IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Reportable

HELD AT MBABANE **Case No. 119/2017**

In the matter between:

THEMBA MAVIMBELA **Applicant**

And

INGEMBA INVESTMENTS (PTY) LTD **1st Respondent**
MDUDUDZI NDLAKUDZE **2nd Respondent**
LUCKY MAVIMBELA **3rd Respondent**
LOMATI MINE (PTY) LTD **4th Respondent**
NED BANK (MANZINI BRANCH) **5th Respondent**
QLC MINING (PTY) LTD **6th Respondent**
MUSKETEER MINING (PTY) LTD **7th Respondent**

Neutral citation: *Themba Mavimbela and Ingemba Investments (Pty) Ltd, Mduduzi Ndlakudze, Lucky Mavimbela, Lomati Mine (Pty) Ltd, Nedbank (Manzini Branch), QLC Mining (Pty) Ltd, Musketeer Mining (Pty) Ltd* (119/17) [2017] SZHC 56 (08 March 2017)

CORAM **MAPHANGA J**

HEARD: **08 March 2017**

DELIVERED: **08 March 2017**

Summary:

[1] This is an application brought on urgency under a certificate to that effect ostensibly in terms of Rule 6 (25) (a) and (b). In terms of the Notice of Application it is prayed that an order be issued as follows:

(1) "Dispensing with the Rules in relation to manner of service, time limits in terms of notice and manner of service of proceedings and dealing with the matter as one of urgency;

(2) Condoning the Applicant's non-compliance with the said Rules of Court;

(3) That a rule nisi be and hereby issue:-

3.1 Compelling the 4th Respondent to make payment of all the instalments in respect of the E400, 000.00 (Four Hundred Thousand Emalangeni) outstanding in terms of the Deed of Settlement executed by the 1st and 4th Respondent on the 28th November 2016, into the 1st Respondents Bank Account Number 080000055984, Ned bank, Manzini branch;

3.2 Prohibiting and restraining the 1st, 2nd and 3rd

Respondents from making any withdrawals from the 1st Respondent's bank account Number 080000055984, Ned bank, Manzini branch, pending finalisation of action to be instituted by the Applicant against the 1st & 3rd Respondents within 7 (seven) days of the final order hereto;

3.3 Alternative to prayers 3.1 and 3.2 above that the E400, 000.00 (Four Hundred Thousand Emalangeni) outstanding in respect of the Deed of Settlement executed by the 1st & 4th Respondent on the 28th November 2016, be paid into the Applicant's bank Account Number 62241665895, First National Bank, Pigg's Peak Branch;

3.4 That the 1st Respondent be ordered to pay costs of this Application at Attorney and own client scale;

……..”

[2] The Applicant, one Themba Mavimbela, has deposed to the founding affidavit in which he describes himself as a signatory to certain, memorandum agreement.

[3] Now a copy of the agreement he adverts to has been attached to the founding affidavit as ANNEXURE A". This document is key. At a blush it is apparent that it was entered into between the 1st and 7th Respondents as can be gleaned from the title page. It is critical to state a fact that was conceded by the Applicants Attorney (Mr. N. Dlamini) is that in reality the Applicant far from being a signatory he in fact appended this signature as a witness for the 1st Respondent.

Venture Agreement

[4] This agreement, which I shall for convenience call a settlement agreement henceforth, is pivotal as an underlying and primary basis for the relief sought herein.

[5] It also forms part of the backdrop and context herein. It is therefore important to set out in brief the history of the matter to place the issues in context.

Background

[6] It is common cause that the 1st Respondent is a company established and registered in the kingdom with a purpose of undertaking and carrying out

certain mining operations in a gold mining venture North of the Kingdom referred to in the papers as LUFAFA Mine.

[7] Without going into the fairly intricate contractual arrangements involving the various entities and actors in the venture, it can be said for present purposes that the key protagonists in the enterprise were the 1st Respondent and another venture led by one Willie Koekermoer, known as MUSKATEER MINING (PTY) LTD (Muskateer).

