THE HIGH COURT OF SWAZILAND

Civil Case No.1188/98

In the matter between:

CHARLES THWALA	Applicant
And	
2643 INSPECTOR S.YV. METHULA	1st Respondent
THE STATION COMMANDER OF LOBAMBA POLICE STATION	2nd Respondent
ATTORNEY-GENERAL KENNETH NGCAMPHALALA	3rdRespondent Intervening Party

In re:

FIRST NATIONAL BANK OF SWAZILAND	Applicant
And	
KENNETH NGCAMPHALALA GLORY	1st Respondent
THEMBI NGCAMPHALALA	2nd Respondent

And

CORAM	MASUKU J.
For the Applicant	Mr T.M. Mlangeni Mr
For the 1st - 3rd Respondents	L. Dlamini Mr A.M.
For the Intervening Party	Lukhele

JUDGEMENT 22nd
April, 2004

This matter comes as an 'unwelcome reminder to the sad episodes experienced in our recent constitutional history, where certain key organs of State took it upon themselves to disobey or frustrate the enforcement of certain judgements of the Courts perceived to be unpalatable.

As is apparent from the citation above, save the Attorney-General, who is cited in his nominal representative capacity, as dictated by the laws of this country, the First two Respondents are police officers who allegedly frustrated the Applicant, a duly appointed *ad hoc* Deputy Sheriff of this Court and prevented him from effecting attachment in pursuance of a Writ issued by the Sheriff, following a judgement of this Court.

The Applicant, in view of the conduct of the said Police Officers applied for the following relief on an urgent basis: -

1. That the normal rules of Court as time limits, Notice and procedure be and are hereby dispensed with and the matter be heard as an urgent one.

2. That the 1st Respondent be and is hereby restrained and interdicted from interfering and preventing the Applicant in his capacity as Ad Hoc Deputy Sheriff to attach and remove the movable goods of KENNETH NGCAMAPHALALA and GLORY THEMBI NGCAMPHALALA wherever and whenever the said movable goods may be;

3. That the 2nd Respondent and members of the Police Force stationed at Lobamba Police Station be and are hereby interdicted and restrained from interfering and preventing the Applicant from attaching and removing the movable goods of KENNETH NGCAMPHALALA and GLORY THMBI NGCAMPHALALA wherever and whenever the said movable goods may be.

4. That the lsl and 2nd Respondents, including the members of the Royal Swaziland Police from Lobamba Police Station be and hereby restrained and interdicted from interfering in any manner whatsoever in the execution of the writs against THEMBI NGCAMPHALALA and KENNETH NGCAMPHALALA under Case No.l **188/98.**

5. That costs at the scale of Attorney and own client be and are hereby granted against all the Respondents jointly and severally.

The Applicant states that on the 16th January 2003, he was appointed by the Sheriff as *Ad hoc* Deputy Sheriff to attach the movable goods of Thembi and Kenneth Ngcamphalala, pursuant to three warrants of Execution issued by this Court. He states further that in pursuance of the said Writs, he proceeded to the home of the Ngcamphalalas in Malkerns on the 24th July 2003. He was prevented by police officers from Lobamba Police Station from executing the Writs. He has it that the said obstructive officers were led by an officer who identified himself as Gwebu.

He states that assisted by Police who blocked the entrance to the property, the Ngcamphalalas managed to lock the gate, thereby effectively denying the Applicant access to the property. Not to be dampened in his resolve to execute the Warrants, the Applicant, the very same day, proceeded to Ezulwini at the bottle store run by the Ngcamphalalas in a bid to attach the movables thereat.

Gwebu from Lobamba Police Station and his charges again intervened and prevented the Applicant from attaching and removing whatever attachable movables were in the shop. The Police, according to the Applicant, removed the goods already attached and placed in a truck and returned them to the bottle store.

The Applicant states that on the 19th August 2003, he set out on a similar mission to Ezulwini and the efforts to effect attachment were this time thwarted by the 1st Respondent, who stopped the removal of the goods and in the process threatened the Applicant with arrest. The 1st Respondent argued that the warrants issued were wrong. The 1st Respondent secured the assistance of other officers to assist in aborting the attachment and in taking the goods back into the bottle store.

Faced with this ugly spectable, the Applicant called his attorneys of record and spoke to Mr Mlangeni who advised the 1st Respondent against his actions but to no avail. Mr Mlangeni confirms this in an Affidavit in which he states that the 1st Respondent arrogantly told him that he would not allow the Applicant to remove any goods belonging to the Ngcamphalalas.

