



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Civil Case No: 535/13**

**In the matter between**

**RUDOLPH DIAMOND  
BONGANI MAHLALELA**

**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT**

**And**

**TSAKANE RUDOLPH SHILUBANE N.O.  
THE REGISTRAR OF DEEDS  
THE MASTER OF THE HIGH COURT  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT**

Neutral citation: *Rudolph Diamond and Another v Tsakane Rudolph Shilubane N.O and 3 Others (535/13) [2013] SZHC178 (13 August 2013)*

**Coram: OTA J**

**Heard: 9 August 2013**

**Delivered: 13 August 2013**

**Summary:** Civil procedure: security for costs; 2<sup>nd</sup> Applicant a peregrinus disputing only the amount sought for security as exorbitant; the Registrar of the High Court determined the amount of security in terms of Rule 47 (2) of the Rules of the High Court; the 2<sup>nd</sup> Applicant failing to give security within a reasonable time of the Registrar's determination; 1<sup>st</sup> Respondent launched an application pursuant to Rule 47 (3) and (4) to compel the giving of said security or dismissal of the proceedings; application upheld.

**OTA J**

### **Judgment**

[1] *In casu*, it is convenient for me to refer to the parties as they appear in the main application.

[2] This matter is a fall out from an application which the Applicants launched on the 12<sup>th</sup> of April 2013 on the premises of urgency, contending for the following substantive reliefs:-

**“3.1 That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby interdicted and restrained from effecting transfer to any one against the prejudice of the creditors and heirs of the Estate of the late Paul Mahlaba Shilubane under Estate EH 92/2012, of the under mentioned property:**

**Certain: Lot No 1532 situate in Mbabane Extension No. 11 (Thembelihle Township) District of Hhohho, Swaziland**

**Measuring: 600 (six zero zero) square meters.**

**Held: Paul Mhlaba Shilubane under Deed of Transfer No. 1022/2011 dated 20<sup>th</sup> December 2011.**

**3.2 Compelling and Directing the 1<sup>st</sup> Respondent in his position as Executor or any other positions he so claims, to deal with this property under the hospices of the office of the 3<sup>rd</sup> Respondent, as immovable property under the Estate of the late Paul Mhlaba Shilubane**

**4. Costs of suit against the First Respondent and any other party who may oppose this application”**

[3] In the wake of the foregoing application, the 1<sup>st</sup> Respondent filed a Notice in terms of Rule 47 of the Rules of the High Court, seeking for an order that 2<sup>nd</sup> Applicant provides for 1<sup>st</sup> Respondent's costs in an amount of at least E15,000-00, on grounds that the 2<sup>nd</sup> Applicant is a peregrinus of this Court, being resident in Nelspruit, Republic of South Africa and has no known movable or immovable property in Swaziland.

[4] The 1<sup>st</sup> Respondent followed up the above Notice with a letter dated the 3<sup>rd</sup> of June 2013 and addressed to the Applicants' attorneys, in which the 1<sup>st</sup> Respondent's attorneys notified the 2<sup>nd</sup> Applicant that he intends instructing an Advocate from South Africa to handle the main application and was thus demanding the sum of E100,000-00 as security for costs, which amount has to be availed to the Registrar of the High Court before the close of business the 6<sup>th</sup> June 2013.

[5] The 2<sup>nd</sup> Applicant reacted to this letter via a letter from his attorneys dated 7<sup>th</sup> June 2013 and addressed to 1<sup>st</sup> Respondent's attorneys, wherein he notified 1<sup>st</sup> Respondent that the demand of the sum of E100,000-00 as security for costs is opposed as same is exorbitant and

in the circumstance, the issue may be referred to the Registrar for determination in terms of the Rules.

[6] Suffice it to say that the matter was eventually set down before the Registrar for determination. In his decision delivered on 12<sup>th</sup> June 2013, the Registrar determined that a deposit of E100,000-00 should be made as security for costs.

