IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 44B/2020

HELD AT MBABANE
In the matter between:

EDMUND MAZIBUKO N.O.	**1st Applicant**
NELLIE NDZIMANDZE N.O.	**2nd Applicant**
DANIEL DUMISANI NTJALINTJALI N.O.	**3rd Applicant**
VELEBANDLA HEZRON DLAMINI N.O.	**4th Applicant**
CARLOS MAPHANDZENI N.O.	**5th Applicant**
KAFOLISHI SERVICE STATION (PTY) LTD	**6th Applicant**
And	
TOTAL SWAZILAND (PTY) LTD	**Respondent**

Neutral Citation: *Edmund Mazibuko N.O. and 5 Others vs Total Swaziland (Pty) Ltd* (44B/2020) [2021] *SZSC* 32 (04/11/2021)

Coram: **J.M. CURRIE AJA.**

Heard: 27th October, 2021.

Delivered: 04th November, 2021.

SUMMARY : *Civil Procedure – Staying execution of a judgment of the Supreme Court pending review proceedings – Principles of law applicable – Doctrine of unclean hands – Applicants in contempt and approached Court with unclean hands – Stay of execution of judgment of Supreme Court refused – Costs to be costs in the cause.*

JUDGMENT

CURRIE – AJA

[1] By way of an urgent application the applicants have sought a stay of execution of an order of this Court which is contained in the judgment of this Court dated 22nd June 2021. The order sought herein is intended to be an *interim* order pending the determination of review proceedings by this Court.

[2] The first to fifth applicants are the executors of the estate late Charles Mafika Ndzimandze. On or about 13 March 2001 the respondent entered into an operating lease agreement with the deceased in terms of which he was entitled to operate a filling station at Lot 367 Nkoseluhlaza Street, Manzini, known as KaFolishi Filling Station. The agreement commenced in

2001 with an initial period of one year. The lease further provided that the agreement would continue thereafter for an indefinite period, terminable by either party giving to the other at lease 3 (three) month's calendar notice.

[3] On 23 March 2020 the respondent gave written notice of termination of the lease agreement to the 6th respondent and the lease agreement therefore terminated on 30 June 2020.

[4] The applicants approached the court *a quo* on an urgent basis seeking orders that the Respondent be interdicted from terminating the operating lease agreement and setting aside the notice of termination. The applicants contended that:

> *"It is clear that in terms of the Notice of Termination and clause 14 of the Agreement the Applicants have no entitlement or whatsoever to goodwill. The Applicants are expected to hand over a business which is a going concern and vacate the premises and thereafter attempt to negotiate the goodwill of the business which will no longer be a going concern. <u>There would be no basis in terms of the Agreement for the Applicants to claim payment of goodwill.</u>* (my underlining)

[5] It is evident from the applicants contentions above that they did not oppose the termination of the lease agreement but that they feared what would happen to their claim for goodwill on vacating the premises.

[6] The respondent alleges that it never refused to pay any proven goodwill. It was common cause in the first application that, prior to 30 June 2020 the Respondent had invited the applicants to prove any alleged entitlement to goodwill. On 23 June 2020 the respondent wrote to the applicants and advised them, *inter alia*, that:

"To the extent that your client is entitled to any goodwill payment as per clause 14 of the Agreement Total is amicable to engage with your client as per the obligations of the parties therein, however it should be noted that this matter shall be treated as a separate issue from the termination and vacation of your client from our premises.

(my underlining)

[7] In its answering affidavit in the first application the respondent repeated the invitation contained in this letter and invited the applicants to prove their claim for goodwill. The respondent still maintains this position today but insists that the payment of goodwill is a separate issue from the termination and vacation of the premises.

[8] The court *a quo* dismissed the application and found in favour of the respondent in that it contended that the proceedings were not necessary as the respondent had indicated that it was willing to pay compensation. The applicants, being dissatisfied with the judgment of the court *a quo* noted an appeal to this Court.

