IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No. 28/2015

In the matter between:

JUSTICE SIBUSISO DLAMINI	**1st Appellant**
ZANDILE PATIENCE DLAMINI	**2nd Appellant**

And

DAVID THEMBA DLAMINI	**Respondent**

Neutral citation: Justice Sibusiso Dlamini & Another v David Themba Dlamini *(28/2015)* [2015] *SZSC 06 (29 July 2015)*

Coram: **S.B. MAPHALALA AJA, P.J. ANNANDALE AJA and CLOETE AJA**

Heard: **13 July 2015**

Delivered: **29 July 2015**

Summary: *Civil Law – On resistance to an interdict, illiquid damages cannot be set off against a liquid claim – Litigants cannot be granted substantive relief which has not been sought in the lis*

JUDGMENT

CLOETE AJA

PRELIMINARY

[1] The parties were invited by the Court to attempt to resolve the matter prior to the hearing but there appeared to be no prospect of settlement. This is accordingly an appeal against a Judgment of the High Court of Swaziland under Case No. 227/2014 handed down by Maphalala ACJ on 22 May 2015.

FACTS

[2] The full facts appear in the aforementioned Judgment but for the sake of continuity the facts of the matter which are not in dispute are summarised as below.

[3] The Respondent alleged that:

a) The Appellants had purchased a property known as Portion 929 (a Portion of Portion 237) of Farm 188 Dalriach, Mbabane at an auction sale on 01 June 2012. It is not necessary for current purposes to give the whole history of the matter, suffice it to say that a financial institution

had foreclosed on Respondent as a result of non-payment and the Appellants subsequently purchased the property at the relevant public auction;

b) Appellants orally agreed with the Respondent's daughter and son-in-law Millicent Makhanya and Ntando Makhanya, who were at the time congregants of the Appellants that;

i. the Appellants would purchase the property;

ii. the Appellants would thereafter sell the property to the Makhanyas;

iii. the Respondent would remain in occupation of the property;

iv. the Respondent would authorise the payment of the residue of the foreclosure action in the sum of E154,606.22 (the deposit to be paid to the Appellants as a deposit for the purchase of the property by the Makhanyas.

c) The said sum was indeed paid to the Appellants and he remained in occupation of the property unconditionally;

d) The Appellants failed to enter into an agreement of sale of the property with the Makhanyas;

e) The Appellants instituted proceedings against him to evict him from the property under Case No. 1854/2013;

f) He agreed to vacate the property against a refund of the deposit;

g) The Appellants had in the meanwhile sold the property to a third party against whom he had no rights;

h) That he feared that if the sale to the third party was completed and the full purchase price paid to the Appellants, they would not refund the deposit to him;

i) That he had a clear right to the Interdict sought and the balance of convenience favoured him;

j) He accordingly sought an Order in the following terms:

“ i. That a *Rule Nisi* do hereby issue operating with immediate and Interim effect calling upon the Respondents to show cause on a date to be fixed by the Honourable court why an Order in the following terms should not be made final:

a. That the Third and/or Fourth Respondent be ordered and directed to deduct the sum of E154,606.22 from the sum of E337,641.52 payable to the First and Second Respondents in respect of the immovable property mentioned hereunder the sum of E154,606.22 and pay same to the Applicant to wit;

   CERTAIN: Portion 929 (a Portion of Portion 237) of Farm 188, Dalriach, District of Hhohho, Swaziland;

b. That the Third and/or Fourth Respondents be interdicted and restrained from paying out the sum of E 154,606.22 to the First and Second Respondents in respect of the balance of the purchase price of the immovable property mentioned hereunder, to wit;

   CERTAIN: Portion 929 (a Portion of Portion 237) of Farm 188, Dalriach, District of Hhohho,

Swaziland; pending finalization of this Application.

c. Alternatively, that the Third and/or Fourth Respondents be interdicted and restrained from paying out the sum of E154,606.22 pending finalization of the action instituted or to be instituted by the Applicant for the payment of the sum of E154,606.22.

ii. Granting costs of this Application in the event it is opposed.

iii. Further and/or alternative relief"

k) The Court *a quo* issued an Interim Order in the terms set out above on 17 February 2014 calling on the Appellants to show cause on 21 February 2014 why the Order should not be made final. The Order is set out at Page 76 of the Record of Proceedings. By way of explanation, the Third and Fourth Respondents are the conveyancing Attorneys Zonke Magagula & Company who are attending to the transfer of the property from the Appellants to the Third party and the Swaziland Building Society who appeared to have an interest in the matter although it is not set out in the papers before the Court.

[4] The Appellants alleged that:

a) they admitted that they bought the property;

b) they admitted that they were to agree with the Makhanyas for the sale of the property;

c) they admitted that they had received the deposit;

d) that the Makhanyas had failed to agree with them relating to the purchase of the property;

e) they admitted that they had instituted action for ejectment of the Respondents from the property under Case No. 1854/2013 which had subsequently been struck off the court roll after the Respondent vacated the property;

f) they tendered repayment of the deposit subject to the conditions set out at 6.1 of their opposing Affidavit which appears at Page 83 of the Record of Proceedings. It basically stated that they require the Court to find that a sum of E5,500.00 per month be deducted as damages arising from the Applicant's occupation since the purchase of the property and at 6.2 stated that they intended instituting action to recover such damages.

