IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 4347/05**

In the matter between :

PLAZA PARK (PTY) LTD t/a THE MALL **APPLICANT**

AND

JOHN BONGANI DLAMINI SIFISO **1st RESPONDENT**

MASEKO LUCKY MASANGO **2nd RESPONDENT**

BONGANI MAGAGULA **3rd RESPONDENT**

4th RESPONDENT

CORAM **MAMBA J**

FOR APPLICANT FOR **ADV. M. VAN DERWALT**

RESPONDENTS **MR B.S. DLAMINI**

JUDGEMENT

18th DECEMBER, 2009

[1] This matter originally came by way of application whereby the Applicant sought an order inter alia interdicting and restraining the respondents "from entering the private property of the applicant

namely The Mall and the New Mall Shopping Centres in Mbabane and also interdicting and restraining the respondents "from interfering with the tenants of The Mall and The New Mall, its customers and the general public at The Mall and The New Mall."

[2] Both Shopping Centres are situate on Lot 2202, Extension 1, Mbabane Township and comprise various business premises which are let or leased out by the Applicant to various trading entities or businesses. According to the Applicant, it "is charged with the general administration of the centres and to ensure inter alia that its tenants, their customers and the general members of the public are secured and in a position to shop in relative safety without any interference."

[3] The Mall Spar Supermarket and Steers Fast Food Restaurant are some of the Applicant's tenants on the property concerned.

[4] The application is based on the following allegations by the Applicant, namely

"13.1 **AT THE MALL SPAR**

(a) They enter into The Mall Spar Supermarket and abuse members of staff claiming inter alia that they are employed by "oppressors";

(b) They load a trolley with various goods and after having lined up to pay at the till, upon taking their turn they simply leave the trolley at the till and walk out of the shop or insist on paying with five (5) cents coins. This causes an inconvenience not only to other customers and shoppers at the store but results in members of staff having to unpack those trolleys and re-pack the goods back on the shelves;

13.1.3 They often walk into the supermarket eating peanuts and throw the shells on the floor purposely so that somebody else has to pick up after them;

(c) At the fruit and vegetable department, they take boxes of waste in particular cabbage leaves and leave them at the front entrance to the store;

(d) At the hot deli department, they insist on tasting the perishable food before purchasing it. When the staff refuse this, they then accuse members of staff of being racist;

(e) At the food counter, they order cooked food and request chillies on/with the food. Once the food has been served, they simply leave it on the counter without having paid for it;

(f) They unlawfully enter the accounts/administration office and insist on speaking to the payroll officer to give her instructions on personal matters pertaining to the 1st and 2nd Respondent;

(g) On one occasion, the 1st and 2nd Respondents flatly refused to leave the store manager's office after repeated requests to do so. They allege that they are Swazis living in Swaziland and could do whatever they wanted to do and go wherever they wanted to go;

3.1.9 All the above incidents as occurred on The Mall Spar premises were reported to me as the Administrator of the Applicant.

13.2 **AT STEERS FAST FOOD RESTAURANT**

13.2.1 They sit at the tables reserved for customers of Steers and refuse to move but at the same time they do not order any food from the Steers Fast Food;

13.2.2 They abuse members of staff at Steers and intimidate customers generally through their conduct.

13.3 **AT THE MALL AND NEW MALL GENERALLY**

(h) They generally walk around the shopping centres in a rowdy fashion designed to intimidate tenants and in particular members of the public who have come to the said centres to shop. They have no intention to purchase any goods from the Applicant's tenants;

(i) They abuse their right of admission to the centres and refuse to leave when requested to do so;

(j) They interfere with the guards contracted by the Applicant to carry out their duties.

(k) The Respondents simply refuse to respect the rights of other shoppers at the centres and when confronted about their rowdy behaviour and intimidatory tactics by the security guards, the Respondents in the most discourteous and humiliating fashion ridicule the security guards and state that should the security guards touch them in any manner whatsoever, they would lodge charges of assault and grievous bodily harm against VIP security guard personnel;

(l) The Respondents in particular the 1st and 2nd Respondents insist on entering the Spar Supermarket to such an extent on the 8th of November 2005, the 2nd Respondent assaulted one Sabelo

> Shongwe a guard employed by VIP Security Services which is contracted by the Applicant to guard centres, was assaulted by the 2nd Respondent in his bit to gain entry into the supermarket."

