



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.91/12

In the matter between:

ENOCK LOKHONJWA DLAMINI

1st Appellant

WESLEY MHLANGA

2nd Appellant

vs

MAVIS LELAPHI DLAMINI

Respondent

Neutral citation: *Enock Lokhonjwa Dlamini & Another vs Mavis Lelaphi Dlamini*
(19/12) [2013] [SZSC 21] (31 May 2013)

Coram: A.M. Ebrahim JA
E.A. Ota JA
P. Levinsohn JA

For the 1st Appellant: S. Gumedze
2nd Appellant: No appearance
For the Respondent: M.S. Dlamini

Heard: 17 May 2013

Delivered: 31 May 2013

Summary: Final interdict set aside and substituted with a temporary interdict.

JUDGMENT

EBRAHIM JA

[1] The Respondent, the estranged wife of the first Appellant, brought an application against him and the second Appellant for an interdict.

[2] The Respondent and the 1st Appellant had been married in January 1979 and had four children from the marriage. Divorce proceedings, which were not complete, were initiated by her against the first Respondent in 2008. Since that time they have lived apart. She lived in the teachers' quarters at the high school where she was employed, while the first Appellant and the second Appellant, his tenant, lived at the former matrimonial home.

[3] The house in question had been bought and developed by the Respondent and the first Appellant. It was registered in the first appellant's name. There they lived until he, as she says "forced [her] and the children out of the matrimonial home".

[4] The development of the house was financed by loans the Respondent was granted by Swazibank. The loans were repaid by monthly deductions from the Respondent's salary. Up to the time the application was made these loans continued to be repaid. As at August 2012 R27 980 was outstanding on the loans.

[5] Since the Respondent moved out, the first Appellant has been taking in tenants. He has paid none of the rent towards the repayment of the loans, keeping the rent payments for his own use.

[6] The Respondent's understandable view is that the rental proceeds should have gone towards liquidating the loans. She had little left over each month to live on, and feared for what would happen when she retired. In fact, we understand, that she has now retired as at 31st December 2012 and that she has repaid the loan due on the property from the pension payments she received upon her retirement.

[7] The relief sought by the Respondent was an order:-

- Interdicting or restraining the first Appellant from collecting rentals from the second Appellant or any other tenant who may be in occupation of the property;
- Interdicting the second Appellant from paying rentals to the first Appellant; and

- Authorising and directing the second Appellant to remit payments of rentals to the Respondent;
- Costs of the application;
- Alternative relief deemed to be appropriate.

[8] The papers disclose a fairly long history of problems between the first Appellant and the Respondent. It is not possible to come to any conclusions about the merits of that matter, nor is it necessary to do so.

[9] The application was brought as an urgent one. The trial judge attempted to get the parties to come to a settlement, but to no avail. The first Appellant's stance at the hearing was to raise the point *in limine* that the Applicant had failed to establish the requirements for an interdict. It was argued that the Respondent had no rights in the property; conversely, as the registered owner, he had a clear right to it and to collect rentals.

[10] The learned judge held that the first Appellant could not claim a better right over the house than the person who secured its existence – the Respondent. She said that it defied logic to hold that the Respondent should be expected to service the loan in respect of the property and not benefit from the *merx* which was the result of the loan. She accordingly granted the application.

[11] In his notice of appeal, the first Appellant gave, as grounds of appeal, the following:-

- That the Respondent has not established a clear right to the rent;
- That the Appellants has not invaded or infringed the Respondent's rights;
- That an interdict should not have been granted, there being other remedies available, including damages.

[12] To my mind, the justice of this case demanded that any rentals should have been applied towards discharging the loan. The first Appellant is living at the property and receiving the benefits of the property. He would be unjustly enriched if he were to keep the income from the rentals and pay nothing towards an important part of the running expenses. It is only right that he should have helped in servicing the loan. If there was anything left over, then the parties should have come to some arrangement about how the excess was to be applied. Presumably there were other expenses to pay: electricity, rates, and so on. As the occupier, the first Appellant would, one imagines, be the person responsible for those expenses.

[13] My view is that the interdict should not have been granted in the form it was.

[14] I am satisfied that the court erred in granting a final interdict. It is apparent, however, that the Applicant made out a case for a temporary interdict pending the finalisation of the matrimonial proceedings which are still pending before the magistrates court. It is open for this court to grant such temporary interdict in the terms it considers fit.

See **Appalsamy v Appalsamy and Anon 1977(3) SA 1082 (D & C.L.D)** at page 1082.

[15] It is noted from the papers that the marriage between the parties is in community of property therefore following divorce the Respondent would be entitled to half of the community property.

[16] The papers show that the Respondent was taking for himself all rentals paid by the tenant who is residing on the property concerned. The Respondent's rights in the community property is therefore being prejudiced.

[17] It is clear that she would be entitled to a temporary interdict to protect her interest in the "community property".

[18] Having put these thoughts to the legal practitioners representing the first Appellant and the Respondent we adjourned and requested them to put their

heads together to see if they could come up with a draft order which would satisfy the interests of both parties.

[19] They returned with the following agreed draft order:-

- “1. The rentals of the house belonging to the 1st Appellant and the Respondent situate at Lot 531, Zakhele Township, Extension 4, Manzini, be paid to a trust account to be held by MS Dlamini the Legal pending finalization of the divorce proceeding between the 1st Appellant and the Respondent at the Manzini Magistrate Courts.
2. First Appellant to pay costs.”

[20] I have redrafted the contents of this order, to what I consider to be in a more acceptable form, whilst ensuring that the essence of the agreement reached by both counsel remains the same.

[21] It is ordered:

1. That the appeal is dismissed with costs.
2. The order of the court *a quo* is set aside and there is substituted therefor the following order.

- 2.1 Pending the determination of the matrimonial proceedings under case no. 2500/2008 in the Manzini Magistrate's Court the first Appellant is interdicted and restrained from accepting any rentals received in respect of the immovable property described as Lot 531, Zakhele Township, Extension 4, Manzini, Swaziland.
- 2.2 The second Appellant (the tenant) or any tenants that succeed him is directed to pay such rentals into a trust account to be held by M.S. Dlamini the legal practitioner representing the Respondent to be held pending the direction of the court in the said matrimonial proceedings.
- 2.3 Costs of the application are reserved for the decision of the said court in the matrimonial proceedings.

A.M. EBRAHIM
JUSTICE OF APPEAL

E.A. OTA
JUSTICE OF APPEAL

P. LEVINSOHN
JUSTICE OF APPEAL