IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.58/2012

In the matter between:

EZISHINENI KANDLOVU **APPELLANT**

AND

NDLOVUNGA DLAMINI **1ST RESPONDENT**

TOM HARRIS **2ND RESPONDENT**

Neutral citation: *Ezishineni Kandlovu v Ndlovunga Dlamini and Another (58/2012) [2012] SZSC 51 (30 November 2012)*

Coram: **A.M. EBRAHIM J.A. , DR S. TWUM J.A. , E.A. OTA J.A.**

Heard: **14 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **Summary judgment refused a quo: defendants counterclaim steeped in allegation of fraud and theft: the allegation of fraud and theft not sufficiently particularized thus defeating counterclaim: defendant raising a *bona fide* defence sufficient to defeat summary**

judgment:- ancillary orders *a quo* set aside: principles that must guide the Court in making ancillary orders discussed.

OTA J.A.

[1] This appeal has it's origins in a suit styled Case No. 549/12 which the Appellant as plaintiff launched against the 1st and 2nd Respondents as 1st and 2nd defendants claiming *inter alia* for the following reliefs:-

(1) An order of ejectment of the defendants from the aforesaid farm.

(2) An order that plaintiff's possession of the farm be restored by the defendants' removal of all their belongings

(3) Cost of suit

(4) Alternative relief.

[2] It is apposite for me from this juncture to refer to the parties as plaintiff and defendants. The crux of the plaintiff's case as embodied

in it’s particulars of claim is that it is the owner of certain undivided five thirteenth (5 /13) share of and in farm “ Pypklip No, 394 situated in the district of Shiselweni Swaziland as evidenced by Deed of Transfer No. 234 of 1999 (annexure A, exhibited to the Plaintiff’s particulars of claim). That since the farm was transferred to it in 1999, it was in peaceful and undisturbed possession of same until about 2009 when the defendants deprived it of it’s possession by occupying the land. Plaintiff alleged that the defendants are therefore in wrongful and unlawful possession of the land and notwithstanding demand, have refused to vacate it.

[3] It is on record that after the defendants delivered a notice of intention to defend, the plaintiff filed a summary judgment application which sought the following orders against the 2nd defendant only:-

> “(a) Ejecting the 2nd defendant from the farm “Pypklip” No 394, Shiselweni district
>
> (b) Costs of suit against 2nd defendant
>
> (c) Further or alternative relief.”

[4] The application is supported by the affidavit of **Siboniso Clement Dlamini** legal adviser to the plaintiff. He verified the facts and the cause of action claimed therein and averred that in his belief there is no *bona fide* defence to plaintiff's claim and the defendants have entered appearance to defend solely for the purposes of delaying the action .

[5] In the wake of the summary judgment application, the 2nd defendant filed an affidavit resisting summary judgment, sworn to by 2nd defendant **Tom Harris**. I will come to the contents of this affidavit anon.

[6] Suffice it to say that on the 8th of August 2012, the High Court per **M. Dlamini J**, denied summary judgment via orders which are contextualized as follows:-

> "(a) the matter is referred to the trial to be held on 23rd October, 2012;

(b) the police station commander Hlathikhulu, is ordered to investigate how plaintiff's title deed was obtained.,

(c) the aforesaid station commander is to file his report with the Registrar on or before the 17th October, 2012;

(d) the Registrar is to furnish the parties with copies of the report

(e) the parties are to ensure that pleadings are closed by the 23rd October, 2012;

(f) Costs are reserved.''

[7] It is the foregoing orders of the court *a quo* that elicited the Plaintiff's cries in this appeal, which are conveyed to this Court via a Notice of Appeal predicated upon 5 grounds of appeal, which are as follows:-

"1. The learned judge erred in referring the matter to trial when there were no genuine disputes of fact on the papers.

2. The learned judge erred in ordering the commander of Hlathikhulu police station to investigate how the appellant procured the title deed as she had no power to do so in a civil matter.

3. The learned judge erred in finding that the appellants attorney was not competent to depose to the affidavit in support of the application for summary judgment.

4. The learned judge erred in finding that appellant's title deed was *"dubious"* as such finding did not accord with the facts.

5. The learned judge erred by not entering default judgment against the 1st Respondent (first defendant in court *a quo*)"

[8] Let me interpolate to observe here, that a careful scrutiny of grounds 3, 4 and 5 of the grounds of appeal reveals that the issues raised therein do not emanate from the assailed orders of the 8th of August 2012, which I have hereinbefore detailed in extenso in paragraph [6] above. They stand out like a sore thumb in contradistinction to the assailed decision. It appears to me therefore in the circumstances, that the issues raised therein cannot validly be raised in this appeal.

[9] I say this because the grounds of appeal constitute the most important part of the appeal. It is the error of law or fact alleged by an Appellant as the defect in the judgment appealed against and relied

upon to set it aside. Grounds of appeal are thus the reasons why the decision on appeal is considered by the aggrieved party to be wrong.

[10] They isolate and accentuate for attack the basis of the reasoning of the decision challenged. A ground of appeal must therefore be fixed and circumscribed within a particular issue in controversy and emanate from the judgment on appeal. It should constitute a challenge to the ratio decidendi of the decision. If the grounds of appeal arise from matters not contained in the decision, they are incompetent, except where leave to argue them is sought from and granted by the appellate Court. See **Silence Gamedze and Others v Thabiso Fakudze Appeal Case No. 52/2012.**

[11] I say this notwithstanding the fact that learned counsel for the 2nd defendant **Mr Mzizi** conceded in paragraph 1.3.1 of the 2nd Respondent's heads of argument, that the court *a quo* decided the issue relating to the affidavit in support of the summary judgment application which was deposed to by plaintiff's attorneys. For such an issue to be competent, it must be extant from the assailed decision which must form a part of the record of appeal except where this

Court grants the Appellant leave to urge it. It should not be brought to court in heads of argument or by embellishing oral submissions of counsel from the bar. This is however not such a case.

[12] Another factor that clearly defeats grounds 3 and 4 of the grounds of appeal is that they are findings, not orders, and are consequently not appealable.

[13] When this appeal was heard, we interrogated learned Senior Counsel **Mr S C Dlamini** who appeared for the plaintiff, on the state of these grounds of appeal. Counsel informed us that though the issues raised therein formed the basis for the refusal of summary judgment *a quo*, they do not however reside in the assailed decision because the Court *a quo* did not produce a reasoned judgment. When asked if he requested of the Court to produce a written judgment and it refused, **Mr Dlamini** conceded that no such request was made. Let me quickly observe here, that it was imperative for plaintiff's Counsel to obtain a written judgment for the purposes of this appeal. Where that is not done, we cannot aid the plaintiff in his adventure. This is because the Court is not clairvoyant. It is not a soothsayer with the

ability to gaze into a crystal ball to know what was decided *a quo*. It's operational parameter lies in the assailed decision. The Court most certainly cannot engage in prophesy. Since **Mr Dlamini** gallantly abandoned these grounds of appeal in the wake of these issues, they are accordingly struck out.

[14] The result from the totality of the foregoing is that we are left with grounds 1 and 2 of the grounds of appeal, from which I distill the following issues:-

(1) Whether or not the Court *a quo* erred in declining summary judgment?

(2) Whether or not the Court *a quo* erred in ordering the Commander of Hlathikhulu police station to investigate how the plaintiff procured his title deed.

[15] Let me now proceed to determine the issues raised *ad seriatim*.

ISSUE I

[16] Whether or not the court a quo erred in declining summary judgment.

It is important for a proper determination of the nitty gritty of this issue, that I paraphrase same by detailing the principles on the potency of the summary judgment procedure which is immortalized by jurisprudence. This principle is that the summary judgment procedure is one that must be approached with a lot of trepidation, due to the fact that it has the potential of becoming a weapon of injustice.

[17] This universally accepted principle stems from the fact that summary judgment is one given in favour of the plaintiff without a plenary trial of the action. The normal steps of filing all necessary pleadings, hearing evidence of witnesses and addresses thereafter by counsel before the court's judgment are not followed. Therefore, rather than be encumbered with the unnecessary delay and expense which often attend a full trial, a plaintiff may resort to procedure by way of summary judgment, where the defendant obviously has no defence. It is for disposing with dispatch cases which are virtually unanswerable, where there can be no reasonable doubt that a plaintiff is entitled to judgment or where it is inexpedient to allow the defendant to defend

for mere purposes of delay. The law has thus, as a precautionary measure, put checks and balances on the part of this procedure to ensure that it is upheld in the clearest of cases, where the defendant's defence is merely a dilatory strategem orchestrated to deprive the plaintiff of an early and inexpensive dance of victory.

[18] It is therefore an obvious fact from the above, and as the Court correctly remarked in the case of **MacGregor Associates v N.M.B. (Nigeria) (1996) 2 SC NJ 72 at 81,** that summary judgment "*is for the plain and straight forward, not for the devious and crafty*"

[19] The foregoing principles were also re-echoed via the trenchant remarks made by **Ramodibedi JA** (as he then was) in the case of **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/2007,** as follows:-

> "(8) It is well-recognised that summary judgment is an extra-ordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the Courts have over the years stressed that the remedy must be

> confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence. See for example Maharaj v Barclays National Bank ltd (1976 (1) SA 418 (A), David Chester v Central Bank of Swaziland CA 50/03. Each case must obviously be judged in the light of its own merits, bearing in mind always that the court has a judicial discretion whether or not to grant summary judgment. Such a discretion must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion"

[20] It is obvious from the foregoing, that summary judgment, is one which the law enjoins the Court not to exercise whimsically, arbitrarily or capriciously, but judicially and judiciously upon facts and circumstances which demonstrate that it is just and equitable to grant it.

[21] It is in a bid to realize this judicial and judicious exercise of discretion that Rule 32 of the High Court rules requires a defendant who wishes to oppose summary judgment to file an affidavit resisting

same. Rule 32 (4) (a) of the rules mandates the court to scrutinize the defendant's affidavit resisting summary judgment to ascertain whether *"there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part therefor"*

[22] Though it is the judicial accord that the defendant is not required at this stage to set out his defence with the precision or exactitude required of a plea, however, for the defendant's affidavit to pass muster, the allegations made therein must be *bona fide*, unequivocal and contain sufficient material facts to enable the Court reach the concluded opinion that a triable issue is raised or that there ought for some other reason to be a trial of the claim or part of it. This is to avoid the danger inherent in self contrived and whimsical disputes of fact urged to defeat summary judgment.

[23] It follows from the above that the statement of the material facts must be sufficiently full to satisfy the Court that what the defendant has alleged, if proved at the trial, will constitute a defence to the plaintiff's claim. The defence should not be so badly, vaguely or laconically

made, that the Court receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have. The Court does not attempt to weigh or decide disputed factual issues, it merely considers whether the facts alleged constitute a good defence in law. If the allegations of fact are equivocal or ambiguous or contradictory or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule see **The law of South Africa Civil Procedure and Costs (Butterworth 1985) WA Joubert et al, pages 227-228**.

[24] Further, it is also the jurisprudential accord, that once the Court reaches the conclusion that the defendant's affidavit discloses triable issues, it should refuse summary judgment and allow the defendant plead to the case, to avoid a miscarriage of justice. The pronouncement of this Court in the case of **Mater Dolorosa High School v R.J.M. Stationery (Pty) Ltd Appeal Case No. 3/2005,** is instructive in this regard:

> " It would be more accurate to say that a Court will not merely "*be slow*" to close the door to a defendant, but will infact refuse to do so if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiff's claim, the Court cannot deny him the opportunity of having such an issue tried"

[25] In compliance with the foregoing command of the rules, the 2nd defendant filed an affidavit of 14 paragraphs in resisting summary judgment *a quo*. This affidavit appears on pages 22 to 26 of the record. Exhibited to this affidavit is annexure A.

[26] I have carefully scrutinized the 2nd defendant's affidavit and I find that he alleges two defences, namely:

A. Counterclaim

B. *Bona fide* defence

I'll now test these alleged defences against the rigours of Rule 32 (4) (a) to ascertain their efficacy and substantiality.

[27] A. Counterclaim

This defence is raised in paragraphs 8.8 and 8.9 of 2nd defendant's affidavit, where the 2nd defendant alleged that the Plaintiff's Deed of Transfer of the suitland ought to be set aside because it is a product of fraud and theft. These allegations of fraud and theft are pleaded as follows:-

> "8.8 The above fact then bring (sic) me to the second part of my defence which is in the form of a counterclaim. I submit that I have a counterclaim to the plaintiff (sic) cause of action and it is in the following under mentioned manner.
>
> 8.9 I submit that the Deed of Transfer ought to be set aside and declared a nullity. This is because it is a product of fraud and theft by whoever was involved in it's execution. I submit that this is so because none of the surving relatives of the deceased namely Cecil Robert Harris ever consented to any transfer of the immovable property. In the circumstances I submit and apply that the Deed of Transfer be set aside and an inquiry be made on how my grandfather's farm was stolen by the plaintiff. I submit that this enquiry can only be achieved through a trial''.

[28] The law as we know it is that a counterclaim can constitute a valid defence to summary judgment. This position of our law is enunciated

by **Herbstein and Van Winsen** in the text **The Civil Practice of the Supreme Court of South Africa (4th ed) page 441,** as follows:-

> "It is open to the defendant to raise a counterclaim to the plaintiff's claim. In this case also, sufficient detail must be given of the claim to enable the court decide, whether it is well founded and must be of such a nature as to afford a defence to the claim''. (underline added)

[29] Therefore, the mere allegation that the defendant has a counterclaim is not a *sine qua non* to the refusal of summary judgment. For the counterclaim to qualify as a basis for declining summary judgment, it must, as demonstrated by **Herbstein** *et al "be well founded and must be of such a nature as to afford a defence to the claim''.*

[30] Learned counsel for the plaintiff **Mr Dlamini** has contended that the 2nd defendant did not raise the defence of fraud with sufficient particularity according to law. This, he says is because the affidavit failed to demonstrate by whom, where, when and how the fraud was allegedly committed. Counsel further contended that the purported counterclaim is also totally defective for non joinder of the Registrar

of Deeds and the Master of the High Court. He thus moved for a dismissal of the alleged counterclaim.

[31] After a very careful perusal of the allegation of fraud and theft upon which the 2nd defendant's counterclaim is predicated, I am inclined to agree with **Mr Dlamini** that these allegations in particular that of fraud, have fallen short of the prerequisites of such allegations as commanded by law. I say this because the learning, one of hallowed antiquity, recognized and applied across jurisdictions, is that charges of fraud are in their nature of the greatest gravity and should not be lightly made, and when made, should not only be made expressly, but should also be formulated with the prescision and fullness demanded in a criminal case. See **Schierhout v Union Government 1927 AD 94 at 98, Jamalodien v Ajimudien 1917 CPD 297 at 295, Estate Schickeying v Schickering 1936 CPD 269 at 771-2, Watson v Hunter and Another 1948 (3) SA 1108.**

[32] This duty is even more so, where as in this case, the allegation of fraud is raised as a defence in a summary judgment application. This

is clearly demonstrated by **Herbstein et al (supra) at page 442**, in the following words:

> " where a defence of fraud is raised, a factual basis for the allegation of fraud must be laid. It is not sufficient particularly in an affidavit resisting summary judgment merely to put up speculative propositions, to raise submissions or to advance arguments on probabilities that might indicate fraud''. (emphasis added)

[33] The foregoing proposition was replicated by **Zulman J in the Case of Nedperm Bank Ltd v Verbri Projects CC 1993 (3) SA 214,** as follows:-

> "It is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up speculative proposition or to raise submissions or to advance arguments on probabilities which might indicate a fraud. What is essential is that there should be laid facts as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment'' (emphasis mine)

[34] It appears to me therefore that a defendant who alleges fraud in an affidavit resisting summary judgment is required to plead the material facts upon which he relies for his claim in a clear and concise fashion with sufficient particularity.

[35] For such a pleading to meet the requirement of conciseness, clarity, precision and particularity commanded, it must comply with the general rules of pleadings as prescribed by Rule 18 (4) of the Rules of the High Court. That rule of Court requires that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies on, with sufficient particularity to enable the opposite party to reply thereto.

[36] Therefore, it is only the material facts (*facta probanda*) that should be pleaded. Allegations such as pieces of evidence (*facta probantia*) or the pleaders opinions and conclusions should be excluded from such a pleading.

[37] In the light of the totality of the foregoing, it appears to me that the 2nd defendant dismally failed to allege fraud or theft in any material

particular. He has not stated by whom the fraud or theft was committed. This is clear from paragraph 8.9 of his affidavit where he avers. "*This is because it is a product of fraud and theft by whoever was involved in it's execution*". He has also failed to state when and where the fraud or theft was committed. He has merely made wild allegations in general terms, which in law will not suffice. The contention in paragraph 8.9 of his affidavit to wit *" I submit that this is so because none of the surviving relatives of the deceased namely **Cecil Roberts Harris** ever consented to any transfer of the immovable property"* amounts to nothing but a rambling preview of the evidence proposed to be adduced at the trial and is not sufficient.

[38] The whole essence as I have already abundantly demonstrated herein is that the allegations must be made in clear and concise terms with sufficient particularity. The 2nd defendant was therefore duty bound to plead how the fraud or alternatively theft was committed, what those defalcations entail, what was the modus operandi employed.

[39] In casu, the counterclaim does not clearly and concisely state the material facts upon which the 2nd defendant relies for his claim, rather

it vigorously laboured in propositions and conclusions of law. As this matter lies, the 2nd defendant has not made out a case for fraud or theft. The alleged counterclaim is bad in law. It therefore fails and is accordingly dismissed.

[40] By way of completeness let me make a brief remark **on Mr Dlamini's** proposition that 2nd defendant's allegation of fraud is defective for non joinder of the Master of the High Court and the Registrar of Deeds. This proposition to my mind is premature at this stage of the proceedings where the allegation of fraud is raised in an affidavit resisting summary judgment. It will only arise if the 2nd defendant had filed a counterclaim in support of the allegations contained in his affidavit (which it seems to me may be the more prudent course, when one considers the connotations which the allegation of fraud is steeped in) or where after the court finds that a case of fraud has been made out, it orders the parties to trial, and also orders the 2nd defendant to file a counterclaim within a stipulated time. In these circumstances, it will be incumbent on the 2nd defendant to join all necessary parties.

B. *Bona fide* defence

2nd defendant alleged that he has *a bona fide* defence to the plaintiff's claim, which defence he raised in paragraphs 8.3, 8.4,8.5and 8.6 of his affidavit, in the following terms:-

"8.3 As the plaintiff avers in it's particulars of claim I am resident at kaHarris Farm at Hlathikhulu. Therefore, it is impossible that I can be in possession of the alleged farm if I am not even resident in it.

8.4 Furthermore, I have never been approached by any member of the plaintiff to vacate the alleged farm. If this had happened I submit that I would be surprised because to the best of my knowledge the farm plaintiff refers to in it's papers is one that belongs to my family. The issue of the Title Deed that the Plaintiff has annexed in his Particulars of Claim is a contentious one and I am desirous of knowing how it came about since our family has never sold or consented to any sale of my grandfather's farm to the plaintiff.

8.5 In fact, in order to put the Court into the picture with regard to the land in question I wish to annex certain copies of letters that were written between the Land Speculation Control Board and the Master of the High Court pertaining the land in question. I mark the letters annexure "**A"**

8.6 To the best of my knowledge this issue is still pending before the said Board since we have not been informed of it's outcome."

[41] As is apparent from the paragraphs ante, whilst denying that he is resident on the suitland, 2nd defendant however alleged that the farm belongs to his family. That his family has never sold or consented to the sale of the farm to any one. He further alleged that the issue of the title deed which the plaintiff holds is a contentious one, as is evidenced by annexure A exhibited to his affidavit.

[42] I have taken the liberty of perusing annexure A which consists of two letters in detail and it appears to me that the issue of the Plaintiff's title deed is indeed a contentious one. It is apparent that this issue was or is under investigation by the Land Speculation Control Board. Whether or not the investigation has been completed is one that is not clear on the papers. The paramount factor to my mind however, is that these facts raise issues which are fit for trial. I hold the view that litigation should not have commenced in the first place if the matter is under investigation. Be that as it may, if the matter goes to trial it will

afford the court and the parties the opportunity to have this issue properly ventilated.

[43] If the investigation has been concluded then the report of the investigation will be put before the Court and if need be, the relevant officer of the Land Speculation Control Board who investigated the matter could be called to Court to testify. That goes to demonstrate that there are issues to be tried. There is also the issue of the alleged executor of the deceased estate**, Mr Litter,** whose appointment as such is not conclusive on the papers.

[44] On these premises, I come to the inexorable conclusion that the 2nd defendant indeed raised triable issues in his affidavit that are sufficient for the matter to go to trial. The court *a quo* was therefore correct to decline summary judgment and refer the parties to trial.

[45] Issue 2

Whether or not the court *a quo* erred in ordering the Commander of Hlathikhulu police station to investigate how the plaintiff procured his Title Deed.

[46] The orders under attack as appear in paragraphs (b) and (c) of the orders *a quo* bear repetition at this juncture:

> "(b) the police station commander, Hlatikhulu, is ordered to investigate how plaintiff's title deed was obtained.
>
> (c) the aforesaid station commander is to file his report with the Registrar on or before the 17th October, 2012.''.

[47] **Mr Dlamini** contended that since our system of adjudication is adversarial and not inquisitorial, the Court *a quo* had no power to descend into the arena of conflict and assist the defendants by ordering the police to investigate the procurement of the title deed.

[48] **Mr Mzizi** offered no argument in this regard. He chose to rely on the decision of this Court.

[49] I intend to make short work of this issue, because it is a straight forward one. I say this because, the learning is that a Court has no power to grant a relief not claimed in the statement of claim or in the

writ. See **Correctional Services v Ntsetselelo Hlatshwako Civil Appeal No. 67/09**. An exception to this rule however, is that where the relief or order appears incidental and is necessary for a proper and just determination of the cause, such relief or order could be awarded or made though not claimed. These kinds of orders are called incidental, ancillary or consequential orders, which usually fall under the omnibus claim for further and/or alternative reliefs.

[50] I should however add here, that such ancillary/consequential orders should not detract from the judgment or have the effect of varying it or contain extraneous matters but give more effect to the judgment. This is because immediately after giving a judgment, the judge becomes *functus officio* except for any act permitted by law or rules of Court.

[51] Such an order therefore gives effect to the judgment it follows. For instance, if there is a challenge to possession and a claim in trespass is founded and damages awarded, an order of injunction may be made consequentially if not expressly claimed, in order to stop a

perpetuation of the damages complained about and to prevent multiplicity of actions and irremediable mischief.

[52] The order can only relate to matters adjudicated on. Where nothing has been decided on, there can be nothing incidental or consequential to order. So once a case is struck out by a judge for instance, he lacks the jurisdiction to make any incidental or consequential orders affecting the subsequent determination of the case.

[53] Such an order is not merely incidental to a decision but one necessarily flowing directly and naturally from and inevitably consequent upon it. It must be giving effect to the judgment already given, not by granting a fresh, unclaimed and unproved relief. It should not properly be made to give to a party entitlement to a relief he has not established in his favour. A proper consequential order need not be claimed but a substantive order must be claimed and sustained from the facts before the Court. See the text **Civil Procedure in Nigeria (2nd ed) by Fidelis Nwadialor .**

[54] *In casu*, it appears to me therefore, that there is much force in **Mr Dlamini's** contention that the Court *a quo* lacked the jurisdiction to grant the orders under attack. I say this because the Court rightly refused summary judgment and ordered the parties to trial. It made no decision on any of the issues raised including the alleged fraud associated with the plaintiff's title deed, which was raised in the alleged counterclaim, which I have hereinbefore dismissed. By granting the consequential or incidental orders in these circumstances, the Court fell into the error of granting a fresh, unclaimed and unproved relief. It gave the defendant a relief which he did not establish on his papers.

[55] Furthermore, having refused summary judgment and referred the parties to trial, the Court *a quo* lacked the jurisdiction to make any consequential orders affecting the subsequent determination of the case at the trial. That is the exclusive province of the trial Court if it deems it fit. It is therefore overwhelmingly evident from the totality of the foregoing, that these orders cannot stand.

[56] In conclusion, this appeal fails and is accordingly dismissed, save for the following variation to the orders *a quo*, to wit

> "That the orders contained in paragraphs (b) and (c) of the impugned decision, be and are hereby set aside.''

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E. A. OTA
JUSTICE OF APPEAL

____

I agree

A. M. EBRAHIM
JUSTICE OF APPEAL

____

I agree

DR S. TWUM
JUSTICE OF APPEAL

For the Appellant : Mr S C Dlamini

For the Respondent : Mr L Mzizi