

THE HIGH COURT OF SWAZILAND

ESIYALWINI (PTY) LTD

Applicant

And

THAMSANQA HUBERT LUKHELE T/A

ESIYALWINI BOTTLE STORE

Respondent

Civil Case No. 1908/2003

Coram S.B. MAPHALALA - J

For the Applicant MISS L.S. MASANGO

For the Respondent MR. D. MAZIBUKO

JUDGMENT

(05/12/2003)

Before court is an application for ejection of the Respondent forthwith from the premises described as Certain ERF 95 situate in Ngwane Street, Manzini, district of Manzini.

Founding the application is an affidavit of one Sarah Jane Thomson who is described as an adult female attorney conducting business as such with the firm of attorneys Kemp Thompson Inc. based at New Mall, Mbabane, district of Hhohho.

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Various affidavits are filed in support thereto. A general power of attorney is filed as annexure "EPL1". A Deed of Lease establishing the causa in this matter is also filed of record.

The Respondent opposes the application and has filed an answering affidavit of the Respondent himself.

In turn the Applicant has filed a replying affidavit of the deponent in the founding affidavit in reply to the Respondent's answering affidavit.

The Respondent in his answering affidavit has raised a point of law in limine which is the subject matter of this judgment. The point is worded in this way:

"The application by Esiyalwini (Pty) Ltd (Applicant) is fatally defective in that the affidavit supporting it is deposed by the legal representative instead of Director or Member of the Applicant. The evidence of the legal representative is hearsay and therefore it (sic) inadmissible in this matter".

Three points were advanced in support of the point of law in limine raised by the Respondent. The first point is that the mandate given to Kemp Thompson Inc. by

Meyer Diamond applies only to Meyer Diamond and not the Plaintiff. Secondly, it was argued for the Respondent that if the court finds that the mandate aforementioned applies to the Plaintiff as well as the Respondent states that the mandate given to Kemp Thompson or Sarah Jane Thompson is that only of an agent or attorney. Sarah Jane Thompson therefore has no authority to depose to an affidavit or give evidence which should be deposed to by Plaintiffs Director. In this regard the! court was referred to the authorities of Herb stein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ED (1997) at page 368 and also that of Gibson, South African Merchantile and Company Law, 7th ED at page 208.

The third argument is that Sarah Jane Thompson in her capacity as attorney for

Plaintiff and therefore relying on instructions given by Plaintiff cannot depose on oath the contents of that instruction. The contents of that instruction is hearsay. An affidavit based on hearsay is defective and therefore inadmissible.

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The arguments in defence of this attack by the Respondent in limine are; firstly, that the deponent signed the affidavit as an agent of her principal who is ah artificial person. The argument here is that an artificial person act through their duly appointed agents. Secondly, the Applicant countered that the deponent is authorised to deal in any manner in the matter before court by virtue of a Power of Attorney granted to her by Applicant company's director. A verifying affidavit by one who has knowledge of the facts in respect of which the deponent does not have first knowledge has been annexed to the founding affidavit.

Thirdly, it is contended even if the statements of information i and belief by the deponent are disregarded, there is still sufficient material on the basis of which the order sought could be granted. In this regard the court was referred to the authority of

Raulstone No. vs Radebe 1955 (4) S.A. 418 (N).

I must state that the Applicant's attorney seemed to concede the point that the contents of the instruction might be hearsay, however argued in her Heads of Argument that the Director of the Applicant company could take the witness stand and testify - if called upon to do so.

It appears to me that Mr. Mazibuko for the Respondent is correction all fronts. The mandate in the Power of Attorney annexed marked "EPL1" is given i to Kemp Thompson Inc by Meyer Diamond and it applies only to Meyer Diamond and not the Plaintiff. This fact appears ex facie annexure "EPL1". The mandate given to Kemp Thompson or Sarah Jane Thompson is that only of an agent or attorney. Sarah Jane Thompson therefore has no authority to depose to an affidavit or give evidence which affidavit should be deposed to by the Plaintiff's Director.

Further the affidavit itself is peppered with hearsay evidence. Examples of this are

found in paragraphs 8, 21, 22 of the founding affidavit. It is trite law that an affidavit based on hearsay evidence is defective and therefore inadmissible.

The suggestion by the Applicant that it be allowed to give viva voce evidence is unacceptable. According to the authors Herbstein (supra) at page 366 an Applicant

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must stand or fall by his founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the Respondent is called upon either to affirm or deny. (see also *Pountas' Trustee vs Lahanas* 1924 WLD 67 at 68).

For the afore-going reasons I find that the point of law in limine is good in law and as a result the application is dismissed with costs.

S.B. MAPHALALA

JUDGE