



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case 1349/2015

In the matter between:

**JACOBUS JONANNES VAN SCHALKWYK**

**Applicant**

And

**DUMISA ERIC NKOMONYE**

**1<sup>st</sup> Respondent**

**THE DEPUTY SHERIFF – HHOHHO DISTRICT**

**2<sup>nd</sup> Respondent**

**THE NATIONAL COMMOSSIONER OF ROYAL**

**SWAZILAND POLICE**

**3<sup>rd</sup> Respondent**

**ATTORENY GENERAL**

**4<sup>th</sup> Respondent**

**Neutral citation:** *Jacobus Hohannes Van Schalkwyk vs Dumisa Eric Nkomonye*  
(1349/2015) [SZHC 45] 4<sup>th</sup> March, 2016)

**Coram:** **MAPHALALA PJ**

**Heard:** **11<sup>th</sup> September, 2015**

**Delivered:** **4<sup>th</sup> March, 2016**

**For Applicant: Mr Mdladla**  
**(of S.V. Mdladla and Associates)**

**For Respondents: Mr. Nkomondze**  
**(of Nkomondze Attorneys)**

**Summary:** Civil Procedure – Application for ejecting and evicting 1<sup>st</sup> Respondent – Respondent contends that the Application is pending before this court under case no. 1320/15 – in the result, 1<sup>st</sup> Respondent point of **lis pendens** fails - this court then determined the merits of the case in terms of Rule 6 (12) of the High Court Rules – grants the Application in terms of the Notice of Motion.

## **JUDGMENT**

### **The Application**

[1] The Applicant instituted Motion proceedings under a Certificate of Urgency for an order in the following terms against the 1<sup>st</sup> Respondent one Dumisa Eric Nkomonye:

**“1. That dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.**

**2. Condoning applicant’ non-compliance with the rules of Court.**

**3. Ejecting and evicting the First Respondent from:**

**Certain: Portion 1 of Lot No. 395 situate in Stewart Street, in the town of Mbabane, District Hhohho, Swaziland;**

**Measuring: 1032 (One Zero Three Two) square metres;**

**Extending: As crown Grant No. 3/1946 made in favour of Johannes Balthus Kok dated the 22<sup>nd</sup> day of May, 1946 and several subsequent Deeds the last of which is Deed of Transfer N. 109/2005 made in favour of Dumisa Eric Nkomonye date 21<sup>st</sup> day of February, 2005 will more fully point out.**

- 4. Authorising the Second Respondent to effect this Order forthwith.**
- 5. Authorising and directing the Third Respondent to lend such assistance as may in the Second Respondent's opinion be necessary.**
- 6. That a rule Nisi do hereby issue calling upon the First Respondent to show cause why Prayers 1, 2, 3, 4, 5, 6, and 7 should not be made final on a date to be determined by the above Honourable Court.**
- 7. Costs of suit.**
- 8. Any further and / or alternative relief.”**

[2] The Application is founded on the affidavit of the Applicant one Jacobus Johannes Van Schalkwyk outlining the material facts in the dispute between the parties and in the said affidavit he has also filed pertinent annexures in this case.

### **The opposition**

[3] The 1<sup>st</sup> Respondent has filed a Notice to raise a point of law and has not canvassed a defence on the merits of the dispute. I must also mention that the attorney for the 1<sup>st</sup> Respondent Mr. Nkomondze further added other points **in limine** from the initial point of **lis pendens** in the notice I have just mentioned.

[4] In the 1<sup>st</sup> Respondent's Heads of Arguments at paragraph 2 thereof the issues that lie for determination by this court are the following:

2.1 **Lis Pendis**

2.2 **Whether Applicant has clear right in the property?**

2.3 **Whether the Applicant's application is defective for non-joinder?**

2.4 **Whether there is dispute of facts?**

2.5 **Whether the matter is urgent?**

[5] The Applicant had not filed a Replying affidavit when the matter appeared before this court on the 11<sup>th</sup> September, 2015 for arguments of the attorneys of the parties. I shall in brief outline the salient features of each parties arguments in the following paragraphs commencing with the Respondent's arguments on account of the point **in limine** mentioned above.

**(i) 1<sup>st</sup> Respondent's arguments**

[6] The attorney for the 1<sup>st</sup> Respondent advanced arguments for his client and dealt with the point **in limine** outlined in paragraph [4] of this judgment. On the point of law of **lis pendens** contended that whilst the Applicant has been served with the Summons by the 1<sup>st</sup> Respondent, the Applicant instituted the current Application for eviction. The Summons are to seek an order cancelling the registration of title of the property in question in the name of the Applicant as such the Applicant's title to the property is not unassailable, has no right to eject the 1<sup>st</sup> Respondent from the property. In the premise the 1<sup>st</sup> Respondent pleads that the issue of title between the Applicant and himself is now subject to determination in the action he instituted. In this regard a return of serve and the Summons as annexures "JJ1" and "JJ2", respectively.

