IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No. 70/18

In the matter between:

MKHULULI DLAMINI	**Appellant**

And

DARYALI INVESTMENTS (PTY) LTD	**1st Respondent**
PHESHEYA ZWANE	**2nd Respondent**
STANDARD BANK SWAZILAND LIMITED	**3rd Respondent**
REGISTRAR OF DEEDS N.O.	**4th Respondent**
THE ATTORNEY GENERAL NO.	**5th Respondent**
REGISTRAR OF THE HIGH COURT N.O.	**6th Respondent**
BARAKA INVESTMENTS (PTY) LTD	**7th Respondent**

Neutral citation: Mkhululi Dlamini vs Daryali Investments (Pty) Ltd and Six Others *(70/2018) [2019] [SZSC] 21 (24th May, 2019)*

Coram: **S.P. DLAMINI JA**
S.B. MAPHALALA JA
J.M. CURRIE AJA

Heard: **6TH MAY, 2019**

Delivered: **24TH MAY, 2019**

Summary: *Civil Procedure – Applicant in the court **a quo** sought a declaratory order that a Deed of Sale of immovable property between the parties be declared null and void – on appeal – the court finds that there are disputes of facts – order of the court **a quo** set aside– orders that the matter be referred back to the court **a quo** to hear **viva voce** evidence – costs to be costs in the cause.*

JUDGMENT

S.B. MAPHALALA JA

[1] The High Court dismissed an Application brought by Applicant, who is now the Appellant in the present appeal, with costs in a judgment by her Ladyship **Mabuza PJ**.

[2] The Application brought by the Appellant (who was an Applicant in the court *a quo)* was for the following orders:

> **"(a) Interdicting the Respondents from alienating, selling, transferring, encumbering or dealing with the land subject herein, in any way, manner or form, pending finalization hereof;**
>
> **3.1 that prayer 3 hereof operates forthwith as an interim order pending finalization of this application.**
>
> **(b) Declaring the Memorandum of Understanding signed by the Applicant and the 1st Respondent as cancelled and of no force and effect, by virtue of the 1st Respondent's material breach thereof;**

(c) Declaring that the land subject-matter herein still belongs to the Applicant unconditionally and free of any encumbrances and/or claims by the Respondents;

(d) Directing the 4th Respondent to do all that is necessary to have the immovable property registered under the Applicant;

(e) Alternatively that the 6th Respondent sign the necessary documents to give effect to the order of this Honourable Court;

(f) That the 4th Respondent expunge all records of the purported transfer of the land from the Applicant to the 1st Respondent; and

(g) Costs of suit."

[3] The attorneys for the parties appeared before the court *a quo* advancing their arguments and at the end of the hearing the court dismissed the Application with costs, as stated above.

[4] The Appellant then filed an appeal before this Court on the 21st August 2018 on the following grounds:

"1. That the Honourable Court *a quo* erred in law and in fact in dismissing the Appellant's Application.

2. That the Honourable Count *a quo* erred in law and in fact by not declaring the Memorandum of Understanding signed by the Appellant and the 1st Respondent as cancelled and of no force and effect.

3. The Honourable Court *a quo* erred in law and in fact by not declaring that the land subject matter still belongs to the Appellant unconditionally and free of any encumbrances and / or claims by the Respondents."

[5] The attorneys for the parties advanced their respective arguments in this matter before the Supreme Court on the 6th May, 2019 and the attorney for the Appellant, when asked by the Court on whether there were disputes of fact in this matter which could not be resolved on the papers, readily conceded that there are such disputes of fact.

[6] On the other hand Mr. Nkomondze for the Respondent took the position that the dispute of facts could be resolved on the papers before Court, and further contended that they are not material disputes of fact. Alternatively he argued that in the event that it is found there are disputes of fact, the Appellant is to blame for embarking on a wrong procedure i.e. motion instead of action proceedings.

[7] The court considered the matter and issued an *ex tempore* order in view of the admitted disputes. The *ex tempore* order forms part of and must be read as one with this judgment.

[8] The conclusion of the court as per the aforesaid court order is that there are material disputes of fact as evidenced by the examples below justifying that the court *a quo* ought to have referred the matter to oral evidence as envisaged in Rule 6(18) of the High Court Rules.

[9] As already alluded to above, it became apparent at the hearing of the matter that there are a number of disputes of fact and that there were clearly errors in the papers on both sides. Firstly, according to the Respondents it is contended that the

most notable dispute of fact is the issue of the cancellation of the MOU (Memorandum of the Understanding) being the very transaction upon which the property was transferred from the Applicant to 1st Respondent. Applicant alleges that he sent a notice of cancellation of the MOU to the 1st Respondent dated the 13th November, 2016. The 1st Respondent agrees that the letter of cancellation was served upon it.

[10] Secondly, there is a material dispute of fact concerning the amount of E4 Million which was held at the disposal of the Appellant for the transfer of the property of the Applicant into the name of the 1st Respondent. The very same amount is the purchase price between the parties. This aspect of the matter therefore requires to be clarified by way of oral evidence.

[11] Thirdly, there is a material dispute of fact with regard to the area of the land being sold. The Appellant contends that whilst the area of the land is described as 7245 square metres (seven thousand two hundred and forty five square metres) he intended to subdivide and sell only a portion of this area. The Respondents contend that there was a subsequent oral agreement to sell the whole property. The Appellant denies this and alleges that there could not be a subsequent oral amendment to the MOU which had lapsed.

[12] In view of the plethora of disputes of fact, in addition to the ones already highlighted above, this Court is of the view that it cannot make a finding on the papers filed of record and confirms the findings it made in the *ex tempore order* namely that:

(i) Having perused the documents filed of record and having heard Counsel for Appellant and 1st Respondent, and the fact the matter has been pending for some time, the Court unanimously agreed to issue an order and that the reasons therefore would in due course.

(ii) The matter points to material disputes of fact which in the view of this Court, were not capable of being resolved by way of motion proceedings.

(iii) This Court is of the view that it is not necessary to consider whether the wrong procedure was adopted before the court *a quo*, as too much water has passed under the bridge and the matter be brought to finality.

[13] In view of the aforegoing the Court orders that the matter be referred back to the court *a quo* for the leading of oral evidence. To the extent that the matter is being referred to the court *a quo* for the leading of oral evidence by this Court, the appeal partially succeeds.

[14] Accordingly the Order of the court *a quo* is set aside and replaced with the following order:

"(i) The matter is hereby referred to the High Court for the leading of oral evidence;

(ii) pending finalization of the proceedings the status *quo* is to be maintained;

(iii) the proceedings in case no. 67/17 are to be held in abeyance pending the outcome of the proceedings in case no. 70/18; and

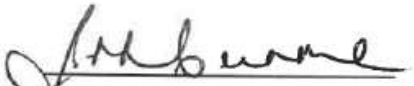
(iv) the costs to be costs in the cause."

S.B. MAPHALALA JA

I AGREE

S.P. DLAMINI JA

I ALSO AGREE



J.M. CURRIE AJA

For the Appellant: Mr. S.V. Mdladla
(S.V. Mdlala & Associates)

For the Respondents: Mrs M Nkomondze
(Nkomondze Attorneys)