



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2214/2002

In the matter between

ROBERT RICHARD JAMES KIRK

Applicant

and

PETER KOWALSKI

Respondent

Coram

Annandale, ACJ

For Applicant For  
Respondent

Mr. L. Mamba Mr.  
S. Nkosi

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JUDGMENT 30<sup>th</sup>  
March, 2004

In his application, the applicant seeks an order that the respondent be evicted from the property known as Portion 35 (a portion of Portion 22) of Farm No. 234 at Manzini, with costs on the scale of attorney and client.

The application was brought on an urgent basis on the 24<sup>th</sup> July 2002 but for a number of reasons, was argued more than a year later, in November 2003. At some stage, probably the 2<sup>nd</sup> December 2002, the matter would already have been heard by the learned former Chief Justice, as he recorded on the court file "*Curia Advisari Vult*" on that date. This aspect was not canvassed by either of the attorneys, and from my own enquiries, the reserved judgment was neither written nor delivered. I will take it as if the merits have not been pronounced upon, hearing it as Court of first instance.

In both the respondent's opposing affidavit and his attorney's Heads of Argument, the point was raised that the applicant failed to set out the grounds and reasons for circumstances as to why the matter has to be dealt with urgently and why substantial redress cannot be obtained in due course. Mr. Nkosi referred the Court to the unreported case of H.P. ENTERPRISES (PTY) LTD v NEDBANK (SWAZILAND) LTD; Case No. 788/1999 where in it was stated by Sapire CJ that *"A litigant seeking to invoke the urgency procedures must make specific allegation which demonstrate the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow."* He thus relies on Rule 6(25)(b) of the High Court Rules, which he says to be preemptory, as a basis to dismiss the matter forthwith.

The application is indeed not supported by sufficient justification of urgency. The applicant does say in his affidavit ( paragraph 10.1 to 10.4) that the respondent is "currently" building a house on the property, without first securing consent of the applicant to do so, also that he has no right to occupy the property, both said to be unlawful. He does not say when this suddenly came to his attention or when it started to be so and why he has done nothing about it since then, nor why he cannot get redress in the ordinary course of the legal process.

Although the issue of urgency was raised in the papers, both in the opposing affidavit and the Heads of Argument, it was not actively pursued during the hearing in court. This may be due to a ruling recorded on the court file, dated the 7<sup>th</sup> August, 2002, when it was ordered that the matter is to take its normal course. It also may be the reason why it took so long to eventually be argued on the merits.

In any event, it does seem that the matter was not sufficiently motivated as one of urgency and that it was not dealt with on that basis either and further, that the point was not pursued in Court. Thus, the point *in limine* does not require further consideration and is not upheld.

A second point was raised by the respondent *in limine*, again in his opposing affidavit, where he states that the applicant has failed to join a necessary party, being the Kowalski Children's Trust, or its trustees, rendering the application defective. He incorporates thereto the 22<sup>nd</sup> paragraph of his affidavit, which reads that:-

*"It is stated that the applicant has failed to join the Kowalski Children's Trust which trust is the owner of the land. In any event the applicant has conceded that I have no loci (sic) standi but despite such knowledge he proceeded to make the application, citing me in my personal capacity as the respondent. "*

This follows on the applicant's contention that the Kowalski Children's Trust was never registered with the Registrar of Deeds or with the Master of the High Court and as a consequence, that it could not operate or act, through the absence of the appointment of trustees, further that no Trust Deed exists. The applicant does not recognise the Trust as such at all, furthermore as there allegedly is no indication that the reported donee ever accepted the donation (of land belonging to a company, Gaines Estate (Pty) Ltd, by Mrs. A.M. Boyder, to the Kowalski Children's Trust), due to the Trust never being in existence. Applicant goes further to state (paragraph 7.12) that even if it was so that the Trust actually was established and registered, *"the respondent clearly has no locus standi in his personal capacity to represent the Trust. There is equally nothing to indicate that the Respondent has any title to the land even less the right to occupy same in his personal capacity."*

This has to be seen in a proper perspective. What the applicant says is that the respondent has no legal capacity to represent the Trust, which is not recognised by the applicant as being in existence, in his personal capacity. He also says that the Trust is not the owner of the property, that it could not and did not accept a "donation" of the property by Mrs. Boyder. He also says that from these facts, the respondent cannot have title to the land or any right to occupy it. He does not say that the respondent, in his personal capacity, does not have *locus standi* to be sued *qua* occupier of the property, in order to seek his eviction. That is why, he says, he does not sue *nomine officio* in the capacity as a trustee or in any other representative capacity. The applicant seeks the eviction of the respondent as natural person in occupation of the

land averred to belong to the applicant and not anyone else. No relief is sought against the Trust or beneficiaries of the Trust.

In the respondent's written argument as presented to Court, non-joinder of the Trust or its trustees is the overriding factor held out to be detrimental to the application, that the citation of the respondent *in eo nomine* lacks legal standing to be sued since *ex facie* the papers, the land in question was donated to the Trust.

To me, this line of argument seems to be self-destructive. On the one hand, it is said that there is no Trust at all, while on the other hand, it is said that the same nonexistent Trust was a necessary party to be joined.

This was not the manner in which the matter was argued at the hearing. The respondent's attorney did not argue these aspects as preliminary points of law, which if accepted, would have disposed of the matter. Only during the course of the hearing after having fully heard the applicant's case, was it said during the respondent's argument, that in the event the Court was to hold that the Trust indeed is valid, that it would only then become necessary to determine whether the respondent was correctly cited, whether he does indeed have *locus standi* as the correct party before court. The matter was heard on that basis and I do not propose to deal with the issue of *locus standi* on the basis as it was pleaded in the papers, as a point *in limine*. The question will only fall to be decided if the merits require so, which is not the position due to the outcome of the matter which impacts on the *locus standi* of the applicant, not the respondent.

In the applicant's founding affidavit, he states that the respondent resides on portion 35 (a portion of portion 22) of farm 234, Matsapha in the Manzini district (the disputed property). The same property is one that he says he has ownership of, which he seeks to prove by way of a Deed of Transfer, incorporated into his papers. This Deed (Annexure "A") records a transfer of "*Remaining Extent of Portion 35 (a portion of portion 22) of Farm No. 234 situate in the District of Manzini, Swaziland*". The transfer is recorded to be from Gaines Estate (Pty) Ltd in favour of Robert Richard James Kirk (the Applicant). The transferor (Gaines Estates), by virtue of a resolution of the Board of Directors of the 24<sup>th</sup> May 2002 authorised its director,

Thomas Moore Carl Kirk to make over the property to the transferee (applicant), it having been sold to him for E75 000.

The applicant then brings into play the first of many complications when he elaborates on his initial averment of where exactly the respondent resides, by saying that he *"is in unlawful possession of a portion of the farm referred to above and for identification purposes that portion of the farm will be referred to as portion 46 ( a portion of portion 35) of farm 234..."*.

From the diagrams he refers to (annexure "D" attached to annexure "B") portion 46 is an angular shaped piece of land along the Northern and Eastern boundaries of the remaining extent portion 35, featured on a subdivisional diagram, surveyed in August 1996, it being part of an application to subdivide portion 35 of farm 234 dated January 1966. The differences in dates may be due to any number of reasons, but the application of 1966 is endorsed "subdivisional boundaries subject to amendment on final survey."

The applicant goes on to say that prior to him taking transfer, the land (the remaining extent of portion 35) belonged to Gaines Estates (Pty) Ltd and that his father, in his capacity as director and shareholder of the company gave notice to the respondent to vacate the portion of the farm occupied by him. The applicant did likewise. The dates of these notices are not stated, nor when the respondent took occupation, nor are any copies of these notices filed of record. He also does not state whether the subdivision of the remainder of portion 35, with the resultant "new" portion 46, proceeded or not.

Essentially, his case is that he owns the land which the respondent occupies, notice to vacate was given but not obeyed, hence his application to evict.

He then proceeds to give a detailed background of his version of the facts. His father, Thomas Moore Carl Kirk bought all the issued shares in Gaines Estate (Pty) Ltd from the executor of the estate of the late Alfreda Mary Boyder. The company owned the contested property, the remaining extent of Portion 35 of the farm in issue. The filed "Memorandum of Agreement of Sale of Shares" (annexure 'B') reflects that one

James, the executor of the estate of Boyder, sold the entire issued and paid up shares in Gaines Estates, which were owned by Boyder, to Thomas Moore Kirk at E700 000 on the 5<sup>th</sup> April, 2002. The seller warranted that the company owned the remainder of portion 22 (a portion of portion 19) of farm 234, Manzini, held under a Deed of Transfer 239/1967 and certificate of registered title 403/1997, and all other immovable property registered in the name of the company, subject to the provisions of the will of the late Mrs. Boyder.

Without providing any details of it, he states that his father as sole director and shareholder of the company "*requested*" the respondent to vacate the portion of the property occupied by him, which he refused to do. Again, no mention of how, when or why the respondent took occupation, or precisely which portion of the farm refers. He adds that the respondent was erecting a dwelling on the farm.

The applicant refers to an application brought earlier, which he incorporates in his papers, wherein the eviction of the same respondent was sought by the company Gaines Estate (Pty) Ltd, under case number 1763/02, which application (brought as one of urgency in June 2002), was withdrawn the following month, with a tender for wasted costs. Therein, the same relief was sought as now, an eviction of Kowalski from portion 35.

The applicant states that the reason for withdrawal of the first application was due to "*an oversight*" by his father's attorneys, who sued in the name of the company, which at that time did not own the property anymore, having already sold it to the present applicant.

In his founding affidavit, the applicant then goes on to deal with the defences raised by the same respondent in the first (withdrawn) application, anticipating that the same would again be raised.

The primary defence then raised, as per the applicant's exposition, is that the respondent denies being in occupation of the land described in the application (portion 35) but that in fact he occupies a portion of portion 35, now described as portion 46. To this, the applicant's argument is that although the subdivision of portion 35 into

portion 46 and the remaining extent of portion 35 was approved by the Surveyor General, such subdivision was never registered against the title deeds of portion 35, nor was it registered in the name of any person or entity. As consequence, the subdivided property remained as the registered property of the company, who sold the *"entire farm inclusive of the divided portion"* to the applicant. Of course this cannot be correct. I take it that he means to say that portion 35, inclusive of portion 46, was sold to him, i.e. portion 46, the subdivided part, as well as the remaining extent of portion 35. *"The entire farm"* literally means the whole of the original farm 234, which has long ago been subdivided into many portions, totalling some 1205 hectares, with portion 35 being only 1,5152 hectares in extent.

The applicant interprets the legal position to be that *"ownership of property vests in the registered owner thereof*, a positive registration system by which ownership is fully and finally determined by the title deeds of the land, that a registered title is unassailable and unquestionably valid as full and final proof of ownership.

The secondary defence of the respondent, on the initial application, as presently set out by the applicant, is that portion 46 was donated by the late Alfreda M. Boyer in terms of a Deed of Donation on the 22<sup>nd</sup> February 1996. This document, annexure "A" in the initial matter, is said to be worthless on the basis that at the time, the property was not hers to donate but was registered in the name of Gaines Estates (Pty) Ltd (the company). As proof of that, the applicant relies on a copy of the Title Deed of the land, annexure "F" which annexure does not exist.

I pause here and divert to record the Court's displeasure with the state of the Book of Pleadings presented in this matter. Apart from not being properly bound, the quality of photocopies is unacceptable, dark overtoned and frequently illegible. The papers are not properly indexed and annexures are not properly identified. Some annexures referred to in the papers, like annexure "F" do not exist in either the Book of Pleadings or anywhere else. At least the pages are properly numbered. The Registrar should not accept papers like the present and litigants will not be heard to complain when their matters are not dealt with to their expectations if practise directives are disregarded.

