



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1986/12

In the matter between:

NGWANE TREATED TIMBERS (PTY) LTD

Appellant

and

MPE TIMBERS SWAZILAND (PTY) LTD

1ST Respondent

TIMBER MAGNET (PTY) LTD

2ND Respondent

Neutral citation: *Ngwane Treated Timbers (Pty) Ltd vs MPE Timbers Swaziland (Pty) Ltd & Another (1986/12) SZHC 264 [21 December 2012]*

Coram: **MAPHALALA PJ**

Heard: **DECEMBER 2012**

Delivered: **21 DECEMBER 2012**

Summary: The Applicant fails to allege possession on an Application for a *mandament van spolie*. Therefore the Application is dismissed on the points *in limine* raised by the Respondent with costs.

The Application

[1] Served before court is an Application under a Certificate of Urgency for an order in the following terms:

- “1. Dispensing with the normal time limits and forms of service as provided for by Rules of this Honourable Court and hearing this matter as one of urgency.
2. Calling upon the Respondent to show cause if any on a date and time to be fixed by this Honourable Court why;
 - 2.1 Second Respondent should not restore forthwith to the Applicant her business forcefully and unlawfully dispossessed by 2nd Respondent.
 - 2.2 The Deed of Sale entered and concluded by first and second Respondents dated 1st October 2012 is and hereby set-aside as *void ab initio*.
 - 2.3 Interdicting and restraining the Respondents and all its agents from operating at Applicants business premises in terms of the Notice.
3. That paragraphs 2.1, 2.2, and 2.3 above operates as an interim order with immediate effect pending the return date.
4. Costs of the Application.

5. Such and/or further alternative relief as the Honourable Court deems just.”

[2] The above orders are founded on the affidavit of one Mr. Robert Nhlabatsi who is the Managing Director of Applicant where he has related at some length the background facts in this dispute between the parties. In the said founding affidavit pertinent annexures are also filed thereto.

[3] The Respondents oppose the granting of the above orders mentioned in paragraph [1] (supra) and has filed an answering affidavit of one Mr. Brian Cope who is a Director and Shareholder of the 1st Respondent where he has set out the Respondents’ opposition. In the said affidavit he has raised points *in limine* as well as the merits of the dispute.

The points *in limine*.

[4] The points *in limine* are addressed at paragraph [5] of the 1st Respondent’s affidavit as follows:

“5.1 The Applicant has failed to comply with the provisions of Rule 6(25) (a) and (b) of the Rules of this Court and for this reason; the Honourable Court should decline to enroll this matter as one of urgency.

5.2 There is an inherent dispute of fact in these proceedings which render motion proceedings incompetent. On this basis, the Honourable Court should dismiss the Application for the reason that the dispute of fact ought to have been foreseen by the Applicant.

5.3 There has been a non-joinder of an entity known as POPCRU and yet from the Applicant's own averments, this entity has a substantial and direct interest in the proceedings before court. The non-joinder is material and on this basis, the Application should fail.

The arguments.

[5] In arguments before me I heard submissions from the attorney in both the point *in limine* and the merits of the dispute. I shall very briefly outline the arguments of the parties. I must also mention that the attorneys also filed very comprehensive Heads of Arguments for which I am grateful.

(i) For the Applicant.

[6] On the point of law of urgency it is the Applicant's argument that the matter is urgent and cited the legal authority of *LTC Harms, Almer's Precedents of Pleading 317 (2003)* to the proposition that relief by way of *mandament van spolie* is not claimed in action proceedings because of the urgency of these matters. That the Applicant alludes to this position in his founding affidavit. Moreover the dispossession of the business amounts to financial and/or economic harm on Applicant. That it is now accepted that in certain

circumstances such as this one which involves the taking of law into our hands financial matters do invite a sense and degree of urgency.

[7] The Applicant further cited the legal authority of *Erasmus, Supreme Court Practice (31-55) 2009* on this aspect of the matter.

[8] At paragraph 10 of the Heads of Arguments of the attorney for the Applicant the point *in limine* regarding dispute of fact is addressed.

[9] On the third point *in limine* that of non-joinder the Applicant contends that for a party to be joined in any proceedings such party has to have a direct and substantial interest which is the subject matter of the litigation, not merely interest which is an indirect interest. For this proposition cited the authority of *Harms (supra)*. That *in casu* the party has no direct and substantial interest.

[10] On the merits of the case the basis of the Applicant's case is that a litigant who launches spoliation proceedings need not be an owner of the property. To support this proposition cited to cases of *Thulani Matsebula/Alfred Mndzebele & Another - High*

Court Case No.211/2005 and that of *Thoko Ivy Mkhabela/Bonginkosi Mkhabela* – Supreme Court Case No.28/2007 at paragraph 7.

[11] The attorney for the Plaintiff argued at length that *in casu* the Applicant has proved all the requirements for the granting of *mandament van spolie* in paragraph 3, 4 & 5 of the attorney's Heads of Arguments.

(ii) Respondent's arguments.

[12] The attorney for the Respondent also filed very comprehensive Heads of Arguments for which I am grateful.

[13] On point *in limine* of urgency the attorney for the Respondent has outlined his arguments at paragraph 3, 4, 5, 6, 7, 8 of his Heads of Arguments citing cases of *Megalith Holdings vs RMS Tibiyo* – High Court Case No.199/2000 and that of *Plastic International Limited t/a Swazi Plastic Industries vs Markus Zbinden* – High Court Case No.4364/2010.

[14] At paragraph 13, 14, 15 & 16 dealt with the point *in limine* that of disputes of facts citing the case of *Kingdom Dlamini vs Bowring and Minet Swaziland & Timit of Room Hire (Pty)*

Ltd vs Jeppe Street Mansions (Pty) Ltd 1949(3) SA and that of *Plascon Evans Paints vs van Reebeck Paints 1984(3) SA 633*.

[15] On the merits of the case the 1st Respondent advanced various arguments in paragraph 17, 18, 19, 20, 21, 22, 23, 24 & 25 of the 1st Respondents Heads of Arguments. At paragraph 25 thereof contends the following:

“25. Stripped down to its core, the Applicant seeks to have the court intervene in a commercial dispute, where the Applicant has failed to comply with its obligations in terms of a commercial transaction and now seeks to use the courts to achieve its objective. The commercial reality of this transaction, is that the first Respondent sought and obtains an investment partner for the business, as it was entitled to.

That investment partner has now come on board and all that the Applicant is required to do is apply business principles and determine whether it wishes to continue with the present arrangement or bail out and seek payment of the amounts due to it. It is submitted that this is a commercial transaction and the court should not intervene in such circumstances.”

The court analysis and conclusion thereof.

[16] Having considered all the arguments of the parties and the affidavits filed of record I am inclined to agree with the submissions of the Respondent on both the points *in limine*

and the merits of the matter. I shall deal first with the three points *in limine* in brief and then the merits of the case.

[17] Firstly, on the issue of urgency in my assessment of the averments in the founding affidavit the Applicant does not set out sufficient averments to warrant this court to invoke the urgency procedures. On the facts of this matter of Applicant contends that on or about 15 October, 2012, it was disposed of its business and premises through the unlawful ejection of its Managing Director. In my view, the Applicant has not demonstrated why it waited from the 15th October 2012 to date before instituting the present Application. I agree *in toto* with the Respondent's arguments advanced in paragraph 11 thereof. I find that the *ratio* in the High Court case of *Plastic International Limited t/a Swazi Plastic Industries vs Markus Zbinden High Court Case No.4363/2010* apposite.

[18] Secondly, I also agree with the submissions of the Respondent that there are disputes of fact in this matter. The following material disputes of fact appear on the Applicant's own version:

“14.1 That the Applicant acquired the first Respondent's business through oral agreement on a date not stipulated but some where in 2008, they say

they commenced operation and yet in the same affidavit, it contends that in 2012 it was on the verge of acquiring the first Respondent's business.

14.2 The Applicant states that it was in possession of the business, and yet contends that the first Respondent was on the verge of selling the business to the second Respondent. How can the second Respondent sell a business belonging to the Applicant?

14.3 The Applicant states that it is the second Respondent that has disposed it of the business through what are termed to be boorish and ruthless actions or forcing out the Applicant's managing director. No detail is provided as to how this was effected or who on behalf of the second Respondent carried out this activity.

14.4 The Applicant contends that it has been operating the business for a period of five years from 2008 but, does establish the legal basis upon which it has been operating this business.

14.5 The Respondents in their affidavit have raised a number of disputes of fact, and in particular deny that the Applicant was in possession of the business or that it was despoiled. The first Respondent contends that it is the owner of the business."

[19] Thirdly, I also agree with the third point *in limine* that of non-joinder. In this respect I agree with the submissions of law advanced by the attorney for the Respondents in this regard.

[20] On the above reasons the Application ought to fail forthwith. However, I wish to address briefly the merits of the case *obiter dictum*. The Applicant in its founding papers does not say that it is the owner, purchaser or in control but that it has made an investment in the business. In this regard I agree *in toto* with the submissions of the Respondent as stated in paragraph [15] of this judgment.

[21] Finally, I also agree with the ratio in the case of *Engling & Another vs Bosiclo & Others 1994(2) SA 388 (B6) TMT* it applies to the facts of the present case.

[22] In the result, for the foregoing reasons the Application is dismissed on the points *in limine* with costs.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For Plaintiff : Mr. Dlamini

For Respondent : Mr. Z. Jele