

THE HIGH COURT OF SWAZILAND

GEORGE JWANKIE

Applicant

And

ROSE NDZINISA THWALA

Respondent

Civil Case No. 4580/2005

CORAM S.B. MAPHALALA

For the Applicant Mr. L.M. Simelane

For the Respondent Mr. D. Mazibuko

JUDGMENT

13th December 2007

[1] Serving before court is a notice to raise a point of law of non joinder by the respondent of estate late Mateleni Ndzinisa and Anthony Tony Fischer on the following basis:

1. (a) The Applicant has failed to join the estate late Mateleni Ndzinisa as Co-Respondent in this matter. The estate late Mateleni Ndzinisa has a substantial and material interest in the relief sought by Applicant. The rights of the estate will be prejudiced by the order sought.

The estate purchased the property in question from Anthony Fischer on the 4th September, 1999 as morefully appears from annexure "D" to the Respondent's affidavit. The estate late Mateleni Ndzinisa was given possession of the property on signing the deed of sale and remains in possession to date.

The estate obtained a court order dated 22nd April, 2005 compelling Anthony Fisher to give the estate transfer or the property as more fully appears on annexure "c" to the Respondent's affidavit. The estate

is represented by its executrix Agnes Ndzinisa by virtue of letters of administration dated 21st May, 2001. The estate late Mataleni Ndzinisa is entitled to possession and ownership of the property in question.

The Applicant has failed to join Anthony Tony Fitcher from whom the Applicant allegedly purchased the property in question.

The Applicant is entitled to claim vacant possession from Anthony Tony Fischer from whom the Applicant allegedly purchased the property in question.

The said Anthony Tony Fischer having sold the same property and received payment from Applicant and the estate late Mataleni Ndzinisa for the property has a material and substantial interest in the application before court and should be joined.

[2] The applicant has made an application seeking an order evicting the respondent and his family from Portion 88 (a portion of 29 of Farm No. 180) called Flame Tree Park, Siteki.

[3] The background of the matter is contained in para 3-5 of applicant's founding affidavit at pages 4-5. The applicant bought the property in issue herein from Shirley Fisher in January, 2005. In April, 2005 the property was transferred to his name. The respondent and her family is in occupation of the property. Applicant wants the respondent to be evicted because he wants to take occupation of the property as stated at page 5 in paragraph 7 thereof.

[4] In arguments before me counsel for the respondent contended that an interested party may be joined as respondent if the matter before court depends upon the determination of substantially the same question of law and fact, which if 2nd respondent were sued separately would arise in that separate action or application. In this respect the court was referred to the provisions of Rule 10 (3) of the High Court Rules.

[5] It was argued further that a person who has a material and substantial interest in a matter before court and one whose rights may be adversely affected by the outcome of the matter before court has a right to be joined in those proceedings as a necessary party. In this regard the court was referred to **Herbstein and von Winsen, the Civil Practice of the Supreme Court of South Africa, 4th Edition at page 165** where the following is stated;

"When such an interest becomes apparent the court has no discretion and will not allow the matter to proceed without joinder."

[6] Further on the same page the learned authors state the following;

"When a party who should have been joined in the proceedings has not been joined the defendant may raise the offence of non-joinder."

[7] The applicant oppose the notice raised by the respondent and has raised the following points;

4.1 The estate of the late Mataleni Ndzinisa has no direct and substantial interest in this matter. The respondent has failed to establish that estate has a direct and substantial interest in this matter.

4.2. The following points show that the estate has no direct and substantial interest.

(a) The executrix Agnes Ndzinisa has not filed a supporting affidavit to the allegations made by the respondent.

(b) The executrix is not in occupation of the property in question. The eviction order is not going to affect her.

(c) The estate never owned the property in issue in these proceedings. The property was under the ownership an Anthony Fischer. He sold it and transferred it to applicant.

(d) The executrix never challenged the transfer of the property into the name of the applicant. The letter of demand was served on the respondent in October, 2005. The letter of demand clearly stated that the property had been registered in the name of the applicant (page 29).

(e) The executrix of the estate has not locus standi to sue or to sued in respect of the estate. In terms of the Administration of Estates Act an Executrix holds office for a period of six months, unless she is granted an extension of time by the Master of the High Court. The executrix was appointed on the 25th May, 2001. Her term as an Executrix had long expired.

4.3. There was no need to cite the seller Anthony Fischer in this proceedings.

He has no direct and substantial interest in this matter. He will not be prejudiced by the orders prayed for in the Notice of Motion. Anthony Fischer sold the property and transferred it to applicant.

[8] Having considered all the arguments of the parties regarding this point of law of nonjoinder by the respondents I have come to the considered view that the arguments by the respondents are correct on the facts of the matter. The potency of the respondents argument is in the order of the High Court dated 22nd April, 2005 and confirmed on the 8th July, 2005. In this regard I refer to paragraphs 8 of 13.4 of the affidavit of Agnes Lomakhisimusi Ndzinisa which outlines at great length what has transpired between the parties in this matter. Therefore I am in total agreement with the arguments advanced for the respondent that the parties ought to be joined in this suit in order for justice to be served between them.

[10] In the result, for the foregoing reasons I agree that the application be dismissed for failure to join the necessary parties and I further order that applicant pays costs of suit.

S.B. MAPHALALA

JUDGE