Returning to the aforementioned "annexure F", which does not exist, at best it can be inferred that the applicant in fact refers to annexure "TK1" also filed as annexure "RK3", a certificate of Registered Title number 403 of 1997. Therein, the Registrar of Deeds certified on the 2<sup>nd</sup> October 1997 that Gaines Estate (Pty) Ltd was the registered owner of portion 35( a portion of portion 22) of farm 234, Manzini, measuring 1,5152 hectares, acquired on the 29<sup>th</sup> December 1967. If this inference is correct, as I am bound to do under the circumstances, the applicant apparently seems to be correct to state that:-

*"At the time the Deed of Donation was made, namely the 22<sup>nd</sup> day of February 1996, she (Boyder) was not the owner of the land she was purportedly donating as same was registered in the name of Gaines Estate (Pty) Ltd."*

However, the Certificate of Registered Title does not bear this out, as *ex facie* the document, it is unknown who owned the property prior to the 29<sup>th</sup> December 1967, or more specifically, on the 22<sup>nd</sup> February 1996, the date of "donation." The certificate states that portion 35 was registered in the name of the company on the 29<sup>th</sup> December 1967. Also, the donation was made by Boyder "for and on behalf of Gaines Estate (Pty) Ltd," as explicitly stated on the document.

The further point raised by the applicant is that over and above his assertion that Boyder was not legally capable of donating land that did not belong to her, the donation was made to the "Kowalski Children Trust". He contends that no such Trust has been registered or validly established with either the Master of the High Court or the Registrar of Deeds. Arising from this, he concludes that no trustees were duly appointed, who could have acted for and on behalf of the non-existent Trust. Furthermore, he says that the donee could not have accepted the donation as it does not appear so on the Deed of Donation and also, that it could not have been accepted as the donee, the Kowalski Children's Trust, never came into existence. Even if it was to be so that indeed the Trust was established and registered, the applicant contends that the respondent has no *locus standi* in his personal capacity to represent the Trust or that he has any title to the land or the right to occupy it in his personal capacity.



The applicant *qua* averred owner of the land, seeks the occupant to be evicted from the property due to unlawful occupation, compounded by the erection of a dwelling on the land, which he refuses to vacate despite repeated notices to do so. Therefore the alleged urgency of the application, as the building of the dwelling continues to be done, over and above the occupation by the respondent.

Turning to the opposing papers, a further and crucial point needs to be dealt with, namely whether the applicant has *locus standi* to bring the application. The respondent avers in paragraph 2(c) of his affidavit that the applicant is not the owner of portion 46, (a portion of portion 35) of farm 234, Manzini, it being the portion that is allegedly unlawfully occupied by the respondent.

This allegation is based on the understanding that portion 46 is owned by the Kowalski Children's Trust by virtue of the Deed of Donation dated the 22<sup>nd</sup> February 1996. In turn, it impacts on the applicant's contention that the donation is invalid and so with the Trust. Hereby, the conundrum that requires determination over and above all else is: who owns portion 46?

I have already alluded to the relevant title deeds *supra* but revert to annexure "B", which is the subdivisional diagram of the contentious portion 46, a portion of portion 35, measuring 3351 Square Metres. It is a diagram made by a land surveyor that depicts the portion alongside its measurements, beacon descriptions and coordinates, which diagram was approved by the Surveyor General on the 17<sup>th</sup> September 1997. It does not further indicate who the owner is or that it is a description of land conveyed by the Registrar of Deeds.

A further plan that follows an annexure "B" is plan S366 RH, part of an application to subdivide the remainder of portion 35, the land of the applicant. That a diagram was approved by the Surveyor-General does not assist as proof how further subdivision took place. By all appearances, the subdivisional diagram seems to have been approved, in slightly different form, as part of an application to subdivide portion 35.

By looking at the papers and documents placed before court and on which the parties rely to substantiate their different points of view, a brief summary of the emerging picture is along the following chronological lines.

1) In January 1966, there was an application to subdivide the remainder of portion 35 of the farm. According to plan S366RH the boundaries of the subdivision is subject to amendment on final survey, provisionally 3200 square metres, leaving some 7450 square metres with the remainder of portion 35. (See the second page of the second annexure "B", page 54 of the papers before court).

