



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 858/16

In the matter between:

**THE SWAZILAND DEVELOPMENT AND
SAVINGS BANK**

Applicant

And

SWAZI AUCTIONERS (PTY) LTD

1st Respondent

MARCHALL CAMPEL (PTY) LTD

2nd Respondent

MALTOCK ESTATES (PTY) LTD

3rd Respondent

PIRCADIE ESTATES (PTY) LTD

5th Respondent

DUMISA RANCHING COMPANY (PTY) LTD AND

SIX OTHERS

6th Respondent

Neutral citation: *The Swaziland Development and Savings Bank vs Swazi Auctioneers (Pty) Ltd and Ten Others (858/16) 2016 [SZHC]115 (15th July, 2016)*

Coram: **MAPHALALA PJ**

Heard: **22nd June, 2016**

Delivered: **15th July, 2016**

For Applicant: Mr. M. Magagula
(from Magagula & Hlophe Attorneys)

For Respondent Advocate J.M. van der Walt
(instructed by L.R. Mamba's Associates)

Summary: Civil Procedure – Applicant a major creditor in the estate of *Dumisa Dlamini* – to protect the ***concurensus creditorium*** therein – the Respondents has advanced a numbers of points ***in limine*** of ***locus standi*** of the Applicant and others – court finds against the ***points in limine*** and rule that parties proceed to the merits of the dispute – cost to be costs in the merits of the dispute.

JUDGMENT

(on points *in limine*)

The Application

[1] On the 17th June, 2016 the Applicant being the Swaziland Development and Savings Bank filed an Urgent Application against the Respondents interdicting the sale of certain properties belonging to the 2nd and 4th Respondent by the 1st and 6th Respondent, without the approval of the shareholders of the 2.1, 3.1 and 4th Respondent and the Master of the High Court for the following relief:

- 1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**
- 2. Condoning Applicant's non-compliance with the Rules and Procedures and time limits relating to institution of proceedings.**

3. Pending finalization of this application, the 1st Respondent be and is hereby interdicted and restrained from selling the properties mentioned below being:

3.1 Portion 69 and 76 of Farm No. 161, situate in the Lubombo District and measuring 160 hectares (Marshall Campbell);

3.2 Portion 12 (a portion of portion 9) of Farm Pircadie No. 457, Lubombo District, measuring 101.2089 hectares (Matlock Estates);

3.3 Portion 9 of Far Pircadie No. 457, Lubombo District Swaziland measuring 31.4644 hectares (Picardies Estates).

At the Auction Sale to be held at Matata Stores, Conference Room, Big Bend at 11:00 a.m. on 12 May 2016.

4. That a *Rule Nisi* do hereby issue calling upon the Respondents to show cause on a date and time set by this Honourable Court why the following Orders should not be made:

4.1 Any sale of the properties referred to in Orders 3.1, 3.2 and 3.3 above is hereby interdicted pending compliance with the necessary statutory requirements and the approval of the sale of the properties by the Shareholders of the 2nd, 3rd and 4th Respondent or the 10th Respondent as the case may be;

4.2 Cost of this application by any party that opposes it on the scale between attorney and client.

5. Such further and alternative relied as the Honourable Court deems fit.

[2] The Application is founded on the affidavit of one Mr. Zakhele Lukhele who is the Managing Director of the Applicant outlining the material facts in support

of the Application. A confirmatory affidavit of one Setsabile Matsebula who is an attorney in this court is filed in support thereto. Further pertinent annexures are filed in support of the averments in the Founding Affidavit of the Managing Director as stated above.

