IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 85/2022**

In the matter between:

IOANNIS CALIVITIS **1st Appellant**

DELPORT WILLEM JOSEPH **2nd Appellant**

And

JACQUES VAN DER HEEVER **1ST Respondent**

Q'S SWAZILAND (PYT) LTD **2nd Respondent**

Neutral Citation: Ioannis Calivitis and Another vs Jacques Van Der Heever and Another (85/2022) [2023] SZSC 41 *(12/10/2023)*

Coram: **R.J. CLOETE AJA;**
M.J. MANZINI AJA; AND
L.M. SIMELANE AJA.

Date Heard: 4th May, 2023.

Date Delivered: 12th October, 2023.

SUMMARY : *Civil Procedure – Urgent Application – Respondent raised two points in limine – Being lack of urgency and approaching the Court with unclean hands – Both points in limine were upheld and the application was dismissed in its entirety – The question of law for determination is whether it was correct to dismiss the application in its entirety on the basis of the points in limine.*

Held: *That the Court a quo erred in dismissing the application in its entirety on the basis of the two points in limine – Appeal upheld with costs.*

JUDGMENT

L.M. SIMELANE, JA:

INTRODUCTION

[1] This is an appeal against the judgment of the Court *a quo* delivered by J. Magagula J. on the 21st October 2022. The Appellants had made an urgent application in the Court *a quo* seeking an order directing the 1st Respondent

to comply with the majority shareholders' resolution of the 2nd Respondent dated 14th June 2022 and 19th September 2022

[2] The Court *a quo* dismissed the urgent application in its entirety with costs on the basis of lack of urgency and the doctrine of unclean hands. The Respondents were dissatisfied with the judgment of the Court *a quo*. They filed an appeal to this Court.

THE PARTIES

[3] The Applicants in the Court *a quo* are the Appellants in this Court and the Respondents in the Court *a quo* are also the Respondents in this Court.

BACK GROUND FACTS

[4] The Appellants and the 1st Respondent are Directors and shareholders in the company Q'S Swaziland (Pty) Ltd which is the 2nd Respondent in this matter. The 2nd Respondent is a Eswatini company having its principal place of business in Manzini. It is operating a lottery business and it operates various gaming outlets in Eswatini.

[5] From the year 2019 the relationship between the Appellants and the 1st Respondent deteriorated. The 1st Respondent failed to attend meetings of directors and shareholders of the 2nd Respondent. The strained relationship between the parties adversely affected the business operations of the

company. As a result of the strained relationship between the parties, there was no co-operation in running the business. That resulted in some outlets being closed down. The efforts that were made by the Directors and shareholders to meet and resolve their differences failed. The 1st Respondent did not attend the company meetings even after having been duly given notices of the meetings.

[6] The 1st Respondent was invited to two meetings which were held by the shareholders of the 2nd Respondent to discuss the issue of the taxes that were owed by the company to Eswatini Revenue Authority (ERA). The company had received a statement from ERA showing that it was owing taxes in the amount of E8 million. The meetings were held on the 14th June 2022 and 19th September 2022. The 1st Respondent did not attend both meetings. The Board of Directors and shareholders passed resolutions in both meetings. The resolutions were communicated to the 1st Respondent and he did not comply with them. In view of the attitude of the 1st Respondent the Appellants were compelled to approach the Court *a quo* to enforce compliance with the company resolutions.

PROCEEDINGS IN THE COURT *A QUO*

[7] On the 26th September 2022 the Appellants instituted motion proceedings on urgent basis in the Court *a quo* seeking the following relief-

"1. *Directing the 1st Respondent to comply with the majority shareholders' resolutions dated the 14th June 2022 and 19th September 2022, respectively, taken by the Applicants.*

"2. *An order that the resolutions be executed to all the gaming outlets belonging and/or affiliated to the 2nd Respondent;*

3. *Costs of suit in the event of unsuccessful opposition;*

4. *Further and/or alternative relief."*

[8] In their application before the Court *a quo* the Appellants sought an order compelling the 1st Respondent to comply with the majority shareholders' resolutions dated 14th June 2022 and 19th September 2022. In his founding affidavit the 1st Appellant alleged that he discovered that the 2nd Respondent was owing taxes of more than eight million Emalangeni (E8 000 000.00) for the period dating back from 2012. Notices and agendas for a meeting of Directors and shareholders were issued. He stated that the purpose of the meeting was to devise strategies for paying the taxes owed to Eswatini Revenue Authority. The 1st Appellant stated that the 1st Respondent was not co-operative and he did not attend the shareholders meeting. Resolutions were passed in his absence.

[9] The 1st Appellant further stated in his affidavit that another invitation and an agenda for the meeting of the shareholders of the 2nd Respondent was issued. The second meeting was set for the 19th September 2022. The 1st Appellant did not attend the second meeting. He instructed his attorneys to object to the

meeting. However, the meeting proceeded in the 1st Respondent's absence and resolutions were passed in that meeting.

[10] The 1st Appellant stated that it was resolved that the 2nd Respondent should enter into immediate negotiations with Eswatini Revenue Authority on how the company intended to settle the owed taxes. It was further resolved that to avoid liquidation of the company, all the profits generated from its lotto outlets were to be used to pay the Eswatini Revenue Authority. The 1st Appellant further stated that the shareholders resolved to appoint an accountant who was to manage and control all profits of the company. The accountant was to utilize the profits of the company to pay all the operational expenses. The balance of the profits that would remain after payment of the expenses were to pay the outstanding taxes due to Eswatini Revenue Authority. The shareholders further resolved that their resolutions be registered as an order of Court. It was further resolved that an application be made to the High Court on urgent basis seeking an order to compel the 1st Respondent to comply with the resolutions of the majority shareholders to avoid the company from being closed down. The 1st Appellant annexed to his affidavit the invitations to the meetings, and the resolutions taken in those meetings.

[11] The 1st Appellant also stated in his affidavit that the matter was urgent because the company was at risk of being liquidated because it was failing to meet its financial obligations, especially its failure to pay the gaming taxes due to Eswatini Revenue Authority which were in the region of eight million

Emalangeni (E8 million). He further stated that the outstanding gaming taxes were accumulating interest on daily basis.

[12] The 1st Appellant in his affidavit also sought an order for costs against the 1st Respondent in the event he opposed the application. He contended that there was no justification for opposing their application. The 1st Respondent was invited to the shareholders meeting and he elected not to attend.

[13] The 2nd Appellant filed a confirmatory affidavit to the founding affidavit of the 1st Appellant. He confirmed the allegations contained in the 1st Appellant's affidavit.

[14] The Application that was launched by the Appellants in the Court *a quo* was opposed by the Respondents. The 1st Respondent filed an answering affidavit in which he raised two points in *limine*. The first point was that the Appellants had approached the Court *a quo* with unclean hands. They had not complied with a Court order which was granted on the 15th March 2019. He stated that the Appellants were interdicted from removing slots machines from the work stations in Siteki, Matsapha, Nhlangano, Hlathikhulu, Piggs Peak and Simunye pending finalization of Court proceedings under High Court case No. 280 and 281/2019. In flagrant disregard of that Court order, the Appellants removed the slots machines. The 1st Respondent contended that the Appellants were abusing the Court process.

[15] The second point was that the application was not urgent. The 1st Respondent contended that the urgency was self-created. He stated that the ground of urgency was that the 2nd Respondent was owing gaming taxes to Eswatini Revenue Authority exceeding the sum of E8 million dating back from the year 2012. The 1st Respondent referred to a judgment of this Court under case No. 66/2021 which was authority on the issue of payment taxes by lottery companies. The 1st Respondent's submission was that in terms of that judgment, lottery companies like the 2nd Respondent are not liable to pay taxes to Eswatini Revenue Authority. They only pay levies to the Eswatini Government. On the basis of the two points in *limine,* the 1st Respondent prayed that the application be dismissed with costs at punitive scale.

[16] On the merits of the allegations made in the founding affidavit, the 1st Respondent stated that he cannot deal with issues that are pending in Court in other matters between the same parties. He stated that the issue of the enforceability and effectiveness of the agreement of sale was dealt with by the Court *a quo* under case 808/2019. On the issue of the resolution removing him as a Director of the 2nd Respondent, he stated that he approached the Court *a quo* to challenge his unlawful removal. He said the matter was pending in the Court *a quo* under case No. 773/2022.

[17] Regarding his failure to attend the shareholders' meetings, the 1st Respondent stated that he could not attend those meetings because the Appellants had failed to fulfill their obligations as shareholders. He further stated that his attorneys wrote two letters explaining that he was not going to attend the

shareholders meetings. Regarding the resolution that was taken by the shareholders that dealt with the issue of how the outstanding taxes in the sum of E8 million were going to be paid to Eswatini Revenue Authority, the 1st Respondent stated in his affidavit that it was based on ignorance of the law. The Court *a quo* was not going to endorse such a resolution. In his answering affidavit, the 1st Respondent annexed the Court order that was issued by the Court *a quo* on the 15th March 2019. It is the Court order that was alleged to have been violated by the Appellants. The 1st Respondent also annexed two judgments of the Court *a quo* in other matters between the same parties, and correspondence exchanged between their attorneys.

[18] After being served with the answering affidavit, the 1st Appellant filed a replying affidavit. In his replying affidavit, he maintained that their application was urgent. He stated that Eswatini Revenue Authority was going to liquidate the 2nd Respondent at any time for the E8 million in respect of taxes owed by the 2nd respondent. In regard to the cited judgment of this Court which dealt with the issue of payment of taxes by lottery companies and gaming companies, the 1st Appellant stated that the statement from Eswatini Revenue Authority was issued after the judgment had been delivered. In regard to the contention that they had approached the Court *a quo* with unclean hands, the 1st Appellant submitted that the Court order alleged to have been violated was issued after the machines had been removed from the premises. He stated that the machines were removed and the shops were surrendered back to the Landlords because the 2nd Respondent was owing rentals for the premises.

[19] In response to the 1st Respondents contention that the resolutions passed by the majority shareholders were not going to be endorsed by the Court because they were premised on ignorance of the law, the 1st Appellant submitted that the resolutions were legally binding because they were passed by the majority shareholders. The 1st Respondent was a minority shareholder. The 1st Appellant further stated that the 1st Respondent did not attend the shareholders' meeting because his sole intention was to frustrate the business operations of the 2nd Respondent. He did not want to co-operate with the other shareholders. On the issue of the pending litigation between the parties, the 1st Appellant contended that their application had nothing to do with the other matters because they deal with different legal issues.

[20] The application made by the Appellants was heard before the Court *a quo* on the 21st October 2022. On the date of the hearing, only the two points in *limine* were argued. After hearing arguments from both sides the Court *a quo* made an *ex-tempore* ruling. It upheld the points in *limine* and dismissed the entire application with costs. The Court a quo issued the following order-

> *"15 For the foregoing reasons the following order is made:*
>
> *15.1 The points raised in limine are upheld.*
>
> *15.2 The application is dismissed.*
>
> *15.3 Costs are awarded to the Respondents."*

[21] The Appellants being dissatisfied with the order of the Court *a quo* filed a notice of appeal. The Appellants' grounds of appeal are as follows-

"The Doctrine of Bringing matters to finality

1. The Court erred in fact and in law in failing to bring the matters between the parties to finality.

1.1 It is common cause between the parties that there had been endless litigation between the parties on the same subject matter and there are matters pending in the High Court.

1.2 The dismissal of the application by the Court has exacerbated the endless litigation between the parties as the Court ought to have dealt with the issues between the parties holistically.

The Doctrine of Unclean Hands

2. The Court erred in fact and in law in holding that the Appellants had approached the Court with unclean hands in that they failed to comply with the interim Court Order issued by Justice N. Maseko of the 15th March 2019.

2.1 There are pending contempt of Court proceedings before the High Court under case No. 280 & 281/2019, between

the same parties, arising from the same subject matter, wherein the issue of unclean hands will be dealt with.

Urgency

3. *The Court erred in fact and in law by failing to consider the fact that the company is running the risk of getting liquidated due to failure to meet its financial obligations and that fact rendered the matter urgent.*

   3.1 *The 1st Respondent is frustrating the business operations of the company and that had incapacitated it to meet its financial obligations. The 1st Respondent is deliberately frustrating the resolutions taken by the company. Hence, the company cannot operate without the execution of the resolutions.*

   3.2 *It is trite that when an urgent application is dismissed on the basis of urgency, the matter will take its normal course. Failing which the right to be heard of the Appellants will be affected.*

Failure to consider the Merits of the Matter

4. *The Court erred in fact and in law in dismissing the application solely on points of law raised and failed to consider the merits of the matter.*

4.1 It is in the best interest of justice that the Court should consider the merits of the case and adjudicate on the matter holistically.

The Relief Sought

5. In the circumstances, the Appellants seek an order in the following terms-

5.1 The appeal should be allowed.

5.2 The dismissal of the application in the High Court of Eswatini under Case No. 1845/2022 is hereby set aside with costs.

[22] **APPELLANTS' HEADS OF ARGUMENTS**

Mr. Mabuza on behalf of the Appellants argued that the Court *a quo* erred in law and in fact to hold that the Appellants had approached the Court with unclean hands. He argued that the doctrine of unclean hands was not applicable in this matter because the contempt proceedings against the Appellants were pending in another Court under High Court Case No. 280 and 281/2019. Mr. Mabuza submitted that the alleged contemptuous conduct of the Appellants was still to be determined by another Court. He further argued that by bringing the application in the Court *a quo*, the Appellants did not in any way impede the wheels of justice and did not taint the fountains of justice. In support of the arguments for the Appellants, Mr. Mabuza cited the following cases; **Muzi P. Simelane vs The Chief Justice of Eswatini & Two**

Others 1508/20 [2020] SZHC 221, The Attorney General vs Ray Gwebu & Another – High Court Case **No. 3699/02** and **Siboniso Clement Dlamini vs The Chief Justice of Swaziland & Two Others** High Court Case **No. 1148/2019.**

[23] Mr. Mabuza further argued that the Court *a quo* erred in law and in fact to dismiss the entire application on the basis of lack of urgency. He submitted that after making a finding that the matter was not urgent, the Court *a quo* should have directed that the matter be heard as a normal application. In support of his argument he relied on the Case of **Nedbank (Swaziland) Limited vs Kenneth G. Ngcamphalala & Another** Supreme Court **No. (08/13) [2013] SZSC 57.** In the case of **Nedbank (Swaziland) Limited** the following cases were cited with approval; **Commissioner, SARS vs Hawker Air Services (Pty)Ltd 2006 (4) SA 292 (SCA), South Africa: South Gauteng High Court Johannesburg 2012 [2012] AGPJHC 165 and Lema Meubel Vervaandiger (Edms). Bak vs Makin (4/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W).**

[24] It was further contended on behalf of the Appellants that the Court *a quo* erred by not considering the merits of the matter. Mr. Mabuza submitted that its failure to consider the merits of the matter resulted in miscarriage of justice. He submitted that the Court *a quo* in upholding the technical objections raised by the Respondents, prevented the attainment of justice on the real merits of the matter. He argued that the upholding of technical objections resulted in unnecessary delays and additional costs of litigation. Mr. Mabuza submitted

that the Court *a quo* should have proceeded to consider the merits of the matter. In support of his argument he cited the case; **Shell Oil Swaziland (Pty)Ltd vs Motor World (Pty)Ltd t/a Sir Motors (23 of 2006) [2006] SZSC (21 June 2006).**

RESPONDENTS'ARGUMENTS

[25] Mr. Khumalo on behalf of the Respondents argued that it was not necessary to go to the merits of the matter because the points in *limine* that were upheld by the Court *a quo* had a bearing on the merits of the matter. He argued that when the Court *a quo* considered the points in *limine* it also dealt with the merits of the matter. He submitted that when the Court *a quo* made a finding that the 2nd Respondent was not liable to pay taxes following the judgment of the Supreme Court in the matter of **Swaziland Lottery Trust (Pty), Ltd vs Swaziland Revenue Authority (Civil 65/2021) [2022] SZCH (13 May 2022)** it dealt with the merits of the matter. The matter could not be urgent because there was no income tax that was due and payable to Eswatini Revenue Authority. Mr. Khumalo contended that the Learned Judge in the Court *a quo* addressed the merits of the matter while considering the point of law on urgency. He submitted that the basis of the application was that the 2nd Respondent was indebted to Eswatini Revenue Authority in the sum of E8 million in respect of income tax. In support of his argument he cited the following cases; **Suid Afrikaanse Atoom Energie Korporasie vs De Jough [2006] JOL 17402 t and BHP Billiton PLC Inc and Another vs De Lange & Others (189/2012 [2013] 2 All SA 523 (SCA) (15 March 2013).**

[26] It was further argued on behalf of the Respondents that the Court *a quo* correctly dismissed the application on the basis that there was no urgency in the matter. Mr. Khumalo submitted that the Learned Judge in the Court *a quo* held that the matter was not urgent because there was no income tax due and payable to Eswatini Revenue Authority, as the Appellants had alleged. There

was also no demand for payment of taxes that had been made by Eswatini Revenue Authority to the 2nd Respondent. Eswatini Revenue Authority had only issued a statement. He submitted that the 2nd Respondent was not in danger of being closed down or liquidated. In support of his argument Mr. Khumalo relied on the judgment in the case of **Fredrick Mapanzene vs Standard Bank Swaziland Limited**. **Civil Appeal Case 741/2016 [2017] 15 May 2017**. Mr. Khumalo argued that in the matter of **Fredrick Mapanzene** the application was dismissed in its entirety on the basis of lack of urgency.

[27] Mr. Khumalo further argued that the Court *a quo* correctly dismissed the application on the basis of the doctrine of unclean hands. He submitted that the Appellants had no *locus standi* to approach the Court because they violated a Court order. He argued that it was not in dispute that an interim order was issued by His Lordship Maseko J. on the 15th March 2019. The interim Court order still stands because it was never discharged. In support of his argument, he referred to two judgments of this Court which dealt with doctrine of unclean hands. He referred to the judgments of **Muzi P. Simelane vs The Chief Justice of Eswatini & Two Others** (*Supra*) and **Siboniso Dlamini vs the Chief Justice of Swaziland and two Others** *(Supra)*. Mr. Khumalo submitted that in the two cases he referred us to, this Court held that a person who is in contempt of an order of Court cannot seek to drink from the pure fountains of justice until such time his contempt has been purged. Mr. Khumalo then prayed that the judgment of the Court *a quo* be upheld and the appeal be dismissed with costs.

CONSIDERATION OF THE ARGUMENTS MADE: URGENCY

[28] The Court *a quo* dismissed the application on the basis of lack of urgency. The Appellants failed to establish in the Court *a quo* that the 2nd Respondent was under a threat of being closed down because it was owing taxes to Eswatini Revenue Authority in the sum of E8 million. There was no evidence that Eswatini Revenue Authority had made demand for payment of the sum

of E8 million or any amount. The Court *a quo* further held that following the judgment of this Court in the matter of **Swaziland Lottery Trust (Pty) Ltd vs Swaziland Revenue Authority** (*Supra*), the Appellants had failed to establish that the 2nd Respondent was in the first place liable to pay the income tax to Eswatini Revenue Authority.

[29] I am unable to fault the findings and conclusion reached by the Court *a quo* on the issue of urgency. The Court *a quo* correctly found that the application launched by the Appellants in the Court *a quo* was not urgent. The arguments made in Court, show that the Appellants are not challenging the finding of the Court *a quo* that the matter was not urgent.

[30] The Appellants contended that the Court *a quo* erred when dismissing the entire application on the basis of lack of urgency. Mr. Mabuza argued that the Court *a quo* should have directed that the matter be enrolled in the normal course as an ordinary application.

