shareholder nor a Director therein, he had emphasized that the other shareholder and Director, who happened to be the wife to the Respondent, be called in.

17.4. From a meeting subsequently held between the police and the shareholders of the company, he alleges it was agreed that the assets of the company were to be handed over to Nelsiwe Dlamini as the majority shareholder. The Applicant was to be transported by the driver of the company car Njabuliso Kunene to wherever he was required to work. The car and the tools were to be fetched from the majority shareholder every morning.

17.5. They had thought the matter resolved when after some days he met Nelsiwe Dlamini who told him the Applicant had not complied with the alleged agreement. He told her to report at the Police station and therefrom called the Applicant to report there as well. His aim he says was to find out why the agreement had not been complied with.

17.6. Explaining why the alleged agreement had not been complied with, he contends that the Applicant told him he was sickly which had happened the whole day.

17.7. Without explaining what else was discussed he says that Applicant was in a jovial mood that day. Their meeting he says was too short and they proceeded to the Applicant's house to have the items removed and taken to the majority shareholder's place. The assets, he says were duly loaded into the company car by the Applicant and Nelsiwe Dlamini. There was then signed the document bearing the list of the items. This document was to him an agreement.

17.8. It transpired under cross examination that he had expected the Applicant to report to the Siteki Police Station the next morning with him for purposes of having the motor vehicle ownership changed from the name of the Applicant into that of the company.

17.9. The Applicant failed to do so but instead reported to his Attorney, who called Constable Mabuza and informed him to leave his client alone.

17.10. The version of this witness was confirmed by Nelsiwe Dlamini. She emphasized the document signed by all the attendees there was an agreement confirming the assets of the company were freely handed over by the Applicant to her.

17.11. To prove that the assets were freely and voluntarily surrendered to her, the said Nelsiwe Dlamini, told the Court that after all the other company assets had already been handed over to her, the Applicant later brought the two gauges which had remained with him.

17.12. She heard the Applicant saying that day the company was dissolving; which she claims was voluntarily said.

[18] The real question for determination, these being spoliation proceedings even though they are overshadowed by a shareholder dispute, is whether the removal or taking of the assets from the Applicant to the other shareholder, Nelsiwe Dlamini was consented to. Owing to the protracted manner in which the said removal or taking of the assets was done, this is obviously not a one word or sentence answer as it calls for a closer scrutiny of the facts.

[19] Since it is contended that the handover of the company assets to the other shareholders of the second Applicant was by agreement, it follows that the agreement concerned, as it is in the nature of a contract, should have been freely and voluntarily made for it to stand. The question is; from the facts of the matter can it be said that the contract concerned was freely and voluntarily made? A corollary to this, is the understanding that if the contract was a result of a misrepresentation, duress or by undue influence, it

then cannot stand and would have to be rescinded as it would not have been concluded lawfully. It is in that sense a voidable contract.

[20] My understanding of the facts suggests that the Applicant is contending that the agreement in question was concluded under duress or was induced by undue influence. It is a settled position of our law that if either of these are proved, they justify the rescission of a contract. In his book titled: **Business Transactions Law, 2007, Seventh Edition, Juta and Company, Robert Sharrock** puts the position of the law as follows at page 120:

“A party to a contract may be permitted to rescind the contract and obtain restitution if he was induced to give his assent by the improper conduct of the other party. The main types of conduct which the law regards as improper and as justifying rescission are misrepresentation (including non- disclosure), duress and undue influence. A contract induced by misrepresentation, duress or undue influence is voidable (rescindable), not void. The innocent

party, in other words, is entitled to rescind the contract, but is not obliged to do so. Until rescission, the contract remains valid.”

[21] In so far as it is suggested that an agreement was reached on the 13th July 2012, that the assets be removed from the possession of the Applicant and be given to the Respondent’s wife, then that agreement was induced by duress. This is because prior to its alleged formation, the Applicant was allegedly threatened with fear such that he had to lock himself in his house whilst calling the police to come and rescue him. I accept his evidence that he was also threatened with violence to his children as it is consistent with what was happening there and I did not hear the Respondent to be realistically refuting same. The facts do not show how the police resolved this problem than them merely understanding that the Respondent had loaned his monies to the second applicant including being involved in purchasing the company car that formed part of the disputed assets. They obviously further understood that the Respondent’s wife was a majority shareholder who in their eyes was entitled to keep the company assets and even perhaps that the Applicant was possibly cheating the other shareholder and Director by using the tools and the Motor Vehicle for his own business.

[22] On the over all the intervention by the Police Officers particularly Constable Mabuza looked highly suspicious, unnatural and somewhat partisan. If indeed an agreement was concluded on the 16th July 2012, why was it his business to enforce it when he discovered it was not being complied with instead of the aggrieved party having to enforce it through the appropriate legal structures. Furthermore, the Respondent's own version on the existence or otherwise of this agreement is contradictory and self destructive. Whilst on the one hand it is contended that the agreement reached on the 16th July 2012, which was merely being enforced on the 23rd July 2012 was that the parties worked together, what was recorded on the document listing the assets, which according to the Respondent was proof of the agreement, was that the company was being dissolved that day. Despite that it is hard to appreciate a dissolution of a company in that manner, it is even more difficult to accept that the Applicant, who had initially had to fight the deprivation of the assets was now handing them over willingly; that is without a comprehensive agreement governing the interest of each one of the parties henceforth.

[23] Owing to these considerations, I am convinced that a rescission of the agreement on the basis of duress or undue influence, given the obvious undue intervention by the Police which was no doubt prejudicial to the Applicant, is warranted. Whilst there may not have been force as such by the police themselves, I am sure he surrendered the possession of the assets to the Respondent's wife, under pressure put to bare upon him or as a result of some undue influence by the police. This is the case borne out by the facts and circumstances of the matter in my view.

[24] This duress or undue influence also becomes apparent in my view when after hearing on the 23rd July 2012 that the Applicant had not complied with the alleged agreement, the Applicant was allegedly called to the Police Station by Constable Mabuza and asked why he had not complied with the agreement allegedly concluded earlier on.

[25] The very fact in my view that the Applicant had either to conclude the alleged agreement or comply with it after the involvement of the Police is an indicature that it was not one freely and voluntarily made. This view is cemented by the failure of the applicant to comply with the alleged

agreement immediately after its conclusion at least on two occasions. His refusal to surrender the items to the Respondent's wife after the 16th July 2016 meeting and his subsequent refusal to effect the transfer of ownership of the motor vehicle after the 23rd July 2012 are indicators that the agreement was not freely and voluntarily made. The failure to have the document that recorded the company assets speak for itself that it was an agreement is another indicator it was not what it is said to be. Accordingly the supposed agreement cannot avoid being rescinded.

[26] Having concluded that the alleged agreement that the company assets be removed from the Applicant to the Respondent was either induced by duress or by undue influence can it be said that the resultant deprivation of possession amounted to spoliation? It seems to me that a natural answer to such a question is that such a conclusion inescapable.

[27] The position of the our law is trite that where one is deprived of the possession of certain assets or items without either a Court Order or his consent; and I should add that including where that consent is shown to have been unlawfully obtained, then the said removal of the assets or the

deprivation of possession of same should amount to spoliation because once that agreement has been rescinded it becomes clear that the removal of the assets was unlawful. In **Swaziland Commercial Amadoda Road Transportation and Others Vs Siteki Town Council Case No. 254/2012 at paragraph 17 and 18** the position of our law with regards to spoliation as a remedy was put as follows;

“17. It is trite that the essence of the “mandament van spolie” is that the person who has been deprived of possession must just be restored to his former position before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order and restrain persons from taking law into their hands and inducing them to submit the matter to the jurisdiction of the courts. In order for peace in the community to prevail, every person who asserts a right to a particular thing should not resort to self – help in order to gain possession of the thing.

18. There are two essential requirements which the Applicants must prove; Firstly that he was in peaceful and undisturbed possession of the thing. Secondly that

he was unlawfully deprived of such possession. It suffices for the Applicant in the first requirement to show that he had factual control of the thing complained of with the intention to derive some benefit from the thing. Furthermore, he must prove an act of spoliation that he had been deprived of his possession of the thing without a Court Order or against his consent”

[28] I am convinced that from the facts of the matter the Applicant has established on a balance of probabilities that he was despoiled of the assets of the company that were in his possession. Perhaps a strong suggestion was made that he was no longer using the said assets for the benefit of the company, but that is not the inquiry at this point as I merely have to determine whether he was in peaceful and undisturbed possession of the assets including whether such deprivation of possession was as a result of a Court Order or the Applicant’s consent. I have come to the conclusion that the deprivation was done unlawfully and without neither an order of court nor his consent.


[29] I comment in passing that the heart of the matter is more about a shareholder dispute between the parties which is an issue that has its own applicable legal principles to resolve it if it cannot be resolved by agreement. Ofcourse the appropriate remedy envisages a proper liquidation if there is no other lawful method of the shareholders parting ways amicably. Like I said, the remedy in terms of this judgement maybe for no more than ensuring that things are done properly and orderly so as to reach permanent solutions.

[30] For the foregoing considerations, I have come to the conclusion that the Applicant's application should succeed. Accordingly I make the following order:

30.1. The Rule issued by this Court in the matter be and is hereby confirmed.

30.2. For the removal of doubt, anyone currently in possession of the assets of the company as listed in paragraph 16.5. hereinabove be and is hereby ordered to hand them over to the Applicant.

30.3. Owing to the peculiar circumstances of the matter, each party is to bear its own costs.



N. J. HLOPHE
JUDGE – HIGH COURT