

CIV. CASE NO. 63/2000

In the matter between

GUY TIMOTHY BERTRAM BERTRAM N.O.

APPLICANT

And

JOHN TEMBE

DEFENDANT

Coram
For Applicant

S.B. MAPHALALA – J
MR.P.FLYNN (Instructed by
Robison Bertram)

For Defendant

MR. MAGAGULA

JUDGEMENT
(23/10/2000)

Maphalala J:

This is an application for summary judgement. The plaintiff issued summons against the defendant on the 19th January 2000, claiming eviction of the defendant from Portion 91 of Farm No. 2 situated in Mbabane, District of Hhohho, Swaziland on Crown Land area No. 1 under Crown Grant No. 54/1957. The plaintiff is acting in his capacity as executor in the estate of the late Lawrence Lanco duly appointed by the Master of the High Court in terms of the law, which governs such matters. The plaintiff further applies for costs of suit and further or alternative relief.

The defendant opposes this application raising points in limine as well as advancing his defence to the application. The first point raised by the defendant is that this matter is improperly before court as it has been brought contrary to Rule 6 (9) of the High Court Rules which are mandatory in that the Master of the High Court has not been served with both the summons and the present application before court yet the application involves property belonging to a deceased person. I must point out however, that the defendant in his Head of Arguments referred to Rule 6 (23) instead of Rule 6 (9) as reflected in the opposing affidavit. Defendant also introduced other preliminary point that the replying affidavit filed by the plaintiff be set aside as an irregular step in terms of Rule 30 read with Rule 32 (5) (a) because leave of court was not sought before the replying affidavit was filed.

On the merit it was submitted for the defendant that he has a defence to the claim filed by the plaintiff. Firstly, the summons issued at the instance of the plaintiff is defective or open to exception in the sense that paragraph 4 of the summons the plaintiff alleges that the defendant fails, neglects and/or refuses to pay to the plaintiff. This is in despite the fact that the nature of the relief sought is not for payment but ejection. To this proposition the court was referred to a number of South African decisions and The Civil Practice of the Supreme Court of South Africa 4th ED by Van Winsen at al at 449.

Secondly, it was submitted that the defendant is in lawful occupation of the property having been given the land by Mrs. Daniels who is a sister of the late Lawrence Lanco. On this point it was argued that where the defendant relies upon a right of occupation given by the plaintiff seeking ejection, the plaintiff must prove termination of that right (see *Chetty vs Naidoo 1974 (3) S.A. 13 at 21*).

It was further argued on the merits that in the alternative or in the event that the court rules that the said Mrs. Daniels did not have the right to give permission to the defendant to develop and occupy the property as she was not the registered owner, it would be argued that the counterclaim filed of record be granted. i.e. that the plaintiff must compensate the defendant for the value of the property erected and the expenses used for clearing the land. Failure to do so would be tantamount to unjust enrichment of the plaintiff.

Furthermore, it was submitted on behalf of the defendant that the nature of the defendant's defence is that it would require oral evidence to be led, then it would be submitted that the matter be referred to trial. To grant the summary judgement would automatically close the door to the defendant.

Mr. Flynn on instructions argued on the contrary. He challenged the contention by the defendant that the application ought to have been served on the Master of the High Court and relies on Rule 6 (9) for this point in limine.

He submitted that the relevant rules are Rule 6 (2) and Rule 6 (23) and not Rule 6 (9). In terms of Rule 6 (23) a copy of an application in connection with the estate of a deceased shall be submitted to the Master of the High Court for consideration and report. Rule 6 (2) requires that where it is necessary to give notice of an application to any person the notice of motion should be addressed to both the Registrar and such person. Mr. Flynn submitted that the judgement of a party who is in unlawful occupation of an estate property is not an application in connection with the estate. It is not a matter in respect of which the Master would or could submit a report. It was submitted that the application for summary judgement is made in terms of Rule 32 and Rule 6 is inapplicable to this application.

It was argued further on behalf of the applicant that the defendant's purported defence is based on an allegation that he is in lawful possession by virtue of having been donated a portion of the land by "the late Mrs Daniels". There is no indication what her legal rights are in respect of the land. There are also no facts provided as to what "a portion of land" represents.

The defendant gives no details whatsoever of his alleged counterclaim and it is submitted that the court could not hold that this is a *bona fide* counterclaim. To support this view I was

referred to *Traut vs Du Toit 1966 (1) S.A. 69* and that of *Crede vs Standard Bank of South Africa 1988 (4) S.A. 786 (E)*.

I now proceed to determine the issues thus:

1. Points “in limine”

a) Admission of Replying Affidavit

It appears to me that the practice is that the replying affidavit is filed first with the court and the plaintiff can then make his application for leave to file from the bar. Following this practice I grant the plaintiff leave to file the replying affidavit as it is thus made part of the papers in this case.

b) Rule 6 (9)

The defendant contends that the application ought to have been served on the Master of the High Court and relies on Rule 6 (9) for this point in limine. Mr. Flynn is correct that the relevant rules are Rule 6 (2) and Rule 6 (23) and not Rule 6 (9). I must say though that defendant’s counsel in his Head of Arguments referred to Rule 6 (23). It would appear to me that the application for summary judgement is made in terms of Rule 32 and Rule 6 is inapplicable to this application. I thus rule that the point in limine is without merit and is thus dismissed.

2. On the merits

a) Whether summons are defective or open to exception

The defendant alleges that the summons issued at the instance of the plaintiff is defective or open to exception in the sense that paragraph 4 of the summons, the plaintiff alleges that the defendant fails, neglects and/or refuses to “pay” to the plaintiff. This is despite the fact that the nature of the relief sought is not for payment but ejection. It appears to me that this objection is only superficial in that if one were to read the whole of paragraph 4 it is clear that plaintiff seeks that defendant vacates his unlawful occupation of the premises. The word “pay” is clearly a typing error. I hold, therefore that exception is without merit.

b) Whether defendant occupation is lawful

The defendant’s purported defence is based on an allegation that he is in lawful possession by virtue of having been donated a portion or the land by “the late Mrs. Daniels”. From the papers before me there is indication what her legal rights are in respect of the land. There are also no facts provided as to what “a portion of land” represents. Further, the case of *Chetty vs Naidoo (supra)* relied upon by the defendant is not applicable in the present case. In that plaintiff if he contends that occupation has become unlawful by reason of

termination of the agreement, he in certain circumstances, assumes the *onus* of proving the terms of that agreement and proving that it has been terminated. In the case in *casu* plaintiff had not alleged any agreement between himself and the defendant.

3. Defendant's counterclaim

As the court has ruled that Mrs. Daniels did not have the right to give permission to the defendant to develop and occupy the property as she was not the registered owner, the court is to consider the counterclaim that the plaintiff must compensate the defendant for the value of the property erected and the expenses used for clearing the land. As failure to do so would be tantamount to unjust enrichment of the plaintiff. It appears trite that where the total failure of the defendant to set out his counterclaim fully makes it impossible for the court to say that the counterclaim can disclose a *bona fide* defence the court will grant summary judgement against the defendant (see *Traut vs Du Toit 1966 (1) S.A. 69*). In the *casu* the defendant failed to particularize his counterclaim in terms of the rules of this court.

In the result, summary judgement is granted with costs.

S.B. MAPHALALA
JUDGE