[31] I fully agree with the Appellants' argument that the Court *a quo* erred in dismissing the entire application on the basis of lack of urgency. The Court *a quo* ought to have directed that the application be enrolled in the normal course as a normal application. The Court *a quo* erred in dismissing the entire application before hearing its merits. It is trite procedure that once the Court upholds a point in *limine,* lack of urgency, it then directs that the matter be enrolled in the normal course to be heard on its merits. Reference is made to the judgment in the matter of **Nedbank (Swaziland) Limited vs Kenneth G. Ngcamphalala** (*Supra*). His Lordship Ebrahim J.A. held as follows-

> "*Assuming the decision that the matter was not urgent was correct, the Learned Judge's course should simply have been to dismiss the application to hear the matter on an urgent basis, to make no decision as to the merits, and to direct that the matter be enrolled in the normal course. It would have been up to the Appellant to decide how to*

proceed. As Cameron JA pointed out in ***Commissioner, SARS v Hawker Air Service (Pty) Ltd 2006 (4) SA 292 (SCA),*** *urgency is the reason which may justify deviation from the time and forms that the rules prescribe. It relates to form, not substance. If a matter is not urgent, the Court declines to hear it. The Applicant can then set the matter down in the normal manner. See also* ***South Africa: South Gauteng High Court Johannesburg 2012 [2012] AGPJHC 165*** *and in particular paragraph 18 where the Learned Judge observed-*

[18] Urgency is a matter of degree. See ***Luna Meubel Vervaardiger (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W).*** *Some applicants who abused the Court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondents to file affidavit should in my view similarly be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved."*

[32] In the case of **Nedbank Swaziland Limited vs Kenneth G. Ngcamphalala** (Supra) the Court *a quo* dismissed an application in its entirety on the basis that it was not urgent. On appeal decision of the Court *a quo* was reversed. The Supreme Court held that the Court *a quo* should have directed that the matter be enrolled in the normal course as a normal application.

[33] Mr. Khumalo on behalf of the Respondents vigorously argued that the Court *a quo* correctly dismissed the application in its entirety because the merits of the matter were also dealt with by the Court *a quo*. He submitted that when the Court *a quo* considered the point in *limine*, the lack of urgency, it also determined the merits of the matter. His argument was that the point in *limine* on urgency had a bearing on the merits of the matter. He submitted that the issue of payment of E8 million had a bearing on the merits of the matter. The

Court *a quo* determined the urgency and the merits of the application when it held that there was no income tax due and payable from the 2nd Respondent. In support of his argument, Mr. Khumalo relied on the judgment of **Fredrick Mapanzane vs Standard Bank Limited** (Supra). He argued that in the matter of **Fredrick Mapanzane** the Respondent raised lack of urgency as a point in *limine*. The Court *a quo* upheld the point in *limine* and dismissed the application in its entirety. Relying on that judgment, Mr. Khumalo argued that in *casu* the Court *a quo* correctly dismissed the entire application on the basis of lack of urgency.

[34] I have carefully read the judgment in the **Frederic Mapanzene** matter. I am of the view that the Respondents' argument is untenable because of the following reasons-

34.1 In the Court *a quo* the Appellants made an application for an order directing the 1st Respondent to comply with the majority shareholders' resolution dated 14th June 2022 and 19th September 2022. The Appellants further sought an order that the resolutions be executed at all gaming outlets belonging or affiliated to the 2nd Respondent. At page 17 of the Record, paragraph [18] of the 1st Appellant's founding affidavit, he stated as follows-

"The purpose of this application is that the resolutions passed in the absence of the 1st Respondent be enforced and the latter be ordered to comply……."

When the application was argued in the Court *a quo*, the merits of the matter were not dealt with. There is nothing in the judgment of the Court a quo which shows that the issue of compliance with the resolutions of the majority shareholders was considered and determined. The judgment of the Court *a quo* shows that it confined itself to the points in *limine* raised by the Respondents. The issue of the income tax in the sum of E8

million due to Eswatini Revenue Authority was addressed by the Court *a quo* when it considered the basis for the urgency. The fact that the Court *a quo* found that there was no income tax due and payable to Eswatini Revenue Authority was not a determination of the legal question whether or not the 1st Respondent had to comply with the majority shareholders' resolutions. In the circumstances, the issue of compliance with the majority shareholders resolution was not dealt with by the Court *a quo*. Therefore, the merits of the matter were not argued and determined.

