



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Case No. 57/2013

In the matter between:

RUDOLPH DIAMOND
BONGANI MAHLALELA

1st Appellant
2nd Appellant

vs

TSAKANE RUDOLPH SHILUBANE
THE REGISTRAR OF DEEDS
THE MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

Neutral citation: *Rudolph Diamond & Another v Tsakane Rudolph Shilubane & 3 Others (57/2013) [2014] SZSC 26 (30 May 2014)*

Coram: **MOORE JA, TWUM JA and MAPHALALA MCB JA.**

Heard: 16 May 2014

Delivered: 30 May 2014

Summary : Claim by a peregrinus against deceased lawyer for money had and received to his use. Order for him to furnish security for costs in the sum of E100 000. Intention by Executor to instruct Advocate from South Africa. Quantum of security too high. Reduced to E50,000.

JUDGMENT

DR S. TWUM J.A.

This is an appeal from the judgment of Ota J dated 27 September, 2014 sitting at the High Court, Mbabane.

(A) Background Facts

- [1] On 9th April 2013, the Applicants (hereinafter referred to as the Appellants) filed a joint Notice of Motion against
- (i) The first Respondent, TSAKANE RUDOLPH SHILUBANE N.O.
 - (ii) The second Respondent, the REGISTRAR OF DEEDS,
 - (iii) 3 other nominal Respondents.

[2] Apart from a plea that the matter be heard as one of urgency and an order for costs against the first Respondent, the quintessential reliefs claimed were :-

(i) That the first and second Respondents be interdicted and restrained from effecting transfer to anyone to the prejudice of the creditors and heirs of the Estate of the Late Paul Mhlaba Shilubane under Estate No. EH92/2012, the following property:-

“Lot No. 1532 situate in Mbabane Extension No. 11 (Thembelihle Township) District of Hhohho; measuring 600.00 Square Metres; held by the deceased, Paul Mhlaba Shilubane under Deed of Transfer No. 1022/2011 dated 20th December 2011.”

(ii) Compelling and Directing the first Respondent in his position as Executor or any other positions he claims, to deal with this property under the auspices of the office of the 3rd Respondent, (The Master of the High Court), as immovable property under the Estate of the Late Paul Mhlaba Shilubane.

[3] Their founding affidavit was sworn to by the first Appellant. In it he explained that the second Appellant, BONGANI MAHLALELA, was a

citizen of South Africa. He deposed in paragraph 5 of that affidavit that he and the second Appellant were creditors of the Estate of the Late Paul Mhlaba Shilubane under Estate No. EH 92/2012. He also explained that the first Respondent was cited in the proceedings as the Executor of the deceased; that the second Respondent was cited in his capacity as the Registrar of Deeds and the third Respondent as the Master of the High Court. The fourth Respondent, the Attorney General, was cited in his capacity as the legal representative of the second and third Respondents.

- [4] The Appellants also explained how each of them became creditors of the Estate of the deceased. It was deposed to in their affidavit that the first Appellant advanced loans to the deceased on diverse days and at his request, totalling E44 000.00 which sum was not repaid. The second Appellant claimed his debt arose out of the deceased's failure to pay over to him the total purchase price of E1,200,000.00 for land the deceased sold for him; which sum was paid into the deceased's firm's trust account. He said the deceased paid only E700.00 to him leaving a balance of E500,000 which the deceased failed or wilfully refused to pay to him; obviously having misused that balance.

[5] The Appellants stated further that the Estate of the deceased was probably insolvent and it was not in a position to satisfy the claims of all creditors as published by the 1st Respondent in the inventory. The Appellants claimed that the only probable immovable asset was land purchased by the deceased in 2011, valued at about E950,000 but it was being claimed that this immovable property had been bequeathed to his wife by the deceased before his death. The Appellants claimed that that immovable property should form part of the Estate and that any attempt by the Executor to sell it by private treaty to avoid participation in the proceeds of sale by other creditors, would be unlawful. It was for these reasons that the application for the interdict was launched.

[6] The first Respondent is the eldest child of the deceased and his Executor. In his affidavit in opposition, he claimed that the only immovable property of the deceased was sold by the deceased himself on or about 26th March 2012, clearly in his life time. He said the claims by the Appellants were in fraud of his father's image and that his father never owed either of them. He raised a number of alleged procedural defects in the Appellants' papers and claimed that even on the papers as they stood, they were not entitled to the interdict.

B. The claim for security for costs

- [1] Amidst the claims of unprofessional conduct and conflict of interests levelled against lawyers on both sides of the controversy, the first Respondent delivered what may be called the *coup de grace* blow against the Appellants. He applied to the Registrar of the High Court to order the second Appellant, who is a peregrinus, to furnish security for costs in the sum of E15000.00 as he had no known movable or immovable property in Swaziland. The first Appellant, who is an incola, was, of course, exempt from that demand.
- [2] Before the Registrar of the High Court could adjudicate on that claim, the first Respondent raised the amount of the security to E100,000.00. He explained that his reason for the increase was that he intended to instruct an Advocate from South Africa to handle the matter on his behalf.
- [3] The Appellants protested against the increase and informed the first Respondent's attorneys that their client's claim for security for costs would be resisted on the ground that the first Respondent was himself a peregrinus.

[4] Eventually, the issue of security for costs was decided by the Registrar of the High Court. He held that the second Appellant was indeed, liable to provide security for costs in the sum of E100,000.00. There was no evidence that the Registrar satisfied himself that the original amount demanded was not sufficient. See Rule 47(6). The second Appellant did not provide the security within the 10 days allowed by the Rules after the Registrar's decision. Consequently, the first Respondent, applied on notice to the Appellants' lawyers for the matter to be listed before the Court for a judicial decision.

[5] On 13th August 2013, Her Ladyship, Ota J., made the following orders after hearing counsel for the parties:

“1. The 2nd Applicant be and is hereby ordered to give security in the sum of E100,000-00 (one hundred thousand emalangeni) as determined by the Registrar of the High Court within twenty-one (21) days of the date hereof.

2. Case No. 535/13 and the entire proceedings therein, be and are hereby stayed pending the giving of the said security.

3. *In keeping with Rule 47(4) of the Rules of the High Court, it is hereby further ordered that if the 2nd Applicant fails to comply with the order herein and that of the Registrar of the High Court after expiration of the 21 days period stipulated herein, Case No. 535/13 and the entire proceedings therein, shall be liable to be dismissed upon application by 1st Respondent.*

4. *Costs to follow the event.”*

[6] After the matter was further considered, Her Ladyship made the following final order:

“[30] ORDER

Accordingly, the claim by the 2nd Applicant in suit No. 535/13 that the estate of the late Paul Mhlaba Shilubane is indebted to him in the sum of E500,000-00 (Five Hundred Thousand Emalangeneni) for legal services rendered by the late Paul Mhlaba Shilubane, as more particularly detailed in the 2nd Applicant’s supporting affidavit (pages 17-19 of the book), be and is hereby dismissed.

[31] It is further ordered that the 1st Applicant's claim in the same suit No 535/13, that the estate of the late Paul Mhlaba Shilubane is indebted to him in the sum of E44, 000-00 (Forty Four Thousand Emalangeni), should proceed to trial."

NOTICE OF APPEAL

[1] The Appellants were aggrieved and dissatisfied with the orders made by the Judge a quo and appealed to this Court against them on 27th September 2013 upon the following grounds :-

- "1. The Court a quo erred in law in dismissing the 2nd Appellant's application on the ground that he had failed to furnish security for costs as per the direction or order of the Registrar of the High Court.*

- 2. The court a quo erred in finding that the Registrar of the High Court had properly exercised his discretion in ordering that the 2nd Appellant should furnish security for costs because he is a peregrinus yet the facts of the case warranted that the security for cost be dispensed with because the 2nd Appellant had suffered serious financial loss as his money E500 000.00 (Five Hundred Thousand Emalangeni) had been embezzled by an attorney, whose conduct*

amounted to professional misconduct, which the court ought not to condone.

3. *The filing of security for costs at E100 000.00 (One Hundred Thousand Emalangeni) was excessive and not justifiable in the circumstances because the 2nd Appellant had already suffered a huge loss in the hands of an attorney who received money on behalf of a client (the 2nd Appellant) then failed to remit or pay it over to the client.*

3.1 The 1st Respondent had alleged that it had engaged the services of a South African Advocate to handle the case yet at all material times no advocate appeared for the 1st Respondent nor were there any Court documents prepared by the said advocate.

4. *The Court a quo erred in determining the matter of the security for costs as a review of the Registrar's decision yet these were no review proceedings since the Court has authority to make its own decision on the matter as per Rule 47 (4) after having itself considered the merits or facts alleged in the affidavits before the Court.*

5. *The Court a quo erred in hearing the matter and granting the orders it did yet there was not application served before the Court as contemplated in Rule 47 (3) of the High Court Rules.*

6. *The Court a quo erred in ordering that both Appellants should pay costs of the determination of the security for costs.”*

[2] During the hearing of the appeal before us, Counsel for the second Appellant raised a number of issues, which though of some moment, were really not germane to a decision on an application for security for costs.

[3] There was a long submission by counsel for the second Appellant on the quantum of the security. He argued that it was not realistic as he did not have that kind of money. Indeed, counsel literally accused the Registrar of the High Court of duplicity for fixing the quantum of the amount for security at E100,000.00 when he was aware, or ought to have been aware, that the only immovable asset which belonged to the lawyer (then deceased) had actually been sold or plans were afoot to sell it. The import of that

submission is that even if he won the case against the Lawyer's Estate, it would probably be a pyrrhic victory.

[4] He also made the point that as the second Appellant's claim was predicated on the embezzlement of his money which was supposed to be faithfully secured in a trust account of the Lawyer's firm, the insistence that he should provide security for costs in the sum of E100,000.00 when he was suing to recover the sums apparently embezzled, would seem to condone the embezzlement of clients' moneys by the deceased attorney.

[5] He submitted that in the circumstances, the learned Judge ought to have considered the merits of the case. In any event, he argued that the order for the security appeared to strangle his efforts to fight for probity and accountability in lawyers' trust accounts. Counsel said the decision of the Court that his action should be struck out played unfairly into the hands of the first Respondent who is the Executor of the deceased's estate.

[6] In reply, Counsel for the first Respondent submitted that both the High Court Registrar, and the learned Judge Ota, acted fairly in applying Rule 47. He pointed out that notice was properly issued by counsel for the first

Respondent in respect of his intention to have the amount of the security increased from E15,000.00 to E100,000.00; a proper notice was also filed for the matter to be referred to the court for a decision. He said withstanding the clear time limit stated in Rule 47 (3) the learned Judge gave him 21 days to provide the security. He added that the judge was scrupulously fair and exercised her discretion judicially.

[7] I have given this matter my most anxious and deep consideration. I have read Rule 47 carefully. There is no argument that the first Respondent's application for security for costs is governed by Rule 47 of the High Court Rules which states:-

“47. (1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar of shall determine the amount to be given.

(3) If the party from whom security is demanded contests his liability to give security or if he fails to refuses to furnish

security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient.”

[8] A fair reading of the Rule leads me to the conclusion that by virtue of his status as a peregrinus the first Respondent was entitled to bring an

application for security for costs against him, particularly since it was common cause that he did not have any tangible assets in the jurisdiction which could be attached in the event that an order for costs was made against him, either before or at the conclusion of the substantive application for an interdict or even at the conclusion of the trial on the merits.

- [9] Except in one respect, it is my considered opinion that the orders made by Her Ladyship, Judge Ota, were substantially correct. My one reservation relates to the quantum of E100,000 which was fixed as security for costs. My opinion is that it was rather high. I am not persuaded that the first Respondent's alleged intention to brief an Advocate from South Africa should entitle him to escalate the figure for security to E100,000.00. After all, it is only a declaration of intention. Admittedly, in the second Appellant's main claim, he was demanding the sum of E500,000.00 which he alleges was embezzled by his lawyer, the deceased, whose estate is legally being administered by the first Respondent as his Executor. The claim for the E500,000 is not a complicated matter which necessarily would require the services of an Advocate from South Africa. In my humble view, most lawyers in this jurisdiction are sufficiently endowed with the requisite professional knowledge and skill to be able to handle the first Respondent's

defence to the second Appellant's claim. Of course, I am not oblivious of the fact that the first Respondent is entitled to instruct counsel of his choice, but as long as the cost of that retainer would enter into the equation for assessing the quantum of the amount for security for costs, I would demur and say that that could have the effect of upsetting the equilibrium and there would then be an uneven playing field for the litigants.

[10] I have given careful thought to the fact that the second Appellant is making a very serious allegation against the deceased in his relation to him as lawyer and client. In that relationship the lawyer was expected to exhibit utmost good faith to all persons who resorted to him for professional service, even mere advice. In the un-initiated view of second Appellant the order that he should provide E100,000.00 could easily be misconstrued as some kind of a subterfuge to have his claim derailed or scuttled.

[11] In his submission before us, counsel for the second Appellant argued that no evidence was proffered to the Registrar of the High Court in proof when the first Respondent increased the demand for security for costs to E100,000.00. His counsel further argued that the Registrar merely repeated the excuse by the first Respondent for the increase: ie, that he intended to instruct a South

African Advocate. Be that as it may, that is no legitimate reason why the quantum should be increased by some E85,000.00. It appears the learned Judge also erred by agreeing to the figure fixed by the Registrar. No evidence on the propriety of the increase was made available for the court's consideration. And yet, Rule 47 (3) provides that when the quantum demanded by the person asking for security is challenged, the matter should be listed before the court by the other party for adjudication. My view is that the figure of E100,000 is far in excess of what this court would have allowed.

In the circumstances,

- [1] I hereby reduce the amount for security for costs to E50,000.00 to be deposited with the Registrar of the High Court within 14 days from Monday 2nd June 2014.

- [2] I further order that if this security is provided, the second Appellant's main action including the application for an interdict should be reinstated by the Registrar of the High Court and may be pursued by him thereafter in accordance with the Rules of the High Court.

- [3] I further order that the costs of this appeal including costs in the High Court, should be borne equally by the first Respondent and the second Appellant. Each of them partly won and partly lost in this appeal. Equality is equity.
- [4] For the avoidance of doubt, it is common cause that the first Appellant's claim against the deceased lawyer for E44,000.00 was not subject to any provision for security for costs. Indeed, the court a quo rightly ordered that his claim should proceed to finality. Accordingly the order for costs against the first Appellant with respect to second Appellant's main application is hereby set aside.

Dated at Mbabane on the 30th May 2014.

Ordered Accordingly.

DR. S. TWUM
JUSTICE OF APPEAL

S.A. MOORE
CHIEF JUSTICE

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For Appellants : **N.S. Manzini**

For 1st Respondent : **B. Mdluli**

For 2nd Respondent : **B. Nkambule**