2) In her will dated the 27<sup>th</sup> January 1997, the late Mrs. Boyder appoints one James as her executor. She bequeaths all of her estate, including Gaines Estate (Pty) Ltd to the same James, her godson, except for her house and surrounding fenced in property, which is bequeathed to a charity. (Annexure RK4 on page 100).

3) On the 22<sup>M</sup> February 1997, Mrs. Boyder, acting on behalf of Gaines Estate (Pty) Ltd donates the *"remainder of portion 35 of farm 234...which in area is 3200 square metres "* to the Kowalski Children's Trust. The Deed of Donation is endorsed to the effect that the land must remain the property of the Trust and may not be sold. Also, it refers to plan S366RH (see 1 *supra*) and that it is to be surveyed for identification and transfer, after subdivision, to the Trust. (The second annexure "A" on page 52 and/or page 71).

4) On the same date, a "Deed of Trust" is drawn by the creator, Kowalski. It states that acting on behalf of Gaines Estates (Pty) Ltd., Mrs. Boyder donated land, now described as the "proposed remainder of portion 35 of (the farm)" to the Trust, that Kowalski as creator of the Trust has accepted the donation on behalf of the Trust, and that he ratifies the acceptance of the donation. The Deed continues to describe what the Trust will do with

the property, who the beneficiaries are, what is to become of the property and the shares in the trust, who the trustees will be, their powers and so on.

On the 23<sup>rd</sup> February 1997, Kowalski, on behalf of the Trust as creator and trustee, signs an "acceptance of Donation" of the remainder of portion 35 of (the farm) measuring 3200 square metres as per subdivisional diagram being plan No. S366RN" Strictly speaking, with reference to the plan he refers to, the application to subdivide is in respect of the remainder of portion 35, totalling 1 065 square metres or 1,065 hectares, which after the proposed subdivision will have two parts: The first, the remaining portion of portion 35 will measure (according to the plan) some 7 450 square metres (0,745 hectares) and the second, the remaining extent of portion 35, which is later referred to as portion 46, measuring some 3 200 square metres or 0,320 hectares. Thus, the "remainder" is different from the remaining portion. Worthy of note is that no copy of a Deed of Registration of a "Portion 46" has been filed by either party, it being the contentious property. It is referred to in a number of places, said to have been donated, and with more than one surface area ascribed to it (3200m<sup>2</sup> or 3351m ). This "L" shaped piece of land to the North East and North West of the remainder of portion 35 used to be part of the whole of portion 35 but is not accounted for in the present matter by way of a Deed of Registration.

(See the third annexure "B" - on pages 73 and 74).

This same piece of land is next referred to on the 17<sup>th</sup> September, 1997, in a subdivisional diagram. Here, the land described as portion 46 (a portion of portion 35) of farm 234, measures 3 351 square metres, instead of the 3 200 square metres as mentioned in the Deed of Donation or the Trust Deed. The property is described in a subdivisional diagram, SG 115/97 of what is now known as portion 46. There is however no endorsement on the diagram that it describes land which is being transferred. It does state that it refers to diagram S166/93, which is the same diagram that is

referred to in the certificate of registered title dated the 2<sup>nd</sup> October 1997 of Gaines Estate in respect of the whole of portion 35 of the farm, measuring some 1,5152 hectares.

(See the second annexure "B" on page 53 and note 7 *infra*)

In the latter document of the 2<sup>nd</sup> October 1997, the Registrar of Deeds certifies that portion 35 of the farm, measuring 1,5152 hectares, is registered as the property of Gaines Estates (Pty) Ltd. The land is said to be a portion of the land registered in its name under a Deed of Transfer dated the 29<sup>th</sup> December 1967. The certificate was issued at the request of Mrs. Boyder, as a director of Gaines Estates (Pty) Ltd, authorised to do so by a resolution of her Board of Directors on the 16<sup>th</sup> September 1997. (See annexure TK1 on page 38 or annexure RK3 on page 91). The property, portion 35, clearly differs from the remainder of portion 35, which formed the subject of the land donated by Mrs. Boyder, according to 3, 4 and 5 *supra*, and from the remaining extent of portion 35, described in 12 *infra*.

A few years later, on the 5<sup>th</sup> April 2002, a memorandum of agreement was recorded wherein James, the executor of Boyder's estate, sold the entire issued shared capital of Gaines Estates (Pty) Ltd, which was held by Mrs. Boyder and her nominee to Thomas Moore Kirk. (See page 24 of the papers). The agreement records further that the seller warrants that the company was the owner of the remainder of portion 22 (a portion of portion 19) of farm 234, Manzini, held under Deed of Transfer No. 239/1967 and certificate of Registered Title No. 403/97, subject to the provisions of Boyder's will. (2 *supra*). The certificate of registered title (7 *supra*) refers to portion 35 of the farm, 1,5152 hectares, which in turn is certified to be a portion of portion 22 of the same farm. The Deed of Transfer No. 239/1967 is in turn certified to be the Deed under which the company, Gaines Estate (Pty) Ltd, had the property, of which portion 35 is a portion of, registered in its name on the 29<sup>th</sup> December, 1967.

5) The following day, the 5<sup>th</sup> May, 2003, all 100 shares in Gaines Estates (Pty) Ltd were transferred to Kirk senior (pages 85 and 86, annexure "RK1a") which effectively made him the owner of portion 35 of the farm.

6) A week later, on the 13<sup>th</sup> May 2002, a form was issued by the Registrar of Companies which indicates that Thomas Moore Kirk was appointed as director of Gaines Estate on the 3<sup>rd</sup> May 2002, as was Robert James Kirk (the applicant) on the 5<sup>th</sup> May 2002. (Annexure "RK2", page 87)

7) On the 24<sup>th</sup> May 2002, according to an extract of the minutes of Gaines Estate, it was resolved that its new director, Thomas Moore Kirk, be authorised to sell and transfer, on behalf of the company, the remaining extent of portion 35 (a portion of portion 22) measuring 1,0655 hectares. (Annexure "RK1" page 84).

8) This ultimately led to the registration of the remaining extent of portion 35, 1,0655 hectares, into the names of the applicant, Robert James Kirk, on the 12<sup>th</sup> June 2002. (The first "annexure A", page 14). .

For the sake of clarity, I reiterate that the applicant's registered property is described in the Title Deed as "the remaining extent of portion 35 (a portion of portion 22) of (the farm) measuring 1,0655 hectares. The property that is mentioned in the Deed of Donation of Mrs. Boyder acting on behalf of Gaines Estate, the Deed of Trust and its acceptance, refers to a different piece of land, described as "the remainder of portion 35" (3200 square metres, which is also said to be 3351 square metres in the subdivisional diagram).

Simple arithmetic shows that the original portion 35 owned by Gaines Estates had an area of 1,5152 hectares. Deducting from this area the remaining extent of portion 35 of 1,0655, registered in the name of the applicant, leaves a balance of 0,4497 hectares or 4 497 square metres. This area does not equate to either the 3200m<sup>2</sup> mentioned in the Donation to the Trust, nor to the 3351m<sup>2</sup> described in the second "annexure B" on page 53, respectively described as the remainder (or proposed remainder) of portion 35 and portion 46. According to the papers filed of record, portion 35 was

subdivided into the remainder of portion 35 and obviously some remaining extent must have been left of it, but as said above, no title deed in respect of that remaining extent is available. If it did indeed end up as being portion 46 as per the subdivisional diagram, the area of 3351 square metres does not account for the full area of 4497 square metres, nor does the land donated by Boyder, 3200 square metres, fill the void. There is no mention anywhere in the papers that the "remaining extent" of portion 35, measuring 4497 square metres was further subdivided into a further portion of land, which could have accounted for the difference.

From this *discursus* I revert to the respondent's opposing affidavit. In paragraph 2(c) The respondent states that:-

*"The applicant has no loci (sic) standi to bring the application as he is not the owner of portion 46 (a portion of portion 35) of farm 234 District of Manzini."*

It is common cause that the respondent is in occupation of the portion of land which is referred to as portion 46, but which portion is not registered in the name of either the respondent or the Kowalski Children's Trust Fund. A subdivisional diagram in respect of portion 46 was proposed and approved but the Court is unaware of any registration of such a portion by the Registrar of Deeds. If it was so, it certainly would have been stated so in the papers.

The point taken *in limine* by the respondent is the counterside of this. What he contends in effect, is that whatever his own rights, or that of the Trust, might be to occupy the land which he occupies, it is not for the applicant to raise any dispute. That is because, he says, the portion he occupies, portion 46, does not belong to the applicant. The question to be decided before the merits of the application comes into play is thus if indeed the applicant has the right to contest his occupation of portion 46. In turn, whether the applicant has any right and title to portion 46, which may be infringed and thereby have legal standing to seek an enforcement of his rights by having the occupant of a portion evicted.

In his founding affidavit the applicant sets out that he is the registered owner of the remaining extent of portion 35 (a portion of portion 22) of the farm. The Deed of Transfer annexed to his papers support this. The portion is 1,065 hectares in extent. The original portion 35, before the remaining portion was subdivided from it, measured 1,5152 hectares. As set out above, the balance remaining after the subdivision, namely 0,4497 hectares or 4 497 square metres, does not equate to the area of land mentioned in the subdivisional diagram relating to portion 46 (being 3 351m ) nor to the area of land mentioned in the Deed of Donation and Trust papers, being 3 200m . Something is amiss as the sums do not balance.

The fact of the matter is that if the applicant wants to have either the respondent in person or the Trust evicted from "his" land, he has to be the owner of it, in order to have legal standing to bring the application in the first place.

In his answering affidavit filed in the first (withdrawn) application against him which was brought by Gaines Estate (Pty) Ltd, Kowalski stated in paragraph 6 that:-

*"The respondent denies being in occupation of portion 35 ( a portion of portion 22) of farm 234 as described above.*

*Applicant is put to strict proof thereof.*

*Respondent specifically avers that he is occupying Portion 46 ( a portion of portion 35) of farm 234 donated by the applicant in terms of a deed of donation dated the 22<sup>nd</sup> February 1996 hereto attached marked "A " .*

*Respondent further avers that the subdivision of the farm into and or adding portion 46(a portion of portion 35) of Farm No. 234 was approved by the Surveyor General on the 19<sup>th</sup> September 1997 as more fully appears on the subdivisional diagram hereto marked "B".*

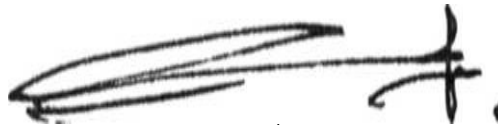
*Respondent lastly avers that there is no legal obligation compelling him to vacate the property he is currently residing in or building on because it does not belong to the applicant. "*

The same contention applies to the present application. By his own admission, and assertion supported by the Deed in respect of his land, the applicant is the owner of the remaining extent of portion 35 and not the whole original of portion 35. The initial portion 35 was subdivided and the applicant owns the remaining extent, now 1,0655 hectares, of what used to be portion 35, then 1,5152 hectares.

Whatever the case may be with regard to the other portion, apparently now portion 46, is not the concern of the applicant as owner of the remaining extent of portion 35. He has no title to portion 46 and accordingly, he is not a person or entity with *locus standi* to seek the eviction of his neighbour from land which does not belong to him.

Therefore, the point raised *in limine* stands to be upheld and it is thus not necessary to determine the other main issues raised in the application, namely whether the donation and trust is in order or not, nor whether the respondent's occupation of portion 46 is enforceable by himself or the Trust. Ownership and the right of occupation in respect of portion 46 or the rest of portion 35, after the remainder was subdivided and registered to the applicant is not pronounced upon.

Accordingly, the application is dismissed *in limine*, with costs.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a vertical stroke and a small dot.