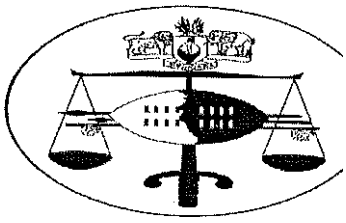

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Case No 1/2022

In the matter between:

SIPHIWE NATTY GUMB!	1st Applicant
CELINKOSI MCEDEYA VILAKATI	2nd Applicant

And

KAILAR INVESTMENTS (PTY) LTD t/a AISHA MOTOR	1st Respondent
THE NATIONAL COMMISSIONER OF POLICE	2'"1 Respondent
THE ATTORNEY GENERAL	3rd Respondent

INRE:

SIPHIWE NATTY GUMBI	1st Applicant
CELINKOSI MCEDEYA VILAKATI	2nd Applicant

And

KAILAR INVESTMENTS (PTY) LTD t/a AISHA MOTOR	Respondent

Neutral citation: Siphiwe Natty Gumbi and Celinkosi Mcedeya Vilakati v Kailar Investments (Pty) Ltd and 2 Others (317/21) [2022] SZIC 14 (01 March, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr. MP. Dlamini and Mr.E.L.B. Dlamini, Nominated Members of the Court

Date Heard: 31st January, 2022

Date Delivered: 01st March, 2022

SUMMARY: *Labour law- Anti dissipation -Applicant brought an urgent application seeking that the court authorizes the sheriff or her lmtjiil deputy, in the district where assets of the respondent may be found, to attach, make an inventory and place under his custody such property, to be kept as security for an unquantified claim of the Applicants. Respondent raised three points in limine, lack of necessary averments, abuse of court process and hearsay evidence*

Held-: *The three points in limine lack of necessary averments, abuse of court process and hearsay evidence are dismissed - application granted- no order as to costs.*

JUDGMENT

[!] The 1'1 Applicant is a maJor Swazi woman of Maseyisini area in the Shiselweni district. King Mswati II, highway, in the Northern district of Hhohho.

[2] The 2nd Applicant Celinkosi Mcedeya Vilakati a maJor Swazi male of Sithobelweni area in the Lubombo district.

(3] The 1st Respondent is Kailarr Investments (Pty) Ltd a limited liability company duly incorporated and registered in terms of the company laws of the country with its principal place of business situated at Plot number 653, 5th Avenue Matsapha Industrial Sites.

[4] The 2nd Respondent is the National Commissioner of Police, with his principal place of business in Mhlambanyatsi Road, Mbabane in the Hhohho District, cited herein in his official capacity as the Commander of all Police Officers in the Kingdom ofEswatini.

(5] The 3rd Respondent is the Attorney General, with his principal place of business at the Ministry of Justice Building, Mhlambanyatsi Road, Mbabane in the Hhohho District.

BRIEF BACKGROUND

[6] The present proceedings are anti dissipation proceedings in terms of which the Applicant seeks a preservation order, pending unfair dismissal proceedings which the Applicant seek to launch against the 1st Respondent. The purpose of the application is to assist the Applicants, by preserving their terminal benefits in order to avoid a situation where if the Applicants are successful with the unfair dismissal application which they wish to institute, they too find that they have a hollow judgment because the 1st Respondent dissipated its funds and there are no assets that are owned by it, which can satisfy the judgment.

[7] The Applicants are former employees of the 1st Respondent, it was their averment that the I st Respondent is facing financial difficulties, due to a decline in business and as a result they fear that the 1st Respondent is at the verge of closing down business. On the 24th December, 2021 the Applicants aver that they were verbally informed by the Respondents director Mr. Fahaz Nawaz that their services were being terminated with immediate effect, ostensibly because the business was not doing well.

[8] The Applicants now seek an order *pendete lite* of 1st Respondent's assets, pending the yet to be instituted unfair dismissal application with the Conciliation, Mediation and Arbitration Commission (CMAC). The order is to ensure that the yet to be instituted proceedings, are not rendered an academic exercise as the 1st Respondent assets will be kept by the Deputy Sheriff pending determination of unfair dismissal proceeding on the one hand. It is on this basis that the present proceedings were instituted.

[9] The Applicant has approached the Court under a ce1iificate of Urgency, seeking an order in the following terms:

9.1 Dispensing with the rules of court as relate to forms, service and time limits and enroll this matter on an *exparte* basis;

9.2 Condoning Applicant's non -compliance with the rules of court this Honourable Comi;

9.3 That a *rule nisi* operative with immediate and interim effect returnable on a date to be determined by the above Honourable Court do herby issue as follows;

9.4 Directing and authorizing the deputy Sheriff for Manzini district wherein assets of the 1st Respondent are found, to attach, make an inventory and place under custody such property to be kept as security pending determination of the unfair dismissal that are yet to be instituted by the Applicants against the Respondent; and

9.5 Directing and ordering the members of the 2"'1 Respondent to assist the deputy sheriff in the execution of the interim Cami Order in making sure that there is compliance from the 1st Respondent.

9.6 Award costs of this application against the pt Respondent in the event of opposition;

9.7 Granting Applicant such fmiher and/or alternative relief as the Court may deem fit.

[I OJ The Applicants Application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by Mr. Irfan Haider who is the director of the 1st Respondent. The Applicant thereafter filed its Replying Affidavit.

[11] The matter came before Court on the 7th January, 2022 where the Applicants successfully applied for an interlocutory order, in terms of prayer 1,2 ,3,3.1,

3.2 and 3.1. the matter was to return on the 14 th January, 2022. On the 14th January, 2022 again, the matter was postponed at the request of the attorneys handling the matter as they were not ready to proceed. The matter was eventually argued on the 31st of January, 2022.

ANALYSIS OF FACTS AND APPLICABLE LAW
POINTS IN LIMINE

[12] Through the answering affidavit of the Respondent Mr. Irfan Haider the following points in limine were raise;

1. **Lack of necessary averments to sustain a cause of action**
2. **Abuse of Court process and /lack of bona fides**
3. **Hearsay evidence**

AD LACK OF NECESSARY AVERMENTS TO SUSTAIN A CAUSE OF ACTION

[13] The pt Respondent raised the point that the Applicants application lacks the necessary averments to sustain a cause of action. It was his argument that the deponent alleges that she was verbally dismissed, but failed to state the terms and effects of such verbal dismissal. It was his submission that the basis of the anti-dissipation application, was as a result of the allegedly unfair termination of the Applicants services. That being the position, their cause of action is the unfair dismissal. The 1st Respondent alleged that the Applicants have failed to state the representation which might have led them to the conclusion that they have been dismissed. It was the 1st Respondent's submission that in fact the Applicants were never dismissed but due to financial constraints the 1st Respondent advised the Applicants

that they would be laid off, with half pay. As a result, it was his averment that the Applicants have failed to establish a *prima facie* case against the l" Respondent, and the only averments that can be gleaned in support of their cause of action, can only be found in paragraph 14 and 28 of the Founding Affidavit where they allege the unfair termination of their services.

[14] In rebuttal it was the Applicants argument that in line with the ration as stated in the case of **SWAZI SPA HOLDIINGS LTD,** per, Judge Hlophe, *"it is in law not essential that the Applicant present proof that the Respondent (intended Defendant) . intends to ji·ustrate an anticipated judgment by dissipating the assets, but it is enough if the conduct of the Respondent is likely to have that effect.* " It was the Applicants contention that there is no need for it to establish a cause of action as alluded to by the I st Respondent.

[I 5] The 1" Respondent has not denied that the Applicants are employees to whom **Section 35 of The Employment Act 1980** apply. The 1st Respondents only claim is that it did not dismiss the Applicants on the 24th December, 2021, but laid them off with half pay. It did not disclose to the Court the intended period of the layoffs, and whether proper procedure was adhered to before same were affected. The Comi was as a result left with unanswered questions as to the true intention of the 1st Respondent if the Applicants were indeed advised, or whether 1st Respondent was now using the defense as an afterthought. It was further its argument that there was no proof of such dismissal except a mere accretion by the Applicants that they

were verbally dismissed. Dealing with dismissal author **Johan Grogan Workplace Law, 8th Edition,** stated the following:-

"Normally a dismissal is easy to recognize. A dismissal takes place when the contract is terminated at the instance of the employer and entails some communication by the employer to the employee that the contract has come to an end This message can be communicated in words or by conduct for example, where the employee will no longer be paid "

[I 6] The evidence before Comi, reveals that the Applicants seized work on the 24th December, 2021, when they were verbally te1111inated by the pt Respondent. From the definition of dismissal, as alluded to by author Johan Grogan it seems the 1st Respondent may have a case to answer too, however the application before this Cami is an anti-dissipation application. It is not for this Cami to determine whether the Applicants were indeed terminated from their employment, and fmiher whether or not the dismissal was fair.

[17] The Cami's task is to establish whether by its conduct the 1st Respondent is dissipating its prope1iy. From the evidence adduced it is evident that the Applicants are/were employees of the 1st Respondent to whom Section 35 applied, and seized work on the 24th December, 2021. It is further evident that if indeed the Applicants were unfairly terminated, they have a cause of action against the 1st Respondent. They have included in their application the different positions they held, their monthly income, the period of their employment and the date and manner in which they allege their employment was terminated. The Applicants have fmiher shown a real fear that through the conduct of the 1st Respondent of changing business names,

changing their monthly payment arrangement, disposing of its property, has led them to believe that the 1st Respondent was disposing its assets. It is this Courts finding that such evidence wan-ants the Applicant to seek redress from the Courts, of any kind for claims they may have against the 1st Respondent. It is on this grounds that the Court find that the Applicants have made the necessary averments to sustain a cause of action, and therefore the point *in limine* fails.

ABUSE OF COURT PROCESS AND /LACK OF BONA FIDES

[18] The 1st Respondent avers that the Applicants have come to Comi *exparte*, and as a general rule they should have disclosed to the Comi, all the material facts including those that might work against their case. It was the 1st Respondent's contention that the Applicants actions were simply set out to vilify the 1st Respondent, and in the process make money out of it. Their action as a result is an abuse of the Comi process and intended to further their ulterior motives.

[19] The Applicants in response submitted that the application before Comi does not amount to an abuse of the Comi process. They averred that the Comi had already granted an interim order, to which the 1st Respondent has not attempted to set aside or appeal. Fmiher it was the Applicants submission that there were no ulterior motives in the entire body of their affidavit, and all they seek is a preservation order pending finalization of their unfair dismissal claims to be instituted.

[20) It is a trite principal of law that a Comi should not easily dismiss an action for want of prosecution, except in cases where there has been a clear abuse of the process of the Court. Indeed, a Court will exercise such powers sparingly and only in exceptional circumstances, because the dismissal of an action seriously impacts on the Constitutional and Conunon Law rights ofa plaintiff to have his dispute adjudicated, in a Comi of law by means of a fair hearing. The Court should carefully assess whether the plaintiff is guilty of an abuse of t!-ie process.

[21) Innes CJ in **WESTERN ASSURANCE CO V CALDWELLS TRUSTEE 1918,266 AT PAGE 273,** stated the following:-

"Now it is needless to say that strong ground must be shown to justifj1 a Court of Justice in staying the hearing of an action. The Courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action. "

It is evident that the Court will exercise the power to dismiss an action on grounds of abuse of Comi process in exceptional circumstances. From the evidence adduced by the 1st Respondent, the Comi observes no exceptional circumstances that would warrant it to dismiss the Applicants application. The Applicants have not conducted themselves in a manner that displays malicioL1s abuse of the legal process. Over and above the 1st Respondent has failed to show that the Applicants have employed the legal process for an unlawful object, and not the purpose for which the law is intended, in other words a perversion of it. This point in limine therefore fails too.

AD HEARSAY EVIDENCE

[22] The last point *in limine* raised by the 1st Respondent, is hearsay evidence. It is the 1st Respondents contention that the Applicants Founding Affidavit is full of hearsay evidence. The 1st Respondent did not expound on this point in its Answering Affidavit and Heads of Argument, save to say that the allegations as alleged by the Applicants were untruthful and hearsay. In response the Applicants submitted that the Founding Affidavit does not contain any material that amounts to hearsay evidence, because all the allegations made in the body of the application, the 1st Applicant paiiicipated in.

[23] In the case of **REX V DLUDLU, SUPREME COURT CASE NO 33/2010 SZSC, 12,** the Supreme Court cited **Hoffmann:-**

"Jn general, it may be said that evidence is hearsay when the court is asked to rely, not upon the personal knowledge of a witness testijj1ing, but upon the assertion of someone else. "

The deponent being the 1st Applicant 111 its Founding Affidavit has explicitly stated that:-

"Save where the contrary is *stated or is necessary to be inferred ji-0111 the context, the facts herein set out are within my personal knowledge or clear fi"om documents and forms under my direct control and are to the best of my knowledge and belief true and correct."*

[24] *Prima facie* the pt Respondent has not adduced evidence to rebut the statement as asserted by the Applicants as hearsay, therefore the Court can

adduce no reason why same should be considered to be hearsay evidence. The point *in limine* is accordingly dismissed.

AD MERITS

[25] Now to deal with the merits of the case. It was the pt Respondent's argument that it is common cause that for one to be granted an anti dissipation order, one must display to the court a clear right, which has been violated by the Respondent. It is the 1st Respondent's averment that in the present case, the Applicants only allege unfair dismissal which is yet to be tested in another forum. Moreover, the Applicants were never dismissed, but were laid off due to decline in business. It was his contention that the Applicants are at pains alleging the dishonesty of the l st Respondent, regarding his tax issues which are not in issue herein and do not advance the Applicants case.

[26] On the other hand it was the Applicant's argument that the nature of the law when it comes to anti- dissipation interdicts, requires one not to establish a clear right but to establish that; there is a real risk that there would be no property owned by the l st Respondent to satisfy the judgment, thus the judgment would be hallow. The 1st Respondent is believed to be deliberately arranging its affairs in such a maimer so as to ensure that it will be without assets within the jurisdiction of the Court; that there is a reasonable fear that the assets in question will be dissipated or removed beyond the jurisdiction, in order to defeat the Applicant's claim before execution of the judgment is affected.

[27] Further it averred that the Court will consider the balance of convenience and that the Applicant has no alternative remedy available to it. This remedy is available to litigants who intend to institute proceedings and those who have, in the present case the Applicants intend to institute unfair dismissal proceedings. Lastly it is not essential in our jurisdiction that the Applicants present proof- that the l st Respondent intends to frustrate an anticipated judgment by dissipating assets, but it is enough if the conduct of the l st Respondent is likely to have that effect.

[28] According to **Herbestein and Van Winscn, The Civil Practice of the Supreme Court of Southern Africa, 4th Edition, at page 1087,** anti - dissipation interdicts are a special type of interdict which may be granted where a Respondent is believed to be deliberately arranging his affairs in such a way as to ensure that he will be without assets within the Republic by the time the Applicant is in a position to execute against him on a judgment which the Applicant expects to secure. A remedy that performs a similar function to that of the *"mareva injuctus"* by Stegma J in the leading case of **KNOX D'ARLY LTD & OTHERS V JAMESON & OTHERS 1994 (3) SA 700 (W) AT 706 D-E.**

[29] It also appears to be trite law that in such interdicts the Applicant is obliged to prove all the requirements of an interdict generally except the requirement of no alternative remedy (in an application for interim relief) for an anti-dissipation order. The second threshold requirement to be met in order to obtain an anti-dissipation order, where the Applicant does not have

any special claim to the Respondent's property, is for the Applicant to convince the Court that "the Respondent is wasting or secreting assets with the intention of defeating the claims of creditors". See the dictum of Harms ADP in **CARMEL TRADING CO LTD V COMMISSIONER OF SOUTH AFRICAN REVENUE SERVICES AND OTHERS 2008 (2) SA 433 (SCA)** at para 3 where the learned Judge states that:-

"such an order [a preservation and anti-dissipation order], which interdicts a respondent fi"om dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order the applicant has to satisjj, the Court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors. Importantly, the order does not create a preference for the applicant to the property interdicted."

[30] It is common cause that this application is to preserve an asset that is not in issue between the paiiies. The Applicants do not claim any proprietary or quasi-proprietary right to the Respondent's assets. The Courts are loath to grant anti-dissipation orders given the restrictions such orders place on a person's ability to deal with his or her asset as he or she wishes. A key question in this matter is whether the Applicants, have on the papers, advanced a prima facie case with regard to 1" Respondent's intention to secrete assets so as to frustrate or defeat their claim and in regard to their right to the relief for unfair dismissal.

[31] The 1 st Respondent case throughout the matter has been that the Applicants were not dismissed and that the averments by the Applicants that it was

disposing of its assets were unfounded. The Applicants have farther provided evidence that the l st Respondent has already disposed some of its assets, by changing ownership of motor vehicle to other individuals to avoid litigation. The litigation includes claims by other employees, and the Eswatini Revenue Authority. The Applicants fmiher provided pictures of the 1st Respondents show room, showing an empty room, with no motor vehicles displayed. The I st Respondent in its papers has not provided evidence, rebutting the asse1iions of the Applicants through documentation, or testimonials. It has fmiher failed to provide evidence that it has other assets that would cater for the Applicants claims if they were to succeed. The 1st Respondent has failed dismally in its papers to sway the Court in its favour.

[32] No evidence was adduced by the 1st Respondent to show that the allegations by the Applicants were unfounded. From the evidence adduced there is a suggestion that the 1st Respondent is involved in a scheme, where when litigation is launched against it, ownership of motor vehicles within the 1st Respondent possession is changed, actuated in bad faith to dissipate the prope1iy, and to deny the litigants the relief claimed. The Applicants have gone at lengths to put the Comi in their confidence by sustaining their claim, and fmiher by stating how they know of the financial affairs of the 1s t Respondent. All these averments were essential in the Comis view especially considering the background of the matter. The principal in Herbstein and Van Winsen has already established that an interdict is a matter of discretion by the Court. The Applicant must show a well grounded apprehension of irreparable loss and that because of the draconian nature, invasiveness and conceivably inequitable consequence the Courts

are reluctant to grant it except in the clearest of cases. This particular case, is an example of where a clear right has been established.

[33] It is evident that the 1st Respondent is facing financial constraints due to the economic environment faced by many as a result of COVID 19. It is further evident that to avoid litigation the l st Respondent is now disposing of assets. The Applicants have established that they will suffer irreparable harm if an order is not granted in their favour. The Court is of the view that the balance of convenience favours the Applicants. If an order is not granted in favour of the Applicants, preserving the prope1iy, the Applicants would find themselves with a hallow judgment. The application by the Applicants is accordingly granted. Both patiies did not vigorously argue, on the issue of costs, therefore the cou1i will not deal with the issue of costs.

[34] In light of the above finding of this Comi, the Comi makes the following order:

l) The anti-dissipation application is granted.

2) There is no order as to costs.

The Members Agree.

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr. D. Hleta (Demhleta Legal)

For Respondent: Mr.M.Nkambule (Dlamini, Nkambule, and Mahlangu Attorneys)