



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1185/2023

In the matter between:

ESWATINI DEVELOPMENT AND

SAVINGS BANK

APPLICANT

IN RE;

DUMISA RANCHING COMPANY

(PTY) LTD

APPLICANT

AND

SIBUSISO MOTSA N.O

FIRST RESPONDENT

THE MASTER OF THE HIGH COURT

SECOND RESPONDENT

THE ATTORNEY GENERAL

THIRD RESPONDENT

Neutral citation : *Eswatini Development & Savings Bank v Dumisa
Ranching Company (Pty) Ltd & Others (1185/2023)*
[2024] SZHC 43 (15/03/2024)

CORAM: B.S DLAMINI J

DATE HEARD: 26 February 2024

DATE DELIVERED 15 March 2024

Summary: *Application for joinder of a third party in ongoing legal proceedings- Application opposed on the basis inter alia, that Applicant's interest or claim has already been determined by Trustee (First Respondent in main matter) in terms of Insolvency Act. Opposition to joinder also based on alleged failure by Applicant to render an account of all monies and assets collected against the estate of the Insolvent Mbsusi Dlamini- Requirements for joinder/intervention considered.*

Held; *The grounds of opposition to the application for joinder are without merit and are accordingly dismissed. Application for joiner granted and costs to be costs in the main matter.*

JUDGMENT

INTRODUCTION

[1] The Applicant, a financial institution registered as Eswatini Development and Savings Bank, filed an application before this Court under a certificate of urgency and prayed to be granted orders as follows;

- “1. Dispensing with the usual form and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**
- 2. Condoning the Applicant’s non-compliance with the Rules relating to form and service;**
- 3. Granting the Applicant leave to intervene as an intervening party/ 4th Respondent in the matter between *Dumisa Ranching Company (Pty) Ltd v Sibusiso Motsa N.O, The***

Master of the High Court and The Attorney General; High Court Case No.1185/32 [sic].

4. That leave to intervene having been granted, the Intervening Party be and is hereby given a period of 14 days to serve on the Applicant and file with the Registrar an Answering Affidavit.
5. Costs of suit on the scale between Attorney and own client in the event the Applicant is successfully opposed [sic].
6. Granting such further and/or alternative relief as this Honourable Court may deem fit.”

[2] This is an application within an application. There is the main application and then there is the present interlocutory application or application for joinder. The party opposing the application for joinder is the Applicant in the main matter. For convenience and easy reference, the Applicant in the main matter shall be referred to as “Applicant in the main matter” or “Dumisa Ranching Company Ltd”

and the party instituting the application for joinder or intervention shall be referred to as the “present Applicant” or “Eswatini Bank” or “the bank”.

HISTORICAL BACKGROUND

- [3] It is important to sketch a brief background to the present application. In the main matter, the Applicant (Dumisa Ranching Company (Pty) Ltd) instituted an application before this Court against the First Respondent and sought in the main, to compel the latter to pay to it the sum of **E 9,548,000.00 (Nine Million Five Hundred and Forty Eight Thousand Emalangeni)** together with interest.
- [4] The First Respondent, one Sibusiso Motsa N.O, was appointed as trustee in the insolvent estate of the late Dumisa Dlamini. The Applicant in the main matter, namely Dumisa Ranching Company Ltd, was or is the registered owner of several immovable properties in the country. On or around January 2020, Dumisa Ranching Company or Applicant in the main matter, took a decision to sell two of its immovable properties to two local companies registered as Verdant Green (Pty) Ltd and Umfomoto Ranch (Pty) Ltd. The decision by

Applicant in the main matter to sell the two immovable properties to the already mentioned purchasers was successful and the deal went through without any problem.

- [5] The Applicant in the main matter, being a registered company, has a number of shareholders. The late Mr. Dumisa Dlamini was one of the registered shareholders in Dumisa Ranching Company (Pty) Ltd. The parties to the present dispute, namely the Applicant in the main matter, and the Applicant in the application for joinder, are not agreed as to the shareholding percentage of the late Dumisa Dlamini in Dumisa Ranching Company Ltd. The importance of ascertaining the exact percentage held by the late Dumisa Dlamini in Dumisa Ranching Company arises because such percentage is to be used in calculating the payout due to the insolvent estate on the sale of the two immovable properties already referred to herein above.
- [6] Even though this fact is, to a certain extent disputed, the Applicant in the present application (Eswatini Development and Savings Bank), on learning of the sale of the immovable properties by the company to third parties, sought to have its interests considered in the whole sale

transaction. It is alleged in the application for joinder that the late Dumisa Dlamini had personal outstanding loans with the present Applicant or the bank.

- [7] In order to escape the hurdle of having the sale transaction frustrated in one way or the other, the shareholders of Dumisa Ranching Company Ltd met on the 15th July 2020 and took a resolution, amongst other resolutions, as follows;

“2. That clause 4.2 of the deed of sale dated 22nd January 2020 be amended to read as follows;

“The Seller requests that the Purchaser pays 50% of the net purchase price to the account of Dumisa Dlamini Insolvent Estate – Standard Bank Account No. 911004047551 and the remaining balance to be paid to the company bank account [seller’s bank account] held in the name of Dumisa Ranching Company (Pty) Ltd.”

- [8] In their wisdom, the shareholders of Dumisa Ranching Company Ltd acknowledged that there could be claims lodged by third parties against the shares held by the late Dumisa Dlamini in the company

emanating from the sale of the two immovable properties. In order to deal with this problem, the shareholders of the company allowed 50% of the proceeds of the sale to be held in trust by the trustee of the insolvent estate of the late Dumisa Dlamini, namely First Respondent in the main matter.

- [9] The sale of the two immovable properties was slightly above Twenty-Three and a half Million Emalangeni. Fifty percent of this amount translates to a sum of **E 11,645,000.00 (Eleven Million Six Hundred and Forty Five Thousand Emalangeni)**. This is of course after certain deductions and legal fees were paid from the proceeds of the sale. After the sale of the immovable properties, 50% of the proceeds went to Dumisa Ranching Company Ltd and the other 50% went to the trustee of the late Dumisa Dlamini as resolved by the shareholders of Dumisa Ranching Company Ltd.

THE PRESENT DISPUTE

- [10] On or around the 31st May 2023, the Applicant in the main matter instituted an application against the trustee of Dumisa Dlamini's estate, seeking to be paid the sum of **E 9, 548,000.00 (Nine Million**

Five Hundred and Forty Eight Emalangeni), being the balance of the money paid to him from the sale of the immovable properties, less Eswatini Bank's claim.

[11] According to Applicant's papers in the main matter, the trustee of Dumisa Dlamini's estate was given a mandate either by the Insolvency Act or the Master of the High Court to calculate the share percentage held by the late Dumisa Dlamini in Dumisa Ranching Company Ltd. Acting on this legal mandate, the trustee calculated the late Dumisa Dlamini's interests or shares in Dumisa Ranching Company Ltd to be 9% or 36 shares. According to Applicant in the main matter, this means the share value or money due to the insolvent estate of Dumisa Dlamini from the sale of the two properties amounts to **E 2,096,100.00 (Two Million Ninety Six Thousand and One Hundred Emalangeni).**

[12] Applicant in the main matter therefore seeks to be paid the balance sum of **E 9,548,900.00** being the money remaining after deduction of the sum of E 2,096,100.00 from the sum of E 11,645,000.00 paid to the trustee as per the company's resolution.

[13] The Applicant in the main matter contends that Eswatini Bank's claim has been ascertained by the trustee and that its claim is limited to the number of shares held by the deceased (Dumisa Dlamini) as ascertained by the trustee, namely 9% or 36 shares. The case being made in the main matter is that the amount of money equivalent to the shares held by the late Dumisa Dlamini in Dumisa Ranching Company Ltd is left with the trustee and is not part of the claim made by it to be refunded the sum of E 9, 948.900.00. It is for this reason that Applicant in the main matter vehemently opposes the application for joinder. According to Dumisa Ranching Company Ltd, Eswatini Bank has no interest in the order it seeks in the main matter since its claim is confined within the scope of the 9% shares as determined by the trustee.

[14] In its written submissions, Dumisa Ranching Company Ltd has placed reliance in the case of **Minister of Local Government v Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (TK) at 678** and contends that;

“[10] apart from showing a direct and substantial interest, a party needs to show that the application is made seriously and is not frivolous, and in addition, that the allegations made by applicant constitute a *prima facie* case or defence, albeit that it is not necessary to show that he [applicant] will succeed in his defence.”

[15] It is further argued by Dumisa Ranching Company Ltd in its heads of argument that;

“[24] Section 20 of the Insolvency Act 1955 is of application here.

Section 20 (1) holds that the effect of the sequestration of the estate of an insolvent shall be to inter alia divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him.

[25] In terms of section 20 (2), the estate is defined as:

25.1 all property of the insolvent at the date of the sequestration, including property or the proceeds

thereof which are in the hands of a sheriff or a messenger under a writ of attachment;

25.2 all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section 23.”

[16] The essence of the written submissions presented on behalf of Dumisa Ranching Company Ltd in the present application, is to say that the sum of E 9,548,500.00 does not form part of the insolvent estate of the late Dumisa Dlamini. The argument being made is that Eswatini Bank's claim is limited to the sum of E 2,096,100.00 as determined by the trustee. For this reason, the bank's application to be joined is misguided because it has no direct or substantial interest in the main application and that its interest in the main matter is not a 'serious' one.

[17] At the hearing of the matter, Dumisa Ranching Company's legal counsel placed reliance on Section 40 (2); Section 68 and Section 53 (3) of the Insolvency Act, 1955. Counsel for the company strongly

argued that the trustee of the insolvent estate made a determination of the percentage held by the insolvent estate in the company and concluded that same was 9% or 36 shares held by the deceased in the company. This fact, according to the company's counsel, was discussed in a formal creditor's meeting and there was no objection from the bank, even though the bank had representatives at the creditors' meeting.

[18] A further point relied upon by the company's counsel as fortifying its stance to oppose the application for joinder is that the bank had failed to render an account of all monies collected by it against the estate of the late Dumisa Dlamini as directed by the Master of the High Court. The point being made here is that Eswatini Bank has laid claim practically on every asset or money due to the estate of the late Dumisa Dlamini and has been doing this without rendering a proper account of all assets and monies collected by it against the insolvent estate.

[19] In response to all the issues raised as a basis for opposing the application for joinder, the bank's counsel submitted that all the issues

raised in opposition to its application are misguided and off-target as these are all issues to be properly dealt with once the bank is joined as a party to the proceedings.

[20] The bank's counsel submitted that all the cited sections of the Insolvency Act do not confer upon the trustee an exclusive and final power to make a determination of shareholding held by the insolvent estate in the company. If there is a dispute on the percentage of the shares held by the deceased in the company, this aspect of the matter must be determined first. According to the bank's legal representative, the deceased had more than 9% shares in the company. As a matter of fact, the deceased, as alluded to in the Founding Affidavit of the joinder application, held 199 shares in Dumisa Ranching Company as opposed to the 36 shares determined by the trustee.

[21] The argument on behalf of the bank was that after the order of sequestration was granted against the deceased, it was only then that the shares held by the deceased in the company were unlawfully changed or altered to represent or misrepresent a 9% shareholding in the company. Such alteration in the share structure of the company,

according to the submissions by the bank's counsel, was unlawful and invalid. This, according to the bank's counsel, is one of the many disputes that needed to be resolved prior to the determination of the main matter instituted by Dumisa Ranching Company.

[22] On behalf of the bank, it was further argued that during or around the 6th March 2023, the Master of the High Court, faced with the dilemma of ascertaining the percentage of shares held by the late Dumisa Dlamini in a related matter, issued directives as follows;

- “(i) That the matter be taken back to the High Court for an order compelling Eswatini Bank to account for the monies she received for all immovable properties sold [belonging to the insolvent estate of Dumisa Dlamini].**
- (ii) An order determining Dumisa's share-holding in all the companies where he was a share-holder.**
- (iii) Reimbursement of estate funds paid as Trustee fees for the sum of E 405,490.00 (Four Hundred and Five Thousand**

Four Hundred and Ninety Emalangeni) (A copy of the letter written to the Trustee is attached herein and marked "S")."

- [23] The directives issued by the Master, according to the bank's legal counsel, have not been complied with. The argument by the bank's representative was that they wrote to the Master and the duly appointed Trustee of the Insolvent estate to say the bank objects to the determination of 9% made by the Trustee as regards the shareholding of the deceased in the company. It was also submitted on behalf of the Applicant in the joinder application that the bank is ready and willing to render a full account of all assets and money received by it against the estate of the late Dumisa Dlamini. This, however, can only happen once the bank is allowed to join the proceedings in the main matter.

ANALYSIS AND FINDINGS

- [24] It is clear to the Court that the main ground of opposition to the application for joinder made on behalf of the bank is that the trustee has made a determination on the number of shares held by the late Dumisa Dlamini in Dumisa Ranching Company Ltd. The argument therefore is that the bank ought to pursue its claim, if any, against the

assessed sum of E 2,096,100.00 (representing 36 shares or 9%) like all other creditors of the insolvent estate.

[25] The Court was indeed shown correspondence which was submitted to the Master of the High Court in which the trustee communicates about the shareholding held by the deceased in the company . The question for determination is firstly, whether such findings by the trustee is lawful and final and, secondly, what ought to happen if one or more of the parties is not satisfied with such determination by the trustee.

[26] In a letter dated 1st April 2022 directed to the Master of the High Court, the trustee wrote as follows; “...*Dumisa had 36 shares ((9%) in Dumisa Ranching.*” It is not clear from the written correspondence where and how the trustee arrived at this conclusion. The Court notes that in one report directed to the Master of the High Court which was in reference to a creditor’s meeting held on 14th July 2020, the trustee wrote as follows;

“[8] It is therefore important that Master [sic] should make a ruling whether Dumisa has 199 shares or 36 shares for distribution purposes...”

[27] The Court has given itself time to carefully scrutinize the provisions of the Insolvency Act relied upon by the legal counsel of Dumisa Ranching Company, giving the trustee power to make a determination on such matters. The company's counsel is absolutely correct in his submissions that it is within the trustee's powers to make such a determination.

[28] The matter however does not end with the trustee's determination of a claim by a creditor. In terms of Section 45 (2) of the Insolvency Act;
"The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount owed."

[29] Since the satisfaction of the bank's claim against the insolvent estate is dependent on the percentage of shares held by the deceased in the company, it follows also that the trustee is required also embark on this exercise. According to the company's legal representative, the trustee did ascertain the percentage held by the deceased in the company. The Court is however not convinced by this observation,

more-so, because the trustee seems to have referred this aspect of the matter to the Master of the High Court as shown in the letter of the 14th July 2020.

- [30] However, assuming that the trustee did make findings to the effect that deceased held only 9% of shares in the company, the Court is asking itself how and in what manner was the bank's claim of deceased holding 199 shares in the company rejected by the trustee?. The trustee acknowledged to have received a claim by the bank to the effect that deceased held 199 shares instead of 36 shares in the company. It seems prudent and reasonable to conclude that the trustee referred this aspect of the matter for determination by the Master of the High Court. This would have been in line with Section 45 (3) of the Insolvency Act, 1955 which provides;

“If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim.”

[31] The trustee may have made a preliminary finding that the deceased had 36 or 9% shares in the company. However, being confronted with a claim that the deceased had 199 shares in Dumisa Ranching Company, the trustee appears to have referred this aspect of the matter for determination by the Master of the High Court. The Act itself is clear that in the case of a dispute, it must be the Master of the High Court who makes a final determination on any disputed claim or claims by creditors against an insolvent estate. The Master of the High Court on the other hand, has, in a similar or related matter, already directed that a Court with competent jurisdiction must be approached for assistance in determining the exact percentage held by the deceased in Dumisa Ranching Company and other companies. The ruling by the Master of the High Court, even though it was on another matter, seems to be the most prudent and practical approach, unless the parties were to agree otherwise.

[32] Having attempted to analyze the true facts of the matter on the ground, it may now be prudent to apply the principles of law as articulated by our Courts in matters of this nature. Rule 6 (21) (a) of the High Court Rules provides;

“Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event rule 10 shall apply *mutatis mutandis*.”

[33] Rule 10 of the High Court Rules on the other hand provides;

“(1) 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 plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to 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.

- (2) A plaintiff may join several causes of action in the same action.
- (3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

[34] In one of the cases referred to by the company’s counsel, namely the case of **Shapiro v SA Recording Rights Association Ltd 2008 (4) SA 145**, the Court stated the law follows;

“[12] The expression ‘entitled to join as plaintiff’ as used in rule 12 [rule 10 in our case] deserves closer attention. Coetzee J in *Vitorakis v Waif* [1973 (3) SA 928 (W) at 930 D-E] found that it refers to a person entitled, but not obliged, join with another plaintiff under rule 10. In such a case the sole

criterion would be whether the intervening party's right to the relief is dependent upon the determination of substantially the same questions of law or fact as the existing plaintiff. This approach, which finds support in Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* is criticized by the authors of Erasmus 'Superior Court Practice who are of the view that the provisions of rule 10 (1) do not apply to rule 12 and that rule 12'

'deals with the intervention in an action by persons who have a legal interest in the subject-matter of litigation between other parties that may be prejudicially affected by the judgment of the court. Such persons may be allowed to intervene as plaintiffs or defendants in the action, not because they have separate claims or because separate claims may be brought against them, but because their interests which may be prejudicially affected coincide with those of the plaintiff or of the defendant in the action.'

[35] In our jurisdiction there is also rule 12 which provides for '*Intervention of Persons as Plaintiffs or Defendants.*' This rule should not be of concern to us as rule 6 (21) specifically makes reference to rule 10 of

our High Court rules. In determining the facts of the matter, the Court in the Shapiro case (above) had this to say;

“[22] As far as the merits are concerned, there is no suggestion that the application for intervention is frivolous or is not made seriously. There was also no suggestion that the allegations made by Shapiro in the main application do not establish a *prima facie* case. That being so, Galeta, who rides on the back of Shapiro’s allegations in the main application (save perhaps for the furnishing of security), would also have a *prima facie* case.”

[36] In the present matter, can it be said that the bank has no direct and substantial interest or that its application to join the main matter is frivolous and not made seriously? This Court has spent considerable time and energy analyzing the grounds of opposition advanced on behalf of Dumisa Ranching Company in opposing the application for joinder. All of the grounds of opposition to the application for joinder are, with respect, not proper or legally acceptable grounds.

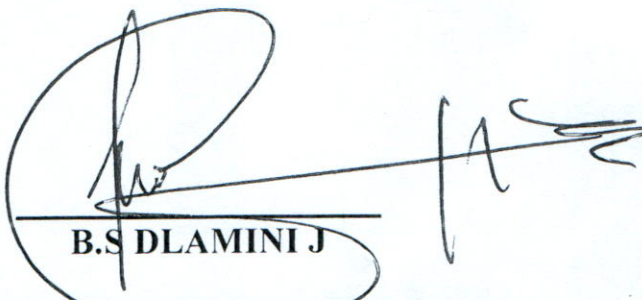
[37] The mere fact that the late Dumisa Dlamini held shares in Dumisa Ranching Company is sufficient to bring about a 'direct and substantial interest' of the bank in the main matter. Such interest is, no doubt, a serious one. The issue of degree or extent of the shareholding held by the deceased in the company is neither here nor there for present purposes. The extent or percentage of shares held by the deceased in the company is ideally an issue to be determined when dealing with the merits of the matter. By the same standard, the issue of the bank having to account for all proceeds resulting from the sale of all movable and immovable assets of the insolvent estate is an issue for the merits of the matter.

ORDER

[39] In conclusion, the Court accordingly grants the following orders;

- (a) The application to join or intervene as 4th Respondent in the main application made on behalf of the Applicant, namely Eswatini Development and Savings Bank, is hereby granted.**

- (b) The bank is granted 14 days to file an Answering Affidavit to the main application.
- (c) Costs are to be costs in the main matter.



B.S DLAMINI J
THE HIGH COURT OF ESWATINI

For Applicant/ Intervening Party: Attorney Mr. M. Magagula

(Magagula & Hlophe Attorneys)

*For Applicant/Opposing Party: Attorney Mr. S. Madzinane
(In main matter)*

(S. Madzinane Attorneys)