

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 1895/2019

In the matter between

Sydney Jele N.O.

Applicant

And

JM Management Consulting

Services (Pty) Limited

1st Respondent

Macks (Pty) Limited

2nd

Shift Capital (Pty) Limited

Respondent 3rd

Respondent

Neutral citation: *Sydney Jele N.O. v JM Management Consulting Services (Pty) Limited & 2 Others (1895/19) SZHC 02 [2020] (31 January 2020).*

Coram : D Tshabalala J

Heard : 11th December 2019

Delivered : 31st January 2020

Summary: *The applicant launched an urgent application for both final and interim interdict, the latter pending determination of action proceedings. The applicant's claim in the main action is that a certain portion of land be excised*

from the property belonging to the P' respondent and be restored to the deceased's estate

on allegation that the deceased purchased it from the 2nd respondent prior to the F¹ respondent's acquisition. The second prayer for interdict relates to a right of way or servitude through the said property of the 1st respondent, based on alleged agreement between the deceased and 2nd respondent, the previous owner. Held: The application falls short of establishing either a clear right to support a final interdict or a right prima facie in respect of interim interdict pedente lite both the property and servitude. The interim order was discharged and the application dismissed with costs.

JUDGEMENT

[1] On 18th November 2019, the applicant, in his capacity as executor *dative* of the late estate William Mfanyana Jele, launched an urgent application primarily seeking interdictory relief in two parts. On the first part,¹ the notice of Motion reads in prayers 3 and 4:

"3. Pending finalization of this application, the respondents be and are hereby interdicted from hindering and/or interfering with the applicant's right of way on the ismuths of the property described as Farm 938, Hluti, Shiselweni region.

4. Pending the finalization of this application, the respondents be and are hereby interdicted from continuing with construction works and /or excavations on the disputed portion of the property described as Farm 938, Hluthi, Shiselweni region." [Underlining is added]

Part B of the claim reads at Paragraph 5:

¹Part A.

"5. Pending the finalization of the action proceedings instituted against the first and second respondents in the High Court of Eswatini under case No. 1461/2019, the respondents be and are hereby interdicted from:

5.1 Engaging in the construction and/or excavation of the disputed portion of the property described as Farm 938 Hluthi Shiselweni region
5.2 interfering and/or preventing the applicant's right of way from the main road to the residence

6. That prayers 3 and 4 operate with immediate and interim relief... "

[Emphasis added.]

[2] By order of this Court issued on 22nd November 2019, on interim basis the order sought under the prayers in Part A of the Notice of Motion² was issued. The 1st respondent subsequently filed answering affidavits and the applicant, the replying affidavits. No opposing papers were filed for the 2nd respondent³ and the matter was argued on the 11 December 2019.

THE PARTIES

[3] The applicant is the executor dative and one of the heirs of the late estate William Mfanyana Jele; the 1st respondent is owner of the said Farm 938, a portion of which the applicant claims was acquired by the deceased from the 2nd respondent; the 2nd respondent sold to the 1st respondent, farm 938 which incorporates the disputed portion and right of way; the 3rd respondent is a contractor engaged by the 1st respondent to construct a shopping complex on the said farm.

² Prayers 2 and 3 thereof.

³ This court was also informed that the 2nd respondent did not defend the main action and that a default

judgment was issued against It.

[4] The applicant's claim as it appears in paragraphs 3 to 5, above, is two-fold, seeking a final interdict under Part A in relation to obstruction of the right of way, a restraint order that the respondents refrain from continuing with construction of a shopping complex on the portion of land that the applicant claims was acquired by the deceased, and secondly, under Part B, an interim interdict pending action proceedings in relation to the same acts complained of in Part A aforesaid. According to the applicant, *[t]he ultimate decision that the applicant seeks in the action proceedings, is that the disputed property that is now part of the 1st respondent's property be excised from the 1st respondent and restored to the Deceased's estate.*⁴

[5] The applicant's action proceedings⁵ as well as its claim before this court, both of which are strongly opposed by the 1st respondent, are premised on the contention that the deceased acquired, during his lifetime, the disputed portion of the property described as farm No 938,⁶ by exchange through a tripartite transaction that involved the deceased, the 2nd respondent and Eswatini Electricity Company (EEC).⁷ The applicant alleges that there was an exchange transaction that supplanted initial sale the deceased had concluded with the 2nd respondent in respect of a portion of the said Farm 938. The applicant's case is that the deceased gave up his intended acquisition of a certain portion to enable EEC to acquire a much bigger portion by incorporating his portion. Further that an exchange agreement was then entered into wherein the deceased was allocated another portion, the subject of current dispute. The Applicant has issue with the fact that the 2nd respondent sold and transferred to the 1st respondent the entire Farm 938 including his alleged portion depicted as GHFC.⁸

[6]

⁴ Paragraph 9 of founding affidavit.

⁵ In case no. 1461/19

⁶ Situate in the Shiselweni.

⁷ Formerly Swaziland Electricity Board (SEB).

⁸ See annexure "SNJ 9" to the founding affidavit, page 51 of the book of pleadings.

[7] The applicant presented as proof of the alleged sale and exchange, separate documents the cumulative effect of which the applicant asserts, establishes the initial sale and the subsequent exchange agreement. The latter is alleged to have been concluded between the deceased, EEC and the 2nd respondent, respectively. The applicant avers there was a tripartite agreement in terms of which the deceased was awarded the disputed portion in exchange, as aforesaid, for relinquishing in favour of EEC, the one he initially purchased from the 2nd respondent. The applicant argued that an exchange agreement need not be contained in one document hence he asks the court to consider and find existence of exchange agreement based on various documents:

- A fax by Mrs Mcseveney *tb* the deceased making reference to certain diagram; ⁹
- EEC diagram of the farm with inscription, "*It was resolved that Mr Jele accepted 4039.52m² signed at(not legible) this 4th day of May 1990*" ¹⁰;
- A diagram of the farm with an inscription alleged to have been made by the deceased, "*I certify that the subdivision is hereby cancelled and the new one is accepted (signature, date)*";¹¹
- A letter by Mrs Mcseveny to the Land Control Board, alluding, *inter alia* to diagrams¹² depicting EEC and deceased's intended acquisitions of portions of the farm;
- A deed of sale between the 2nd Respondent and EEC,¹³ which makes reference in its text, to the deceased thus: "*...Mr. Jele 's portion is labelled GFHC.*"

[8] The applicant has not filed any copy of the deed of sale or any form of written agreement between the deceased and the 2nd respondent in support of the alleged

⁹ "SNJ4" Page44 of the book of pleadings.

¹⁰ "SNJS" Page 46 of the book.

¹¹ Page 49 of the book.

¹² SNJ6 SNJ8 Page 47 of the book.

¹³ SNJ9 Page 51 of the book.

disputed sale. The Applicant asserts that the sale was in writing but the deed of sale cannot be located, suggesting that it is lost. The applicant refers to two receipt numbers which he asserts relate to payment receipts in purchase of the property, however, no actual receipt copies were attached.

[9] The applicant submits that a *prima facie* right has been established entitling it to interdict pending the outcome of the action proceedings. The applicant submits that in determining whether the applicant has established a *prima facie* right sufficient for the grant of interim relief, the right relied on need not be shown on a balance of probabilities, that it is sufficient if it is *prima facie* established, though open to some doubt. This court is called upon to determine whether a minimum threshold of a *prima facie* right in the disputed property by the applicant has been established, further whether a *prima facie* right to passage alleged to have been blocked by the 1st respondent, has been established.

[10] Some discrepancies are noted between the notice of motion, the applicant's founding affidavit,¹⁴ the applicant's heads as well as the oral submissions made by counsel. It is recorded at paragraphs 1-5 of this judgment that the applicant's prayers in Parts A and B seek final interdict and an interim interdict respectively. However the applicant's heads and oral submissions do not address the final interdict requirements, little or nothing is said concerning the final relief sought in Part A. Focus is placed only on the interim relief sought in Part B. Counsel for the respondent submitted in relation to the interim court order of the 22nd November 2019 that it should not be confirmed unless the applicant's clear right was proved or established at the end of this application.

RESPONDENT'S CASE

¹⁴ Paragraphs 41.1-41.2

[11] The 2nd respondent raised at least four issues in its heads : 1) whether the matter was urgent in terms of the Rules of this court 2) whether the applicant has demonstrated a clear right for final relief 3) whether the applicant has suffered an injury that has been committed or is reasonably apprehended and 4) whether there is no similar protection (available to the applicant) by other ordinary remedy.

[12] The pt respondent's contention is that the applicant has failed to allege and prove existence of any sale agreement between the deceased and Mack.¹⁵ That the applicant makes bare allegation of the sale of property which falls short of the essential requirements of sale of immovable property.

[13]The respondent, points out correctly in my view that the requirement for a *prima facie* right cover the alleged previous sale agreement¹⁶ (supposedly, novated by alleged subsequent exchange agreement).¹⁷ Without demonstration of a *prima facie* proof of the said sale agreement or exchange agreement there can be no ground on which the court should grant either the final or interim order for interdict.

[14] The 2nd respondent denies that the application is urgent in terms of the Rules of the High Court, or that it deserves to be treated with urgency, asserting that any urgency was self-created in so far as the applicant was aware long before September 2019 of the impending construction work on the farm and that the access route to the residence would be affected. The 1st respondent notified the applicant to that effect in April 2019, but took no action to seek relief. ¹⁸ Prior to that the applicant should be aware as far back as 2005 that its claim to the property in question was disputed. The applicant's

¹⁵ The 2^o respondent.

¹⁵ Between the deceased and 2^o respondent.

¹⁷ Between the 2^o respondent and EEC.

¹⁸ SNJ13 dated 10 April 2019 notifying the applicant of resumption of construction work and impending closure of the access road used by the Jele family.

Knowledge time frames stated by the respondent are not disputed. However, urgency can be imputed to the alleged obstruction of access to the applicant's home, (which is strongly denied by the respondent).

[15] Regarding the prayer for interdict from interfering with and/ or preventing the applicant's right of way from the main road to the residence, the respondent avers that the applicant has failed to prove a servitude. The court notes that prove of existence of the servitude depends on the applicant's ability to prove a valid sale of the piece of property. The respondent gave details of alternative access points which it alleges were available to the applicant, including the one it alleges the applicant previously utilized. Noteworthy is the respondent's offer to fix one of these routes and make it usable by the applicant. The respondent's offer is understood to be in the context that the current route used by the applicant will, according to the respondent, no longer be usable by the applicant after construction of the shopping complex is complete.

[16] The respondent states that the application is fraught with disputes of fact and that it should either be referred to trial or oral evidence be led. Reference is made in this regard to disputed facts between the parties on whether access route for the Jele family has been blocked by ongoing construction on farm 983 or not. Perhaps the more prominent disputes of fact confronting the parties are whether or not sale of property was concluded, whether or not there was property exchange and whether any purchase price was paid. It is noted that some disputes are not purely factual and may be intertwined with legally issues, for instance, whether the requirements of a valid sale of immovable property were satisfied.

[17] The 1st respondent disputes that any sale agreement was concluded between the deceased and the 2nd respondent for the said portion of farm 938, and that eml

enlists a confirmatory affidavit of Rossina Mcsevenny who was one of the directors

of the 2nd respondent at the material time. She is also cited by the applicant as having been active in the preparations towards the said sale transaction. Rossinna denies that the sale was concluded and avers that there were intentions only and that preparations were carried out but the deal fell through due to non-payment of the purchase price. Rossinna's deposition seems to explain the documents filed by the applicant in this matter: drawings and applications for approval for subdivision made to the Land Control Board.

[18] Concerning the servitude or right of way, the 1st respondent disputes any knowledge of the agreement between his employers and the deceased, prior to purchasing the property. He denies any knowledge of it by proxy asserted by the applicant.

[19] The pt respondent submits that in consequence of the interim order of the 22 December 2019 the court must determine whether the applicant has proved a clear right in support of a final interdict. The respondent submits that the applicant having failed to establish a clear right, the interim order must be discharged and the application dismissed.

FINDINGS

[20] The Applicant sought¹⁹ and was granted interim interdict order on the 22 November 2019. Subsequent to the filing of all the evidence and oral submissions the court must evaluate material presented by both parties and determine whether the applicant has discharged the burden of proof that lies on him for existence of the requirements of an interdict,²⁰ justifying confirmation of the interim order. The requisites are of an interdict are: a clear right, an injury committed or reasonably

¹⁹ In terms of Part A, Prayers 3 and 4 of the Notice of Motion.

²⁰ That is a final interdict sought in Part A of the Notice of Motion.

apprehended; and the absence of similar protection by any other ordinary remedy.

²¹ To establish a clear right the inquiry at this stage is whether the applicant has proved on a balance of probabilities the purchase of the property by the deceased followed by the exchange of the property as alleged.

[21] Failure to provide written requisite details of the alleged sale and purchase of the portion of Farm 938 is found to be fatal to the applicant's case. The applicant has failed to establish a clear right as a prerequisite for an interdict. The applicant's case falls short of the requirements for sale of immovable property as set out in *Henwood v Henwood & another*²² stated as: 1) names of the seller and purchaser, respectively; 2) full description of the property; 2) selling price of the property; and

4) how payment of the sale price was to be effected. The facts placed before court, in particular the affidavit deposed to by Rosena in support of the 1st respondent, has the effect of casting a serious doubt on the alleged sale. The documents presented to prove conclusion of exchange agreement are far from conclusive. The applicant failed to show a clear right and therefore there is no basis for the interdict sought. relief sought. There is no basis on which the interim order can be confirmed.