[7] The 2<sup>nd</sup> Applicant failed to provide security for costs as determined by the Registrar. It is this state of affairs that precipitated the present application by 1<sup>st</sup> Respondent to compel 2<sup>nd</sup> Applicant to provide the said security for costs, failing which the Court should dismiss the matter.

[8] This application is predicated on Rule 47(3) and (4) of the Rules of this Court which state as follows:-

**“3 If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the Registrar within ten days of the demand or the Registrar’s decision, the other party may apply to Court on notice for an**

**order that such security be given and that the proceedings be stayed until such order is complied with.**

- 4. -----the Court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike-out any pleadings filed by the party in default, or make such order as to it may seem meet.”**

[9] Now, Rule 47(2) empowers the Registrar of the High Court to make a determination on the amount to be given as security for costs where the only issue in dispute is the amount to be fixed as such security. This legislation therefore confers on the Registrar quasi-judicial functions in this regard. Where the Registrar *bona fide* and in the exercise of his discretion fixed the amount, the Court will not interfere with that exercise of discretion except it is shown that it was exercised arbitrarily or capriciously or based on wrong principles.

[10] The Registrar’s discretion is as such not an arbitrary one. It is one which the law enjoins him to exercise judicially and judiciously upon facts and circumstances which show that it is just and equitable to do so.

[11] The Registrar in carrying out this function is required to comply with the laid down principles that must guide the Court in the exercise of such discretion.

[12] These principles were succinctly stated by the learned editor Erasmus, in the text **Superior Court Practice**, page B1-341, as follows:-

**“In Magid v Minister of Police the Appellate Division, after a review of the Roman Dutch authorities, held that at Common Law an incola did not have a right which entitled him or her as a matter of course to the furnishing of security for his or her costs by a peregrinus. The Court has a discretion whether or not to order security to be lodged in any given case; a discretion which is to be exercised by having regard to all the relevant facts as well as consideration of equity and fairness to both parties. There is no justification for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly. If the defendant incola is sufficiently safeguarded in other ways the Court will not order the security to be given. The underlying principle that in proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent, should be read subject to the qualification that it is applicable only after the Court, in the exercise of its discretion, had come to the conclusion that the peregrinus should not be absolved from furnishing security for costs”.** (emphasis added)

[13] How then did the Registrar reach the conclusion that security for costs should be given in the sum of E100,000-00.?

[14] The relevant aspects of the Registrar's decision appear on pages 105-106 of the record as follows:-

**“Registrar- All submissions have been properly considered. There is overwhelming evidence that this is a matter that involves peregrines as stated by the Respondent's attorney. The Registrar's involvement in such proceedings is to make a determination on whether there has to be security for costs. It is the Applicants submission that there are no assets and there is no adequate compensation that could be found. It is not in issue that this is a contentious matter that will take a number of days to resolve. The Respondents have indicated that they are engaging counsel and it is their right to do so. This will obviously escalate, the costs of the litigation. The Applicant's counsel states that the matter involves the embezzlement of funds by an attorney. This is a very serious allegation which believe (sic) the one alleging such can explore the appropriate avenues for redress. This is a transaction that was entered into by the buyer in the lifetime of the deceased and this is not disputed by the Applicant's counsel as also envisaged in the Master's report filed herein. It is not for the Registrar to deal with the merits or demerits of the case but for determination on the security for costs.**

**Rule 47 (1) entitles the party entitled and desirous to demand security for costs from another to do so and Rule 47 (2) entitled the Registrar to demand security for costs from another to do so and Rule 47 (2)**



**entitled the Registrar to make a determination on the amount to be given.**

**Rule 47 (4) talks about the Court on what it can do should there be default on the deposition of the security for costs. The Registrar is not in essence the Court and as such cannot issue Court order as the spirit of the section talks about the Judge making orders.**

**The Registrar is of the opinion that a deposit of One Hundred Thousand Emalangi (E100,000-00) be made as security. This is for the costs of counsel in the matter. The Respondents must be compensated for the costs of litigation. This is compounded by the fact that it is not in issue that second applicant is peregrines.”**

[15] I cannot on the record fault the above findings. The Registrar clearly and very carefully considered the facts and circumstances of this case before he made his determination. He considered the established fact that the 2<sup>nd</sup> Applicant is a peregrinus and has no movable or immovable assets in the jurisdiction.