The opposition

- [3] The Directors of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondent have filed opposing affidavits against the averments of the Applicant in the Founding Affidavit. The 6th Respondents have filed an opposing affidavit on behalf of the 2nd to 6th Respondents where a number of points **in limine** are raised. These points were the subject matter of the arguments of the attorneys of the parties on the 22nd June, 2016.
- [4] According to the opposing affidavit of the 6th Respondent the points **in limine** are firstly, that Applicant has no **locus standi**. Secondly, that Applicant has not advanced a cause of action in that it does not allege that the 2nd, 3rd and 4th Respondent are distributing assets to the detriment of the creditors. Thirdly, that Applicant's conduct is abusive where Applicant approached the court **ex parte** resulting in a **rule nisi** to be issued against the Respondents in their absence. Fourthly, that Applicant has not joined a party in these proceedings being the Liquidator. This judgment there is concerned with these points **in limine** raised in argument on of the 22nd June, 2016.
- [5] The Applicant then filed a Replying affidavit in accordance with the Rules of this court.

The background

[6] The facts of the matter are captured in the Founding affidavit of the Applicant where the Managing Director from paragraphs 17 to 22 are outlined and for clarity I shall reproduce these facts in the following paragraphs of this judgment:

17. **The Applicant is a creditor of the Insolvent Estate of the Late Dumisa Mbusi Dlamini (herein referred to as “the Insolvent Estate”) and has proved a claim in the Insolvent Estate for the sum of E13 860.23 (Thirteen Million Eight Hundred and Sixty Thousand Nine Hundred and Five Emalangeneni and Twenty Three Cents) together with interest and costs. The claim is based on Judgment of this Honourable Court dated 19 March 1999. The value of the Applicant’s claim is now estimated to be in excess of the sum of E27 721, 810.46 (Twenty Seven Million Hundred and Twenty One Thousand Eight Hundred and Ten Emalangeneni forty Six Cents).**

18. **When the late Dumisa Dlamini passes way, the Insolvent Estate had not been wound up. To date the Insolvent has not been wound up. This is despite an order of the High Court dated 10 August 2012 directing the Trustees of the Insolvent Estate to wind up the Estate within a period of four (4) months. A copy of the Court Order is attached marked “SBs”.**

19. **The Applicant is in the process of instituting proceedings against the 7th to 9th Respondents to have them removed as Trustees of the Insolvent Estate on the grounds of their failure to wind up the Estate and the dereliction of their duties as Trustees of the Insolvent Estate. The failure to wind up the Estate has resulted in**

the creditors of the insolvent estate and the deceased insolvent's estate being prejudiced.

- 20. The Applicant is the major creditor in the Insolvent Estate of the Late Dumisa Mbusi Dlamini. It has vested interest in the insolvency process. The properties which are the subject of the sale are owned by the 2nd, 3rd and 4th Respondents' in which the late Dumisa Dlamini was a direct and indirect shareholder. This means that no sale of the properties would be valid in the absence of approval of the disposal of the properties by the shareholders of the 2nd, 3rd and 4th Respondents. No such approval has been given.**

- 21. Furthermore, the 10th Respondent's approval is necessary as some of the shares in the 2nd, 3rd and 4th Respondents are part of the Insolvent Estate. Put differently, the shares held by the late Dumisa Dlamini form part of the Insolvent Estate and are administered by the 7th to 9th Respondent with the participation of the Applicant and subject to the supervision of the 10th Respondent.**

- 22. It is important to state that the company that the properties are the sole assets of the 2nd, 3rd and 4th Respondents which are property companies formed for the sole purpose of holding the properties. The sale of the properties is effectively the sale of the companies.**

The Arguments

[7] As I stated above in paragraph [3] of this judgment the attorneys of the parties advanced their arguments on the 22nd June, 2016 where Advocate van der Walt

for the Respondent advanced her arguments and filed detailed Heads of Arguments for which I am grateful. Mr Magagula also advanced arguments for the Applicant and filed Heads of Arguments. I shall in brief outline the salient features of such arguments for one to understand the issues for decision by this court.

(i) The Respondents arguments

- [8] Advocate van der Walt as I have stated above canvassed the three points in **limine** and filed Heads of Arguments. In the said Heads of Arguments commenced with the point of **locus standi** that in the founding papers, Applicant contends that: **“it has a vested interest in the insolvency process”** and that the shares held by the deceased form part of the insolvent estate which is administered by the relevant trustees **“with the participation of the Applicant”**.
- [9] That after the Applicant’s **locus standi** was disputed in the answering papers, the Applicant in its Replying affidavit contended that it **“----- has a direct and substantial interest in the properties that are sought to be disposed of by the respondents and further has interest in the outcome of the instant Application.”**
- [10] Advocate van der Walt contends that the Applicant is not a creditor of, or shareholder in the 2nd to 5th Respondents, nor the deceased a shareholder in the 2nd to 4th Respondents, and as such the Applicant cannot have any legal interest in these Respondents’ properties including **locus standi** to seek **anti dissapatory interdict**, as regards the assets of such a company.

[11] That the shares held by the deceased in the 5th Respondent constitute assets in the insolvent / deceased estate, but same are not being disposed of, alienated, or otherwise transferred, nor is there any indication of any intention to do so, which precludes any relief pertaining to those shares.

[12] In support of the above contentions of the Respondents this court was referred to the South African case of **Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction And Others 2C11 (6) S.A 331 (65...)** at paragraph [12] to the **dictum**:

“[12] The general rule that a person who claims relief from a court must establish an interest in that matter in order to acquire the necessary locus standi to seek relief is well established. The interest, Rabie ACJ pointed out in Cabinet of the Transitional Government for the Territory of South West Africa vs Eins 1988 (3) SA 369 (A) at 388A – 1, with reference to earlier judgments of the Appellate Division, must be direct and not therefore too remote or as it has also been referred to, an actual and existing interest in the matter.”

[13] The essence of the dictum in the above decision is the trite principle of law, that for purposes of **locus standi**, that an Applicant must have a direct interest which should not be remote.

[14] Advocate van der Walt advanced further arguments in paragraphs 10, 10.1, 10.2, 10.3 and 11 of the Heads of Arguments. In paragraph 11 thereof dealt with the operation of the Companies Act of 2005 and in paragraph 11.3 contends the following:

No provision is made in the Companies Act for a creditor to make such an application, and no authorities in support of such locus standi on any

other legal basis, could be found. This renders any interest in an indirect shareholding even more remote, and more removed from the realm of locus standi.

[15] The court was further referred to majority judgment in **Letseng Diamonds Ltd v JC1 And Others 2009 (4) SA 58 (SCA)**. That this Application therefore stand to be summarily dismissed on the ground that Applicant lacks **locus standi**.

[16] The second point **in limine** advanced by the Respondents is that Applicant's conduct is abusive of court process that Applicant elected to obtain its interim order and **rule nisi** on **ex parte** basis after it had failed and / or been unable to effect service on the relevant Respondents. As a consequence, this court did not enjoy the benefit of having the full picture serve before it.

[17] In this regard the court was referred to the High Court case of **Cizer Lopes and Themba H. Tsabedze & Edna Carmichael (62/15) [2015] SZHC 18** to the trite principle that utmost good faith must be observed by litigants making **ex parte** application, and that all material facts must be placed before court.

[18] In tandem with the above arguments Advocate van der Walt also contends that the liquidator in this case has not been joined in these proceedings and therefore this Application ought to be dismissed for lack of non joinder of a party.

[19] The court was further referred to the **dictum** of the South African case of **De Jager vs Heilbrow and Other 1947 (2) SA 419 (w) at E – F per Roper J** to the following:

“It has been laid down, in numerous decisions of our court that the utmost good faith must be observed by litigants making ex parte applications, and that all material facts must be placed before the court. (See in In Re: Leydsdorp and Pietersburg Estates Ltd 1903 TS 254; Crowley 1919 TPD 426). If an order has been made upon an ex parte application, and it appears that material facts have been kept back which might have influenced the decision of the court whether to make the order or not, the court has a discretion to set aside the order on the ground of the non-disclosure (Venter v Van Graan 1929 435; Barclays bank vs Giles 1931 TPD 9; Hillman Bros v Van den Heuvel 1937 WLD 41). It is not necessary that the suppression of the material fact shall have been wilful or male fide.”

[20] Further arguments that are supported by decided cases are advanced by Advocate van der Walt at paragraphs 15, 15.1, 15.2, 15.3, 15.4, 16, 17, 18, 19, 20, 21 to the arguments in paragraph 20 thereof that then it follows that the Applicant is not before this court with “clean hands” and in all circumstances, the **interim** order and the **rule nisi** stands to be discharged with costs of Counsel as certified in accordance with the High Court Rule 6 8(2) on the scale as between attorney and own client, with reference to the abuse of process of this court.

(ii) The Applicant’s arguments

[21] Mr. Magagula for the Applicant advanced arguments for his client and filed two sets of Heads of Arguments being the main Heads followed by Supplementary Heads dealing with the point **in limine** of **locus standi**.

[22] In the said Supplementary Heads of Arguments this court is referred to the High Court case of **Swaziland Development and Savings Bank vs Martinus Jacobus Dewald And Others Case Nos. 2034/2004, 1275/2011 And 1276/2011** to the following dictum:

“Now, locus standi simply means an interest in the subject matter of the action which gives a person the right to bring the action.

The term locus standi denotes legal capacity to institute proceedings in a Court of law and is used interchangeably with terms like “standing or title to sue”. It has also been defines as the right of a party to appear and be heard on a question before any Court or a tribunal. Whether or not a party has locus standi in an action is easily decipherable from the pleadings. For a Plaintiff to be said to have locus standi the facts pleaded must establish his right and obligation in the suit. It is therefore the interest in the subject matter of the action that gives the standing.”

[23] The attorney for the Applicant pointed out that coincidentally, the above case was concerned with an Applicant instituting proceedings as a creditor of the insolvent estate of Dumisa Mbusi Dlamini. The court in that case found that Applicant had **locus standi** as a creditor to institute proceedings for the removal of the Trustees.

[24] Mr Magagula contends that the Applicant as a creditor in the insolvent estate of Dumisa Mbusi Dlamini (the insolvent estate) and has proved a claim in the estate of E13,86,905.23. That the total value of the claim inclusive of interest and costs in the excess of E22,721,810.46 that the insolvent is now deceased.

[25] That the Applicant is a major creditor in the insolvent estate and has a direct and substantial interest in all the assets that are subject to be administered in

terms of the insolvency process. That the shares in the 2nd, 3rd and 4th Respondents are directly or indirectly held by the insolvent are such assets.

[26] That the disposal of the properties requirement shareholders approval. Directors cannot lawfully dispose of the properties which are the only assets of the company. It is the shareholders, as owners of the company who can do this.

[27] **In casu**, so the arguments goes, the Applicant as a major stake holder in the insolvent estate is entitled to protect the assets of the insolvent estate by way of a preservation order. As it looks to those assets for satisfaction of its claim. The Applicant cannot simply fold its arms when the assets it look to for satisfaction or its claim and are sold without the approval of shareholders and the Master of the High Court.

[28] Finally it is contended for the Applicant that the points **in limine** raised by the Respondent ought to fail and the matter to proceed on the merits of the case.

The Court's Analysis and conclusions thereof

[29] Having considered all the affidavits of the parties and the arguments of the attorneys of the parties the first port of call is a determination of the three points **in limine** being firstly, the question of the **locus standi** of the Applicant, secondly the issue of the non joinder of the liquidator and thirdly, the issue of the doctrine of “**clean hands**” that Applicant approached this court **ex parte** and obtain an interim order against the interests of the Respondents in their absence.

[30] The attorneys of the parties appeared before this court on 22nd June, 2016 for arguments and the court ruled that arguments on the point **in limine** be heard and judgment reserved **in limine** and the merits of the dispute to be dealt with on a later date depending on the outcome on the points **in limine**.

[31] I shall proceed to consider these points **in limine** one after the other in the following paragraphs of this judgment.