[9] It is common cause that this Court, by a majority decision, on 22 June 2021 dismissed the appeal and made the following order:

> *" 1. The appeal is dismissed with costs including certified costs of Counsel.*
>
> *2. The Appellants must vacate the premises of the Respondent within one (1) month from the date of this judgment.*

3. *Paragraph 17.2 of the order a quo is substituted as follows: "The applicants are to pay the costs of this application on the ordinary scale including the certified costs of counsel."*

[10] In terms of this order the applicants were directed to vacate the premises within one month of the date of judgment, being by 21 July 2021. The applicants did not comply with this order, nor did they seek to review or vary the order, before the expiry of one month from the date of the judgment but flagrantly and willfully chose to ignore the order of this Court as will be demonstrated below.

[11] Instead, on 14 July 2021 the applicants wrote to the respondent as follows:

"RE KAFOLISHI SERVICE STATION – CLAIM FOR PAYMENT OF GOODWILL

1. *We refer to the Judgment of the Supreme Court regarding the issue of Goodwill.*
2. *As you will recall the Court acknowledged that goodwill is payable to us in respect of the business that you will acquire when we vacate the premises.*

3. *We conducted evaluation of the business and have been advised that the figure for goodwill is the sum of E2 473 299.00 (Two Million Four Hundred and Seventy – Three Two hundred and Ninety- Nine Emalangeni). We enclose a valuation Report prepared by Pips Chartered Accountants.*
4. *We would welcome discussions and agreement on the goodwill so that we are in position to vacate the premises next week. We remain of the view that we will hand over the premises upon payment of goodwill.*
5. *We reserve our right to institute review proceedings in terms of Section 148 of the Constitution to the extent that it may be said that we have to hand over possession of the business to yourselves without compensation. This would violate our right in terms of Section 19 of the Constitution and is reviewable irregularity in terms of Section 148 of the Constitution."*

[12] It is evident from this letter that the applicants chose to ignore the order of this Court and refused to vacate the premises pending the payment of goodwill. As judgment was delivered on 22 June 2021 the period of one month elapsed on 21 July 2021. In addition, whilst they disobey an order of this Court they appear to have set their own conditions as to when they

would vacate and on what conditions, failing which they reserve an alleged right to institute review proceedings.

[13] Having chosen not to comply with the orders of this Court dated 22 June 2021, nor having instituted review proceedings the applicants only approached this Court on 24 September 2021 when the Deputy Sheriff gave effect to the order by serving a Writ of Ejectment on the applicants on 22 September 2021.

[14] The matter was set down for hearing on 7 October 2021. The respondent had filed a notice to oppose but had not filed any opposing papers by the date of the hearing and the following order was made:

"1. *The Respondent is to file its Answering Affidavit, if any, by Wednesday the 13th October 2021.*

2. The Applicants are to file the Replying Affidavit, if any, by 20th October 2021.

3. Pending the outcome of the Application, the judgment of the Supreme Court dated 22nd June 2021, directing the Applicants to vacate the premises within one month from the date of the Judgment, be stayed and the status quo in effect before the issue of the Judgment is to remain intact.

The matter is postponed to 27 October 2021 for hearing."

[15] The respondent filed its answering affidavit in compliance with the above order but the applicants filed their reply out of time on the 26th October 2021 which affidavit was accepted, despite no application for condonation, in the interests of justice and finalization of the matter. No heads of argument were filed by the applicants.

[16] This court has jurisdiction to review its own decisions. Sections 148 and 149 of the Constitution provide as follows:

"148. (1) The Supreme Court has Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority, and may, in the discharge of that jurisdiction, issue orders

and directions for the purpose of enforcing or securing the enforcement of its supervisory power.

(2) The Supreme may review any decision made or given by it in such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court.

(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench.

149. (1) Subject to the provisions of subsections (2) and (3) a single Justice of the Supreme Court may exercise power vested in the Supreme Court not involving the determination of the cause or matter before the Supreme Court.

(2) In criminal matters, where a single Justice refuses or grants an application in the exercise of power vesting in the Supreme Court, a person affected by such an exercise is entitled to have the application determined by the Supreme Court constituted by three justices.

(3) In civil matters, any order, direction or decision made by a single Justice may be varied, discharged or reversed by the Supreme

Court of three Justices at the instances of either party to that matter."

[17] In the matter of **President Street Properties (Pty) Ltd vs Maxwell Uchechukwu and 4 Others (11/2014) [2015] SZSC 11** it was held that in an application for review the applicant must allege "*rare and compelling or exceptional circumstances".*

[18] In the recent matter of **Henwood and Another v Henwood (10 2018) [2018] SZSC 64** the Court found that:

"Where a litigant relies on "exceptional circumstances" as a ground of review, these must be clearly set out in the founding papers to enable the other party to put up facts in opposition or counter argument."

[19] The applicants seek to have the orders of this Court reviewed on the following basis:

"17. The grounds of review of the decision, is[sic] that the Supreme Court granted the Order for the eviction of the applicants without a

hearing without the order having been sought by the respondent. This violated the applicants' right to a fair hearing, in particular, the right to audi alterum parterm [sic]. This also demonstrated bias by the majority of the Court in favour of the Respondent and against the Applicants. (my underlining)

18 *A further ground of review is that the Order by the majority would result in a compulsory deprivation of property without compensation and in violation of the Applicant's rights in terms of Section 19 of the Constitution. The Applicants are entitled to protection from compulsory deprivation of their rights over the filling station business without compensation.* (my underlining)

19. *The Supreme Court inadvertently committed a fundamental and basic error by ordering the ejectment of the Applicants from the sites in which they operate the filling station business under the Respondent's franchise because such an order will occasion manifest, gross injustice to the Applicants who stand to be deprived of their proprietary rights without compensation, in circumstances where this is unjustifiable from a contractual, constitutional and public policy view point. This creates an exceptional circumstance in which this court exercising its review powers is justified to intervene to protect*

the Applicants' proprietary rights from being unfairly expropriated by the Respondent.".

[20] In the application before this Court the applicants provide no explanation as to what their defence is to the order directing them to vacate the premises. Their issue is that they have to vacate the premises without compensation and this amounts to compulsory deprivation of property without compensation which violates Section 19 of the Constitution.

[21] The applicants contend further that they have good prospects of success and in argument applicants' counsel stated that they rely on the contentions of the learned Judge Hlophe in the minority judgment. Whilst I am *prima facie* of the view that the applicants' prospects of success are poor this Court only has to decide whether a stay of execution should be granted pending the review.

[22] The respondent contends that the application for a review of the decision of this Court is an abuse of the law in that the application is in fact an appeal

under the guise of a review. The applicants do not accept and are unhappy with the decision of this Court. Whilst the applicants accept they are obliged to vacate the premises their complaint is that they were ordered to vacate without compensation having been paid before they vacate. The facts set out in the founding affidavit at first blush do not establish any exceptional circumstances as is required by a party seeking to review a decision of this Court.

[23] It is not necessary for me to adjudicate on the merits of the review application and these will be decided by a full bench when the review proceedings are heard by this Court in due course.

[24] It is common cause that in the event this this application fails the respondent would be entitled to execute the judgment obtained in June 2021.

[25] In the matter of **Strime v Strime 1983 (4) SA 850 CPD at 852** the learned Tebbutt J stated with regard to the inherent powers of the courts to stay execution of an order:

> *"Execution is a process of the court, and, the court has an inherent power to control its own process subject to the Rules of Court. It accordingly has a discretion to set aside or stay a writ of execution…. The court will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or put otherwise, where injustice would otherwise be done…."*
>
> *Execution should therefore generally be allowed unless the applicant for a stay shows that real and substantial justice requires that such a stay should be granted.*

[26] Having considered the evidence before this Court I am of the view that the application for a stay sought by the applicants should not succeed and should be dismissed. The applicants had accepted that the respondent was entitled to terminate the lease as it did. Their true complaint is that they now face the prospect of having to vacate the premises without being paid for the

goodwill which is their proprietary right. Respondent on the other hand, as long ago as July 2020 indicated that it was prepared to negotiate the payment of compensation but same was to be treated as a separate issue from the termination of the lease and occupation of the premises. Applicants however remained in the premises and wish to use their occupation as a bargaining tool and Respondent has been denied occupation of its property. The respondent has for over one year maintained that the applicants claim for goodwill does not grant it a right to refuse to vacate the premises. When this Court ordered the applicants to vacate the premises within one month of the order of this Court they flagrantly disregarded the order of this Court and remained on the premises and they remain in contempt of an order of this Court. They now wish this Court to legitimise that which violates this Court's own order. The applicants have not only been in contempt of an order of this court but have referred disdainfully and contemptuously to the majority judgment of this Court and have approached this Court "with dirty hands".

[27] The High Court in **Muzi. P Simelane v. The Chief Justice of Eswatini & Two Others** recently approved of the following principle*:*

"……<u>*before a person seeks to establish his rights in a court of law he must approach the court with clean hands;*</u> *where he himself, through his own conduct makes it impossible for the process of the court….. to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests.*

[28] In **<u>Sibonsiso Clement Dlamini v The Chief Justice of Swaziland & Two Others</u>,** this Court stated the principle as follows:

"……. It is my considered view that the justice in this matter favours that the Applicant's application be declined. To grant him the right to audience in light of the doctrine of unclean hands would indirectly set aside the Supreme Court Judgment which has reached its finality in that it has been adjudicated upon even on review…. At any rate the directive to debar applicant by the 1st respondent was nothing else than a confirmatory of the doctrine of unclean hands. Whether the directive to debar is there or not is immaterial as applicant will always be confronted by thus doctrine in every court he appears; until he purges his contempt.

[29] The respondent has over the past few months engaged in negotiations in an attempt to agree goodwill but final figures have not yet been agreed. Respondent further contends that if the parties are unable to resolve the issues between them Clause 15 of the lease agreement provides a complete remedy to the applicants insofar as the parties are unable to resolve their issues. In my view there will be no prejudice to the applicants as they have accepted termination of the lease and can continue with the negotiations for payment of goodwill.

[30] With regard to the issue of costs I am of the view that costs ought to be awarded to the respondent on a punitive basis. The respondent has been denied the right to its property for over one year despite the termination of the lease and the applicants' acceptance of same. The applicants have flagrantly disregarded and order of this Court and have alleged bias on the part of the majority of the Supreme Court judges after judgment has been handed down.

[31] However, while costs normally following the event, this is an interlocutory application and the court is of the view that costs should be reserved and be

determined in the main application where all the circumstances of this application should be taken into account including, in particular, the conduct of the applicants.

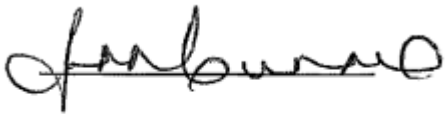
[32] Accordingly the following Order is made:

1. The application for a stay of execution pending review is dismissed.

2. The *interim* order of this Court dated 7 October 2021 is hereby discharged.

3. The applicants are directed to comply with the orders of the Supreme Court dated 22 June 2021. As the time for the vacation of the premises has expired in terms of that Supreme Court Order the applicants are ordered to vacate the premises within 10 (ten) Court days of this Judgment.

4. Costs are to be costs in the cause.



J. M. CURRIE

ACTING JUSTICE OF APPEAL

For the Applicants: S. DLAMINI WITH Z. HLOPHE FROM MAGAGULA & HLOPHE ATTORNEYS

For the Respondent: P. FLYNN WITH L. NDLOVU FROM M.J. MANZINI & ASSOCIATES