

THE HIGH COURT OF SWAZILAND  
SIMON MHLEKWA DLAMINI

Applicant

And

PHILEMON MAZINYO DLAMINI

Respondent Civil Case No.

1871/2004

Coram

S.B. MAPHALALA - J

For the Applicant

MR. S. KUBHEKA MR. O.

For the Respondent

NDZIMA

JUDGMENT

**[1]** The Plaintiff issued summons against his brother the Defendant z~ the extended family common in this country, for payment of the sum of E144, 000-00 and interest thereon from the 27<sup>th</sup> January 2004, to date of payment at the rate of 9% per annum.

23<sup>rd</sup> February 2007

[2] The suit between the parties arose this way; According to the Plaintiff on or about June 2003, the Plaintiff entered into an oral agreement with the Ministry of Housing and Urban Development (hereinafter called the "Ministry") with the consent of the Nhlambeni Umphakatsi wherein it was agreed that the sewerage project which was to be constructed by the Ministry on another piece of land be relocated from the initial site of construction to the Plaintiff's piece of land. Further that the Plaintiff shall be paid a certain sum of money as compensation for his piece of land by the Ministry which payment was to follow after the necessary surveys and evaluation of the land was done. The land belonging to Plaintiff was eventually surveyed and evaluated as agreed by the Ministry and the Plaintiff and to date the construction of the project is on-going. The Ministry did indicate to Plaintiff that he shall be paid a sum of E 144, 000-00 as compensation for his land. The Plaintiff was then ordered by the Ministry to come at a certain date for payment.

[3] On or about the 27<sup>th</sup> January 2004, the Plaintiff went to the Ministry for purposes of receiving payment as promised. However, for reasons not known to him, it transpired that the monies were actually released by the Ministry to Defendant. Plaintiff contends that the Defendant is not entitled to receive the money as compensation from the Ministry due to one or more of the following respects: (i) the land in respect of which compensation was paid belongs to the Plaintiff (ii) at all material times thereto, the Ministry was dealing with the Plaintiff since it was the latter that came with the idea of relocating the project to his piece of land and (iii) it is the Plaintiff who initiated the negotiations between himself and the Ministry of Housing and Urban Development.

[4] The Defendant on the other hand avers in his plea, *inter alia*, that payment made to him by the Ministry was in respect of settlement of land belonging to him which land was used for purposes of the urban development project. Further that no monies belonging to Plaintiff were released to him. Furthermore the sum of E 144, 000-00 paid for it was for his own land.

[5] The court then heard the evidence of the Plaintiff who then closed his case. Thereafter followed an application by the Defendant for absolution from the instance and almost simultaneously Plaintiff applied that a certain witness whose name featured prominently in the events leading to the dispute between the parties be called. Then followed arguments in respect of these questions where thereafter the court refused the application for absolution from the instance and ordered that Plaintiff re-open his case by calling this witness. Indeed, when the court resumed to hear evidence this witness was called to give evidence here in court and also at an inspection *in loco* of the area in this dispute. Thereafter the Plaintiff closed his case and the Defendant there and then also closed his case without leading any evidence.

[6] The evidence of the Plaintiff came from three (3) witnesses, namely, the Plaintiff himself who appeared as PW1. PW2 Joseph Mphica Dlamini and PW3 Abel Dlamini. In a nutshell, the Plaintiffs evidence is that he entered into an agreement with the Ministry of Housing and Urban Development, wherein he surrendered his fields for a water sewerage project. Plaintiff stated that the Ministry of Housing and Urban Development were to compensate him for the handover of his fields in the amount of E1 44, 000-00. Plaintiff's evidence further revealed that the above-stated amount was not paid by the Ministr/ to him. It was his evidence further that at all times he was expecting payment of the sum of E1 44, 000-00 from the Ministry, and at no stage did he agree nor was it agreed that payment be made to the Defendant. He was actually angry with the officers of the Ministry when he learnt that payment was effected to the Defendant.

[7] Plaintiffs second witness PW2 Joseph Mphica Dlamini narrated to the court the succession amongst the Dlamini family as the Plaintiff and the Defendant were brothers. He told the court who occupied and used the land where the water sewerage project presently stands and actually who the land belongs to.

