



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CASE NO: 396/18

In the matter between:

NTOMBIFUTHI PHINDILE DLAMINI

1ST APPLICANT

BUSISIWE NGCAMPHALALA

2ND APPLICANT

And

NONDUMISO MAGONGO

RESPONDENT

Neutral Citation: *Ntombifuthi Phindile Dlamini and Another vs. Nondumiso Magongo (396/18) [2018] SZHC 76*

Coram: **MLANGENI J.**

Heard: **29.03.2018**

Order made: **29.03.2018**

Judgment: **18.04.2018**

Flynote: Civil procedure - application for leave to execute judgment of the court pending appeal – court has wide discretion which must be exercised judicially and with the ultimate goal to do real and substantial justice between the parties.

Guiding principles discussed – court not bound by any one principle.

Summary: Applicants, being trustees of a trust which owns residential property, obtained an eviction order against the occupant who had no lease agreement, was not paying rental and claimed to have a right of occupation arising from a love relationship that she had with the founder of the trust, who had since died.

The notice of appeal was filed within one hour of the eviction order being made and raises some grounds which have nothing to do with the judgment being appealed against.

Held: Appeal has no reasonable prospects of success.

Held, further, that the Applicant had succeeded in establishing irreparable harm to the trust.

Application granted. No order as to costs.

JUDGMENT

[1] On the 23rd February 2018 the Applicants obtained an ejection order against the Respondent, per judgment of His Lordship Justice T. Dlamini. On the same date, I am informed within the same hour that the written judgment was handed down in open court, the Respondent issued and filed a notice of appeal to the Supreme Court. The notice of appeal is prolix and comprises eight (8) grounds¹. It is a matter of passing comment that some of the grounds of appeal are matters that

¹ See pages 33-34 of the Book of Pleadings.

the *court-a-quo* did not pronounce upon², hence there is a lot to imagine about the circumstances under which the grounds of appeal were formulated. At the hearing of this application Respondent's Counsel, S.C. Simelane, just fell short of admitting that the notice of appeal and the grounds thereof were prepared in advance of the judgment. It is, perhaps, a matter of knowing, as counsel the likely outcome of your case and gearing up for the next move.

- [2] The Applicants, in whose favour the eviction order was granted, have moved the present application for leave to execute the judgment while the appeal is pending.

THE LAW

- [3] The law on this subject is well canvassed in this jurisdiction³ and other similar jurisdictions beyond the borders of this country⁴. In the recent case of **THULANI RUDOLF MASEKO v THE CHAIRMAN OF THE LIQUOR LICENCING BOARD AND ANOTHER**⁵ I had occasion to deal with a similar application and had this to say:-

“Leave to execute an order of court pending the outcome of an appeal is at the discretion of the court that is called upon to deal with the matter. The discretion has been described as general and wide. The purpose is to ameliorate or prevent further hardship that may be occasioned to a party who has judgment in his favour, by delay in execution of the order. The exercise requires striking a balance between the conflicting interests of the Applicant and those of the

² See, for instance, ground of appeal No.4, which is that “the *court-a-quo* erred in holding that the Respondent had failed to establish a claim to the property either as a common law wife and/or as a Universal Partner.” As a matter of fact the *court-a-quo* did not pronounce on this aspect in the judgment that is the subject of this appeal.

³ Swaziland Development and Savings Bank v Mchepa Chemical Industries (Pty) Ltd and Two others (1661/2011) [2016] SZHC 152

⁴ South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534.

⁵ (1198/17) [2018] SZHC 06.

Respondent, in a manner that advances justice and equity. To this end principles have been laid down for the guidance of the court in the exercise of its discretion.⁶

[4] The relevant considerations are as follows:-

4.1 prospects of success on appeal;

4.2 potentiality of irreparable harm or prejudice upon either party;

4.3 where there is potentiality of irreparable harm or prejudice to both parties, the balance of hardship or convenience.

[5] The above considerations are guidelines that have stood the test of time, but they do not need to all co-exist in order to determine the outcome of the application in one way or the other⁷.

THE RELEVANT BACKGROUND

[6] The present Applicants, as trustees of a trust that owns certain immovable property, instituted an action for the eviction of the present Respondent, together with ancillary relief sounding in money. The Respondent, as defendant, filed notice of intention to defend and the Applicants, as Plaintiffs, applied for summary judgment. The summary judgment application was opposed on various grounds as articulated in the affidavit resisting summary judgment. On the 9th August 2017 the summary judgment application was granted, save in respect of the eviction. The result was that the aspect in respect of eviction remained alive, until Justice T. Dlamini's judgment dated 23rd February 2018, in which eviction was granted, hence the appeal that has precipitated the present application for leave to execute.

⁶ See para 5 of the judgment referred to at note 5 above.

⁷ See South Cape Corporation (Pty) Ltd, supra.

[7] It is of significance that the order granting summary judgment has not been challenged in any manner, e.g. through a rescission application or whatever else. Consequently it stands. I mention this because it has a degree of relevance regarding the present Respondent's prospects of success on appeal, given that the appeal raises, in part, issues that were canvassed in the matter where summary judgment was granted.

THE GROUNDS OF APPEAL

[8] I quote all the grounds of appeal below: -

- “1. That his Lordship in the *court-a-quo* erred in law and in fact when he held that the Plaintiff has *locus standi in judicio* to sue the defendant in the circumstances of the matter before him.**
- 2. That His Lordship in the *court-a-quo* erred in law and in fact when he held that the claim for summary judgment was competent in the circumstances of the matter in so far as it included a claim for future rentals not yet due.**
- 3. That His Lordship erred in law when he held that the Plaintiffs were owners of the property and therefore could sue in respect thereof.**
- 4. That His Lordship erred in law in fact when he held that Appellant (*defendant-a-quo*) had failed to establish a claim to the property either as a common law wife and/or as a universal partner.**
- 5. That His Lordship in the *court-a-quo* erred in law and in fact when he held that the matter under case No. 587/17 between the same parties had been decided on the merits and was therefore *res judicata*.**

6. **That His Lordship in the *court-a-quo* erred in law and in fact when he held that the Appellant was precluded from raising the contentious made under case 587/17 as a defence in the action before him in so far as the matter under case 587/17 has not been decided on the merits and was therefore not *res judicata*.**
7. **His Lordship in the *court-a-quo* erred in law and in fact when he held that the Appellant (*defendant a quo*) had failed to establish a *bona fide* defence against her.**
8. **That His Lordship in the *court-a-quo* erred in law and in fact when he granted summary judgment in the circumstances of the matter before him.”**

[9] I cannot imagine anything that is more monotonous, and I have much sympathy for judges of appeal who are called upon to make sense out of melodrama such as this, which, in some cases is solely to buy time.

PROSPECTS OF SUCCESS ON APPEAL

[10] At the heart of this litigation is a residential property situated at Fairview North, Manzini. This house is owned by a trust known as “**Bhubhudla Family Trust**”. The founder of the trust, one Nqaba Dlamini, has passed on to the celestial world. During his lifetime, and now, the Respondent resides in this house, having been put there by the deceased who was her lover and, it is alleged, the two not only intended to get married but they actually treated each other as husband and wife. In the process, it is alleged, a universal partnership developed between them.

It is on the basis of the universal partnership that the Appellant refuses to vacate the house and refuses to pay rent, hence the trustees sought her eviction.

- [11] The Respondent's benefactor has died. It appears to me that privileges that she enjoyed from the deceased have passed on with him. I do not see that she can succeed in asserting claims against the trust or trustees on the basis of an arrangement that she may have had with the deceased while he was alive.
- [12] The demise of her benefactor could well be a tragic blow in her life, but it cannot translate to legal obligation now owed to her by the trust or the trustees, so as to maintain her in whatever manner. Nor can she, under any circumstances become owner of the property that is, in law, owned by the trustees of the trust for the time being.
- [13] The stark reality is that her claims in respect of the house are at best based on sentimental grounds and I am of the view that her prospects of success on appeal are not good.

IRREPARABLE HARM

- [14] The trustees submit that the trust, as owner of the property, stands to suffer irreparable harm if leave to execute is not granted. It is common cause that the property is bonded in favour of a financier, and this requires that payments be made from month to month. The current position is that such payments cannot be made because the house is occupied by the Respondent who refuses to pay rent. Neither can the property be sold in order to save the situation, because '**vacua possessio**' cannot be guaranteed so long as the Respondent is in occupation. At paragraph 24 of the founding affidavit of Ntombifuthi P. Dlamini the following averments are made:-

“Over and above the bond liability attaching to the property, there is an additional rates levy which places the property at risk of sale by public auction to recover rates. Again, the Respondent has no obligation in this regard and will simply

walk out scot-free if the municipality puts in motion the recovery process under the Rating Act of 1995.”

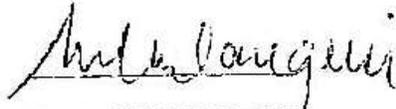
- [15] Applicants submit that the Respondent is a business woman of means, and therefore in a position to find alternative accommodation. In her papers she mentions that she operates a beauty parlour⁸. Of significance is the fact that she does not, in her papers, say that she is not in a position to afford alternative accommodation. What she does say is that she **“would have no objection if the house had to be sold to pay off the debts of the estate and as part of the winding up process”⁹**.
- [16] The situation would clearly be different if the Respondent was willing to pay rent because, according to the Applicants, such amounts could be applied in maintaining bond repayments and other costs, which would avert the possibility of foreclosure, while pertinent matters are resolved.
- [17] It is my considered view that whatever inconvenience or prejudice may be suffered by the Respondent as a result of having to move out of the property is far outweighed by the possibility that the property could be lost in the event of foreclosure or non-payment of municipal rates. The Respondent mentions that the estate of the late Nqaba Dlamini is not short of cash, but this is a matter that I cannot go into because it leads to other issues that are not before me for determination, for instance the question whether the house is estate property or trust property.
- [18] Taking all the circumstances of this matter into account¹⁰, including the reasonable inference that the notice of appeal was prepared in advance of the judgment, this pointing towards a lack of *bona fides* in the appeal, after hearing arguments on the 29th March 2018 I granted the application for leave to execute, with no order for costs, and ordered that

⁸ At para 7.3 of answering affidavit, page 60 of the Book of Pleadings.

⁹ At para 8.4 of Answering Affidavit, page 60 of the Book of Pleadings.

¹⁰ See *Rood v Wallach* 1904 TS 257, per Innes C.J. regarding the quest to do real substantial justice in each particular case.

execution be stayed for a period of 21 calendar days to enable the Respondent arrange alternative accommodation.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicants: Mr. S. Dlamini

For the Respondent: Mr. S.C. Simelane