[22] The claim on right of way/servitude based on alleged pre-existing agreement ²³ register a servitude in favour of the deceased, suffers a similar fate of lack of substantiation as the case of sale of the property. Again, the deposition by Rosina provides a possible, probable explanation that it ended in talks and negotiations that never materialized. Unregistered servitude in the circumstances averred by the applicant (that there was an agreement to register one) remains at best a personal right and is not binding on subsequent purchaser of the property, unless such purchaser was aware of its existence. In the present case the 1st respondent denies any knowledge of servitude agreement related to the property prior to acquiring it. The mere fact that the

¹¹ Setlogelo v Setlogelo 1914 AD 221 at 227

²² (10/2018) (2019) SZSC 32 (11 September 2019) at 13-14.

²³ The alleged agreement between the 2nd respondent and the deceased.

respondent's director was General Manager of Skonkwane group at the material time of the alleged servitude agreement, without more, is insufficient to support a presumption of such knowledge on his part.

[24] Prayers 3 and 4 of the Notice of Motion accordingly cannot succeed and the interim order of the 22 November 2019 is discharged. I now consider whether it is necessary for me to make a determination on the relief sought in prayer 5 of the application which seeks an interim order pending action proceedings. The inquiry is whether the discharge of the interim order of the 22 November 2019 disposes of the issues and that the application should be dismissed. The application introduced some confusion wherein the reliefs in parts A and B were sought alongside each other and not in the alternative. The latter style would have avoided the disharmony in the applicant's arguments vis-a-vis its prayers. I now proceed to deal with the prayer for interim relief pending action proceedings.

[25] The requirements for an interim interdict have been authoritatively articulated as follows: *(a) a prima facie right though open to some doubt (b) a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted (c) That the balance of convenience favour the granting of the interim relief and (d) that the applicant has no other satisfactory remedy.*

[26] To establish the required *prima facie* right the applicant must prove facts that establish existence of such a right in terms of substantive law. Whether the applicant has a right is a matter of substantive law; whether the right is clearly established is a matter of evidence.²⁵ The degree of proof is formulated as follows:

²⁴ CLB Prest, *The Law of Interdicts*. See also *Tsabedze & 45 others v Swaziland National Provident Fund Civil Case No: 1400/2011* at Paragrap [31].

²⁵ *East London Tuberculosis Assosiation v Decawiz (Pty) Ltd & 2 others Case No. 1497/2014 ZAECHC*

"The right can be prima facie established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient but the weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set out in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case he cannot succeed. "

26

[27] The decision in *East London Tuberculosis Association v Decawiz Investmen t2*⁷ is instructive on the approach for assessing in motion proceedings, whether the right *prima facie* with some doubt, has been demonstrated:

"It is also necessary to repeat that although normally stated as a single requirement, the requirement for a *rightprima facie* established, though open to some doubt, involves two stages. Once the *prima facie* right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."²⁸ [Underlining is added]

DECISION

[28] Considering the facts put forward by the respondent in answer to the _____ applicant's case, in particular, the deposition of Rosina to the effect that

²⁶ Harms, Civil Procedure in the Supreme Court, A-41.

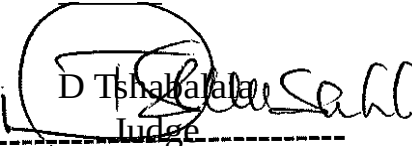
²⁷ East London Tuberculosis Association Supra.

²⁸ At paragraph [24].

discussion on the sale took place but did not to reach fruition, the court comes to the conclusion that a serious doubt has been cast on the applicant's case in a way that the application cannot succeed either for an interdict or interim interdict. The disputed facts between the parties render deciding the matter on papers inappropriate, moreover the applicant should have foreseen or was aware of the respondent's stance on the contested issues, but nonetheless proceeded on Motion without furnishing requisite basic proof.

[29] Accordingly the following order is made:

1. The interim order granted on the 22 November 2019 is hereby discharged.
2. The application is dismissed with costs at the ordinary scale.
3. The 1st respondent must adhere to his offer and undertaking to ensure that main road access to and from the Jele residence is unimpeded, alternatively to fix and repair alternative convenient route for such access. This part of the order shall have immediate interim effect pending finalization of action proceedings under case No, 1461/2019.


D Tshahafala
Judge

For the Applicant : **Z D** Jele of Robinson Bertram

For the 1st & 3rd Respondents: **S M** Shongwe of Sibusiso Shongwe and Associates

For the 2nd Respondent: No Appearance