



IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 475/2021

In the matter between:

ANNASTACIA NOMSA SIMELANE

Applicant

And

THE MASTER OF THE HIGH COURT

1st Respondent

ADRINA KRUKIE SIMELANE N.O.

2nd Respondent

CECILIA SIMELANE

3rd Respondent

BONKHE SIMELANE

4th Respondent

NCEDILE SIMELANE

5th Respondent

SIFISO SIMELANE

6th Respondent

THE ATTORNEY GENERAL

7th Respondent

Neutral Citation: *Annastacia Nomsa Simelane vs The Master of the High*

Court and 6 Others (475/2021) [2023] SZHC 53

(16/03/2023)

Coram: **K. MANZINI J**

Date Heard: 15 July, 2022.

Date Delivered: 16 March, 2023.

SUMMARY: *Civil Procedure – Application for review of ruling by Master of the High Court dated 17th February, 2021 – Applicant’s case being that receipts of building materials and payments to Workmen suffice as evidence proving ownership of a structure erected on land forming part of the deceased estate of the late John Fly Simelane (ES 53/19) – Respondents oppose the application for review arguing that the house was built by the late John Fly Simelane, therefore the house forms part of the deceased estate, and falls to be distributed amongst all of the beneficiaries of his estate.*

Held: In terms of the principle of Accession, the house has acceded to the land upon which it was built, therefore forming part of the deceased estate – The application for review is hereby dismissed.

JUDGMENT

K. MANZINI – J:

[1] The present application was instituted by the Applicant on or about the 17th of March, 2022. The Applicant herein seeks an order in the following terms:

1.1 That the 1st Respondent’s ruling dated the 17th of February, 2021 in respect of the Estate of the Late John Fly Simelane, E.S.53/19 is hereby reviewed and set aside.

1.2 Declaring that the house on Lot No. 1061, Ngwane Park Township Extension 1, was built by the Applicant.

1.3 Costs of this application against any Respondent who unsuccessfully opposes this application.

1.4 Further and/or alternative relief.

BACKGROUND OF THE MATTER

[2] The Applicant herein is the first born daughter of the Late John Fly Simelane. The 2nd Respondent herein is the deceased's second wife, as well as the Executor of the Estate (ES 53/19). The deceased herein passed away on the 25th of April, 2017.

[3] The Applicant is the first born, biological daughter of the late John Fly Simelane, having been born out of a relationship between the deceased, and Ms. Michel Gugu Shabangu. The parents of the Applicant were not married, and she was therefore born out of wedlock. The Late John Fly Simelane passed away on the 25th of April, 2017, without leaving a valid Will (the death certificate was attached to the Founding Affidavit, and **Marked ANS 1**).

- [4] Having died intestate, the late Mr. Simelane, was survived by his five children, being the Applicant as well as the 3rd, 4th, 5th and 6th Respondents. The 2nd Respondent herein is the biological mother of the 4th, 5th and 6th Respondents. The Applicant then caused the Estate of her late father to be reported to the Master of the High Court in accordance with the Administration of Estates Act No. 28/1902.
- [5] The Applicant's late father, during his lifetime was the registered owner of certain immovable property, being:

Lot No. 1061

Situate: Ngwane Park Township, Extension 1

Measuring: 1385 Square Metres

Held Under Deed of Transfer No.: 393 of 1998

- [6] Subsequent to the report of this estate, a next of kin meeting was convened and held at the Office of the 1st Respondent in Hlathikhulu. The 2nd Respondent was appointed Executrix Dative at the said meeting of the next of kin, despite the fact that the Applicant is of the opinion that

the marriage was invalid, because at the time it was contracted, her deceased father was still married to one Jane Simelane (who is now late). An abridged marriage certificate was annexed to the founding affidavit, and is featured on page 15 of the Book of Pleadings.

[7] The 2nd Respondent caused a Notice calling upon debtors and creditors to lodge their claim, and to pay their debts, respectively. The Applicant received a consent form requiring her to indicate whether or not one was consenting to the sale of the property in Ngwane Park. At this point, the Applicant hastily filed her claim against the estate by submitting an official affidavit, which document, stated that she had built the house at the Ngwane Park, and had done so with her father's consent. The Affidavit (featured in page 18 of the Book of Pleadings). The Applicant in the claim lodged, via the affidavit further acknowledged the other beneficiaries rights over the plot upon which the house was erected, and offered to buy out, or to pay the other beneficiaries their shares in the said plot.

[8] It was contended on behalf of the Applicant that through her attorneys, the 2nd Respondent disputes the Applicant's claim, and insists that the house and plot, all belong to the Applicant's deceased father (page 20 of

the Book of Pleadings). The Master of the High Court further convened another meeting of the next of kin whereat the Applicant's claim was dismissed, and a written ruling to this effect was issued by the 1st Respondent.

[9] It is the contention of the Applicant's Counsel herein that the 1st Respondent's ruling should be reviewed and set aside on the ground that she failed to fully consider the issues before her, and therefore failed to apply her mind, hence she arrived at an improper conclusion. It was contended by Applicant in her founding affidavit, that she constructed the house on the plot with her father's permission because out of all of his children, she was the only one who was without a home of her own. It was averred by the Applicant herein that during his lifetime, her deceased father had constructed a homestead for his wife Jane Simelane, and their children together at the Mbowane area, in Hlathikhulu. According to the Applicant, the deceased had also constructed, a homestead for the 2nd Respondent, and the children that they had together, at an area known as Mkhitsini, within the Shiselweni District.

[10] It was further averred by Applicant that she had hired a certain Mr. Ngwenya, who is of Mozambican descent, and origin, who is a resident

of Malindza as a builder. She averred that it was actually her late husband who had actually brokered her meeting with this Builder in the first place. This construction of the house actually took place between the years 1997 and 1998. Applicant averred that she had tried without success to locate the builder, so he could depose to a confirmatory affidavit, since he is well placed to attest that she had paid him from her own funds to construct the house. It was also averred by Applicant herein that she also contracted with an electrician to wire the house. The said Electrician is a Mr. Thulani Shongwe. This Electrician deposed to a confirmatory affidavit (page 32 of the Book of Pleadings), wherein he confirmed that he was hired to wire the house at Ngwane Park by the Applicant. He confirmed as well that he knew that the house had been constructed by Mr. Ngwenya, and that both he and the said Ngwenya were hired by the Applicant, who also remunerated them for their work and/or labour. The Deponent herein further confirmed that the Applicant provided all the building material, electrical wires and fittings.

[11] It was the averment of the Applicant that the only funds that her late father assisted her with was a sum of E2000.00 (Two Thousand Emalangenani only) when she was roofing the house. It was her averment that she has resided in the disputed property since 2007, with her

children, and none of the other Respondents had ever challenged her occupation of the house, up until she reported the estate to the 1st Respondent. It was the Applicant's contention that the Master's ruling which found that there was no evidence supporting that the house was actually constructed by the Applicant, because the receipts submitted, though bearing the Applicant's name, do not necessarily mean that she paid these amounts from her own funds. It was the Master's conclusion that the fact that her name was on the receipts does not rule out that she could have been sent by her father to make the payments on his behalf. The Master then proceeded to rule that the house fell to be distributed to all the beneficiaries as part of the intestate Estate of the late John Fly Simelane, as it forms part of his estate.

[12] The submission of Counsel for Applicant was that the present application for review is founded on **Section 51 bis (8) of the Administration of Estates Act 28/1902**, as well as the common law. According to Counsel herein, any person who is aggrieved by a decision of the Master may apply on motion to the High Court within 30 days, for a review of such ruling and/or decision. The Court may make whatever decision it deems fit in the circumstances, including a setting aside of this decision.

[13] Citing the case of **Lungile Hotencia Gamedze v The Master of the High Court of Eswatini & 7 Others High Court Case No. 1537/2018**, Counsel gave a statement of the law on the grounds of judicial review as being the following:

- (i) Failure by the decision-maker to properly apply his or her mind to the evidence that is presented.
- (ii) Unreasonableness or gross unreasonableness.
- (iii) Failure of natural justice.
- (iv) Taking into account irrelevant considerations or ignoring relevant considerations.
- (v) Irregularity of procedure.
- (vi) *Mala fide*, capriciousness or arbitrariness (per His Lordship Mlangeni J at page 7 of the Judgment).

His Lordship further stated the following:

“It has been held time and again that the list is not exhaustive. For instances, failure to give reasons for the decision, or give reasons which are not justified by evidence, appears to me to be a ground for review.”

- [14] Counsel further relied on the case of **Takhona Dlamini v President of the Industrial Court and Another – Civil Appeal Case No. 23/97** where Tebutt J.A. stated the following as being common law grounds for review:

“.....these grounds embrace inter alia the fact that the decision was arrived at arbitrarily or was capriciously or mala fide, or as a result of an unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or that the Court misconceived its function or took into account irrelevant considerations or ignored relevant ones or that the decision was so grossly unreasonable to warrant the interference, thus the Court had failed to apply its mind into the matter.”

[15] It was vehemently contended by Applicant's Counsel that the 1st Respondent's decision is grossly unreasonable such that it warrants intervention and review by this Court on the following grounds:

15.1 The 1st Respondent's decision to find that there was no evidence put forward to support that the house was constructed by the Applicant as the receipts were not on their own convincing was wrong and/or incorrect.

15.2 The 1st Respondent failed to consider and completely ignored the inescapable fact that the receipts submitted in proof of the Applicant's claim were the only form of evidence.

15.3 The Applicant's submission is that the 2nd, 4th, 5th and 6th Respondents did not furnish the 1st Respondent with any proof to the contrary, i.e. that the house was constructed by the late John Fly Simelane. It was argued by the Counsel for the Applicant that the 1st Respondent also ignored this fact, and by so doing came to an incorrect decision.

[16] It was submitted that the 1st Respondent failed to properly apply her mind to the evidence that was presented to her, and thereby reached a wrong decision. It was contended by Counsel that the 1st Respondent failed to apply her mind to the claim, and had she had done so, she would have shed light on what type of “*convincing proof*” ought to have been submitted by the Applicant apart from the receipts. The Applicant’s Counsel decried the 1st Respondent’s failure to shed light on what more the Applicant could have done in the bid to adduce evidence in proof of her claim. The Counsel for Applicant insisted that the receipts for building material were more than sufficient, as these receipts are clear proof that the material was purchased by the Applicant.

[17] Counsel further submitted that the 1st Respondent reached her decision in a capricious fashion, or failed to apply her mind or considered irrelevant factors, and ignored relevant ones, thus leading to the proceedings being rendered irregular and reviewable because of this procedural flaw. The said procedural flaws being:

17.1 The 1st Respondent ignored that the building materials were purchased by the Applicant and not by the deceased. The Applicant paid for the water installation, as well as for the

connection of electricity with the Electricity Company. (receipts featured on pages 75, 76, 77, 78, 79 and 80 of the Book of Pleadings).

17.2 The 1st Respondent further ignored the fact that if the late John Fly Simelane was the one responsible for the construction of the house, then there was no reason for him not to personally purchase the building material, as well as to personally pay for the water and electricity connections.

17.3 The Applicant's Counsel opined that it is irrational, and difficult to understand how the 1st Respondent deduced that the late John Fly Simelane would allow the Applicant to construct her house on his land without validating same by means of a Will.

17.4 The Applicant's Counsel argued that the Applicant ought not to be the one who is penalised for her father's failure to execute a Will. He stated that the fact that her father died intestate, should not then be a reason to deprive the Applicant of her right to the house that she constructed with her own hard-earned money. It was further

contended that the fact that the late John Fly Simelane did not give written consent to his daughter to construct the house in his land, is not an indicator that such consent was never given. The Applicant's Counsel further contended that there is no requirement of the law that the said consent ought to be written.

17.5 It was contended by Applicant's Counsel that after the death of the deceased father of the Applicant none of the beneficiaries made a claim regarding the said house, but the issue only came up after the Applicant reported to the estate of the deceased to the 1st Respondent. It was also pointed out by Counsel herein that despite the fact that the deceased passed away on the 25th of April 2017, none of the beneficiaries to the estate did anything regarding the estate, and it was only when the Applicant took the initiative that the estate was eventually reported on the 9th of October, 2019.

[18] It was the Applicant's case therefore that for all these reasons, the decision of the 1st Respondent, which held that the house constructed on Lot 1061, Ngwane Park Township, Extension 1, Manzini Region ought to be included in the estate of the Late John Fly Simelane ought to be reviewed and set aside.

THE 2ND, 4TH, 5TH, AND 6TH RESPONDENTS' CASE

[19] The case of the Respondents is that the 2nd Respondent is the second wife and widow of the late John Fly Simelane. The Applicant is one of the five (5) children who survived the deceased. The 2nd Respondent was appointed, and is the Executor of the estate of the deceased, who owned Lot No. 1061, Extension One, Ngwane Park Township, upon which property there is constructed a house, which house, was admittedly occupied by the Applicant, but belonged to the late John Fly Simelane. According to the 2nd Respondent, the Master of the High Court after, appointing her as Executrix of her late husband's estate, had directed that anyone who had an issue with such appointment, should lodge their dispute of same, within 14 (fourteen) days, and duly challenge the appointment, but the Applicant did not do this. (paragraph 17 of the Answering Affidavit).

[20] The 2nd Respondent in paragraph 8 of the Answering Affidavit further averred that the *locus standi* of the Applicant to challenge the validity of her marriage to the late John Fly Simelane was wanting. She further pointed out that in any event the validity or invalidity of her marriage to the Applicant's late father is not an issue that is pertinent to the application matter at hand, as well as the prayers that are before Court.

[21] According to the Counsel for the Respondents herein, the Applicant has failed to make out a case in the application before Court, and this can be seen on the following:

21.1 On the Notice of Motion, the Applicant seeks to set aside the ruling of the Master of the High Court which was made on the 17th of April, 2021, and further seeks a declaratory order, wherein she expects the Court to declare her to be the one who built or constructed the house. According to the case of the Respondent that the Master of the High Court dealt with the Applicant extensively and reached a conclusion that there was no evidence in support of the claim by the Applicant, and therefore dismissed her claim.

21.2 The application lodged fails to disclose a cause of action, in that she seeks to have set aside, the Master's decision, and yet she is not the owner of the property registered as Lot No. 1061 Ngwane Park Township, Manzini. The Founding Affidavit does not contain any averments that will guide the Court on what should happen to the estate of the deceased once the ruling of the Master in this regard is made.

[22] The case of the Respondent is that it is not true that the Master failed to fully consider the issues before her, and failed to apply her mind to these, thus leading her to reach an improper conclusion. The Respondent's Counsel argued that the Applicant fails to state what the proper conclusion ought to have been. The 2nd Respondent in paragraph 17, averred in the affidavit that her late husband did not assist the Applicant to construct the house in question, but instead constructed same himself, using his pension benefits. She further averred that she also contributed some of her own personal funds by giving him money to finance the building project. It was averred by 2nd Respondent that on a particular day, and in the process of such construction, she accompanied her husband to the construction site when he went to install the doors to the house. She proceeded to state the following:

“On that day, the Applicant’s mother LaShabangu, came with a set of beds loaded in a van, to deliver at the house. To this act, my husband rebuked the Applicant for involving her mother in the house he was building.”

[23] According to the 2nd Respondent's contentions, she and deceased allowed the Applicant and her children to reside on the property due to the fact

that she was not financially secure, and struggled in this regard. She averred further that her husband once hosted a family gathering (a braai) at the Ngwane Park homestead, where he announced to all the family members who were there that that house was a home meant for all of his children, and the whole family. The Applicant had never disputed, or contradicted the statement made by her father on this day (paragraph 18).

[24] The Respondent's Counsel further opined that the application seems to be premised more on personal grievances, rather than facts that sustain the "*cause of action*", and/or the prayers before Court. She pointed out that the Applicant's assertions in the founding affidavit that her marriage to the deceased was invalid had very little to do with the matter at hand (paragraph 17 and 10 of the affidavit).

[25] The Respondent's Counsel further pointed out receipts filed by the Applicant did not assist the Applicant in the endeavour to prove that the house does indeed belong to her. The 2nd Respondent in her Answering Affidavit sought to explain the issue in the following manner:

In paragraph 21 she stated thus:

“Save to point out that the alleged receipts have not been filed herein, it was correct for the 1st Respondent to disregard these receipts for many reasons. Some of the receipts are in fact invoices, some do not reflect the name of the Applicant and many more other reasons.”

In paragraph 22 she stated the following:

“The receipts amongst other things, failed to prove the construction of the house in issue herein and the 1st Respondent fully comprehensively and adequately applied her mind in reaching the decision made. The Applicant ought to have filed the alleged “consent” from her father, amongst other things. “

In paragraph 23 the 2nd Respondent stated the following in response to the assertion that the Applicant used her own funds to construct the house and to pay the workmen who performed the construction, and electricity installation:

“.....Even if the Applicant’s allegations were correct, the mandate and/or authority to do so was not obtained from the property owner. What I know is that the deceased would give the Applicant, money to purchase what was needed to be fixed on the property as she was staying there while the construction was going on. The Applicant would make quotations and send the invoices to the deceased and the latter send the required amount or purchase the required item....”

[26] The Respondent’s Counsel further decried the propriety of the Applicant’s act of seeking a declaratory order against the deceased’s estate, rather than seeking to assert her rights during the lifetime of the deceased. She stated that if her rights were justifiable, then she should not have waited to assert her “rights” until the demise of her father. Citing the case of Martha Nokuthula Makhanya and 4 Others v Sarah B. Dlamini (53/16) [2017] SZHC 48 (2016), Counsel herein reaffirmed her position that a declaratory order cannot affect the rights of persons who are not party to the proceedings. She maintained that the declaratory order the Applicant seeks is ill conceived and baseless because she should not have waited until the death of the property owner to assert her alleged rights herein.

[27] It was further the contention of Counsel for Respondent that in terms of our law, review proceedings require that an Applicant should establish irregularity, misdirection and/or procedural flaws by the Court and or tribunal concerned, which would result in grave injustice if the Court does not interfere with the ruling of the tribunal. According to Counsel herein, the Applicant had not met these requirements in her application. The Counsel herein cited the case of **Wakhile Lukhele and 2 Others v Vice Chancellor and Another (1089/18) [2018] SZHC 235 (14 December 2018)** in support of her assertions.

[28] Respondent's Counsel further opined that in terms of our law, an agreement such as that which the Applicant alleges, cannot be upheld in our Courts because it clearly involves immovable land. She stated that Section 87 of the Deeds Registry Act 37/196 requires that any transfer of land and/or session of lease or sublease or other real right in land, apart from a mortgage, made as security for a debt or other obligation shall by law be attested to by the Registrar of Deeds, or registered in the Deeds Registry.

[29] Counsel herein further argued that in terms of Section 31 of the Transfer Duty Act of 1902, the law stipulates the following:

“No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by the agents duly authorised in writing.”

Counsel herein further referred to the case of **Michael Masotja Shongwe v Henry Sibusiso Shongwe and 3 Others (58/2016) [2018] SZSC 6 (3rd May 2018)** to support her assertions. She emphasised also that since the Applicant was alleging that the late Jane Simelane was the rightful wife of the Applicant’s late father then the fact of the matter is therefore that the law could not allow the Applicant to take possession of the property to the exclusion of the rights of the late Jane Simelane who was allegedly married to the deceased in terms of Civil Rights (Section 34 of the Constitution of Eswatini 2005).

ANALYSIS OF SUBMISSIONS, THE LAW, AND FINDINGS OF THE COURT.

[30] The Court herein has taken cognisance of the submissions of both Counsel wherein they both rely on legal authority to buttress the fundamental or basic grounds for review of the decision of an administrative or judicial body and/or tribunal. The Court fully aligns itself with these submissions in that as stated by the Applicant's Counsel herein where a Court finds that the decision maker (Judicial or administrative) misconceived its functions, or took irrelevant factors into account, and ignored relevant ones in arriving at its decisions, these are grounds that warrant the Court's intervention. In addition, even circumstances where the decision can be deemed to be grossly unreasonable because the Court/administrative body has failed to apply its mind to the matter is grounds for review (**Takhona Dlamini v President of the Industrial Court and Another** (*supra*)).

[31] Furthermore, the Respondent's Attorney also vehemently contended herein that in as much the Applicant's Attorney opines that the Master of the High Court came to, or reached an improper conclusion. The conclusion being to the receipts and invoices are insufficient to prove ownership of the house erected on the property known as Lot No. 1061, Extension One, Ngwane Park Township, but she maintained that the Applicant's Attorney failed to then shed light on what the decision of the

Master ought to have been in this regard. She opined further and submitted that in line with the findings of the Court in **Wakhile Lukhele & 2 Others v Vice Chancellor and Another** (*supra*) the Applicant's Attorney has not pointed out any irregularity, misdirection and/or procedural flaws in the Master's decision, which would warrant this Court's intervention.

[32] The Court in reaching its determination has had recourse to some fundamental principles of the Law of Property more specifically, that of the concept of "Accession", wherein buildings (*inaedificatio*) will denote the permanent annexation of structures to the land in terms of the Common Law principle of *superficies solo cedit*. The Learned Authors; **Van der Walt and Pienaar, "Introduction to The Law of Property", 6th edition, page 105** explains the concept in this manner;

"Building is the process whereby a movable thing (as accessory thing) is attached to the land (as principal thing) in such a way or with the intention that it becomes part of the land and, as a result thereof, becomes the property of the landowner. In terms of the rule superficies solo cedit the accessory thing is, after attachment, merely a part of the composite thing and this composite thing belongs to the landowner."

Therefore, in accordance with this principle, any buildings or structures erected on land, become the property of the owner of the land on which they have been built. It is a trite legal principle that the building loses its independence, and becomes an integral part of the immovable property, or land on which it has been constructed. Put in different terms, the building accedes to the land, and becomes the property of, or is then owned by the owner of the land upon which it is erected. (see also: **Badenhorst P.J et al “Silberberg and Schoeman’s The Law of Property”5th ed, page 147, see also Macdonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co. Ltd 1915 AD 454).**

[33] When the above principle is applied to the facts *in casu*, it becomes evident that regardless of whether or not the Applicant herein actually funded the construction of the house in question from her own pocket, what is abundantly clear is that in terms of our law, that house acceded to Lot No. 1061, Extension One, Ngwane Park Township. This property, it is without a doubt, owned by the estate of the Late John Fly Simelane. Indeed, the production of the receipts by the Applicant herein is not sufficient to sustain a claim that she owned the house in question. Instead, if the Applicant perhaps was claiming compensation for improvements that she effected in the property of her late father, in that

case those receipts may be pertinent. However, this is not the case, and this is not the application that this Court is seized with.

[34] In actual fact, even the source of the funds that the Applicant may have used remains in dispute herein. The Respondent's case herein is that the Applicant's name appears on the receipts simply because she was sent by her father to pay for the building materials. All these disputes of fact do not auger well for the Applicant's claim that she should be declared to be the one who built the house. Indeed even the confirmatory affidavits filed herein cannot be taken to be dispositive of the allegation that the Applicant, being very close to her late father, may have been sent by him to buy building materials, and also to pay for the installation of electricity and other amenities at the building site.

[35] In light of the foregoing the Court herein finds that the Master's ruling that the house belongs to the Estate of the Late John Fly Simelane, E.S. 53/2019 is correct, and is hereby upheld. The application instituted for the review and setting aside of the Ruling of the Master of the High Court herein is hereby dismissed in its entirety.

35.1 Each party herein is ordered to pay own costs.

K. MANZINI
JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: MR. I. DU POINT (ZONKE MAGAGULA & CO
ATTORNEYS)

For the Respondents: MS. L. SIMELANE (KHUMALO NGCAMPALALA
ATTORNEYS)