[16] He considered the fact that the 1<sup>st</sup> Respondent intends to engage on advocate from South Africa to prosecute his case, this in itself involves a lot of costs, which costs, as correctly found by the Registrar, will be escalated by the fact that the matter is a contentious one which will take a number of days to resolve.

[17] The Registrar also considered the 2<sup>nd</sup> Applicant's allegation that the matter involves embezzlement of funds by an attorney, which allegation learned Counsel for 2<sup>nd</sup> Applicant Mr Manzini submitted before me, is a ground for the 2<sup>nd</sup> Applicant to be exempt from giving security for costs. It is obvious that the Registrar considered this allegation which he juxtaposed with the sale transaction alleged to have been entered by the deceased in his life time, wherein the deceased sold the property in issue to a third party as envisaged by the Master's report.

[18] I cannot fault these findings on the papers. I say this because even though in paragraph [7] of her report the Master stated that her office will abide by the Court's decision, she had however earlier on in paragraph [3] of the same report said the following:-

**“---what is relevant and important to draw the Honourable Court's attention to, is the fact that in our opinion and observation through filed documentation to this office, this immovable property was sold to an innocent purchaser during the life time of the deceased. This being the reason why, it does not appear in the filed inventory”.**

[19] It appears to me that the Registrar weighed and considered all the facts and circumstances of this case before he exercised his discretion in favour of a deposit of E100,000-00 as security for costs.

[20] I find no misdirection on the part of the Registrar. I hold that the discretion was properly exercised, therefore, I find no reason to interfere with the exercise of discretion.

[21] It is obvious from the record that the Registrar's determination was made on the 12<sup>th</sup> of June 2013. It is not disputed that there has still been non-compliance with that determination by the 2<sup>nd</sup> Applicant. I am inclined to agree with Mr Mdluli who appeared for the 1<sup>st</sup> Respondent, that the 2<sup>nd</sup> Applicant has indeed failed to comply with the order to furnish said security for costs within a reasonable time. This is more so, when one considers that the rights of a third party who allegedly bought the property during the life time of the deceased is left hanging in the balance, whilst prosecution of the main proceedings dwindles.

[22] Even though 1<sup>st</sup> Respondent seeks costs *de bonis propriis* against the 2<sup>nd</sup> Applicant's attorneys, I do not however think that the facts and circumstances of this matter demand such.

[23] I agree with Mr Manzini that the spirit of Rule 47 (3) places the duty on the 1<sup>st</sup> Respondent to approach the Court to compel deposit of such security. This duty does not lie on 2<sup>nd</sup> Applicant as to justify the punitive costs sought.

[24] In the result of the totality of the foregoing, this application has merits. It succeeds. I make the following order:-

1. That the 2<sup>nd</sup> Applicant be and is hereby ordered to give security in the sum of E100,000-00 as determined by the Registrar within 21 days of the date hereof.
2. That Case No. 535/13 and the entire proceedings therein, be and are hereby stayed pending the giving of the said security.

3. In keeping with Rule 47(4) of the Rules of the High Court, it is hereby further ordered that if the 2<sup>nd</sup> Applicant fails to comply with the order herein and that of the Registrar after the expiration of the 21 days period stipulated herein, Case No. 535/13 and the entire proceedings therein, shall be liable to be dismissed upon application by 1<sup>st</sup> Respondent.
  
4. Costs to follow the event.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
.....DAY OF .....2013**

**OTA J  
JUDGE OF THE HIGH COURT**

For the 2<sup>nd</sup> Applicant: N. Manzini

For the 1<sup>st</sup> Respondent: G. B. Mdluli