



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 553/19

In the matter between:

FAROOK SHAZAIB

APPLICANT

AND

SIALKO INVESTMENTS (Pty) Ltd

t/a COLLECTION CENTRE

1ST RESPONDENT

MALIK SUNNY

2ND RESPONDENT

QAISAR MALIK

3RD RESPONDENT

MUHAMMAD “MALIK” AZEEM

4TH RESPONDENT

Neutral citation: *Farook Shazaib and Sialko Investments Pty Ltd t/a Collection*

Centre & 3 Others [553/19] [2019] SZHC 90 (4th June, 2019)

Coram: FAKUDZE, J

Heard: 30th April 2019

Delivered: 4th June, 2019

Summary: *Civil Procedure – Applicant filed an Application for a preservation Order issued out provisionally – alleges that he entered into an oral agreement with Respondents wherein he invested about E150.000.00 into First Respondent’s Company – Applicant’s locus standi and that called upon to make a of law – court concludes that Disputes of facts also exist – discharged – costs in favour of Respondent.*

Respondent raises issue of the disputes of facts exist – Court determination on these points Applicant has no locus standi. Provisional preservation order the 1st and 4th

BACKGROUND

[1] On the 25th March, 2019, the Applicant filed an Application on a certificate of urgency seeking the following:-

1. *Dispensing with the normal Rules of Court relating to form, service and time limits;*

2. *Condoning the Applicant's non-compliance with the Rules of the above Honourable Court;*
3. *Directing and authorising the sheriff or her lawful deputy in any district wherein assets of the Respondents may be found, to attach, make an inventory and place under his custody such property to be kept as security for the Applicant's claim against the Respondents currently pending under High Court Case No. 553/2019 and pending finalisation of the said proceedings;*
4. *That costs of this Application should be costs in the main action.*
5. *Granting Applicant such further and/or alternative relief as the court may deem fit.*

CONTENTION

[2] The Application is opposed by the 1st and 4th Respondents. The Respondents have raised two points of law. The first one pertains to the Applicant's *locus standi* and the other pertains to the fact that the Applicant's case has raised disputes of facts. By virtue of these points, the Applicant is not entitled to the order sought, so argues the Respondents. Let us deal with each point of law.

- [3] On the issue of *locus standi* the Respondents contend that the Applicant has no *locus standi*. This is based on the fact that the Applicant has no special interest in the business. The Applicant has failed to show a legal right that he possesses in so far as the 1st Respondent's business is concerned. He has also failed to demonstrate through some evidence that he indeed invested the amount which constitutes the basis for him to institute the proceedings.
- [4] On the issue of the existence of the disputes of facts, the Respondents contend that the Applicant should have foreseen or ought to have been foreseen the dispute around the fact that there was an allegation by the Applicant that an oral agreement which caused him to invest money in the business was entered into. Such dispute cannot be resolved on papers filed by the parties. Oral evidence will have to be adduced to establish this fact.
- [5] The Respondents finally contend that in the Replying Affidavit, the Applicant allegedly received the money invested into the activities of the 1st Respondent from a certain cousin of his. The cousin has not filed any Confirmatory Affidavit to confirm the Applicant's contention. The Applicant has made a bare allegation.

[6] The Applicant's case is that he has the necessary *locus standi* by virtue of the fact that he entered into an oral agreement with the 1st Respondent's representatives who have now flee the country. They are allegedly in South Africa. The Applicant is asking the court to grant it an order preserving the assets of the 1st Respondent until the proceedings against the 2nd and 3rd Respondents are instituted. The Applicant claims that he invested an amount of One Hundred and Fifty Two Thousand Four Hundred and Three Emalangeni, Fifty Cents (E152,403.50) into the Respondent. The aforesaid amount was used to purchase stock for the 1st Respondent's business. The preservation order is the only remedy available to the Applicant in order to secure his interests.

THE APPLICABLE LAW

[7] In **Sithole N.O and Others V Prime Minister of the Government of Swaziland and Others High Court Case No. 2792/2006** at paragraph 15, it was held that, "in the case of **Roodepoort Maraisburg Town Council V Eastern Properties (Pty) Ltd (1933) AD 87**, Wesels C.J. expressed the principle of *locus standi* in the following terms: by our law any person can bring an action to vindicate a right which he possesses whatever that right may be and whether he suffers special damages or not he can show that he

has a direct interest in the matter and not merely the interest which all citizens have.”

- [8] In **VIF Limited V Vuvulane Irrigation Farmers Association (Public) Company (Pty) Ltd Case No. 30/2000** (unreported) at Page 8, Tebbutt J.A. stated as follows:

“It is well established that an Applicant must make the appropriate allegation in its launching or Founding Affidavit to establish its locus standi to bring an application.”

- [9] On the issue of the existence of disputes of facts, in **Elmon Masilela V Wrenning Investments (Pty) Ltd and 2 Others High Court Civil Case No. 1768/2002**, it was held that:-

“It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated infra) the court has a discretion as to the future course of proceedings. If it does not consider the case that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings or with a direction that pleadings

be filed. Or the application may be dismissed with costs, particularly when the Applicant should have realised when launching the application that a serious dispute of fact was bound to develop. It is certainly not proper that an Applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the court to apply Rule 9 to what is essentially the subject of an ordinary trial action.”

COURT’S ANALYSIS AND CONCLUSION

[10] Having gone through the parties’ pleadings and having heard the Applicant’s and Respondent’s oral argument, the court is inclined to agree with the Respondent that the Applicant has failed to establish that it has the necessary *locus standi*. The Applicant has failed to furnish any form of evidence to substantiate his argument that he deposited any money into the account of Respondent. Further, even if there was money received from his cousin, there is no confirmatory affidavit from the cousin confirm that indeed he gave money to the Applicant. It is therefore this court’s view that the Applicant has no *locus standi*.

[11] It is also this court's observation that the Applicant's case is full of disputed facts which cannot be resolved by way of affidavits. Oral evidence must be adduced. This is so with respect of the amount that was allegedly deposited into the account of the Applicant.

[12] Since the Applicant has failed to substantiate his claims of having invested in the business of the Respondent, the points of law raised by the Respondent are hereby upheld with costs at an ordinary scale.

A handwritten signature in black ink, consisting of a large, stylized initial 'F' followed by a surname, written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

APPLICANT: D. E. HLETA

RESPONDENT: MR. GUMEDZE