IN THE HIGH COURT OF SWAZILAND

Civ. Case No.17/88

In the matter between

LAKE VIEW (PTY) LTD

and

STEGI PROPERTIES (PTY) LTD

CORAM F. X. ROONEY

FOR APPLICANT MR OSCROFT
FOR RESPONDENT MR NXUMALO

JUDGMENT
7 June 89
Rooney, J.

The applicant is the registered owner of Portion 6 of Farm 987 situated near Mbabane - Piggs Peak Road. The respondent is the registered owner of the adjacent Portion 7. Some years ago the respondent contructed a dwelling house on Portion 6 in the mistaken belief that the land used for this purpose was included in Portion 7.

In June 1987 the applicant became aware of the existence of the building on its land and this was brought to the attention of the respondent. Later that year the respondent made further additions to the existing building. On the 2nd January, 1988 the applicant obtained a Rule Nisi interdicting the respondent from building on portion 6, directing it to demolish and remove all buildings and evicting the respondent. The rule was opposed by the respondent.

Counsel for both parties agreed at the hearing of the matter that the only issue to be tried was the respondent's entitlement to receive compensation for the building erected on the land. The estimated cost of the original building is said to be E4,500 and now is worth E9,000. The further improvements effected by the respondent, subsequent to it being advised of the true position, is assessed at E4,000.

The applicant maintains that the existing building do not amount to any improvement and that they cannot be adopted for its purposes. The respondent takes the view that it was in possession of the land bona fide and that the building is an useful improvement which had benefited the applicant.

As the applicant is the owner of the land it is entitled to an order for possession and the eviction of the respondent. The only question to be decided is whether that order should be unconditional or conditional upon the respondent being paid compensation for the improvements effected.

In an affidavit filed by the respondent the building in question is described as "a one bedroomed house with a kitchen and storeroom, with a combined dining room and lounge, outside toilet and an open veranda. The total area of the building erected is 123.5 square metres..."

The original building was enhanced in January 1988 to the following extent. "The open veranda was closed in, a new open veranda was built, a new bathroom was built, the house was wired for the

installation of electricity......and plumbing was effected in the bathroom".

There is no indication of the materials used in the construction of this modest dwelling. The applicant's attorneys stated in a letter dated 12 June 1987 "Our clients would have no use for the building....it does not lend itself to conversion into a standard dwelling". There is no indication of the intention of the applicant in regard to the land except a statement by Mr J. R. Masson that the existing building "will be a hindrence to the development of the land".

In regard to the original building erected by the defendant, it is accepted that this was the result of a genuine mistake. The defendant believed that the land used was part of Portion 7 which it owned. It was therefore a bona fide possessor with the animus domini. It intended to hold the land as owner. (Oosthuizen v Estate Oosthuizen (1903) T.S. 688...... Innes CJ. at 691).

A bona fide possessor is entitled to be paid upon demand what are known as "useful expenses." The position of the owner of the land is considered by de Villiers J.P. in Meyer's Trustee v Malain 1911 T.P.D. 559 at 566; where the learned judge set out passages from Voet, the Digest and other ancient authorities. The bond fide pssessor is entitled to recover the useful expenses "insofar as the property has in reality been enhanced in value, provided the cost was greater than is the utility or the improvement actually in existence" (Voet)

The authorities cited by de Villiers state that the order of the judge will vary according to the circumstances of the parties and the facts. At 567 he states -
"Gluck (-Vol.8 sec. 592 p 303) ....draws the distinction between improvements which cannot be seperated at all, and those which can be removed without injury to the principal thing - a distinction which is inherent in the nature of the case. In the former case, if the improvements are not as useful as they were to the possessor, or the expenditure is so great that the owner is not in a position to pay without selling the property, the possessor cannot ask for compensation, except insofar as the owner is in a position to sell the thing and obtain a buyer at once who, in view of the improvements, is prepared to give considerably more than he otherwise would have done. If, on the other hand, the improvements can be separated from the principal thing without damage, then we have to consider whether the owner, having regard to his position and financial circumstances, would probably have incurred the expenditure himself or not. In the former case the possessor can recover the expenses incurred insofar as the thing has really been improved and has now been rendered more useful. But if the value of the improvement is greater than the expenses actually incurred, the possessor can only recover the expenses. In the latter case, however the owner may free himself from any liability,

liability in respect of the improvements, and allow the possessor to remove them insofar as this can be done without rendering the thing worse than it was before the expenditure was made."
At 569 de Villiers concluded
"If the improvements can be separated, and the owner himself would probably not have incurred the expenditure, the owner would be freed from all liability if he were to allow the possessor to remove them. In the present case it is beyond doubt that the defendant himself would not have incurred the expenditure of building the home. His own home, with which he is quite satisfied, is some distance away, and the house built by Meyer is quite useless to him. This seems to me to the equitable view to take; and on this view of the law, even if we assume for the purpose of this case that Meyer was a bona fide possessor, the plaintiff cannot succeed." The issue arose again in Fletcher and Fletcher v Bulawayo Waterworks Ltd 1915 A.D. 636. Because the improvement effected on the land comprised a well and pumping plant a separation could not be effected, (see Innes C.J. at 648).

In Lechona v Cloete and Others 1925 A.D. 537, it was held that even if the defendant was to receive the full benefit of the Maxim that "no one shall be enriched at the expense of another" and was therefore entitled to useful expenses, as the evidence showed that the land had not been enhanced in value byond the price of the base materials annexed to the soil, defendant was not entitled to be paid by way of compensation more than the value of such materials.

Boshoff and Another v R & S Syndicate Limited 1933 T.P.D. 253 is a case very similar to the present one. The appellants without the knowledge and consent of the owners erected and occupied a building of brick, wood and iron on their land in the belief that the land was theirs. The owners would not have erected the building and they sued for ejectment tendering the right to remove the building even if the removal caused damage. The court held that the appellants were not entitled to compensation and upheld the magistrate who had granted ejectment against the appellants with leave to remove the building.

The applicant here asks for an order that the the respondent demolish and remove all buildings on Portion 6. It must be assumed, in the absence of evidence to the contrary, that the improvements can be separated from the land without damage to the land itself. In any event the applicant has not claimed that the removal of the building would cause any damage and, if it might do so, they have by implication waived any benefit arising.

I therefore confirm the Rule Nisi obtained on the 22nd January 1988 with the proviso that the respondent shall have 60 days in which to remove the buildings and all materials relating to it.

I confirm that the costs of this application must be paid by the respondent.

F. X. ROONEY
JUDGE