[5] The Respondent replied that;

a) He had been in occupation of the property but there was no lease agreement or any other formal agreement relating to the payment of any rental or consideration on respect of his occupancy;

b) That the Appellants had suffered no damages as they had sold the property for a profit;

c) That any such deduction suggested by the Appellants would be tantamount to a lease being imposed on him.

THE JUDGMENT OF THE COURT *A QUO*

[6] The Court set out the facts as above, found that the was no lease agreement between the parties, noted that the matter under Case No. 1854/2013 was struck off the roll by consent, dealt with all relevant authorities and found that the Respondent had established a clear right to the Interdict sought and issued the following Order:

"The *Rule Nisi* is hereby confirmed as follows:

i. The Third and/or Fourth Respondents are directed to deduct the sum of E154,606.22, less E39,106.22 already paid to the Applicant, from the E337,641.52 payable to the First and Second Respondents in respect of Portion 929 (a Portion of Portion 237) of Farm 188, Dalriach, District of Hhohho, Swaziland measuring 1,3906 hectares. The money so deducted to be paid to the Applicant.

ii. The Third and/or Fourth Respondents are interdicted and restrained from paying out the sum of E154,606.22 to the First and Second Respondents in respect of the deposit of the purchase price of the property;

iii. The First and Second Respondents are directed to pay costs of suit to the Applicant."

<u>CONCESSIONS BY MR MOTSA ON BEHALF OF THE APPELLANTS</u>

[7] In the course of the hearing, Mr Motsa for the Appellants conceded that:

a) The Appellants did not oppose the Respondent's right to restitution of the deposit;

b) That it was trite law that there was no right of set off of a claim for damages against a liquidated claim;

c) That a litigant cannot insist on being awarded relief which the litigant had neither raised in the proceedings nor prayed for in the proceedings;

d) That the Appellants had subsequently and after the Judgment of the Court *a quo* instituted proceedings against the Respondent for damages and that matter was currently pending;

e) That the eviction proceedings brought by the Appellants in Case No. 1854/2013 did not include any claim for damages.

f) Accordingly, the only outstanding issue for this Court to deal with was that at Paragraph 3 of the Notice of Appeal which reads: "The learned Judge should have issued an interim interdict pending an assessment of the damages suffered by the Appellants or the institution of an action for those damages."

FINDINGS OF THIS COURT

[8] It is clear that the Appellants did not in any of the papers before this Court apply for any Order requesting the Court *a quo* to issue an Interim Interdict as referred to in paragraph 3 of the Notice of Appeal.

[9] In paragraph 6.2 of their replying affidavit, the Appellants further conceded that:

> "I am advised and humbly submit that I am entitled to claim damages suffered as a result of the Applicant's occupation. I intend instituting action proceedings to recover the said amount."

On view of the further concession listed in paragraph 7 above, coupled with the fact that they had subsequently already instituted separate proceedings for damages, acknowledged that the correct procedure to prosecute their alleged claim for damages, is in any event by way of action and not as counterclaim to resist the claim for restitution of the deposit.

[10] The Court *a quo* did not at any point indicate that the Appellant had possible counterclaims for damages arising out of the Respondent's occupation of the property and the reference in Paragraph 2 of the Heads of Appeal are accordingly completely void of substance.

[11] The Attorney for the Appellants made concessions relating to the issues referred to in Paragraph 7 above and it is accordingly not necessary to deal with those issues.

[12] The Court *a quo* dealt extensively with the issue and found that the Respondent had a clear right to the relief sought and this Court has absolutely no reason to interfere with the findings of that Court.

[13] As regards the issue of the suggestion by the Applicants that the High Court should have issued an interim interdict pending an assessment of damages, it is clear that the Appellants never sought any such Order from the Court and the decision of the Supreme Court in the matter between **The Prime Minister of Swaziland and Others v. Christopher Vilakati and Others Civil Case No. 35/2013** clearly dealt with the issue and stated that, **"It is of fundamental importance to note that this Court has laid down a salutary principle, which binds all the Courts in this jurisdiction, that a litigant can also not be granted that which he/she has not prayed for in the *lis*."** We fully align ourselves with this principle of litigation.

[14] Mr Motsa for the Appellants, referred us to the Judgment of this Court in the matter between **Enock Lokhonjwa Dlamini and Another v. Mavis Lelaphi Dlamini (19/12) [2013] [SZSC] (31 May 2013)** where the Court set aside a final Interdict and substituted it with a temporary Interdict. This was however done with the consent of the parties and related to completely different circumstances in respect of the finalisation of a matrimonial dispute and has no bearing on the issue at hand.

[15] For these reasons this ill-advised appeal must fail.

[16] The Court needs to point out that the Third and Fourth Respondents were for some inexplicable reason not cited in the Appeal documentation and as such we assume that they remain bound to the Final Interdict granted by the Court *a quo*.

[17] Accordingly the Appeal is dismissed with costs and the Appellants and the Third and Fourth Respondents referred to above are ordered to adhere in all

respects to the Order made by the Court *a quo* in Case No. 227/2014 handed down on 22 May 2015 which appears at paragraph [5] *supra*.

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CLOETE AJA

I agree ________________________________

MAPHALALA AJA

I agree ________________________________

ANNANDALE AJA

For the Appellants **:** Mr. M. Motsa

For the Respondents **:** Mr. S. Bhembe