IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Civil Case No. 3210/10

In the matter between:

Meshack Dlamini	**APPLICANT**
AND	
Sandile Thwala N.O.	**First Respondent**
Cowigan (PTY) Ltd	**Second Respondent**
Manzini City Council	**Third Respondent**
The Registrar of Deeds	**Fourth Respondent**
The Master of the High Court	**Fifth Respondent**
The Attorney General	**Sixth Respondent**

CORAM	MCB MAPHALALA, J
For Applicants	S. Dlamini
For Second Respondent	B. Sigwane
For Third Respondent	M. Ndlovu

Summary

Civil Procedure - Application to strike out in terms of High Court Rules 6 (28) and 23 (2) - offending matter should be scandalous, vexatious and irrelevant - in addition aggrieved party to prove that offending matter is prejudicial to his case - Furthermore Application to be made when matter before court on merits.

RULING ON APPLICATION TO STRIKE OUT 5th APRIL 2011

[1] This is the second interlocutory application in this matter; the main application is still pending where an order is sought interdicting and

restraining the Second Respondent from encumbering or transferring lot ERF 260 in Manzini, interdicting and restraining the First Respondent from utilizing or distributing the proceeds of the sale of the property, reviewing and setting aside the order of the Manzini Magistrate's Court granted on the 12th April 2010, setting aside the transfer of the property to the Second Respondent and directing the Fourth Respondent to expunge the Deed of Transfer No. 491/2010 from the Registrar of Deeds, directing the First Respondent to give full effect to the written agreement between the applicant and the First Respondent as well as directing the Fifth Respondent to issue a written authorization of the sale of the property to the applicant at a purchase price of E940 000.00 (Nine hundred and forty thousand Emalangeni).

[2] The above application is opposed by the Second and Third Respondents. The Second Respondent has filed an application to strike out paragraphs 8, 15, 19, 22, 24, 24.1, 24.4, 24.5, 24.7, 24.8 24.9, 24.10, 24.11, 25, 26, 30 and 31 on the grounds that same are inadmissible and irrelevant, embarrassing, vexatious, scandalous, contradictory, defamatory and argumentative.

[3] Rule 23 deals with Notices of Exception as well as Applications to Strike out. An exception is taken to a pleading which is vague and embarrassing or lacks averments which are necessary to sustain an action or defence. An application to strike out is permissible in a pleading which contains averments which are scandalous, vexatious or irrelevant; the decisive factor in determining whether to grant the application to strike-out is the "existence" of prejudice to the applicant

in the conduct of his claim or defence if it is not granted. It is worth mentioning that the application by the Second Respondent does not appreciate the distinction between exceptions and applications to strike out. Rule 23 (1) provides the following:

> "Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of Rule 6 (14).
>
> Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed under this sub-rule, by notice afford his opponent an opportunity of removing the cause of complaint within fourteen days. Provided further that the party excepting shall within seven days from the date which a reply to such notice is received or from the date of which such reply is due deliver his exception."

[4] Rule 23 (2) provides the following:

> "Where any pleading contains averments which are scandalous, vexatious, or irrelevant the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of such matter, and may set such application down for hearing in terms of Rule 6 (14), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.

[5] Rule 6 (28) provides as follows:

"The court may on application, order to be struck out from an affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs as between attorney and client, but the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted"

[6] In the case of **Vaatz v. Law Society of Namibia** 1991 (3) SA 563 (NH) at 566, **Levy J** stated the following;

"The grounds for striking out as set out in the said Rule are... scandalous or vexatious or irrelevant. Needless to say allegations may be irrelevant but not scandalous or vexatious. Even if the matter complained of is scandalous or vexations or irrelevant, this court may not strike out such matter unless the respondent would be prejudiced in its case if such matter were allowed to remain."

[7] At page 566 C-D, His Lordship stated the following:

"In Rule 6 (15) the meaning of these terms can be briefly stated as follows: Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter- allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter- allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."

[8] At page 566J-567A-B, His Lordship said the following:

"The phrase "prejudice" to the applicant's case clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party."

[9] In the case of **Steyn v. Schabort and Another** 1979 (1) SA 694 at 697 (O) **Justice Erasmus** emphasized that the procedure for striking out was never intended to be utilized to make technical objections of no advantage to anyone and just increasing costs. He stated that the court should not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it is not granted.

- **See also the cases of John Graig (PTY) Ltd v. Dupa Clothing Industries 1977 (3) SA 144 at 148; Titty's Bar and Bottle Store (PTY) Ltd v. ABC Garage (PTY) Ltd and Others 1974 (4) SA 362 (T).**

[10] In an application to strike out the aggrieved Party should not only state the nature of his objection but he must also state the basis why the offending matter is irrelevant, scandalous, or vexatious. Furthermore, he must show that the offending matter is prejudicial to his case if it were allowed to remain.

[11] The first objection in paragraph 3.1 of the last four lines is alleged to be irrelevant. There is nothing irrelevant about this portion of the paragraph since it only seeks to establish the physical address of the Second Respondent.

[12] Paragraph 8 which is objected on the basis of irrelevance is necessary to show that this court has jurisdiction to entertain this matter. Paragraph 15 is directed at the conduct of the First Respondent, and, it is not directed against the Second Respondent; hence, it is not open to the Second Respondent to challenge it. This goes for paragraph 19 which is similarly directed at the conduct of the First Respondent.

[13] Paragraph 22 which is objected oh the basis of irrelevance deals with the investigations conducted by Applicant's Counsel at the Manzini Magistrates Court which established irregularities in the manner the proceedings were conducted. These are the proceedings which led to the issue of a judgment by default against the First Respondent, the attachment and subsequent sale by Execution of the property of the First Respondent by the Third Respondent. The irregularities highlighted in paragraph 22 are necessary in proceedings of this nature where the judgment which culminated in the sale of the property is in issue. Furthermore, the allegations in paragraph 22 challenge the auction sale on the basis that it was not conducted in accordance with the law; hence, such allegations cannot be said to be irrelevant in the matter before court.

[14] Annexure "MD1" is sought to be s truck-off on the basis that "it is irrelevant, self-serving or proves consistency". The annexure referred to is a correspondence by the Swazibank to the Applicant advising him that they "still await receipt of the consent to the sale by the Master of the High Court which was to be submitted by the Seller's agents Sigwane and Partners." The letter was in response to an application for a loan by the applicant to purchase the property and the issuance of a bank guarantee. The letter proceeds and states that "we have confirmation from the agents by letter of the 18th November 2008 that they would be attending to the registration of the transfer of property and that the relevant consent to the sale by the Master would be submitted upon liquidation and Distribution of the estate. However, no further communication has been received and we advise you to consult with them. As the matter stands the bank is unable to finalize the application".

14.1. It is common cause that the applicant and the Estate of the late Daniel Reuben Thwala represented by the Attorney for the Second Respondent in his capacity as Attorney to the Executor of the Estate by virtue of a Power of Attorney concluded the contract for the sale of the property being Lot No. ERF260 situate in Manzini for a purchase price of E940 000.00 (Nine hundred and forty thousand Emalangeni) on the 8th
October 2007. In terms of the contract, the applicant paid a deposit of E700 000.00 (Seven hundred thousand Emalangeni) to the Seller's Conveyancers Sigwane and Partners; and these are the same Attorneys who drew the Deed of Sale, and, who now represents the

Second Respondent in this matter. The balance of E240 000.00 (Two hundred
and forty thousand Emalangeni) was payable by means of a bank guarantee secured by a bank and drawn in favour of the Seller's Conveyancer to be furnished within thirty days from the date of signature and payable upon registration of transfer.

14.2 It is common cause that the thirty day period for the applicant to submit a bank guarantee has expired; and according to the applicant and Swazibank, this has been stalled by the failure to furnish the Master's consent to the sale. The attack on annexure "MD1" is ill-conceived in the light of the allegations by the applicant and Swazibank that the failure to release the bank guarantee was caused by the failure of the Seller's Agents to secure the Master's consent for the sale; the Attorneys for the Second Respondent are the Seller's Agents.

14.3 In the circumstances, Annexure "MD1" is not irrelevant, scandalous or vexatious as alleged by the Second Respondent.

[15] The Second Respondent has also objected to paragraphs 24, 24.1, 24.4, 24.5, 24.7, 24.8, 24.9, 24.10 and 24.11, as being vexatious, scandalous, hearsay, embarrassing, defamatory, annoying and opinionated. These paragraphs relate to the conduct between the First and Third Respondents as well as the offices of Attorney Sigwane and Partners; the said conduct is alleged to amount to a collusion. The allegations thereof are not directed at the Second Respondent as a

party to the proceedings. Similarly, paragraph 25 is alleged to be defamatory, vexatious, scandalous and embarrassing; however, the said paragraph only refers to the conduct of the First and Third Respondents as well as Attorney Bob Sigwane.

[16] Paragraph 26 is alleged to be embarrassing, vexatious and defamatory and that it has to be struck-out. This paragraph constitutes a conclusion of law based on the irregularities alleged in the preceding paragraphs against Attorneys Sigwane and Partners, as well as the First and Third Respondents; it is not directed at the Second Respondent. The said paragraph cannot be said to be embarrassing, vexatious and defamatory against the Second Respondent.

[17] Paragraph 30 is said to be embarrassing against the Second Respondent. As I have stated in the preceding paragraphs, if a matter is alleged to be embarrassing, it is the subject of Rule 23 (1) relating to Exceptions and not applications to strike-out. In any event, the contents of paragraph 30 are common cause that the property is registered in the name of the Second Respondent; and, that as registered owner he could evict the applicant or even encumber or transfer the property. There is no legal basis for the Second Respondent to object to the contents of this paragraph.

[18] Paragraph 31 is directed at the conduct of the First Respondent and his erstwhile Attorney; it has nothing to do with the conduct of the Second Respondent; hence, there is no legal basis for the Second Respondent to challenge the contents of the said paragraph.

[19] It is trite law that a party intending to object to a matter on the basis that it is scandalous, vexatious or irrelevant, he may apply to court to have the matter struck off from the affidavit. However, the court will not grant the application unless satisfied that the applicant will be prejudiced in his case if it be not granted. Applications to strike out are taken by way of motion upon proper notice to the other party indicating the passages that are being objected together with a brief statement of the grounds of the objection. Such an application is interlocutory and incidental to pending proceedings; hence, the time limits stated in Rule 6 need not be strictly followed as in the main application:

- **Herbstein & Van Winsen, the Civil Practice of the Supreme Court of South Africa, 4th edition Juta & Co. Ltd 1997, pages 370-372.**
- **Vaatz v. Law Society of Nambia (Supra) at pages 566-567**
- **Angilly v. Hersman; In re: Prisman 1936 (2) PHF94 (C).**

[20] The application to strike out should be made when the matter is before court on the merits; if made prior as in the present case, the application to strike out will be premature. **Price J** in **Elher (PTY) Ltd v. Silver** 1947 (4) SA 173 (W) at 176 stated that an application to strike out matter from an affidavit is not an objection to a pleading, but an objection to evidence proposed to be tendered to the court hearing the application. His Lordship continued and said the following:

> "How can a court which is not hearing the application disallow evidence which it is proposed to tender later on as irrelevant to the merits of the dispute? The court which ultimately decides the application may have quite a different view as regards the relevance of some of the passages when all the evidence is presented to it and the matter has been fully argued."

[21] At page 177 His Lordship stated that until the actual hearing of the application, the affidavits are not before court as evidence, they are merely documents filed with the Registrar to be used later as evidence when the application is heard, and they cannot be objected to until then. It is for this reason that in the case of **Molebatsi v. Mogasela** 1953 (4) SA 484 (W), the court refused an application to strike out prior to the filing of an Answering Affidavit. In the case of **Elher (PTY) Ltd v. Silver** (supra), the court refused the application when a Replying Affidavit had not been filed. In the case of **Dennis v. Garment Workers' Union, Cape Peninsula** 1955 (3) SA 232 (C) at 239 G, the court emphasized that the time for an application to strike out is when the matter is before court on the merits and that in the meantime the allegations to which objection is intended to be taken must be dealt with in the Answering or Replying Affidavits as the case may be. In the case of **Shephard v. Tuckers Land and Development Corporation (PTY) Ltd** 1978 (1) SA 173 at 177 D-E, **Nestadt J** said the following:

> "Applications to strike out must be made when the matter is before the court on its merits, and if made prior thereto the application will be premature....

> There being no opportunity to object until the matter is before the court on its merits the allegations to which objection is intended to be taken must meanwhile be dealt with in the answering or replying affidavits, as the case may be, but this does not constitute a waiver of the right to object."

[22] I have analyzed the matters to which the Second Respondent has objected even though it was not necessary because the application to strike out had been lodged prematurely; and, the matter was not before court for hearing on the merits. However, in order to avoid a multiplicity of interlocutory applications to strike out, I felt obliged to deal with the application to strike out once and for all. This application is dismissed on two grounds: First, the application was brought prematurely when the matter was not before court on its merits. Secondly, the Second Respondent has failed to show that the matters complained of were irrelevant, vexatious or scandalous. Furthermore, he has failed to show that the matters are prejudicial to it because the allegations complained of relate to the conduct of the First and Third Respondents as well as Attorneys Sigwane and Partners.

[23] The warning given by **Justice Erasmus** in the case of **Steyn v. Schabort and Another** (supra) with regard to technical objections in applications to strike out is relevant in this application; this procedure was never intended to be utilized to make technical objections of no advantage to anyone save to delay the merits of the case and an increase in costs unnecessarily. Furthermore, before a party lodges such an application he must satisfy himself that the offending matter is not only irrelevant, vexatious or scandalous but that it is prejudicial to the conduct of his case.

[24] The Second Respondent is ordered to pay costs of suit to the Applicant at a scale between Attorney and Client.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT