IN THE HIGH COURT OF SWAZILAND

Civil Case No. 490/2007

MFANA WENDLELA RAPHAEL MKHABELA **Applicant**

And

MESHACK SHONGWE **1st Respondent**

MELUSI QWANE **2nd Respondent**

In Re:

MESHACK SHONGWE **Applicant**

And

RAPHAEL MKHABELA **Ist Respondent**

NKOSINATHI MVUBU **2nd Respondent**

Coram S.B. MAPHALALA - J

For the Applicant For MR. O. NDZIMA MR. T.

the Respondents MOFOKENG

JUDGMENT 7th

December 2007

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[1] This is an application filed under a Certificate of Urgency for the variation and/or rescission of an order by this court in favour of the 1st Respondent. The initial application, where present Applicant was Respondent, was brought to this court as an *ex parte* application, wherein a rule *nisi* was issued returnable on a certain date. On the return date, there were no opposing papers, and therefore the rule *nisi* was confirmed. In essence, the order which is sought to be rescinded in this application was granted in the absence of the Applicant.

[2] The Applicants grounds for relief are that the court erred in granting the order sought because:

> **(a) Dispensing with the usual forms and procedures relating service, time limits and allowing the matter to be heard as one of urgency;**
>
> **(b) Condoning Applicant's non-compliance with the Rules of this Honourable Court;**
>
> **(c) That the final court order with the Registrar's stamp dated 26th February 2007, be and is hereby stayed pending finalization of this matter.**

[3] The Respondent in his Answering affidavit has raised a number of points of law *in limine* as follows:

4.1 **In approaching the court more in particular to set the order aside and on an urgent basis, the Applicant brazenly states that the 2nd Respondent has attached and will sell the motor vehicle which does not belong to him and will not have any other remedy save for the present application and this it is submitted for the Respondent is not only false but constitutes objectively a breach of good faith.**

4.2 **In the circumstances the court following the decision of Nathan CJ in the Photo Agencies case should hold that by its own creation the Applicant is not entitled to seek or to be granted**

[4] I shall proceed to address the above cited points *in limine* as they appear *ad seriatim* thusly:

1. The doctrine of clean hands.

[5] According to the Respondents the 1st Respondent brought an application to this court seeking certain interim relief from the present Applicant and another (2nd Respondent in the main application) which relief included *inter alia,* a declaratory and an interdict restraining the two from (i) collecting rentals from the "disputed" land and not to enter the aforesaid land. Such interim order was granted and later confirmed as a final order by this court after being satisfied that the then Respondents were aware of the matter after being well aware of the order, chose not to abide by it but now comes to the very court whose order it brazenly defies and seeks to be heard.

[6] In this regard the court was referred to the South African case in the matter of *Zuurbevom Ltd vs Union Corporation Ltd 1947 (1) S.A. 514 (A)* at page *535 — 536* where the court stated the following *dictum:* "So that a person should not by reason of subtley of the civil law, and contrary to the dictates of natural justice, derive advantage from his own bad faith".

[7Further at page 536 of the above-cited decision it stated as follows:

> "Not only where the Plaintiff by taking legal proceedings acting maliciously, but also wherever, as it was said *"ipsa res in se dolum habet"* i.e. whenever, the raising of the action constituted objectively a breach of good faith".

[8] The Respondents have further relied in the *dictum* of this court in the Civil Case of *Photo Agencies (Pty) Ltd vs Commissioner of Police 1970 - 76 S.L.R 398* where Nathan CJ (as he then was) stated the following:

> **"In the present case the Applicant brazenly admits that it used a false address in Swaziland in order to overcome and circumvent the resolutions of the Security Council. By doing so it has become enmeshed in the web of deceit of its own creation. But it appears to me that in these circumstances the Applicant is not entitled to seek or be granted, relief by a Swazi court, (my emphasis).**

[9] According to the Respondent in *casu* to the supplementary affidavit of Michael T. Mngadi clearly demonstrates the deceit of the Applicant in that it states that the motor vehicle alleged by the Applicant to belong to (Mngadi) actually does not belong to him. In approaching the court more in particular to set aside and on urgent basis, the Applicant brazenly states that the 2nd Respondent has attached and will sell the motor vehicle which does not belong to him and will not have any other remedy save for the present application and this it is submitted for the Respondent is not only false but constitutes objectively a breach of good faith. In the circumstances the court following the decision of Nathan CJ in the Photo **Agencies** case should hold that by its own creation the Applicant is not entitled to seek or to be granted relief by this court.

[10] Counsel for the Respondents has taken the court through the affidavits filed of record to show that Applicant has brazenly defied the court order in that from a reading of the Applicant's own papers, it states that it became aware of the order against it on the 26th March 2007 and thereafter launched

the present proceedings on the 18 April 2007. Some 24 days later. When one looks at this long period of time and being aware that there was an order which barred him from entering his **own** premises and not to collect his rentals from those premises he chose to wait such a long time to pursue the matter.

[11] The Respondent further relied in the authorities in the Appeal Court case of *Lindiphi W. Ntshangase and 3 others vs Prince Tfohlongwane and 2 others, Culverwell vs Beira 1992 (4) S.A. 490* at *493 D 494.* The court was further referred to the South African case of *Holtz vs Douglas and Associates and another 1991 (2) S.A. 797 (O)* at *802C* to the proposition that civil contempt is defied simply as the "intentional refusal of failure to comply with the order of contempt order (in translation). The court was further referred to the local decision in *Bertram Stewart vs Thuli Makama and others — Civil case No. 4050/2006 (unreported).*

[12] The Applicant on the other hand has advanced *au contraire* arguments to the above stating simply that the Respondents arguments in this regard cannot be sustained on the facts of the matter.

[13] It would appear to me after hearing the arguments of the parties and the affidavits filed of record that this point raised by the Respondent ought to succeed. Clearly on the facts presented the Applicant has acted in brazen contempt of the order of this court such that he ought not to be heard until he purges such contempt.

[14] In view of what I have stated above in paragraph [13] *supra* I have come to the considered view that the application ought to be dismissed on this ground until Applicant purges his contempt. I shall not address the other arguments as a result. The Applicant to further pay wasted costs.

S.B. MAPHALALA

JUDGE