



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No: 62/2012

In the appeal between:

**THEMBI C. DLAMINI**

**Appellant**

and

**SWAZI SPA HOLDINGS LTD**

**Respondent**

**Neutral citation:** *Thembi C. Dlamini vs Swazi Spa Holdings Ltd 62/2012*  
*SZSC 56 [2012] (30 November 2012)*

**Coram:** **A.M. EBRAHIM JA**  
**M.C.B. MAPHALALA JA**  
**E.A. OTA JA**

**Heard:** **16 NOVEMBER 2012**

**Delivered:** **30 NOVEMBER 2012**

**Summary:** *Civil Appeal – Practice and procedure – interdict – anti-dissipation – purpose of – requirements – same requirements as for normal interlocutory interdict.*

**EBRAHIM JA:**

[1] The Respondent on appeal, Swaziswa Holdings, is the owner of a number of hotels in Swaziland. It brought an Application on Notice of Motion, seeking an order interdicting the five Respondents (who included the Appellant) to show cause why the 1<sup>st</sup> Respondent (the Appellant's and the 5<sup>th</sup> Respondent's bank) should not be interdicted from allowing any withdrawals or transfers to be made from the Appellant's and the 5<sup>th</sup> Respondent's accounts. A similar order was sought in respect of the 4<sup>th</sup> Respondent and her bank, the 2<sup>nd</sup> Respondent. Such an order is commonly known as an anti-dissipation interdict.

[2] To avoid confusion, I will refer to the parties by name.

[3] The Application was accompanied by a Certificate of Urgency.

[4] In his founding affidavit, Swaziswa's General Manager, Dumisani Dlamini, averred that the Appellant (Thembi Dlamini, the 3<sup>rd</sup> Respondent in the proceedings in the court a quo) was employed by Swaziswa as a Credit Supervisor in the company's finance department. The 4<sup>th</sup> Respondent in the proceedings, Gugu Dlamini, was an Accounts Clerk in the same department. The 5<sup>th</sup> Respondent, Akani Investments (Pty) Ltd, was a company which supplied fresh fruit and vegetables to Swaziswa.

- [5] The procedure for payment was that when a supplier such as Akani delivers produce it must present its invoice to Swazispa's warehouse department for payment. The warehouse department would capture the invoice in the computer system. The invoice would then be transmitted to the finance department where the Accounts Clerk, Gugu Dlamini, would generate a payment invoice, which would be transmitted to the Credit Supervisor, Thembi Dlamini. It was her duty to check the documents to ensure that delivery had been effected and that payment was due.
- [6] It was discovered that on numerous occasions during the period of September 2010 to February 2012 payment invoices had been generated which had no corresponding invoice in the warehouse department. Nonetheless, payments were made against these invoices to Akani. The total sum paid out under those invoices was E1 533 743.47.
- [7] The General Manager concluded that these invoices constituted a deliberate series of fraudulent acts committed by Thembi Dlamini, Gugu Dlamini and Gcebile Dlamini a director of Akani. Disciplinary proceedings were instituted and Thembi and Gugu were dismissed from their employment with Swazispa.
- [8] Swazispa accordingly brought the Application against the five Respondents.

[9] It appears that Thembi Dlamini, the Appellant, arranged for her pension contributions to be paid out of the pension fund into her bank account. The sum involved was E64 885.12 (see page 31 of the record), a very small proportion of the money allegedly embezzled. Even if judgment is ultimately obtained against her, she is most unlikely to be able to pay more than a fraction of what is owed.

[10] Thembi Dlamini opposed the Application. She averred that there was no urgency and that the evidence did not establish a *prima facie* right. She also made a number of assertions disputing some of the facts put forward by the General Manager. Among them was an assertion that Gugu Dlamini was not the only person who was responsible for generating payment invoices.

[11] The General Manager filed an Answering Affidavit, in which he averred that Thembi Dlamini had already withdrawn most of the money received from her pension fund, leaving a balance of only E28 000-00. He said that section 32(2)(a) of the RETIREMENT FUNDS ACT 2005 was intended to protect an employer from loss due to the misconduct of its employees. He also produced a hand written statement made by Gugu Dlamini (pages 150-152 of the record) in which Gugu admitted generating false invoices and stated that Thembi was fully aware of what was going on. She said that Thembi had initiated the scheme and that Gcebile Dlamini, who was

employed by Akani, would then pay out cash corresponding to the amounts on the false invoices.

[12] On 5 July 2012 Swaziswa issued summons against Thembi Dlamini, Gugu Dlamini, Gcebile Dlamini and Akani, claiming the sum of E1 543 743.47.

[13] The following day, HLOPHE J heard the Application for the anti-dissipation interdict. At the time of hearing, all the Respondents apart from Thembi Dlamini were engaged in discussion with Swaziswa to resolve the matter amicably. Accordingly, only the Application against Thembi Dlamini was heard. The learned judge considered that a *prima facie* case had been established against Thembi and that there was a well grounded apprehension on the part of Swaziswa that Thembi's assets would be dissipated, rendering any judgment against her valueless.

[14] He also held that Swaziswa was not introducing a new cause of action in its Replying Affidavit. He considered that Swaziswa was answering Thembi's denial that there was no *prima facie* case established.

[15] He granted the order sought.

[16] An anti-dissipation prohibitory interdict is a form of interlocutory interdict. It is not necessary for the Applicant to show that the Respondent has no *bona fide* defence; the Applicant must simply establish a *prima*

*facie* case, even if it is open to some doubt. It must also establish an infringement, or a reasonable apprehension of an infringement, of the right, the absence of any other satisfactory remedy and a balance of convenience in favour of granting the interdict. See BOZIMO TRADE & DEVELOPMENT COMPANY (PVT) LTD V FIRST MERCHANT BANK OF ZIMBABWE LTD & ORS 2000(1) ZLR 1 (H) per CHATIKOBO J, and the authorities there cited.

[17] In my view, the evidence adduced by the General Manager certainly establishes a *prima facie* case against Thembi Dlamini. That is all that is required at this stage.

[18] As to the question of whether Swazispa was introducing a new cause of action through its Answering Affidavit, I am satisfied that the learned judge was correct in holding that no new cause of action was introduced. In his Founding Affidavit, the General Manager had averred that Thembi and Gugu were acting in concert to generate false payment invoices in favour of Akani. It might have been better if he had attached Gugu's statement to his affidavit, but I do not consider that this was a fatal error. The General Manager made the assertion; Thembi denied it; and the General Manager then gave more detail, in the form of Gugu's statement. This was not a new assertion, merely an elaboration of the first one.

[19] The Respondent's counsel submitted that the order granted by the learned judge a quo was an interim order and therefore not appealable without leave, as it was an interlocutory order. *Prima facie* there is merit in this submission but we do not consider it necessary to make a firm ruling on this issue, in view of the conclusion we have reached, as outlined above. Counsel should, however, take note that where an order made by a court at first instance, is interlocutory in nature, leave to appeal should be sought.

[20] I see no merit in this appeal and accordingly dismiss it, with costs.

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A.M. EBRAHIM  
JUSTICE OF APPEAL

I AGREE :

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M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I AGREE :

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E.A. OTA  
JUSTICE OF APPEAL

**FOR APPELLANT** : **S. Bhembe**

**FOR RESPONDENT** : **M.M. Sibandze**