THE HIGH COURT OF SWAZILAND

DANIEL MABUZA

Applicant

And

VIVIAN CAMELIUS DLAMINI

1st **Respondent**

REGISTRAR OF DEEDS OF SWAZILAND

2nd **Respondent**

THE ATTORNEY GENERAL

3rd **Respondent**

Civil Case No. 273/2004

Coram	S.B. MAPHALALA - J
For the Applicant	MR. A.LUKHELE
For the 1st Respondent	MR. P. SHILUBANE

JUDGMENT

(13/08/2004)

The Applicant by notice of motion brought under a certificate of urgency dated 2 February 2004, obtained ***ex parte*** an order in the following terms:

1) "That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency.

2) That the Applicant's non-compliance with the rules relating to the above said forms and service is hereby condoned.

3) Pending finalisation of this application and/or any action that might be instituted by the Applicant against the 1st Respondent, the Respondents are hereby interdicted from in nay manner transferring and/or disposing of the property known as:

Certain: Remaining Extent of Portion 56 of farm 50 situate in the district of Hhohho, Swaziland. Measuring as such: 12, 8649 (one two comma eight six four nine) hectares.

4) That the Applicant be and hereby ordered to institute action or action proceedings against the 1sl Respondent within fourteen (14) days and confirmation of this order.

5) That prayer 3 operates with immediate effect.

6) That the Respondents be called upon, on a date to be determined by the above Honourable Court, to show cause why an order in terms of prayer 3 and 4 should not be made final.

g) That copies of this application and the rule ***nisi*** be served on all the Respondents".

The 1st Respondent filed an answering affidavit where a point of law ***in limine*** was raised in paragraph 3 therein. The said paragraph reads as follows:

> ***limine,*** **I am advised and accept that the rule nisi should not have been granted in as much as the *ex parte* application was not served on me".**

The point was further amplified when the matter came for arguments on the return date of the Rule. An additional point on urgency was advanced from the bar. These points are outlined in 1st Respondent's Heads of Arguments in paragraph 2.1, 2.2, 3 and 4. They read ***in extenso*** as follows:

2. AD **Points *in limine.***

2.1 It will be submitted on behalf of the Is" Respondent that the court should not have made an ***ex parte*** order because the Applicant was claiming specific relief against the lsl Respondent. As provided for in Rule 6 (1) of the Rules of Court, the Applicant should have employed Form 3 to the Rules of Court and given lsl Respondent the appropriate notice as required by the Rules of Court. It was held in ***Amalgamated Engineering Union vs Minister of Labour 1949 (3) S.A. 637 (A) at 651*** and ***659*** that

the court should not make an order which may prejudice the rights of parties not before it. See also ***Glegg vs Pristley 1985 (3) S.A. 1950 and Khuketla vs Malahleha LAC 1990-1994*** at ***280. 2.2*** An ***ex parte*** application is an application brought without notice to anyone, either because no relief of a final nature is sought against any person or because it is not necessary to give notice to the Respondent (see ***Collective Investments (Pty) Ltd vs Brink and another 1978 (2) S.A. 252).***

7) In this case, there is no legal basis upon which this matter should have been treated as urgent.

8) The fact the Applicant could dispose of the property does not make the matter urgent because numerous legal steps must be undertaken before transfer of immovable property could be affected (see Paragraph 24 of Founding Affidavit, Record page 17).

Before attempting to address the issue at hand I wish to sketch a brief history of the matter, for the sake of clarity. The facts of the matter are that on or about the 29th July 1963, the Applicant purchased a property known as Portion 56 (Portion of Portion 1 of Portion C) of Farm No. 50, situate in the district of Mbabane, Swaziland on Crown land area no. 52, which he held under Deed of Transfer no. 184/1963. He subdivided the property and over the years he had sold various portions to various people.

The Applicant avers in paragraph 10 of his Founding affidavit that on or about the 26th January 2004, while on a visit to Swaziland he discovered that he was no longer the registered owner of the property. Following this discovery he made certain enquiries which revealed that the said property was on the 9th June 2003 transferred into the name of the 1st Respondent under Deed of Transfer no. 324/2003; that the transfer was on the basis that he had on the 8th April 2003, sold the said property to the 1st Respondent for a sum of E20, 000-00 and that the transfer was done by the 2nd Respondent in his capacity as his nominated conveyancer and agent. On further investigations on the pertinent documents he concluded that the 1st Respondent had perpetrated a fraud in this matter. He then approached this court for an interdict Lo maintain the *status quo* until the issues have been resolved.

The 1st Respondent on the other hand avers in his Answering affidavit that the Applicant sold him the property in question. To this end he has annexed "VD1" being

a Memorandum of Agreement of sale between him and the Applicant. He annexes also an affidavit marked "VD2" allegedly made by the Applicant. In this affidavit the Applicant deposes that on the 21st January 2002, he sold to the 1st Respondent certain Portion 299 (a Portion of Portion 56) of Farm No. 50, situate in the district of Hhohho, Swaziland. He also sold to the 1st Respondent, a further piece of land being Rem 56 of Farm 50 which is adjacent to Portion 299. The 1st Respondent alleges at paragraph 7.2 of his Answering affidavit that he paid for the property in question before they signed the Deed of Sale on 8th April 2003.

Reverting to the points of law ***in limine, Mr. Shilubane*** in arguing the point that the Applicant was not served with the papers cited a Lesotho Court of Appeal judgment in the case of ***Khaketla vs Malahleha and others 1990 - 1994*** at page ***280*** where ***Ackermann J A (Browde J A and Kotze' JA*** concurring) stated in paragraph **C *in fin F*** as follows:

> ***"Audi alteram partem*** is a fundamental principle of procedural justice. I do not propose burdening this judgment with an exposition of the circumstances under which the rule may be departed from in civil litigation. Apart from cases where:
>
> 9) Statute or the Rules of court sanction such a departure; or
>
> 10) The relief sought does not affect any other party;
>
> The rule should only be departed from in exceptional cases. One such exceptional case is where there is a reasonable likelihood that notice to the opposing party would enable him to defeat or render nugatory the relief sought or precipitate the very harm which the Applicant is seeking to avert, (see in general, ***Herbstein and Van Winsen, The Civil Practice in the Superior Courts of South Africa, 3rd ed*** at page **59 -60).** The principle of ***audi alteram partem*** ought not to be subverted, even when granting a rule ***nisi,*** by ordering the rule (or any part thereof) to operate as an interim order if such interim order affects the rights of another party, unless such interim order can itself be justified by the exceptions above referred to."

On the issue of urgency it was contended for the 1st Respondent that the Applicant has not laid the basis for urgency in his Founding affidavit and therefore the application should not have been enrolled as an urgent matter.

Mr. Lukhele advanced arguments ***au contraire*** that ***in casu*** the court exercised its discretion to grant an ***ex parte*** order, on good cause shown. The court was referred to ***Jourbert, The Law of South Africa (Vol 3)*** in paragraph ***348*** at page ***300*** where it is stated that a court always has a discretion to refuse an interim interdict even if the requisites have been established.

It was further submitted for the 1st Applicant that the nature of the relief that the Applicant was seeking ought to have been granted on an urgent basis to preserve the ***status quo*** and to prevent irreparable harm being occasioned on the Applicant in the event of a transfer.

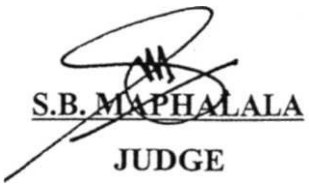
Having considered the affidavits before me and the legal arguments advanced for and against the points of law ***in limine*** I have come to the conclusion that the objections cannot be sustained on the facts. A court has a wide discretion in such matters and important factors taken into account are the relative strengths of the parties' respective cases and whether any other adequate remedy is available. In my view, the learned Acting Chief Justice exercised his discretion to grant an ***ex parte*** order on good cause shown thereof.

It would appear to me further that the issue of urgency is now academic in view of the effect of the ***ex parte*** order granted on the 2nd February 2004. The operative prayers being prayer (a) and (b) read as follows:

> **"a) That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency;**
> **b) That the Applicant's non-compliance with the rules relating to the above said forms and service is hereby condoned..."**

It is abundantly clear therefore from the above that the arguments advanced by ***Mr. Shilubane*** as to urgency and form cannot be sustained.

In the result, I rule that the points of law ***in limine*** be dismissed and order that the matter proceeds on the merits. Costs to be costs in the cause.



S.B. MAPHALALA

JUDGE