IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CIV. CASE NO. 1633/2024**

In the matter between:

VUSANI RODWELL NSIBANZE Applicant

And

PHUMZILE ESTHER MDLADLA N.O. 1st Respondent

BUSISIWE MAVIS SIMELANE N.O. 2nd Respondent

BONGIWE PRISCILLA MOYO N.O. 3rd Respondent

THE MASTER OF THE HIGH COURT - ESTATE 4th Respondent

LATE BENJAMIN NSIBANDZE EM 47/2021

THE NATIONAL COMMISSIONER OF POLICE 5th Respondent

THE ATTORNEY GENERAL 6th Respondent

Neutral Citation: *Vusani Rodwell Nsibandze v Phumzile Esther Mdladla N.O. and 5 Others (1633/2024) [2025] SZHC 56 (04 April 2025)*

CORAM: **N.M. MASEKO J**

FOR APPLICANTS: **ADV. L.M. MAZIYA instructed by NZIMA ATTORNEYS**

FOR 1ST- 3RD RESPONDENTS: **ATTORNEY MR. T.V. HLANZE**
ATTORNEY MR. T.N. SIBANDZE

DATE HEARD: **25/10/2024**

DATE OF JUDGMENT: **04/04/2025**

Preamble:

Civil Law – Civil Procedure – Points in limine being raised in a matter wherein the validity of a Joint Will is contested, whereas that matter has already been determined by this Court, and an appeal filed. The aforesaid appeal is currently pending reinstatement before the Supreme Court – Lis pendens, Res judicata, Functus Officio and failure to Exhaust Local Remedies all discussed and upheld.

JUDGMENT

MASEKO J

[1] On the 16th July 2024 the Applicants launched motion proceedings on urgency for an order in the following terms:-

1. That the Honourable Court dispense with the normal and usual requirements of the rules relating to service of process, time limits and notices and hearing the matter urgently.

2. That a *rule nisi* do hereby issue calling upon the Respondents to show cause on a date to be determined by the Honourable Court, why the underlisted orders should not be made final:

   2.1 That the Liquidation and Distribution Account with the Master of the High Court approved stamp dated 18th June, 2024 be and is hereby stayed pending finalization of this matter:

   2.2 That the Liquidation and Distribution Account of the estate assets including funds be and are hereby stayed pending finalization of this matter.

   2.3 That the Liquidation and Distribution Account dated 18th June, 2024, under Estate Late Benjamini Mshamndane Nsibande EM 47/2021 be and is hereby set aside.

   2.4 That the deceased Mshamndane Benjamin Nsibande Last Will and Testament and/or Joint Will dated 17th October 2005 be and is hereby declared null and void, *pro non scripto* and invalid.

   2.5 That the deceased, Benjamini Mshamndana Nsibandze be and is hereby declared to have passed – on intestate.

   2.6 That the First Respondent, Second Respondent and Third Respondent account for funds and assets of the estate since the passing on of the deceased, especially rental collections.

   2.7 That the appointment of the First, Second and Third Respondents as Executors Testamentary be and is hereby revoked.

   2.8 That the office of the Fifth Respondent be and is hereby ordered and directed to investigate and compile a report in relation to this estate, especially the authenticity of the Last Will and Testament of the deceased.

   2.9 That prayers 1, 2, 2.1, and 2.2 be and is hereby issued as a rule nisi operating with immediate effect pending return date to be fixed by this Honourable Court.

3. Costs of suit.

[2] It is common cause that the Founding and Replying Affidavits of the First Applicant herein are used in support hereof, and further supported by the affidavit of the Second Applicant. On the other hand the Answering Affidavit is deposed by the Second Respondent and supported by the affidavits of the First Respondent.

BRIEF HISTORY OF THIS MATTER

[3] The Applicants and the First to Third Respondents are all siblings being the children of Glory Nsibande who passed on the 19th October 2005, and the Late Benjamini Mshamndane Nsibandze who passed on the 13th January 2021.

[4] During their lifetime the two allegedly executed a Joint Will on the 17th October 2005. They made various bequests in favour of the Applicants and 1st-3rd Respondents respectively in their capacities as beneficiaries in the estate of their deceased parents.

[5] It is common cause that Glory Nsibande passed on, on the 19th October 2005 and her estate was peacefully wound-up in the year 2008 without any objection having been filed by any person.

[6] It is common cause also that Mr. Benjamin M. Nsibandze passed on on the 13th January 2021 and his demise was duly reported to the Master hence his estate is referenced as Estate Late Benjamin Mshamndane Nsibande EM 47/2021.

[7] It is during the winding-up of the estate of the Late Benjamini Mshamndane Nsibandze that there has been challenges in the sense that the 1st Applicant challenged the validity of the Joint Will and instituted civil action proceedings under Case No. 298/22 for the declaration of the Joint Will *pro non scripto* and that the deceased be declared to have died intestate.

[8] It is common cause that this Court per Her Ladyship Langwenya J upheld an exception resulting to the 1st Applicant appealing to the Supreme Court, whereupon the Supreme Court per Annandale JA under Civil Äppeal Case No. 17/2023 ordered that **"the appeal is struck off the roll with costs in favour of the Second and Third Respondents. It is further ordered that the appeal shall not be re-instated without leave of the Court. It is also ordered that no costs arising from this appeal shall be borne by the Estate herein."**

[9] It is common cause that once a liquidation and distribution account is lodged with the Master, it is also advertised and gazette by the executor(s) wherein those who have an interest of whatever nature may object to the aforesaid

Liquidation and Distribution Account. This is in terms of Section 51 *bis* of the Administration of Estates of 1902 (the Act).

[10] *In casu* the executors advertised the estate for inspection of the Liquidation and distribution account on the Times of Eswatini of the 20th June 2024. It appears that the Applicants did not object to the aforesaid Liquidation and Distribution Account as per Section 51 *bis* of the Act. Instead the Applicants through their attorney wrote to the Master advising her that they were formally lodging an objection on the basis that the matter was in Court challenging the authenticity and validity of the Will.

[11] The 1st, 2nd and 3rd Respondents have raised points *in limine in casu*, and these points were argued simultaneously with the merits. The points *in limine* raised are as follows:-

(i) Failure to exhaust local remedies;

(ii) Lack of urgency;

(iii) *Lis Pendens;*

(iv) Res judicata/*Functus Officio*;

(v) Error in proceedings;

(vi) Abuse of Court Process and

(vii) Application overtaken by events.

[12] It is common cause that the practice in this jurisdiction is that where points *in limine* and the merits have been argued simultaneously the Court considers the *points in limine* first, and if they don't have any merit, the Court then considers the merits, but where the points *in limine* have merit, the Court upholds them, and the application is dismissed if those points *in limine* are capable of having the matter dismissed, unless it's those points that are dilatory in nature to the progress of the matter.

[13] It appears from the consideration of the points *in limine* that they have a potential to dispose of the matter without going into the merits, in the following manner:-

Lis Pendens

In my view this is a very strong point *in limine*, and on its own it is capable of disposing of this matter. I make this observation because, when the 1st Applicant *in casu* launched the action proceedings in Case No. 298/2022 the main prayer or order sought was to declare the Joint Will executed by the deceased jointly with his wife Glory Nsibandze on the 17th October 2004 *pro non scripto* and that the deceased be declared to have died interstate. This is the same prayer being made by the Applicants *in casu*. The only difference is

that in Case No. 298/2022 the proceedings were launched through action proceedings whereas *in casu* these are motion proceedings brought on urgency.