[5] Save for the second Respondent, the Respondents are former employees of The Mall Spar and were dismissed from their employ in October, 2005 and at the time of filing this application, the issue pertaining to the lawfulness or otherwise of their dismissal was still pending before the appropriate authorities i.e. the Conciliation Mediation and Arbitration Commission (CMAC).

[6] Following the acts complained of, the Applicant without discussing the issue with the Respondents, issued an order banning them form entering the premises. This order was given to the VIP Security guards who were on the premises and they were instructed to relay it to the Respondents and also enforce it. These instructions were indeed carried out by the said guards.

[7] The Respondents refused to obey or comply with the ban, alleging that they were not guilty of the charges against them and that the ban had no justification whatsoever as it was not an order of a court of law, they were not obliged to comply therewith. The respondents have, in substance, stated that they are legitimate or genuine shoppers at the premises. The first Respondent also stated that he is a trade union officer of the Commercial and Allied Workers Union, whose members include workers of the Mall Spar and Steers. Besides his shopping, he goes to the premises to consult with these workers, outside their working hours. He argues that his ban or exclusion from the premises is an attempt by the management of The Mall Spar to curb his trade union activities with regards to these workers.

[8] After hearing arguments on the application, the court granted the an interim interdict pending finalisation of this matter.

> "The matter [was] referred for the hearing of oral evidence ...to resolve
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> (m) the locus standi of the Applicant;

(n) the issues between the parties with regard to the facts."

[9] I point out from the outset that I heard evidence from a total of nine witnesses on the disputed factual issues; five on behalf of the Applicant and four on behalf of the Respondents. Counsel informed me that the issue of the locus standi of the Applicant was no longer in issue. By this I understood Counsel to be saying that the Respondents were satisfied and conceding that the Applicant had the requisite locus standi to move this application. That concession therefore gets that issue out of the way.

[10] In order to succeed in its application for a final interdict, the Applicant must allege and prove on a preponderance of probabilities the following three things, namely;

(o) a clear right,

(p) an invasion or interference or a reasonable apprehension of interference with that right and that,

(q) there is no other satisfactory remedy available to the applicant. The leading case in this regard is that of **SETLOGELO v SETLOGELO 1914 A.D. 221** at p.227 where INNES CJ stated the position as follows:

> "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. Now the right of the applicant is perfectly clear. He is a possessor; he is in actual possession of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession. ...It was urged that in any event no irreparable injury had been sustained. That was not the ground upon which the Learned Judge based his refusal: but in any event it is not a ground which can avail the respondent in this case. The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading of the well known passage in van der Linden's Institutes where the enumerates the essentials for such an application. The first he says is a clear right; the second is injury. But he does not say where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party."

This exposition of the law has been consistently restated in inter alia the

following cases:

APLENTI v MINISTER OF LAW AND ORDER AND OTHERS, 1989 (1) SA 195 (A), FOURIE v OLIVIER en 'n ANDER, 1971 (3) SA 274, MINISTER OF LAW AND ORDER, BOPHUTHATSWANA AND ANOTHER v COMMITTEE OF THE CHURCH SUMMIT OF BOPHUTHASWANA AND OTHERS, 1994 (3) SA 89 (BGD), FREESTATE GOLD AREAS LTD v MERRIESPRUIT (ORANGE FREE STATE) GOLD MINING CO LTD AND ANOTHER, 1961 (2) SA 505.

See also **CB PREST, THE LAW AND PRACTICE OF INTERDICTS (JUTA, 1996) AT 42-46.**

In the **MERRIESPRUIT** case (supra) at 515 the court stated that:

> "It remains in my view still the clearest statement of what an applicant with a clear right must establish to obtain an interdict. Since 1914 there have been many judicial decisions and dicta in our courts on the subject of interdicts and when they should and should not be granted. But in my view the validity of this statement as a correct summary of the position of a person who establishes that he has a clear right has never been questioned."

[11] I now examine the evidence presented herein. In doing so I shall deal with each alleged incident of nuisance or interference with the Applicant's rights of ownership in turn.

[12] **Abuse of staff members and customers at Steers Restaurant.**

This allegation is contained in the affidavit of Colin Foster and has been disputed by the Respondents. It is, I think, one of the disputes of fact that was referred to oral evidence. The Applicant has led no evidence in an attempt to prove it. Mr Foster was not one of the witnesses called by the Applicant. He was, at the relevant time not an employee of Steers Restaurant and it does not appear to me that he has first hand information or knowledge of these allegations. One would have expected that an employee of the Restaurant or one of its customers would have been called to testify on these allegations. No such evidence has been led. These allegations have consequently not been established by the

applicant.

[13] **The rowdy and intimidating behaviour at the two Malls.**

Apart from the admitted confrontation or altercation the respondent had with the security guards, the applicant has led no evidence on this allegation either. The incidents involving the security guards though occurred after a decision had been reached by the applicant to exclude the Respondents from the Malls. It cannot therefore be a reason for their exclusion or ban. Again, apart from the altercation referred to above, all the witnesses led in evidence by the Applicant testified on events which occurred at the Spar. I am of course not unmindful of the fact that Bongani Dlamini (PW4) and Sabelo Zwane (PW5) both stated that the Respondents were generally noisy whenever they were at the Mall. This evidence again, in particular that of Zwane, pertains to the Spar where Zwane was posted as a security guard. The rowdy or noisy behaviour is expressed in such general and is unspecified, either in its content or in its direction or target. I do not think that a court would be entitled to conclude or find in such unspecified generalisation that the respondents have acted in violation of the applicant's reasonable enjoyment of its rights over its property or (let alone) that such unspecified acts were intimidating or disruptive and interfered with the rights of the general public at the two Malls. To say the Respondents' actions were rowdy, intimidatory and disruptive is not to state a fact but a conclusion. The court is entitled to know the facts upon which that conclusion is based, for it to make its own finding or judgement. For practical purposes based on our diverse personalities and cultural differences and or preferences or sensitivities, a court ought to be slow to characterise or declare acts described in such loose and general terms as in this case, as nuisance deserving of censure.

[14] The Respondents' reaction to or public spat with the security guards was, perhaps to be expected. The Applicant unilaterally issued an order banning them from the premises without first calling them and informing them of the complaint against them. The Respondents were being banned or prevented from entering licensed premises in a city. Some of them had been previously employed on some of the businesses there and had free

and unfettered access therein. Such a right of access to such premises can not, in my view, be taken away or whittled down/away on the whims and caprices of the owner of such premises. By converting its private property into a Mall with shops that are licensed to sell to the public at large, the applicant is and should be deemed to have surrendered some of its rights as owner of the property and cannot treat it as its private dwelling or home. It can not act capriciously and exclude some members of the public from entering such property. Whilst this court can not condone the actions of the Respondents in fighting back and resisting the actions of the security guards who were bent on barring them from entering the property, this court is not satisfied that respondents' reaction constituted an interference with the applicant's reasonable enjoyment of its rights as owner of the property in question. The said reaction was a response resisting an arbitrary act that adversely affected the respondents.

[15] **The dropping of peanut shells on the floor at the Spar.**

The Spar appears to be the epicentre of the differences between the parties herein. I am in no way suggesting that the Spar was the

cause of these troubles; only that the acts complained of occurred there.

Mr William de Koker testified that the Respondents for a period of about two months in 2005, would come into the shop eating peanuts and would drop the peanut shells on the floor as they meandered about. He referred to the respondents as a group rather than as separate individuals but when he was asked under cross-examination if he had actually seen the dropping of the shells he said he had seen the first Respondent and one Sifiso Masuku, do so and laughing in the process. He had instructed his staff to pick up the peanut shells from the floor. PW4, Bongani Dlamini put a slightly different gloss to this. He testified that the 1st Respondent and Sifiso Masuku came into the shop eating peanuts and after passing one of the tills, the packet of peanuts dropped or fell from Sifiso's hands and Sifiso did not retrieve it from the floor. PW1 (Mr de Koker) did so. The

evidence of Sabelo Zwane (PW 5) did not clarify this piece of evidence either. He referred to the Respondents just in general terms and was not specific on any particular individual. Although apparently suggesting that the peanut shells were dropped on the floor on more than one occasion, under cross examination, he stated that he actually witnessed this only once and the cleaner at the shop had done the cleaning after Zwane had showed this to his supervisor (PW4). Mr Zwane was a Security guard posted at the shop. He did not testify about a packet containing peanut shells falling (accidentally) onto the floor, as suggested by his supervisor. The three Respondents denied ever doing this.

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[16] From the above evidence, I am unable to say that the Applicant has produced the required evidence to satisfy me, on a balance of probability that the respondents, jointly or severally, did deliberately dirty or trash the Mall Spar with peanut shells as alleged. The other issue of course is the uncertainty as to who, if any, amongst the respondents did this. PW4 says the packet of peanut shells fell from Sifiso Masuku's hands whilst he was in the company of 1st Respondent. There is neither allegation nor evidence to prove that Sifiso did this intentionally and that the 1st Respondent was acting in the furtherance of a common or shared purpose with him. (Mr Masuku is of course not a party in these proceedings). Again, if the incident under consideration occurred just once then one would require further evidence to establish that there is a reasonable apprehension that it will be repeated and thus an interdict should be put in place to prevent its re-occurrence. No such evidence has been presented before court. An interdict is not a remedy to address past events but to stop and prevent present and future infringements. (See **PHILIP MORRIS INC. AND ANOTHER v MARLBORO SHIRT CO. SA LTD AND ANOTHER, 1991 (2) SA 720 (A).**

[17] **The non-payment for food ordered from the Hot Delicatessen (Hot Deli).**

As in the other incidents discussed above, the evidence has not been specific either on dates or what each individual respondent did. Like lions, we are told, they hunted in or as a pack. In substance, the applicant alleges that the respondents would go to the Hot Deli, order prepared food, have it spiced according to their instructions, take it to the Hot Deli testified that the respondents would order food and leave it there. To the contrary, the food would be removed from there and the alleged non payment or offer of E0.05 would be at the tills. The evidence points to the fact that, everyday, food ordered from the Hot Deli is found abandoned and unpaid for in the shop.

[19] **Misconduct at the Fruit and Vegetable section.**

Other than what is stated by Mr Foster that;

> "At the fruit and vegetable department, they take boxes of waste in particular cabbage leaves and leave them at the front entrance to the store,"

no evidence was led before me on this issue. The allegation has not been established or proven.

[20] **Harassing staff in the accounts office.**

PW1, Mr de Koker's testimony is that he got a complaint from the accounts office that the respondents were harassing them. On confronting the respondents about this, the respondents told him that as Swazis they had the right to be anywhere in Swaziland. No one from the accounts office testified about his, except Mary Quaynor, a former employee of the Spar, who informed the court that she had been asked by PW1 and Mr Foster to fabricate evidence of harassment against the respondents. She had declined to do so. She was called as a witness for the respondents. Mr de Koker on the other hand whilst admitting that this witness worked in the accounts office, denied that he had asked her to fabricate evidence against the respondents. Instead, Mr de Koker testified that she had made the complaint to him. Mr Foster did not testify.

[21] The respondents denied harassing the said staff. In particular the

1st respondent stated that he was being barred from the premises because as a trade union officer, he was recruiting workers at the various shops on the property and this was seen as a threat by the applicant. This tallies with the testimony of Mary Quaynor, who testified that the first respondent had only come to her office for her to process the payroll forms for the unionised workers. The applicant only retorted that her evidence was a fabrication because she had since been fired by the Spar.

[22] From the above evidence, I am unable to say that the allegations of harassment have been proven.

[23] In the result, the applicant has failed to prove any of the alleged acts of interference. I have, for purposes of this judgement and particularly because the challenge on the locus standi of the applicant was withdrawn or not persisted in by the respondents, assumed that the applicant has the necessary locus standi and further that it had, as owner of the premises in question, established the necessary right to apply for a final or absolute interdict. The application is dismissed with-costs.

MAMBA J