[7] The attorney for the 1<sup>st</sup> Respondent further made submissions in respect of the other points being a **“clear right”** in paragraphs 3.1 to 4.2; **“non-joinder** in paragraphs 8.1, 5.2 and 5.3.1 **“disputes of facts”** in paragraph 6.1, 5.6.2; lastly, **“urgency”** in paragraphs 7.1, 7.2 and 7.3 of the said Heads of Arguments.

[8] Finally, the attorney for the 1<sup>st</sup> Respondent applied that this Application be dismissed with costs on the punitive scale.

**(ii) Applicant’s arguments**

[9] The attorney for the Applicant advanced arguments for his client and filed comprehensive Heads of Arguments and framed the issues for a decision by this court at paragraph 2 of his Heads of Arguments to be the following:

**2.1 Whether or not the Applicant entitled for an eviction order through vindication as the lawful property owner?**

**2.2 Does Applicant satisfy the grounds for vindication to eject?**

**2.3 Whether or not the action under case number 1320/2015 meets the requirements of *lis pendens* to defeat the grant of an eviction order?**

[10] That the 1<sup>st</sup> Respondent has opposed the Application and has only raised a point of law, namely, of **lis pendens** and the Notice is raised in terms of Rule 6 (12) (c) of the High Court Rules of Swaziland. Therefore, the 1<sup>st</sup> Respondent’s defence stands or falls on whether **lis pendens** is established or not.

[11] The attorney for the Applicant contends that the plea of **lis pendens** is not applicable **in casu** as the issue for determination is whether or not the Applicant is entitled to eject the 1<sup>st</sup> Respondent as a registered owner of the property through vindication.

[12] That the Applicant's case is further that **lis pendens** is not applicable as the issue is **not** whether the sale was invalid or not but whether Applicant is entitled to eject 1<sup>st</sup> Respondent from his property as the registered owner.

[13] In this regard the attorney for the Applicant has advanced in paragraph 4.3 of his Heads of Arguments the following arguments:

**4.3 The First Respondent has failed to institute any application to interdict the transfer and registration of the property in favour of the Applicant since 24<sup>th</sup> April 2015, being the date of auction. Nothing has been done. Further, on the 24<sup>th</sup> June 2015, First Respondent was advised Applicant had title. First Respondent still elected not to approach the Honourable Court for redress in expunging the Applicant's title as clearly the property was sold lawfully. It is Eternal Stores (Pty) Ltd that purports to challenge the sale on the 24<sup>th</sup> April 2015, as a purported successful bidder. Therefore, the parties cannot be the same in casu and the issues herein are completely distinct. The Applicant in casu is exercising his right to ownership and vindicating his property against the First Respondent.**

[14] The attorney for the Applicant contends that to establish a defence of **lis pendens**, the party must prove that the action is between the same **parties**, the same cause of action exists and the subject matter is the same.

[15] That on the facts of the present case the suit under case no. 1320/2015 is not between the same parties as appeared **ex facie** the Summons. There is **Eternal Stores (Pty) Ltd** and **Swaziland Development and Savings Bank** respectively, further that the Summons are issued in respect of a suit between **Swaziland Development and Savings Bank vs Eric Nkomonye** under Case No. 811/2014 (as reflected in annexure “JJ2”).

[16] In support of the above argument the attorney for the Applicant cited what is stated by the learned authors, **Herbstein and Van Winsen, Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition at page 9** to the following:

**“If an action is already pending between the parties and the Plaintiff beings another action against the same Defendant on the same cause of action and in respect of the same subject matter---”**

[17] The attorney for the Applicant then dealt with the issue of vindication in paragraph 7.1 to 16 of his Heads of Arguments citing decided cases to support his arguments. I must mention that the 1<sup>st</sup> Respondent has not answered on the matter on the merits being the Application for vindication.

[18] Finally the attorney for the Applicant prayed that the point of law be dismissed with costs and further prayers be granted in terms of the Notice of Motion.

### **The Court’s analysis and conclusions thereof**

[19] Having considered the affidavits of the parties and the arguments of the attorneys of the parties this court is called upon to determine the points **in limine** raised by the 1<sup>st</sup> Respondent outline at paragraph [4] of this judgment to the following effect:

- (i) **Lis Pendis**
- (ii) **Whether Applicant has clear right in the property?**
- (iii) **Whether the Applicant's application is defective for non-joinder?**
- (iv) **Whether there is dispute of facts?**
- (v) **Whether the matter is urgent?**

[20] I must, however point out that when this matter was argued on 11<sup>th</sup> September, 2015 only the first point **in limine** was addressed by the attorneys of the parties. Furthermore, it was also clear that the 1<sup>st</sup> Respondent relied on this point and has not answered to the main matter concerning the issue of vindication.

[21] On this point **in limine** it is contended for the 1<sup>st</sup> Respondent that whilst the Applicant has been served with the Summons by the 1<sup>st</sup> Respondent, the Applicant instituted the current Application for eviction. That the Summons are to seek an order cancelling registration of title of the property in question in the move of the Application. As such the Applicant's title to the property is not unassailable, has no right to eject the 1<sup>st</sup> Respondent from the property. In the premise the 1<sup>st</sup> Respondent pleads that the issue of title between the Applicant and himself is subject to determination in the action he has instituted. In this regard has attached a copy of the Summons and the return of service being annexure "JJ1" and "JJ2" respectively. Therefore 1<sup>st</sup> Respondent pleads that the matter is **lis pendens**.

[22] On the other hand it contended for the Applicant that **lis pendens** is not applicable in **casu** as the issue is **not** whether the sale was valid or not but



whether Applicant is entitled to eject 1<sup>st</sup> Respondent from the property as the registered owner.

[23] In my assessment of the competing arguments on this point I am in agreement with the Applicant on the contentions advanced at paragraph 4.3 of Applicant's Heads of Arguments. The 1<sup>st</sup> Respondent has failed to institute application to interdict the transfer and no registration of the property in favour of the Applicant since the 24 April, 2013 being the date of action. Nothing has been done.

[24] Further, on the 24 April 2015 1<sup>st</sup> Respondent was advised that Applicant had title. The 1<sup>st</sup> Respondent still elected not to approach this court for redress in expunging the Applicant's title as clearly the property was sold properly. It is Eternal Stores (Pty) Ltd that purports to challenge on the 24 April, 2015 as a purported successful bidder. Therefore, the parties cannot be the same in **casu** and the issue herein are completely distinct. The Applicant on the facts of this case is exercising his right to ownership and vindicating his property against the 1<sup>st</sup> Respondent.

[25] On the above facts as outline in the paragraph [24] **supra** the fact that the sale in execution being challenged by Eternal Stores (Pty) Ltd does not amount to **lis pendens**. There is a new party altogether. The 1<sup>st</sup> Respondent is the judgment debtor under case number 1320/2005 yet the property was declared executable under case no. 811/2014 where the Swaziland Development and Saving Bank as the judgment creditor.

[26] In this regard I find the legal authorities in the cases of **Nelisiwe Ndlangamandla vs Robert Samkelo Hadebe, Sifiso Khumalo High Court Case No. 2148/2012**, the case of **Swaziland Revenue Authority vs Pimenta KFC (Pty) Ltd High Court Case No. 394/2013** and the legal text book by **Herbstein and Van Winsen, Civil Practice of the Supreme Court of South African, 4<sup>th</sup> Edition at page 249** apposite.

[27] Since the 1<sup>st</sup> Respondent has raised a point **in limine** in terms of Rule 6 (12) of the High Court Rules of Swaziland, therefore the 1<sup>st</sup> Respondent's defence stands on fails on whether **lis pendens** is established or not. This therefore means the Application by the Applicant for vindication of his rights stand unopposed and ought to be granted without any further ado on these facts.

[28] In this regard I find the **dictum** in the case of **Grace Ntombane Dlodlu vs Philemon Ngulube Sifundza High Court Case No. 1952/2003** apposite where the facts in that case are similar as the case in **casu**.

[29] I find it important to outline the facts of that case as extracted from paragraph 11 of the Applicant's Heads of Arguments, at page 13 from the judgment of my brother **Annandale J** at page 2 to the following:

**“Thus the property which used to belong to the present Respondent, was sold after attachment on an order of Court to the Building Society, which in turn sold it to the present Applicant.**

**It is the former ownership of the property by Sifundza that is said to be the fly in the chemist's ointment in a dispute with the Swaziland Building Society relating to the property and in light of this he simply refuses to vacate the property....**

Historically, the property again acquired new ownership on the 17<sup>th</sup> September 2002 when it was transferred by the Building Society to Grace Ntombane Dlodlu, following the selling of it to her on the 16<sup>th</sup> May 2002. She acquired full ownership finance through a bond in favour of the Building Society from which she brought it at the execution sale, following a judgment against Sifundza.

The conditions of sale in execution contained in paragraph 8 thereof a provision that the property may be taken possession of immediately after the sale, pending payment of a deposit in cash and furnishing security from the bank....

Clearly, the Building society is not the owner of the property as it was at the time it instituted the action against the Defendant Sifundza .... Dlodlu was the same person for the same cause, but based on the present ownership, just as the Building Society did. She is the registered owner and cannot take occupation of her land and house...

To succeed on a plea of *is pendens*, it has to be shown that the same suit is pending elsewhere, between the same parties. Elsewhere or not, the parties are simply not the same, nor can it be found that the Applicant derives title to sue from the Plaintiff society. She obtains title to sue by virtue of being the registered owner of the property, which the Respondent prevents her from occupying.

Accordingly, the plea that there is a pending suit between the same parties concerning that same thing and founded on the same cause of action stands to be dismissed.”

[30] In the totality of the facts of the matter no issue of fact have been raised to the ejectment by the 1<sup>st</sup> Respondent. Therefore the point **in limine** raised is dismissed and further an order is granted in terms of the Notice of Motion.

**STANLEY B. MAPHALALA**  
**PRINCIPAL JUDGE**