34.2 The judgment in the case of **Frederic Mapanzene** is distinguishable from the set of facts in *casu*. In the case of **Frederic Mapanzene** the Court *a quo* dealt with the merits of the matter. The Applicant in the case of **Frederic Mapanzene** made an urgent application seeking an order for stay of a sale in execution of an immovable property pending determination of whether or not the property could be sold at its market value which was E2.5 million. In the alternative, the Applicant sought an order that the immovable property be sold at a market value fixed by an evaluator agreed between the parties. The Respondent in that matter raised a point in *limine* being lack of urgency and further addressed the merits of the matter in the answering affidavit. When the matter was argued, both the point in *limine* and the merits of the matter were addressed. When the judgment was delivered it dealt with the point in *limine* and the merits of the matter. The point in *limine* on urgency was upheld. The merits of the application were also considered and determined. The application was then dismissed in its entirety. In the judgment in the case of **Frederic Mapanzene** matter the merits were considered and determined, while in the present matter the Court *a quo* did not consider and determine the merits.

[35] For the foregoing reasons, I entirely agree with the Appellants' argument that the Court *a quo* erred in dismissing the entire application on the basis of lack of urgency. The correct procedure that has to be followed by the Court after making a finding that an application is not urgent was clearly stated in the case of **Nedbank (Swaziland) Limited vs Kenneth G. Ngcamphalala** (*Supra*) and in the other cases cited in that judgment. It is trite procedure that in such circumstances the Court should issue an order directing that the matter be enrolled in the normal course to be heard on its merits. In *casu* the Court *a quo* should have directed that the matter be enrolled in the normal course for arguments on the merits.

DOCTRINE OF UNCLEAN HANDS

[36] Mr. Khumalo on behalf of the Respondents argued that the Court *a quo* correctly held that the Appellant had no *locus standi* to approach the Court because they were in breach of an interim order which was issued by Maseko J. on the 15th March 2019. He argued that the Court order still stands because it was never discharged. He further submitted that a litigant who is in contempt of an order of Court cannot seek to drink from the pure fountains of justice until such time the contempt has been purged.

[37] On the other hand Mr. Mabuza on behalf of the Appellants argued that the Court *a quo* erred in holding that the Appellants approached the Court with unclean hands. He submitted that the doctrine of unclean hands was not applicable in *casu* because the contempt proceedings in relation to that Court order that was in issue were still pending in another Court under High Court Case No. 280 and 281/2019.

THE POSITION OF THE LAW ON THE DOCTRINE OF UNCLEAN HANDS-

[38] According to Court judgments and Learned authors, it is now well settled that there are certain requirements that should be satisfied for the doctrine of clean hands to be applied. The requirements that have to satisfied are summarized as follows-

38.1 A Court order must have been granted against the Respondent.

38.2 A Court order must have been served upon the Respondent or he must have been informed of the grant of the order.

38.3 The Respondent must have disobeyed the Court order or neglected to comply with it.

38.4 The disobedience of the Court should be such that as long as it continues; it impedes the course of justice by making it difficult for the Court to ascertain the truth or to enforce it.

[39] In this matter, it is not in dispute that a rule *nisi* was issued on the 15th March 2019 calling upon the 1st Appellant herein to show cause why he should not be interdicted from removing gaming machines from certain gaming shops listed in the Court order. It is also not in dispute that the 1st Appellant removed the gaming machines from the gaming shops listed in the Court order. Apparently, there is a dispute of fact as to whether the machines were removed after or before the *rule nisi* had been issued. After the Court *a quo* had made a finding that a Court order had been issued and the Appellants had not complied with it, it came to a conclusion that the doctrine of unclean hands was applicable. The Court *a quo* upheld the point in *limine* and dismissed the application.

