



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case 900/2014

In the matter between:

In the Ex parte Application of:

<b>SISANE FAKUDZE</b>	<b>1<sup>st</sup> Applicant</b>
<b>LIZZY GUMBI</b>	<b>2<sup>nd</sup> Applicant</b>
<b>THEMBI NDLOVU</b>	<b>3<sup>rd</sup> Applicant</b>
<b>GLORY NDLOVU</b>	<b>4<sup>th</sup> Applicant</b>
<b>ALFRED NDLOVU</b>	<b>5<sup>th</sup> Applicant</b>
<b>NICHOLUS NDLOVU</b>	<b>6<sup>th</sup> Applicant</b>
<b>SIMO DLAMINI</b>	<b>7<sup>th</sup> Applicant</b>
<b>ANNAROSE NGCAMPHALALA</b>	<b>8<sup>th</sup> Applicant</b>

**In re:**

<b>SISANE FAKUDZE</b>	<b>1<sup>st</sup> Applicant</b>
<b>LIZZY GUMBI</b>	<b>2<sup>nd</sup> Applicant</b>
<b>THEMBI NDLOVU</b>	<b>3<sup>rd</sup> Applicant</b>
<b>GLORY NDLOVU</b>	<b>4<sup>th</sup> Applicant</b>
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<b>ANNAROSE NGCAMPHALALA</b>	<b>8<sup>th</sup> Applicant</b>

And

TIKANE INVESTMENTS (PTY) LTD	1 <sup>st</sup> Respondent
NLOSINATHI TFWALA	2 <sup>nd</sup> Respondent
ROBERT STEENKAMP	3 <sup>rd</sup> Respondent
SISIFO NHLEKO AND TWELVE OTHERS	4 <sup>th</sup> Respondent

Neutral citation: *Sisana Fakudze and Seven Others vs Tikane Investments (Pty) Ltd and Fifteen Others (900/2014) [2016] [SZHC] 140 (12<sup>th</sup> August 2016)*

Coram: MAPHALALA PJ

Heard: 27<sup>th</sup> July, 2016

Delivered: 12<sup>th</sup> August, 2016

For the Applicants: Mr. B. Xaba  
(of Xaba Attorneys)

For the Respondents: Mr. S. Madzinane  
(of Madzinane Attorneys)

**Summary:** *Civil Procedure – Respondents filed an Application to anticipate a rule nisi granted **ex parte** – advancing a number of grounds – the Applicants contends **in limine** that Respondents has contravened the doctrine of “clean hands” – cited the Supreme Court case of **Thomas Investments Corporation vs Greans Investments (Pty) Limited, case no. 31/12** - on the facts this court finds that the objection **in limine** has substance and dismiss the Application to anticipate the **Rule nisi** – Respondents to pay costs the matter to then proceed to the merits - the **Rule nisi** extended accordingly.*

## JUDGMENT

### **The issue for decision**

(Being a Notice to anticipate a **Rule nisi** granted **ex parte**)

- [1] On the 8<sup>th</sup> July, 2016 the Applicants in the present proceedings brought an Urgent and Ex parte Application before this court, seeking, **inter alia** that the 1<sup>st</sup> Respondent's bank accounts as held by the 16<sup>th</sup> Respondent be frozen pending finalization of these proceedings. The court granted an interim order freezing the 1<sup>st</sup> Respondent's bank account. It is such interim court order freezing the 1<sup>st</sup> Respondent's bank account that the Respondent have anticipated as they seek such to be discharged.
- [2] On the 26<sup>th</sup> July, 2016 the Respondents filed a Notice of set down to Anticipate the above **Rule nisi** in terms of the Rules of this court.
- [3] The matter then appeared before me on the 27<sup>th</sup> July, 2016 when I heard arguments on the above Notice to Anticipate.

### **A brief back ground**

- [4] The legality of the 2<sup>nd</sup> to 7<sup>th</sup> Respondents holding office as office bearers of the 1<sup>st</sup> Respondents Executive Committee has been central to this protracted litigation which commenced on or before June, 2014. In the main case under case no. 8900/2014 the central issue which the court is called upon to determine was whether or not the 1<sup>st</sup> Respondent's constitution was operational. The court is called upon to determine the aforesaid issue since the Applicant's arguments in that case was not and on the other hand the Respondents' contended that it was not operational.

[5] The Court (per **Hlophe J**) in its judgment delivered in open court on the 16<sup>th</sup> February, 2016 found that the 1<sup>st</sup> Respondent's constitution was operational since the 13<sup>th</sup> November, 2013 the date on which it was adopted by the general memberships of the 1<sup>st</sup> Respondent. Further facts are outline in paragraphs 3, and 4 of the Applicant's Heads of Arguments.

### **The arguments**

[6] The attorney of the parties appeared before this court on 27<sup>th</sup> July, 2016 where I heard arguments of the parties where they filed comprehensive arguments on both sides. The judgment was reserved to the following Friday but then I called the attorneys of the parties to clarity certain issues as to which Heads of Arguments should the court consider in its judgment on the Application to anticipate the **rule nisi** as stated above.

[7] The Applicant's attorney has raise a point **in limine** against the Application to anticipate.

[8] The Applicant therefore commenced arguments as I shall outline the arguments of the parties **ad seriatim**.

#### **(i) The applicant's arguments**

[9] The attorney for the applicants promised his argument on the doctrine of "clean hand" on the **dictum** of Supreme Court in the case of **Thomas Investments Corporation vs Greans Investments (Pty) Limited case no. 31/12** where at page 9, the court made reference to the case of **Mulligar vs Mulligar 1925 WLD 164 at 167** where **De Waal J** dealt with the doctrine of unclean hands in the following manner:

**“Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands; where he himself through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to he cannot ask the court to set its machinery in motion to protect his civil rights and interest ---- were the court to entertain a suit at the instance of such a litigant, it would be stultifying its own processes, and it would, moreover, be conniving at an condoning the conduct of a person who through his flight from justice, set law and orders in defiance.”**

[10] The gravamen of the arguments of the Applicants is captured in paragraphs 10 to 12 of the Heads of Arguments. I shall revert to pertinent arguments as I proceed with my analysis and conclusions.

[11] In conclusion at paragraph 28 thereof it is contended for the Applicant that the reasons placed before court to have the matter heard of ex parte basis were good and competent in law and that the interim interdict should not be discharged in order to safeguard the interests of the Applicants, the 1<sup>st</sup> Respondent together with the general membership of the 1<sup>st</sup> Respondent.

**(ii) The Respondents arguments**

[12] The attorney for the Respondent Mr. Madzinane advanced arguments for his clients where in this written submissions he dealt with the merits of the case. The said arguments he had addressed on a number of topics those being a topic of the incompetency of grounds for ex parte nature of the Application in paragraphs 3.1 (a), (b); a topic on full disclosures /good faith in paragraph 3.2 (a), (b), (c), (d) and (e); the requirements of an interdict in paragraph 4.1, 4.2 and in paragraph 4.3 the balance of convenience.

[13] I have searched high and low in the Respondents Answering Affidavit and the arguments by Mr. Madzinane on the issue for determination that of the doctrine of “**clean hands**” but nothing was said by Mr. Madzinane in court where matter came for arguments. Therefore, I ought to consider the arguments of the Applicants as there was “no contest” by the Respondents on this issue that is foundational to the Respondents status before this court.

[14] The final argument for the Respondents is that the **Rule nisi** ought to be discharged forthwith.

#### **The Court’s analysis and conclusions thereon**

[15] Having considered the affidavits of the parties and the arguments of the attorneys it is without question that the first port of call is a determination of the point **in limine** raised by the Applicant against the discharge on the **Rule nisi** that of the doctrine of “**clean hands**”. If I find against the point **in limine** to proceed with the determination of the merits of the case. However, If I find in favour of the point **in limine** to dismiss the Application without any further ado.

[16] On this point **in limine** the Applicant contends that the Respondents cannot be heard by this court as they should first purge themselves of their “dirty hands”. That the Respondents have failed to comply with the court order which was served upon their attorney in the main matter on the 18 February, 2016.

[17] The Respondents are silent on this point but have only addressed the merits of the Application.

[18] I have assessed the argument of the parties to and fro I have come to the conclusion that the Applicants' arguments are correct. As contended in paragraphs 11 to 12 of the Heads of Arguments of the attorney for the Applicant I find what is submitted in paragraph 11 thereof compelling where he state the following:

**Despite the allegation by the 2<sup>nd</sup> Respondent that the said court order was impugned due to the appeal, an argument that was fortified by the Respondents' legal representative during his oral address to the court, it is however, a glaring fact that the 1<sup>st</sup> Respondents did not challenge the court's finding that the 1<sup>st</sup> Respondent's Executive Committee was unlawfully elected into office. The notice of appeal further attached to the applicant's founding papers is further clear that the aforesaid aspect of the judgment remains unchallenged to date yet the 2<sup>nd</sup> to 7<sup>th</sup> Respondents are still in office as the office bearers of the 1<sup>st</sup> Respondent's Executive Committee despite the judgment giving them thirty (30) days in office upon service upon them of the court order. The court order was served upon the said Respondent's attorneys on the 19<sup>th</sup> February, 2016 but to date there has been no compliance with it.**

[19] Finally, I find that the **dictum** in the Supreme Court case of **Thomas Investments Corporation vs Greans (supra)** outlined at paragraph [9] apposite. The Respondents ought to purge themselves on the facts of this case.

[20] In the result, for the foregoing reasons the point **in limine** on the doctrine of "clean hands" succeeds and the Application to discharge the **Rule nisi** is dismissed with costs. In exercise of my discretion on the costs order costs in the ordinary scale. Furthermore, the Application to proceed to the merits of the case within the ambit of the **Rule nisi** that is in operation.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**