



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 253/15

In the matter between:

MOHAMED ISMAIL TILLY

Applicant

And

MUSA LEON DLAMINI

1st Respondent

JOANE KHERU RANCHOD N.O.

2nd Respondent

In Re:

MOHAMED ISMAIL TILLY

Applicant

And

MUSA LEON DLAMINI

1st Respondent

JOANE KHERU RANCHOD N.O.

2nd Respondent

Neutral citation: *Mohamed Ismail Tilly vs Musa Leon Dlamini and Another(253/15) [SZHC 28] (19th February 2016)*

Coram: **MAPHALALA PJ**

Heard: **4th April, 2015**

Delivered: 19th February, 2016

For Applicant: Mr. M. Ndlovu
(from Masina Ndlovu Attorneys)

For Respondents: Mr. M. Tembe
(from S.V. Mdladla & Associates)

Summary: Civil Procedure – for attorney to release monies held in Trust to the Applicant – Applicant alleges prejudice – that the attorney has prejudicial relationship with the 1st Respondent – the court finds Applicant has not shown such prejudice on the affidavits - dismisses the Application with costs – further orders that the main Application for debatement of the account be heard urgently.

JUDGMENT

Introduction

[1] For decision by this court in this judgment are the merits of the dispute where the Applicant seeks the following order:

1. **That the Normal rules of the above court relating to time limits and service be dispensed with and that this application be heard as urgent;**
2. **Condoning the applicants none-compliance with the rules of the above Honourable court relating to time limits and service;**
3. **That, and with 5 (five) days of the said Order, the 1st Respondent, Musa Leon Dlamini, be herein ordered and directed to release from his custody and / or possession / and / or Trust Account, the sum of E2 939 021.40 (two million nine hundred and thirty nine**

thousand and twenty one Emalangeni and forty cents) in respect of the proceeds of sale from certain fixed property being Erf 235 Manzini as per Order of Court issued on the 9th April 2014 and pending determination of the main application and / or of any litigious matter arising in respect hereof between the parties, be immediately paid over and / or placed or held into the Trust account of CJ Little Attorneys and / or such other neutral Firm of Attorneys that the above Honourable Court can deem fit.

- 4. That the issues and / or files under civil case 253/15 and 276/2008 be hereby consolidated;**
- 5. Costs of suit in the event of apposition hereto;**
- 6. Further and / or alternative relief.**

[2] The Founding Affidavit of the Applicant is filed outlining the background of the case. Pertinent annexures are also filed including a supporting affidavit of one Damatio S. Madau and courts orders relevant to the case before court.

The opposition

[3] The 1st and 2nd Respondent oppose the Application and has filed an Answering Affidavit of the 2nd Respondent one Joane Kheru Ranchod N.O. who is the executrix of late Kankuben Bayabhai Racllon “ estate” outlining in detail the defence advanced by the Respondents in this Application. The Respondents also filed pertinent annexures to their Defence. A supporting affidavit of the 1st Respondent is also filed stating that he fully support and align himself with the Answering Affidavit of the 2nd Respondent.

[4] The Applicant then filed a Replying Affidavit in accordance with the Rules of this court.

The background

[5] The chronology of events leading to the present Application is stated in the Applicant's Heads of Arguments, at paragraph 2, 3, 4 as follows:

2. **It is the Applicants case that about the 1st February 2008, the 2nd Respondent, in her capacity as executrix dative, moved an application before the above Honourable Court under civil case 276/2008, seeking inter alia my rendition of an account arising from the administration of the fixed property described as Erf 235 Manzini.**
 - a. **The above matter under civil case 276/2008 on the 9th of April 2014, as per copy of the Order attached to the book and marked CJ1¹, served before Her Ladyship Justice Dlamini who upon hearing arguments inter alai Ordered that;**
 - i. **That the said fixed property be sold;**
 - ii. **That the 2nd respondent be granted leave to pay rates accruing to the property;**
 - iii. **And that I be ordered to file an account of the rentals I had collected from the period 10th January 1999.**
3. **Pursuant to the above Order indeed the parties on the 10th and 14th July 2014 respectively, entered into a written sale agreement for the said fixed property with one Mcebo M. Dlamini and for a sum of E 3 500 000.00 (three million five hundred thousand). A copy of the dame is attached to the book of pleadings and marked CJ2² being such deed of sale.**

- b. To the above end, the 2nd respondent duly filed her affidavit in proof of balance on the 3rd October 2014, and wherein she stated that the sum of E2 939 021.40 had remained in the possession of the 1st respondent after payment of all dues in respect of the property and in the first respondents capacity as conveyance in the matter. I beg leave to refer to annexure CJ3³ attached to the book being such affidavit.
- c. Applicant states as well that by such time he had, in compliance with the Court Order of the 9th April 2014, and to the utmost best of his ability had also filed his account. I beg leave of court to refer to such account attached to the Book and marked CJ4⁴. Applicant avers too that ever since filing the said account, he has never received anything formal disputing such account or calling for a debatement of the same.
- d. Applicant as well points out at this juncture too that no' where in the body of the Court Order of the 9th April 2014 did the court say his share of the purchase price would or should be held against and / or "b" Above. In fact Nowhere in the Body of Order was debatement Ordered.
4. Applicant state too that to the above end that there would not have been need to withhold his share his share since he is a man of means and would clearly be in a position to pay, if any, amount that would arise from any such debatment, and completely independent of the proceeds of the sale of the property. Applicants states that he also has another other fixed properties within the Kingdom, and under his company being Manzini Trust (Pty) Ltd and would afford to pay if called upon to do so . Applicant has attached his bank statements Marked CJ5⁵ being Bank Statement showing inter alia a balance exceeding over E 4000 000.00 (four million Emalangeni). He has also

annexed the Company Memorandum and Articles of Association ⁶ showing him to be a shareholder and director in the said company and as well as three title deeds⁷ in respect of other fixed properties that he own.

