IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No: 1995/2008

In the matter between:

DAVID THEMBA DLAMINI	**APPLICANT**
AND	
SYLVIAN LONGENGO OKONDA	**FIRST RESPONDENT**
JUSTICE SIBUSISO DLAMINI	**SECOND RESPONDENT**
ZANDILE PATIENCE DLAMINI	**THIRD RESPODNENT**
FIRST NATIONAL BANK	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS	**FIFTH RESPONDENT**
ZONKE MAGAGULA & COMPANY	**SIXTH RESPONDENT**
M.J. MANZINI AND ASSOCIAATES	**SEVENTH RESPONDENT**
THE ATTORNEY GENERAL	**EIGHTH RESPONDENT**

In re:

Sylvian Longengo Okonda	Plaintiff
and	
David Themba Dlamini	Defendant

Neutral citation: *David Themba Dlamini* vs *Sylvian Longengo Okonda & 7 others (1995/2008) [2013] SZHC167 (8 August 2013)*

CORAM: **M.C.B. MAPHALALA, J**

Summary

Interim interdict – applicant seeks an interim order interdicting and restraining the fourth respondent from transferring an immovable property to the second and third respondents pending review proceedings before the Supreme Court – requirements of interim interdict an

discussed – review dismissed by Supreme Court – held that the applicant has failed to prove the essential requirements of the remedy sought – application dismissed with costs.

JUDGMENT
8 AUGUST 2013

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[1] This is an urgent application for a *rule nisi* to issue with immediate and interim effect calling upon the respondents to show cause why an order should not be made final interdicting and restraining the fourth respondent from effecting the transfer of Portion 929 (a Portion of Portion 237) of Farm 188, Dalriach, Hhohho district, Swaziland, measuring 1, 3906 hectares and held by Themba David Dlamini, the applicant, to the second and third respondents pending the hearing of the review proceedings before the Supreme Court.

[2] The applicant alleges that on the 28th June 2011, the above Honourable Court issued an order against him to pay E280 000.00 (two hundred and eighty thousand emalangeni) to the first respondent together with interest at the rate of 9% per annum calculated from the date of summons to date of payment as well as costs of suit. It is common cause that the first respondent issued summons against the applicant for the said amount including the said interest and costs. The first respondent had alleged in the summons that the money claimed was in respect of a refund of a purchase price that she paid pursuant to the conclusion of a contract of sale between the parties for an immovable property being Portion 929 (a Portion of portion 237) of Farm 188, Dalriach, in the Hhohho District on the 10th October 2007.

[3] The first respondent further alleged in the Particulars of Claim that the applicant had subsequently sold the property to Ayanda Trust and further transferred it on the 17th January 2008, effectively repudiating their contract. The first respondent had also alleged that she had accepted the repudiation and termination of the contract, and, that she was claiming the deposit of the purchase price paid, and, which the applicant had acknowledged in terms of clause 2 of the Deed of Sale. The applicant had defended the Action, and, the first respondent had filed an Application for Summary Judgment. The first respondent inturn filed an Affidavit Resisting Summary Judgment.

[4] The matter was heard on the 28th June 2011. The presiding judge records that the first respondent was represented by Attorney Zonke Magagula and the applicant was initially represented by Attorney S.C. Dlamini who subsequently withdrew his services. The learned judge further records that after hearing evidence by the first respondent who was the plaintiff, the applicant indicated at the commencement of the defence case that he had no desire to proceed with the case and that he acknowledges signing the Deed of Sale; hence, he has no defence to the action. It is against this background that His Lordship granted the Order.

[5] The applicant argues that pursuant to the judgment, the first respondent issued a Writ of execution against the movable property, and, a *nulla bona* return was made by the Deputy Sheriff. The first respondent inturn caused execution against his

immovable property, and, it was sold in execution to the second and third respondents for a purchase prince of E615 000.00 (six hundred and fifteen thousand emalangeni).

[6] The sixth respondent opposes the application and has filed an Answering Affidavit. In *limine* it is argued that the second respondent has already paid for the property, and, the first respondent has already been paid from the proceeds thereof. It is further argued that the applicant has failed to show that he is entitled to the interdict.

[7] On the merits the sixth respondent states that the summary judgment application was argued before *Justice Q. M. Mabuza*, and, that she subsequently referred the matter to trial. The sixth respondent further denies that the applicant was denied the right to engage another attorney after his attorney had withdrawn in Court, and, it further contends that the presiding Judge, *Justice Hlophe*, granted leave to the applicant to engage another attorney; however, he declined the opportunity to engage another attorney, and, told the Court that he would represent himself.

[8] Attorney Zonke Magagula who deposed to the affidavit on behalf of the sixth respondent contends that the applicant, who was entitled to the excess of the purchase price, personally instructed him to pay it over the second respondent at a meeting held between the applicant, his wife and daughter as well as the second respondent in terms of a prior agreement between them.

[9] The sixth respondent argues that the relief being sought by the applicant does not exist in law on the basis that the above Honourable Court is *functus officio* and cannot entertain the matter. In addition, that the Supreme Court does not have review jurisdiction over the High Court.

[10] The replying affidavit deposed to by the applicant does not take the matter any further save to repeat the allegations in the founding affidavit. In addition the applicant argues wrongly that the Supreme Court has the power to review the decision of the High Court in terms of section 148 (1) of the Constitution; and, that this gives him a *prima facie* right to the interim interdict sought. He argues that the review of this Court's decision will have the effect of setting aside the judgment, and, the trial to start afresh. Furthermore, he concedes that he approached the offices of the sixth respondent with his wife and daughter as well as the second respondent where he instructed the sixth respondent to pay the excess of the purchase price to the second respondent.

[11] It is common cause that subsequent to the hearing of this matter, the Supreme Court heard the review application in this matter on the 17th May 2013. A unanimous judgment was delivered by *His Lordship Ramodibedi CJ* on the 31st May 2013. At paragraph 16 *His Lordship* stated the following:

> **"16. .... As the Full Bench of this Court meticulously held in *Kenneth B. Ngcamphalala v. The Principal Judge of the High Court and Others*, Civil Case No, 24/2012 in terms of sections 146 and 147 of the Constitution, read with**

sections 14, 15 and 16 of the Court of Appeal Act, that the jurisdiction of the Supreme Court is wholly statutory and appellate only. Importantly, this Court held that it has no review jurisdiction over High Court decisions. This is precisely so because review is a remedy which lies against inferior Courts. In terms of s 139 (1) (a) (ii) of the Constitution, the High Court is a Superior Court. See also *John Roland Rudd v. Rex*, Criminal Appeal case No. 26/2012."

[12] The Supreme Court consequently dismissed with costs the application to review the High Court's decision delivered by this Court on the 28th June 2011. The Court further dismissed with costs the applicant's ancillary applications as follows: firstly, on the 15 February 2013, the applicant filed an application to have an affidavit of one Sithembile Kunene admitted as part of the applicant's founding affidavit in support of the review application. Secondly, on the 26th March 2013, the applicant filed a Notice of intention to strike out certain paragraphs of respondent's answering affidavit as well as the confirmatory affidavit of Zonke Magagula. Thirdly, on the 2nd April 2013, the applicant filed a notice of application for condonation of the late filing of the record of proceedings.

[13] The applicant in so far as it seeks an interim interdict has failed to show a *prima facie* right for the following reasons: Firstly, the applicant's agent Sithembile Kunene has acknowledged receipt of the deposit of E280 000.00 (two hundred and eighty thousand emalangeni) on behalf of the applicant; secondly, Attorney Mabandla Manzini has deposed to an affidavit in which he states that he was approached by the applicant and the said Sithembile Kunene to prepare an acknowledgement of debt to the applicant and which she subsequently signed. Thirdly, the applicant signed the

Deed of Sale in which he acknowledged payment of the deposit of E280 000.00 (two hundred and eighty thousand emalangeni). Clause 2 thereof provides:

> **"The purchase price shall be the sum of E620 000-00 (six hundred and twenty thousand emalangeni) less E280 000.00 (two hundred and eighty thousand emalangeni). The balance shall be payable in the bank or Building Society against the registration of transfer. The aforesaid purchase price shall be secured by a guarantee drawn in favour of the Seller's Conveyancers (R.J.S. Perry) for the account of the Seller within 60 (sixty) days of signing hereof, failing which the sale shall be cancelled and may be extended by a mutual agreement."**

13.1 Lastly, the Supreme Court has since dismissed with costs the anticipated application for review of the High Court's judgment of the 28th June 2011.

[14] It is well-settled that an applicant who seeks an interim interdict should establish the following essential requirements: firstly, a right which is though *prima facie* established is open to some doubt, namely, that he has a *prima facie* right. Secondly, a well grounded apprehension of irreparable injury if the interim relief is not granted. Thirdly, that the balance of convenience favours the grant of an interim interdict. Fourthly, that there is no other satisfactory remedy.

See cases of *Setlogelo v. Setlogelo* 1914 AD 221 at 227; *Erickson Motors Ltd v. Protea Motors and Another* 1973 (3) SA 685 AD) at 691.

[15] Accordingly, the following order is made:

(a) The *rule nisi* is discharged.

(b) The application is dismissed with costs.

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

For Applicant	Attorney Sabelo Bhembe
For First and Sixth Respondents	Attorney Zonke Magagula