



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE

Case No. 3210/2010

In the matter between

MESHACK DLAMINI

Applicant

and

**SANDILE THWALA
COWIGAN (PTY) LTD
MANZINI CITY COUNCIL
THE REGISTRAR OF DEEDS
MASTER OF THE HIGH COURT
THE ATTORNEY GENERAL
NHLANGANO TOWN COUNCIL
MBABANE CITY COUNCIL
MATSAPHA TOWN COUNCIL**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent**

Neutral citation: *Meshack Dlamini v Sandile Thwala and Others*
(3210/10) [2013] SZSC 47 (30th September 2013)

Coram: **MAPHALALA PJ, ANNANDALE and MAMBA JJ**

Heard: **18 September, 2013**

Delivered: **30 September, 2013**

- [1] Civil Law – Litigant’s locus standi or standing – to sue, join or intervene – same test. Test is a direct and substantial legal interest in the subject matter of the litigation and outcome of the legal process. Purely financial or commercial interest not enough.
- [2] Civil Law – standing – direct and substantial legal interest – in constitutional litigation or litigation with a public character – courts adopt a broad and generous approach to issue as opposed to purely private or own – interest litigation.
- [3] Civil Law – local municipality – has right to assess and collect rates on all rateable property – rates owing – property acts as preferent hypothec in favour of municipality per the rating Act.
- [4] Municipal Law – rates owed on property – registered owner liable for payment thereof and where such property is sold in execution to recover such rates, tenants thereof have no locus standi to challenge such sale.

THE COURT

- [1] The late Daniel Reuben Thwala was until 23 July 2010, the registered owner of the immovable or fixed property described as

CERTAIN: Lot No. 260, Manzini District, Swaziland

MEASURING : 2855m²

(hereinafter referred to as the property). Upon his death the 1st respondent was duly appointed as the executor of his estate.
- [2] The property was, on 23 July 2010 transferred and registered into the name of the 2nd respondent following a sale in execution granted by the Manzini Magistrate’s Court Clerk of Court in or about March 2010 in favour of the 3rd respondent. This was because of due and unpaid property rates and accrued penalties, levies and other charges or costs in respect of the property

in the sum of E130, 317.70. The said court proceedings and sale in execution were allegedly instituted and executed in terms of the Rating Act Number 4 of 1995 (the Act). The Act came into effect on 01 April 1996. That rates were owing and over-due, and payable in respect of the property is common cause and is therefore not an issue in these proceedings.

[3] It is common cause further, that before the court proceedings referred to in the preceding paragraph were initiated, the applicant entered into a written agreement of sale of the property with the 1st respondent who was then represented by his attorney. The property was sold to the applicant for a sum of E940,000.00 and a deposit in the sum of E700,000.00 was paid upon signature of the agreement which was on 8 October 2007. (We note here that this agreement does not indicate the date on which it was signed and executed by the applicant; the space for the date is blank).

[4] In terms of clause 2.2 of the said agreement, the balance of the purchase price, ie E240, 000.00 was to be 'secured by a Bank or Building society guarantee drawn in favour of the seller's conveyancer's to be furnished within thirty (30) days from the date of signature hereof, payable upon

registration of transfer'. It was a term of the agreement further that 'any latitude or extension of time which may be allowed by the seller to the purchaser in respect of any payment provided for or any matter or thing which the purchaser is bound to perform or observe in terms hereof shall not under any circumstances be deemed to be a waiver of the seller's right subsequently to require strict and punctual compliance with each and every provision or term hereof, neither will such laxity be deemed to be a waiver of the purchaser's rights.' It was agreed further that 'transfer of the property shall be given to and taken by the purchaser upon compliance with the terms of clause two (2) hereof and upon both the seller and purchaser obtaining the necessary authority and upon the giving of due notice to the local authority to have the property transferred to the purchaser.' (per clauses 4 and 5.1 thereof respectively).

- [5] As can be seen from the above cited clauses or provisions of the deed of sale, the agreement was subject to, amongst others, these two suspensive conditions. It is also common cause that, for varying and contentious reasons, these conditions were never fulfilled or met. They have, to date not been met.

