

IN THE HIGH COURT OF SWAZILAND

J.M. MANAGEMENT CONSULTING SERVICE

Plaintiff

And

SWAZILAND ELECTRICITY BOARD Defendant

Civil Case No. 2223/2005

Coram

S.B. MAPHALALA - J

For the Plaintiff

MR. B. MAGAGULA

For the Defendant

MR MTHETHWA

[1] Before court is an opposed application for summary judgment where Plaintiff seeks for eviction of the Defendant from the Plaintiffs farm and

JUDGMENT

22nd June 2007

further directing the Defendant to demolish and remove all structures erected by it on the said farm within 14 days failing which authorizing the Deputy Sheriff to do so and costs.

[2] The Defendant has filed an affidavit resisting summary judgment. The Defendant raises a defence that it intends to raise a special plea to the effect that it terms of Section 46 of the Electricity Act of 1963 the Plaintiffs claim has prescribed.

[3] Section 46 of the Electricity Act provides as follows:

(1) Any person desiring to take action against the Board for damages arising *ex delicto* shall notify the Board in writing of his intention to do so within one month of his becoming aware of the event giving rise to such damage, and the proposed action shall be instituted within one year from the giving of such notice;

(2) If notice is not given within the time stipulated or if the action be not commenced within one year from the giving of such notice then such action shall be prescribed and may not be instituted except by leave of the High Court on good cause shown"

[4] The Plaintiff contends that damages arising *ex delicto* and a claim for eviction underpinned by a right of ownership of land are two distinct and different causes of action and cannot be conflated Plaintiff 's cause of action is eviction and not for damages *ex delicto*. Therefore Section 46 of the Electricity Act of 1965 is not applicable to the Plaintiffs claim for eviction which claim is extant and enforceable against the Defendant.

[5] On the second argument by the Defendant that it asserts its right of occupation to the portion of land in question by a Deed of Sale between itself and Macks Property Limited, the previous owner of the Plaintiffs farm cannot stand because according to the Plaintiff any personal right against Macks (Pty) Limited, the previous owner of

the property, which the Defendant may have acquired in terms of the Deed of Sale are subservient to the Plaintiffs real right of ownership of the property.

[6] Furthermore the Defendant alleges that its right of occupation of Plaintiffs property flows from Section 32 of the Electricity Act which empowers it to expropriate land for its service provision purposes. The Defendant alleges as its defence that it is occupying the land on the strength of a purchase of the property yet in the same breath alleges that it expropriated the property in terms of Section 32 (a) and (b) of the Electricity Act. The Plaintiff contends that these two defences do not dovetail one another and illustrate *mala fide* on the part of the Defendant.

[7] In any event even if Section 32 (1) (a) and (b) of the Electricity Act applied the Plaintiff contends that the expropriation of the Plaintiffs property is conditional upon the peremptory compliance with Section 32 (2) by the Defendant's board which provides that before the Defendant's board expropriates someone's land it must serve him with a notice in writing advising him of its intention to do so". The said pre-requisite written notice has not been served on the Plaintiff nor has Defendant alleged that it did serve it on the previous owner and attached a copy thereof.

[7] The Plaintiffs final salvo is premised on Section 19 (2) of the Constitution of the Kingdom of Swaziland of 2005 which provides as follows: "A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied:-

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health;

(b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for-

(i) prompt payment of fair and adequate compensation; and

- (ii) a right of access to a court of law by any person who has an interest in or right over the property;
- (c) the taking of possession or the acquisition is made under a court order".

[8] The argument by the Plaintiff based on the above section of the Constitution is that presuming that the Defendant had a right to expropriate the Plaintiff's property such expropriation is unconstitutional.


[9] The Defendant on the other hand contends that it has a *bona fide* defence, and that the nature of the issues that are raised are triable and as such there cannot be properly determined on the affidavits. The first argument by the Defendant is that the Plaintiff's claim against the Defendant has prescribed. Therefore the Plaintiff is not entitled to any order against the Defendant in relation to this matter.

[10] The second argument advanced by the Defendant is that Plaintiff has not set out an unanswerable case against the Defendant, in light of the fact that Defendant has presented before court a Deed of Sale which was entered into between the latter and the Plaintiff. That fact alone without going into details removes this claim from the realm of matters that are fit for summary judgment. Clearly, the Defendant should be given an opportunity to state its case properly in a form of a plea and then present its evidence in trial. In this regard the court was referred to the cases of *Maharaj vs Barclays National Bank Ltd 1976 (1) S.A. 418*, *Glinsky vs Superb Londerous 1978 (3) S.A. 807* and that of *Musa Magongo vs First National Bank Swaziland Appeal Case No. 38/1999*. The court was further referred to the case of *Breitenback vs Fiat S.A. (EDMS) BPK1976 (2) S.A. 2260*.

[11] According to the legal authors *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 434 the procedure provided by the rules has always been regarded as one with a limited objective to enable a Plaintiff

with a clear case to obtain swift, enforcement of his claim. The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an extraordinary one which is "very stringent" in that it closes the door to the Defendant, and which will thus be accorded only to a Plaintiff who has, in effect, an un-answerable case. Some of the decisions come close to limiting a Plaintiffs resort to this remedy to cases in which the Defendant's conduct in giving Notice of intention to defend is equivalent to an abuse of the process of the court, (see *Edwards vs Menezes* 1973 (1) S.A. 299 (SG)

[12] On the facts of the case and the arguments advanced by the Respondent in paragraphs [9] and [10] of this judgment I cannot say that Plaintiff has an un-answerable case on the facts presented-



S.B. MAPHALALA JUDGE

[13] In the result, for the afore-going reasons the application for summary judgment is refused and costs to be costs in the trial of this matter.