The Applicant proceeded* to aver the legal grounds upon which he Ts entitled to an interdict and proceeded to allege why the matter is urgent.

The Respondents filed a Notice of Intention to Oppose but did not file any opposing affidavits. The inescapable conclusion to be drawn from their neglect in filing papers is that they do not oppose the application and all the allegations of fact made by the Applicant must be accepted as true as they stand uncontroverted. There is on the papers, no reason why the relief sought against the 1st and 2nd Respondents should not be granted. In particular, I am satisfied diat the relevant requirements for the grant of an interdict have been pleaded. Mr Dlamini indicated that his clients would not file any opposing the papers but would abide by the Court's decision.

I am of the view however that the 4th Respondent cannot be tarred with the same brush as the other Respondents. I say that for the reason that there is no allegation that the Respondents carried out their aforesaid unlawful crusade within the scope of their employment and in the scope their duties. Strictly speaking, the averments necessary to join the 4lh Respondent, are wanting.

Intervening Application

It is common cause that Kenneth Ngcamphalala then filed an application to intervene in the proceedings as an interested party. His application for intervention appears to have been granted by consent. For that reason, the grant of the relief applied for by the Applicant, will hinge on the view the Court takes of the issues raised by the Intervening Party in his opposing affidavit.

In opposing the grant of the relief sought by the Applicant, the Intervening Party raised the following issues: -

(a) that the matter under Case No. 1188/98 is pending before this Court and that the costs sought to be recovered are therefor not recoverable while the matter remains pending.

6. the warrants of execution were irregularly issued by the Applicant's attorneys of record as they ceased to act in the aforesaid matter.

7. the Applicant does not have *locus standi in judicio* to launch the present proceedings.

Simultaneously with filing the opposing Affidavit, the mtervening Party made a counter application setting aside the Writs of Execution issued under Case No. 1188/98 on the 14th December, 2002, 13th November, 2002 and 13th November 2002, respectively. I interpolate to mention that there is no affidavit filed by the Intervening Party in support of this counter-application and in particular, no grounds are advanced by the Intervening Party as to the facts and legal reasons behind the application. The consequences of this will be addressed later in the course of judgement.

The Doctrine of "Clean hands"

Mr Mlangeni, in his spirited address, argued that Intervening Party ought not to be heard for he was responsible, in part, for frustrating the enforcement of the Court Orders and should not be allowed to approach the pure fountains of justice unless and until he purged his contempt.

I am of the view that this question ought be decided in relation to the counter-application, after deciding whether the Intervening Party has made out any sustainable case in opposition to the interdict against the relevant Respondents.

Ruling on Interdict re: Intervening Party.

(a) Matter is *lis pendens* and costs not yet recoverable

As indicated above, the Intervening Party alleges that the matter under 1 188/98 is still pending before the Honourable Court. This is a bald allegation and in which the nature and particulars of the issues allegedly pending are not disclosed. From the annexures, it is clear

that the costs in the sum of El 4, 424.05 are in respect of the Summary Judgement granted on the~20th April 1998. These costs were taxed on the 1st November 2002.

On the other hand, the costs in the amount of E3, 724.92, are in respect of an interlocutory application moved by the Bank to be granted access to the Ngcamphalala assets. These were also taxed on the same date i.e. 1st November 2002. There is yet another Bill of Costs also of even date in the sum of E10, 583.17 and this is in respect of the refusal of an application for the rescission of a summary judgement by Glory Ngcamphalala.

In the absence of the particular grounds upon which it is now claimed that the matter is *lis pendens* and to which the Applicant and his attorneys of record can answer to, I am of the view that there is no substance in this point of law. This appears to me to be nothing else than a dilatory ploy, perpetrated by the Intervening Party, who is not from the papers, even a party to the main proceedings. Such a deliberate waste of the Court's time must not be countenanced. It cannot be said, in the absence of clear and credible evidence, that the costs, which are the subject matter in these proceedings, are not yet recoverable. I dismiss this point of law. From the history of the matter on file, indications are that the matter was finalised in Court and this is the only reasonable conclusion in the absence of evidence to the contrary.

(b) Alleged withdrawal of Mlangeni & Co. Attorneys

There is yet another bald and unsubstantiated allegation by the Intervening Party and it is to the effect that Mlangeni & Company withdrew as the Bank's Attorneys of record. This, allegation is clearly denied by Mlangeni & Co. There is no shred of evidence placed before Court by the Intervening Party, in proof of its assertion. Withdrawals, according to the Rules of Court, particularly Rule 16 (4) must be on notice to the Registrar and all interested parties. The Intervening Party has not filed the copy of the Notice of withdrawal served on his wife and I say that there is none in the Court file to bear out the Intervening Party's allegation. This point of law must again fall to the ground and is hereby dismissed.

(c) Applicant's lack *oUocus standi in judicio*

It has also been urged on the Intervening Party's behalf that the Applicant does not possess the *locus standi in judicio* to launch the present proceedings. The grounds for such a declaration are again not disclosed in the papers to enable the Applicant to prepare and to deal with them.

One can only presume that the reason for that submission is that the proceedings should have to be launched by the parties in the main proceedings. I do not agree. The Deputy Sheriff in this case was duly authorised by the Sheriff to effect attachment as an officer of this Court. He was prevented from carrying out his official duties by the Respondents. In my view, he surely has a right to move proceedings to interdict the persons who rendered him unable to perform his official functions. This point was not persisted in or argued by Mr Lukhele in Court though. It must likewise fall to the ground and is hereby dismissed.

The Applicant, in the Replying Affidavit took issue with the application to set aside the Writs because of the failure of the Intervening Party, to place the matter on review in terms of the provisions of Rule 48. I am however of the view that Rule 48 applies in cases where a party is dissatisfied with the Ruling of the Taxing Master on items or part of items which were objected to or disallowed. The Rule is of no application, in my view, to a case where a party contends that the Writs were not issued properly, as appears to be the Intervening Party's contention *in casu.*

In dealing with the merits of the opposition to the prayers sought, the Intervening Party, in response to the Applicant's allegations that he and his wife locked the gate to prevent execution, assisted by the Police on the 24lh July 2003, merely records a bare denial. He fails, in the face of direct evidence placing him at the scene and which depicts him actively hamstringing the effecting of the Writs, to state his account of the events e.g. to deny if he was not there, or if he was there, to state what he did or did not do. The denial, bare and bony as it is, takes the matter no further.

It is also important to note that the Orders sought are not against the Intervening Party and his wife but against the Police. The main allegations arc therefor focused on the actions of the Police, the majority of which he claims to be unaware of. It is in my view therefor

abundantly clear that he cannot, standing alone, unassisted by any useful material furnished bylhe culprits, who therrlselves have not denied the Applicant's cas"e to successfully oppose the granting of the relief claimed. Save the allegations, which I have dismissed, raised *in limine,* on the basis of which the Court is urged to find that the Writs were issued irregularly, I have no option but to grant the relief sought in prayers 2,3,4 and 5 of the Notice of Motion.

The conduct of the Respondents, in frustrating the attachment pursuant to a Court Order is viewed in a very dim light and deserves censure. To mark the Court's disapproval, I am of the view that the costs on the attorney and own client scale are well justified. This is rendered a more serious situation in the sense that the Respondents left their jurisdictional area i.e. Lobamba and went to frustrate the enforcements of the Court Orders in Malkems. The Malkerns Police have jurisdiction over that area. The conduct was clearly malicious and unlawful. Police Officers are expected to assist, rather than impede execution of Court Orders. Police are otherwise referred to as the "limbs of the law". In this case, their actions incapacitated and effectively rendered the law a disabled entity.

I further order that the Police Officers mentioned above, the 1st Respondent and the Officer identified as Gwebu, whom the Applicant is given leave to furnish the full further particulars of, be and are hereby ordered to show cause within twenty-one days of this Order, why they should not be committed to goal for a period of ten (10) days for contempt of Court. This judgement and a specific Order in this regard is to be served personally upon each one of them. It is such kind of action that may perchance restore the esteem and dignity of this Court on the one hand, and also remind Police Officers on the other hand, of their role in keeping peace and assisting in effecting Orders of Court. The above actions, if left unabated will cause Police Officers to think that they are above the law they enforce. They are not, neither am I. In this regard, I can, do no better than quote from Theodore Roosevelt, who said the following:-

> *"No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to law is demanded as a right, not asked as a favour. "*

I do however need to conect an erroneous impression created by Mr Lukhele to the effect that the Intervening Party has nothing to do with the Writs and that therefor it is wrong to

attach his property. It is however clear from the Writs that at least in respect of one, he was the *1st* Respondent and that was the application dated 7th May 19"99, in which costs were granted against him.

Intervening Party's Counter Application

The terms of the relief sought in the counter application were traversed elsewhere above. The question to determine, as raised by the Applicant's attorneys, is whether the Intervening Party's counter application ought to be entertained, because it is claimed, he prevented the execution of the Orders of Court and clearly on more than one occasion. Can justice be extended to such an one?

I did not understand Mr Lukhele to deny that his client did frustrate the execution process. All that he said in his client's favour is that his client was of the view that the Writs were improperly issued. I will therefore deal with the matter on the basis that the Intervening Party did frustrate the execution of Writs of Attachment against himself and his wife. The papers are replete with allegations in this connection. It cannot be gainsaid, and Mr Lukhele was unable to persuade me otherwise, that even if the Writs were improperly issued, which has not thus far been shown to be so, that the proper course open to the Intervening Party and his wife was to approach the Court for appropriate urgent relief and not to set the law of defiance in motion by taking the law into their hands.

In support of the doctrine of clean hands, Mr Mlangeni made reference to a number of cases. Heavy reliance was however placed on the case of PHOTO AGENCIES (PTY) LTD VS THE COMMISSIONER OF THE ROYAL SWAZILAND POLICE AND THE GOVERNMENT OF SWAZILAND 1970-76 SLR 398 at 407, where Nathan C.J. (as he then was), enunciated the principle admirably in the following language: -

> *"Before a person seeks to establish his rights in 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 civil or criminal) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests ....Were the Court to entertain a suit at the instance of such a litigant, it would, moreover be conniving at and condoning the conduct of a person, who*

through his flight from justice, sets the law and order in defiance. "

Mr Mlangeni argued that the Intervening Party's actions in this matter fall neatly in the pigeonhole set out by Nathan C.J. above. Mr Lukhele, on the other hand, argued that the Court should not view the Intervening Party in this serious light, because his actions were not actuated by malice but buy a sincere but erroneous belief that the Writs were improperly issued. A warning, in the strongest possible terms to the Intervening Party, argued Mr Lukhele, would suffice to bring home to the Intervening Party, the seriousness and the full implications of his aforesaid actions.

In my view, the proper test to be applied, in deciding whether or not the Intervening Party should be heard is adumbrated succinctly by Lord Denning in HADKINSON VS HADKINSON (1952) 2 All E**.R.** 571 **at** 574 - 5:

"It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations ofpublic policy. It is a step, which the Court will only take when the contempt itself impedes the course ofjustice and there is no other effective means of securing a compliance. Applying this principle, lam of the opinion that the fact that a party has disobeyed an order of this Court is not of itself a bar to his being heard but if his disobedience is such that so long as it continues it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may, in its discretion, refuse to hear him until the impediment is removed or good cause shown why it should not be removed. "

It is clear that the decision to refuse a party a hearing is discretionary. Like discretion in all other matters, the discretion must be exercised judiciously. The determining criterion in exercising this discretion, is whether the disobedience *in casu* impedes the course of justice by making it difficult for this Court to enforce its orders which it may make, to borrow from the rendering by Lord Denning above.

The question can also be considered in relation to the case of SOLLER VS SOLLER 2001 (1) SA 570 (CPD) at 573, where Hiring J. stated the following:-

> *"It is not lightly that this Court will close its doors to a litigant. However a litigant who has contemptuously turned his back on those doors and has repeatedly treated with (sic) contumely the Judges who sit within them, as the applicant has done, must not be surprised if, when he attempts to re-enter the halls of justice, to seek relief, he finds the way barred to him until he has purged, his contempt (sic) for the very tribunal which he now seeks justice. "*

See also THE ATTORNEY-GENERAL VS RAY GWEBU AND ANOTHER CASE NO.3699/02 (delivered on 19/12/02 and SANELE CELE AND THREE OTHERS VS UNIVERSITY OF SWAZILAND AND ANOTHER CIV. CASE NO. 3749/02

(unreported judgements of the High Court).

There is nothing to gainsay the fact that the Intervening Party has acted illegally and treated with disdain the Writs issued by this Court by blocking the way in the enforcement of the Orders in this matter on numerous and diverse occasions. To make matters worse, he invited the Police in this illegal crusade and the Police happily partook in eating this dirty pudding. The Intervening Party claims that the Writs were illegally issued.

