IN THE SUPREME COURTOF SWAZILAND

Civil Appeal Case No. 65/2015

In the matter between:

PIET ZACHARIAS EBERSOHN N. O. **Appellant**

And

SWAZILAND DEVELOPMENT SAVINGS BANK
1st Respondent
SAMUKELO SEMASWAZI INVESTMENTS (PTY) LTD **2nd Respondent**

Neutral Citation: *Piet Zacharias Ebersohn N. O. vs Swaziland Development Savings Bank & Another (65/2015)* [2016] SZSC 74 (30th June 2016)

Coram: K. M. NXUMALO AJA
Z. W. MAGAGULA AJA
M. LANGWENYA AJA

Date Heard: 16th May 2016

Date Handed Down: 30th June 2016

SUMMARY: **Civil Procedure – Application for rescission of judgment, *locus standi* to institute interlocutory application – Appellant was appointed executor in the estate of first dying spouse when there was a joint will – Testators providing in joint will that estates are massed - After death of second spouse Appellant acting for massed estate – Spouses/testators married in Community of Property.**

Civil Procedure – Application to stay sale is execution pending finalization of the matter pending – Consolidation of action – Effect of Respondents separately colluding to dispose one of two consolidated action – Court granting order in the absence of Appellant.

Civil Procedure – Rule 42 (1) (a) - Order erroneously sought and erroneously granted in the absence of party.

In an appeal; held: Appellant has locus standi to institute action for massed estate.

Held further – It is clear that estate of testator was massed.

Held further – Once court orders consolidation of matters, the one cannot be finalized separate from the other.

Held further – Order erroneous sought and erroneously granted if notice of set down was not served on a party to action.

Judgment of Court *a quo* overturned.

JUDGMENT

MAGAGULA AJA.

[1] This is an appeal from the judgment of the Court *a quo* dismissing with costs an application for rescission of judgment by the Appellant granted in his absence. In the application for rescission the Appellant deposed the following facts which were largely unchallenged and which gave rise to this appeal;

(i) In or about the year 1985 the late Obed Mntshali sold to the late Jacobus Christoffel du

Plessis (J. C. du Plessis) the whole farm which comprised two portions of Farm “Vlakhoek” No. 378 situate in the Shiselweni District. The first portion being Portion B of Farm “Vlakhoek” No. 378 situate in the Shiselweni District and the second portion being 14/15thshare of the remaining extent of Portion D of farm Vlakhoek No. 378 situate in the Shiselweni District. [The Property].

(ii) Because the property was always treated as one farm there was an oversight on the part of the Conveyancer instructed to transfer the property in that he only transferred Portion B of Farm “Vlakhoek” No. 378 and omitted to transfer the 14/15thshare of Portion D of Farm “Vlakhoek” to J. C. du Plessis.

(iii) Upon realizing that the second property had not been transferred to du Plessis, Obed Mntshali colluded with Maswazi Nsibande, a director of the 2nd Respondent to have the

second property transferred to the second Respondent.

(iv) J. C. du Plessis took occupation of the property and lived with his family on the second property for a period of about 7 years. He only became aware of the defect in his title when he was served with summons by the second Respondent, wherein an order for his ejectment from the property was being sought. This was under Case No. 288/1993.

(v) J. C. du Plessis defended the action and summary judgment was refused. Subsequently the 1st Respondent was joined in the proceedings under Case No. 288/1993. Despite the fact that 1st respondent was aware and affectively a party to the proceedings under Case. No. 288/1993; In the year 1996 the 1st Respondent issued a summons against the 2nd Respondent.

(vi) Again in the year 2011 the 1st Respondent instituted another action against 2ndRespondent seeking payment of a certain sum or sums of money and an order declaring this property executable [The second property] this notwithstanding the fact that Appellant in his capacity as the executor in the massed estate of J. C. du Plessis and his wife Martha Johanna Louisa du Plessis (Martha du Plessis) had an interest in the same property. Appellant applied to be joined as a party and an order was so granted.

(vii) On the 21st March 2013 high Court Case No. 288/1997 was consolidated with the proceedings under High Court Case No. 1512/2011 and the court made further orders for the holding of a pre-trial conference and set the matter down for trial on the 28th May 2013.

(viii) The pre-trial conference could not be held because Appellant's attorneys discovered that

in Case No. 288/1993 the court file had been "Cannibalized" by the removal of the Defendants plea and counter claim.

