IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1920/2012

In the matter between:

MAVIS LALAPHI DLAMINI (NEE SIBEKO) **Applicant**

And

ENOCK LONKONJWA DLAMINI **1st Respondent**
WESLEY MHLANGA **2nd Respondent**

Neutral citation: Mavis Lalaphi Dlamini (nee Sibeko) v Enock Lonkonjwa Dlamini and Another 262 (1920/2012) [2012] SZHC (19th December 2012)

Coram: M. Dlamini J.

Heard: 10th December 2012

Delivered: 19th December 2012

Application proceedings –interdict – definite right as essential requirement – other two requirements predicated upon clear right.

Summary: Applicant who is married to the 1st respondent in community of property and both have four major children, has filed an application interdicting 1st respondent from collecting rentals from their matrimonial home and directing the 2nd respondent, a tenant to pay rentals to her. The *raison d'etre* for such prayers is that she secured a bank loan to construct their matrimonial home now occupied by 2nd respondent in terms of a lease agreement between 1st and 2nd respondents and as she would be retiring soon, she will not be in a position to service the loan agreement.

[1] Applicant avers in her founding affidavit as follows:

The applicant and 1st respondent entered into a civil rites marriage in community of property on 26th January 1979. Four children who are now majors were born out of the marriage. Both applicant and 1st respondent purchased an immovable property in Manzini. As per the Deeds Registry Act, however, this property was registered in the name of 1st respondent. Subsequently applicant secured two separate loans with Swazi Bank in order to construct a matrimonial house on the said property. However, during the course of the marriage, the relationship between applicant and 1st respondent became strained. Applicant in order to save her life and that of her children from 1st respondent moved out of the matrimonial house in 2008. By this time, applicant avers, 1st respondent had already wedded a second "wife" in terms of Swazi law and custom. The marriage had irretrievably broken down in terms of the South African laws governing divorce, applicant submits. Applicant however consistently serviced the loans with Swazi Bank. In her reply, she states that she had to solicit a further loan in order to save the property from attachment for failure to pay rates and water bills by 1st respondent. She states further that when she

secured the loans with Swazi Bank to construct the common house, she had never anticipated a situation in which she and the 1st respondent would part ways. She had hopped that 1st respondent would assist in supplementing her income and she would service the loans without any difficulty. Now that she is retiring without such assistance from 1st respondent, she prays for an order to collect the rentals.

[2] The 1st respondent in his answering affidavit informs the court of a number of different positions. Firstly, he states that applicant should not have approached the court but rather discuss the matter with him as he is willing to take over the loan and that applicant is free to come back home. Secondly, he avers that as applicant was, through her cell-phone, called by various men, her conduct was disrespectful of him and this could not be tolerated by him. Applicant decided to leave the matrimonial home and should have known that she will face such dire consequences. Her decision to leave the matrimonial home and failure to calculate the monthly payment with her retirement period should be borne squarely by her. Thirdly, he further submits that as he is not employed, he uses the rentals to maintain himself. He alludes to his option of applying to court in order to compel applicant to maintain him. Fourthly, he submits that applicant has no right at all both in terms of ownership of the property as the title deed is in his name and the existing lease agreement under which 2nd respondent is paying rentals in respect of the house which is the subject matter of this application.

[3] When the matter appeared before me on 10th December 2012, on the basis of 1st respondent's averments that applicant should have approached him in order to resolve the matter, I ordered the parties to discuss the matter and return with a deed of settlement on 12th December 2012.

[4] However, on the return date both counsel indicated that the parties had failed to reach a consensus. It was imperative that the court decide on the merit of the case.

[5] Respondents' counsel raised points in *limine viz*. that the applicant had dismally failed to establish the requirements of an interdict and insisted that the matter should be dismissed on those grounds. Respondents strenuously contended that the applicant has failed to meet the very first requirement of an interdict. 1st respondent informs court that as the titled deed holder of the immovable property upon which the house is built, he has a clear right and certainly not the applicant. He carries this assertion further by stating that by virtue of the lease agreement between the 2nd respondent and himself, he has a right to collect the rentals as the applicant does not feature in the lease agreement.

[6] The issue for determination therefore is whether applicant has established a clear right.

[7] In **Maziya Ntombi v Ndzimandze Thembinkosi (02/12) [2012] SZSC 23 Maphalala J. A**. at page 14 propounds:

> *"…..the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear right to the subject – matter of the dispute."*

[8] It is on the basis of this *dictum* in **Maziya** that this court will adjudicate on the question of definite right and not burden itself with the other two

requirements and Counsel for respondents challenged the application on the basis of lack of this clear right only.

[9] **Hebstein and Van Winsen**, **"The Civil Practice of the High Courts of South Africa" 4th Edition, Volume 2** writing on a clear right under interdicts at **page 1457 – 1458** and citing **Minister of Law and Order v Committee of the Church Summit 1994 (3) S.A. 89 AT 98** state:

> *"Whether the applicant has a right is a matter of substantive law. … The right which the applicant must prove is also a right which can be protected. This is a right which exist in law, be it at common law or statutory law."*

[10] It is apposite to highlight that it is not in issue that the applicant and 1st respondent are married and the marriage still subsists although divorce proceedings are at an advanced stage. It is not disputed that the house which is the subject matter of the lease agreement was built by use of a loan secured by applicant. 1st respondent does not further contest that at the time when applicant secured the loan agreement, the applicant and 1st respondent were living together as husband and wife. It is further not disputed that when applicant retires, the loan agreement would be subsisting. It is further not in issue that the 1st respondent is receiving the rentals from the house built out of the loan secured by applicant.

[11] I have already alluded that my duty is to determine whether the applicant has a right to the rentals collected. In so doing, I juxtapose the case *in casu* with that of **Nokuthula N. Dlamini v Goodwill Tsela (11/20120[2012] 28 SZSC** for the reason that its facts are akin to the present one.

[12] Briefly, the facts in **Nokuthula N. Dlamini**'s case *supra* were that the appellant who when living with the respondent as lovers, had brought with her furniture which was still a subject of a hire purchase agreement. The relationship between the two was strained and appellant left behind the furniture which was still a subject of a hire purchase. When she later went back to collect it, respondent refused. Appellant moved an urgent application for the said property on the basis that she was at all material times servicing the hire purchase agreement while respondent enjoyed the comfort of the furniture. A number of allegations were raised by the respondent as is the case in the present application. Their Lordships, under the hand of **Agim J.A** and in a well articulated judgment on various diverse issues, held on the appellant's rights to the property and noted at page 18 para 30:

> "*We cannot close of our eyes to the high incidence of abuse of court processes. Parties often times do not show a readiness to admit liability even when it is obvious that they have no defence to an application or a claim."*

[13] The court then called upon every judicial officer to scrutinize parties averments with a view to concentrating on:

> " *.. fact material or relevant where the determination of a claim is dependent on or influenced fundamentally by it.* (see page 18)

[14] The court proceeded:

> "*<u>Not all facts in a case are material</u>. <u>So it is only those that have a bearing on the primary claim or issue for determination in a way</u>*

that they influence the result of the determination of the claim one way or the other." (my emphasis).

[15] For the above *ratio decidendi*, I intend to direct my attention only to those facts relevant or material to the issue at hand. I must point out from the onset that in our leading case *viz*. the **Nokuthula N. Dlamini** *op. cit.* it was alleged by the respondent as in casu that because of the existing marriage between the parties, appellant was not entitled to the furniture. The court unanimously held that such was not a "*fact relevant to the determination"* of the claim by the appellant.

[16] It is my considered view that in *casu*, the following averments are material for the determination of the claim before me:

1st respondent, in defending the claim by applicant to collect the rentals to pay off the loan, states at his paragraph 3.14 page 7.

> "*No one has done anything to interfere with applicant's rights. Applicant is paying in terms of the agreement that she made to the bank when she applied for and was granted the loan. Applicant should have foreseen such a situation when she moved out of the home, nothing has changed since then, the bank is effecting the terms of the agreement as made between it and applicant. Applicant knows what she earns and ought to make her budget around her income taking into account that she has to pay for the property as promised."*

[17] To this averment, Applicant replies at paragraph 3:

> *"In as much as I was aware that I will retire before finishing the loan I never anticipated that things will go sour between myself and the 1st respondent. All plans were based on a concrete family and hoped that I and 1st respondent will pull resources together as a family hence the risk of the loan was warranted and not based on my singular efforts but based on family efforts."*

[18] In **Nokuthula N Dlamini** *op. cit.* it was held that the right of the appellant to claim the furniture was based on the hire purchase agreement. Similarly *in casu*, the applicant has alleged that there is a loan agreement compelling her to pay for the house. Surely, respondent cannot claim a better right over the house than the person who secured its existence. At any rate she has stated in court the reason she is now incapacitated in servicing the loan. She states that she had not anticipated that the relationship between 1st respondent and herself would be strained. She needs the rentals to service the loan. It defeats all logic how the applicant can on the one hand be expected to service a loan and on the other hand not benefit from the *merx* which is the result of the loan. She must surely look up to the court to protect her from anyone interfering with her right to enjoy the fruits of her labour as it were *viz.* the loan which is under her name. As already demonstrated with authority from **Nokuthula N. Dlamini's** case, applicant's right over the house flows from the loan agreement.

[19] In the aforegoing, I enter the following orders:

1. Applicant's application succeed;

2. 1st respondent is ordered to refrain from collecting rentals from the 2nd respondent or any tenant of the house in this application;

3. 2nd respondent or any tenant is directed to pay rentals forthwith to the applicant;

4. 1st and 2nd respondents are ordered to pay cost jointly or severally, each absolving the other.

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M. DLAMINI

JUDGE

For Applicant: Mr. S. Dlamini

For Respondent: Mr. B. J. Simelane