

THE HIGH COURT OF SWAZILAND

Civil Case No. 1684/2005

PATRICIA PHUMZILE MASEMOLA

Applicant

And

STHEMBILE DORAH SHABANGU AND OTHERS

Respondents

Coram S.B. MAPHALALA-J

For the Applicant MR. P. SHILUBANE

For 1<sup>st</sup> Respondent MR. M. MKHWANAZI

For 2<sup>nd</sup> Respondent NO APPEARANCES

For 3<sup>rd</sup> Respondent MR. J. HENWOOD

For 4<sup>th</sup> Respondent MR. C. NTIWANE

For 5<sup>th</sup> Respondent MR. M. MABILA

RULING

(On points of law in limine) (29<sup>th</sup> July 2005)

[1] For present purposes the Respondents have raised various points of law in limine to an application which was brought under a Certificate of Urgency on 11<sup>th</sup> May 2005. The Applicant in this application is seeking various forms of relief, inter alia, declaring that the Deed of Sale in respect of Portion 1009 (a portion of portion 123) of farm No. 2 situate in the Hhohho district, Swaziland is null and void and of no force or effect in as much as it does not comply with the provisions of Section 31 of the Transfer Duty Act, 1902 as amended; compelling the Registrar of Deeds to cancel Deed of Transfer No. 641/2004 and Mortgage Bond No. 756/2004; and costs of suit against the Respondents jointly and severally the one paying the other to be absolved.

[2] The parties have filed the required affidavits opposing the granting of the above-mentioned relief and thus joining issue with the Applicant. The 1<sup>st</sup> Respondent has filed a Notice to raise points in limine found at pages 28 to 30 of the Book of Pleadings. The said points read in extenso as follows:

1. Ad Jurisdiction

The Founding affidavit of the Applicant contains no allegations to show that the above Honourable Court has jurisdiction to hear the matter and grant the sought orders. In other words, the Applicant has failed in her Founding affidavit to make allegations to show that the court has jurisdiction to hear the application and grant the order that she seeks.

2. Ad Urgency

It is not clearly justified on the papers why the matter has been brought on an extremely urgent basis and the Applicant has not made a case justifying the urgency therefore failing dismally to satisfy the requirement of Rule 25 (b) of the Rules of Court. This matter is not urgent because the Founding affidavit does not fully address the requirements of Rule 25 (a) and (b).

3. Ad Joinder of the Attorney - General

The application is totally defective for the non-joinder of the Attorney - General as a representative of the 2<sup>nd</sup> Respondent in these proceedings yet he is a legal representative of all Government departments and Government officials acting in their capacity as such.

#### 4. Ad Enrolment

The Applicant has failed to comply with Rule 6 (26) of the Rules of Court in that while the 2<sup>nd</sup> Respondent is an officer of Government acting in such capacity, and cited herein as Sueli has not been given fourteen (14) days within which to file a Notice of Intention to Oppose and further fourteen (14) days to file Opposing affidavits. The court has neither authorized a shorter period of time nor ordered such shorter period of time.

5. Ad Election

The application should be dismissed in that it cannot be sustained because an application based on the same subject property is pending before this Honourable Court under Case No. 3600/2004 wherein the Applicant elects to demand the proceeds of the sale of the property (to the 1<sup>st</sup> Respondent) from the 4<sup>th</sup> and 5<sup>th</sup> Respondents. The application which heretofore now challenges the legality of the sale and transfer contradicts the earlier application electing to pursue a benefit from the sale and transfer of the same property. For this reason the application should be dismissed.

The 1<sup>st</sup> Respondent accordingly prays that this Honourable Court upholds the points in limine and dismiss the application with costs.

[3] The 3<sup>rd</sup> Respondent has also raised a point of law in limine found at page 85 of the Book of Pleadings as follows: "

3.1 The Applicant has instituted the present proceeding serving before court on an urgent basis.

3.2 The alleged basis of urgency is set out at paragraph 11 of the Applicant's affidavit. The 3<sup>rd</sup> Respondent submit that the Applicant has failed to comply with the provisions of Rule 6 (25) by setting out fully the reasons why she alleges that the matter is urgent and why it cannot be dealt with at a hearing in due course".

[4] Mr. Ntiwane for the 4<sup>th</sup> Respondent contended simply, that the fact that the parties have filed all their opposing affidavits does not mean that the issue of urgency cannot be dealt with at this stage.

[5] The 5<sup>th</sup> Respondent has also raised points of law in limine found at pages 33, 34 and 35 of the Answering affidavit of attorney Mr. Mabandla J. Manzini. The point of law in limine reads *ipsisima verba* as follows:

## In limine

1.1 On or about the 8<sup>th</sup> November 2004, the Applicant herein caused to be sued out of the above Honourable Court a Notice of Motion (High Court Case No.

3600/04) in terms of which she sought the orders which are outlined therein. I annex hereto a copy of the said Notice of Motion marked annexure "MJM1". 1.2 It will be noted from the Notice of Motion that the Applicant primarily sought an order compelling me, as the 1<sup>st</sup> Respondent in the matter, to pay her an amount of E60, 241-13 (Sixty Thousand Two Hundred and Forty Emalangenzi Thirteen Cents).

1.3 In terms of the Applicant's Founding affidavit my obligation to pay her the aforesaid amount arose from the sale of her immovable property to Sthembile Dorah Shabangu (the 1<sup>st</sup> Respondent in the present proceedings). The Applicant alleged that the said amount was part of the purchase price and I was refusing to account to her in respect of the same.

1.4 As will appear from annexure "MJM1" the application is still pending before this Honourable Court and is yet to be finalised. The Applicant is actively pursuing this matter and has not made any indication that she is withdrawing the same.

1.5 It is submitted that the present application is ill-conceived and should be dismissed because:

a) Under Case No. 3600/04 the Applicant seeks to enforce the provisions of the contract of the sale of her immovable property by seeking payment of the purchase price (or part thereof as the case may be). In this application she has neither contested the validity of the transfer of the sale.

b) Under the present application the Applicant seeks to cancel the very same contract of sale whose proceeds she seeks to have paid under Case No. 3600/04.

c) In the circumstances the Applicant seeks to exercise two inconsistent rights which are mutually destructive. By instituting an action under Case No. 3600/04 and the relief sought therein, the Applicant made an election and should be bound by it. The Applicant cannot have it both ways.

[6] In summary therefore the points of law in limine raised fall under the following headings'.

- (I) Ad urgency
- (ii) Ad jurisdiction
- (iii) Ad joinder of the Attorney General
- (iv) Ad enrolment
- (v) Ad election

[7] Before addressing these points I wish to put it on record that some of these points were abandoned by Counsel when the matter came for arguments. Mr. Mkhwanazi for the 1<sup>st</sup> Respondent did not pursue the point on urgency, the issue of enrolment and the issue of election. Mr. Henwood who appeared for the 3<sup>rd</sup> Respondent did not pursue the point he had raised that of urgency stating that the issue has been overtaken by events and he thereafter abandoned the point. Mr. Ntiwane for the 4<sup>th</sup> Respondent pursued the point of urgency. Mr. Mabila for the 5<sup>th</sup> Respondent did not pursue the point on urgency but vigorously argued the point of election. Therefore I shall address the remaining points sequentially as i) urgency, ii) jurisdiction, iii) joinder of the Attorney General and iv) election, thusly:

i) Urgency.

[8] The point raised in this regard is that it is not clearly justified on the papers why the matter has been brought on an extremely urgent basis as the Applicant has not made a case justifying the urgency therefore failing dismally to satisfy the requirement of Rule 25 (b) of the Rules of Court. This matter is not urgent because the Founding affidavit does not fully address the requirements of Rule 6 (25) (a) and (b). It would appear to me that Mr. Henwood for the 3<sup>rd</sup> Respondent is correct that this point has been overtaken by events. It would be merely academic to address this issue any further at this stage. This application was initially set down on the 16<sup>th</sup> May

2005 at 9.30am and it appeared before me on the 25<sup>th</sup> May 2005 where it was further postponed to the 7<sup>th</sup> June 2005 and no point as to urgency was raised on those dates. It is my considered view that the filing of papers can only be with regard to addressing the contents of the Founding affidavit, as the raising of a point in limine against urgency would not have required the filing of any papers. I further agree in toto with the submissions made by Mr. Shilubane in this regard and his reliance on the case of South African of 21<sup>st</sup> Century Fox Films vs Black Films J 982 (3) S.A 382 at 586. Therefore this point in limine ought to fail.

ii)Jurisdiction.

[9] Mr. Mkhwanazi appearing for the 1<sup>st</sup> Respondent contended that the Applicant has not established that this court has jurisdiction to hear this matter as it was held in the Full Bench case of the High Court in Swaziland Federation of Trade Unions et al vs Chairman, Constitutional Review Commission et al - Civil Case No. 3367/2004 which relied on the judgment by Masuku J in the case of Ben M. Zwane vs The Deputy Prime Minister and another - Civil Case No. 624/2000. These two cases relied on what is said by the authors Herbstein and Von Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition at page 364 and Erasmus, Superior Court Practice at B - 37 to 38. The principle stated in these legal authorities is that factual allegations relating to jurisdiction ought to ex facie appear in the Applicant's Founding affidavit. The argument for the Respondents in this case is that none has been canvassed in the Founding affidavit of the Applicant and therefore the application stands to be dismissed on this ground.

[10] On the other hand Mr. Shilubane contended for the Applicant has made the necessary averments to show that the court has jurisdiction for example, all the parties in this matter reside within the jurisdiction of this court. He further relied on the provisions of the Swaziland Constitution in Section 104 (1) which proclaims that the High Court shall be a superior court of record and shall have (a) unlimited original jurisdiction in civil and criminal matters. He furthermore relied on what is said by the author, Newall's Law and Practice of Deeds Registration 2<sup>nd</sup> Edition at page 30 as follows:

"No act in connection with a registration in the Deeds Registry shall be invalidated by a formal defect, whether such defect occurs in the deed passed or registered, or in a document upon the authority of which the deed has been passed or registered or which is required to be produced in connection with the passing or registration of the deed, unless a substantial injustice has by that act been done which in the opinion of the court cannot be remedied by an order of court".

[11] He further cited two cases that of *Cassim vs Menam Mosque Trustees*, 1917 A.D. 154 at page 163, *Bryten Bench vs Frankel* and another 1913 A.D. 390 at 401 and what is stated by *Herbstein (supra)* at 364 as follows:

"If the court is not satisfied on the facts stated in the application that it has jurisdiction, it will not entertain the proceedings".

[12] The question of the High Court jurisdiction was dealt with extensively by the Full Bench of this court in the case of *Swaziland Federation of Trade Unions, et al vs Chairman, Constitutional Review Commission (supra)* where the court made the following authoritative pronouncement; and I quote:

"From the judgment of Masuku J, it is clear that what needs to be stated are the necessary factual allegations relating to jurisdiction. In other words information or facts pleaded indicating that the court has jurisdiction. As if an after-thought, the first Applicant blandly states in paragraph 28 of his affidavit that "this court has jurisdiction to deal with the matter". What the textbooks do not say is that there merely must be a statement that the court indeed does have jurisdiction. There is a distinction between allegations of fact indicating that the court has jurisdiction and a statement that the court has jurisdiction. There is no statement of facts on which it is averred that this court does have jurisdiction, nor even a bland legal conclusion of jurisdiction".

[13] In the present case no factual allegations relating to jurisdiction has been made, whatsoever. The only mention of the jurisdiction of the court is found in the Heads of Argument by Applicant's Counsel at paragraph 2.1, 2.2 and 2.3 thereof. However, following what is said by *Herbstein (supra)* at page 346 I am satisfied on the facts stated in the application that the court has jurisdiction to entertain the proceedings. All the parties in this matter reside within the jurisdiction of this court. I must mention though in passing that Counsel for the

Applicant is advised in drawing up such papers to follow what was said in the Full Bench decision of Swaziland Federation of Trade Unions et al (supra). In the final analysis, therefore as regards this objection I find that it cannot be sustained.

iii) Joinder of the Attorney - General.

[14] It is contended in this regard that this application is totally defective for the non-joinder of the Attorney - General as a representative of the 2<sup>nd</sup> Respondent in these proceedings yet he is a legal representative of all Government Departments and Government officials acting in their capacity as such. The court was referred to Section 3 of the Government Liabilities Act No. 2 of 1967.

Section 3 thereof reads as follows:

"In any action or other proceedings which are instituted by virtue of Section 2, the Plaintiff, the Applicant or the Petitioner, as the case may be, may make the attorney the nominal Defendant or Respondent and in any action or other legal proceedings by Government, or any Minister, the Attorney - General may be cited as the nominal Plaintiff or Applicant, as the case may be".

[15] It is clear from the above that the Attorney-General may be cited only on claims against Government in terms of Section 2 thereof. In the instant case no claim against Government has been made under the said Section and therefore the provisions of the Government Liabilities Act do not apply to the facts of this case. I agree with Mr. Shilubane in this regard that it was not necessary to cite the Attorney-General in these proceedings because Government has no direct and substantial interest in the matter. Therefore the point of law in limine in this regard ought to fail.

iv) Election.



[16] The argument under this point of law in limine was vigorously pursued by Mr. Mabila that the application should be dismissed in that it cannot be sustained because an application based on the same subject matter is pending before this court under Case No. 3600/2004. In that case the Applicant elected to demand the proceeds of the sale of the property (to the 1<sup>st</sup> Respondent) from the 4<sup>th</sup> and 5<sup>th</sup> Respondents. Presently, the Applicant now challenges the legality of the sale and transfer and this contradicts the earlier application thus electing to pursue a benefit from the sale and transfer of the same property. It would appear to me in this regard that Mr. Shilubane's submissions are sound as they are stated in the Replying affidavit. Applicant is not barred from instituting the proceedings because the proceedings in Case No. 3600/2004 have now been withdrawn. Therefore this point of law in limine cannot succeed.

[17] In the result, for the afore-going reasons the points of law in limine raised by the Respondents are dismissed and cost to be costs in the course. The matter to proceed on the merits.

S.B. MAPHALALA

JUDGE