



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1375/2022

HELD IN MBABANE

IN THE MATTER BETWEEN

BETHULISILE GULE (N.O)

APPLICANT

AND

NATHANIEL MANDLA GULE (N.O)

1ST RESPONDENT

BONGANI GULE (N.O)

2ND RESPONDENT

MASTER OF THE HIGH COURT

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

**NEUTRAL CITATION: BETHULISILE GULE (N.O) Vs
NATHANIEL MANDLA GULE (N.O) &
3 OTHERS (1375/2022) SZHC – 233
[27/10/2022]**

CORAM: B W MAGAGULA J

HEARD: 30/09/2022

DELIVERED: 07/11/2022

SUMMARY: *Civil Law – Eviction brought by an Executor of an estate against the 1st and 2nd Respondents in their capacities as Executors of the estate late Hermon Gule – A counter claim filed on the basis that the late Hermon Gule who was the son of the late Wilson Gule who the Applicant represents, is the true owner of the property - Section 31 of The Transfer Duty Act considered.*

CONSIDERED:

In what circumstances is a counter claim to stay motion proceedings pending the consideration of action proceedings competent – Eviction – Despite of that – Ownership of immovable property.

HELD: *Applicant’s application succeed with costs.*

JUDGMENT

BACKGROUND FACTS

[1] The Applicant is before court in her official capacity as the executor of the estate of her late father, Wilson Skomu Gule. It is alleged the deceased during his lifetime, was the owner of certain immovable being LOT 230, Pigg’s Peak Township. It was registered in his name on the 10th of March 1975.

[2] The 1st and Respondents are the grandsons of the late Wilson Skomu Gule, by virtue of being sons to the late Hermon Gule, who was the biological son of the late Wilson S. Gule. This means the late Herman Gule was a biological brother to the Applicant. As it will play out in the course of the judgment, in as much as the Applicant and the late Herman Gule were siblings, they were born from different mothers. Their father, the late Wilson Gule was a polygamist of note, during his lifetime.

[3] In essence, the Executor is desirous of the following orders from the court.

3.1 Declaring the Estate late Hermon Sambo Gule as a lawful owner of Lot 230 situated at Pigg's Peak.

3.2 Ordering the 1st and 2nd defendants to register the title of the property to the name of the Estate Late Sambo Gule on the condition that the estate pays an amount equivalent to ½ share to the estate late Gladys Tobhiya Gule (nee Dlamini).

3.3 Directing the Master of the High Court to include the property in question in the liquidation and distribution account of the estate of the late Wilson Skomu Gule.

THE APPLICANT'S CASE

[4] The Applicant's case hinges on the following arguments:-

4.1 The property belongs to the deceased as depicted by the Deed of Transfer.¹ It does not belong to Make Gladys Dlamini. The latter has her own homestead at Mshingishingini, Hhohho District. Furthermore, there are common cause facts which show that the property does not belong to Gladys Dlamini. These facts have not been denied by the Respondents and as a consequence they are admitted. These facts are as follows:

4.1.1 The deceased whilst still alive, acquired a piece of land in Pigg's Peak, namely, Lot230, Pigg's Peak Township (Hereinafter referred to as the "property") in the early 1950s. It was not under title deed at that time. He built a house on the property. The property was converted to title deed property sometime in 1975².

4.1.2 The deceased and his two other wives at that time, being Make Gladys and Make Thandeka Mthethwa stayed together on the property at Pigg's Peak. This was in the late 1950s to mid-1960s. These two wives shared the same house with the deceased and their children³.

1 See page 37 of the book of pleadings

2 See page 8 of the book of pleadings, paragraph 5.2

3 See page 9 of the book of pleadings , paragraph 5.6

4.1.3 With the passage of time, the transport business which the deceased was operating became economically untenable. It was at this point that the deceased decided to relocate to Mshingishingini and establish two homesteads there, with the intention of venturing into subsistence farming. The property at Pigg's Peak was converted into a commercial venture, so as to generate income for the whole family. A grocery shop was opened and flats for rental were constructed⁴.

4.1.4 One of the deceased wives, Gladys Dlamini died in 1977, having been sick for a while. It is alleged her night vigil was held at her homestead at Mshingishingini.⁵

4.2 The above Honourable Court in 1991 in a case involving the deceased being **Wilson Skomu Gule v Ora Dlamini, Hermon Sambo Gule**⁶ stated as follows:

As between the parties in these proceedings, the claims of the 1st and 3rd Respondents to resist the orders sought on the basis that Lot 230, or some interest therein, forms part of the estate of the late Gladys Gule, do not in my view lie.

4 See page 9 of the book of pleadings , paragraph 5.7

5 See page 12 of the book of pleadings , paragraph 5.15

6 High Court Case No 735/1991 page 52 of the book of pleadings

4.3 The Applicant argues that it is crystal clear that the property does not belong to the estate of Gladys Gule. This is a finding of fact made by the above Honourable Court under case number 735/1991.

[5] The Applicant also argues that it is common cause that the deceased had business dealings with a certain John Shongwe. The following facts have been admitted;

a) The rental of the shop

b) The rental of the transport permit

c) The sale of the Mercedes bus by Shongwe from the deceased.

[6] It is argued that the above facts support the Applicant's contention that the Toyota van the deceased received from John Shongwe, was not payment of a loan, but a payment for the value or benefit in respect of the above, which Shongwe received from the deceased.

[7] It is further submitted on behalf of the Applicant in response to the Respondents contention that there was a meeting where the deceased gave the late Hermon Gule the property. There is no such agreement. This is based on the fact that there was no such meeting where the agreement was concluded and there was no compliance with the law. Furthermore, the

specific terms of the agreement have not been pleaded and the allegations of sickness are unfounded.

- [8] The following is pleaded by 1st and 2nd Respondents in respect of the meeting where the alleged agreement was made;

It was my grandfather who initiated a meeting with the surviving children of Gladys Dlamini to the exclusion of one Joseph Gule who was always residing in Mbabane.

Present in the meeting was my father and Daniel Gule in front of his wife Lomakhisimusi Mkhonta⁷.

- [9] The Applicant argues that the above is questionable in the following respects:

- 9.1 There is no date of the alleged meeting;
- 9.2 There is no exact place of the alleged meeting, this is fundamental as the deceased had many homesteads;
- 9.3 The people present in the alleged meeting, have not been mentioned; and the time of the meeting has not been stated.

- [10] It is also the Applicant's contention that the cession of the loan agreement is questionable for the following reasons:

⁷ See page 89 of the book of pleadings, paragraph 11

- 10.1 The terms of the loan are not clear;
- 10.2 The monthly instalment of the loan is not stated;
- 10.3 The duration of the loan is not stated;
- 10.4 It is not stated how much was paid by the deceased in total before Hermon took over is not stated;

10.5 How much was paid by Hermon in total is not stated, whether he paid the debt in full or not;

10.6 The date of the agreement is not stated; and

10.7 The witnesses to the agreement are not mentioned.

[11] The Executor further argues that, in the previous decided case the late Hermon Gule sought to rely on a written document, yet in the present proceedings, an oral agreement is relied on. On this contradiction alone, Applicant argues that it is clear that there was no such agreement, either in writing or orally.

[12] The other gravamen of the Applicant's argument is premised on Section 31 of the Transfer Duty Act⁸ which provides as follows:

No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties or by their agents duly authorized in writing.

[13] **The thrust of the legislation is that, there must be a written Sale agreement pertaining to immovable property. In the present matter, the Applicant argues that there was no written agreement between the parties. Even if there was a verbal agreement as it is alleged, the Applicant contends that there was no compliance with Section 31 of the Transfer Duty Act. The ownership of the property still vests on the deceased. The existing Deed of Transfer is the only acceptable proof that the ownership of property belongs to the deceased and not Hermon Gule.**

⁸ 1902

[14] The Applicant also contends that the sum of **E30, 000.00 (Thirty Thousand Emalangeni)** was never used to pay for the deceased medical bills. There is no detail on how this bill came about and made up of. There is no proof of medical bills. The Court was referred to the case of Stephnee Patricia Snyders (Nee Bennett) v Estate Late Dick Richard Bennett and Others⁸ which states as follows;

No evidence of his illness was adduced by the Applicant. Surely the question of person's health or ill-health, as the case may be, is one that is best settled through medical evidence. To make a bald statement falls far short of the minimum threshold. There is not enough evidence before the Court to warrant the Court to order investigation into the authenticity of the last will and testament of the will at this stage would, quite frankly, serve no useful purpose as the estate has been wound up to finality. It would be a non est utilis ad.

[15] The Applicant therefore argues that in the present case, there is no evidence that the deceased was sick and that there was accumulation of medical bills. It is also contended that what is presently before Court, are just bare allegations. This Court is persuaded not to rely on. The Applicant disputes that there was a loan in the sum of **E150,000.00 (One Hundred and Fifty Thousand Emalangeni)** that was obtained by the deceased from John

Shongwe. By extension, there was no cession agreement of this loan to late Hermon Gule.

[16] It is also argued that the deceased was a sophisticated person and not just an ordinary person. This is evinced by the very act that he deposed to a Will during his lifetime⁹. He also litigated in the courts to enforce rights he believed he had.¹⁰ He was also a business man of note as he operated a transport business, at some point in his life. He was a landlord he owned a grocery shop and had title deed property¹¹. With all this, so the argument goes the deceased would have sought legal advice in transferring his property and would not have transferred his property **under a tree** (sic).

[17] The Executor asserts that both the deceased and Hermon are now deceased. Therefore, there is no better person to say something about the alleged agreement. The best evidence available is the Deed of Transfer. The title deed is therefore a *prima facie* proof of ownership of the property¹². The Deed of Transfer has not been challenged. The

⁹ See page 41 of the book of pleadings

¹⁰ See page 44 of the book of pleadings

¹¹ See page 37 of the book of pleadings

¹² Simon Dlamini v Daisy Dlamini and others (High Court) Case No. 1530/2007 page 19 @26

Applicant persuades Court to place reliance on the Deed of Transfer in deciding this matter.

[18] The Applicant also contends that the deceased gave Hermon another place being Plot No. 224 allocated next to the property in question where Hermon stayed with LaTsabedze and his children. The late Hermon built a big and beautiful house on this place before selling it. At that time according to

Applicant the late Hermon used to own a fleet of buses trading as “Phumzakhele Bus Service”. The said property is alleged to have subsequently changed hands and is now owned by a person of Mozambican origin. His surname is Masinga and the property is currently registered under Deed of Transfer No. 224. The Applicant argues that this fact has been admitted by the 1st and 2nd Respondents. The estate of the late Hermon Gule cannot benefit again, at the expense of the other beneficiaries in the estate of the deceased, so the argument goes.

[19] In support of the prayer for eviction, the Applicant argues that this is not the first time this court has been called to adjudicate on this issue. In previous proceedings,¹³ which were instituted by the deceased¹⁵

¹³ Wilson Skomu Gule vs Ora Dlamini, Hermon Sambo Gule High Court Case No 735/1991 ¹⁵
The late William Skomu Gule

himself during his lifetime an eviction was granted in his favor by the court against the late Hermon Gule. The reasoning of the court in that case was that the late

Wilson Gule was entitled to the order of eviction on the strength of Section 30 of The Transfer Duty Act of 1902. Therefore the Executor concludes that there is no merit in the prayer for eviction sought by the 1st and 2nd Respondents.

THE RESPONDENT'S ARGUMENT'S

[20] The 3rd and 4th Respondents have not filed answering affidavit in proceedings. Therefore whenever I refer to Respondents I mean the 1st and 2nd Respondents.

[21] The Respondents commence their argument by contending that there are inherent disputes of facts on the affidavits before court, which cannot be easily resolved. The Respondent implores the court to allow the action proceedings which have been instituted under case no. 1509/2022 to be dealt with, to enable the question of ownership of the property to be decided first.

[22] The Respondents have articulated the inherent disputes of facts to be the following:-

22.1 Whether there was a civil rites marriage between Wilson Skomu Gule and Gladys Tobhiya Gule (nee Dlamini), which marriage would have certain legal consequences.

22.2 Whether Wilson Skomu Gule during his lifetime was indebted to

John Mandla Shongwe and whether he place as security of the debt Lot 230 at Pigg's Peak Township.

22.3 Whether there was a cession of the debt by Wilson to Hermon Gule on the condition that the ownership of Lot 230 at Pigg's Peak passes to Hermon on fulfilment of the suspended conditions.

22.4 Whether Hermon Gule occupied the property during the lifetime of Wilson Skomu Gule on the strength of their agreement.

22.5 Whether Hermon Gule liquidated the debt he inherited from Wilson Skomu Gule in terms of the suspended conditions.

[23] The Respondents also argue that the Applicant deny the following averments:-

23.1 The loan agreement between Wilson Gule and John Shongwe.

23.2 The Civil rites marriage between Wilson Gule and Gladys Gule.

23.3 The meeting between Wilson and Hermon Gule in the presence of Daniel Gule.

23.4 The cession agreement.

23.5 The agreement to transfer ownership and possession from Wilson Gule to Hermon Gule.

[24] Over and above the existence of disputes of fact as articulated above, the Respondents argue that their father¹⁴ had offered to liquidate the debt that the late Wilson Gule had with John Shongwe. This was

¹⁴ Harman Gule

subsequent to a meeting called by the late Wilson Gule with all his children¹⁵. It is in that meeting where it is alleged Hermon Gule offered to liquidate Shongwe's debt for his father. He also accepted the offer of ownership and possession (sic) of Lot 230 in lieu of taking over the debt. It is also alleged that Wilson Shongwe was still alive when Hermon Gule, took ownership and possession of the property and no one objected to it. It is on that basis that it is alleged the said Hermon Gule took what is said to be "actual ownership" and actual possession of the property. He subsequently let out the flats and occupied another part of the property that was unlettable.

The Law

[25] Fundamentally, possession denotes a purely factual relationship of a person to a thing which exists irrespective of whether or not the person concerned has any legal right to that thing. Therefore, even a thief acquires possession of the things he steals. ¹⁶This is the other leg on which the Respondents in a way resist the order for eviction sought by the Applicant. They have argued at length that their father had been in possession of this property in Pigg's Peak for a while. Other than the other grounds already stated, It is argued that the owed debts by the deceased to Wilson Shongwe was liquidated by them and their father or both which must be taken as payment.

15 See paragraph 13 of the 1st and 2nd Respondents affidavit.

16 Silverberg and Schoeman; the law of property second edition at page 114.

Eviction

[26] An eviction occurs when a person is legally forced to leave the property he or she is staying on. The constitution provides that no person's property may be taken away from him or her and that no person may be evicted from his or her home without a court order.¹⁷ This means that an owner or person in charge of the property must apply to court for evicting a person from his or her property.

Stay of proceedings

[27] It is now trite that the High Court possess an inherent jurisdiction to stay proceedings in certain circumstances. The power to do so will be exercised sparingly and only in exceptional cases.¹⁸ This should be done with very great caution and only on clear cases.¹⁹ Proceedings will be stayed when they are vexatious or frivolous or when they are continuous in all circumstances of the case, it may prove to be an injustice or serious embarrassment to one or other of the parties.

¹⁷ See constitution of the Kingdom of Eswatini and the common law. An owner of land is entitled to apply to court for an eviction order by simply alleging ownership of the land and stating that the occupation is unlawful.. See **Kusa Kusa Vs Mbele 2003 (2) BCLR 222 (LCC) 724**. See also *Dryer NNO Vs EXZS 25 Industries (Pty) Ltd* 2006 (5) SA at 554. See also *Real Rides Stenkamp Vs Nies* 1987 (4) SA AT 186 (NC) AT 188.

¹⁸ *Western Assurance Co. Vs Caldwell's Trustee* 1918 AD 262 at 274

¹⁹ *Fisheries Development Cooperation of SA Ltd Vs Jorgensen Fisheries Development Cooperation of SA Ltd (AWJ Investment (Pty) Ltd* 179 (SA 1331) at W 1338

[28] Strong grounds must be shown to justify the courts staying an action. It is only in very exceptional circumstances that the door will then be closed upon anyone who desires to prosecute on action²⁰. When the courts inherent jurisdiction is involved for the purpose of staying an action, it is not enough for example, to show that the version of the facts set out in the pleadings is highly improbable and one which it is difficult to believe could be proven. The Applicant must go further and show that, the action is hopeless or impossible of success, for it is only when the case stands outside the region of probability all together and becomes vexatious because it is impossible that the court will grant a stay.²¹

[29] If a litigant repeatedly and persistently brings proceedings against the same person, on the same cause of action and in respect of same subject matter, it will be inequitable to force to the Defendant to file repeated pleas of the *res judicata* or to make a succession of the applications to stay proceedings when the costs of the previous proceedings have not been paid. The Defendant is entitled to more effectual protection against continued unsuccessful own slots in respect of the same dispute. That protection may take the form of a general order curtailing pertaining some respects Plaintiff ordinarily rights of litigation in the matter. In the same way when a court find that an attempt is being made to for altered motives machinery

20 Herbstein & Van Winsen; the **Civil Practice of the High Courts** of SA 5th Edition Volume one at page 306.

21 Ravden Vs Beten 1935 CPD 269 at 275

devised for the better administration of justice, it is the duty of the court to prevent such abuse, if necessary by staying the proceedings.²²

[30] There are certain other cases in which the stay is merely temporal, as where civil actions have been postponed until criminal proceedings raising the same issue have been determined, and there can be no doubt about the jurisdiction of a court to postpone the hearing of a suit on the application of either party in such cases²⁵. Whether a stay of proceedings is final or temporary, it amounts merely to a granting of a postponement. The underlying principles upon which the court acts on granting or refusing are practically the same.

