

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 365/2005

In the matter between

PETRUS MKASI

Applicant

and

THEMBUMENZI MAVIMBELA

1st Respondent

FORTUNATE HLATSHWAYO

2nd Respondent

BHEKI MAVUSO

3rd Respondent

In

THEMBUMENZI MAVIMBELA

Applicant

and

P. RAMUNTU FREIGHT SERVICES (PTY) LTD

Respondent

FOR APPLICANT : W. MKHATSHWA

FOR RESPONDENTS : M. NDLOVU

RULING ON POINTS IN LIMINE – 22/08/07

1. The Applicant has applied to court on an urgent basis claiming that the Deputy Sheriff Bheki Mavuso has attached his personal belongings in the execution of writs issued out by the 1st and 2nd Respondents against a company P. Ramuntu Freight Services (Pty)

Ltd.

2. The goods were attached inside a house leased in the name of the company, but the Applicant says that he was occupying the house personally and the goods attached therein are his personal property.
3. On the 20th July 2007 the court granted an ex parte order permitting the Deputy Sheriff to forcibly gain entry to the house in question for purposes of execution against the company.
4. The goods are due to be sold on 23rd August 2007 at 11.00 a.m.. The Applicant seeks an order:
 - 4.1 Dispensing with the Rules of this Honourable Court with regards from services and time limits to hear this application as one of urgency.
 - 4.2 Rescinding and/or setting aside the order granted by this Honourable Court on the 20th July 2007.
 - 4.3 Canceling and/or staying the sale of movable assets scheduled to be conducted on the 23rd day of August 2006 at 11.00 a.m. at the Jubilee Park, Manzini, District of Manzini.
 - 4.4 Ordering and directing the 3rd Respondent to restore possession forthwith, of all movable assets

removed by himself from House No. 3. Sidvokodvo Railway Houses and to deliver same thereat.

4.5 Directing that a rule nisi do hereby issue to operate effectively in the interim, pending return on a date to be determined by this Honourable Court, calling upon the Respondents to show cause why:

4.5.1 an order in terms of prayers 2, 3, and 4 hereinabove should not be made final;

4.5.2 the Respondents, jointly and severally, should not be ordered to pay the costs of this application.

5. Although inelegantly drafted, the notice of motion appears to seek a rule nisi operating with interim effect.
6. The Respondent opposes the application and its counsel Mr. Ndlovu has argued three points in limine. Firstly, he says that the Applicant has no locus standi to apply for the rescission of the order granted on 20th July 2007. This submission is incontrovertible. The order was not granted against the present Applicant. He is not the tenant of the house in question. He had no direct interest in an order permitting the Deputy-Sheriff to gain access to company premises. The court cannot in the circumstances grant a rule nisi

or any interim relief with respect to the prayer for rescission.

7. Secondly, Mr. Ndlovu argued that separate proceedings should have been instituted for the same relief in respect of the writ issued in the matter of Fortunate Hlatshwayo under Case No. 366/05. He submits that it was not proper to join Fortunate Hlatshwayo in the matter. The court will however make allowance for the urgency of the application, the fact that identical issues arise in respect of 1st and 2nd Respondents and that the Applicant is the same in Case No. 365/05 and Case No. 366/05. Whilst Mr. Ndlovu is correct in his argument that the application is, strictly speaking, ancillary to the main applications and separate applications should have been instituted, we are prepared to condone this technical irregularity. The interested parties are before court and no prejudice will result from the two matters being rolled up together.
8. Finally, Mr. Ndlovu says the Applicant has come to court with unclean hands because the company of which he is a director has not paid its judgement debt. He argues that the directors of the defaulting company are “cloaked with contempt” and the Applicant should not be permitted to hide behind “the corporate veil”. Apart from mixing his metaphors, Mr. Ndlovu has also failed to distinguish between the roles of the Applicant as director and as individual. The Applicant has not approached the court as a director of the company, but in his personal capacity. In his personal capacity, he is not liable for the debts of the company. In any event, failure to comply with an order *ad pecuniam solvendam* is not contempt of court, and the doctrine of clean hands cannot operate to deny an individual access to court because the company

in which he is a director has failed to honour its debts.

9. Any argument that the corporate veil should be pulled aside in the case of the Applicant is a question of fact which must be dealt with as part of the merits of the matter, in relation to whether the Applicant's assets are at large for attachment in execution of a judgement against the company. Such an issue cannot be addressed as a preliminary point of law.

10. In the circumstances, we uphold the first point in limine and dismiss the other two points. The application for an order rescinding and/or setting aside the order dated 20 July 2007 is dismissed. The court will now hear further arguments from the parties as to whether the interim relief prayed for should be granted.

The members agree.

P. R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT