

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 2240/22**

In the matter between: -

**SIPHEPHISO SANDRA NXUMALO**

Plaintiff

and

**PHILANI MACBETH TSELA**

Defendant

*Neutral citation:*

*Siphephiso Sandra Nxumalo vs Philani Macbeth Tsela  
(2240/2022) SZHC 30 (12 March 2024)*

**CORAM:**

**N.M. MASEKO J.**

**FOR PLAINTIFF:  
FOR DEFENDANT:**

**M.L. MAMBA  
L. DLAMINI**

**HEARD:  
DELIVERED:**

**21/04/2023  
12/03/2024**

**PREAMBLE:**

Civil law – Civil Procedure – Summary Judgment  
– Law of Property – Ejectment – Rule 32 of the  
Rules of Court – *Rei Vindicatio* and essential  
elements thereof.

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## JUDGMENT

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### MASEKO J

- [1] On the 23<sup>rd</sup> November 2022, the Plaintiff sued out a Combined Summons against the Defendant for ejectment or eviction of the said Defendant and all those who hold title under him from Lot No. 2145 situate in the township of Mbabane Extension No. 18 (Benfell Estate) in the Hhohho District, Eswatini and for costs of suit in the event the action is defended.
  
- [2] The Defendant filed his Notice to Defend the eviction on the 28<sup>th</sup> February 2022. The Plaintiff thereafter filed an application for Summary Judgment on the 8<sup>th</sup> December 2022 wherein the Plaintiff declared that she verily believes that the Defendant has no *bona fide* defence to the action instituted against him and that the Notice of Intention to Defend has been delivered solely for the purpose of delay.
  
- [3] On the 10<sup>th</sup> February 2022 the Defendant filed an affidavit resisting the Summary Judgment and denied that he had filed the Notice of Defend to delay the Plaintiff, and he further denied that he had no *bona fide* defence.
  
- [4] The Defendant states that his company PMT (Pty) Ltd obtained a home loan from Standard Bank Swaziland Limited of E1, 080-000-00 (Emalangeneni One Million and Eighty Thousand) and the company struggled to service the loan, and eventually Standard Bank instituted a civil suit against the company and himself respectively. The Defendant states that he has filed an application before this Court where he is challenging the eviction proceedings and he says this application is under Case No. 164/2018.

- [5] I must state at the outset that the application under Case 164/2018 came before Her Ladyship M. Dlamini J on the 23<sup>rd</sup> February 2023 and she dismissed it **without costs** on the basis that prayer 1 was academic.
- [6] For ease of reference the prayers in the Notice of Motion are framed as follows:-
- (1) Reviewing and setting aside the foreclosure sale of the 1<sup>st</sup> Respondent which was scheduled on the 7<sup>th</sup> May 2021 at 10:00am for not being in compliance with the law and/or the Rules of Court.
  - (2) Ordering the maintenance of the *status quo ante* between the parties pending the determination of this application.
  - (3) Staying the proceedings under High Court Case No. 2240/2022 (Summary Judgment application) pending finalisation of this application.
  - (4) Costs in the cause; and
  - (5) Further and/or alternative relief.
- [7] I have no doubt in my mind that Her Ladyship M. Dlamini J. dismissed the above cited prayers as academic purely because the relief sought to review and set aside the foreclosure sale of the 7<sup>th</sup> May 2021 at 10:00am, and this was being done on the 10<sup>th</sup> February 2023. The orders sought were no longer enforceable because the sale in execution had long been conducted.
- [8] Even the immovable property in issue was transferred into the name of the Applicant in these Summary Judgment proceedings on the 6<sup>th</sup> July 2022 under Deed of Transfer No. 558 of 2022. The aforesaid immovable property is under a Continuing Mortgage Bond No. 464 of 2022 with Standard Bank.