[8] In terms of an agreement, between the 1st Respondent and the said Muskateer the former was to provide certain logistical operations including haulage and the ancillary provision of plant and equipment at the mining site. This agreement was executed during the inception of the project between the 1st Respondent and Muskateer. To distinguish it let it be called the primary agreement.

[9] During 2016 a dispute arose in the course of the mining venture in which the 1st Respondent was pitted against the 7th Respondent and various other entities involved in the main and multilateral contractual arrangements the mining operations. Suffice to say this dispute was over certain contractual claims sought by the 1st Respondents as payments accruing under the primary agreement.

[10] As matters came to a head, the 1st Respondent instituted an action before this court against the 7th Respondent and various other entities involved in the venture wherein the former brought the claims for the payment of certain sums of money together with interest, amongst other relief in the action. This process was sued out under Case No. 1518/2016.

[11] In the course of the aforesaid action certain settlement negotiations ensued between Muskateer and the 1st Respondent and in the event a settlement agreement was struck between the parties in terms of which a compromise was entered as an order of court.

[12] The settlement agreement was executed into on the 28th November 2016 and is annexed to the Applicants founding affidavit as Annexure B. That is the settlement agreement at the heart of this application.

[13] Specifically it is the proceeds or monies payable in terms of this settlement agreement that are the subject matter of this application. For the sake of clarity it is worth highlighting its essential its key elements were that:

(a) a certain sum of E600, 000.00 (Six Hundred Thousand Emalangeni) would be payable in full and final settlement of its claims; and further provided

(b) that the sum would be liquidated by way of monthly remittances of E100, 000.00 (One Hundred Thousand Emalangeni) commencing on the 10th December 2016 and the 10th of each successive month thereafter into the 1st Respondent's designated bank account.

[14] It is common cause that what ensued is that the settlement process in terms of that settlement agreement was set in motion and that by the time of the launch of this application (albeit on grounds of urgency) the Respondent had already paid the first two instalments.

Interdicts (mandatory)

[15] In essence it is the balance of the monies that is the object of the mandatory interdict sought in prayer 3.1 of the Applicants notice of application. In the alternative he is seeking a similar interdict for the payment of the balance into his own (the Applicants) bank account (as set out in prayer 3.3) held with 5th Respondent.

[16] Though cast as a rule nisi what the Applicant prays for under prayer 3.1 and 3.3 are in effect final interdicts for they are not set out as provisional or interim interdicts pending proof of a claim to the stated sums in a separate suit or proceedings.

Interdict/Prohibitory

[17] In terms of prayer 3.2 the Applicant has sought the relief of a prohibitory interdict against the 1st, 2nd & 3rd Respondents to restrain the said Respondents from accessing the 1st Respondent's account and from drawing down the sums in that account.

Points in Limine

[18] In opposing the applications the 1st, 2nd and 3rd Respondents have raised certain preliminary points of law and on the strength of these points are urging the dismissal of the application in limine.

[19] These points are foreshadowed in the Respondents answering affidavit and were amplified in argument by Mr Simelane. I propose to deal with them in turn.

Ad urgency

[20] It was contended by the Respondents that no grounds for urgency have been established by the Applicant to bring it within the fold contemplated by the Rules of this court on urgency. To that end Respondents urge that the circumstances relied on as giving rise to the cause for the 'urgent' relief are set some time in November 2016, the critical time frame being at least one month prior to the launch of the proceedings presently.

[21] I am inclined to agree with Mr. Simelane in that nowhere in his papers does the applicant come anywhere near the requisite content necessary to set out cogent grounds for the application of the Rule on urgency. Nothing is said to explain the reason or cause for the delay on the part of the Applicant shortly after the 28th November 2016 when the settlement agreement was entered into and made an order of court.

[22] Secondly no substantive facts are set out in the application as to what renders the proceedings to be of the urgency claimed. I was urged that the appropriate relief to Respondents in upholding the point would be to strike off the application from the roll. But this would be to simply defer the disposition of the matter that is already before the court (albeit serving

with full submissions and a full set of affidavits). It can only be of moment on a costs award consideration. It therefore serves no purpose to seek an order that the matter be struck off or finding that it should not have been enrolled. Once the papers are filled what remains would be an appropriate costs award.

[23] As to the requirements of the rule, these are so well known hence scarcely require detailed restatement.

[24] I need only refer to the rigor of clarity of the rule (Rule 6 (25) (a) and (b) which states:

a) ***"In urgent applications, the court or a Judge may dispense with the forms and service provided for in the rules and may dispose of such matter at such time and place in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to the court or Judge, as the case may be, seems fit.***

b) ***In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the Applicant shall set forth expliatly the circumstance which he avers render the matter urgent and the***

reasons why he claims that he could not be afforded substantial redress in due course".

[25] It is a well settled position before this court that in applications the rule must be strictly construed to require a litigant to stringently comply with its letter in disclosing forthrightly why redress in the ordinary course of civil proceedings "in due course" as it were, would elude the Applicant.

(see Humphrey H. Henwood v Maloma Colliery & Another Civil Case No. 1623/24; Also Megalith Holdings v RMS Tibiyo (Pty) Ltd & Others Civil Case No. 199/2000).

[26] The founding affidavit is bereft of any clear detailed and credible reasons to the exacting standards contemplated in the rule as would justify deviation from the peremptory rules for the conduct of applications.

[27] The Applicant was hard put, even when pressed during argument to show why an application in the form and normal timelines afforded by the rules would not adequately afford the Applicant due redress.

[28] The banal statement, which is incorrect, made by the Applicant in Paragraph 31.2 of the founding affidavit to the effect that "the matter is urgent because an ordinary application on normal course takes 3 to 6

months to reach finality, by that time the 2nd and 3rd Respondents would have used up all the money" is incomprehensible and of a speculative nature. It does not attempt to set forth the requisite circumstances to show that the enrolment of the matter as an urgent one exists.

[29] But most importantly urgency and the grounds therefore cannot be adequately dealt with in abstraction without showing prejudice linked to interest in the subject matter or mischief sought to be averted. In this regard the following passage in the dictum of Sapire CJ in ***H P Enterprises (Pty) Ltd v Nedbank (Swaziland) Ltd Case No. 788/99*** (unreported) is instructive:

> ***"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate the observance of the normal procedures and the limits prescribed by the rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow".***

[30] The time line of the alleged squabbles and financial disputes that the

Applicant adverts to in his own papers goes as far back as 2015. The settlement agreement which is the incidental source of these proceedings according to him was entered into in November 2016.

[31] The remittances payable in terms of the said agreement started flowing as anticipated with the result that by the time of the launch of the application no less than two payments had already been rendered. All this without any indication as to what steps for recourse the Applicant took in the meantime.

[32] Clearly no attempt has been made to proffer sufficient grounds for the invocation of the Rules on urgency in the Applicants papers. The point on urgency is upheld for the above reasons. I shall deal with the consequences for this defect on the matter of costs as indicated.

[33] The shortcomings in the Applicants case on urgency pale in relation to the second preliminary point – that the Applicant has to show he has the requisite *locus standi in iudicio.*

Locus standi

[34] As in action proceedings, likewise in applications the Applicant is required to show that he has right *ex facie* his papers to bring the proceedings in the relief claimed. He must demonstrate that he has a direct and substantial interest to the thing claimed or which in the object of the proceedings.

[35] There is a manifest defect in application in that no connection between the Applicant and the relief he seeks – in the form of either a legal interest in either the settlement agreement or a legitimate the sum payable to the 1st Respondent thereunder; nor in any interest established in the form of any rights or interest either in the equity, management or control in the affairs of the 1st Respondent.

[36] He is neither a party nor beneficiary to the settlement agreement. This much was strongly submitted by Mr Simelane on behalf of the Respondents and I fully agree.

[37] He claims to have been a signatory to the original contract (the underlying agreement) but this is in fact a false claim as it turns out. As stated earlier he only signed as a signatory to the 1st Respondent. He is

not a shareholder or member of the 1st Respondent and it was conceded by Mr. Dlamini that he is not a Director either. His only basis to the claim, it was again conceded, is the alleged lease by the 1st Respondent and or the 2nd & 3rd Respondents from him of certain "earth-moving" equipment described as a front-end loader on account of which he claims he is owed certain monies. He also alleges he is promised certain remuneration for certain services ostensibly as an employee of the Respondent.

[38] Whatever the merits of any such claims none of the facts alleged even remotely create a connection between such a claim, the monies due and payable to the 1st Respondent to establish the 1st Respondents *locus standi.*

[39] On this basis alone I find there is no merit to the Applicants application for want of standing.

[40] Incidentally the question of standing is inextricably linked in terms of the issues with the essence of the relief claim *vis* the requirements of an interdict. As in *locus standi* the Applicant faces formidable obstacles even there. For completeness, though it is not necessary in light of my

ruling on standing I propose to deal with this aspect as well to lay the matter to rest.

Interdict

[41] As stated earlier herein in effect the Applicant approaches the court for a mandatory interdict which is of a final nature and a prohibitory interdict with an element of an interim effect if regard is to be had to the qualification "pending finalisation of action to be instituted by the Applicant against the 1st & 3rd Respondents within 7 days of the final order hereto".

Interim/Final interdict

[42] The foremost issue on the merits that the Applicant faces is whether he has, in his papers made out a case for the relief that he has sought.

[43] It is settled law that in order for a litigant to succeed in his quest for an interdict he must show:

a) That he has a clear right in the thing which is the subject of the application the case of a final interdict or a prima facie

right though open to some doubt in the interest that he contemplates and seeks to protect in the main action;

b) Where the right is prima facie established such a well-grounded apprehension of irreparable harm being occasioned the Applicant if the relief sought is not granted if he were to succeed in proving it;

c) That the balance of convenience favours the Applicant in the granting of the relief; and

d) That the Applicant has no other satisfactory remedy.

See Megalith Holdings v RMS Tibiyo …….; C B Prest, : Interlocutory interdicts" Juta & Company Ltd 1993, Page 155; Steel Engineering industries and Others v nation union of metal workers of South Africa. (2) 1993 SA. 196 at 1999 -205.)

[44] As noted earlier the test of sufficient and substantial interest which is so direct in the thing claimed as to confer standing is closely associated with the enquiry as to a right whether clear (as to be set out and out) in final interdicts or *prima facie* (though open some doubt) in interim injunctions.

[45] In this application the Applicant in his own words falls short of showing what is the basis (if any) he could possibly lay an interest either in the bank accounts or in a claim to the repository of funds he proposes to seize and interdict or to the company (the 1st Respondents) in whose account the monies accrue.

[46] None has been established whatsoever. It was urged by Mr. Simelane that in light of the affidavits as they stand (and this much is common cause) the Applicant is neither a Director nor a Shareholder in the 1st Respondent. I am inclined to agree.

[47] In fact his entire expedition in this application is a pursuit to a cause of action that is not remotely linked to the relief sought – namely a contract for plant hire in relation to the front loader he claims and other allegations pertaining to alleged investments in the mining enterprise. It is not necessary to go into the veracity of the allegations. Whether any disputes of facts relating to these factual allegations might exist in the course of the affidavits are not pertinent or relevant herein.

[48] It is the Applicant that bears the *onus* of proving the existence of a right in the robust requirement for a final interdict or prima facie for an interlocutory intervention; in both respects the Applicants papers are abysmal.

[49] Apart from the issue of urgency I determine that the Applicant has failed to set out proper cause for the relief claimed either in the main or alternative prayers and therefore dismiss the same with costs.

[50] On the scale of costs I do note that this application is largely misconceived both in form and the relief claimed, the licence taken in bringing the proceedings by way of urgency is to be frowned upon. However such is not a case as would attract a punitive measure of costs.

[51] In that regard costs are awarded on an ordinary scale as between party and party.

MAPHANGA J

For the Applicant : Mr. L. Dlamini

For the Respondents (1st, 2nd, & 3rd): Mr. K. Simelane