[14] It is common cause that in Case No. 298/2022 the defendants who are the Respondents *in casu*, raised an **exception** on the ground that the particulars of claim do not sustain a cause of action. My Sister Langwenya J upheld the exception stating as follows at para 28 of her judgment, and I quote:-

> *"[28] In the result, the following order is made:-*
>
> *1. The exception succeeds and the **plaintiff's particulars of claim and summons are set aside with costs**." (my emphasis)*

[15] As mentioned in the preceding paragraphs, the 1st Applicant *in casu* launched an appeal under Appeal Case No. 17/2023 which was struck off the roll of the Supreme Court **"for failure to lodge the Record timeously, and unspecified application under either Rule 16 or 17, for either condonation for late filing, or extension of time"**. The matter was removed from the roll of the Supreme Court per Annadale JA, who also ordered that the matter should not be reinstated without the leave of the Court, and also ordered the Appellant to pay costs. It appears that after the removal of the matter from the Supreme Court's roll, there was no effort to reinstate same. The question therefore is what is the status of the matter currently? Is it pending before the Supreme Court or not? The answer is that the matter is currently pending before the Supreme Court, because it was not declared by that Court either as dismissed, withdrawn or even abandoned. The matter has to be reinstated **but** with the leave of the Supreme Court. Until that order of the Supreme Court is complied with that matter remains pending there before the Supreme Court.

[16] In order for the point *in limine* on *lis pendens* to succeed the respondents must prove the following requirements:-

> That Case No. 298/2022 and Appeal Case NO. 17/2023 and Case No 1633/2024 are
>
> (a) between the same parties
> (b) based on the same cause of action; and
> (c) concerning the same subject matter

[17] As stated above herein, there is no doubt *in casu* that the matter is pending before the Supreme Court where the 1st Applicant was permitted to re-instate the matter only with the leave of the Court. His Lordship Annandale JA sitting together with MJ Dlamini JA and MJ Manzini AJA never dismissed the matter but removed it from the roll for failure of the Appellant (1st Applicant *in casu*) to comply with the Rules of the Supreme Court. As things stand the matter under

Case No. 17/2023 is pending before the Supreme Court, after my Sister Her Ladyship Langwenya J upheld the exception and set aside the particulars of claim and the summons.

[18] The judgment of Langwenya J in upholding the exception and setting aside the particulars of claim and the summons has a final effect on the adjudication of the matter, it is for that reason that the Appellant was able to lodge an appeal because the aforesaid judgment had a final effect on the matter, i.e. the effect of dismissal of the action proceedings.

[19] This point *in limine* on *lis pendens* leads to the question on whether this Court is *functus officio* and whether this matter is *res judicata*. These are other points *in limine* which are very strong and also capable of disposing of this matter. There is no doubt that this matter is *res judicata* because my Sister Langwenya J dealt with this matter under Case 298/2022 and issued a judgment which was appealed before the Supreme Court under Case No. 17/2023. Since the matter was adjudicated by Langwenya J it means that this Court is *functus officio* because both myself and my Sister Her Ladyship Langwenya J are in the same division, therefore I cannot in law hear and determine a matter which she has heard and determined, conversely Her Ladyship cannot, in law, hear and determine a matter which I have heard and determined. *In casu* I therefore become *functus officio* because in principle this Court has heard and determined that matter.

[20] It is trite law that when a matter is struck off the roll or removed from the roll, it means that the Court will not hear the matter on that appointed date, and each party is entitled to reinstate same into the roll, however, where the Court removes a matter from the roll because the *dominis litis* is at fault, it can remove the matter from the roll and issue an order that same be reinstated only with the leave of Court. This order is usually issued where the Court shows its disapproval of the manner in which the matter is handled. Further when a Court removes a matter from the roll, and issue an order that it be reinstated with leave of Court, the Court usually grant an order for costs against the defaulting party.

[21] *In casu* that is the position in the Appeal Case No. 17/2023, the Court issued an order that the matter is removed with costs and that it is to be reinstated with leave of Court. This means therefore that the matter Case No. 17/2023 is live and pending before the Supreme Court, after this Court per Langwenya J upheld the exception and set aside the summons.

[22] The defence or plea of *lis pendens* is always raised to prevent duplication of the same proceedings between the same parties resulting from the same cause of action. It is therefore a **special plea** that can be raised where there is

litigation pending between the same parties, based on the same cause of action, and in respect of the same subject matter. This is the undoubted position *in casu*.

