

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 623/2022

In the matter between:

WORLD VISION ESWATINI

Applicant

And

ESWATJNI ROYAL INSURANCE

CORPORATION

First Respondent

NTOKOZO BIRTHWELL DLAMINI

Second Respondent

Neutral citation:

World Vision Eswatini v Eswatini Royal insurance Corporation & Ntokozo Birthwell Dlamini
623/2022 [202 I] SZHC 8 1 (10/05/2022)

CORAM:

B.S. DLAMINI ,J

DATE HEARD: 03 May 2022

DATE DELIVERED: 10 May 2022

Summary: *Application compelling Re.1po11dent to disclose assets/or purposes of securing a civil claim yet to be instituted. Requirements to be established by Applica/11 assessed. Applicant seeking to introduce additional relief under the 'salutary relief' without supplementing or amending its papers.*

Held; The additional prayer sought to be introduced by the Applica/11 in its heads of argument is substantially distinct fiYJ/11 the main relief and cannot be permitted on the facts of the matter. Application failing to meet the required standard and accordingly dismissed

JUDGMENT

INTRODUCTION

- [1] The Applicant, World Vision Eswatini, is described in the Founding Affidavit as a 'company duly registered and incorporated in accordance with the company laws of the Kingdom of Eswatini, conducting business as a non-profit making organization, whose principal place of business is situated at Mbabane, Ning Group Office Park, Somhlolo Road in the District of Hhohho'.
- [2] The Respondent, Ntokozo Birthwell Dlamini, is an adult Liswati male residing at Manzini and is a former employee of the Applicant. The Respondent was employed by the Applicant as a Supply Chain Manager on a fixed term contract of employment.
- [3] Under a Certificate of Urgency and by way of motion proceedings, the Applicant approached the Court seeking the following relief;

"1. Dispensing with the usual forms, procedures and time limits relating to the bringing of application proceedings and hearing the matter as one of urgency.

2. That a rule nisi do issue with immediate and interim effect;

2.1 That the 1st Respondent (Eswalini Royal Insurance Corporation) be and is hereby interdicted from releasing (payout) the Provident Fund Withdrawal Benefit to the 2nd Respondent, pending finalization of an action proceedings [sic] to be instituted (in the next 10 Court days) before the High Court of Eswatini, by Applicant against 2nd Respondent for recovery of money unlawfully and wrongfully paid by Applicant to the 2nd Respondent. The nature of the proceedings will be restitution arising from unjust enrichment.

2.2 That the 2nd Respondent be and is hereby interdicted from engaging the 1st Respondent in respect of processing a claim for the Provident Fund Withdrawal Benefit pending finalization of the claim to be instituted in terms of prayer 2.1 above.

2.3 That the 2nd Respondent be compelled to disclose other assets he owns, other than the Provident Fund Withdrawal Benefit package.

2.4 That prayers 2.1, 2.2 and 2.3 above operate with immediate and interim effect pending finalization of this application.

2.5 Costs of suit.

2.6 Further anc/'or alternative relief;"

BRIEF FACTS

- (4) It is alleged by the Applicant that during the subsistence of the contract of employment between itself and the second Respondent, the latter was tasked with the following responsibilities;
- (a) Assessing the pre-qualification of suppliers to create a database of service providers to the Applicant and to update regularly the database.
 - (b) Managing supplier performance to assess ability to meet quality and delivery requirements and to meet with suppliers to discuss performance metrics and to provide performance feedback.
 - (c) Leading of the supply chain unit by monitoring and implementing audit recommendations timeously.
 - (d) Managing adherence to ethical procurement standards and compliance with organizational quality levels for all goods and services utilized.
 - (e) Ensuring competitiveness and achieving value for money in the supply chain process.

(f) Managing quality reviews of_ procurement plans, purchasing of requisition forms, bid analysis and purchasing orders prior to procurement.

[5] The Applicant states that the second Respondent was entrusted with the entire procurement process from start to finish. It is alleged by the Applicant that in executing his duties within the procurement process, the second Respondent acted dishonestly, unethically and corruptly in that he failed to disclose that he was a shareholder in one of the approved service providers, namely Breeze (Pty) Ltd.

[6] The Applicant alleges in the Founding Affidavit that the second Respondent fraudulently concealed on the standard form (Known as 'Form J') that he was a shareholder in the company registered as Breeze (Pty) Ltd.

[7] It is the Applicant's contention that as the person in charge of procurement on behalf of the Applicant, the second Respondent channeled a sum of E 6,941,134.74 (Six Million Nine Hundred and Forty One Thousand and One Hundred and Thirty Four Emalangeni and Seventy Four Cents) towards the Breeze (Pty) Ltd.

[8] The Applicant further asserts in its Founding Affidavit that in its quest to ensure transparency in the procurement process, it developed and approved a 'Procurement Management Policy' which *inter alia*, allowed the second Respondent to adjudicate and approve all tenders below the sum of \$ 15,000.00. The discontent of the Applicant arises from the fact that out of the total sum of E 6,941,134.74 worth of tenders awarded to the Breeze (Pty) Ltd, tenders worth E 5,301,434.74 awarded to this company were presided over by the second Respondent.

[9] The Applicant further alleges that the second Respondent signed a 'Conflict of Interest Disclosure Letter' in which he openly declared that he had no financial interest or income in any organization or person who has dealings with the Applicant. The allegation by the Applicant is that the second Respondent misled it when he disclosed that he had no financial interest in any organization or entity which had a business relationship with it.

[10] The second Respondent does not dispute that he is a shareholder in the company registered as Breeze (Pty) Ltd. The assertion by the second

Respondent is that he did not in any way act dishonestly and fraudulently against the Applicant.

(11] In the Answering affidavit, it is alleged by the second Respondent that the company namely, Breeze (Pty) Ltd, is a separate legal entity and is independent from him and therefore that the Applicant ought to pursue any claim it may have against this company and not him.

(12] It is further stated by the Applicant that all procurement processes within the Applicant are done in a transparent manner since there is a committee that evaluates each and every request for tender by the different service providers or suppliers. The assertion by the second Respondent is that the Applicant has "an automated procurement system which has built-in approvals based on budget lines... " The second Respondent disputes that he was involved in any of the tenders awarded to the Breeze (Pty) Ltd.

APPLICANT'S SUBMISSIONS

(13] At the hearing of the matter on the merits, the Applicant's representative informed the Court that he was abandoning prayers 2.1 and 2.2 of the Notice of Motion but was pressing on with prayers

2.3, 2.4, 3 and 4 of the application. The reasoning by the Applicant's representative in abandoning these prayers was that he had come across a decision of the Supreme Court of Eswatini in the case of the **Government of Eswatini v Lucky Mhlanga & 2 Others (72/2018) 69 SZSC [2019] (12 March 2020)** in which the Supreme Court held that Section 195 (6) of the Constitution of Eswatini 2005 prohibited the attachment of employees' pension benefits unless such attachment was in relation to maintenance orders.

[14] In his submissions, the Applicant's attorney urged the Court to grant prayer 2.3 of the Notice of Motion as such relief was competent and proper in the circumstances. Prayer 2.3 is for an order compelling the second Respondent to disclose all his assets other than the Provident Fund Withdrawal Benefit package.

[15] in motivating the relief sought under prayer 2.3, the Applicant's attorney submitted that the second Respondent had been requested by way of a letter to disclose all his assets but had refused to do so and thus the present application. The Applicant's contention is that the mere act of refusal by the second Respondent to disclose his assets is

an act intended to frustrate the Applicant's civil claim which will be filed in due course.

[16] It was submitted on behalf of the Applicant that in addition to prayer 2.3 of the Notice of Motion, the Applicant was seeking leave of the Court to include another relief under the 'salutary prayer' ('further and/or alternative relief) as follows;

"That the second Respondent be and is hereby restrained and interdicted from alienating and dissipating the property disclosed in terms of the order granted in prayer 2.3, pending finalization of the action proceedings pending before this Honourable Court".

[17] The submission by the Applicant's attorney was that the additional prayer is substantially similar to the relief sought under prayer 2.3 and therefore that the Court had a discretion to grant same in order to give meaningful effect to prayer 2.3.

[18] The Applicant's attorney submitted that if the Court felt disinclined to grant the additional relief, then prayer 2.3 was sufficient as a stand-

alone relief in that if the Applicant knew of the second Respondent's assets, then it would be in a position to act swiftly in the event that the second Respondent evinced an intention to dispose of these assets with a view of defeating its claim.

SECOND RESPONDENT'S SUBMISSIONS

[19] The second Respondent's attorney submitted that the Applicant has failed to make out a case for the relief sought under prayer 2.3 of its Notice of Motion. The submission by the second Respondent's attorney was that all the averments in the Applicant's Founding Affidavit were aimed at supporting the relief sought in terms of prayers 2.1 and 2.2 and not prayer 2.3 of the Notice of Motion.

[20] The submission on behalf of the second Respondent was that with the withdrawal or abandonment of prayers 2.1 and 2.2 of the Notice of Motion, the relief sought under prayer 2.3 was rendered abstract and meaningless in the absence of supporting averments to it.

[21] It was the second Respondent's contention that a disclosure of assets without an interim order attaching those assets was meaningless as the assets could be disposed of through natural disasters or could get

depleted through natural use by virtue of the right of ownership

enjoyed by the second Respondent.

- [22] The second Respondent's attorney disputed that the additional prayer sought to be introduced under the salutary prayer was linked or similar in substance to prayer 2.3 of the Notice of Motion.

ANALYSIS AND CONCLUSION

- [23] The Court is required to determine the competency of prayer 2.3 of the Notice of Motion and whether necessary and proper averments have been made by the Applicant in the Founding Affidavit in support of this particular relief.

- [24] The only relevant paragraph in the Applicant's Founding Affidavit seeking to justify the granting of prayer 2.3 is to be found in paragraph 9.5 which states that;

"The refusal by the 2nd Respondent to declare his assets other than the Provident Fund Withdrawal Benefit has the same effect of frustrating the anticipated judgment by dissipating the assets."

[25] The Applicant's attorney referred the Court to the case of *Swazi Spa Holdings Ltd v Standard Bank Swaziland Ltd & 4 Others* (1154/12) SZHC 185 (3rd August 2012) wherein it was held by the Court that;

"[26] The order sought is in the form of an anti-dissipation interdict. This form of interdict is conceivable in situations where the Respondent in a given matter is believed to be deliberately arranging his affairs in such a manner so as to ensure that he will be without assets within the jurisdiction of the court when the Applicant shall have obtained a judgment he anticipates to obtain against the given Respondent. See in this regard *Hebstein and Van Winsen's Civil Practice of the Supreme Court of South Africa at page 1087*.

This would be the case where the concerned Respondent (the intended defendant), is shown to be about to defeat the Plaintiffs claim by rendering it hollow through concealing or dissipating his assets before the judgment can be obtained or executed. The case of *Knox v Archy Ltd and Others v Jameison and Others 1994 (3) SA 700 (W) at 706 B-E at 709 I-1*.

127] It is in law not essential that the Applicant presents proof that the Respondent (intended Defendant) intends to frustrate an anticipated judgment by dissipating the assets, but it is enough if the conduct of the Respondent is likely to have that effect. In this regard, *Hebstein and Van Winsen*, in their book '*17ie Civil Practice of the Supreme Court of South Africa*', said the following at page 1088:

"It is not essential to establish the intention on the part of the Respondent to frustrate an anticipated judgment against himself if the conduct of the Respondent is likely to have that effect."

[26] It would appear that the conduct attributed to the second Respondent which, according to the Applicant, necessitates the granting of the relief sought under prayer 2.3 is the alleged refusal of the second Respondent to disclose his assets when requested to do so by the Applicant by means of a letter.

[27] The conduct attributed to the second Respondent of refusing to disclose his assets when requested by the Applicant or its attorneys to do so is a normal reaction that every reasonable person would do

when faced with such a request. No reasonable person is likely to put up his assets in the open for a potential Plaintiff to have easy access in the event of a judgment being granted in favour of the Plaintiff. The refusal to disclose assets when requested to do so does by another party does not, on its own, equate to an act of concealing the assets or deliberately dissipating the assets with the view of defeating the intended action by the Applicant. The act of deliberately 'concealing or dissipating assets' must be contextualized within a legal framework.

- [28] The reference by the Court to conduct aimed at concealing assets or taking active steps to dissipate assets with the intention to defeat a potential claim would arise in a situation where for instance, the intended Defendant sells his shares or interests held in various companies to his immediate relatives; registers his motor vehicles under the names of his children or wife or other immediate family members and generally disposes of his movable or immovable assets in such a way that his name does not appear as owner of those assets. These are just some of the examples that the Applicant ought to have relied upon in seeking the relief under prayer 2.3.

(29] The Court enquired from the Applicant's attorney if there was any reasonable apprehension on the part of the Applicant that by the time the Applicant obtains judgment against the second Respondent, there would be no assets owned by the second Respondent with which to satisfy the Court's judgment. The answer by the Applicant's attorney was in the negative. The Applicant's representative was only content in stating that his client was only desirous of preserving the current assets held by the second Respondent so that when finally they obtain judgment against him, there would be enough assets to satisfy their claim.

[30] Section 19 (2) of the Constitution of the Kingdom of Eswatini, 2005 provides that;

"A person has a right to own property either alone or in association with others."

[3.1) The Applicant also has a fundamental right to be accorded substantive justice, including the fundamental right to be able to recover its losses in the event that it is successful in its claim. However to be able to legally interfere with the fundamental right enshrined in section 19 (2)

of the Constitution of Eswatini, an Applicant must go beyond the mere light assertion to the effect that the Respondent refused to disclose his assets when requested to do so.

[32] There is no evidence placed before Court or conduct attributed to the second Respondent in which it may be inferred, either directly or indirectly, that the second Respondent is in the process of concealing some of his assets in the true legal sense or meaning of the word or that the second Respondent is in the process of dissipating some or all of his assets. Most importantly, there is also no evidence placed before Court, which demonstrates with some reasonable measure, that unless prayer 2.3 of the Notice of Motion is granted, the Applicant will not be able to realize its loss were judgment to be issued in its favour in the action to be instituted by it against the second Respondent.

[33] One other issue raised by the Applicant's attorney during the hearing of the matter relates to the relief sought by the Applicant's attorney to include additional relief under the salutary prayer to enable it (Applicant) to interdict (pending finalization of the action to yet to be

instituted) the assets which the second Respondent would have been compelled by the Court to disclose under prayer 2 .3 of the Notice of Motion.

[34] The Applicant opted not to amend its Notice of Motion with a view of introducing the prayer it now seeks to introduce nor did it seek leave of the Court to file a supplementary affidavit in order to give support to the new prayer being sought to be introduced. This, in the Court's view, is the route that ought to have been taken by the Applicant. The relief sought to be introduced by the Applicant (temporary interdict against the assets of the second Respondent pending finalization of the action proceedings) is a serious remedy and one likely to impact significantly on the welfare of the second Respondent. This relief is in no way similar to the prayer requiring the second Respondent to disclose his assets.

[35] The Supreme Court of Eswatini in **Ntsetselelo Hlatshwako v Commissioner General of the Correctional Services (067/2009) (20211 SZSC 40 (18/01/2022))** stated the law as follows;.

".112] The consequences of setting aside the im1mgned judgment are also a relevant consideration. If the ,judgment were to be set

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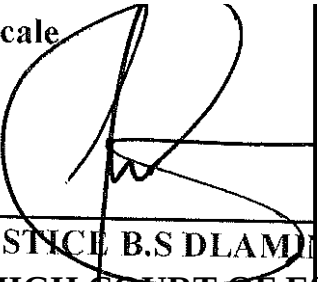
aside, in its entirety, the High Court Order would be automatically reinstated. However, there is a fundamental flaw with the High Court Order, in that it purported to set aside the proceedings of the Disciplinary Board, which was not cited as a party, and without it (High Court) being asked to do so. The High Court erred in this regard. It is trite law that no court should grant relief which has not been prayed for ... "

[36] Accordingly, if the Court were to grant the relief sought by the Applicant without any legal basis or justification for doing so, this would mean many of the litigants coming to Court on a daily basis and those who have filed claims sounding in money would also be entitled to file similar applications and seek to attach the Defendants' assets pending the outcome of their action proceedings. Such a state of affairs cannot be proper and would fly in the face of the normal rules of litigation.

[37] In the circumstances, the Court comes to the conclusion that the Applicant's application is without merit and ought to fail. It is accordingly ordered that;

(a) The Applicant's application is dismissed.

**(b) The Applicant is ordered to pay the second Respondent's costs
on the ordinary scale**


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JUSTICE B.S. DLAMINI
THE HIGH COURT OF ESWATINI

For Applicant:

Mr. N. N. N., Mamha (In/Agagufa Attorneys)

For Second Respondent:

Mr. M Mntungtt'a (Dynasty Inc. Attorneys)