[6] The attorneys of the parties advanced their arguments before this court on 4th April, 2016 and filed comprehensive Heads of Arguments on both sides, for which I am grateful. I shall in brief outline such Heads of Arguments, only on the salient features for decision by this court in the following paragraphs.

(i) The Applicant's arguments

[7] The attorney for the Applicant Mr. Ndlovu submitted arguments before court and also filed Heads of Arguments as stated above in paragraph [6] of this judgment.

[8] Arguments are canvassed in paragraphs [5] to [15] and in paragraph [7] contends the Applicant's case, and law as clearly gleaned from all the surrounding circumstances, the 1st Respondent is clearly no longer an independent and or neutral party in the entire transaction. He has clearly been compromised by his alliance with 2nd Respondent. If anything Applicant states that he would certainly not be surprised if he has already made payment to the 2nd Respondent.

[9] That Applicants attorney, at the material point in time had known of the 1st Respondent's bias and alliance with the 2nd Respondent, he certainly would not have agreed to the selection of the 1st Respondent as Conveyancer in transaction.

[10] In paragraphs [10] to [12] the attorney for the Applicant advances reasons why the Applicant is of the view that he will be prejudiced if 1st Respondent continue to hold the Funds in his Trust account.

[11] Finally, the attorney for the Applicant prays for an order in terms of the Notice of Motion.

(ii) The Respondent's arguments

[12] The attorney for the Respondents also advanced arguments for his client before this court and also filed Heads of Arguments. In paragraph 1 dealt with the background of the case. In paragraph 2 dealt with the issue of urgency from 2.1 to 2.14 citing pertinent cases to support his arguments.

[13] In paragraph 3, 3.1, 3.2, 3.3, 3.4, 3.5 3.6, 3.7, 3.8 dealt with the issue of prejudice that on the main the Plaintiff has failed to show to this court that it will suffer any prejudice.

[14] In paragraphs 4.1, 4.2, 4.3 dealt with the issue of alternative remedy. The essence of these arguments is that this current Application is frivolous. As to date, no parties have suffered any prejudice by the 1st Respondent holding the moneys in Trust for the Applicant and 2nd Respondent. That the application is not only not necessary but delaying the conclusion of the main issue of debatement.

[15] The attorney for the Respondent then dealt with the issue of **consolidation of cases** in paragraph 5, **alternative remedy – debatement of rentals** in

paragraph 6 **interest of the parties** in paragraph 2, and lastly **competitive relief** in paragraph 8.

[16] Finally, on the above arguments. The 1st Respondent applies that the Application be dismissed with costs.

The Court's analysis and conclusion thereon

[17] Having considered all the papers filed by the parties and the arguments of the attorneys of the parties it would appear to me that this whole Application hinges on the question of prejudice. Whether the Applicant has shown that it will suffer prejudice with the money being in the custody of the 1st Respondent Trust account.

[18] The gist of the Applicant's case in this regard as can be clearly gleaned from all the surrounding circumstances that the 1st Respondent is clearly no longer an independent and neutral party in the entire transaction. That he has clearly been compromised by his alliance with the 2nd Respondent. In this regard the attorney for the Applicant has submitted various arguments on the relationships of the parties.

[19] On the other hands it is contended for the respondents that Applicant has failed to show to this court that Applicant will suffer any prejudice.

[20] In paragraph 3.1 of the Heads of Arguments the attorney of the Respondents it is contended that the Applicant is under an imaginary fear that his funds may

be misappropriated and / or attached by a third party. That such allegations are vehemently denied. That as alleged in Respondents Answering and Confirmatory affidavit, that are no such judgments debts issued against the 1st Respondent. Furthermore, it is contended for the Respondents that the Applicant is ill-advised as it not possible for financial institution to attach money held in Trust as it does not belong to the 1st Respondent.

[21] In my assessment of all the arguments of the parties to and fro it would appear to me that case is based on Applicant's baseless fears that money held in a trust fund be interfered with as stated by the Respondent at para [19] supra. I am unable to find any ground to disqualify the 2nd Respondent whose conduct is regulated by the provisions of law as an attorney of this court. The Legal Practitioners Act provides protection to clients funds in the possession of attorneys. Further, I have taken judicial notice that the 2nd Respondent is also a member of the Judicial Service Commission and would not spirit away monies held in his Trust account belonging to clients.

[22] I am unable to take Applicant's fears to constitute a valid cause of action in law.

[23] I have also come to the considered that it will be interest of justice to put this matter to rest is to conclude the main issue of debatement, the rental account, before transferring the said funds to any party. Applicant should have simply set down the matter and have the rental accounts debated.

[24] On the issue of costs the attorney for the Applicant has sought costs at punitive scale. I have considered the arguments of the parties in this regard and in exercise of my discretion would levy costs at the ordinary scale.

[25] In the result, for the foregoing reasons the Application is dismissed with costs. This Court further directs that the Applicant brings the Application for debatement of the rental account as a matter of urgency to put this dispute to rest.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE