



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1920/2012

In the matter between:

MAVIS LALAPHI DLAMINI (NEE SIBEKO)

Applicant

And

ENOCK LONKONJWA DLAMINI & ANOTHER

Respondent

Neutral citation: Mavis Lalaphi Dlamini (nee Sibeko) v Enock Lonkonjwa Dlamini and Another (1920/2012) [2012] SZHC (13th December 2012)

Coram: M. Dlamini J.

Heard: 10th December 2012

Delivered: 13th December 2012

*Application proceedings –interdict - three essential requirements-
each case to be decided on its merit.*

Summary: Applicant who is married to the 1st respondent in community of property and have four major children, has filed an application interdicting 1st respondent from collecting rentals from their matrimonial home and directing the 2nd respondent, a tenant to pay rentals to her. The *raison d’etre* for such prayers is that she secured a bank loan to construct their matrimonial home now occupied by 2nd respondent in terms of the lease agreement between 1st and 2nd respondent.

[1] Applicant avers in her founding affidavit as follows:

The applicant and 1st respondent entered into a civil rites marriage in community of property on 26th January 1979. Four children who are now majors were born out of the marriage.

[2] Both applicant and 1st respondent purchased an immovable property in Manzini. As per the Deeds Registry Act, however, this property was registered in the name of 1st respondent. Subsequently applicant secured two separate loans with Swazi Bank in order to construct a matrimonial house on the said property. However, during the course of the marriage, the relationship between applicant and 1st respondent became strained. Applicant in order to save her life and that of her children from 1st respondent moved out of the matrimonial house in 2008. By this time, applicant avers, 1st respondent already wedded a second “wife” in terms of Swazi law and custom. The marriage had irretrievably broken down in terms of the South African Laws governing divorce, applicant submits. Applicant however consistently serviced the loans with Swazi Bank. In her reply, she states that she had to solicit a further loan in order to save the property from attachment for failure to pay various debts which I will revert to later on in my judgment.

[3] She states further that when she secured the loans with Swazi Bank to construct the common house, she had never anticipated a situation in which she and the 1st respondent would part ways. She had hoped that 1st respondent would assist in supplementing her income and she would service the loans without any difficulty. Now that she is retiring without such assistance from 1st respondent, she prays for an order to collect the rentals.

[4] The 1st respondent in his answering affidavit informs the court of a number of different positions. In brief, he states that applicant should not have approached the court but rather discuss the matter with him as he is willing to take over the loan and that applicant is free to come back home. He, however, concedes that as applicant was, through her cell-phone, called by various men, her conduct disrespectful of him and this could not be tolerated by him. He further submits that as he is not employed, he uses the rentals to maintain himself and his option of compelling applicant to maintain him is still open.

[5] He also puts forth another position that applicant ought to have known that she would retire and made her calculations well before entering into the loan agreement with the Swazi Bank. He goes further to dispute applicant's right to be rentals as he is the registered owner of the property and the lease agreement is binding between himself and the 2nd respondent and not applicant.

[6] When the matter appeared before court on 10th December 2012, on the basis of 1st respondent's averments that applicant should have approached him in order to resolve the matter amicably. I ordered the parties to discuss the matter and return with a deed of settlement on 12th December 2012.

[7] However, on the return date both counsel indicated that the parties had failed to reach a consensus. It was imperative that the court decide on the merit of the case.

[8] Respondents' counsel raised points in *limine viz.* that the applicant had dismally failed to establish the requirements of an interdict and insisted that the matter should be dismissed on those grounds. Respondents strenuously contend that the applicant has failed to meet the very first requirement of an interdict. 1st respondent informs court that as the titled deed holder of the immovable property upon which the house is built, he has a clear right and certainly not the applicant. He carries this assertion further by stating that by virtue of the lease agreement between the 2nd respondent and himself, he has a right to collect the rentals as the applicant does not feature in the lease agreement. Respondents does not challenge the other requirements.

[9] The issue for determination therefore is whether applicant has established a clear right.

[10] **Hebstein and Van Winsen, “The Civil Practice of the High Courts of South Africa” 4th Edition Volume 2** writing on a clear right under interdicts state at **page 1457 – 1458** and citing **Minister of Law and Order v Committee of the Church Summit 1994 (3) S.A. 89 AT 98.**

“Whether the applicant has a right is a matter of substantive law. ... The right which the applicant must prove is also a right which can prove is also a right which can be protected. This is a right which exist in law, be it at common law or statutory law.”

[11] In **Maziya Ntombi v Ndzimandze Thembinkosi (02/12) [2012] SZSC 23 Maphalala J. A.** at **page 14** propounds:

“.....the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear right to the subject – matter of the dispute.”

[12] It is not in issue that the applicant and 1st respondent are married and the marriage still subsist although divorce proceedings are as indicated by applicant at an advanced stage. It is not disputed that the house which is the subject matter of the lease agreement was built by use of a loan secured by applicant. 1st respondent does not further contest that at the time when applicant secured the loan agreement, the applicant and 1st respondent were living together as husband and wife.

[13] However, 1st respondent in defending a claim by applicant to collect the rentals to pay off the loan states at his paragraph 3.14 page 7.

“No one has done anything to interfere with applicant’s rights. Applicant is paying in terms of the agreement that she made to the bank when she applied for and was granted the loan. Applicant should have foreseen such a situation when she moved out of the home, nothing has changed since then, the bank is effecting the terms of the agreement as made between it and applicant. Applicant knows what she earns and ought to make her budget around her income taking into account that she has to pay for the property as promised.”

[14] Applicant replies:

1st respondent does not dispute that the relationship between the applicant and himself was strained. In fact, respondent states that this was as a result of telephone calls received by applicant from men.

[15] 1st respondent further contends as reason for collecting rentals:

“

[16] In brief 1st respondent admits that the tense relationship between himself and applicant warranted applicant to move out.

[17] It is clear that interviewing factors since the date of the loan agreement by applicant has compelled applicant to move the present application.

