IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 535/13

In the matter between

TSAKANE RUDOLPH SHILUBANE NO	**APPLICANT**

And

RUDOLPH DIAMOND	**1ST RESPONDENT**
BONGANI MAHLALELA	**2ND RESPONDNET**
In Re:	
RUDOLPH DIAMOND	**1ST APPLICANT**
BONGANI MAHLALELA	**2ND APPLICANT**

And

TSAKANE RUDOLPH SHILUBANE NO	**1ST RESPONDENT**
THE REGISTRAR OF DEEDS	**2ND RESPONDENT**
THE MASTER OF THE HIGH COURT	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation	**Tsakane Rudolph Shilubane NO vs Rudoph Diamond and Others (535/13) [2013] SZHC 217 (26 September 2013)**
Coram:	**OTA J**
Heard:	**23 September 2013**
Delivered:	**26 September 2013**
Summary:	**Civil procedure; Security for costs in terms of Rule 47 of the Rules of the High Court; second Applicant a *peregrinus* of this Court failing to deposit security for costs as determined by the Registrar of the High Court; application made to the Court by 1st Respondent that since both Applicants jointly brought the suit, the entire application stands to be dismissed; Held: The interest of justice demands that the suit should be dismissed only against the 2nd Applicant who failed to deposit security for costs**

OTA J.

[1] It is imperative right at this nascent stage to detail a brief history of this case, in a bid to foster a better understanding of my reasoning and conclusion reached. For ease of convenience, I will refer to the parties as they appear in the main application.

[2] The 1st Applicant Rudolph Diamond, who is an incola of this Court, jointly launched application with the 2nd Applicant who is a *peregrinus* of this Court, in a suit styled Case No. 535/13, against the Respondents.

[3] Both Applicants claimed the following substantive reliefs:-

> **"3.1 That the 1st and 2nd Respondents are hereby interdicted and restrained from effecting transfer to anyone against the prejudice of the creditors and heirs of the Estate of the late Paul Mahlaba Shilubane under Estate EH 92/2012, of the under mentioned property:**
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> **Certain: Lot No 1532 situated in Mbabane Extension No. 11 (Thembelihle Township) District of Hhohho, Swaziland.**
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> **Measuring : 600 (six zero zero) square meters.**
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> **Held: Paul Mhlaba Shilubane under Deed of Transfer No. 1022/2011 dated 20th December 2011.**
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> **3.2 Compelling and Directing the 1st Respondent in his position as Executor or any other positions he so claims, to deal with this property under the hospices of the office of the 3rd Respondent, as immovable property under the Estate of the late Paul Mhlaba Shilubane.**
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> **4. Costs of suit against the First Respondent and any other party who may oppose this application."**

[4] The 2nd Applicant being a *peregrinus* is required by law to provide security for costs in terms of Rule 47 of the Rules of the High Court, since he has no known movable or immovable property in Swaziland.

[5] Consequently, the 1st Respondent demanded for security for costs in the sum of E100,000=00 to be availed to the Registrar of the High Court before the close of business the 6th of June 2013.

[6] The 2nd Applicant was opposed to the amount of E100,000=00 as such security for costs, and in terms of Rule 47 (2), the matter was referred to the Registrar of the High Court for determination.

[7] The Registrar in his decision rendered on the 12th of June 2013, determined that a deposit of E100,000=00 should be made by 2nd Applicant as security for costs.

[8] The 2nd Applicant failed to provide the said security as determined by the Registrar. This conduct of the 2nd Applicant elicited an application by the 1st Respondent premised on Rule 47 (3) and (4) in which he sought a dismissal of the suit in the circumstances.

[9] The matter was argued before me on 9th August 2013. In my decision handed up on the 13th of August 2013, I made the following order:-

"1. That the 2nd Applicant be and is hereby ordered to give security in the sum of E100,000=00 as determined by the Registrar within 21 days of the date hereof.

2. That 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 High Court, it is hereby further ordered that if the 2nd Applicant fails to comply with the order herein and that of the Registrar after the 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."

[10] It is common cause that the *dies* of the 21 days upon which the said amount of E100,000=00 should be deposited by 2nd Applicant as security for costs has lapsed, and there has been non-compliance by 2nd Applicant with the order of the Court as he failed to deposit said security for costs.

[11] It is against a backdrop of the aforegoing facts that the 1st Respondent as Applicant, pursuant to paragraph 3 of the order recited in paragraph [9] above, launched the application instant praying for the following reliefs:-

"(a) That the entire proceedings under High Court Civil Case No 535/13 herein be dismissed.

(b) Respondents herein be ordered to pay costs of both the main and the present application."

[12] The application is opposed by the 1st Applicant alone.

[13] I ordered the parties to file comprehensive papers, thereafter, I heard oral argument from counsel on both sides on the 23rd of September 2013.

[14] Since this application hinges of paragraph 3 of my order, it is pertinent right from the outset, that I disabuse a certain misapprehension that the order requires some interpretation. The contention by 1st Respondent is that the tenor of the order is a dismissal of the entire suit. This proposition is with respect, misconceived. I say this because the order is not self executing. It states clearly that the suit will be dismissed if application is brought. By virture of the order the suit is still pending until it is dismissed. It does not stand dismissed upon the order. It requires a party to set in motion a mechanism for its dismissal. That is what the 1st Respondent has done here. So what the Court has to do is to consider the application to dismiss the entire suit.

[15] I must say that I would have gone ahead on the basis of the application to dismiss the case against all the Applicants. But I cannot do so without considering the contention of the 1st Applicant that the case should be dismissed only in respect of the 2nd Applicant who is a *peregrinus* and is required by law to provide security for costs and he has not done so.

[16] The contention of the 1st Respondent is that the entire suit and proceedings under Case No. 535/13 should be dismissed against both Applicants.

[17] Mr Mdluli who appeared for the 1st Respondent contended, that the Applicants are actually in Court with dirty hands for failing to comply with the order of Court, which conduct amounts to contempt of Court and ought to be seriously inveighed.

[18] Counsel further contended that the 1st Applicant cannot extricate himself from the impending dismissal of the entire suit. In fact, he is estopped from doing so because, he not only willingly joint himself in a suit with a *peregrinus,* but he made averments in his pleading in aid of the case for the *peregrinus* and as such cannot dissociate himself from the consequences of that step. In this event, he cannot claim that he was not aware of the

proceedings in terms of Rule 47 or that they did not concern him, so argued Mr Mdluli. Counsel further contended that, in any case, the principles of natural justice expressed in the maxim *audi alteram partem* has exceptions especially in the interest of public policy; and this is such a case, as the 1st Applicant by his own voluntary action has forfeited such right by voluntarily joining with 2nd Applicant in the suit.

[19] On the other hand, the contention for the 1st Applicant is that in the initial application which was heard on 9th of September 2013, no relief was sought against him and he therefore filed no papers and preferred no arguments in opposition of same. Learned counsel for 1st Applicant Mr Manzini therefore contended, that it is a fundamental principle of our law and natural justice that a Court cannot hear a matter and grant an adverse order against a person who is not a party to the proceedings before that Court. He urged the case of **Maria Mavimbela NO vs Sedcom Swazi and Others Civil Appeal No. 27/08.** Counsel further contended that though 1st and 2nd Applicants moved the main application jointly contending for the same reliefs, the cause of action in respect of the 1st Applicant's claim against the late Mr Paul Shilubane, is different from that of the 2nd Applicant. That since both suits

entailed the determination of similar questions they were entitled to move the application jointly in terms of Rule 10 (1).

[20] Counsel further contended that the doctrine of unclean hands raised by Mr Mdluli is inapplicable in the circumstances of this case.

[21] Having carefully considered the totality of the papers filed for and against this application, and also having taken cognizance of the submissions by counsel, I find that the 1st Applicant has an interest that he can sue to protect and payment of security for costs is not an pre-condition for such a suit since he is an incola. The cause of action by each of the Applicants is separate even though they sought the same remedy.

[22] It follows therefore, that it is possible to sever the basis of the action by the 2nd Applicant. The case can be sustained by the claim for the 1st Applicant that the estate of the late Paul Shilubane is indebted to him in the sum of E44,000=00 (Forty Four Thousand Emalangeni) being balance of sums . which 1st Applicant is alleged to have loaned to the deceased, as more particularly detailed in paragraphs 13 and 14 of 1st Applicant's founding affidavit in the main application.

[23] In coming to this conclusion, I am mindful of the provisions of Rule 10 (1) of the Rules of this Court which permits such joinder of Plaintiffs or Applicants as the case may be, in the following words:-

> ***"Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiff would, if he brought a separate action, be entitled to bring such action, provided that the relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise in each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing."***

[24] There is no doubt that the purport of this Rule of Court is that all persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to the relief. It is clear that the joinder of parties in one action as plaintiffs as well as the joinder of cause of action are permissible under the Rules. The only limitation in principle is that it is not

desirable to embark on such joinder if it may embarrass any of the parties or delay the trial of the action.

[25] *In casu*, there is no doubt that the joint claim by both Applicants is undesirable in these circumstances. In the face of the fact that the 2nd Applicant is a peregrines they should have brought separate claims in respect of the debts allegedly owed to each of them by the estate. This would have prevented the embarrassment and unnecessary delay which the Rule 47 proceedings have occasioned to the 1st Applicant. But it will not be in the interest of substantial justice to throw away the case of the 1st Applicant along with the 2nd Applicant. The 1st Applicant can maintain the suit. Therefore, the suit is competent in respect of 1st Applicant but incompetent in respect of 2nd Applicant.

[26] This is why I say that the recovery of the debt allegedly owed to the 1st Applicant can be pursued in the suit without the necessity of a fresh suit. So there is nothing wrong with severing his case from that of the 2nd Applicant and allowing him pursue his remedy in this suit. It is obvious that the Respondents will not suffer any miscarriage of justice in these circumstances.

[27] It is of paramountcy I observe here, that the liability of the Co- Applicants to costs is also joint. This is underpinned by their joint representation by one legal practitioner.

[28] In the light of the foregoing, I will dismiss the suit against the 2nd Applicant and order that the suit should continue in respect of the 1st Applicant.

[29] Dismissal of the suit is one of the consequences of the failure by a *peregrinus* to provide security in terms of the Rules. This is captured in apposite terms by the learned editors **Herbstein** and **Van Winsen in The Civil Practice of the Supreme Court of South Africa (4th ed) pages 348 – 349.**

> **"EFFECT OF FAILURE TO GIVE SECURITY**
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> **The Court may, if security is 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. This provision gives effect to the previously existing inherent jurisdiction that the Supreme Court has exercised to dismiss an action on account of failure to furnish the security ordered."**

See **Selero (Pty) Ltd & Another vs Chavier & Another 1982 (3) SA 519 (T) at 522 A-C and Excelsior Meubels Bpk vs Trans Unie Ontwikkelings Korporasie Bpk 1957 (1) SA 74 (T).**

[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 Emalangeni) 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 (Forth Four Thousand Emalangeni), should proceed to trial.

[32] Costs against both Applicants with respect to 2nd Applicant's main application as well as this application.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE .....DAY OF 2013

OTA J.

JUDGE OF THE HIGH COURT

For the Applicants: **N. Manzini**

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