IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 60/2022**

In the matter between:

RODGERS MABHOYANE DUPONT **1st Appellant**

MHHAMUZA NTUTHU INVESTMENTS (PTY) LTD **2nd Appellant**

And

WAFA WAFA INVESTMENTS (PTY) LTD **Respondent**

Neutral Citation: *Rodgers Mabhoyane Dupont and Another vs Wafa Wafa Investments (Pty) Ltd* (60/2022) [2023] *SZSC* 26 (29/06/2023)

Coram: **M.D. MAMBA JA; J.M. VAN DER WALT JA; and M.J. MANZINI AJA.**

Date Heard: 24 May, 2023.

Date Delivered: 29 June, 2023.

SUMMARY: *Civil law – Appeal against High Court Order declaring a lease agreement (1st lease agreement) concluded by the parties to be valid and that lessee is entitled to occupation of the premises despite premises being occupied by third party – High Court issuing declaratory order notwithstanding that business premises being are occupied by a third party whose particulars were fully disclosed to the other side and to the court, but who was not cited in the proceedings – third party alleged to be in occupation of business premises in terms of a lease agreement (2nd lease agreement) concluded with Appellant.*

Held: *High Court misdirected itself by granting declaratory order in the absence of a party who has a direct and substantial interest – matter remitted to High Court coupled with an Order directing that third party be joined in the proceedings.*

JUDGMENT

M.J. MANZINI, AJA:

[1] On the 18th August, 2022 the High Court made an *ex tempore* Order to the effect that:

(i) It is hereby declared that a valid lease agreement between the Applicant and the 1st Respondent for the filling station situate on Farm 769, Main Road Croydon, Manzini does exist;

(ii) **That the 1st Respondent is compelled to deliver to the Applicant possession of the premises described above, together with the fuel supply agreement from Total Energies;**

(iii) **That the 1st Respondent is interdicted and/or restrained from operating and/or leasing out the premises to any other person; alternatively;**

(iv) **Evicting anyone already in occupation of the premises at the behest of the 1st Respondent.**

[2] On the 8th November, 2022 written reasons were furnished by the High Court, whereby it concluded by stating that:

> ***"In the result, I granted the declaratory order to the effect that applicant's lease agreement was valid and subsisting. It ought therefore to take occupation of the leased premises."***
>
> (My own underling)

[3] Appellants, who were the Respondents in the Court *a quo* subsequently filed an appeal. 1st Appellant (1st Respondent in the Court *a quo*) is the owner of the premises which are the subject matter of the litigation. 2nd Appellant is a company which is alleged, by the Respondent, to be

operating a fuel filling station on the business premises in issue. Respondent alleged that 2nd Appellant had been specifically incorporated to apply for a fuel retail licence for the filling station to be operated on the business premises.

[4] Respondent is a company which was previously operating a fuel filling station on the premises. Respondent had approached the High Court seeking a declaratory order and the reliefs set out in paragraph (1) hereof. Respondent alleged that it had entered into a written lease agreement with 1st Appellant sometime in October, 2021. It was further alleged that the commencement date of the lease agreement was 1st November 2021, and was to endure for a period of five (5) years terminating on the 30th October, 2026. Respondent stated that the agreed rentals were duly paid.

[5] Respondent alleged that immediately after taking occupation of the premises and before making an application for a fuel retail licence from Eswatini Energy Regulatory Authority (ESERA), the parties jointly decided to change fuel suppliers, from Puma Energy Swaziland to Total Energies Eswatini. This necessitated removal of the fuel pumps installed by Puma Energy Swaziland. The parties were also required by ESERA to conduct an environmental audit and to file the relevant approvals by the

environmental authority, as part of the application for the licence. Respondent alleged that in order to facilitate the digging, removal and reinstallation of the fuel pumps, and transition from Puma Energy to Total Energies, it vacated the premises and handed them over to Appellant.

[6] Respondent further alleged that sometime around the 17th June, 2022 its sole director discovered that the fuel filling station was operational. All this happened without its knowledge. On this basis Respondent's sole director assumed that the fuel retail licence had eventually been issued by ESERA to 2nd Appellant; and that the Appellants were responsible for operating the business.

[7] In their Answering Affidavit Appellants raised two preliminary objections, as well as pleaded over the merits. For purposes of this Judgment I do not intend to deal with what was raised as a defence on the merits, as I consider the preliminary objection raised by Appellants to be dispositive of the appeal. Appellants raised the issue of non-joinder, and argued that on that basis a declaratory order was incompetent. Firstly, Appellants objected to the non-joinder of the third party, A & I Enterprise (Pty) Ltd, which was alleged to be currently in occupation of the premises, having entered into a lease agreement with 1st Appellant. Appellants contended that the

Respondent was fully aware that the premises had been let to this entity which was operating the filling station and other business units on the premises. A copy of the lease agreement between 1st Appellant and A & I Enterprise (Pty) Ltd was annexed to the Answering Affidavit.

[8] Secondly, Appellants objected to the non-joinder of Total Energies, the fuel supplier, obligated to supply fuel in terms of the *"fuel supply agreement"* which 1st Appellant was being compelled to deliver.

[9] The Court *a quo* dismissed the preliminary objection of non-joinder. The Court *a quo* at paragraph [17] said the following:

> ***"It is therefore not clear why respondents are challenging the applicant for a non-joinder of a third party when the applicant states clearly that he believes that the 2nd Respondent holds the licence and is operating in the premises. The Applicant has cited the 2nd Respondent whom it believes is operating the filling station. Applicant did not assert that there was a third party operating the filling station thereby giving the need for it to cite this third party. This point has no basis therefore in law."***

[10] The Court *a quo* did not deal with non-joinder of the fuel supplier.

[11] In my assessment the Court *a quo* misdirected itself by dismissing the preliminary objection on the ground(s) that it did. Appellant positively stated that there was a third party who was in occupation of the premises and against whom the eviction order would operate. Details of the third party were fully disclosed to Respondent and the Court. The eviction order sought by Respondent could not have been implemented without affecting the rights, which had not been determined to be non-existent, of the third party in occupation of the premises. Clearly, there were two competing lease agreements – one, in favour of the third party who was already in occupation of the premises and conducting business thereon; and the other in favour of Respondent. All the parties had a right to contest and advocate for their respective lease agreements. By directing that Respondent ***"ought therefore to take occupation of the leased premises"*** the Court *a quo* effectively evicted the third party. Evicting the third party already in occupation effectively meant that its lease agreement was invalid. In my view, this could not be lawfully done without affording the third party an opportunity to be heard. The third party had a direct and substantial interest in the outcome of the proceedings – it stood to be ejected from the premises.

[12] **Herbstein and Van Winsen "The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Edition 2009)** at page 1442 aptly state the requirement for joining interested parties in declaratory proceedings as follows:

> ***"It follows that the interested parties against whom or in whose favour the declaration will operate must be identifiable and must have had an opportunity of being heard in the matter. Inherent in the concept of a right is the idea that it resides in a determinate person and the persons interested in a right are those in whom it inheres against when it avails. All interested persons should be joined in an application for a declaration of rights. A declaratory cannot affect the rights of persons who were not parties to the proceedings."***

[13] *In casu*, it goes without saying that the declaratory order was wrongly made in the absence of an interested party; a party who had the right to be heard and against whom the eviction order was to be effected. In these circumstances the Court *a quo* was duty bound to direct that the third party in occupation of the premises be joined as a party, alternatively, notice of the proceedings be given to it. The Court *a quo* had no discretion. It could not simply disregard the interests of the third party when its attention had

been expressly drawn to the existence of the lease and details of the lessee furnished. In those circumstances, therefore, it was not correct for the Court to conclude that there was no merit in the objection because Respondent had not asserted that there was a third party operating the filling station.

[14] Although not much has been said about the fuel supply agreement my understanding is that for Total Energies to supply fuel to the filling station there must be an underlying agreement. Total Energies cannot be compelled to supply fuel in the absence of an agreement. To that extent Total Energies has an interest as to who eventually fuel must be supplied to. On this basis I find it prudent that they must be given notice of the proceedings.

[15] In the circumstances, this matter ought to be heard afresh, and dealt with by a different Judge as Her Lady M. DLAMINI J. has already dealt with it and expressed her opinion. Costs will follow the cause.

[16] In light of the foregoing the appeal is upheld, and the following Order is hereby issued:

1. The Appeal is upheld.

2. The matter is remitted to the High Court to be dealt with by a different Judge.
3. A & I Enterprise (Pty) Ltd, the occupant and lessee of the business premises situate on Farm 769 Croydon, Manzini, is hereby joined as a party to the proceedings; and shall be entitled to file its Answering Affidavit, if any, within a period of fourteen (14) days from the date of service of this Order;
4. Notice of these proceedings shall be given to Total Energies, by service of the Notice of Motion, who will be entitled to oppose the application if they so wish; and
5. The Respondent is to bear the costs of this Appeal.

M.J. MANZINI

ACTING JUSTICE OF APPEAL

I agree

M.D. MAMBA

JUSTICE OF APPEAL

I agree

P.P.

J.M. VAN DER WALT

JUSTICE OF APPEAL

For the 1st and 2nd Appellants: MR. MAGAGULA (SITHOLE MAGAGULA ATTORNEYS)

For the Respondent: MR. PHAKATHI (PHAKATHI JELE ATTORNEYS)