(a) The issue of locus standi

[32] The essence of the arguments of the Respondents in this regard is that Applicant has no **locus standi** in this case as it is not a creditor of, or shareholder in the 2nd to 5th Respondents nor was the deceased a shareholder in the 2nd to 4th Respondent, and as such the Applicant cannot have any legal interest these Respondents properties including **locus stands** to seek anti-dissapatory or other relief, as regards the assets of such company. That it is trite, for purposes of **locus standi**, that an Applicant must have a **direct interest** which should not be too remote. To support this position has cited the South African case of **Cosira (supra)** in paragraph [11] of page 5 of this judgment.

[33] On the other hand the Applicant contends that it is a major creditor in the insolvent estate and has a direct and substantial interest in all the assets that are subject to be administered in terms of the insolvency process. That the shares in the 2nd, 3rd and 4th Respondent are directly, or indirectly held by the insolvency are such assets.

[34] I have considered all the arguments of the attorneys of the parties to and from and in my view the Applicant has **locus standi** to seek protection of this court as it did. It is without question that the Applicant is a creditor in the insolvent estate of Dumisa Mbusi Dlamini and has prove a claim in the estate in the sum of E13,860,905.23. The total value of the claim inclusive of interest and costs is in excess of E27,721,810.46.

[35] In view of the above facts outlined in paragraph [33] it is without question that Applicant has an **interest** as propounded in the High Court case of **Swaziland Development and Saving Bank vs Martinus Jacobs** cited at paragraph [21] of this judgment.

[36] I disagree with the Respondents contentions that the Plaintiff's interest is too remote but it is substantial interest by any standard as stated in paragraph [33] above. This point of law ought to fail and it so ordered.

(b) Non joinder of a liquidator

[37] Having considered the arguments of the attorneys of the parties as stated earlier on in this judgment I have considered the issue of non joinder of the liquidator may be fatal to the Application. In weighing the interest of justice it would be unjust to dismiss this Application on this point. The Applicant is the major creditor in this liquidation where it has raised an important matter in the interest of all the creditors of estate of Dumisa Dlamini. It is my considered view that the Applicant ought to join the liquidator without any further ado. However, on these facts in line with the **dictum** in **Shell Oil, Swaziland (Pty) Ltd (supra)** it will be unjust for this court to dismiss this Application on his point. Clearly, the Applicant is protecting the **concurensus creditorium** of the whole estate of Dumisa Dlamini.

[38] It can be a chilling proposition to hold that Applicant has no **locus standi** on these facts.

(c) Applicant's conduct abusive of court process

[39] It is contended for the 1st to 6th Respondents by Advocate van der Walt that Applicant elected to obtain its interim order and **rule nisi** on **ex parte** basis after it had failed and / or been unable to effect service on the relevant Respondents as a consequence, this court did not enjoy the benefit of having a full picture before it. In this regard this court was referred to the High Court case of **Cizer Lopes (supra)** and pertinent **dictum** outlined as paragraph [19] of page 6.

[40] The Applicant on the other hand contends that nothing untowards on this and the allegations that Applicant and its officials acted improperly are but nothing but an attempt to deflate attention from the 6th Respondent unlawful activities. In this regard the attorney for the Applicant relied on what is averred by the Applicant at paragraphs 17 to 18 of its Replying affidavit.

[41] Having considered all those arguments on this point and I am inclined to agree with submissions of the Applicant that it acted properly in law in view of the damaging averments against the 6th Respondent in paragraphs 17 to 18 of the Applicant's Replying Affidavit. Therefor, this point of law also fails.

[42] I wish to comment **en passant** that the Application by the Swazi Bank which is a major creditor in the estate of Dumisa Dlamini is to protect **concurensus creditorium** created by the winding up order, and nothing else.

[43] In the result, for the foregoing reasons the points **in limine** raised by the Respondents are dismissed and the matter to proceeds to the merits of the case of whether or not the **rule nisi** is to be confirmed. I further order that costs are reserved to the merits of the Application.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE