



IN THE HIGH COURT OF ESWATINI

RULING

HELD AT MBABANE

Case No.: 688/2022

In the matter between:

XOLILE MAMBA

Applicant

And

SAMUEL SENGITHEMBILE MZILENI

1st Respondent

DUDUZILE NQOBILE DLAMINI

2nd Respondent

THE REGISTRAR OF DEEDS

3rd Respondent

THE REGISTRAR OF THE HIGH COURT

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

Neutral Citation: *Xolile Mamba vs Samuel Sengithembile Mzileni and 4 Others*
(688/2022) [2022] SZHC 133 (27/06/2022)

Coram: **K. MANZINI J**

Date Heard: 30 May, 2022.

Date Delivered: 27 June, 2022.

RULING: POINTS OF LAW

K. MANZINI J

- [1] The Applicant herein is an adult LiSwati female, and resident of Coates Valley, Manzini Region.
- [2] The 1st Respondent herein is Samuel Sengithembile Mzileni, an adult LiSwati male of Moneni, Manzini Region.
- [3] The 2nd Respondent is Duduzile Nqobile Dlamini an adult married LiSwati female, whose further particulars are unknown to me.
- [4] The 3rd Respondent is the **Registrar of Deeds** cited herein in his nominal capacity as such and having his principal place of business at the deeds Building in Mbabane, Hhohho Region.

[5] The 4th Respondent is the **Registrar of the High Court** cited herein in his official capacity as such and having his principal place of business at High Court Building in Mbabane, Hhohho Region.

[6] The 5th Respondent is the **Attorney General** cited herein in his nominal capacity as the Legal advisor of the Government of Eswatini, and having his offices at the 4th Floor Ministry of Justice Building, in Mbabane in the Hhohho Region.

[7] The filed this application on an urgent basis seeking an order in the following terms:

1. Dispensing with the requirements of the rules of Court with relation to service of process and timelines, and permitting this matter to be heard as one of urgency.
2. That the Applicant's non-compliance with the rules relating to the above forms and service is condoned.

3. Setting aside the Transfer and Registration under 207/2002 of certain immovable property described as:

Certain: Remaining Extent Farm 313 situate in the District of Manzini, Eswatini.

Measuring: 4667 (Four six seven) square meters.

Effected from the name of Tinyatselo Fund to Duduzile Nqobile Dlamini on the 28th February, 2022 (*sic*).

4. Immediately reverting the title of the said fixed property described in Order 1 above to the ownership of the Co-Trustees under the Tinyatselo Trust.
5. Directing that the rentals accruing from the property in question, be deposited into a suspense account with Nedbank Mbabane.

6. Directing the Conveyancer of the immovable property Robinson Bertram to hold onto the proceeds of the sale until the finalization of this matter.
7. That pending the finalization of this matter that orders 5 and 6 operate with interim effect.
8. That the 4th Respondent is hereby authorized to sign all necessary Deeds and Documentation necessary to give effect to orders 1 and 2 above.
9. Cost of suit only in the event of opposition thereof.
10. Further and /alternative relief.

[8] In support of the application is the Applicant's Founding Affidavit, sworn to by the Applicant herself on the 6th of April 2022. The 1st and 2nd

Respondents filed Answering Affidavits. The 2nd Respondent went further to file a Counter-Application which was filed in Court on the 20th of April, 2022. The Applicant also filed replying affidavits in response to the answering affidavits filed by 2nd and 3rd Respondent. The Applicant's replying affidavit to 1st Respondent's answering affidavit was filed on the 3rd May, 2022, whilst the Applicant's answering affidavit was filed on the same day. Each document was appropriately headed to avoid any confusion.

[9] On the 13th May, 2022 the Attorney for the 1st Respondent, Mr. Simelane filed a Notice to Strike Out. The cause for complaint according to the said Notice, and for which he entreats the Court to strike out, are the following paragraphs of the replying affidavit:

“1. Paragraph 3, 13, 15.8, 16.2, 17.3, 17.4, 17.5, 18.3 and 41.8 of the Replying Affidavit for the reason that the allegations made in the said paragraph constitute or introduce a new cause of action or new facts; and

1.1 Paragraph 31.1 for the reason that the said paragraph introduces the facts in the Replying Affidavit which ought to have been alleged or pleaded in the Founding Affidavit.”

It was the prayer of the 1st Respondent's Attorney that the paragraphs be struck out with costs.

[10] When the matter came up for hearing before this Court on the day of 30th May, 2022, the 1st Respondent's Attorney applied for striking out in terms of the Notice of Application for striking out dated 13th May, 2022. The Court herein will deal with the application for striking out before delving into the main application, as well as the counter claim.

[11] The Respondent seek the striking out on the basis that these paragraphs introduce a new cause of action and or new facts. It was the assertion of the Counsel for 1st Respondent that the new facts raised in the Replying Affidavit, now seek to raise a new cause of action, in reply the new cause of action according to Counsel for 1st Respondent, raises in an irregular fashion, relates to allegations that the Deed of Sale, or contract of sale of the land is a nullity. This according to the submissions of 1st Respondent was not specifically pleaded in the Founding Affidavit. He further alleged that the Applicant is thereby not permitted by law to introduce this by way of reply.

[12] The argument of Counsel for 1st Respondent is that this alleged nullity of the Deed of Sale ought to have been pleaded by the Applicant in the Founding Affidavit. He stated that as things stand, no cause of action of that nature was pleaded therein. He stated that this is not permissible in terms of the law since it is tantamount to making out an entirely new case in reply. He pointed out that if the offending paragraphs were not struck out, this would be prejudicial to the case of the 1st Respondent because at no point did they deal with these assertions (relating to the nullity of the contract) in their Answering Affidavit. He stated that currently, three sets of affidavits had already been filed, and pleadings are at this time closed, hence they are denied the opportunity to answer further to the new cause of action.

[13] In support of these assertions the Counsel for 1st Respondent the case of **Adrian Investments (Pty) Limited t/a Celltronics v Banele Zwane t/a Deez Super Mix, High Court Case No. 1350/2013 at page 14**. He further relied on the authoritative writings by **Herbstein and Van Winsen** in **Court Practice of the Supreme Court of South Africa (4th edition) page 366** which reads as follows:

“The general rule which has been laid down repeatedly is that an applicant must stand or fall by his Founding Affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main Founding of the application is the allegation of facts stated there, because those are the facts, that the respondent is called upon either to affirm or to deny.”

[14] Counsel for 1st Respondent further referred to the case of **Royal Swaziland Sugar Corporation Limited t/a Simunye v Swaziland Agricultural and Plantation Workers Union and 3 Others Civil Case No. 295/97.** This case deals specifically with new averments that are made in a replying affidavit. The Court held that an applicant must in general “*stand or fall*” by his founding affidavit, and cannot introduce new facts in the replying affidavit, which new facts seek to found a new cause of action. It was strenuously argued by Counsel herein that this case lays down that exceptional circumstance must exist in order for the Court to allow new facts to be raised in reply. He explained that one such circumstance of note is that new facts must have come to light after the filing of the Founding Affidavit. He insisted that the authorities cited in this case such as **Titty’s Bar &**

Bottle Store v A.B.C. Garage and Others 1974 (4) SA 362 which also buttressed his point that Courts have always contained in the founding affidavits, from replying affidavits.

[15] He further referred to the case of **Poseidon Ships Agencies v African Coaling and Another 1980 (1) SA 313** Broome J stated at 315 G where it is found in the general scheme of things that it would be unjust to confine an applicant where relevant facts come to light later on, the Court should exercise its discretion in a very judicious manner. Mr. Simelane argued that the issue of the nullity of the contract of sale was totally new, and Applicant ought to have pleaded this in the Founding Affidavit, but chose not to do so. He pointed out also that the Court was being asked to determine a case that has not been responded to by way of Answering Affidavit. He submitted also that the main relief sought in terms of her Notice of Motion was that the transfer and registration – number 207/2022 of the immovable property referred to in prayer number three, to be set aside. He stated also that the Applicant merely alleged in the affidavit that the property was sold at a very low price, but failed to inform the Court (or provide the Court with valuation reports) of the actual value so as to make the determination of whether or not the said selling price was indeed low.

[16] The Attorney for the 1st Respondent argued that despite that this application was instituted in April, 2022 on an urgent basis, the Applicant had access to valuation reports dated as early as February, 2022 (featured in page 185 – 189 of the Book of Pleadings). He stated that this valuation report is stamped on its file with a Nedbank stamp, and it is common cause that the Applicant herein is employed at this bank. He further pointed out that the report bears the Applicant's name at the top. He explained that at page 119 of the Book of Pleadings there is new evidence which demonstrates the market value of the property after improvements, whilst on page 121 there is contained an older report without the improvements. Mr. Simelane argued that these reports had always been in the possession of the Applicant, but she opted not to attach these to her Founding Affidavit, but only to plead this now in the Replying Affidavit. The Attorney herein argued that if the Applicant intended at all times to establish a case that the sale was made at a low price, then why did she exclude the report in the Founding Affidavit.

[17] The Attorney herein argued that the Court should not countenance the establishment of a bare allegation in the Founding Affidavit, and have the

Applicant, as an afterthought, supplement her case later on. The Attorney for the 1st Respondent further urged the Court to strike out the paragraphs complained about, on the authority of the **Royal Swaziland Sugar Corporation Limited** case (*supra*) which is on all fours with the case at hand.

THE APPLICANTS RESPONSE

[18] The submissions of Counsel for the Applicant were that the Applicant from the very onset, brought a case wherein she sought to challenge the legality of the sale between the 1st and 2nd Respondent. It was the Attorney herein's argument that the 2nd Respondent in her Answering Affidavit annexed a Deed of Sale, being "*Annexure D.M.4*". She pointed out that the 2nd Respondent in paragraph 6 of her Answering Affidavit seeks to rely on the said Deed of Sale to counter the application made by the Applicant herein to have the sale set aside.

[19] It was argued also that at paragraph 40 of the 1st Respondent's Answering Affidavit, the 1st Respondent also make reference to a sale. The Attorney for Applicant argued that at all times the Applicant sought to have the sale set

aside, but it was fortunate that the 2nd Respondent then provided a copy of the said Deed of Sale. She opined that it is common cause that she is after all, going to argue her client's case in a holistic manner, dealing with both the 1st and the 2nd Respondents' answers to the Applicants case. She stated that it was inconceivable therefore to ignore the Deed of Sale. She argued that since the two Respondents contend that the sale was valid, it is therefore incumbent upon her to argue that it was not, and to use all information at her disposal to do so.

[20] Counsel for the Applicant maintained that the facts complained about in the paragraphs cited in the Notice to Strike Out were not necessarily new facts. She stated that the Courts have adopted a more flexible approach to instances such as the one at hand. She proceeded to refer to the case of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal Case No. 23/2006** wherein Tebbutt JA to buttress her point. She pointed out that the Learned Judge in this case at paragraph 29, where the Court stated that where certain facts are challenged in an answering affidavit, the Courts will allow the applicant to bring clarity in relation to that matter in a replying affidavit. She stated further that the Court further referred to the case **of Baeck & Co. (SA) (Pty) Ltd v Van Zummeren and Another 1982 (2) SA**

112 (W), and another case being Shepard v Tuckers Land and Development Corporation (Pty) Ltd 1978 (1) SA 173 (W). The gist of the submissions of Counsel for Applicant, and thus supported by these authorities, were that Courts are now following a trend of allowing applicants to supplement their founding affidavits in replying affidavits. She stated however, that these authorities did emphasize that the Courts do retain a discretion to permit the new matter that is contained in replying affidavits to remain there, whilst availing the opportunity to deal with it in a set of answering affidavits.

[21] It was the assertion of the Counsel for Applicant that matters raised in the replying affidavits, though pertaining to issues raised in the answering affidavit of 2nd Respondent did not necessarily relate to new facts since from the onset it was the prayer of the Applicant that this Court should cancel the transfer of the said property to the 2nd Respondent. She pointed out that when it was time to argue the case on the merits, she would certainly not be sectioning her case in such a manner that she addressed the two Respondents separately. She prayed therefore that the Notice to Strike Out be dismissed, and if the 1st Respondent indeed felt prejudiced, that the Court allow the Respondents to file further affidavits. She stated that it was also her prayer

that if the Court found that indeed the contents of the highlighted paragraphs were indeed new matter, then it was her application for leave of Court to file a supplementary affidavit.

[22] In his reply Counsel for the 1st Respondent insisted that the parties had agreed when the matter commenced that only the sets of affidavits would be filed herein. He maintained also that he was not applying for leave to file any additional affidavits. He maintained also that the Applicant should have filed a Deed of Sale, because it is trite that all sales of land in terms of our law have to be made in terms of a written contract as contained in **Section 31 of the Transfer of Duty Act 1902**. Mr. Simelane insisted that no exceptional circumstances had been presented in favour of allowing the Applicant to raise new facts and/or cause of action in reply. He maintained that failure to strike the offending paragraphs out of the replying affidavit, would indeed be prejudicial to his case, because he could not file any response to these new facts contained in the highlighted paragraphs.

ANALYSIS OF SUBMISSIONS AND THE LAW

[23] From the very inception of these proceedings, the Applicant herein has sought an order of Court setting aside of the transfer and registration of the immovable property which is more fully described in prayer number 3 of the Notice of Motion. In prayer 4, the Applicant further seeks the immediate reversal of the title from being registered in the name of the purchaser, being the 2nd Respondent, and the same to the ownership of the Co-Trustees under Tinyatselo Trust.

[24] The Applicant in her Founding Affidavit, in paragraph 26, to be precise, makes the following comment:

“26. The reversal of sale is being sought as a fraudulent sale cannot be allowed to stand.”

The Applicant, clearly at all times has been desirous that the transfer of the property which is in question in *casu* be “*set aside*” by the Court.

[25] The Attorney for 1st Respondent herein has applied for paragraphs 3, 13, 15.8, 16.2, 17.3, 17.4, 17.5, 18.3, 41.8 as well as 31.1 to be struck out as being irregularly raised or as alleging “*new facts*” in the Replying Affidavit

and /or seeking to introduce a new cause of action, in reply. In paragraph 4 and 5 of the 1st Respondent's Heads of Argument the assertions made are that whilst the Applicant originally (in her Founding Affidavit) asserted that the sale ought to establish a cause of action as being that the property was sold at a low price. It was argued by Mr. Simelane that the Applicant in reply now seeks to rely on a different cause of action, being that the Deed of Sale, or contract giving rise to the sale null and void.

[26] The Applicant's attorney argued before Court that assertions made, and the reference to the Deed of Sale allegedly being a nullity are not exactly new. She argued that the Deed of Sale was availed to her, and to the Court by the 2nd Respondent. She further contended that though she responded to the 1st Respondent's Answering Affidavit using information gleaned from the 2nd Respondent's answering affidavit, it was not a fatal defect to her papers because she is going to argue her case against both Respondents in any event. She further referred to a number of authorities which introduce a more flexible approach to the manner in which Courts are to deal with such issues.

[27] Ms. Hlabangane herein referred to the **Shell Oil Swaziland Case** (*supra*) where in paragraph 29 of this case, the Court did, though in orbiter, state that Courts will allow an applicant to rectify, and or clarify an issue in a replying affidavit. The Court therein further referred to the **Baeck & Co (SA) Case** (*supra*) and in particular to a quotation of the headnote of that case which reads in this manner:

“Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit the approach of the Court should never the less always be to attempt to consider substance rather than form in the absence of prejudice to the other party.”

[28] I tend to align myself with this position. I do so, also emboldened by further authority sourced from the case of **Kukhanya (Pty) Ltd v Jonas Construction (Pty) Ltd Civil Case No. 2080/2011** wherein the **Learned Sey J.** at paragraph 11 thereof, referred to the case of **Steyn v Schubert and Another 1979 (1) SA 64 at 697 (0)** where it was pronounced that:

“the procedure for striking out was never intended to be utilized to make technical objectives of no advantage to anyone and just increasing costs.”

It was further the holding of the Court in the **Steyn v Schubert Case** (*supra*) that the Court should not grant an application for striking out unless the applicant for such striking out will be prejudiced in his case if it is not granted.

[29] Indeed in **Dlamini v Thwala N.O and Others Civil Case No. 3210/10, dated 5th April 2011 (unreported)**, His Lordship MCB Maphalala J (as he then was) opined that:

“The decisive factor in determining whether to grant the application to strike out is the existence of prejudice to the applicant in the conduct of his claim or defence if it is not granted.”

[30] This being said, I also find that the reference to the Deed of Sale, and alleging it to be a nullity, by Counsel for the Applicant, and having reference to all the averments contained in the paragraphs complained about by the 1st Respondent, there is no pressing need, or justification for these to be struck out. The legal position relating to registration of deeds (or conveyancing) is that for any act of registration of transfer of immovable property, there must be a valid reason for the transfer (*justa causa traditionis*). This could be in

the form of a contract of sale, or even succession (See: **D.L. Carey Miller and Pope A, (2010), “Land Title in South Africa”, page 49).**

[31] The Learned Authors (D.L. Carey and A. Pope), also referred to **Ex Parte Menzies et Uvor 1993 (3) SA 799 (C), 816 – 20**, and further detailed that if at all the validity of the transfer deed should be attacked in Court, any dispute is bound to run on the *causa* of the transfer. This being the case, and in reference to the case at hand, the Applicant herein has clearly always sought to challenge the validity of the transfer of the property. This means she therefore, by extension, was challenging the *causa* of such transfer. The paragraphs objected to, and sought to be struck out by the Counsel for 1st Respondent, are not in my considered opinion, bringing about a new cause of action. If at all the Counsel herein is still desirous of responding to the Replying Affidavit as filed by the Applicant’s Counsel, this Court is more than amiable to the filing of further affidavits.

[32] The Court herein further does not opine that the filing of further affidavits in this regard will in any material way, put the Counsel for 1st Respondent out. This is due to the fact that the very same Counsel’s papers, and in the

Answering Affidavit to be precise (paragraph 7, of same) the deponent thereof, being the 1st Respondent did “*beg leave of this Court to supplement his affidavit in due course.*”

RULING

[33] The ruling is hereby entered in the Applicants favour.

33.1 The Application to Strike Out is hereby dismissed.

33.2 There is no order as to costs.

**K. MANZINI
JUDGE OF THE HIGH COURT**

For the Applicants: MS. T. HLABANGANE (HLABANGANE & ASSOCIATES)

For the 1st Respondent: MR. K.N. SIMELANE (K.N. SIMELANE IN ASSOCIATION WITH HENDWOOD & CO.)

For the 2nd Respondent: MR. T. MAVUSO (MOTSA MAVUSO ATTORNEYS)