(viv) In what he alleges to be fraud, the appellant alleges that in order to short circuit the proceedings under Case No. 288/1993 the 1st and 2nd Respondents secretly settled the matter among themselves by concluding a deed of agreement in terms of which 1st Respondent is allowed to attach the second property and sell it in execution.

The Appellant also alleges that there was an order of the High Court interdicting the sale of the second property until the proceedings under Case No. 288/1993 were finalized.

(x) The order of the 21st June 2014 was erroneously granted since the same could not be lawfully granted during the subsistence of the first order of the 21st March 2013, had this

Honourable Court been made aware of the existence of the order of the 21st March 2013 it would not have granted the order of the 21st June 2013.

(xi) Appellant further submitted that if the order of the 21st June 2013 is not rescinded and set aside the massed estate which he represents will suffer prejudice as the second property would be sold in execution and the proceedings under Case No. 288/1993 be rendered a nugatory.

The court, he went on, ought to have satisfied itself as to the authority of those who signed for the Respondent, because to Appellant's knowledge, Maswazi Nsibandze who was the Architect of the confusion had passed on 4 years before and Obed Mntshali was also deceased.

(xii) As far as the sale in execution is concerned Appellant argues that the property described in the Notice of attachment is different from the property described in the Notice of Sale therefore the sale is irregular; the Deputy Sheriff has also advertised the sale of the property to take place in Mbabane and not in the Shiselweni District as provided for in Rule 46 of the Rules of the High Court. The Notice of the Sale in execution was not published in the Government Gazette as required in Rule 46 (8) (c). The Appellant made further averments relating to urgency which are however not material in this appeal as the Court *a quo* did entertain the matter.

[2] The application was opposed by both 1st and 2nd Respondents. The 1st Respondents filed what is termed a preliminary affidavit in which it raised the following points again I will paraphrase the contents of the affidavit:

(i) 1st Respondent obtained an order against the 2nd Respondent, the parties then entered into an agreement in June 2013 for settlement of the *lis inter partes*, being the debt owed by the 2nd Respondent to the 1st Respondent.

(ii) Pursuant to such order and agreement, 1st Respondent has time and again sought to exercise its rights by causing the property to be sold in execution to no avail. This is prevented by Appellant who then institutes action to stop the sale every time it is advertised; he obtains interim orders which are not confirmed. This according to the 1st Respondent is a gross abuse of the process of court.

(iii) The Applicant has failed to meet the requirements for the grant of an interim interdict. The property is registered in the name of the 2nd Respondent and such 2nd Respondent was at liberty to deal therewith as it pleases. The Appellant does not have *locus standi* and

any other right to this property or to stop the sale of the property. Appellant has failed to disclose the nature of the harm he stands to suffer or that such harm is irreparable, he has dismally failed to disclose that the balance of convenience favours the grant of the order, or that he has no alternative remedy.

(iv) 1st Respondent further stated that Appellant had failed to join the Deputy Sheriff for the Shiselweni Region and the Master of the High Court.

[3] The 2nd Respondent filed the Answering Affidavit of Winile Sibandze who stated that she was a director of the 2nd Respondent who argued in *limine* that Appellant did not have *locus standi* and consequently has no clear right to the interdict. Second Respondent further pleaded to the averments made by Appellant by denying the correctness thereof.

[4] The Court *a quo* upheld the points of non-joinder *locus standi,* and the failure to meet the requirements of an interdict and dismissed the application with costs. The Appellant has appealed to this court against the judgment of the Court *a quo* and filed grounds of appeal spanning some four pages and nine paragraphs long.

[5] The first to fourth grounds relate to *locus standi*, it being alleged that the Court *a quo* erred in holding that the Appellant had no *locus standi*, in judicio. Ground of Appeal number five complain about the finding of the court that Appellant's application was one for an interdict and as such he had failed to satisfy the requirements thereof. The sixth and seventh grounds complain about the findings of the Court *a quo on* the point of non-joinder and grounds of appeal number eight and nine relate to the finding by the Court *a quo* that the application was based on the contested court order. I shall deal with the grounds in the manner I have set them up hereinabove.

[6] The Court *a quo* found that Appellant had no *locus standi* to institute the action *inter alia* because the letters of administration issued to him by the Master of the High Court in Pretoria and sealed by the Master of the High Court in Swaziland *ex-facie* indicated that he was appointed executor only in the estate of the late Martha du Plessis.

Per Corbett J. in ***United Watch & Diamond Co. vs Disa Hotels 1972 (4) SA 409 at 415 A-B***

> ***"In my opinion, an Applicant for an order setting aside or varying a judgment or an order of court must show, in order to establish locus standi that he has an interest in the subject-matter of the judgment or order granted".***

[7] The Appellant has deposed to the fact that J. C. du Plessis and Martha du Plessis, during their life time had executed a joint will in which they expressly massed their estates. The effect of massing the estate effectively means what was hitherto a joint estate effectively becomes one. It

may be that the estate may be named after the first dying spouse. The surviving spouse is effectively left with not estate that he can separately from his/her first dying spouse, dispose of. It is common cause that both testators are now deceased; Martha du Plessis having pre-deceased her husband. Whether an estate is massed or not is a question of fact to be determined upon the proper construction of the will. See ***D'Oyly-John vs Lousad 1957 (1) SA 368.***

[8] In clause 3 the testatrix and testator provide "We Mass our estates in Swaziland and South Africa" and in Clause 3.1 "Out of our massed estate we make the following special bequests:" This shows a clear and unambiguous intention on the part of the testators to have their estate dealt with as one.

MILNE J. in D'oyly-John (Supra) at 371 A-B:

> ***"I have come to the conclusion that upon a proper construction of the joint will, there was a massing of the separate estates of the testators that both the testator and testatrix intended, in terms of Clauses 3 to 8 of the will to dispose not only of his or her own***

property of the survivor, including property acquired by him or her after the death of the first dying…"

[9] Now assuming that the Court *a quo* was correct in its finding that there was no evidence that the estates were massed; Appellant alleged that the testator and testatrix were married to each other (during their life-time) according to Civil Rites, in Community of property. This was not denied by either of the Respondents. In the absence of evidence that Martha du Plessis's estate had been wound up, then Appellant as executor thereof would have an interest in property in which J. C. du Plessis has or claims. This interest, would entitle him to institute proceedings or intervene in proceedings or give him legal standing or *locus standi.*

Locus standi has been defined as simply meaning:

"…An interest in the subject matter of the action, which gives a person the right to bring the action".

Per Otta J. in ***Swaziland Development and Savings Bank vs Martinus Jacobus Dewald Breytema N. O. &***

6 Others Case No. 20134/04 consolidated with Case No. 1276/11.

The learned Judge continued:

"[18] The term locus standi denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like "standing" or "title to sue". It has also been defined as the right of a party to appear and be heard on a question before any court or tribunal. Whether or not a party of Plaintiff has locus standi in an action is easily decipherable from the pleadings. For a Plaintiff to be said to have locus standi, the facts pleaded must establish his right and obligations in the suit. In other words the facts pleaded must demonstrate his interest in the action. It is therefore the interest in the subject matter of the action that gives the standing".

[10] Having come to the conclusion that the estate of the late Martha du Plessis and that of J. C. du Plessis were massed by the express provision in the joint will, it follows that the finding of the Court *a quo* cannot stand on this ground. The Court *a quo* could have found that, even if the estate was not massed, the Appellant would have an interest in

the estate of J. C. du Plessis by virtue of the marriage in community of Property.

[11] However, there is the other related but no less important aspect. It would appear that the Court *a quo* ignored the fact that there was pending between the parties the consolidated proceedings under Case No. 288/ 1993 and 1512/2011. Although the question of *locus standi* appears not to have been decided, it seems unlikely that a litigant may have *locus standi* in the main action and not in an interlocutory application.

[12] I now turn to the grounds of appeal relating to an interdict, I am of the view that the Court *a quo* was correct in finding that an interdict was prayed for. Prayer 4 of the Appellants Notice of Motion reads:

> ***"Accordingly interdicting and restraining the Respondents and/or any one acting under their authority from proceeding with the sale and transfer of the property in dispute under Case No. 288/1993 as consolidated with case No. 1512/2011".***

[13] The Court *a quo* found that the application before it was for an interdict and the requirements for the grant of an interdict had not been satisfied by the Appellant. The Appellant argued before us that the interdict was, but an incidental prayer and that the requirements for the grant of the relief had been satisfied. I agree with the contention by counsel for the Appellant that the interdict was a prayer incidental to the prayer for the stay of execution. The Appellant averred in his Founding Affidavit at paragraph 24.

> ***"I therefore humbly submit that if the order of the 21st June 2013 is not rescinded and set aside, the massed estate which I represent stands to suffer imparable harm in so far as the property in question which we still maintain belongs to the massed estate of the late Martha du Plessis and the proceedings under Case No. 288/1993 will be rendered nugatory"***

I must again disagree with the findings of the Court *a quo* on this ground. It appears to me that the application was one for the rescission and setting aside of the order of the court of the 21st June 2013. The interdiction of the sale was to maintain the status quo in order to keep alive the

consolidated proceedings under Case Number 288/1993. It would defy logic in my view for the court to, say grant the prayer for the setting aside of the order, but refuse the prayer interdicting sale of the property, the subject matter of the litigation in the main action.

[14] This must be considered simultaneously with the fact that the sale of the property does not seem to comply with the requirement laid down in Rule 46 Sub rules (4) and (8) (c). Sub rule (4) of Rule 46 reads:

> ***"After attachment, any sale in execution shall take place in the District in which such property is situated and be conducted by the Deputy Sheriff for such District.***
>
> ***Provided that the Sheriff…may on good cause shown <u>authorize the sale to be conducted elsewhere</u> and by another Deputy Sheriff" (My Emphasis).***

Sub rule 8 (c) reads:

> ***"The Sheriff shall… require the execution creditor to publish the said notice once in the said newspaper and in the <u>Gazette</u>…" (My Emphasis).***

[15] From the affidavits filed, the sale was advertised to take place in Mbabane, Hhohho District, yet the property is situated in the Shiselweni District. There was no evidence that the Sheriff had authorized the sale of the property away from the District in which it is located. There was also no evidence that the Notice of the sale in execution had been published in the Gazette. Even if the Court *a quo* was not satisfied that the requirements for an interdict were met, the sale stood to be set aside for failure by the 1st Respondent as execution creditor to comply with the rules.

[16] The general rule is that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. **Herbstein and Van Winsen "The Civil Procedure of the High Court of South Africa Vol.1 page 208.**Wessels J. in ***Marais and Others vs Pongola Sugar Milling Co. and Others 1961 (2) SA 698 at 702***.

> ***"Certain principals seem to have become established which govern the matter of joinder and different***

principles would seem to apply to different circumstances…"

A direct and substantial interest has been held to be an interest in the right which is the subject matter of the litigation and not merely a legal interest which is only an indirect interest in such litigation – ***Bohlokong Black taxi Association vs Interstate Bus Lines (Edms) Bpk 1997 (4) SA 635 at 644 A-B.***

[17] In terms of the rule 6 (23) of the Rules of the High Court, an applicant is required to submit his application to the Master of the High Court if the application concerns the estate of a deceased person, for the Masters consideration and report.

[18] The relief that Appellant sought in the Court *a quo* was not against any interest that the Master of the High Court may have therefore any order that the court would grant could be carried into effect without the master's interest suffering any violence. Should the application be

dismissed because the Master of the High Court has not been given Notice of the Application?

[19] It would appear to be settled law now that the effect of non-joinder in law is not to result in the dismissal of a matter. Non-joinder is dilatory in that the court may still stay the proceedings until the party is joined or given notice of proceedings. In ***Amalgamated Engineering Union vs Minister of Labour 1949 (3) SA 637 at 653***. The court suggested two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined; any order the court might make would not be *res judicata* against him, entitling him to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.

[20] Applying these tests to the facts of this matter it becomes clear that the Master of the High Court could (and this possibility is in practical terms remote) have *locus standi* to claim the same property but any order the court could make on his claim would not be inconsistent with the order sought by the Appellant. The case of the Deputy Sheriff is completely different. The Deputy Sheriff is often cited or joined more for convenience than out of necessity. There is a sharp distinction between a joinder for convenience and joinder out of necessity. The Deputy Sheriff does not have direct and substantial interest in the outcome of the proceedings separate from that of the first and/or second Respondents. On this ground this court is again not able to agree with the Court *a quo*. Courts of law are not constituted for the discussion of academic questions, and they require a litigant to have not only an interest, but also an interest that is not too remote. The same, I believe could be said for a party seeking to be joined or complaining of non-joinder.

[21] Finally, the Court *a quo* held that the Appellant's application for rescission of the order of the 21st June 2013

was ***"based fundamentally, on the order in annexure P.Z5 that interdicts the sale and transfer of the property in question"*** and having found that he relied on a non- existent order, the court found that there were no prospects of success for the application for rescission. At paragraph 23 of his Founding Affidavit, the Appellant states:

> ***"[23] I further submit that the court order of the 21st June 2013 was erroneously granted since the same could not lawfully be granted during the subsistence of the first order of the 21st March 2013. These two court orders are mutually destructive and cannot exist at the same time. Had this Honorable Court been made aware of the existence of the court order of the 21st March 2013, it would hot have granted the order of the 21st June 2013. I humbly submit that this Honourable Court cannot contradict itself to issue an order, on the one hand, that the sale of the property be interdicted pending the finalization of the matter in case No. 288/1993 and, on the other hand, issue another order declaring the property to be executable when in fact the proceedings under Case No. 288/1993 have not been finalized".***

[22] While this court makes no finding about the authenticity of the contested court order, it appears that on the face of it, the Court *a quo* may be correct in holding that the application for the rescission of Judgment is a nullity if based on an order that was never granted. Having said so, the appellant's application although not so worded is based on the existence of a fact that the court was not aware of and had such court been aware of that fact it would have been precluded from granting the order of the 21st June 2013. The "fact" relied on by Appellant is the order of the 21st March 2013. What the Court a quo over looked is that the order of the 21st March 2013 contains other matter that is not disputed; in particular that the court ordered that the proceedings under Case No. 288/1993 be consolidated with the proceedings under Case No. 1512/2011, and that all three parties in this matter are also parties in Case No. 288/1993 and 1512/2011.

[23] Once this order is made none of the two matters may be finalized independent of the other. The further effect of the consolidation of the proceedings is that there are now

three parties and notice that would ordinarily be given by one party to the other now has to be given to two parties. It was therefore not lawful for the first and second Respondents to purport to enter into an agreement of settlement and have the property, the subject matter if the consolidated Case No. 288/1993 executable without the Appellant.

[24] It was further irregular for the attorneys to set down Case No. 1512/11 before the court on the 21st June 2013 well knowing that the proceedings had been consolidated with the proceedings under Case No. 288/1993 and without giving notice to the Appellant. Appellant in his Founding Affidavit complains that he was not served with the Notice of Set Down. Now, the court on the 21st June 2013 was not aware that; Case 1512/2011 as a separate issue ceased to exist on the 21st March 2013 when it was consolidated with Case No. 288/1999; that the Appellant who was a party to the proceedings was not aware of the Notice of Set Down. Had the court been aware of this fact, it would have been precluded from granting the order prayed for.

This is the essence of rule 42 (1) (a) of the Rules of the High Court.

Rule 42 (1)

> ***"The court may in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary;***
>
> ***(a) An order or judgment erroneously granted in the absence of any party affected thereby"***

[25] White J. in ***Nyingwa vs Moolman N. O. 1993 (2) SA 508 at 5010 F***, (referring to the South African Rule 42 (1)) said:

> ***"It therefore seems that a judgment has been erroneously granted if there existed at the time an issue of fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment".***

And after quoting the Nyingwa Case Tebbutt JA in ***Stanley Matsebula vs Aaron Mavimbela Appeal Case No. 34/99*** (Unreported) page 3 stated:

"Moreover it has been held…that where a party to the proceedings has not been properly served or where service is defective, on application to rescind falls under Rule 42".

[26] It is clear that the order of the 21st June 2013 was erroneously sought and erroneously granted in the absence of a party affected thereby. It was necessary and proper to give notice to the Appellant that the Respondent had entered into an agreement and that such agreement was to be made an order of court.

[27] In the result this court makes the following order:

(1) The Judgment of the Court *a quo* is set aside.

(2) The Appeal is allowed.

(3) The order granted by the High Court on the 21st June 2013 is hereby rescinded and set aside.

(4) The consolidated Case No. 288/1993 and Case No. 1512/2011 are referred back to the High Court for trial.

(5) Costs of this appeal are to be borne by the first and second Respondent jointly and severally the one paying the other to be absolved.

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Z. W. MAGAGULA
ACTING JUSTICE OF APPEAL

I Agree

_____

K. M. NXUMALO
ACTING JUSTICE OF APPEAL

I also Agree

_____

M. LANGWENYA
ACTING JUSTICE OF APPEAL

For the Appellant: Advocate Mabila (Instructed by T. Mavuso)

For the 1st Respondent: N. V. Mabuza

For the 2nd Respondent: M. E. Simelane