In my assessment, the illegality and the contemptuous nature of his conduct was driven home during the proceedings and his attorney, as recorded elsewhere above, pleaded with the Court to give the Intervening Party a very stern warning, rather than taking the ultimate step of barring the Intervening Party from entering the portals of justice.

I am unpersuaded to follow that course in this case. The Intervening Party's course of conduct in frustration of the effecting of this Court's Orders, is from the papers clearly determined and has been a gratuitous and prolonged-defiance streak which must be brought to a screeching halt by making an appropriate Order, which will serve both as an individual and general deterrence.

A message must be sent to all and sundry that one takes the law into one's own hands to one's own peril. The Courts and their processes cannot be denigrated and held in contempt with impunity. Litigants or other parties for that matter, who set out on such a crusade must

know and realise the enormity of their actions and that the law has to descend with might in Or3er to preserve the esteem and integrity of this institution.

In light of the foregoing, I rule that the Intervening Parry's hands are dirty, so dirty that before he can be heard, he must purge his contempt. I hereby grant him this indulgence by affording him an opportunity to do so.

The Intervening Party be and is hereby ordered within fourteen (14) days or such other extended period applied for and granted, of the granting of this Order to:-

(i) file an affidavit in this Court in which he

8. unreservedly apologises to the Judges of this Court, the Sheriff and the *ad hoc* Deputy Sheriff concerned, for frustrating the effecting of the Orders of this Court;

9. undertakes not to defy or frustrate the Orders of this and any other Court in this country in the future, and

10. to assist effectively in whatever way possible, in giving effect of judgements of this Court.

This affidavit must be placed before me within the period stipulated above, failing which the Intervening Party shall not be entitled to be heard as a Plaintiff, Applicant or Petitioner and may not be allowed to file any papers in any proceedings before this Court.

This Order must be brought to the attention of the learned Judges of this Court and the Registrar and his Staff.

I must mention, *en passant,* without venturing in any great detail into the counter-application, in view of the course that I have adopted, that the Intervening Party did not file any Affidavit in support of the Counter-application. All that he filed was an Opposing Affidavit to the Deputy Sheriffs application. In terms of the provisions of Rule **6 (1),** of the Rules of this Court, as amended, every application shall be supported by an affidavit in which the basis for

the relief claimed is fully and concisely set out. As will appear above, the indicators, flicking faintly, as they were, regarding why the Writs were alleged to be bad, as set out in the Opposing Affidavit, have been dismissed as unsustainable. The Applicant has, in the circumstances been placed in the dark, in the absence of an affidavit regarding the bases upon which it is claimed that the Writs are bad. This, the Intervening Party, must seriously consider before launching any further proceedings, if he is so advised.

I view the Intervening Party's conduct in this and the related matters in a particularly serious light. The deliberate, wilful and malicious impeding of the Applicant in executing Writs issued in pursuance of Orders of this Court is a matter that must attract the special sting of attorney and client costs as set out in *IN RE;* ALLUVIAL CREEK LTD, 1929 CPD 532 at 535 (Gardiner J.P.). I therefor authorise the costs against the Intervening Party, at such a scale.

In view of the foregoing and in conclusion, the following Orders be and are hereby granted:-

11. The Applicant's application is granted in terms of prayers 1,2,3,4 and 5 of the Notice of Motion.

12. The costs on the attorney and own client scale be and are hereby granted jointly and severally against the 1st, 2nd, 3rd Respondents and the Intervening Party, the one paying and the other being thereby absolved.

13. In view of the Intervening Party's previous despicable conduct, I order that he pays or deposits his *pro rata* share of the taxed costs of this application with the Registrar of this Court before he can launch any further proceedings in this matter, and which can only be done after purging his contempt in any event.

14. In relation to the Policemen cited in these proceedings, I order that the Is' Respondent and ihe Officer named, as Gwebu, and whose full and further particulars, I hereby allow the Applicant to ascertain and insert in the Order of Court are hereby called upon to show cause within twenty-one days of today's date, why they should not be personally committed for contempt for a period of ten (10) days.

The *rule nisi*, relating to the aforesaid Policemen be and is hereby postponed to the 28 May, 2003 before me. I find it necessary to postpone the matter before me not for any personal interest I hold in this matter, rather because this matter has a long history and bulky papers which would be unfair and inconsiderate to expect another Judge at this juncture to familiarise himself with.

T.S. MASUKU
JUDGE