[40] The legal issue for determination is whether or not the doctrine of unclean hands was correctly applied by the Court *a quo* in *casu*. It is my considered view that the doctrine of unclean hands was not correctly applied by the Court

a quo in the given set of facts. My reasons for coming to that conclusion are as follows-

40.1 There is nothing in the record of the proceedings in the Court *a quo* which shows that the rule *nisi* was still valid and had full force and effect when the Appellants instituted the application on the 26th September 2022. The Court record shows that a *rule nisi* with interim effect was issued on the 15th March 2019 and returnable on the 22nd March 2019. There is no evidence that the rule was confirmed on the return day. There is also no evidence that the rule was extended. During arguments before this Court, Counsel for both sides were asked as to what happened to the *rule nisi* on the return date. They both said they do not know what happened to the *rule nisi* on the return date. It is common course that a *rule nisi* lapses if it is not confirmed or extended on the return date. In the absence of evidence on the Court record that the *rule nisi* was confirmed or extended on the return date, I have come to the conclusion that it lapsed. For that reason alone, the doctrine of unclean hands was not applicable in this matter because the *rule nisi* had lapsed.

40.2 It was argued on behalf of the Appellants that the contempt of Court proceedings arising from non-compliance with the rule *nisi* were still pending before another Court under case No.280 and 281/2019. Since the Appellants had not yet been found guilty of contempt of Court for disregarding the rule *nisi* issued on the 15th March 2019, the Court *a quo* erred in holding that the doctrine of unclean hands was applicable in this matter.

Herbstein & Van Vinsen – The Civil Practice of the Courts of South Africa (5th Edition) Vol. 2 at page 1112 stated the position of the law as follows;

"The Court is inclined to exercise its discretion in favour of hearing a party alleged to be in contempt if the contempt is still in issue and has not yet been established."

My view is that even if the rule *nisi* had been confirmed, the Court *a quo* should have dismissed the point in *limine* because the contempt proceedings were still pending in another Court. It had not yet been established that the Appellants were in contempt of Court. In the case of **Muzi P. Simelane** *(Supra)* and the case of **Siboniso Clement Dlamini** (*Supra*) the contempt proceedings had been finalized and the litigants were found guilty of contempt of Court. The doctrine of unclean hands was therefore applicable.

40.3 The Respondents in the Court *a quo* failed to establish that the Appellants' disobedience of the Court order was such that as long as it continued it impeded the course of justice. The judgment of the Court *a quo* does not show that an enquiry was made as to whether or not the appellants' disobedience of the *rule nisi* impeded the course of justice. When reading the impugned judgment, it sufficed that a Court order had been issued and the Appellants had not complied with it for doctrine of unclean hands to be applied.

The learned author – **Herbstein & Van Winsen** (Supra) at page 1111 stated the position of the law as follows-

"The Court could refuse to hear a person who had disobeyed an order of Court until he had purged the contempt. The fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to being heard, but if the disobedience is such that, for as long as it continues, it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce its orders, the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not first be removed."

Lord Denning when dealing with a similar issue in the case of **Hadkinson vs Hadkinson (1952) 2 ALL ER 371** at 574 held as follows-

> *"It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which the Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing a compliance".*

My view is that the doctrine of unclean hands is not applicable in instances where it has not been established that the disobedience of the Court order, as long as it continues, impedes the course of justice. A mere disobedience of the Court order is not itself a bar to being heard under the doctrine of unclean hands. For the disobedience of the Court order to be a bar to being heard it has to be established that as long as it continues it impedes the course of justice and there are no other means of securing a compliance.

[41] For the above reasons, I have come to the conclusion that the Court *a quo* erred in upholding the point in *limine* on the doctrine of unclean hands. The Court *a quo* also erred in dismissing the application in its entirety on the basis of lack of urgency. The following order is hereby issued-

41.1 The appeal is allowed.

41.2 The matter is referred back to the Court *a quo* to hear the merits of the application in the normal course.

41.3 The Respondents are ordered to pay costs of the appeal at ordinary scale.

L.M SIMELANE

ACTING JUSTICE OF APPEAL

I agree

R.J. CLOETE

ACTING JUSTICE OF APPEAL

I agree

M.J. MANZINI

ACTING JUSTICE OF APPEAL

For the Appellant: MR S. MABUZA FROM MTSHALI NGAMPHALALA ATTORNEYS

For the Respondent: MR M. KHUMALO FROM KHUMALO ATTORNEY