



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 591/2013

In the matter between:

**EMANGWENI PROPERTIES (PTY) LTD**

**Applicant**

And

**NELLIY MASEKO**

**Respondent**

**Neutral citation:** *Emangweni Properties (Pty) Ltd v Nelly Maseko (591/2013) [2014] SZHC 116(13<sup>th</sup> June 2014)*

**Coram:** **M. Dlamini J.**

**Heard:** **27<sup>th</sup> March, 2014**

**Delivered:** **13<sup>th</sup> June, 2014**

*Summary judgment application- question is whether the respondent has raised a bona fide defence. If yes, the court to dismiss application*

**Summary:** The applicant, a title deed holder, by summary judgment, seeks for an ejectment order against respondent. Respondent submits that a court order to the effect that applicant should transfer land to one **Andries Stepfianus Du Plessis** exist and that occupation of the premises is on the basis of that order after **Andries Stepfianus Du Plessis** sold the said land to her son-in-law, **Fidelis Dlamini**.

### **The pleadings**

[1] By means of a simple summons, the applicant sought for orders of ejectment and payment of arrear rentals to the total tune of E991,250.00.

[2] The respondent filed a notice to defend. Before she could file a plea, the applicant filed the present application where he deposed:

“3. *I have read the plaintiff’s Summons and Declaration and state that:*

3.1 *I can and do verify the facts and the amounts claimed therein;*

3.2 *In my belief there is no bona fide defense to claim 1 of the Declaration in respect of the prayer for ejectment and the Defendant has filed the Notice to defend solely for purposes of delaying the action.”*

[3] This was met with an affidavit resisting summary judgment which reads:

“4.2 *The Plaintiff sold the house to one ANDRIES STEPFIANUS DU PLESSIS who subsequently sold the house to my son-in-law FIDELIS DLAMINI. I was subsequently given occupation of the house by my son-in-law who advised me that the house had been bought. My son-in-law resides together with my daughter in Pretoria and my attempt to advise them of this situation failed since they are currently in the United Kingdom.*

- 4.3 *I had always known that the house was bought by my son-in-law ever since I took occupation and the Plaintiff had never maintained the house but I effected all maintenance and repairs and further made improvements on the property.*
- 4.4 *I have since been advised by my daughter ZODWA DLAMINI (born MASEKO) that the Plaintiff has all along failed to transfer the property into the name of my son-in-law FIDELIS DLAMINI, notwithstanding a directive from Mr. DU PLESSIS to do so.*
- 4.5 *The Plaintiff, particularly, its Director Mr. ROBERT LOBI ZWANE who signed the affidavit in support of the Summary Judgment Application is aware that the issue of transfer of the property has even been litigated upon in this Honourable Court under High Court Case No. 1089/2009 such that an Order was issued directing the said Mr. Zwane and other Directors of the Plaintiff to transfer the said properties*
- 4.6 *The Plaintiff's Directors have approached this Honourable Court with dirty hands in that they have failed to comply with this Honourable Court Order and now seek to eject me from the premises notwithstanding that the Plaintiff sold the property to a third party who subsequently sold it to my son-in-law.*
- 4.7 *I concede that the Plaintiff never relinquished its right of ownership in my favour but the Plaintiff ignores the fact that it sold the property and my occupation of the said property for all these years is consequence of that transaction.*
- 4.8 *Further, I concede that the Plaintiff remains the registered owner at the Deeds Registry, however, the presence of the Order directing the Plaintiff's Directors to execute all documents to give effect to the transfer of the property to Mr. DU PLESSIS failing which the Registrar of this Honourable Court be authorised to sign such documents renders the Plaintiff's claim excipiable for lack of locus standi."*

### **Issue**

[4] The issue is crisp. Does the applicant have an answerable case? See **First National Bank of SA Ltd v Myburg and Another 2002 (4) SA 176** at 177.

### **Adjudication**

[5] **Corbett JA** meticulously articulated what ought to be observed in applications of the present nature as follows:

*“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All the court enquires into is (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed, the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters, the court must refuse summary judgment either wholly or in part, as the case may be.” (Maharaj v Barclays National Bank Ltd (1976 (1) SA 418 at 426)(my emphasis)*

The learned judge wisely opines:

*“The word “fully” as used in the context of the Rule (and its predecessors) has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.” (Maharaj supra)*

[6] *In casu*, what is respondent’s defence? Does it disclose a *bona fide* defence? Respondent has deposed that she is in occupation of the land in issue by virtue of a sale agreement between one **Andries Stepfianus Du Plessis** and **Fidelis Dlamini** involving the same said land, that is, Lot 117 Manzini. The said **Fidelis Dlamini** is her son-in-law. She contends further that there is before court an order compelling applicant to transfer the said

piece of land to **Mr. Du Plessis** but applicant has failed to do so. She refers this court to case No.1082/09 and annexes a copy of the said order.

The court order reads:

“IN THE HIGH COURT OF SWAZILAND  
HOLDEN AT MBABANE ON FRIDAY THE 06<sup>TH</sup> DAY OF JULY 2012 BEFORE HER LADYSHIP THE  
HONOURABLE JUSTICE DLAMINI M.  
CASE NO. 1089

*In the matter between:*

ANDRIES STEPHANUS DU PLESSIS

Plaintiff

And

ROBERT LOBI ZWANE

1<sup>st</sup> Defendant

BONGANI ZWANE

2<sup>nd</sup> Defendant

MATHOKOZA ZWANE

3<sup>rd</sup> Defendant

EMANGWENI (PTY) LTD

4<sup>th</sup> Defendant

REGISTRAR OF DEEDS

5<sup>th</sup> Defendant

ATTORNEY GENERAL

6<sup>th</sup> Defendant

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COURT ORDER

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*Having heard Counsel for the Plaintiff and having read papers filed of record:*

*IT IS HEREBY ORDERED THAT:*

1. *The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant sign all documents to transfer Lot 177 Extension to Lot 177 (Pty) Ltd within 7 days of service upon them of the order of this Honourable Court.”*

[7] In the face of the court order calling upon applicant to transfer the property to **Mr. Du Plessis**, and the deposition of respondent that her son-in-law subsequently purchased the said property from **Mr. Du Plessis**, it is my considered view that respondent has fully raised a *bona fide* defence on the matter.

[8] For the above, I therefore enter the following orders:

1. Applicant’s application is dismissed.

2. Applicant is ordered to pay costs.

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**M. DLAMINI**  
**JUDGE**

**For Plaintiff** : **M. Nkomonde**

**For Defendant** : **D. Mande**