- [6] The 3rd respondent is the Manzini City Council which is a statutory body established in terms of the Urban Government Act 8 of 1969. The property falls under its Administrative jurisdiction or boundary in terms of the said Act. By virtue of this fact it has statutory powers to collect all rates and levies in respect of all rateable properties within its sphere of administration or jurisdiction. These properties include the property under the spotlight in this application.
- [7] When the applicant executed the Deed of Sale stated above, he was already in occupation of the property, conducting his private business thereat. He states that this was ‘pursuant to a lease agreement between the parties and I still remain in occupation to date. I run a mechanical workshop in the said property and this is my only means of livelihood.’ It is common ground that the applicant has been in occupation of the property for a period in excess of ten years. No lease agreement has been filed in this case and we have to assume, for purposes of this ruling, that the lease is verbal and thus not registered. It is therefore a month to month lease. Again, we think this is common ground.

[8] It would appear that in or about November 2008, the applicant approached his Bankers (Swazi Bank) for the Bank guarantee that he had to provide, inter alia, to perfect or meet the terms of the deed of sale. He was advised by the bank that the consent of and by the 5th Respondent was required for the 1st respondent to sell the property and that such a Bank guarantee could not be granted or offered to him before this was obtained. In a letter dated 10 August 2009, the 1st respondent's attorneys effectively informed the applicant, through his attorneys, that he was in breach of the Deed of Sale inasmuch as he had failed to inform the seller within the stipulated time of thirty (30) days that his bank required the master's consent to the sale before a guarantee could be issued.' The applicant was informed further that the value of the property had since changed from what it was in 2007 when the deed of sale was signed. The Applicant was then requested and required to let them '... know when [he] has finished dealing with his bank regarding the extension of his loan for the new value which he shall now be receiving should he wish to continue with the purchase [and] should he be unwilling to cooperate in the foregoing regard, then we shall be taking instructions regarding payment of a refund to him.'

[9] From the excerpt in the preceding paragraph, the 1st respondent's attorneys told the Applicant that he was in breach of the agreement of sale by failing to furnish them with the requisite guarantee within the stipulated period, and the agreement had been cancelled, but they were willing to renegotiate the sale of the property to him failing which they would consider refunding him his deposit. (See pages 36 to 38 of the Book of Pleadings).

[10] We think it is fair to say that the parties could not agree on anything meaningful or significant on the transaction and by letter dated 4 August, 2010, the 1st respondent's attorneys informed the applicant's attorneys that the property had been "unfortunately" sold following a court order in favour of the 3rd respondent as a result of rates due thereon. A cheque in the sum of E700,000.00 payable to the Applicant, as a refund, was enclosed in the letter.

[11] Based in the main, on the above events, the Applicant has filed this application wherein he seeks, inter alia:

‘1.1 Granting the Applicant special leave to institute legal proceedings against the 3rd Respondent...

3.1 Interdicting and restraining the 2nd Respondent from encumbering or transferring the immovable property, Lot / ERF 260 in the Manzini District.

3.2 Interdicting and restraining the 1st Respondent from utilizing or distributing in any manner whatsoever the proceeds of the sale of Lot /ERF 260 in the Manzini District or so much of the said proceeds as remain in the possession of either the 1st or 5th Respondents.

4. Reviewing and setting aside the order of the Magistrate's Court for the District of Manzini granted on 12 April 2010.

5. Setting aside the transfer of Lot / ERF 260 in the Manzini District to the 2nd Respondent and directing the 4th Respondent to expunge Deed of transfer No. 491/2010 from the Register of Deeds.

6. Directing the 5th Respondent to issue written authorization of the sale of Lot / ERF 260 in the Manzini District at **E940 000.00 (Nine Hundred and Forty Thousand Emalangeni)** property to the Applicant or his bank **SWAZILAND DEVELOPMENT AND SAVINGS BANK.**

7. Directing the 1st Respondent to do all that is necessary to give full effect to the written agreement between the Applicant and 1st

Respondent dated 8 October 2007, in particular to pass transfer of Lot / ERF 260 in the Manzini District to the Applicant forthwith, failing which the Registrar of the High Court be authorized to sign all relevant documents necessary to pass transfer to the Applicant.

8. Directing the 1st Respondent to pay the Applicant's costs at attorney-and-client scale with the rest of the Respondents to pay costs only if they oppose the application.'

[12] In his founding affidavit, the Applicant states that

'25. I submit that the foregoing point to one conclusion and that is the sale of the property in execution was orchestrated by the 1st Respondent (duly assisted by his attorneys, specifically **BOB SIGWANE**) who colluded with the 3rd Respondent's attorneys resulting in patently unlawful process concluded to the Applicant's detriment.

26. I am advised and submit that what is set out above constitutes fundamental irregularities in which case this Honourable Court should intervene, in the interests of justice, and set aside not only the Magistrate's Court Order of 12 April 2010 as well as the deed of

transfer number 491/2010 in terms of which the property was transferred to the 2nd Respondent. The Magistrate's Court would certainly never have granted the order of 12 April 2010 had it not been duped. The Magistrate's Court was lulled into a false sense of security by the apparent representation of the 1st Respondent by **SIGWANE AND PARTNERS** and service on him of the Interim Court Order of 29 March 2010.'

And at paragraph 29 concludes that "...I face the real prospect of losing property I invested my life savings in (way back in 2007) if I do not obtain the relief I seek.' (See also his averments to the same effect in paragraph 30.2 and 34 of his affidavit). He concludes by stating that

'33. I submit that it is neither fair nor just for 1st respondent to enter into an agreement with me, enjoy the fruits of the substantial capital sum of E700,000.00 for nearly three (3) years and then seek to avoid the consequences of the agreement simply because of his desire to make further profit. I have a clear right to transfer of the property by virtue of the agreement between myself and the 1st respondent.'

[13] The 1st, 3rd, 8th and 9th Respondents have raised a point *in limine* herein that the Applicant does not have standing or *locus standi* to bring this

application, based on the averments and facts that are common cause herein.

We now examine this point and argument.

[14] We have already stated the salient facts herein and what may be extrapolated therefrom are the following:

(a) the property falls within the administrative jurisdiction of the 3rd Respondent;

(b) the 3rd Respondent has the power, right and obligation to assess and collect rates on the property as stipulated in the Act;

(c) the rates chargeable on the property are due and payable by the registered owner of the property; in this case, the 1st Respondent.

(d) The Applicant has been in occupation of the property for the past two decades or so on a verbal month to month lease.

(e) On 8th October, 2007 the Applicant entered into an agreement of sale of the property and paid a deposit as part of the purchase price but has to date failed to furnish the 1st Respondent with the required bank guarantee for the balance.

(f) the property was sold in an auction sale on the strength of a court order issued in favour of the 2nd Respondent for rates that remained due, owing and payable to the 2nd Respondent.

(g) The property was subsequently purchased by and transferred to a third party; the 2nd Respondent. These are, in our judgment, the essential facts that have to be considered in the enquiry to determine whether or not the Applicant has the necessary standing to bring this application which seeks to set aside the sale and subsequent transfer of the property to the 2nd Respondent.

[15] Legal standing generally refers to whether a particular litigant has a right or is entitled to appear in court and bring a particular litigation seeking a specified relief or redress or vindicate a specified right in respect of a specified issue. In order to succeed, the litigant must show or establish that he or she has a direct and substantial interest in the matter and outcome of the litigation. This must be a legal interest. A mere financial interest which is an indirect one is not enough. This direct and substantial interest is the same as that required of a party who applies to intervene or to be joined in proceedings already pending before the court. This observation was made

abundantly clear by Corbett J in *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*, 1972 (4) SA 409 at 415B-H.

There the learned judge said:

‘In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted. Before this approach can be usefully applied, however, it is necessary to examine more closely the right of a party to intervene in legal proceedings.

Intervention is closely linked with the matter of joinder; in fact it is often treated as a particular facet of joinder. As was pointed out by WESSELS, J. (as he then was), in *Marais and Others v. Pongola Sugar Milling Co. and Others*, 1961 (2) SA 698 (N) at p. 702:

“...certain principles seem to have become established which govern the matter of joinder, and different principles would seem to apply to different circumstances, depending on whether the Court is concerned with a plaintiff’s right to join parties as defendants, a defendant’s right

to demand that parties be joined as co-defendants, the rights of third parties to join either as plaintiffs or defendants, or the Court's duty to order the joinder of some other party (as was done in the case of *Home Sites (pty) Ltd v Senekal, 1948 (3) SA 514 (AD)*), or to stay the action until proof is forthcoming that such party has waived his right to be joined as a party, e.g. by filing a consent to be bound by the judgment of the Court (as was done in the case of *Amalgamated Engineering Union v Minister of Labour, 1949 (3) SA 637 (AD)*)”

It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is a waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour, 1949 (3) SA 637 (AD)*; *Koch and Schmidt v Alma Modehuis (Edms) Bpk., 1959 (3) SA 308 (AD)*. In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers, 1953 (2) SA 151 (O)*, HORWITZ AJP (with whom VAN BLERK, J., concurred) analysed the concept of such a

“direct and substantial interest” and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) –

“... an interest in the right which is the subject-matter of the litigation and ...not merely a financial interest which is only an indirect interest in such litigation.”

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent divisions, including two in this Division (see *Brauer v Cape Liquor Licensing Board*, 1953 (3) SA 752 (C) a Full Bench decision which is binding upon me – and *Abrahamse and Others v Cape Town City Council*, 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see *Henri Viljoen's case*, *supra* at p. 167).’

Having thus analysed the law, the court came to the conclusion that “the subtenants’ right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The

sub-tenant, in effect, hires a defeasible interest. (see *Ntai and others v Vereeniging Town Council and another* 1953 (4) SA 579 (A) at 591). He can consequently have no direct legal interest in proceedings in which the tenant's continuing right of occupation is in issue, however much the termination of that right may affect him commercially and financially.' Vide *Milani and Another v South African Medical and Dental Council and another*, 1990 (1) SA 899 at 903.

With due respect, we entirely agree with this exposition and statement of the law and we are of the view that it also correctly reflects the law in this jurisdiction in the realm of private litigation. See *Jan Sithole N.O. and Others v The Prime Minister of Swaziland and Others*, Civil case 2792/2006.

- [16] The position is of course different in matters of litigation of a public character and or Constitutional nature. There the courts are prepared to be liberal and generous or expansive in their interpretation or approach to the meaning and import of standing as such cases, as a rule, generally involve a wider public than in purely private litigation. See *Ferreira v Levin N.O. and*

Others; Vryenhoek and Others v Powell N.O. and others, 1996 (1) SA 984 (CC) at para 229. There the court stated that

‘Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.’

See *Giant Concerts cc v Rinaldo Investments (Pty) Ltd and 4 others, [2012] ZACC 25 at para 41-43, Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another, 2001 (2) SA 609 (E)*. This application is, however, not a Constitutional matter or one with a public character. It is purely a private matter.

[17] In the present case, the Applicant has, if anything, a financial or commercial interest in the property that is the subject matter of this litigation. This is either because of his tenancy thereon or the deed of sale referred to above. This right or interest, however, is not sufficient or strong enough as against the legal direct and substantial interest which the 3rd respondent has over the property in respect of the rates owing in respect of that property. The 3rd Respondent's action that culminated in the sale of the property was against the 1st respondent who was the registered owner and the person liable to pay property rates. We are, in respectful agreement with the South African decisions in *Hoofair Investments (Pty) Ltd v Moodley 2009 (6) SA 556 (KZN)*, *Irvin v Davies, 1937 CPD 442*, *City of Tshwane Metropolitan Municipality v Mathabathe and another 2013 (4) SA 319 (SCA)*, cited to us by Counsel for 3rd, 8th and 9th Respondents, which held that property rates and the owner's obligation to pay such constitute a preferent statutory hypothec over the property in favour of the relevant municipality, in this case the 3rd Respondent.

[18] We emphasise that even if we were to adopt a generous and expansive or liberal approach to the issue of standing, the facts herein or the averments by the Applicant fail to establish that he has *locus standi* herein. What he may

possibly have is an action against the 1st respondent. He may, however, not impugn the actions of the 3rd respondent in its quest or endeavour to collect or recover the property rates in respect of the property. His interest is a purely financial one and he has not shown that the interests of justice favour that he should be accorded locus standi. (Vide *Kruger v President of Republic of South Africa and Others, 2010 (1) SA 417 (CC) Giant's case (supra)* at 41 (d)). We are therefore not in agreement with Counsel that a failure to establish standing on the traditional common law basis *ipso facto* means a failure to establish own-interest or private standing under or on a Constitutional basis. The standards are different; one broader and the other restrictive.

[19] For the foregoing, we hold that the applicant has failed to demonstrate that he has the required standing to challenge the validity and sale of the property herein. His remedy against the 1st respondent lies elsewhere and not in this application. That being the case, the application must fail and it is hereby dismissed with costs, such costs to include those of counsel to be duly certified in terms of the applicable rule of this court.

S.B. MAPHALALA P.J.

J.P.ANNANDALE J

MAMBA J

For the Applicant : Mr Sabela Dlamini

For 1st Respondent : Mr N. Manana

For 7th Respondent : Mr B. Ngcamphalala

For 3rd, 8th and 9th Respondents: Adv. AA Gabriel, SC

For 4th, 5th and 6th Respondents : Mr J. Dlamini (A.G)