[8] The third and last witness for the Plaintiff was PW3 Abel Dlamini. This witness was actually part and parcel of the negotiations of the handover of the land to the Ministry. He attended almost all the meetings between the Dlaminis and the officials of the Ministry. This witness further told the court that it was agreed on 6<sup>th</sup> January 2004, that payment of the sum of E144, 000-00 be made to the Defendant, and present in that meeting were both the Plaintiff and the Defendant himself and the officers of the Ministry who were Mchobokazi and Ntezinde. It was in his evidence where he revealed that the Plaintiff agreed that payment and/or the cheque be issued in the name of the Defendant.

[9] On the other hand, the Defendant called only one witness, an official of the Ministry Bafana N. Mchobokazi. It should be noted that the Plaintiff had applied to recall this witness to support his case. The Plaintiff having been granted leave by this court to recall this witness decided not to call him as a witness. In a nutshell, the witness evidence was that the Government of Swaziland paid compensation for the fields that were ploughed and not for vacant land because it belongs to the Swazi Nation. He confirmed the evidence of Plaintiff's witness number three, Abel Dlamini, to the effect that it was agreed that payment be effected to the Defendant. He also disclosed that the fields that were ploughed belong to Mzanywa Dlamini and that his successor was the Defendant. He also informed the court that there were no ploughed fields belonging to the Plaintiff and that is why the Plaintiff was not paid anything. This witness further told the court that Magametjwala Dlamini was also paid accordingly for his produce as well as his five-bedroom house which was removed. He further told the court that various meetings were held between the officers of the Ministry and the Dlamini family.

[10] In arguments before me it was contended for the Plaintiff that in the circumstances of this particular case it is significantly remarkable that the Defendant elected not to give evidence. For this argument the court was referred to the case of *R vs Busisiwe Dlamini 1977 - 78 S.L.R 45*. Further, that Defendant

has failed to establish any right to retain possession of the money. The *onus* to establish any right to retain possession of the thing is always on the Defendant. In this regard the court was referred to the South African case of *Jeena vs Ministry of Lands 1955 (2) S.A. 380 (A)*. The court was further referred to the case of *Clifford vs Farinha 1988 (4) S.A. 315 (W)* in support of the Plaintiff's case.

[11] On the other hand, it was contended for the Defendant that the Plaintiff and the Ministry had no agreement whatsoever relating to payment of any sort of compensation because the Plaintiff did not plough any fields. The Plaintiff and the Defendant had no contract and no agreement whatsoever relating to the event that once payment was made by Government it should be divided between the parties. The Plaintiff in his evidence and/or in the Book of Pleadings did not disclose that he was acting on behalf of the Dlamini family and/or that he was sent by the Dlamini to institute the present proceedings, nor did he disclose his capacity to act as such, if any. In this regard the court was referred to the cases of *Rawjee Brothers vs De Vega and another 1979 - 81 S.L.R. 125 at 131*, *Nsibandze vs Hu Shen Chung 1970 - 76 S.L.R 166* and the South African case of *Cams (Pty) Ltd vs Play don and Company Ltd 1948 (3) S.A. 99*.

[12] After considering all the evidence adduced for the Plaintiff and the evidence led for the Defendant I have come to the considered view that the Plaintiff has no cause of action whatsoever against the Defendant in the circumstances of this case. In this regard I am in complete agreement with *Mr Nzima* for the Defendant that in actual fact, the evidence of Mr. Mchobokazi brought clarity to the whole controversy between the parties. His evidence was clear that the Government of Swaziland paid compensation for the fields that were ploughed and not for vacant land because it belonged to the Swazi Nation. This witness confirmed the evidence of Plaintiff's witness number three, Abel Dlamini, to the effect that it was agreed that payment be effected to the Defendant. This witness also disclosed that the fields that were ploughed belong to Mzanywa Dlamini and that his successor was the Defendant. It was also brought in evidence that there were

no ploughed fields belonging to the Plaintiff, and that is why the Plaintiff was not paid anything.

**[13] In the result, for the afore-going reasons the Plaintiffs dismissed with costs to be levied on the ordinary scale.**

XS3. MAPHALALA JUDGE