IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 0017/16

In the matter between:

BILAL INVESTMENTS (PTY) LTD **Appellants**

and

G S TRADERS (Pty) LTD t/a LADIES AND GENTS FASHIONS **1st Respondent**

THWAHIRA PROPERTIES (Pty) LTD **2nd Respondent**

THE COMMISSIONER OF POLICE **3rd Respondent**

ATTORNEY GENERAL **4th Respondent**

Neutral citation: *Bilal Investments (Pty) Ltd v GS Traders (Pty) Ltd t/a Ladies and Gents Fashion and Three Others (0017/2016) [SZSC] 47 (30 June, 2016)*

Coram: **R. J. CLOETE AJA**
J. S. MAGAGULA AJA
C. MAPHANGA AJA

Heard: 4th May, 2016;

Delivered: 30th June, 2016.

Summary: *Civil Procedure - Landlord and tenant-point in limine contesting locus standi of a tenant in proceedings-landlord acquiescent to judgement of court a quo-concession of point by Appellant-Punitive costs award sought on account of grave conduct of Applicant and attorney- special costs award due to collusive and abusive conduct by Appellant in proceedings - warranting censure - Appeal dismissed with costs on an attorney and own client scale-*

Post hearing of Appeal - irregular application to intervene by landlord- highly irregular proceedings and untenable; warranting strong reprimand of attorney and measure of courts displeasure with costs on attorney and own client scale.

JUDGMENT

MAPHANGA AJA

[1] This is an appeal from a judgment handed down by the court a quo on the 4th of March 2016. It is important to say that owing to the special circumstance of that matter, the court a quo saw it fit to make a determination that the Appellant and the 2nd Respondent herein had engaged in a collusive and somewhat devious course of conduct and dealings with an ulterior purpose to contrive a certain set of circumstances and outcome.

[2] Thus the court in reference to these parties determined in part that:

'It is abundantly clear from the above that the 1st and 2nd Respondents <u>are acting in tandem with mala fides for the purpose of misleading the court,</u> so as to say performance is impossible.

I wish to comment *en passant* that the complicity of the 1st and 2nd Respondents of impossibility of performance is contrived and cannot be countenanced by this court.

In this regard, for the aforegoing reasons the Application is granted in terms of the Notice of Motion. Further on the question of costs I find the conduct of both the 1nd and 2nd Respondents to be questionable in the circumstances and I would in then levy costs on the punitive scale, it is so ordered". (added underlining)

[3] The Appellant swiftly filed a Notice of Appeal on the same date and sets out the grounds of the appeal as follows:

'1. The Court a quo erred in law and in fact in finding that a valid cession had occurred in law and in fact as between the 1ST and the 2nd respondents and that a ceded lease agreement therefore existed between the 1st and 2nd respondents;

2. The Court a quo erred in law and in fact, by extension to ground 1 above, in holding that a party could be compelled into entering into contract;

3. The Court a quo erred in law and in fact in failing to find that the matter was one fatally riddled with disputes of fact and in failing to further apply the legal principles attendant to disputes of fact as they arise in motion proceedings;

4. The Court a quo erred in law and in fact in failing to find that an impossibility of performance now existed, regarding the Appellants ability (as innocent 3rd party) to give away its possession of the store, and in immeasurable levels, and that the remedy of specific performance was therefore rendered ill-suited in the circumstances and would inter alia occasion undue hardship upon the Appellants and their own sub-tenants;

5. The Court a quo erred in law and in fact in finding that the 1st Respondent had satisfied the requirements of an interdict and in further granting the 1st Respondent final relief in the circumstances;

6. The Court a quo further erred in law and in fact in granting costs of suit against the Appellant, in as much as the Appellants was an innocent 3rd Party in the entire transaction and joined to the proceedings specifically by Order of the court a quo to afford the court their account of the event."

[4] It is only the second Respondent that appealed the decision of the court and it is on account of its notice that the matter is before us. This was not lost on the 1st Respondent which has seized on this anomaly to raise a point *in limine.*

[5] In its point *in limine* the 1st Respondents disputes the Appellant's *locus standi* to bring this appeal. It is a layered argument whose sub-points are set out in the 1st Respondent's heads and submissions as follows:

"1 This an appeal which has been brought by the second Respondent in the court a quo, himself having been joined

in the proceedings following the judgement of the court delivered on the 12th June, 2015 ……..

1.1 It is worth mentioning from the onset that, the second Respondent who was the first Respondent in the court a quo (hereinafter referred to as the 'second Respondent") has not appealed the decision of the court. This failure by this Respondent to appeal the decision of the court a quo, has serious consequences to the appeal and mainly to the Appellant's right to appeal the decision of the court a quo as will be shown more fully hereunder;

1.2 The Appellant, as appears in the notice of appeal dated 4th March 2016 has raised the following grounds of appeal (goes on to reiterate the grounds in the notice)

1.3 As already highlighted above, the second Respondent has not appealed the decision of the court a quo. The consequence….is that the second Respondent has acquiesced to the judgement of the court. <u>It must be emphasised that, the Appellant's rights to the property in question are derived and/or flow from the second Respondent's ownership of the property, who has the real right to the property."</u>

[6] The foremost issue to be determined in this appeal is whether there is any merit in the 1st Respondent's point in limine. If so, this being a threshold issue that is dispositive of the appeal, then that would be the end of the appeal and therefore there would be no need to deal with the merits thereof.

[7] Having said so, due to the peculiar nature of the conduct of the parties in contention, with the 1st Respondent who happened to be the Applicant in the court a quo, it shall be necessary to sketch the substance and issues leading to the judgement a quo and the courts special findings on the nature of the dealings of the parties which it deemed ' collusive', contrived and mala fide. These findings would impact on the special costs award that followed and the special punitive costs award that the 1st Respondent has sought herein.

[8] Before dealing with the point *in limine* it is essential to ground the matter in the factual circumstances giving rise to the proceedings at the lower court. This is necessary because as shall be seen, the Appellant and 2nd Respondent have been very crafty in carefully constructing an elaborate scheme of dealings from which they sought, in their actions and subsequent conduct of their case, to present a *fait accompli* under the guise of genuine and bona fide transactions.

[9] In all their dealings they appear to have worked in concert and in a co-ordinated effort in a determined mission. That theme has followed in the proceedings before us.

The facts

[10] The brief background facts grounding this matter do not directly concern the Appellant in the sense that it was not an immediate party to the underlying legal transactions giving rise to the dispute. The key protagonists were the 1st and Second Respondents, G S Traders (Pty) Ltd, otherwise known as Ladies and Gents Fashion and Twahirwa Properties (Pty) Ltd. To locate the matter in context it is necessary to outline in broad brushstrokes the key factual elements in the proceedings a quo.

[11] The 2nd Respondent (Thwahira) is an entity whose business is to let commercial premises being retail space in a building described as Eagle House situate on Erf 93 Ngwane Street in the Manzini central business district. The 1st Respondent, as its name suggests, is a retailer in wearing apparel and had been one of the 2nd Respondent's tenants occupying a retail shop No.2 from which it was plying its trade. For ease, I shall henceforth refer to the 1st and 2nd Respondents as GS Traders and Thwahira, respectively.

[12] During the earlier part of March 2015, G S Traders became interested in and acquired from one Ms Song Hau Ding a certain business as a going concern (also in the trade of clothing apparel) known as Pacific International Trading Ltd (sic), trading as Kai Kai Fashion Centre. Ms Song's business was also a tenant in the same building run by Thwahira in shop premises under the designation Shop No.3, adjacent to GS Traders, the said shop No. 3 being described as much bigger and with more enhanced space than No.2.

[13] The successful acquisition by GS Traders of the Kai Kai shop hinged on it securing, as a parallel transaction, the leasing rights to Shop No.3 and this became a key factor driving the deal. Needless to say GS Traders was keen to secure a concomitant lease with the landlord Thwahira as an arrangement contingent of its acquisition of the business from Ms Song. Its director a Mr Habtau Kibret Gebreegiabher (Kibret), immediately set out to negotiate a lease upon which retention of the premises in Shop No.3 could be secured as a parallel and critical contingent arrangement to the purchase of the business.

[14] A three-way negotiation process, with Ms Song acting as an intermediary ensued, with the outcome being that, according to GS Traders, an agreement was reached in terms of which GS Traders would

take over and occupy the premises on certain specific terms and conditions; these being

1. A monthly rental fixed at E30,000.00 would be payable for the first year of the lease the initial date for first rental being 1st May 2015.

2. Rental for the second and third yearly terms would rise to a sum of E33,000.00

3. To secure the May rental and cover a conventional deposit of E30,000.00, being the equivalent of a months' rental, a sum of E60,000.00 would be payable by GS Traders to Thwahira.

4. G S Traders would have the month of April as a grace period beneficial occupation to enable shop re-fitting and renovations;

5. A written lease agreement incorporating the terms of the agreed lease terms and conditions would be prepared by Thwahira for signature of the parties.

[15] It was established in the court a quo as a fact that during the month of March, ostensibly pursuant to these discussions, GS Traders caused to be deposited by way of bank transfer, the sum of E60,000.00 Emalangeni which Thwahira received without as much as demur or question.

Cession

[16] Now from the record, the affidavits and submissions made by way of legal contentions and points of law, it has been stated and at times suggested that the nature of the arrangements in dispute a quo were

some form of cession of the lease originally held by Ms Song's business (Pacific Traders).

[17] To characterise the circumstances of the arrangements and transactions that are asserted as an oral lease agreement by GS Traders, as a cession would be a misnomer for the reasons I set out here.

[18] In the context of a lease agreement it is conceivable that the rights of a tenant may be ceded and delegated to another. It is appropriate to speak of the transfer by cession of rights however it is more correct and accurate in the sense of wholesale transfer of rights and obligations to speak of assignment. Be that as it may this entails an entirely different result from the conclusion of a subsequent and separate agreement or lease outside of an original one.

[19] This accords with the established understanding of the concepts of cession and assignment. The consequence thereof would be the substitution of a party and the assumption by the cessionary of the rights of the cedent. By assignment the degree of assumption is greater being that of rights and obligations and consequently the stepping of the cessionary into the shoes of the cedent.

[20] That is certainly not what the 1st Respondent in substance was asserting in its application a quo. As stated elsewhere herein, the use of the 'phrase' cession which it would seem was a mutual error by the parties and with respect the court, was unfortunate. Ultimately upon the analysis of the evidence and the undelying facts, the court reached the correct conclusion in my respectful view of the existence of and the true nature and legal effect of the agreement entered into between the 1st and 2nd Respondents.

[21] In the judgement of the court a quo at para 38 it is stated thus after analysis of the evidence:

> **" A bare denial by him (Thwahira) that he did not consent to the lessor (GS Traders) does not assist the (Thwahira), this is so taking into account the following factors:**
>
> **"5.6.1 The contents of the letter from Ndzima attorneys dated 1st April 2015, where he stated "Our instructions further are to thank you for consenting to the agreement on a handover of the premises to the new tenant. This was done in terms of the lease agreement;**
>
> **5.6.2 The affidavit from Ms Song Hau Ding, the previous tenant;**
>
> **5.6.3 The handing over of the key to the applicant;**
>
> **5.6.4 The first respondent accepting money from the applicant on the 9th March 2015."**

[22] I agree with the Applicant's arguments that taking into account all these factors outlined above, the only reasonable inference that can be drawn is that the 1st Respondent consented to the arrangement as he was aware of the implications. In its answering affidavit the 1ST Respondent wants to create an impression that the Applicant deposited the E60,000.00 on its own volition, then thus to say he could not return same because he did not know applicants bank details. In this regard I agree with the Applicant's arguments at paragraph 5.7.1 to explain this state of affairs.

[23] Clearly in effect the agreement would not have been a cession in so far it would imply variation or stipulation of specific terms of the original lease as pertains the rental payable and the escalation thereof. Further the expectation that a new lease deed would be drawn, also points to a new lease as does the payment of a substantial deposit and the allowance of a grace or 'cooling' period. These factors are what weighed in the mind of the court and swayed it on a balance as more probable facts in reaching the conclusion it did.

[24] It is my respectful view that it correctly found that there was a valid agreement and awarded the remedy of specific performance, but was led into error in characterising this as a cession of the lease between Thwahira and Pacific. What it was in reality was the creation of a new lease arrangement based on the facts as established a quo. There is no doubt that the Court correctly granted the application when it did and therefore on the merits, even notwithstanding the legal contentions *in limine* by the 1st Respondent, the appeal would and should fail.

[25] That is not the cause upon which the GS Traders case a quo was founded. The premises of the 1ST Respondent's case was that the essence of the transaction between Thwahira Properties which the 1st Respondent sought to assert, was a lease agreement albeit oral one to be reduced into writing in the future.

[26] The effect of this transaction was therefore to interpose a new lease of the said Shop No.3 premises on specific and new terms which were to be subsequently reduced into a written lease.

[27] Pacific Traders was to fall out of the picture altogether, as indeed it did. If a cession at all certainly the issue of the dispute that ensued as to the sum to be paid as rental by GS Traders that Thwahira was putting up a

quo, would not have arisen at all for in a cession G S Traders would have simply stepped into the shoes of the existing lease agreement between Pacific Traders and Thwahira on the original lease terms and conditions as obtained in that lease without any changed provisions.

[28] That this could not have been so is also evident in the sale of business agreement attaching to the founding papers of G S traders in the Notice of Motion for the application before the court a quo. That agreement was a sale of business as a trading entity or going concern as opposed to an acquisition of shares and equity in Pacific Traders, which would have been the case in a cession arrangement. The facts clearly do not bear out a cession.

[29] This distinction is important because it became central on account of the legal contentions relied on by Thwahira in contesting the 1st Respondent's application for a declaratory and G S Traders' ancillary relief seeking enforcement of its rights to occupation. A central plank in Thwahira's case in the proceedings a quo was that GS Traders was seeking to impose a 'cession' of a lease agreement on it. We return to this aspect.

The Dispute

[30] The critical circumstances giving rise to the proceedings a quo are that the 2nd Respondent, in complete disavowal of the lease agreement, gave the premises to a third party, the Appellant presently, ostensibly pursuant to a new lease between it and the landlord. The 1st Respondent regarded this as a repudiation by Thwahira of the lease agreement relied on by 1st Respondent.

[31] On the 7th April 2015, G S Traders then launched an application before the court a quo under a certificate of urgency seeking a declaratory order

and interdict and various orders, the essence of which was to enforce the lease agreement it was asserting. In terms of the Notice of Motion, apart from the usual dispensation orders attendant on urgent applications, the 1st Respondent was seeking the following substantive orders (albeit in the form of a rule nisi):

> **'1. An order declaring that a valid lease agreement does exist between the Applicant company(GS Traders and the 1st Respondent (Thwahira) for lease of the premises known as shop No.3 Ngwane Street, formerly Kai Kai Centre, Manzini:**
>
> **2. The 1st Respondent is ordered and compelled to surrender to the Applicant the premises known as**
>
> **Ngwane Street Eagle House**
> **Shop No. 3 Kai Kai Centre**
> **Manzini**
> **Swaziland.**
>
> **As per lease agreement concluded between the parties on or about March 2015;**
>
> **3. The 1st Respondent be interdicted and restrained from leasing out the premises known as shop No. 3 Ngwane Street, formerly Kai Kai Centre, Manzini to any other person and/ or tenant; alternatively;**
>
> **4. That the 2nd Respondent be evicted from the premises ……**

5. The pending the finalisation of the present matter in court the premises…..remain unoccupied and /or alternatively locked;

[32] In the said Notice of Motion and founding affidavit, GS Traders had cited and served the papers on one Wozir Z Abdela, a Director and the controlling executive of the Appellant, the trading company that had now emerged as a rival of GS Trading in the battle for the premises.

[33] Thahira in its answering papers objected to the citation of Abdela on the basis that this was a misjoinder and that Thwahira's application sought the joinder of the Appellant as the designated entity which it claimed was in lawful occupation of the contested premises. This it did in contesting the relief for ejectment and interdict sought.

[34] It turned out that GS Traders had been mistaken in its citation of the third party that had assumed occupation of the premises, this being an incidental error conceded by GS Traders, and the court a quo in an interim reasoned order by the Learned Lordship Justice Maphalala PJ, directed the joinder and correct citation of the Appellant.

[35] That is how the Appellant came to be involved in the proceedings. Clearly this was in the context of and incidental to the interdict and specific prayer to which it was the identified entity and a central feature to the mischief the interdict sought to address.

[36] As regards the main issues turning on the validity of the alleged lease agreement that were central in the matter before the court a quo, the Appellant's position and *locus standi* bears scrutiny. It is dealt with

separately in relation to the preliminary points raised by the 1st Respondent to this appeal.

[37] The 2nd Respondent in its answering affidavit raised several points of law. A key point *in limine* forming the basis of its defence to the application was premised on the contention that the 1st Respondent was seeking to assert a cession of the original lease between Thwahira and Pacific Traders from the latter to GS Traders.

[38] As stated earlier, this point of law is misconceived as it is predicated an incorrect characterisation of the true nature of the transaction alleged by GS Traders. For what it is worth this point and the other points in limine were comprehensively highlighted in the interim reasoned order issued in the partial judgement of Justice Maphalala referred to above. The relevant portions of the affidavit dealing with this point and indeed the nutshell of Thahira's case are abstracted and highlighted here. It states:

> **"4 This application to force me into the said cession unfortunately bears many preliminary fatal aspects and which are not raised for mere preference of technicalities but infact to into the heart of the Application itself.**
>
> **5. In the first and important instance, I categorically deny having any oral agreements with the applicant and the said Pacific International (Pty) Ltd to allow any cession of the lease previously held by Pacific International into the name of the Applicant or having any private agreements independent of Pacific to let out my shop number 3 to the Applicant…….**

6. Prayer 5 of the Application seeks eviction of the 2nd Respondent. The 2nd Respondent is not in occupation of my premises but they are in the lawful occupation of a company named Bilal Investments (Pty) Ltd as per the lease attached hereto and market MTN 2.

7. By extension further there has been a misjoinder and/or non-joinder of my tenant company the said Bilal Investments (Pty) Ltd. The said tenant company has a direct and substantial interest in these proceedings. The party cited as a 2nd Respondent herein has wrongly been joined.

8. Furthermore there is now clearly an impossibility of performance of the prayers sought by the applicants. The premises have simply been leased to a new tenant, the said Bilal Investments (Pty) Ltd who have at this time taken full physical occupation and have erected fixtures and fittings of their own which are in a semi-permanent state of attachment to the building itself and their removal can clearly not be carried out at this point without causing substantial damage to the building itself. The Application has effectively been overtaken by events."

Joinder

[39] In considering Thwahira as version of events and legal contentions put up in limine, his **Lordship Maphalala PJ** ordered the joinder by rectification of the Notice in effect substituting / altering the second Respondent's designation to reflect the name of the company concerned-namely the Appellant presently.

[40] Although it was contended by the 2nd Respondent that the Appellant was entitled to be joined to the proceedings on account of its being in 'lawful occupation' as a 'tenant', this does not appear *ex facie* the judgement of the court a quo of the 12th June 2015 to have been the ratio for the joinder ordered by the court. In so far as it is suggested and implicit in Thahira's argument that Bilal had a 'direct and substantial interest in the proceedings, that is not the basis on which the court a quo ordered joinder. As stated, in effect the order was corrective in the sense of 'joinder' of the entity that Mr Abdela was found to represent.

[41] What the order was not, was a determination thereby of the *locus standi* of the Appellant in the proceedings or ultimately in the subject matter of the proceedings, the occupational rights to Shop No. 3. That matter remains moot and accordingly the 1st Respondent's point *in limine* on the Appellant's *locus standi* lingers on.

Locus Standi
The Law

[42] This appeal, as indicated earlier, turns foremost on locus standi of the Appellant being the principal point in limine raised by the 1st Respondent. Without proper standing there ends the matter and therefore this appeal is liable to fail.

[43] Generally the question of legal standing concerns the status of a party as a litigant in regard to whether it can demonstrate an interest recognised in law to prosecute or defend a claim, right or interest or to seek specific legal redress or recourse in relation to a subject matter or issue. It is trite that this entails the person claiming standing to show that he has a direct or substantial interest in the matter, the subject or object of the proceedings in question and consequently the outcome of the

proceedings or litigation as the case may be. ***(Meshack Dlamini v Sandile Tfwala and Others SWSC Case No. 3210/2010; Abrahamse and Others v Cape Town City Council, 1953 (3) SA 855 (C)***

[44] That interest must be a legally recognised interest and it has been said that a mere financial interest which is incidental and indirect is not enough. So pertinent and critical is this interest in instances where a party seeks to intervene or to be joined in proceedings already before court that it is brought into sharp focus.

[45] The oft-cited remarks of **Corbet J** in ***United Watch and Diamond Co. Pty Ltd and Others v Disa Hotels Ltd and Another Ltd and Another, 1972 (4) SA 409 AT 415 B-H*** bear reference:

> **'In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted. Before this approach can be usefully applied, however, it is necessary to examine more closely the right of a party to intervene in legal proceedings.**
>
> **Intervention is closely linked with the matter of joinder; in fact it is often treated as a particular facet of joinder. As was pointed out by WESSELS, J. (as he then was), in *Marais and Others v. Pongola Sugar Milling Co. and Others, 1961 (2) SA 698 (N) at p. 702:***
>
> **"...certain principles seem to have become established which govern the matter of joinder, and different principles would seem to apply to different circumstances, depending on whether the Court is concerned with a plaintiff's right to join parties as defendants, a defendant's right to demand that**

parties be joined as co-defendants, the rights of third parties to join either as plaintiffs or defendants, or the Court's duty to order the joinder of some other party (as was done in the case of *Home Sites (Pty) Ltd v Senekal, 1948 (3) SA 514 (AD))*, or to stay the action until proof is forthcoming that such party has waived his right to be joined as a party, e.g. by filing a consent to be bound by the judgment of the Court (as was done in the case of *Amalgamated Engineering Union v Minister of Labour, 1949 (3) SA 637 (AD))"*

It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is a waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour, 1949 (3) SA 637 (AD); Koch and Schmidt v Alma Modehuis (Edms) Bpk., 1959 (3) SA 308 (AD). In Henri Viljoen (Pty) Ltd v Awerbuch Brothers, 1953 (2) SA 151 (O)*, HORWITZ AJP (with whom VAN BLERK, J., concurred) analysed the concept of such a"direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) –"... an interest in the right which is the subject-matter of the litigation and not…merely a financial interest which is only an indirect interest in such litigation."