[23] In the case of **Ceaserstone Sdol-Yam Ltd v The World of Marble and Granite 2000 CC and Others 2013 ALL SA 509 (SCA) at para 2** Wallis J stated as follows:-

> *"As its name indicates, a plea of **lis alibi pendens** is based on the proposition that the dispute (lis) between the parties is being litigated in the same Court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties, and that it is desirable that there be finality in litigation. The Courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach different conclusions. It is a plea that has been recognized by our Courts for over 100 years."*

[24] It is without doubt that *in casu* that the subject matter is the invalidation of the Joint Will of the deceased Nsibande couple, and that the dispute is between the same parties, and so is the cause of action. As stated earlier above herein that this Court determined that matter it is therefore *res judicata*, and this Court is *functus officio*. The matter is currently pending reinstatement before the Supreme Court, and until that is done, the judgment of Langwenya remains in force, hence this Court cannot and should not be expected to deal with this matter again. This Court is *functus officio* because the matter is *res judicata before this Court*, and pending reinstatement before the Supreme Court as per the order of Annandale JA issued on the 30th November 2023. It is unheard of in this jurisdiction that this Court will adjudicate on a matter which it has already heard and determined because the matter becomes *res judicata*, this Court therefore becomes *functus officio*, and this matter *in casu* remains *lis pendens* before the Supreme Court because an appeal was lodged and awaits prosecution.

[25] In the case of **DB v NB (CA62/2022) [2023] ZAECGHC 39 (22 March 2023)** Beshe J stated as follows at paras 6-7:-

> *"[6] It is trite that it is inappropriate for a dispute (lis) between the parties to be litigated in two different courts. Put differently, if there is pending litigation between the parties in respect of the same subject matter in one jurisdiction, the defendant/respondent may raise the plea of **lis pendens** in the other jurisdiction where the matter is instituted, entitling him to a stay of the latter proceedings.*
>
> *[7] For a plea of **lis pendens** to be successful, the following requirements must be met:-*
>
> *(i) There must be pending litigation;*
>
> *(ii) between the same parties*
>
> *(iii) based on the same cause of action*

(iv) in respect of the same subject matter."

[26] In the case of **Democratic Alliance v Brummer (793/2021) [2023] ZASCA 151 (3 November 2022)** Goosen AJA stated as follows **at paras 12, 13, 14 and 16:-**

*"[12] The nature of a plea of issue estoppel has been explained by this Court on numerous occasions. The explanation in **Smith v Porrie tt [2007] ZASCA 2008 (6) SA 303 SCA @ para 10** is worth reiterating:-*

> *"Following the decision in **Boshoff v Union Government 1923 TPD** the ambit of the exception **rei judicata** has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same **(eadem res** and **eadem petendi causa)** in both the case in question and the **earlier** judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same **(idem actor)** and that the same issue **(eadem quaestio)** must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of a cause of action and relief claimed it has become common place to adopt the terminology of English Law and to speak of issue estoppel. But, as was stressed by Botha JA in **Kommisaris van Binnelandse Inkomste v ABSA Bank 1995 (1) Sa 653 at 669D, 670J-671B**, this is not to be construed as an abandonment of the principles of the common law in favour of those of English Law: the defence remains one of **res judicata**. The recognition of the defence in such cases will, however, require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. Relevant considerations will include questions of equity and fairness not only to the parties themselves but to others.*

*[13] The first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the judgment of the previous Court is before another Court for determination. This is so because if the same issue **(eadem quaestio)** was not determined by the earlier Court, an essential requirement for a plea of **res judicata** in the forms of issue estoppel is not met. There is then no scope for upholding the plea….*

*[14] The first component of the enquiry requires a careful examination of **what issues of fact or law were decided by the first Court**. In **Boshoff v Union Government 1932 TPD 345 at 350-351**, the following statement by Spencer-Bower in Res Judicata was held to be correct:-*

> *"Where the decision set us as a **res judicata** necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, it*

deemed to constitute an integral part of it as effectively as if it had been made so in express terms.

[16] Whether the findings made by the Court or the order(s) granted are correct is of no relevance. A prior determination of an issue, although wrong, may nevertheless support a plea of res judicata. As held in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 564 C:-

> *"Because of the authority with which, in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous. In regard to res judicata the enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment."*

[27] *In casu* there is a judgment of Langwenya J which was appealed and is pending reinstatement before the Supreme Court. The effect of the High Court is that it is set aside the Summons, and that, it dismissed the action proceedings wherein the 1st Applicant *in casu* was seeking to have the Joint Will of Mrs. Glory Bhacile Nsibandze and Benjamin Nsibandze declared null and void *pro non scriptio*. This is the same **main prayer** *in casu*, and the matter is between the same parties and so is the subject matter. The authorities cited are very clear that the matter is pending before the Supreme Court, and that this Court is *functus officio* because it issued a definitive judgment per Langwenya J which then renders the matter to be *res judicata*.

[28] In the case of **Nestle (South Africa) Pty Ltd v Mars Incorporated (333/99) [2001] ZASCA 76: [2001] 3 ALL SA 315 (A) (31 May 2001)** Nugent AJA stated as follows at para 16:-

> *"[16] The defence of **lis alibi pendens** shares features in common with the defence of **res judicata** because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated **(lis pendens)**. By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the parties, should be brought only once and finally."*

[29] As regards the point *in limine* that the local remedies were not exhausted, this point too has merit. The Master of the High Court has a procedure to deal with situations where an objection has been launched. The procedure is prescribed by Section 51 *bis* (5) of the Administration of Estates Act of 1902 which provides as follows:-

> ***Advertising of accounts and objections thereto:***
>
> *51 bis (5) Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons stated therefore; to any such account and the Master shall deliver or transmit by registered post to the*

executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.

[30] *In casu* the Applicants never lodged an objection as per the provisions of Section 51 *bis* (5) because the letter written by Applicant's attorneys, found at pgs. 107-108 of the Book, was only informing the Master that they have lodged an objection because the matter is already in court where they are challenging the validity of the Will. *In casu* it is my view that the objection purportedly lodged does not amount to an objection, because in a procedurally lodged objection scenario, the Master is supposed to make a ruling on the objection. Any objection to a liquidation and distribution is distributed by the Master first, and if any of the parties are not satisfied by the Master's ruling, then they are at liberty to approach this Court for or on review, in this regard see Section 51 *bis* (7) and (8) which provides as follows:-

> 51 *bis* [7] If, after consideration of such objection the comments of the executor and such further particulars as the Master may require, the Master is of the opinion that such objection is well-founded or if; apart from any objection, is of the opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.
>
> [8] Any person (including the executor) aggrieved by any such direction by the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the High Court within thirty days after such direction or refusal, or within such further period as the High Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.

[31] The legal position of dealing with objections in respect of liquidation and distribution accounts is clearly articulated in Section 51 *bis* and should be followed and complied with before any proceedings are launched before this Court. *In casu* the Applicants were supposed to deal with their objection on the validity of the Joint Will before the Master before launching these proceedings, they could only launch these proceedings if not satisfied with the Master's directives or ruling to their objection. This is also further complicated by the fact that the Master had wound-up the Estate of the Late Glory Bhacile Nsibandze in the year 2008 on the basis of the Joint Will, and no objection whatsoever has been or was raised.

[32] In the circumstances of this matter as outlined above, I hereby hand down the following order:-

1. The points *in limine* on

   Lis pendens

   Res judicata

   Functus officio and

   Failure to exhaust local remedies

   are hereby upheld, and

2. The *rule nisi* is hereby discharged, and consequently;

3. The application on the Notice Motion bearing the Registrar's stamp of the 16th July 2024 is hereby dismissed.

4. Each party to pay its own costs.

N.M. MASEKO
JUDGE