

THE HIGH COURT OF SWAZILAND

LUNGILE NYANBZENI

Plaintiff

And

JEREMIAH MKHGNTA

Defendant

Civil Case No. 2306/03

Coram

S.B. MAPHALALA – J

For the Plaintiff

MISS ZWANE

For the Defendant

MR. DUNSEITH

JUDGMENT

(07/05/2004)

Before court is an opposed application for summary judgment where the Plaintiff is seeking for an order of ejection of the Defendant from Lot No. 1142, Ngwane Park Extension 1, his family or any other person holding title under him and cost of suit.

According to the Particulars of Claim she is suing in this matter in her capacity as executrix in the estate of the late Thembi Nyawo registered with the Master of the.

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High Court under Case No. EM 133/03. She resides at Madonsa Township, in the district of Manzini.

The Defendant is an adult Swazi male residing at Lot No. 1142, Ngwane Park, Extension 1 and is carrying on business as a traditional healer at Ka Ngeobo in Bethany, in the district of Manzini.

The deceased, Thembi Nyawo was the lawful registered owner of Lot No. 1142. During January 2003, the deceased served the Defendant with a notice to vacate within one full calendar month, as she required the premises for her own use. Defendant had no written lease with deceased and according to the Plaintiff is occupying the aforesaid property wrongfully and unlawfully.

A copy of the notice to vacate is attached to the plaintiff's Particulars of Claim, as annexure "LN2". The said notice is a letter from the deceased to Mr. & Mrs Mkhonta dated the 9th January 2003. The deceased in this letter was informing the addressees therein that she has since acquired ownership of Lot 1142; Ngwane Park and she attached the title deed for their perusal. She proceeded to give the Defendant a one-month notice to vacate the premises on or before January 31, 2003 as she intended to use the said property thereafter.

The Defendant filed a Notice of Intention to Defend on the 22nd November 2003. The Plaintiff filed an application for summary judgment on the 14th February 2004. On the 29th January 2004, the Defendant filed his opposing affidavit.

In the opposing affidavit the Defendant has raised a point in limine and has also advanced his case on the merits.

The point of law raised is that the plaintiff's combined summons was not served upon the Master of the High Court, notwithstanding that the action concerns a deceased estate and purports to be instituted in the name of an executrix. In the premise, the action is irregular and the application for

summary judgment is defective and should be dismissed with costs.

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In argument on this point Mr. Dunseith for the Defendant submitted to the court that the Plaintiff purports to institute the proceedings in her capacity as executrix in the estate late Thembi Nyawo. The proceedings were instituted by issue of summons on the 15th September 2003. The Plaintiff was only appointed as executrix on the 17th January 2004. Therefore the summons is a complete nullity because the Plaintiff had no authority nor locus standi to institute proceedings on behalf of the estate on the 15th September 2003. Moreover, the Plaintiff perjured herself when she stated on oath in her affidavit sworn on the 14th January 2004, that she was the executrix in the estate of the late Thembi Nyawo. The affidavit in support of the application for summary judgment is likewise a complete nullity.

When the matter was argued on the 29th February 2004 and counsel for the Plaintiff being confronted with this anomaly could not advance a convincing argument save to argue that if the application were to be dismissed on this ground alone then that would mean the Plaintiff will have to start the proceedings afresh. I must say that I cannot accept this argument, if it is an argument at all.

In terms of Rule 17 of the High Court at sub-Rule 4 the following is provided:

"Every summons shall set forth:

- a) The name (including where possible the first name or initials) by which the Defendant is known to the Plaintiff, his residence or place of business and where known, his occupation and, if he is sued in any representative capacity, such capacity, and it shall also state the Defendant's sex and, if female, her marital status;
- b) The full names, sex and occupation and the residence or place of business of the Plaintiff, and where he sues in a representative capacity, such capacity, if the Plaintiff is female, the summons shall state her marital status".

Although in casu the Plaintiff has made all the averments in accordance with the said rule, her title to sue as an executrix at the time she did was defective. The facts before me show that she issued the combined summons on the 15th September 2003, in her capacity as executrix in the estate late Thembi Nyawo EM 133/03. However, the Letters of Administration giving her title to sue as executrix of the estate were only issued on the 17th January 2004. Therefore she could not have been the executrix of the estate prior to that date. It follows therefore that the summons is a complete

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nullity because the Plaintiff had no authority nor locus standi to institute proceedings on "behalf of the estate on the 15th September 2003.

It would appear to me further that Mr. Dunseith is correct on the facts of this case that the Plaintiff perjured herself when she stated on oath in her affidavit sworn on 14th January 2004, that she was the executrix in the estate of the late Thembi Nyawo. The affidavit in support of the application for summary judgment is likewise a complete nullity.

In the result, the application is dismissed on the basis of defective title and costs to follow the event.

S.B.MAPHALALA

JUDGE