



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 20/2014

In the matter between:

SIMPHIWE LINDELWA MNGADI

Applicant

vs

GCINAPHI NXUMALO N.O. & 7 OTHERS

Respondent

Neutral citation: *Simphiwe Lindelwa Mngadi vs Gcinaphi Nxumalo & 7 Others (20/2014) [2014]SZHC 45 (21st March 2014)*

Coram: **MAPHALALA PJ**

Heard: 11th March 2014

Delivered: 21st March 2014

For Applicant: Mr. M. Ndlovu

For Respondent: In absentia

Summary: (i) *Application proceedings – referral to oral evidence – Applicant seeking setting aside of “deed of transfer” on the*

basis of fraud and non-compliance with section 51 of the Administration of Estates Act No.28 of 1902.

- (ii) The Respondents have not filed any opposition to the Application.*
- (iii) After hearing the evidence of the Applicant the court granted the order in terms of the Notice of Motion.*
- (iv) This judgment outlines the reasons of the court in ordering as it did an order in terms of the Particulars of Claim with costs.*

JUDGMENT

Introduction

- [1] This Application appeared before this court on 11th March 2014 where I heard *viva voce* of the Applicant as directed by this court on the 3rd December 2013. The Respondents have not filed any opposition in accordance with the Rules of this Court. Then this court heard the evidence of the Applicant as aforesaid and granted the Application in terms of the Notice of Motion and stated that fuller reasons for granting the order as sought.
- [2] The attorney for the Applicant has filed very comprehensive Heads of Arguments as he usually does before this court and I am grateful.

[3] The Applicant in this Application sought an order in the following terms:

“1. *Setting aside the Transfer and Registration – under Deed of Transfer 420/2008- of certain immovable property described as:*

Certain: Lot Number 518 situate at Ngwane Park Township, Manzini Region, Swaziland

Measuring: 2325 (two three two five) square metres

Effected from the name of Vusi Nhlanhla Mngadi into the name of Patricia Thuli Mngadi on the 4th June 2008;

2. *Immediately reverting title of the said fixed property described in Order 1 above into the name of Vusi Nhlanhla Mngadi;*

3. *That, and immediately thereafter (upon occurrence of prayer 1 and 2 above), the 5th Respondent take the appropriate and necessary procedural steps at seeing to the proper and lawful liquidation and distribution of the asset and fixed property described above (1) under the estate of the said Vusi Nhlanhla Mngadi registered as estate late Vusi Mngadi EM 219/96;*

Or/and in the alternative to prayer 3 above

3.1 *Further that and upon the occurrence of Order (1 and 2) above the 5th Respondent take all appropriate and necessary steps at seeing to the proper and lawful*

liquidation and distribution of the asset and fixed property described above (1) under the estate of the said Vusi Nhlanhla Mngadi registered as Estate Late Vusi Mngadi EM 219/96 as per the approved liquidation and distribution account under the said Estate EM 219/96 dated the 19th February 2007.

4. *That the 7th Respondent by hereby authorized to sign all necessary deeds and documentation necessary to give effect to Orders 1, 2 and 3 above;)*

[4] The 1st and 2nd Respondents, one Gcinaphi Nxumalo and Nokuthula Malinga respectively are cited herein in their capacity as joint Executrix dative to the Estate of the Applicant's mother (who is since deceased). The 4th and 5th Respondents of one Elizabeth Dlamni and Charity Mathunjwa respectively are cited herein as beneficiaries, by virtue of legal adoption by Applicant's mother and in so far as prayers sought affect the Applicant's mother's estate. These parties were personally served with the Application and they elected not to oppose the Application.

The evidence of the Applicant

[5] The Applicant gave oral evidence, under oath, and stated that she was the sole biological child born of wedlock in community of property by one

Vusi Nhlanhla Mngadi and one Patricia Thuli Mngadi. She handed a copy of her Birth Certificate which was marked as exhibit “1A”. A copy of her parents’ Marriage Certificate was also handed into the court and was marked as exhibit “A2”.

- [6] It was the unchallenged evidence of the Applicant that during her father’s lifetime her biological father, the said Vusi Nhlanhla Mngadi was the registered owner of certain immovable property described as:

*“Certain : Lot Number 518 situate at Ngwane Park
Township, Manzini Region, Swaziland
Measuring : 2325 (two three two five) square metres*

- [7] A copy of this Title Deed was also handed in by the Applicant and marked as exhibit “A3”.

- [8] The Applicant further testified that her biological father, the said Vusi Nhlanhla Mngadi passed away interstate on the 19th October, 1996, survived only by the Applicant and her biological mother the latter was duly appointed by the Master of the High Court as Executrix dative to the Applicant’s father’s estate which was duly registered under EM 219/1996. A copy of her (Applicant’s mother) Letters of Administration

were duly handed in by the Applicant to the court and marked as exhibit “A4”. She testified furthermore that her mother then drew up a distribution of a liquidation account in accordance with section 51(2) of the Administration of Estate Act No.28 of 1902 which was duly approved by the office of the Master of the High Court on 19th February, 1997.

- [9] It was the Applicant’s evidence that her biological mother, the said Thuli Mngadi did on the 9th November, 2011 passed away and upon her death the 1st and 3rd Respondents were appointed as joint Executrix dative to wind up of her estate:

“It was Applicant’s evidence before this court further that while attempting to make a follow up concerning the finality of both her parents estates she did come across some glaring and with respect, fraudulent and highly prejudicial irregularities, that have precipitated the essence of her moving the application. These were formulated by the Applicant in the following terms:

- (a) *Applicant states that, and in the first instance, notwithstanding the **Final and Approved Distribution and Liquidation Account** relating to her father’s estate, it would seem, with the greatest of respects, her biological mother – and as Executrix Dative to applicants fathers estate – somehow referred to in the*

notice of motion transferred into her (applicants mother's) personal name and to the applicants utmost complete exclusion and prejudice. Applicant stated under oath that she never consented to the same. A copy of the Deed of Transfer – into applicant's mothers' name – and which deed of transfer is sought to be impugned herein – was handed in by the applicant as part of her evidence and marked A6.

(b) Applicant stated further that having instructed her present attorneys, around December 2013, to conduct a Deeds Search to educate herself as to how such transfer into her mother's name came about, she learnt with great shock, that the same was on the strength of an alleged "written agreement" she supposedly signed waiving her rights to the fixed property in her mothers' favour. A copy of this alleged "memorandum of agreement" was handed in by the Applicant as part of her evidence before court and was marked A7.

(c) It was the applicants' evidence herein that she has never, at any given point in time material hereto, signed the alleged "memorandum of agreement". She further denied – and under oath – up until its exhibition to her by her attorneys after conducting the said Deeds Search, knowledge of it. Applicant stated further in her oral evidence that she was not even in Swaziland at the time she allegedly to have "signed"

(at Mbabane on the 20th May 2008) and she stated that she was at University in Pretoria – TUT – South Africa at such time.

(d) Applicant further gave oral evidence to the effect that she was an adult major at such time and had not given her mother any authority to execute any document(s) on her behalf. In short applicant denied ever signing the said document on the strength of which transfer of the fixed property into her mother's name was affected. She states that this was simply an act of fraud. It was applicants evidence that at no point in time has she ever relinquished her legal birthright to inherit as an ab intestatio heir to the estate of her late father.

(e) Applicant states that this was simply fraud and such transfer into her mother's personal name should be set aside as such. It is the Applicants evidence that she had a natural right to inherit, and a sole natural offspring, from her father's estate and that her mother's fraudulent transfer eroded her rights to inherit from her father. It is as a result of the same that she seeks that such fraudulent transfer be set aside.

[10] Further evidence is outlined in paragraph (f) to (g) of the Applicant's Heads of Arguments.

The court's analysis and conclusion thereon

[10] Having considered the oral evidence of the Applicant and the arguments of the attorney for the Applicant, I found that the Applicant was a reliable witness and her evidence could not be faltered in the circumstances. The court is therefore inclined to find in her favour therefore, having heard her oral evidence and perused the documents and/or supporting her assessing the court finds in favour of the Applicant that indeed the transfer of the fixed property into her mother's name was entirely improper and irregular in the circumstances regard being had to the consent from the Applicant concerning such transfer into her mother's name.

[11] In this regard I agree with the Applicant' argument that this was clearly a fraudulent act and transfer which totally overrides the Applicant's rights to inherit *ab intestatio* from her biological father as such, this court sets aside such fraudulent transfer.

[12] I also agree with the Applicant's arguments at paragraph [18] of the Heads of Arguments of the attorney for the Applicant.

[13] In the result, the above are the reasons for the order I granted on 11th March 2014 granting an order in terms of prayers 1, 2, 3 and 4 of the Notice of Motion.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE