

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No. 1604/2007

PINKY LINDIWE NYEMBE (BORN MANGO)

Applicant

And

SIBUSISO DUMISANI BOY BOY NYEMBE

1<sup>st</sup> Respondent

MANDLA JACOB MANZINI

2<sup>nd</sup> Respondent

In Re:

PINKY LINDIWE NYEMBE (BORN MANGO)

And

SIBUSISO DUMISANI BOY BOY NYEMBE

Defendant

Coram: S.B. MAPHALALA - J

For the Applicant: MR. B. MAGAGULA

For the 1<sup>st</sup> Respondent; MR. A LUKHELE

For the 2<sup>nd</sup> Respondent: MR. E. MAZIYA

## JUDGMENT

[1] The issue for consideration in this application is to interdict a husband from alienating property belonging to a joint marital estate pending divorce where the seller of one of the properties was not cited.

[2] The Notice of Motion by the Applicant seeks for an order as follows:

1. That the above Honourable Court dispense with the normal and usual requirements of the Rules of the above Honourable Court relating to service of process and notices and that this matter be heard as a matter of urgency in terms of the Rules of court.
2. That pending the institution of legal proceedings to set aside a Deed of Sale relating to Lot No. 53 situate in Makholokholo Township, district of Hhohho, entered into by the 1<sup>st</sup> Respondent and one Richard Dlamini on the 22<sup>nd</sup> of August 2007, the 2<sup>nd</sup> respondent be interdicted from accounting and/or paying over the proceeds of the sale.
3. That the 1<sup>st</sup> Respondent be interdicted from disposing any of the immovable property belonging to the joint estate registered in his name which are as follows:  
Lot 3035 and 3025 Mbabane Extension No. 11 situate on Portion 447 (Portion of Portion 300) of Farm No. 188 Dalriach;  
Plot 52/72 Sidvwashini South; Plot 53 Makholokolo Township.
4. That the Deputy Sheriff for the district of Hhohho be directed and/or authorised to:
  - (a) Forthwith serve this Order, Notice of Motion and the Founding affidavits upon the 1<sup>st</sup> Respondent and to explain the full nature and exigency thereof to him.

[3] The application is founded on the affidavit of the Applicant where she relates all the material facts in the dispute.

[4] The 1<sup>st</sup> Respondent has filed a Notice of Intention to Raise Points of Law that the Applicant has failed to cite E.B. Investments (Propriety) Limited, the owner of Lot No. 3035 and 3025, Mbabane Extension No. 11, Thembelihle Township, Mbabane and having a material interest in the matter as more fully set out in annexure "R1" and "R2" hereto.

[5] The 2<sup>nd</sup> Respondent also raised a point *in limine* to the general proposition that Applicant has no right of repossession since she is not possessor like in *res vindicatio*. Applicant is a not title holder and cannot claim for *res vindicatio* or repossession and therefore has no legal basis to claim property that she never owned.

[6] Further that Applicant's rights are confined to the marriage she entered into and do not extend any further to third parties. Furthermore that Applicant even though having a right to share of her husband's estate she does not have right to claim over property that does not belong to her husband. In the circumstances, Applicant lacks the required legal capacity "*locus standi in judicio*" to claim property that does not belong to her but owned by third parties like the Respondent in the circumstances.

[7] In arguments before me the first point *in limine* by the 1<sup>st</sup> Respondent was not pursued. Only the second point *in limine* by the 2<sup>nd</sup> Respondent was argued by *Mr. E. Maziya* for the 2<sup>nd</sup> Respondent and *Mr. Magagula* for the Applicant.

[8] The arguments on behalf of the 2<sup>nd</sup> Respondent followed what is outlined above in paragraph [5] of this judgment. The court was further referred to the textbook by *Willie and Millin, Merchantile Law of South Africa, 17<sup>th</sup> Edition* at page 161 to the principle of our law that no man can give another a greater right to a thing than he himself possesses. From this principle it follows

that the true owner of an article may always follow it up and recover it by what is called a "*res vindicatio*" or vindicatory action from hands of an innocent purchaser.

[9] The right of the true owner of property *bona fide* purchased from another are subject to the condition that the true owner has not been guilty of conduct. Likely to mislead innocent purchasers into thinking that the person from whom they were bought was entitled to sell. A person so conducting himself is said to be estopped from reclaiming the property. For this proposition Counsel for the 2<sup>nd</sup> Respondent cited the textbook by *Willie and Millin (supra)* at page 162 and the case of *Morum Bros Ltd vs Nepgen 1966 CPD 392*.

[10] Counsel for the Applicant contended that the 1<sup>st</sup> Respondent has elected not to respond to the merits so it was implied that at the end of the arguments that in the event the point is dismissed then the Rule must be confirmed because there is no opposition to the merits of the application.

[11] On the point of law raised, it is the Applicants contention that the 1<sup>st</sup> Respondent's point has no substance particularly because the prayers sought is not that everyone who has got an interest in the property is interdicted from exercising his or its rights. But the prayer sought is particularly against the 1<sup>st</sup> Respondent and that does not affect legal interests of any other parties who have got an interest in this property. In this regard the court was referred to the case of *Bowring No. vs Vrededorp Properties CC and another 2007 (5) S.A. 391 (SCA)*. This was a case of a double sale of land which it is the Applicant's submission that a similar inference should be used in the matter at hand.

[12] The court held that in such an application it is not necessary to join other subsequent purchasers or sellers if there is no potential prejudice to their legal interest. It is submitted on behalf of the Applicant, that the underlying consideration that must be used by the court is the issue of potential prejudice to any other party who is concerned in the matter. So the court must

actually consider if there is any potential prejudice to their legal interest.

[13] In the present case in as much as E.B. Investments sold the property in instalments and it retained ownership up until the property was sold in full it is clear that the present Applicant has an interest because certain payments have been made and if the 1<sup>st</sup> Respondent can dispose of the same property, whatever difference that is left between what is owed to E.B. Investments from the proceeds of the sale forms part of the joint marital estate of which the Applicant is entitled to half.

[14] Having considered the arguments of the parties as stated above it appears to me that the Applicants contentions are correct on the facts of this matter. I say so because the prayer sought does not interdict E.B. Investments from disposing its property in the event there is a breach of the agreement it has with the 1<sup>st</sup> Respondent. So there is no prejudice to the legal interests of E.B. Investments on the order sought.

[15] In this regard the decided cases in South Africa of *Govender vs Chetty* 1982 (3) S.A. 1078, *Pretorious No. vs Smith and Others* 1971 (4) S.A. 459, *Hollard vs Cullen and Another* 1956 (2) S.A. 605 and *Siegruhn vs Siegruhn and Another* 1963 (2) S.A. 298, where the court has interdicted husbands from selling properties pending a divorce are apposite. The factual circumstances which support this prayer is clearly outlined in the affidavit and therefore this court confirms the rule *nisi* forthwith. I further order that the 1<sup>st</sup> Respondent pays wasted costs.

Pronounced at the High Court sitting at Mbabane this 29th.day of August 2008.

**S.B. MAPHALALA**  
**PRINCIPAL JUDGE**