IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal case No: 31/12

In the matter between:

THOMAS INVESTMENTS CORPORATION **APPELLANT**

AND

GREANS INVESTMENTS (PTY) LIMITED **RESPONDENT**

Neutral citation: *Thomas Investments Corporation and Greans Investments (PTY) Ltd (31/12) [2012] SZSC58 (30th November 2012)*

CORAM: DR. S. TWUM JA, M.C.B. MAPHALALA JA, E.A. OTA, JA

Heard **13th November 2012**

Delivered **30th November 2012**

Summary

Civil Appeal – Contract of Lease – tenant evicted from the premises without a Court Order – doctrine of clean hands applicable – Appeal dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] On the 17th November 2011, the appellant lodged an urgent *ex parte* application in the Court *a quo* to perfect its hypothec; it further sought a rule *nisi* calling upon the respondent to show cause why a final order should not be made ejecting the respondent from the premises and further granting judgment in respect of arrear rental and utilities in the sum of E114 755.44 (one hundred and fourteen thousand seven hundred and fifty five emalangeni forty four cents).

[2] It is common cause that the parties concluded a lease agreement on the 17th November 2010; in terms of the said lease, the appellant leased premises to the respondent to conduct a coffee shop business. The lease was for a period of five years commencing on the 1st March 2011 until the 29th February 2016; the rental payable was E8 482.50 (eight thousand four hundred and eighty two emalangeni fifty cents) per month payable in advance on or before the first day of the month. The rental clause had an escalating rate of 8% per annum.

In the event of default in the payment of rental, the appellant was entitled to give notice to the respondent to pay the arrears within seven days failing which to cancel the lease.

[3] The Court *a quo* granted the order for the perfection of the appellant's hypothec as well as the rule *nisi* sought. The respondent opposed the application and filed an answering affidavit as well as a counter-application.

In *limine* the respondent argued as follows: firstly, that the appellant is not entitled to the relief sought on the basis that it has approached the court with dirty hands. The respondent submitted that on the 21st October 2011, the appellant unlawfully disconnected electricity, gas and water supply at the leased premises without a Court Order; and that no notice was given to the respondent prior to the disconnection.

[4] Subsequent thereto, the respondent sought the intervention of the Court and lodged an urgent application on the 21st October 2011 under High Court Civil case No. 2201/2011 directing the respondent to reconnect the electricity supply to the leased premises; the Court granted the order on the 22nd October 2011, and, the appellant refused to comply with the Court Order. In addition the appellant proceeded to change door locks on the 23rd October 2011 and this was discovered by the respondent on the morning of the same day when he attempted to open the shop. The respondent was therefore unable to operate his business from the premises.

[5] The second point in *limine* raised by the respondent is that the appellant is not entitled to the relief sought, because it has failed to disclose material facts in the *ex parte* application, particularly that it locked the premises without a Court

Order. The respondent argued that in *ex parte* applications a party is obliged to disclose all material facts even those which are detrimental to its case.

[6] The Court *a quo* decided the matter on the points in *limine* raised by the respondent and upheld them. In doing so His Lordship stated that the Appellant's Attorney conceded that the appellant had failed to disclose that it locked the premises without a Court order, notwithstanding that the application was brought ex parte. His Lordship reasoned that the application stood to be dismissed on that point in *limine* alone.

[7] With regard to the second point in *limine,* His Lordship agreed with the respondent's submission that the appellant sought to use the Court to endorse its unlawful conduct of locking out the respondent without a Court Order, and that such conduct constitutes spoliation. His Lordship took into account the fact that the appellant ejected the respondent through the unlawful lockout; he held that the only inference that could be drawn in the circumstances is that the appellant instituted the present proceedings in order to legitimise its unlawful act of spoliation.

[8] The appellant filed an Amended Notice of Appeal in which it raised twelve grounds of appeal; however, it is apparent that the appellant duplicated the grounds of appeal. Generally the appellant argued that the Honourable Judge *a quo* misdirected himself in the following respects: firstly, that the appellant

unlawfully locked out the respondent from the leased premises when in actual fact the respondent's manageress handed the keys to the appellant. Secondly, by holding that the appellant unlawfully deprived the respondent of possession of the said premises whereas the respondent was no longer in possession of the premises when the appellant changed the locks; hence, there was no spoliation. Thirdly, by holding that the disconnection of electricity supply by the appellant to the leased premises was unlawful in as much as the respondent had consented to the disconnection in terms of clause 3.5 in the event the respondent failed to make due payment. Fourthly, by holding that the appellant failed to make a material disclosure of the lockout in its *ex parte* application and not exercising its discretion in favour of the appellant regard being had to all the circumstances of the matter. Fifthly, by holding that the appellant was before Court with unclean hands, and, that spoliation satisfies the requirements of the doctrine of unclean hands.

[9] It is not in dispute that the appellant, unlike most landlords, controls the supply of water, gas and electricity; and, that in terms of the Contract of Lease concluded between the parties, the appellant could withdraw the supply of these utilities in the event of arrear payment. It is common cause that on the 21st October 2011 the appellant withdrew the supply of water, gas and electricity from the leased premises; these utilities are essential for the conduct of business by the respondent without which the respondent's business would collapse.

[10] After the supply of the utilities were withdrawn, the respondent could not conduct its business. On the 23rd October 2011 the appellant without a Court Order, changed locks to the premises. The appellant disputes the date on which the locks were changed, however, it is not in dispute that it changed the locks without a Court Order. Even if the respondent's manageress did surrender the keys on the 30th October 2011, it is apparent from the evidence that the appellant changed the locks on the 23rd October 2011, immediately after switching off the supply of the utilities. An employee of the respondent Thami Mamba has filed a confirmatory affidavit in support of the Director of the respondent Johan Oliver, that locks were changed by the appellant on the 23rd October 2011. After the change of the locks, the keys held by the respondent were ineffectual. The change of the locks effectively evicted the respondent from the premises and ultimately destroyed its business.

[11] It is apparent from the evidence that when the appellant lodged its application to perfect its hypothec and the subsequent granting of the *Rule Nisi* on the 17th November 2011, the respondent had effectively been evicted from the premises by the appellant. I agree with the observation by the respondent that the application by the appellant was intended to legitimise an otherwise unlawful act of spoliation. It is apparent from the evidence that when an employee of the respondent tried to open the premises on the 23rd October 2011, he discovered that the locks had been changed; this shows that the respondent was still in possession of the premises when it was locked out.

[12] *Malan AJA* in the case of *First Rand Ltd t/a Rand Merchant Bank and Another v. Scholtz NO And Others* 2008 (2) SA 503 (SCA) at para 12 stated the following:

> **"The *mandament van spolie* is a remedy to restore to another ante omnia property dispossessed forcibly or wrongfully and against his consent. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The *mandament van spolie* is available for the restoration of *quasi-possessio* of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right."**

[13] *Dunn J* in the case of *Dlamini Malungisa v Msibi Timothy* 1987 – 1995 (2) SLR at 122 (HC) stated the following:

> **"In order to succeed in a *mandament van spolie* an applicant must show that he was in quiet and undisturbed possession of the property sought to be returned and that he was unlawfully deprived of such possession."**

[14] The fact that clause 3.5 of the Lease allowed the appellant to discontinue the supply of utilities on default of payment did not allow the appellant to take the law into its own hands and effect self-help. It was still incumbent upon the appellant to obtain a Court Order to stop the supply of the utilities. Furthermore, and to the knowledge of the appellant, the respondent disputed the arrears claimed by the appellant on the utilities; and, the appellant had admitted the existence of the dispute.

[15] In paragraph 18 of the judgment, the trial Court found that the appellant's counsel had conceded during the hearing that the appellant had failed to disclose in an ex parte application a material fact that it locked the premises without a Court Order. Appellant's counsel did not make any submission urging the Court to exercise its discretion in favour of the appellant that the fact not disclosed was not material. Similarly, no such attempt was made to persuade this Court to exercise its discretion in favour of the appellant. Furthermore, it was not disputed that the undisclosed fact was material.

[16] *Hull CJ* in the case of *Makhowe Investment (PTY) Ltd v. Usutu Pulp Co. Ltd* 1987-1995 (4) SLR 85 at 93 (HC) stated the following:

> **"...a litigant who seeks an order ex parte is bound to display the utmost good faith by disclosing fully and frankly to the court all material facts within his knowledge,... The reason for this is that the Court hears only the applicant, and not the respondent. In entertaining his one-sided application, it therefore relies on his complete candour. If it transpires that the applicant has withheld wilfully or negligently material facts that might have influenced the decision of the Court, then in its discretion, the court may set the order aside for that reason alone."**

[17] I have had occasion to state the following in the case of *Khanyisile Masuku v. J.D. Group Swaziland (PTY) Ltd* Civil Appeal No. 38 /11 at para 15:

> **"It is trite law that "utmost good faith" must be observed by litigants making *ex parte* applications, and, that all material facts must be placed**

before the court. If any order has been made upon an *ex parte* application, and it appears that material facts have been kept back which might have influenced the decision of the court whether or not to make the Order, the court has a discretion to set aside the Order on the ground of non-disclosure; it is not necessary that the suppression of the material facts be wilfully, negligently or *mala fide*. "Materiality" in this regard means that the facts not disclosed must not only be relevant but should have a bearing on the merits of the *ex parte* application. In the exercise of its discretion, the court should have regard to the extent to which the rule has been breached, the reasons for non-disclosure, the extent to which the court might have been influenced by full disclosure as well as the consequences of denying relief to the applicant on the *ex parte* order. The court has a discretion even where the non-disclosure was material to dismiss the application or to set aside the proceedings."

[18] In dismissing the application, the trial Court found that the appellant had contravened the doctrine of clean hands by lodging the application after it had unlawfully locked out the respondent from the premises, and effectively ejected the respondent without a Court Order. His Lordship concluded that the application was subsequently instituted to legitimise the unlawful act of spoliation. The application was dismissed pending the purging of the contempt by the appellant.

[19] In *Mulligan v. Mulligan* 1925 WLD 164 at 167 *His Lordship De Waal J* dealt with the doctrine of unclean hands in the following manner:

"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 to he cannot ask the court to set its machinery in motion to protect his civil rights and interests... were the Court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes, and it would, moreover, be conniving at and condoning the conduct of a person who through his flight from justice, sets law and order in defiance."

[20] The South African case of *Mulligan v. Mulligan* (supra) was followed and adopted in this country in the case of *Photo Agencies (PTY) Ltd v. The Commissioner of the Swaziland Royal Police and the Government of Swaziland* 1970-1976 SLR 398 at 407 (HC).

[21] Having considered the evidence adduced by the parties, submissions by counsel as well as the applicable authorities, I am satisfied that the trial Court did not misdirect itself resulting in a failure of justice. Accordingly the appeal is dismissed with costs at attorney and client scale.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

DR. S. TWUM
JUSTICE OF APPEAL

I agree: E.A. OTA

JUSTICE OF APPEAL

FOR APPELLANT Advocate J.M. Vander Walt
Instructed by
Attorney J. Henwood

FOR RESPONDENT Attorney Lloyd Mzizi

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012.