IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 1619/19

HELD AT MBABANE

In the matter between:

SITHEMBILE THWALA **APPLICANT**

And

RICHARD MSUNDUZA DUBE **1st RESPONDENT**

NOMFUNDO SHABANGU **2nd RESPONDENT**

MASTER OF THE HIGH COURT **3rd RESPONDENT**

THE ATTORNEY GENERAL **4th RESPONDENT**

Neutral Citation: *Sithembile Thwala vs Richard Msunduza Dube & 3 Others [1619/19] [2020] SZHC 79 (30 April, 2020)*

Coram: M. LANGWENYA, J

Heard: 4 October 2019; 10 October 2019; 5 December 2019.

Delivered: 30 April 2020

Summary: *Civil law and Procedure-ex parte application for order granting final interdict-application raises disputes of fact-approach in Plascon-Evans is applicable-applicant failed to satisfy requirements of a final interdict-application dismissed-no order as to costs.*

JUDGMENT

[1] In this urgent *ex parte* application, the applicant moved the Court for an order in the following terms:

1) Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the Court and directing that the matter be heard as one of urgency.
2) Calling upon the Respondents to show cause why the following orders should not be made final:

2.1 Declaring the first respondent's sale of land at Nkoyoyo area in the Hhohho district to be unlawful and to be stopped forthwith.

2.2 Ordering and directing the second respondent to pay any amounts paid in respect of the aforementioned sale, if any, to be deposited with the Master of the High Court for distribution to all beneficiaries of the deceased Margaret Sitile Dlamini-Dube (Estate late No. 184/2017).

2.3 Ordering and directing that the applicant and the first respondent share the rentals from the deceased's property equally.

3. Costs.

4. Further and or alternative relief.

[2] On 4 October 2019 a rule *nisi* was issued operating with immediate effect as an interim order calling upon the first respondent to show cause why the rule *nisi* should not be made final.

[3] The application is opposed by the first respondent who has raised points *in limine* as follows: that the matter raised a dispute of fact; that the High Court has no jurisdiction in matters of customary law; and that the applicant has failed to meet the requirements of a final interdict.

Background

[4] The first respondent and the deceased Margaret Sitile Dlamini-Dube were married in terms of customary law. The applicant is a biological offspring of the deceased. The applicant resided-and continues to do so-in the homestead of the deceased and the first respondent when the former died in May 2017.

Applicant's Case

[5] After the deceased died, the applicant and the first respondent were appointed co-executors of the estate of the deceased in file number EH 184/2017.

[6] According to the applicant, when the deceased died she owned two motor vehicles and a piece of land on ESwatini nation land at Nkoyoyo. The land in question was divided into two parts. On one part there were three one-room houses which deceased rented out for profit. It is this piece of land that the first respondent is now selling.

[7] The other land belonging to the deceased, by applicant's account has two-room flats and a main house. The applicant resides in the main house while the two-room flats are leased out for profit.

[8] The first respondent resides with his female partner away from deceased's piece of land.

[9] It is averred by the applicant that the first respondent has, without applicant's consent and approval brought people to live in the main house with the applicant as he now rents out some of the rooms of the main house. The first respondent, it is argued does not share the rent proceeds with the applicant. The first respondent collects rental of eight thousand Emalangeni (E8,000) per month from deceased's property.

[10] In October 2019, the applicant discovered that the first respondent was selling a part of the land belonging to deceased's estate. Applicant approached the Court with a view to have the sale of the land stopped; alternatively for an order compelling the first respondent to share the proceeds of rentals equally with her as she is also a beneficiary of deceased's estate.

[11] The land in question was sold by the first respondent for an amount of ninety thousand Emalangeni (E90,000). The applicant contends that the sale of non-title deed land is prohibited by law; that it can only be done in exceptional circumstances with the consent of all beneficiaries of the estate of the deceased herein.

[12] In the orders sought the applicant want the sale of the land in question stopped. Applicant states that the property in question has been sold already by the first and second respondents. It is unclear how the Court may be expected to stopped a sale that has taken place already.

[13] The applicant averred further that from the year 2018, she has had run-ins with the first respondent concerning the properties which are the subject of this application. She states that she reported the matter to the Mpolonjeni

royal kraal and nothing came out of it. She also reported the matter to the Mbabane Magistrate Court.

[14] It is the contention of the applicant that the matter should be heard *ex parte* to prevent the first and the second respondents from taking proceeds from an unlawful sale of non-title deed land as this would cause unnecessary hardship to would-be buyers who might be forced to seek a refund. Further, if the property has been sold and paid for already, the first and second respondents might disappear with the proceeds of sale to the prejudice of the applicant if they are served with this application.

The First Respondent's Case

[15] The first respondent argues that the applicant makes contrasting allegations. On the one hand, she seeks an order that the intended sale of deceased's property be stopped[1]; and on the other hand, she states that the said property has already been sold[2]. First respondent argues that if the property has been sold already, the appropriate relief for the applicant is a claim for damages. I agree.

[16] The first respondent contends that the land complained of and developments thereon were never owned by the deceased. The first respondent avers that he owns the said properties as he *khontaed* for same and paid the customary

[1] See paragraph 6 of the Founding Affidavit
[2] See paragraph 15 of the Founding affidavit.

price of a cow. The supporting affidavit of John Sipho Ngwenya filed on behalf of the applicant states that the deceased and the first respondent were allocated the piece of land after they were introduced to the Mpolonjeni umphakatsi by John Sipho Ngwenya's father.

[17] The first respondent says he paid the customary price of a cow for the land in question while the applicant's case is that the deceased paid for the land in question as well as the developments thereon. As can be seen, there is a dispute of facts on who owns the land and developments which are the subject of the litigation herein. The first respondent avers that save to be reported to the traditional authorities as the wife of the first respondent, the deceased never played any role in the acquisition and development of the land in question. The first respondent contends that the main house and the attendant flats for rental were constructed by himself in anticipation of a source of income after retiring as a civil servant.

[18] The first respondent argues further that the traditional authorities have ruled on the matter in his favour; that such a ruling cannot be overturned by this Court unless on review. Minutes of the alleged ruling were filed on behalf of the first respondent. The applicant on the other hand states that the matter has appeared before the traditional structures and has not been deliberated upon except that it was said the applicant and first respondent must go and live peaceably. The applicant argues that the minutes produced on behalf of

the first respondent are a fraud as she was never part of the deliberations that are the subject of the minutes. Here, also is another dispute of facts.

[19] The first respondent admits that the land in question and the improvements thereon has been sold already by himself. He states that he sought and got permission from traditional structures to sell the land in question.

[20] It is the case for the first respondent that the Master of the High Court has no say on the land in question as it did not form part of the estate of the deceased. The applicant on the other hand argues that the land in question forms part of the assets of the deceased's estate. Here again is another dispute of fact.

[21] While the applicant argues that the rental proceeds collected from flats on the said piece of land belong to the estate of the deceased, the first respondent argues that the said rentals belong to him alone as he owns the said properties for that reason, rental proceeds cannot be made payable to the Master's office-so first respondent's argument goes.

Disputes of fact

[22] It is settled law that motion proceedings are impermissible in proceedings in which genuine disputes of fact exist. The law is that where a genuine dispute

of fact exists and the case cannot be resolved on affidavit, the judicial officer presiding can dismiss the application; consider the probabilities and assess the credibility of witnesses after hearing *viva voce* evidence; or refer the matter to trial. The consideration of probabilities as well as assessment of credibility of witnesses cannot be done on affidavit.

[23] Conversely, where facts are not really in dispute and the rights of parties depend upon a question of law, motion proceedings are appropriate. The existence or non-existence of a *bona fide* dispute of fact on a material question of fact is the determinant whether one proceeds by way of motion or by way of action.

[24] The question whether a real and genuine dispute of facts exists is a question of fact for the Court to decide[3].

[25] A real dispute of fact arises when the respondent denies material allegations made by the deponents of the applicant and produces positive evidence to the contrary[4]. In *R Bakers*'s case, the following was said:

'Enough must be stated by the respondent to enable the Court…to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious and intended merely to delay the hearing. The

[3] *Ismail and Another v Durban City Council* 1973 (2) SA 362(N) at 374 where the Courts stated: 'The decision as to whether or not a dispute of fact exists is not, however, discretionary; it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion.'

[4] *R v Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd* 1948 (2) SA 626(T); *Room Hire (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd* 1949 (3) SA 1155(T).

respondent's material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.'

[26] In the matter at hand, there is a genuine dispute of fact concerning ownership of the contested properties; whether or not the matter was adjudicated upon by the traditional authorities and whether or not the proceeds from the rental of the properties should be shared between the applicant and the first respondent.

[27] I am of the view that in this matter there is a genuine dispute of fact as outlined above. In my assessment, the first respondent has denied material allegations made by the applicant and has produced what appears to be positive evidence to the contrary in the case of the minutes about the ruling on the matter by traditional authorities.

[28] The first respondent has also traversed the material facts put forward by the applicant in such a manner that I am no wiser and have no ready answer to the dispute between the parties in the absence of further evidence[5]. Accordingly, I uphold this point in *limine*.

[5] Herbstein & Van Winsen *Civil Practice of the Superior Courts in South Africa*, 3rd edition, page 61.

The High Court has no jurisdiction on the matter

[29] It was submitted on behalf of the first respondent that the High Court lacks original jurisdiction in matters involving customary disputes relating to Swazi Nation land. The Court was referred to a myriad of authorities in this regard. In this application, this Court is not called upon to determine the merits of the land dispute as much as it is called upon to issue an interdict to preserve the status quo ante. In this regard, the Court has jurisdiction to hear the matter.

Failure to satisfy the requirements for final interdict

[30] The requirements for a final interdict are: (a) a clear right; (b) irreparable harm actually committed or reasonably apprehended; and (c) absence of an alternative remedy.

[31] The authorities show that the word ‘clear’ in the context of the interdict does not really qualify the right itself but speaks to the extent to which the right has been proved by evidence. Whether there is a right is a question of substantive law, whether that right is clearly established is a matter of evidence. What is required where a final interdict is sought is that the right must be established clearly (as opposed to it being prima facie established) on a balance of probabilities.

[32] In the instant case, the applicant lives on the disputed land by virtue of being deceased's biological offspring. On the other hand, the first respondent is the husband of the deceased and duly *khontaed* for the properties in question. By law, and as husband of the deceased, the first respondent has lawful authority over the property as somebody who *khontaed* for it. On the face of the minutes of Mpolonjeni royal kraal, the first respondent has a right over the properties complained of. For this reason, the applicant has not established a clear right over the disputed property.

[33] As for harm, this means any interference with a right which is recognized in law. The respondent cannot be said to have interfered with a right of the applicant if the applicant has been found to have no clear right over the properties complained of.

[34] It has been suggested by the first respondent that there is an alternative remedy by which applicant can protect her right, if any, to undisturbed occupation and enjoyment of proceeds from the properties complained of. The alternative remedy is damages. I agree. I accept that the applicant has another remedy in the nature of damages.

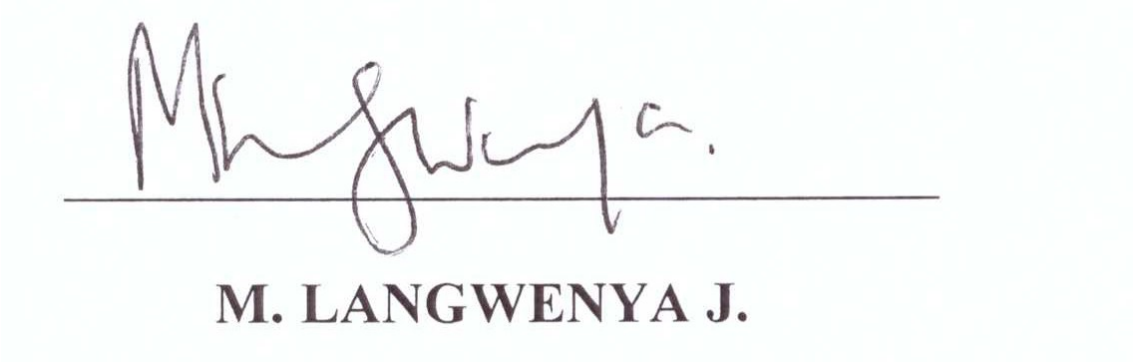
[35] In view of the foregoing conclusions and reasoning, I am impelled to the inevitable conclusion that the first respondent's first and third points in *limine* have a great deal of merit and so I uphold those points in *limine*. The

points in *limine* are individually or collectively dispositive of the application.

[36] In the result I order as follows:

1. The rule *nisi* issued on 4 October 2019 is hereby discharged and the application is dismissed.

2. I make no order as to costs due to the nature of the relationship between the applicant and the first respondent.



M. LANGWENYA J.

For the Applicant: Mr. S. M. Jele

For the first Respondent: Mr. B. S. Dlamini