



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

Case No. 129/15

In the matter between:

**FLORA SOLANI DLAMINI**

**APPLICANT**

**AND**

**THEMBIE CEBE**

**1<sup>st</sup> RESPONDENT**

**NCAMSILE MNGOMETULU**

**2<sup>nd</sup> RESPONDENT**

**Neutral citation:** *Flora Solani Dlamini vs Thembie Cebe & Another* [129/15]

*[2019] SZHC 132 (25<sup>th</sup> July, 2019)*

**Coram:** FAKUDZE, J

**Heard:** 4<sup>th</sup> July, 2019

**Delivered:** 25<sup>th</sup> July, 2019

## **RULING**

### **INTRODUCTION**

[1] On the 28<sup>th</sup> June, 2019, the Applicant filed an Exparte Application seeking the following:-

1. *Condoning the non-compliance with the normal forms of times and procedure relating to the services of pleadings and allowing the matter to be heard as an urgent and exparte application and condoning the non compliance with Rule 6 on the reasons of urgency.*
2. *Authorising the Applicant and her nominated children to intervene in the running and operations of the company business Madvubahle Investments (Pty) Ltd t/a Dlamini Transport, currently being run exclusively by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the absence of Mr. Alfred Skhakhane Dlamini, the founder and shareholder of the company.*
3. *Removing the 1<sup>st</sup> Respondent's powers of transacting and/or signing and/or authorising and/or operating any bank accounts of the business as she currently transact alone in the absence of Mr. Alfred Skhakhane Dlamini.*

4. *Authorising the Applicant and Mr. Alfred Skhakhane Dlamini's nominated children, Ncamiso Dlamini and Henry Dlamini to transact, sign, operate the bank accounts of the company business.*
5. *Directing that Applicant and Mr. Alfred Skhakhane Dlamini's nominated children, Ncamiso Dlamini, Henry Dlamini, Xolile Dlamini and Nkosingiphile Dlamini be and are hereby appointed to be directors and take over, in the interim, the operations of the company businesses from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*
6. *Directing that the nominated directors in 5 above, to appoint independent auditors to check and audit all the books of accounts from the year 2012 to date.*
7. *Directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to give undisturbed access and immediate possession of the bank accounts, software and hardware computers, order books, keys and all other operating equipment to the nominated directors Ncamiso Dlamini, Henry Dlamini, Xolile Dlamini and Nkosingiphile Dlamini so that they can take over the operations of the company business.*
8. *In the event of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failing or refusing to comply with this Court Order within eight (8) hours of service on the Respondents, the Deputy Sheriff assisted by Eswatini Royal*

*Swaziland Police are hereby authorised to take all such steps as may be necessary to effect this Order of Court.*

9. *Directing the Deputy Sheriff to serve the Interim Order, together with the Notice of Motion and Founding Affidavit together with all annexures to the Respondents.*
10. *A Rule Nisi be with interim effect and be hereby issued with immediate effect, calling upon the Respondents to show cause, if any, why the order should not be made final and why they should not be directed to pay the Applicant's costs in the event they oppose this Application.*

[2] The Respondents filed a Notice to Oppose on the 2<sup>nd</sup> July, 2019. They went further to file a Notice of Set Down to anticipate The Rule *Nisi*. The Respondents also filed a preliminary Answering Affidavit.

[3] The Applicants then filed a Notice to Raise a Point of Law before court on Tuesday, 2<sup>nd</sup> July, 2019 contesting that the Respondents have failed to deliver the operating equipment to the nominated directors so that the nominated directors can take over and operate the company business. Until the Respondents have purged their defiance, the court cannot condone their

conduct of their flight from justice and should dismiss their intervention application with costs, order their compliance and the matter return as scheduled.

- [4] The Respondents have filed an opposition and the Notice to Raise the point pertaining to dirty hands is the subject of this Ruling.

### **THE PARTIES' CONTENTION**

#### **The Applicant's Case**

- [5] The Applicant state that the Deputy Sheriff filed a return of service stating that he personally served the Respondents with the Orders of the Court on the 1<sup>st</sup> July, 2019 at Manzini and after explaining the exigencies of the Orders, they refused and/or neglected to comply with the Orders. They informed the Deputy Sheriff that the Respondents will wait for instructions from their attorney. Upon numerous follow ups, the Respondents persisted and later switched off their phones.

- [6] The Applicants further aver that the conduct by the Respondents suggest that a litigant can defy an Order of Court and get away with it in full view of

other would be litigants. Notwithstanding such defiance, they can still come to court to seek the same court's intervention with impunity.

[7] The doctrine of dirty hands should be invoked by the court in dealing with the Respondents. This doctrine entails that before a person seeks to establish his rights in a court of law he must approach the court with clean hands.

[8] Likewise, the court should guard against its authority and dignity by refusing the anticipation by the Respondents, order compliance with the order and make an order for costs against the Respondents.

### **The Respondent's Case**

[9] The Respondents contend that they have filed an Answering Affidavit establishing that the keys to the business premises are no longer with them since Alfred Skhakhane Dlamini is back from hospital. Even if the court were to grant the relief sought by the Applicants, it is impossible for the Respondents to purge the contempt because the whole Application has been overtaken by events. What has since happened is consistent with the allegations by the Applicants to sustain the Application. What grounded the

Application is that an Interim arrangement should be put in place until Mr. Sikhakhane Dlamini is back down from hospital. Now that he has come back, the Application is academic.

- [10] The Respondents further contend that after the Deputy Sheriff had served the First Respondent, he prepared an Affidavit of Service. At paragraph 6, the Deputy Sheriff states that he was informed that the First Respondent's father was back at home at New Village and was invited to go there in order to meet all the members of the family. The Deputy Sheriff was introduced to Mr. Alfred Sikhakhane Dlamini. The Deputy Sheriff called the First Respondent around 17:21 hours to check if there had been compliance with the Order and the response was that the keys had been handed over to the father. In the Replying Affidavit there was no denial of this averment by the Applicants. At paragraph 12 of the First Respondent's Affidavit on Alleged Dirty Hands, the First Respondent categorically states that the keys were taken from her by the father. This happened on the 1<sup>st</sup> July, 2019 at 1700 hours. The father told the First Respondent that he will keep the keys until he makes a decision on the way forward. The Confirmatory Affidavit of Attorney Sipho Madzinane also supports this contention.

[11] The Respondents state that the Interim Order had stated that compliance must take place within eight (8) hours of service. There was compliance in that the owner and shareholder had taken over the business within that period. Second, before the eight (8) hours expired, the Respondent's attorney called Applicant's attorney and the Registrar so as to anticipate the return date of the Rule. When the call was made, the keys were no longer with the First Respondent. Not only did the First Respondent understand the order, she went further to seek the court's intervention so as to enable the latest developments to be known by the court.

### **APPLICABLE LAW**

[12] The doctrine of unclean hands was well captured in **Mulligan v Mulligan 1925 WLD** where De Waal J stated as follows:-

*“Before a person seeks to establish his rights in a court of law, he must approach the Court with clean hands.....”*

[13] A number of locally decided cases have recognised this doctrine. In **Sisane Fakudze and Seven Others v Tikane Investments (Pty) Ltd and Fifteen Others 900/2014 SZHC** Maphalala P.J. stated as follows:



*“Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands; where he himself through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect so he cannot ask the court to set its machinery in motion to protect his civil rights and interest – where the court to entertain a writ at the instance of the litigant, it would be stultifying its own process, and it would, moreover, be convincing and condoning the conduct if a person who through his flight from justice, set law and order in defiance.”*

### **COURT’S ANALYSIS AND CONCLUSION**

[14] Having listened to the arguments of counsel for the Applicant and Respondents, this court is inclined to agree with the Respondents. The Respondents have rightly pointed out at the time of the service of the Rule, Mr. Alfred Sikhakhane Dlamini had already been discharged from hospital. The Applicant had indicated that they are seeking an order in the “interim” because Mr. Sikhakhane Dlamini had been hospitalised. His being discharged led to a change of circumstances.

[15] Mr. Sikhakhane Dlamini's discharge not only changed the circumstances, but he also took charge of the business. The 1<sup>st</sup> Respondent bears testimony to this fact. Her version is also confirmed by her Attorney who happened to be a witness to this happening. Mr. Sikhakhane Dlamini went further to file a Confirmatory Affidavit stating he is the one who had authorised the 1<sup>st</sup> Respondent to carry on with His business.

[16] I must point out that this court had been called upon to determine if the Respondents approached the court with dirty hands following their failure to do what the court had called upon them to do; the way the Respondents responded revealed that the new circumstances made it impossible for the Order to be carried out. The court is failing to see any defiance on the part of the Respondents because of these new circumstances.

[17] The Application by the Applicants is therefore dismissed. The merits of the matter may now be argued if the parties so wish.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a series of loops and a horizontal line extending to the right.

**FAKUDZE J.**

**JUDGE OF THE HIGH COURT**

Applicant: S. Masuku

Respondents: S. Madzinane