[31] *Nemo dat quod non habet* – The law of property has it that nobody can transfer more rights to another than he himself has. This principle is described by Silberberg & Schoeman as the golden rule²⁶.

Provisions of the Transfer Duty Act of 1902

[32] The above legislation stipulates that no contract of sale of fixed property shall be of any force or effect unless it is in writing or signed by the parties or by their agents duly authorized in writing.

²² Hudson Vs Hudson 1927 AD 259

Administration of Estates Act 28/1902

[33] It is one of the duties of an executor to wind up the estate of a deceased person. Winding up the estate of a deceased person includes identifying all movable and immovable properties, paying the debts of the deceased owned by the deceased person. Collecting what was owed to the deceased. Thereafter drawing up a liquidation and distribution account for examination by the Master of the High Court.

²⁵ Western Assurance Co. Vs Cadwell Trustees 1918 AD 262 at 275 ²⁶
Law of property at page 73

Right to vindication

[34] An owner who has been deprived of his property against his will, as a general rule, is entitled to vindicate it from any person. This is according to the learned authors Silberberg and Schoeman; The law of property second edition at page 291. Judge Jansen in the case of Chatty Vs Naidoo 1974 (3) SA 28 2C stated the law as follows;

“It may be difficult to define dominion comprehensivelybut there can be little doubt that one of it’s incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever from whosoever is holding it. It is inherent in the nature of ownership

that possession of the res should normally be with the owner unless he is vested with some right enforceable against the owner”.

[35] His Lordship **Judge Masuku J** in the matter of **Bone Harm Vs Master Hardware (Pty) Ltd Trading as Build It and others In Re-Master Hardware (Pty) Ltd Vs Nevile (294/08) [209] SZHC** at page 11 made the following observations;

“According to this perception, ownership is the real right that potentially confers the most comprehensive control over a thing. Which means that the right of ownership empowers the owner to do with his thing as he deems fit, subject to the limitations imposed by public and private law”.

[36] His Lordship **Judge Fakudze** in the matter of **Bheki Shongwe Vs Contour bedding Swaziland Limited and another case 119/15** stated the following on the issue of *rei vindication*. The requirements of *rei vindicatio* as stated by Silberberg and Schoeman at page 289;

“An owner who institutes the rei vindicatio to recover his property, is required to allege and prove no more than –

1. That he is the owner of the thing, the burden rest upon the vindicator in the absence on the pleadings of his title to prove it. 2. That it was in the possession of the Defendant at the commencement of the action.”

Adjudication

[37] The essence of the 1st and 2nd Respondent’s defence is that notwithstanding the registration of ownership of the property in the name of the deceased, the Applicant’s application must be held in abeyance until the action proceedings which they have instituted is decided. In the action proceedings the Respondents seek in essence, that the estate of their father Hermon Sambo Gule, be declared as the owner of Lot 230 situated at Pigg’s Peak, the property in contention. Once such a declaration is made, the Master be authorized to register it in the name of the estate late Sambo Gule, on the condition that the estate pays an amount equivalent to a half share to the estate of the late Gladys Tobhiya Gule.

[38] It is common cause that the counter application as filed by 1st and 2nd Respondents was launched on the 15th day of August about 10 days later after the Applicant had launched the current eviction

proceedings. The same applies to the action proceedings which seek to stay the Applicant's application. It was also launched way after the motion proceedings.

[39] In terms of section 22 of the Administration of Estates Act no. 28 of 1902, estates of all persons dying either testate or intestate shall be administered according to law under letter of administration granted by the Master. The Applicant is in possession of such letter of administration. This is the duty that the current Applicant Bethulisile Gule, has, in terms of The Administration of Estates Act.

[40] There is no explanation apparent on the papers why the Respondents had to wait up until the Applicant launched the current motion proceedings for eviction from the property to institute the action proceedings under case no. without deciding the merits of the action proceedings, it is my view that the action proceedings, considering their timing, were purposefully launched to manufacture and engineer disputes of facts, in order to frustrate the expeditious determination of the current eviction proceedings.

[41] Having said so, I do not by any means determine the merits and demerits of the action proceedings. However, it is my view that

whatever merits the action proceedings may have, there is no harm to allow the eviction order to be sustained. In the event Respondents are able to prove at the trial court that the estate of the late Hermon Gule is the owner much against what the title deed stipulates, the court would be perfectly empowered to order the appropriate compensation. There would be no prejudice as the estate would be compensated for the value of the property. As things stand at this stage, the registration document point to the direction that the ownership of the property lies with estate of the late Wilson Skomu Gule. This is not only *prima facie* evidence, but it is acceptable proof of immovable property as provided for in the Deeds Registry Act.

[42] In the absence of any other cogent prove of ownership, I am inclined to hold that it would be inequitable to dismiss the application for executors who is armed with *prima facie* evidence that the property belongs to the deceased. To state the winding up of the estate solely on the assertion that the Respondents are desirous to prove title in action proceedings that are yet to be allocated a trail date. The Respondent's claim are action proceedings. It may take a while, before the Respondents have their day in court and have the Master adjudicated upon. This would not be in the best interest of the estate and the beneficiaries.

[43] It is trite that an Applicant for a stay of proceedings must make out a

clear case for such relief. The court considering same will exercise a discretion as to whether to grant the stay or not.²³

[44] Fundamental to any claim for stay based on *lis pendens* is that the Applicant for the stay must show that the court in each case will have before it the same parties claiming the same relief on the same issue. That is manifestly not the case in the matter in *casu*. The Applicant claims an order for eviction, yet in the action proceedings, the Respondents claim a declaratory and registration of the property in the name of the estate late Hermon Gule.

[45] Furthermore, it has been repeatedly held that an application for a stay must not constitute an abuse of court process. Moreso where it is designed as a ploy to obstruct, for instance, a lawful order for eviction. In this regard see the case of **Belmond House (Pty) Ltd Vs Gore and another 2011 (6) SA 173 (WCC)** at 13 to 19.

[46] In this matter, the action proceedings that have been launched by the 1st and 2nd Respondents seek to interfere with the rights of the late Wilson Skomu Gule of ownership in the property, dully registered in

23 Caesarstone Sdot -Yam Ltd Vs World of Marble and granite 2000cc and others 2013 (6) SA 499 (SCA)

terms of the law. The current Applicant as an executor, steps onto the shoes of the deceased. She is therefore entitled to exercise all the rights that the deceased could have exercised. The property is registered in the name of the deceased and there is a title deed that is before court which was sanctioned by the Registrar of Deeds. That in it and of itself, is a difficult obstacle for the Respondents to overcome.

[47] The issue is exacerbated by that as far back in the year 1991,²⁴ during the lifetime of the late Wilson Skomu Gule, this court adjudicated on the issue and pronounced itself. The full citation of the case is **Wilson Skomu Gule Vs Ora Dlamini, and Hermon Sambo Gule** wherein

the court stated the following;

“As between the parties in these proceedings the claims of the 1st and 2nd Respondent’s claim to resist the order sought on the basis that Lot 230 at some interest therein form part of the estate of the late Gladys Gule do not in my view lie”.

[48] The court pronounced itself explicitly that the property does not belong to the estate of the late Gladys Gule. This is a finding of fact

24 High Court Case No 735/1991

made by this very same court in 1991. In the action proceedings, the order that is sought seeks determination of the very same issue that was decided by this court in 1991. In prayer (b) it is sought that the court must order registration of the property to name of the estate late Hermon Gule, on the condition that the estate pays an amount equivalent to half share to the estate of the late Gladys Tobhiya Gule (nee Dlamini).

[49] It cannot be. The court decided the very same issue based on which the Respondents argue this application must be stayed. The right which they seek to enforce is hopelessly disastrous, specifically to the order that is sought in prayer (b) as this issue has already been decided by this court.

[50] There is also the argument that the late Wilson Gule owed a certain John Shongwe subsequent to business dealings they had. I do not again wish to get to the merits and demerits of who owed who. The other version of course is that the said Shongwe owed the deceased to an extent that he paid him with a Toyota Van. Whatever the case maybe it is inconsequential by virtue of the fact that The Administration of Estates Act provides that any debtor that claims he is owed by an estate has a right to file his claim to the executor within the time limits stated²⁵.

25 Section 42 of The Administration of Estates Act 28/1902

- [51] Again it is my observation that this argument cannot hamstring the winding up of the estate by the Applicant. She has the right to continue with her duties in terms of the administration of the estate, any person that has a claim against the estate can file his claim with the executor in terms of section 42. I can form no basis that the entire winding up can stall, up until that claim is proved through action proceedings. That is clearly unsustainable and it is not supported by the law.
- [52] There is also the argument relating to a meeting that was held where an agreement that the property be held to Hermon Gule. I agree with the argument by the Applicant that the existence of this meeting has not been demonstrated. Therefore it cannot be used as challenge to a real right conferred to the deceased through registration of an immovable property. For instance there is no date of the alleged meeting. There are no exact place where the meeting was held has not been volunteered, especially light of the fact that the deceased had numerous homesteads.
- [53] This then leads me to consider the provisions of **Section 31 of the Transfer Duty Act**. If the Respondents argue that the meeting conferred ownership on their father than clearly that process was in contravention of Section 31 of The Transfer Duty Act of 1902. The legislation clearly states that no contract of sale of fixed property shall be enforced or effected unless it is in writing and signed by the parties or by the agent duly authorized in writing.

[54] If that meeting as alleged by the Respondents sought to confer ownership on Hermon Gule, then it should have been reduced into writing, for it to be enforceable and for it to be able to upset the current application.

[55] There is also the argument that a sum of E30, 000.00 (**Thirty Thousand**

Emalangen) was spent to cater for medical bills of the deceased. The

Applicant has argued that the alleged sickness was not stated and it is made up. There is also no proof of the medical bills. I actually do not even want to venture in the direction of whether the E30, 000.00 was paid or not. I do not think it is relevant to the real issues to be considered here. If there is such a claim there is nothing preventing whoever that paid E30, 000.00 whether for medical bills or for whatever on behalf of the deceased to file a claim with the executor as provided for in terms of Section 42 of The Administration of Estates Act. It cannot therefore form a basis for the stay of the current proceedings so that the validity of the E30. 000.00 payment is made in the action proceedings. There is an avenue provided for in Section 42.

[56] With regard to the counter application that has been filed by the Respondents in light of what I have already stated above, there is absolutely no merits in this application. It has been engineered, it is meant to delay the Applicant's application. The main basis for this counter application is that the eviction proceedings must be stayed

because in the answering affidavit the Respondents have raised many dispute of facts contrary to what is contained in the founding affidavit of the Applicant. Also, because the Respondents after being served with the eviction proceedings, only then decided to bring action proceedings against the estate. The Act, ²⁶ states it unambiguously that every person who is not the executor of the estate of a deceased person who has or comes into possession or custody of any property or asset belonging to such estate shall forthwith either deliver such property or asset to the dully appointed executor (if any) or report the particulars thereof to the Master. The title Deed reflects that the immovable property in question is for the late Wilson Gule. The Respondents are in possession and in control of this asset. They continue to collect rental on this property. They have not handed the control thereof to the executor. They are therefore in contravention of Section 41 of the Act.

[57] The further argument by the Respondents that it is apparent on the face of the application that is littered with disputes of facts that cannot be resolved on the papers. Hence, the action proceedings should be determined first which will also address the disputes of facts by the parties.

²⁶ In Section 41 of The Administration of the Estates Act of 1902

[58] In as much as the 1st and 2nd Respondents have explained at length on how they came to be in occupation of the property. Tracing their entitlement as far back to their grandmother, and by steps to their father. They further alluded to the period their father was in eviction prior to his occupation of same to the point when he eventually returned subsequent to an agreement he allegedly had with their grandfather (the late Wilson Gule).

[59] In the matter of **Plascon –Evans Pennings Ltd Vs Van Riebeeck Pains Pty Ltd 1984 (3) SA 623 A**. The court may in its discretion dismiss the application, order oral evidence to be heard on specified issues in terms of rules of court or order the parties to trial. Every claimant that seeks to proceed on motion, runs the risk that a dispute of fact may exist or maybe shown to exist. The way in which the court exercises its discretion as to the future course of the proceedings, in such an event, will depend very much on the extent in which the claimant should have been justified in accepting that risk. If for example, the Applicant should have realized on launching his application that serious disputes may be bound to develop, the court will dismiss the application with costs. In the matter at hand it cannot be said the Applicant should have realized that when enforcing the provisions of Section 41 of the Act, she should have realized that the Respondents would contest ownership of the property contrary to what is stated in the Title Deed.

[60] In the case of **Room Hire Co. Pty Ltd Vs Jeppe Street Pty Ltd 1949 (3) SA 1155T**. The principal ways in which a dispute of fact may arise were set out. Some of the issues were set out to be as follows;

- 1. When the Respondent denies all the material allegations made by the various deponent on the Applicant behalf or produces positive evidence be deponent witness to the contrary he may have witnesses who are not presently available or though adverse to making an affidavit would give evidence viva facie if supen that.*
- 2. When the Respondents admits the Applicant affidavit evidence but alleges other facts which the Applicant disputes.*
- 3. When the Respondent concedes that he has no knowledge of the main facts stated by the Applicant but denies them putting the Applicant to the prove and himself give propose to evidence to show that the Applicants and his deponent are biased and untruthful or otherwise unreliable and that certain facts up which Applicant relies to prove the main facts are untrue.*

[61] I am unable to find cogent disputes of fact in this matter that may be held to justify the stay of the Applicant's application. Moreso because the Respondents have already instituted action proceedings where the issues will play themselves out and be determined by the trial court. However, that is by no means a justification that the relief sought by the executor should pend.

[62] The fundamental flaw in the Respondent's arguments is that they seek to challenge the rights of ownership based on a meeting that happened in the past. Yet the estate has a real right to the immovable property against the whole world. The right is registered at the deeds office. The process of winding up the estate cannot be held in abeyance solely on some verbal assertions which are yet to be proved in the future. Let's say the trial court finds that there is a claim of some sort against the estate. There is still recourse. They could sue the estate for the value. However, the balance of convenience at this stage, favors that the Executor must be allowed to proceed and wind up the estate.

[63] This ruling will not affect the validity of the action proceedings. The Plaintiffs are entitled to proceed with the action and if they are able to persuade the trial court ultimately of the integrity of their case, they will be entitled to relief. *Non-constat* that the Respondents/Plaintiffs in the action proceedings are entitled to avoid eviction from the property at this stage on the basis of their evidence.

Conclusion

[64] The Applicant as the Executor of the estate of the late Wilson Skomu Gule is entitled to invoke the *rei vindicatio*. She has satisfied all the requirements. She has alleged that estate owns the immovable property at Pigg's Peak, by so doing she has asserted the right to possession of the property. Yet on the other hand, the Respondents are

in physical possession of the property, they argue that sometime in the future they will seek a declaratory order that the court declares that the estate of their father is the owner. At the moment, they are currently benefiting from the collections of the rentals. They have not tendered that the rentals be collected by Executor or some neutral party. Therefore, it is my finding that if I can allow the stay as proposed, it will cause prejudice as the Respondents will continue to collect the rentals, which they have been collecting for a while now, to the detriment of the estate.

[65] Due to the foregoing reasons, it is my finding that in the matter at hand, the 1st and 2nd Respondents have made out no case to resist the executor's claim under the *rei vindicatio*. The opposition by the Respondent to the eviction application is brazen and uncompromising. They seek to advance some form of entitlement to the property on the basis of evidence that they will produce in the future pertaining to a meeting that occurred where the deceased handed over ownership of the property to their father. I have already stated that this assertion even without the evidence is against the provisions of the Transfer Duty Act.

[66] In my view, the claims of the 1st and 2nd Respondents herein amounts to nothing more than a shameless attempt to protract the litigation by the Applicant in an endeavor to ward off the inevitable. Their defense

to the eviction application is thus manifestly groundless and in bad faith. In the circumstances, I conclude that it will be just and equitable to evict the 1st and 2nd Respondents and anyone in occupation thereof. That being so, this court is inclined to grant an order for the eviction of the Respondents from the Pigg's Peak property.

Order of court

1. Accordingly it is ordered that; evicting the 1st and 2nd Respondents or anyone acting under their instruction forthwith from occupying Lot 230, Pigg's Peak Township measuring 1549 (**One thousand five hundred and forty nine**) square meters held under deed of transfer no. 34/1975
2. That pending the finalization and winding up of the estate of the late Wilson Skomu Gule estate no EP8/2010 rentals collected from the property be deposited into the 3rd Respondents account.
3. Directing the 3rd Respondent to include the property in the liquidation and distribution account in the estate of the late Wilson Skomu Gule EP8/ 2010 and not any other distribution of the late estate.
4. Cost to suit to be borne by the 1st and 2nd Respondents.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicant: (W. Maseko Tsambokhulu
Attorneys)
For the Respondents: (M.C. Simelane Attorneys)