



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Appeal Case No: 95/12

In the matter between

ROBERT S. DLAMINI

APPLICANT

And

DZELIWE FLORA DLAMINI

RESPONDENT

Neutral citation: *Robert S. Dlamini v Dzeliwe Flora Dlamini*
(95/13) 2013 [SZHC] 12 (6th February
2013)

Coram: **OTA J**

Heard: **1 February 2013**

Delivered: **6 February 2013**

Summary: Disputes of fact in motion proceedings: applicable principles: matter referred to trial.

- [1] This case which came to me on the premises of urgency turns on the ownership of a business known as Lozindonga Bottle Store and Bar situated at Martin Street opposite the Ilanga Centre Building in the City Centre of Manzini. (the business)
- [2] It is worth mentioning that the parties herein are siblings. The Applicant claims to be the owner of the business while the Respondent contends for ownership with equal force. This situation generated the acrimony that birthed this application wherein the Applicant claims the following substantive reliefs:
1. Directing the Respondent to surrender or restore the operation or possession of Lozindonga Bottle Store and Bar to the Applicant including keys and their duplicates to all entry points in the said business.
 2. Interdicting and restraining the Respondent from alienating or removing the business equipment and stock at Lozindonga Bottle Store and Bar situated at Martin Street opposite the Ilanga Centre Building in the City Centre of Manzini.
 3. Directing the Respondent to deposit all cash and bank draft receipts from sales in the business in the Applicants Swazi Bank repayment account number 77018683932 held at the

Manzini Branch of Swaziland Development and Savings Bank (Swazi Bank).

4. Directing the Respondent to fully account to the Applicant in respect of the conduct and operation of Lozindonga Bottle Store and Bar from May 2011 until this matter is fully and finally concluded by this Honourable Court.
 5. Directing the Respondent to pay the Applicant's costs of suit at attorney-and-client scale.
 6. Further and/or alternative relief.
- [3] Having carefully considered the totality of the affidavits filed of record, as well as oral submissions of counsel , I will proceed straight to the meat of this matter.
- [4] It is common ground in this application that the business was purchased from one **Hleziphi Reginah Maseko (Hleziphi)** for the sum of E380,000-00.
- [5] It is common cause that the said sum of E380,000-00 used to purchase the business was secured by the Applicant via a loan from a Bank. The Respondent admits this fact in para 27 of her answering affidavit to be found on page 38 of the book, where she avers that the Applicant assisted her financially in procuring the business by securing a loan from a Bank. She however alleges that she has paid

- back the Applicant his money. That she deposited the sum of E150,000-00 to the bank as a condition for him to secure the loan and the balance was paid to the Applicant at different intervals. The Respondent urged no documentary evidence in proof of this allegation which is vehemently disputed by the Applicant.
- [6] What is evident from the papers is that the Applicant secured a loan of E380,000-00 from Swazi Bank (RSD2). Also clear from the papers is a receipt acknowledging payment of the sum of E380,000-00 (RSD1) which was issued by **Hleziphi** on 01/06/2011 in the names of both the Applicant and Respondent.
- [7] Even though RSD1 does not indicate what the sum of E380,000-00 paid was meant for, RSD3A which is also dated 01-06-2011 shows that Swazi Bank paid the sum of E380,000-00 to **Hleziphi** from whom both parties claim to have purchased the business for the same amount. Thus raising the logical inference that the amount of E380,000-00 which **Hleziphi** acknowledged in RSD1 was for the purchase of the business.
- [8] This is where my difficulty in resolving this case on the strength of the affidavit evidence lies. I say this because, even though the Respondent has exhibited a trading licence for the business in her name claiming ownership of same, the Applicant who is also named on RSD1 as one of the parties from whom **Hleziphi** received the purchase price of E380,000-00 for the business, contends that the business belongs to him and that he merely authorized the

Respondent to operate the business on his behalf and to make deposits of all receipts in his account so that there would always be credit against which the monthly installment of at least E13,640-00 due in repayment of the loan secured from Swazi Bank to finance the business could be levied or offset. He alleged that the Respondent failed to adhere to this agreement which resulted in his default in the sum of E70.000-00 in repayment of the loan and Swazi Bank paying for his blood in consequence thereof.

- [9] To my mind notwithstanding the trading licence via which the Respondent claims ownership of the business, the presence of RSD1 raises a serious dispute as to the ownership of the business especially as there is no clear cut evidence of how Respondent acquired the trading licence of the business in the circumstances.
- [10] This state of affairs is compounded by **Hleziphi** who filed a supporting affidavit to the Respondents answering affidavit in which she avers that in June 2011 she sold the business to the Respondent and issued a receipt of payment, effectively contradicting RSD1 in which she acknowledged receiving the sum of E380,000-00 from both parties.
- [11] It is inexorably apparent that the affidavits serving before court raise the following disputes of fact:

1. Whether or not **Hleziphi** sold the business to both parties or to Respondent alone?
2. Whether or not the Respondent is the owner of the business.
3. Whether or not the Respondent was merely authorized by the Applicant to manage the business on his behalf?
4. Whether or not the Applicant merely assisted the Respondent to service a loan to finance the business and she has paid him back his money?

[12] These are issues that cannot be resolved on the affidavit before court but require viva voce evidence. Counsel's entreaties for the matter to be determined on the balance of probabilities is inconceivable. This is because the judicial consensus is that the question of probabilities ought not to arise in motion proceedings. These issues require viva voce evidence, to accord the court the opportunity to come to a just decision on the balance of probabilities after a consideration of the evidence and the credibility of witnesses.

[13] **As Herbstein et al stated in the Civil Practice of the Supreme Court of South Africa (4th edition) at page 234.**

“ It is clearly undesirable in cases in which facts relied upon are disputed to endeavour to settle the dispute of fact on an affidavit, for the ascertainment of the true facts is effected by the trial judge on

consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and coming to a conclusion”

See Sandile Zwane v Celiwe Nxumalo and another Civil Case No. 3809/09 para 7.

[14] The Applicant clearly acknowledged the possibility of disputes of fact arising in casu, in paragraph 7 of his Replying affidavit where he avers as follows

“7. To the extent that the Respondent claims that I assisted her by securing a loan to finance the business and that she paid me back the money, I submit that this is self evidently untrue because the details are not only unspecified but the Respondent has no plausible explanation for all the documentary evidence that points (sic) to the overwhelming probability that I acquired the business through the Swazi Bank loan. In the unlikely event that this Honourable Court finds that there is a dispute of fact in this regard, I am advised that this is a proper case for this Honourable Court to refer the matter to oral evidence on this narrow aspect as this will ensure a just and expeditious decision.”

[15] It is worth mentioning that jurisprudence also enjoins the Judge even when there is no bona fide disputes of fact, to reserve itself the discretion in appropriate circumstances to deny an Applicant the use of motion proceedings in cases where a trial action would be the appropriate course. **See R Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd 1948 20 SA 626 (T) At 631 Hlobsile Cynthia Maseko (Nee**

**Sukati) and Others V Sellinah Maseko (Nee Mabuza) & Others
Civil Case No. 3815/10.**

[16] **Mr Mamba** has urged upon me the case of **Cedric Mndzebele v Dumisa Zwane and Others Civil Case No. 130/11**, as authority for his proposition that the presence of the Respondents trading licence puts the question of the ownership of the business beyond dispute. I beg with respect to disagree. This is because the facts of that case are easily distinguishable from the facts of this case.

[17] In the **Mndzebele** case the applicant claimed ownership of the business on the allegation that his sister the 6th Respondent illegally sold it to the 5th Respondent who was operating the business without his consent. However, contrary to the Applicants assertions the evidence revealed that the 5th Respondent was running the business on behalf of one **Vacu Magongo** who held the trading licence of the business and was also the owner of the premises.

[18] In casu, in the light of RSD1 and the Respondents admissions that the Applicant did assist her to secure a loan to purchase the business even though she claims to have repaid the Applicant, which fact is not established on the papers, it is imperative that oral evidence be adduced to establish ownership of the business.

[19] In the light of the totality of the foregoing, I hereby make the following orders:-

1. That the parties be and are hereby referred to trial action.
2. That the affidavits filed of record be and are hereby ordered to stand as pleadings in the trial.
3. That the matter shall take its normal course in terms of the rules
4. The question of costs to be determined at the trial.

For the Applicant: S. K. Dlamini

For the Respondent: S. P. Mamba

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
6th DAY OF FEBRUARY 2013**

**OTA J
JUDGE OF THE HIGH COURT**