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent divisions, including two in this Division (see *Brauer v Cape Liquor Licensing*

Board, 1953 (3) SA 752 (C) **a Full Bench decision which is binding upon me – and** ***Abrahamse and Others v Cape Town City Council, 1953 (3) SA 855 (C)),*** **and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see** ***Henri Viljoen's case, supra at p. 167).'***

[46] Indeed it has also been adopted with approval in this jurisdiction as a correct statement of the law in the Kingdom. ***(See Meshack Dlamini v Sandile Thwala and Others (3210/10) [2013] SZSC 47).***

[47] The status of the Appellant in regard to its locus standi in the proceedings a quo was not directly dealt with by the court, its joinder having been brought up in the form of a misjoinder by the 2nd Respondent rather than an approach by the Appellant to intervene in the proceedings. It so happens that the director of the Appellant, the said Mr Abdela, had been cited incorrectly in his personal capacity when the appropriate party that should have been cited, as the Court correctly (respectfully) determined, was the Appellant.

[48] In our view that did not have the effect of conferring *locus standi* on the Appellant in the sense of recognising its independent interest in either the subject matter or the substantial issue to be determined by the court, that of validity of the lease agreement asserted by 1st Respondent a quo.

[49] It is common cause that the only basis that Thwahira sought the joinder of the Appellant was on account of its averment in its answering affidavit that the landlord had leased the said contested premises to the latter. The Appellant without doubt is no more than a tenant in relation to the subject matter and asserts no greater right than the more immediate party to the proceedings, the 2nd Respondent, Thwahira.

[50] The *locus standi* of a tenant in proceedings where the landlord's interests or rights are at issue, has been well stated in a number or authoritative decisions.

[51] It is settled law that the right of a sub-tenant in relation to an issue for the determination of the tenant's right or that of a tenant in respect to an issue affecting the landlord's rights in rem, is derivative. The tenant or sub-tenant by virtue of whatever secondary agreement or arrangement requires a defensible right. It is not a direct or independent right *vis a vis* the principal rights of the tenant or landlord in the case of a sub-lease or lease respectively.

[52] The Appellants case a quo, predicated as it were on an allegation of the existence of another lease with the landlord, evinces a secondary and indirect interest in the subject matter. This is so as the central issue at the core of the application ultimately affects the landlord's contested right to vindication of the merx or the surrender thereof in terms of the alleged lease agreement (albeit incorrectly referred to as a cession in the adopted nomenclature). I am therefore of the view that despite the joinder as it were, by the lower court of the Appellant in the sense of correcting what was termed a misjoinder, this did not confer locus standi on the Appellant in relation to the substantive rights at issue where none existed in law. Its rights, if any, were derivative, indirect and ultimately of a financial or personal nature as opposed to *ius in rem* attaching to the property in question.

[53] In any event this much was conceded by the Appellant's attorney, Mr Ndlovu, especially when confronted with the stark fact that the 2nd Respondent, being the owner of the property, had not appealed the

decision of the court a quo and had to all intents and purposes acquiesced to the judgement of the court a quo.

[54] It is quite evident that in the circumstances of the case, the joinder of the Appellant in the manner as engineered by the 1st Respondent, the adverse finding of the court a quo on the material facts that the nature of the conduct of the Appellant and the 2nd Respondent, being of a collusive scheme designed to create conditions designed to frustrate the interests of the 1st Respondent, had in effect created a *fait accompli* to place the premises beyond the reach of the 1st Respondent and claim impossibility of performance. To this extent the court deemed the 'facts' presented under affidavits by the landlord and Bilal to be 'contrived'.

[55] On the aforegoing basis I find merit in the 1st Respondents first point *in limine* on *locus standi*.

[56] In any case I find that in light of the 2nd Respondents apparent acquiescence of the judgment of the court a quo, the Appellants rights in the proceedings are non-existent for want of legal standing and direct and substantial interests in the matter and on this basis accordingly dismiss the appeal with costs.

[57] However the matter of costs will have to take into account the further peculiar circumstances in the conduct of the Appellant, the 2nd Respondent and their attorney Mr Ndlovu, whose conduct warrants serious consideration on account of the serious departure from acceptable bounds of appropriate litigation practice and rules demonstrated by the attorney and his clients' highly irregular and irresponsible conduct during the appeal and the subsequent developments after the appeal had been exhaustively dealt with by the court.

[58] This is an unusual appeal brought by a party which entered the fray by way of joinder in proceedings essentially somewhat removed from it. That is one aspect of the matter. Another peculiar event has come about as a result of a rather novel if not altogether highly irregular and unprocedural step taken by the Attorney acting for the Appellant of lodging and causing the recall of the matter on the basis of an unorthodox and unknown procedure under some form of notice termed

'NOTICE OF APPLICATION FOR CONDONATION, JOINDER AND AUDIENCE'.

[59] This strange notice was filed on the 6th of May 2016, some two days and well after the hearing of the Appeal had been concluded and the matter had been adjourned with the court having reserved judgement to be handed down as scheduled at the end of the current session of this court. In the said Notice the following orders are prayed for:

> **'1. Condoning the Applicants Late Filing of Its Notice of Appeal;**
>
> **2. Granting Leave to applicant to Join as Second Appellant to the appeal herein already noted under the above case number;**
>
> **3. That and pursuant to prayer 3 above, <u>Granting immediate audience to the applicant herein</u>- and as 2nd appellant in respect of such appeal- and before issue of the Judgement in respect of 1st Appellants Appeal (as argued on the 4th May 2016) as scheduled;**
>
> **4. Costs only in the event of Opposition herein;**

5. Further and/ or alternative Relief"

[60] That the said attorney has, as an officer of the court, had the temerity of even contemplating bringing such an irregular proceeding in the manner and form as would display such complete disregard for the rules and due regulation of the appeals conduct is cause for serious disquiet. In addition the allegations contained in the founding papers that it appeared that the court had already seemingly made up its mind at the initial hearing is contemptuous of the authority of the Court in many more ways than one and should be brought to the attention of the Law Society.

[61] This court had dealt with instances of matters sought to be enrolled on the basis of notices and papers filed late on account of falling foul of the prescribed timelines of filing of process, be they in the form of Notices of Appeal, heads of Argument, Applications for condonation or extension of time. Unheard of are applications of the kind where the degree of indifference to the prescripts of the rules of this court are so brazen and extreme as to be tantamount to sheer contempt of the institution.

[62] As if this was not inappropriate enough, Mr Ndlovu then, needless to say, without having sought and obtained leave of this court to do so, simultaneously filed a series of accompanying documents all bearing the same date being and under the case number of the appeal presently before the court. These documents all have one purpose, to enter the appearance and the 'intervention' of the 2nd Respondent as an Appellant in these proceedings and to attempt to establish the locus standi of the Appellant. These include a so-called Notice of Appeal ostensibly filed on behalf of Thwahira as well as a document entitled "2nd Appellants Heads of Argument".

[63] Upon appearing before us and rising to address the court on the matter, Mr Ndlovu was hard put to explain the legal basis for his conduct in lodging this irregular process before the Registrar and in causing it to be enrolled. He was unable to cite any authority or rule in terms of which he had brought the matter before the court.

[64] Now this application for condonation and joinder is clearly outside of the procedure and timelines set out in Rule 17 of the Rules of this Court and the Notice sought to be filed by the 2nd Respondent out of turn and in contravention of the Rules, flouts the Rules blatantly. The 1st Respondent has opposed this proceeding and accordingly filed a notice to this effect. At the hearing the Court was addressed by the 1st Respondent's Attorney who moved that the court dismiss the application as being incompetent and award costs on a punitive attorney and own client scale. We are inclined to agree.

[65] There is no question that, in light of the clear breach by the 2nd Respondent and his Attorney of the rules of this court, the step taken and the filing of the various documents in support of this irregular proceeding by the party, is grossly unprocedural, without legal foundation or precedent and constitutes the most serious form of abuse of court process that it warrants censure. We had no hesitation in accordingly determining the same to be out of order and dismissible at the pain of punitive costs.

[66] We there and then entered an order dismissing the Application but reserved our fuller our reasoned judgment as to the attendant costs pertaining to this auxillary proceeding. This we did in view of the need to consider an appropriate costs order commensurate to the measure and reasons to follow. We deal with this aspect in the latter part of the judgement as we do with the comprehensive and special award of costs

in the appeal given the peculiar circumstances of the matter and conduct of the parties involved.

Punitive costs

[67] The circumstances of this case are exceptional in light of the grave concession made by the Appellant's attorney at the inception of this matter concerning his client's lack of standing to bring the appeal, compounded by the fact that the grounds of appeal themselves are no more than a rehash of the very legal contentions based on the legal misconception of the issues around the notion of a cession, this being the point put up by the Landlord a quo at the advice of the very attorneys who now seek to re-argue the same points via the present Appellant.

[68] *Locus standi* notwithstanding the futility of the appeal even on the merits if it was ever meritorious, was likewise acknowledged and conceded by Mr Ndlovu when he appeared before us.

[69] It is clear to us that in light of the obvious folly of the misconceived appeal, Mr Ndlovu and his clients were undeterred and from his address when questioned about the basis and propriety of the subsequent attempt at enrolling the parlous 'application for condonation and joinder' on the 6th of May 2016, we were left with no doubt that the Appellant and the second respondent were still colluding to mislead the court and would stop at nothing in abusing the court process to achieve their nefarious mission. Their conduct before this court only confirmed and underscored the findings of his Lordship Maphalala S, PJ that they have at all times material to the matter at hand acted in collusion to contrive and engineer a favourable outcome. To this end they have sought to mislead the court.

[70] The conduct of the parties and their attorney is truly reprehensible and as such warrants censure as an indication of the courts disapproval.

[71] As regards Mr Ndlovu's conduct we can do no more than sound the caveat in the words of his **Lordship Moore JA** in the case of **Malcos Sengwayo v Thilisile Simelane** where he said:

> **"It remains for me to emphasise, that the legal professional is one of dignity and honour; highly revered. It is generally regarded as a formidable cult; one that is beyond reproach; supporting the weights of justice in consortium with the Courts. It thus places a duty of respect and forthrightness on its members in their dealings with the Court to facilitate the administration of justice. That is the mark of their high calling".**

[72] To this dictum one could add the equally forthright observation of Lord Denning MR (as he then was) in **Rondel v Worsely (1966) 3 WLR 950 at 962-63:**

> "**[The advocate] has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouth piece of his client to say what he wants: or his tool to what he directs. He is none of these things. He owes his allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts"**

[73] We are convinced that Mr Ndlovu has ill-advisedly crossed the line and dipped below the standard and expectations set out above, straying from his professional duty to the court throughout his client's concerted campaign in the litigation before this court and the court a quo.

[74] The courts discretion to award costs on a punitive scale and the range and bounds of that discretion as well as the applicable criteria for

determining cases deserving of such measures finds elaboration in the case of **Jomas Construction (Pty) Limited v Kukhanya (Proprietary) Limited, Case No. 48/2011** where following fitting remarks are made:

> **"Now, the law on attorney and client costs as well as costs *de bonis propriis* is well settled in this jurisdiction. In the first place an award of costs lies within the inherent discretion of the Court. Such a discretion must not, however, be exercised arbitrarily, capriciously, mala fide or upon consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. Generally speaking, an award of costs on attorney and client scale will not be granted lightly. The authors Cillers, Loots and Nel: Costs 5th Edition state the principle succinctly at p971 in the following apposite terms:-**
>
> **'An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such a party may have.'**
>
> **We agree with this statement. We wish to caution, however, that everything has its own limits. It is not inconceivable that even a person who exercises his right to obtain a judicial decision may abuse such right. In such a situation the court would be entitled within its discretion to award costs on attorney-and-client scale against such a person in order, for example, to mark the Court's displeasure."**

[75] The Court in that case has listed, by way of example, instances or grounds wherein the Court may grant costs on a punitive scale including where there has been dishonesty, fraud, conduct which is vexatious, egregious, trifling with the court, dilatory conduct, grave misconduct, such as conduct which is insulting to the court or to counsel and the

other parties. This court has dealt with the matter on a number of cases (See **Jomas Construction (Pty) Ltd v Kukhanya (Pty) Ltd Civil Appeal No. 48/2011, Philani Clinic Services (Pty) Ltd V Swaziland Revenue Authority and Another, Civil Appeal No. 36/2012, Silence Gamedze and Others v Thabiso Fakudze Civil Appeal No 14/2012**)

[76] A prayer was made for an award of punitive costs arises in both the appeal and in the ill-fated and frivolous application to intervene as an Appellant in this appeal by the 2nd Respondent. In light of the circumstances of this case there is no doubt in my mind that the conduct of the Appellant and the second Respondent and their attorney is most deserving of being visited with a costs measure on a punitive attorney-and-client scale for the reasons stated above.

Orders

[77] I find that the appeal filed before us is incompetent for want of locus standi on the part of the appellant and accordingly dismiss same with costs, such costs to be on a punitive scale as between attorney and own client.

[78] In confirmation of the order granted ex-tempore on the 6th March, 2016, I also determine that the application brought by the 2nd Respondent to be irregular, unprocedural and frivolous and accordingly dismiss the same and make an award for costs against the 2nd Respondent and its Attorney, jointly and severally, such costs, likewise to be punitive scale as between attorney and own client.

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C. MAPHANGA

ACTING JUSTICE OF APPEAL

I AGREE: _____

R. J. CLOETE AJA

ACTING JUSTICE OF APPEAL

I ALSO AGREE _____

J. S. MAGAGULA AJA

ACTING JUSTICE OF APPEAL

For the Appellants: Mr. T. Ndlovu

For the Respondents: Mr. M Dlamini