IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal Case No. 80/2015

In the matter between:

MPHIKELELI MAMBA Applicant

And

U.S.A DISTILLERS 1st Respondent

THANDIWE NKAMBULE 2nd Respondent

Neutral citation: *Mphikeleli Mamba vs. U.S.A Distillers (Pty) Ltd. And Another (80/2015) [2016] SZSC 49 (30 June 2016)*

CORAM **M.C.B MAPHALALA, CJ**

B.J. ODOKI JA

S.P. DLAMINI, JA

Head: 20th May 2016

Delivered: 30th June 2016

Summary: *Civil procedure-notice of application- interdict- lease agreement-ownership of property-payment and collection of rentals – oral evidence – misstatement of facts and/or case and misdirection- grounds of appeal not connected to the relief sought in the notice of application- appeal upheld with costs.*

JUDGMENT

S. P. DLAMINI, JA

[1] This is an appeal against the judgment of the High Court delivered on the 10th November 2015.

[2] The appellant moved an application at the High Court against the respondents in the following terms;

> ***"(a) Directing and ordering the first respondent to deposit rental monies into the Applicant's bank account held at Swaziland Building Society, account number 132299, in respect of Lot7, Hlanze Township situate in Big Bend in the Lubombo District.***
>
> ***(b) Interdicting and restraining the first Respondent from depositing rental monies into the second Respondent's bank account in respect of Lot7, Hlanze Township situate in Big Bend in the Lubombo District.***
>
> ***(c) Costs of suit in the event the application is opposed.***

(d) Any further and/or alternative relief."

[3] The notice of application is found in pages 1 to 4 of the record of appeal. Applicant relies on the founding affidavit in pages 5 to 11 the record of appeal for the relief sought in the matter of application.

[4] First respondent did not oppose the application or file a notice to oppose or any opposing papers or give any evidence or make appearance during the hearing of the matter at the Court *a quo.*

[5] Second respondent opposed the application. I say so even though there is no notice to oppose filed in the record, because of the answering affidavit deposed to by the second respondent together with confirmatory affidavit (found in pages 44 to 58 of the record of Appeal). The confirmatory affidavit was deposed to by one Jabulane Zephaniah Makhube.

[6] In addition, appellant filed his replying affidavit to the answering affidavit together with the confirmatory affidavit of the second respondent.

[7] The Court *a quo* summarized the issues at page 2 of the judgment as follows;

"Summary: The applicant's claim is premised on a title deed which is in his name in respect of an immovable. He therefore calls for this court to direct first respondent, as the tenant in the said immovable, to deposit rentals into his bank account. The second respondent is opposed to the application."

[8] Further, it is stated in paragraph 1 of the judgment of the court *a quo* that the matter was referred to oral evidence:

> **"(1)** ***By consent of the parties, the matter was referred to oral evidence. The question for determination as agreed between the parties was whether in the light of the circumstances applicant was entitled to the orders sought."***

[9] The oral evidence was commenced on the 28 September 2015 and it appears it was finalized on the same day the transcript of the record of the oral evidence is found at page 106 to 175 of the record of appeal.

[10] Both appellant and respondent gave their evidence and were also cross-examined. In addition, two other witnesses gave evidence in support of respondent, namely, **Jabulane Zephaniah Makhube** (signed the confirmation affidavit) and **Sipho Shongwe**.

[11] Upon hearing the matter, the Court *a quo* dismissed the application with costs. Central to the court *a quo's* judgment in dismissing the application was the issue of ownership of the property, to wit, Lot 7 Hlanze Township situate in Big Bend, Lubombo District.

[12] It is not apparent on what legal basis did the issue of ownership of the property become central in this matter. The only possible explanation is that since appellant did not have in his possession a copy of the lease agreement for the reasons stated in the founding affidavit, the copy of the mortgage Bond (ANNEXTURE "MM4") was introduced to the proceedings in lieu of the lease agreement to bolster appellant's locus standi to seek the relief set out in the notice of application before the court *a quo*. It was certainly not included for the determination of title and/or rights over the property between appellant and second respondent. Unwittingly, the proceedings were as a result veered off the basis upon which the relief was

being sought which was the only basis on which it could either be granted or rejected. That basis being the enforceability or lack thereof the lease agreement between appellant and first respondent. The issue of title over the property then took center stage.

[13] The application in the court *a quo* was essentially directed against first respondent and not against the second respondent. This much was conceded by counsel for second respondent.

[14] The basis of the notice of application was the refusal by first respondent as a lessor to act in accordance with the directive of the appellant as a lessor. In paragraph 8 of the founding affidavit appellant states the following;

"Subsequent to the purchase, the first respondent and I entered into a written lease agreement with the terms being as follows:

8.1 a monthly rental of E2 000.00 (Two Thousand Emalangeni) would be deposited into my bank account.

8.2 there would be an annual increase in the rental at the rate of 10% at the beginning of each month of October;

8.3 the lease was for an indefinite period;

8.4 there would be at least a month's notice in the event the lease agreement was terminated for whatever reason.''

[15] Appellant further avers that after the signing of the lease agreement, first respondent deposited the monthly rentals into his account without fail.

[16] Appellant further avers that he subsequently instructed the first respondent to pay the money to the second respondent's account as he was out of the country (see letter at page 72 of the records). First respondent apparently complied with this instruction but was not prepared to comply with another instruction reversing it at a later stage. First respondent stated that it required a court order in order to comply with the latest instruction .

[17] Appellant, through his Attorneys, stated that he sought to reverse his earlier instructions to have the rentals paid to the respondent's account and directed first respondent to pay the rentals to his account that he holds at First National Bank. In this regard, see the letter to first respondent at page 39 of the record and marked Annexure "MMS.'' First respondent replied to the letter and, inter alia, informed the first appellant that;

> **"2.1 We have an agreement in terms of which the details of the recipient of the rental is recorded.**
>
> **2.2 We cannot unilaterally vary the terms of the agreement and instruction without an order of court to that effect'' (This latter is marked "MM6'' and found at page 41 of the record). As a result of this dispute, appellant instituted the proceedings before the court *a quo*."**

[18] As it was stated previously, first respondent did not appear before court and /or file any papers in opposition at all.

[19] Second respondent on her papers was essentially contesting ownership of the property and the circumstances under which it was purchased. She confirms the existence of the lease agreement between appellant and first respondent but adds at paragraph 21.1 of the replying affidavit that it was made with her full knowledge and consent. Second respondent's Attorney also confirmed the existence of the said lease agreement before this court.

[20] In view of the fact that first respondent did not oppose the notice of motion and on the papers before court as they stand, appellant was entitled to the relief sought. I hasten to add that, the position of this court is not in anyway negating the claims raised herein or may be raised in future by the second respondent. The remedies regarding for instance the transfer to her name of the lease agreement between appellant and first respondent, the registration title over the property (registration of the property in the name of the appellant) and her election to assert her rights in anyway whatsoever have always been open to second respondent and will continue to be open to her beyond the judgment of this court. However, second respondent has the benefit of being represented by counsel who can best advise her of available legal options. The notice of application by appellant is not the correct legal route to deal with all the matters that second respondent may wish to pursue against appellant nor can it be said that to introduce them through her opposing papers to appellant's notice of application was appropriate. It is mind- boggling that the property in question was purchased and registered in the name of the appellant in 2001 and notwithstanding the parties having marital problems and other disputes, the second respondent has not taken any legal step to assert her rights as to the title over the property and/or substitute appellant's name in the indefinite lease agreement between appellant and first respondent.

[21] Indeed, there are many issues between the parties. It appears that there is another property in dispute between appellant and respondent that is being adjudicated upon at the Siteki Magistrate's Court (see paragraph 10 of second respondent's answering affidavit). Further, it is alleged by second respondent that appellant had encumbered the property in question through an additional loan of E134, 000.00 from the Building Society in 2008. Again, it is alleged by second Respondent, Appellant on 22nd October 2013 took additional loans against the property. The property was initially bought for E160,000.00 but the Court papers reflect an outstanding balance of E197, 188.40 notwithstanding the payments made over the years since the property was purchased. Respondent states that all the loans were made without her knowledge. In paragraph 15.3 of her answering affidavit, she states as follows;

> **"15.3 In fear that Applicant, once the property is fully paid, may sell it without notice to me, I then deliberately made the payment erratic in order to have the matter resolved before the debt is fully paid."**

Also under cross- examination, during the oral evidence, second respondent revealed that her employer deducts E400.00 monthly for rates and water. Clearly and as already stated second respondent has many issues to resolve between her and appellant. However, she cannot sit quietly in the face of all the issues over time and only spring into action when her continued receipt of the rentals is being challenged hope for them to be resolved in the proceedings.

[22] Even if the oral evidence was the correct legal route to take, in so far as it deals with the question of title, with respect it cannot stand. Firstly, the matter of title was not before court and or relevant to the proceedings. Secondly, apart from appellant and second respondent there are other parties that may have a direct and/

or substantial interest regarding issue of title over the property that have to be heard when question property is finally and lawfully adjudicated upon namely the Building Society, the Registrar of Deeds and Attorney General. Furthermore, the value of the oral (or lack of it) evidence in some ways complicated even the issues more namely;

1. The marital status of the parties remains unclear, appellant claims that they are divorced whereas the second respondent claims the marriage subsists;

2. Appellant in response to a question during the oral evidence at page 161 of the record **" ….. that is not correct, Mr Khumalo went to discuss this issue with my husband after I had requested him to convince my husband to purchase the house because he was not someone who knows anything about property."; and**

3. Lack of evidence from Mr Nhlanhla Khumalo, an employee of the Swaziland Building Society particularly in view of the fact that he played a major role in the transaction in question and a representative of Ubombo Ranches as the Employer that designed the housing scheme relevant to the proceedings.

[23] The case of **Boy Boy Nyembe t/a Mr Traileer and One Stop Tyre Services** and **Another v VMB Investments (Pty) Ltd (22/2014) [2014] SZSC 13** is distinguishable from the present case for the following reasons;

(i) In the **BOY BOY NYEMBE** case, the cause of action is different. In that case the applicant sought to evict respondents from property registered in its name. The

proceedings were directed towards the respondents who were contesting ownership albeit a small portion of it. In the present case, the issue is for transmission of the rentals on the basis of a lease agreement and first respondent against whom the proceedings are largely directed is not contesting any rights nor has it objected to the proceedings;

(ii) The assailability of the Deed of transfer was central in the **BOY BOY NYEMBE** case but, in the view of this court, it's relevance has not been established in the present proceedings; and

(iii) In the **BOY BOY NYEMBE** case, examples of circumstances whereby the validity of a Deed of transfer may be open to challenge are stated namely, property sold contrary to law or the existence of some illegality such as fraud etc. In the present case the validity of the Deed of transfer is not being challenged nor has any illegality been pleaded and/or relied upon by second respondent.

[24] With respect and for the reasons already stated above, the Court *a quo* misdirected itself in coming to the conclusion at paragraph [14] of the judgment at page 182 of the record that;

"ISSUE

[14] The matter at hand is to make a determination on who the purchaser is between applicant and first respondent.

[25] The notice of appeal is also problematic in that it is largely concerned with the findings of the court *a quo* arising out of the question of title over the property and

its evaluation of the oral evidence. This court has already indicated that there was no legal basis in view of the notice of application to enquire into the matter, title over the property. Therefore, grounds (a) to (e) are not worth considering at any further.

[26] In my view the only competent ground of appeal is (f) since it is the only ground relevant to the notice of the motion and the relief sought by the appellant. In this regard, it is stated by appellant in the notice of appeal at page 190 of the record that;

> **"(f) The court *a quo* erred in failing to judicious consider the whole application and the proven facts by the appellant ''**

[27] The issue that arose in the proceedings concerns the distinction between personal and real rights. In the case of **Universitiet van Pretoria Tommie Meyer Films (Edms**) **BPK 1977 (4) SA 376 (T),** The Learned Judge Mostert J. considered and distinguished the various categories of subjective rights, namely, real rights, personality rights, immaterial property rights and personal/ performance rights. The distinction of these rights is of great practical significance because different consequence flow from them **(see The Law of Things and Seritudes CG van der Merwe and MJ De Waal 1993 at paragraph 42).**

[28] In the present case, on the one hand, a contractual relationship was established between appellant and first respondent through the lease agreement which applicant sought to enforce through the application in the court *a quo*. No such relationship exists either between the applicant and second respondent or between

first and second respondents. On the other hand, there is a real right dispute between the appellant and second respondent whereby both claim the ownership of the property in question. In such a case the holder of a real right protects his or her rights through the exercise of the *rei vindicatio.* Second respondent has not done so, as already stated above. Therefore, appellant is entitled to the remedy to the sought to enforce his personal right arising out of the lease agreement.

[29] In view of what has already been stated above, in my view, the court ***a quo*** misdirected itself in not determining the matter on the basis of the enforceability or otherwise of the lease agreement between appellant and first respondent. In the circumstances, there was no legal basis to proceed to oral evidence in order to determine the issue of title over the property in question. Estate agents, attorneys and others persons (real or otherwise) lawfully lease and collect rentals over properties they do not own and or are not registered as owners. Therefore, the appeal is upheld with cost.

ORDER;

In the premise, the court orders that;

(a) The appeal is upheld with costs.

(b) The order of the court *a quo* is set aside and replaced with the following order;

"1. Applicant's application is hereby granted; and

2. Second respondent is hereby ordered to pay costs of suit."

_____

S.P. DLAMINI

JUSTICE OF APPEAL

I agree

_____

M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

_____

DR. B.J. ODOKI

JUSTICE OF APPEAL