- [9] The Defendant states that on the 4<sup>th</sup> May 2018, the Court granted an order in favour of Standard Bank. A sale in execution was eventually conducted and the property was sold for E1 150 000-00. The reserve price was E1 150 000-00.
- [10] The Defendant states that the Notice of Sale filed earlier had reflected the reserve price as E1 440 000-00, however, another Notice of Sale was filed later reflecting a reserve price of E1 050 000-00 and that was when the property was purchased for E1 150 000-00. The Defendant states that the sale of the property based on the Notice of Sale reflecting the reserve price of E1 050 00-00 was not in accordance with the Rules of Court for conducting sales in execution and therefore the sale is liable to be set aside.
- [11] The Defendant further states that the sale of the property at E1 150 000-00 as opposed to the E1 440 000-00 unlawfully deprived him of E290 000-00 and this is shocking to the conscience. The Defendant states that the sale in execution resulting to the purchase price of E1 150 000-00 was a private – closed – door sale whereas the sale in execution should have been conducted by public auction.
- [12] The Defendant states that the Plaintiff is therefore not entitled to evict him from the property purchased through a questionable auction sale and without adhering to the Rules of Court governing sales in execution of immovable property.
- [13] On the other hand the Plaintiff reiterates that the Defendant has no bona fide defence and has filed the Notice to Defend solely to delay her claim. She states that the sale in execution was conducted on 7<sup>th</sup> May 2021 through a public auction where she was represented by her brother in-law Bheki Mtshali, as appears at page 102 of the Book. She states

further that no Rules of Court were violated when the sale was conducted as per the terms and conditions laid down in the Notice of Sale in Execution of Immovable Property duly issued by the Sheriff of Eswatini.

#### **THE SALE IN EXECUTION**

[14] The sale in execution sought to be reviewed or set aside was conducted on the 7<sup>th</sup> May 2021. There is no way by which this prayer can be deemed to be competent. This matter was dealt with by Her Ladyship M. Dlamini J on the 23<sup>rd</sup> February 2023 and she dismissed same because the prayers were academic. As far as I am concerned this matter is now *res judicata* because of the order of this Court per Her Ladyship Dlamini J as demonstrated above.

#### **STAY OF PROCEEDINGS UNDER HIGH COURT CASE NO. 2240/2022**

##### **(SUMMARY JUDGMENT)**

[15] As stated in the opening paragraph of this judgment the Combined Summons for ejectment or eviction of the Defendant was issued on the 23<sup>rd</sup> November 2022 and the Defendant filed his Notice to Defend the aforesaid action proceedings, and the Plaintiff thereafter launched these Summary Judgment proceedings.

[16] The defence raised by the Defendant that he has filed an application before this Court where he is challenging the eviction under High Court Case No. 164/2019 is the very case I have referred to above wherein Her Ladyship M. Dlamini J dismissed as academic on the 23<sup>rd</sup> February 2023. There is no way by which this Court can make a pronouncement again on this issue. This defence has no merit.

**SUMMARY JUDGMENT**

- [17] The Plaintiff filed Summary Judgment proceedings in order to evict the Defendant from her premises as herein fully described in paragraph 1 of this judgment. As stated herein above the aforesaid property was transferred into the name of the Plaintiff on the 6<sup>th</sup> July 2022 under Deed of Transfer No. 558/2022. On the same day the 6<sup>th</sup> July 2022 a **Continuing Covering Mortgage Bond No. 464/2022** was issued in respect of this property in favour of Standard Bank Swaziland Limited.
  
- [18] The Plaintiff despite being the owner of the immovable property in question has not yet assumed occupation of these premises yet she is servicing the mortgage with Standard Bank Swaziland Limited on a monthly basis. There is no doubt that she is suffering financial prejudice as a result of the unlawful occupation of the premises by the Defendant.
  
- [19] The Defendant does not have a *bona fide* defence to the Plaintiff's particulars of claim which can even be said to raise a triable issue. The defence raised by the Defendant that the sale in execution was not in accordance with the Rules of this Court has **no merit** on account of the explanation given by the Plaintiff and the documentation as contained in both High Court files numbers 164/2018 and 2240/2022 respectively. The Notice of Sale as well as the sale in execution were properly issued and advertised and in my view there is no irregularity in the manner in which the sale in execution was conducted on the 7<sup>th</sup> May 2021.

**SUMMARY JUDGMENT**

[20] Summary Judgment is regulated by Rule 32 of the Rules of Court and *in casu* the most relevant rule is Rule 32 (2) (d) which provides as follows:-

32 (2) This rule applies to such claims in the summons as is only -

(a) .....

(b) .....

(c) .....

(d) ejectment;

together with any other claims for interests and costs.

[21] The Combined Summons *in casu* is for the ejectment or eviction of the Defendant, from the premises herein described above on the basis that they are now owned and registered in the name of the Plaintiff. The Plaintiff has a better title over the premises and it is therefore in the interest of justice that summary judgment be hereby granted as prayed for in these proceedings.

[22] In the case of **Riverside Investments (Pty) Ltd v The Minister for Works and Construction & Another Civ. Case No. 1423/93** His Lordship Hull CJ (as he then was ) stated as follows at page 3:-

“It is common cause at the hearing that the cause of action of the applicant being a *rei vindicatio*, and it being not disputed that the Applicant is the owner of the property or that the respondents are in possession of it (or of part of it), then the applicant is entitled of right to an order evicting them unless the respondents discharge the onus of proving that they have a legal right to occupy the property.”

[23] *In casu*, the property is lawfully registered in the name of the Plaintiff. The only challenge or defence which is advanced by the Defendant is that the sale in execution was not in accordance with the rules of this Court and that the property was sold far below its value. This defence is not *bona fide* and has no merit because of the order of Her Ladyship M. Dlamini J when she dismissed the application on the 23<sup>rd</sup> February 2023. Her Ladyship dismissed the Defendant’s application without costs. There is no obstacle now preventing the Plaintiff from assuming possession and enjoying her property since she is servicing the mortgage bond with Standard Bank Swaziland Limited. Further these proceedings are not for the debatement of the account of the sale in execution.

[24] The principle of *rei vindicatio* in the law of property refers to an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent.

[25] In the case of **Jacobs v Mostert (16942/2021) [2021] ZAWCHC 213 (25 October 2021)** Montzinger J stated as follows at paragraphs 22-25:-

“[22] The owner of a thing has a right to possess, use, enjoy, destroy and to alienate it. If any of these things are in any way infringed he has appropriate legal remedies like this case a *rei vindicatio*. In the South African law context, the *rei vindicatio* action’s importance is clearly articulated and flows from the judgment of **Chetty v Naidoo**.

[23] In order for an owner to succeed he must prove that:-

- (a) he is the owner of the truck;
- (b) that the other party was in possession of the truck at the time of the commencement of the application; and
- (c) that the item in question is still in existence and clearly identifiable.

[24] It does not make any difference whether the possessor is *bona fide* or *mala fide*. The owner of the movable property found in the possession of a third party may recover it from any possessor without having to compensate him. Even from a possessor in good faith who gave value for it.

[25] If the person claiming vindication can prove all the requirements, the onus then shifts to the person claiming a right to retain the vehicle to establish such right.”

[26] The principle of *rei vindicatio* was also dealt with in the Namibian case of **Standard Bank Namibia Limited v Somaeb (1 1912/2013)** where Cheda J, stated as follows at paragraphs 7, 8, 9, 10 and 11:-



- [7] Applicant seeks the return of possession and ejectment of the respondent from Erf 4785 (a portion of Erf 8446 Katutura, Ext 15, Windhoek, Republic of Namibia) [hereinafter referred to as the property]. Applicant seeks to regain possession of its immovable property on the basis of the principle of *rei vindicatio*. A litigant relying on this common law principle is entitled to repossess its property provided that it fulfils certain requirements, namely, that:-
- 1) he is the owner, and;
  - 2) that defendant is in possession of it;
- [8] In that instance applicant/plaintiff will be entitled to an order for ejectment unless respondent/defendant is able to prove that he is entitled to a continued possession/occupation of the said property, see **Chetty v Naidoo**. It was also stated in Chetty's case that the owner may claim his property, wherever found and from whomsoever is holding it. It therefore, stands to reason that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner, e.g. a right of retention or a contractual right.
- [9] In instituting a *rei vindicatio*, applicant only needs to allege and prove that he is the owner and that the defendant is holding the property. The onus then shifts to the defendant/respondent to allege and prove any right to continue to hold the property against the owner----
- [10] Applicant has proved that it is the owner of the property as evidenced by the Title Deed, copy of which is filed of record. It is common cause that the respondent is in possession of the property and despite demand is refusing to vacate it.
- [11] One of the rights that arise out of ownership is the right to possession. Ownership consist in the right to recover lost possession. It logically follows that *prima facie* proof that applicant is the owner and that respondent is in possession of the property entitles applicant to an order for ejectment. The

vindication by the owner is against the possessor and is so harsh that it does not matter whether the possessor is a *bona fide* or *mala fide* possessor or occupier, and the owner need not compensate the possessor for its value, even where the later had acquired it for consideration (*ex causa onerosa*).”

[27] At paragraphs 17-18 Cheda J continues to state as follows on Summary Judgment proceedings:-

“[17] Summary Judgment is a drastic method of debt collection as once it is granted it entitles plaintiff final relief without trial, thereby closing the door of the Court against the defendant. See *ERASMUS SUPERIOR COURT PRACTISE B1-206*. It is for that reason that these courts require strict compliance with the rules pertaining to that procedure. On that score these courts will not grant Summary Judgment where plaintiff has not made a clear case against defendant and has not complied with the rules of Court.

[18] In order for defendant/respondent to succeed in resisting Summary Judgment, he/she should show that he/she has a *bona fide* defence. In establishing a *bona fide* defence, he must at least disclose sufficient particularity to enable the Court to judge that the opposing affidavit discloses a *bona fide* defence, see **Maharaj v Barclays National Bank Limited and District Bank v Hoosain.**”

[28] I have stated *in casu* that the Defendant does not have a *bona fide* defence *in casu*. I was also addressed at length by Mr. Dlamini for the Defendant on the authority of the Supreme Court judgment in **Rodgers Bhothane Du-Pont v Swaziland Building Society and Two Others Supreme Court Case No. 7/2015**. In my view the two cases are distinguishable in the sense that the property *in casu* was sold at reasonable market value whereas in the Du-Pont case (*supra*) the immovable property was sold far below its market value(s) in fact, the property was sold at the amount of

the loan arrears, and it is for that reason why in the majority judgment the Supreme Court ordered as follows:-

- (a) -----
- (b) -----
- (c) -----
- (d) The current provisions of Rule 46 (13 is referred to the Rules Committee of the High Court, for re-consideration vis-à-vis the objective to avoid mortgaged immovable property being sold in execution below market value.”

[29] In the case of **Chetty v Naidoo 1974 (3) SA 13 (A)** Jansen JA stated as follows when he dealt with the *rei vindicatio* principle at p 20:-

“The incidence of the burden of proof is a matter of substantive law (**Tregea and Another v Godart and Another 1939 AD 16 at p. 32**), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define dominion comprehensively -----but there can be little doubt that one of its incidence is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner. It appears to be immaterial whether in stating his claim, the owner dubs the defendant’s holding “**unlawful**” or “**against his will**” or leaves it unqualified. But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as “**unlawful**” or “**against his will**”) other considerations come into play.”

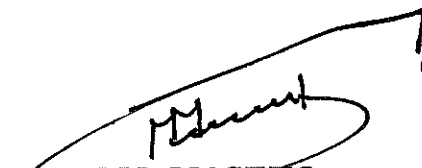
[30] The principle of *rei vindicatio* is also dealt with by Constitutional Court of South Africa in the case of Van der Merwe N.O and Others v Taylor and Others Case CCT 45/06 [2007] ZACC 16 where Mokgoro J stated as follows at para 23:-

“An action based on the *rei vindicatio* is available to an owner who has been deprived of his or her property without consent and who wishes to recover it from the one who retains possession. In order to succeed with any vindicatory action, generally in addition to ownership, the applicant also has to prove that the property was in possession of the respondent at the beginning of the proceedings, that the property in question is still in existence and is clearly identifiable.”

[31] *In casu* the Plaintiff has proven these three requirements in that the property is in the possession of the Defendant, she has never had occupation or possession of same since it was transferred into her name or ownership. Further the property is clearly identifiable and is still in existence. On the other hand the Defendant has failed to establish any right of retention over the immovable property in issue in these proceedings.

[32] In the circumstances, I hereby hand down the following order:-

1. Summary Judgment is hereby granted with costs.

  
**N.M. MASEKO**  
**JUDGE**