



**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**JUDGMENT**

**Civil Case No. 54/2013**

**In the matter between**

**JEKE (PTY) LIMITED**

**Applicant**

**And**

**SAMUEL SOLOMON NKABINDE**

**Respondent**

**Neutral citation:** *Jeke (Pty) Ltd v Samuel Solomon Nkabinde*  
(54/2013) [2013] SZSC 53 (29 November  
2013)

**Coram:** RAMODIBEDI CJ, MOORE JA, and  
MCB MAPHALALA JA

**Heard:** 14 NOVEMBER 2013

**Delivered:** 29 NOVEMBER 2013

**Summary:** **Civil Procedure – Application for leave to appeal against the order of the High Court dismissing the appellant’s application for summary judgment – Section 14 (1) of the Court of Appeal Act – The applicant filing a notice of motion for leave to appeal but failing to support it with an affidavit – The Court *a quo* in effect correctly holding the view that the respondent raised triable issues – Application for leave to appeal refused with costs – The defendant given leave to file his plea by not later than 14 December 2013.**

## **JUDGMENT**

**RAMODIBEDI CJ**

[1] In these proceedings the applicant has applied to this Court for leave to appeal against the order of the High Court dismissing his application for summary judgment against the respondent. For the sake of convenience, I shall henceforth refer to the applicant as plaintiff and the respondent as defendant respectively as the case may be.

[2] At the outset, I should mention one glaring shortcoming in the applicant's application. It is this. Contrary to Rule 9 of the Court of Appeal Rules 1954 which enjoins the applicant to verify by affidavit the facts in support of the application for leave to appeal, the applicant failed to file any affidavit at all. The result is that there are no facts on affidavit upon which this Court is called upon to exercise its discretion either way. I shall bear this factor in mind against the applicant in the order proposed below. It shall suffice at this juncture to mention that Mr Z.D. Jele for the defendant made a valid point, in my view, in his submission that the application stands to fall at the first hurdle.

[3] The background facts leading up to this application are as follows. On 19 March 2009, the plaintiff issued out a combined summons against the defendant in the High Court. It turned out, however, that the defendant actually passed away as long ago as 16 August 1993. Henceforth, it will be convenient to refer to him alternatively as defendant or "the deceased" depending on the context. Be that as it may, the plaintiff alleged in its particulars of

claim that it was the registered owner of immovable property described as Portion 224 of Farm Dalriach No. 188 situate in the District of Hhohho, Swaziland.

[4] The plaintiff further alleged in its particulars of claim that the defendant and/or some other persons unknown to it had unlawfully and without its consent “retained occupation” and “continued occupation or possession of the property” in question.

[5] Accordingly, the plaintiff prayed for the following relief:-

*“(a) Ejection of the Defendant and whosoever is in occupation or holding title through the Defendant from Portion 224 of Farm Dalriach No. 188 District of Hhohho, Swaziland.*

*(b) Costs of suit.*

*(c) Further and/or alternative relief.”*

[6] It is necessary to stress at the outset that this litigation has throughout been conducted on the mutual understanding that the phrase “and whosoever is in occupation” in prayer (a) included the defendant’s sons, namely, Jabulani Harrisson Nkabinde (“Jabulani”) who is the heir to the deceased’s estate and his younger brother Solomon Themba Nkabinde (“Solomon”). It is probably for that reason that no formal application for substitution was made.

[7] On 6 April 2009, and after delivery of a notice of intention to defend, the plaintiff filed an application for summary judgment on the ground that the defendant had no *bona fide* defence and that the notice of intention to defend had been entered solely for the purposes of delay.

[8] On 24 April 2009, and as he was evidently entitled to do so in the circumstances in terms of Rule 32 (5) of the High Court Rules 1954, Solomon filed an affidavit resisting summary judgment. Similarly, Jabulani filed a supporting affidavit.

[9] The crux of the defence raised to plaintiff's application for summary judgment was multidimensional. In a nutshell, the defence raised the following issues:-

- (1) That the plaintiff's title was based on a sale in execution which was defective in as much as the disputed property was registered in the name of the deceased, whose estate had not been cited in the court proceedings leading up to the sale.
- (2) That the notice of sale falsely described the property as "A vacant piece of land." Thus, the notice did not indicate that there were improvements on the property such as a dwelling house comprising, *inter alia*, three bedrooms. Hence, this was contrary to Rule 46 (8) (b) of the High Court Rules 1954.
- (3) That the property was purchased by a Deputy Sheriff purporting to act on behalf of the plaintiff.

[10] The *Court a quo* in effect came to the conclusion that, given the drastic nature of summary judgment proceedings in closing the door to the defendant without trial, the defences raised in the preceding paragraph raised triable issues. Accordingly, the court refused summary judgment. Hence this appeal.

[11] In determining the correctness or otherwise of the *court a quo*'s decision, it is necessary to have regard to our law relating to summary judgment. I start by observing that, in several of its decisions, this Court has expressed itself on the subject in no uncertain terms. Thus, for example, I, myself had occasion to add my own voice in the following terms in the case of **Zanele Zwane v Lewis Stores (Pty) Ltd c/a Best Electric, Civil Appeal No. 22/07** at paragraph [8]:-

*“[8] It is well-recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless*

*properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purposes of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence. See for example **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A); David Chester v Central Bank of Swaziland CA 50/03.***

*Each case must obviously be judged in the light of its own merits, bearing in mind always that the court has a judicial discretion whether or not to grant summary judgment. Such a discretion must be exercised upon a consideration of all the relevant factors. It is as such not an arbitrary discretion.”*

[12] Indeed, I find myself in good company in the view I hold of the matter. In the case of **Temahlubi Investments (Pty) Ltd v Standard Bank Swaziland Limited, Civil Appeal Case No.**



**35/2008**, my brother Ebrahim JA (Banda CJ and Foxcroft JA concurring) stressed the need for the applicants in summary judgment applications to “meet the stringent requirements needed to be satisfied” in order to succeed. This is such a case. See also **Mater Dolorosa High School v R.M.J. Stationery (Pty) Ltd, Civil Appeal Case No. 3/2005.**

[13] It is equally trite that the defendant does not have to prove his defence when resisting summary judgment application. In this jurisdiction, all that the defendant is required to do at that stage is to raise triable issues. Rule 32 (4) (a) of the High Court Rules 1954 is itself authority for this proposition. The Rule provides as follows:-

*“(4) (a) Unless on the hearing of an application under sub-rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a*

*trial of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.” (Emphasis added.)*

I have underlined the words “an issue or question in dispute which ought to be tried” to indicate my view that a defendant is not expected to prove his defence at that stage. All that is required, as I repeat for emphasis, is for the defendant to raise a triable issue.

[14] It is convenient at this stage to return briefly to a consideration of the issues raised in paragraph [8] above.

(1) It is not in dispute that the plaintiff’s title was based on a sale in execution which was allegedly defective inasmuch as the disputed property was registered in the name of the deceased, whose estate had not been joined in the court proceedings leading up to the sale.

Pointedly, the defence raised was that the provisions relating to the administration of the deceased's estates were not followed and that, consequently, "the purported execution and sale were a nullity." Furthermore, the defence added, for good measure, that "immovable property belonging to a deceased's estate cannot be sold in execution unless the relevant provisions of the administration of estates have been complied with."

As can be seen, this issue squarely raises the question of non-joinder of an interested party, including the Master of the High Court who is responsible for the administration of the deceased's estates in this country in terms of the Administration of Estate Act No. 28 of 1902. It is as such a validly triable issue in my view.

- (2) The record of proceedings shows at page 61 that the notice of sale described the disputed property under the heading "IMPROVEMENTS" as "A vacant piece of land."

According to the uncontested contents of paragraph 4.8 of Solomon's affidavit resisting summary judgment this was a blatantly incorrect description of the property. The paragraph reads as follows:-

*“4.8. Thereafter, a sale in execution was advertised and in that notice of sale, it was indicated that there were no improvements on the property. The notice of sale in fact stated that this was a vacant piece of land. Again, this information was factually incorrect and I am advised rendered the sale to be defective in that there is a requirement in terms of the rules that if there are improvements on the property, then there must be a description of the improvements in the notice of sale. This is a requirement of rule 46 [8] [b] of the rules of the above Honourable Court. The improvements on the property include a dwelling house which is three bedrooms, kitchen, study room, 1 bathroom, toilet and a shower only, chicken shed and a cattle kraal. A copy of the notice of sale is annexed hereto to marked “STN10”.”*

In my view, this was once again a validly triable issue. *Prima facie*, the description of the property in the notice of

sale fell woefully short of the requirement laid down in Rule 46 (8) (b) which in turn is obviously aimed at attracting an appropriate price for the property by not selling at less than the true value as happened here.

- (3) The parties are on common ground that the property in question was purchased by one Zakhile Ndzimandze, a Deputy Sheriff “purporting” to act on behalf of the plaintiff. There can be no doubt that this is very unusual on its own. I consider that at the very least, it is enough to raise a red flag as a warning sign for something which might propably be untoward. As such it is a triable issue in the circumstances.

[14] I should stress that it is strictly not necessary to express a concluded view on the soundness or otherwise of the defendant’s defences at this stage. It is sufficient to say that, in my view, they do raise triable issues as contemplated by authorities. In my view, the issues raised in this matter are such that it cannot by

any stretch of the imagination be said that this is the clearest case where the defendant has no *bona defence* as laid down in such cases as **Zanele Zwane, supra**. In coming to this conclusion, I have not lost sight of a further fundamental principle as laid down in **Pu Setto (Sunny Side 11 (Pty) and Others v Financial Services Company of Botswana Ltd [1994] BLR 274 (CA)** at 287, namely, that:-

*“The Court should, in my view, not be astute to extend liberality to defendants in summary judgment matters who raise bogus defences in order to evade their obligations and to keep plaintiffs with valid claims out of their money. A refusal to exercise the [court’s] discretion in the appellants favour, and particularly in Du Plessiss favour, would result in no injustice to them or him.”*

This is a principle which I myself had occasion to happily adopt in the Botswana Court of Appeal case of **Information Systems Zone (Pty) Limited And Others V First National Bank Of Botswana Limited [2008] 1 BLR 221 (CA)**. Similarly, I am

happy to adopt it in this jurisdiction. Each case must, however, depend on its own peculiar circumstances.

[15] Finally, I should mention that Mr L.R. Mamba for the applicant spent considerable time in his argument in this Court advancing the submission that, simply because the applicant was the registered owner of the property in terms of a deed of transfer following the sale in question as stated above, then on that basis alone the applicant's title is unassailable. This submission is in my view completely untenable. There is no magic power contained in a deed of transfer. Like any document, it is open to challenge as to its validity. In *casu*, it is specifically challenged on various grounds as set out above. The defence raised is that it is in fact a "nullity" due to the fact, *inter alia*, that the deceased's property was sold contrary to the Administration of Estates Act.

[16] In the result the following order is made:-

- (1) The applicant's application for leave to appeal is refused with costs.

- (2) The defendant is given leave to file his plea by not later than 14 December 2013.

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**M.M. RAMODIBEDI**  
**CHIEF JUSTICE**

**I agree**

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**S. A. MOORE**  
**JUSTICE OF APPEAL**

**I agree**

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**MCB MAPHALALA**  
**JUSTICE OF APPEAL**

**For Applicant** : Mr L.R. Mamba

**For Respondent** : Mr Z.D. Jele



