IN THE HIGH COURT OF SWAZILAND

CASE NO. 3028/06

HELD AT MBABANE

BETWEEN

JOEL MAVIMBELA...	**FIRST PLAINTIFF**
AMOS NDZIMANZE...	**SECOND PLAINTIFF**
RICHARD MAVIMBELA...	**THIRD PLAINTIFF**
BONGINKOSI W. NDZIMANDZE...	**FOURTH PLAINTIFF**
DUDUZILE MABUZA...	**FIFTH PLAINTIFF**

AND

FOHLOZA ZWANE…	**FIRST DEFENDANT**
MADALA SHONGWE...	**SECOND DEFENDANT**

CORAM

AGYEMANG J

FOR THE PLAINTIFF:

ADV. D. A. SMITH SC

INSTR

UCTED BY S.C. DLAMINI AND COMPANY

FOR THE DEFENDANT:

S. MAGONGO ESQ.

DATED THE 15TH DAY OF FEBRUARY 2010

JUDGMENT

The first and second plaintiffs in their own right, the third plaintiff as executor dative of the estate of Mashayinyoni Isaac Mavimbela, and the fourth and fifth plaintiffs as co-executors of the estate of Abel Thisela Ndzimandze have sued the defendants herein, adult Swazis of Sifuntaneni for the following reliefs:

a. An order of eviction of the defendants from Farm No. 474;
b. Costs of suit;
c. Further and/or alternative relief.

The plaintiff's in their pleading, alleged that they were owners of Farm 474 situate at Sifuntaneni, and that the defendants who had no claim thereto were in wrongful and unlawful possession of same. The plaintiffs relied on a copy of a deed of transfer marked 'C', executed in their favour following a purchase of the said property for the purchase price of E20, 000. The said document, executed at the Office of the Registrar for Deeds on 20th October 2000, recited the vendors of the property to be the executors of the estate of Robert Clarence and Laura Olive Henwood the registered owners of the property. The property was described as Farm 474 lying in the Shiselweni District of Swaziland.

The second plaintiff gave evidence for himself and the other plaintiffs. It was the evidence of this witness that he and his brothers purchased the property in question which they referred to as Farm 474, from one Samuel Sibandze in 1982. He alleged that during the sale transaction, Mr. Sibandze had no title

deeds to give and that it was explained by Mr. Sibandze's attorney that they were with Mr. Henwood. Mr. Henwood allegedly demanded E20,000 from them to enable him transfer the land to them as the previous owners had not paid what was due in full. He added that in 1992, when after the sale to them by Sibandze, a transfer had to be made, they ran into problems. A deed of sale was made in that year, with the Henwoods assisting.

The second plaintiff acknowledged that the defendants had their homestead on the said land. It was his evidence that although the second defendant had lived on the land before 1953, in that year however, she was driven off the land by one Vezati, then owner of the land. He alleged that this followed an identification of the land as a farm following a survey and that the second defendant having left the land, stayed off it until she returned to it in 1968.

Regarding the first defendant, the witness further alleged it was in 1975 that the first defendant who married the daughter of the second defendant, moved onto the land. The land was then owned by a Mr. Ryan whose immediate predecessor was a Mr. Jacobson. The occupation of the land by the defendants he said, was not peaceful for in 1976, it was challenged by the said Samuel Sibandze (since deceased) who sought to evict them from it. The witness testified that the defendants remained on the land at the sufferance of the said Samuel Sibandze who following their entreaties to him before the Police to be permitted to cultivate the land, fenced the land, to define the boundaries and also to secure same for his own cattle.

It was the case of the plaintiffs, as this witness recounted, that when in 1982 he and his brothers became owners of the land having bought same from Samuel Sibandze for E35,000, the entered into possession by putting their

cattle on the land although one of their number: Abel moved onto the land to occupy same. He alleged that the plaintiffs as new owners called the defendants to a meeting whereat the defendants were informed of the plaintiff's ownership of the land they occupied. He alleged that on that occasion, the plaintiffs who were allegedly warmly received by the defendants, permitted the defendants to remain on the land and to cultivate same subject to their compliance with certain demands. These were: that the defendants should not build permanent structures (concrete houses), should burn all plastic they used, to build a lavatory and to dig a pit. The defendants allegedly failed to do these and moreover, the first defendant allegedly had the fence surrounding the fields cut. These matters resulted in the plaintiffs making a demand that the defendants vacate the land.

The defendants refused to do so and made a report of this to King Maja, the King of the Mambas. The said traditional authority wrote a letter admitted in evidence as exhibit A by which he asked the plaintiff's to vacate the land for the defendants. It was the further evidence of this witness, that following an explanation of the true state of affairs to the small Council of Sifuntaneni: that what the defendants were claiming was inside a farm, the said Chief Maja allegedly wrote another letter (which was not produced in court), to change his position and to apologise.

The plaintiffs also made a report to the Farm Tribunal Council. The first defendant duly summoned to attend a meeting, failed to attend. When the defendants failed to heed the calls to vacate the land, the plaintiffs secured a peace-binding order exhibit B against them from the Siteki Magistrates Court. When this measure also failed, the plaintiffs commenced the present suit.

The case of the defendants appeared to be two-fold, first that the land in dispute that that the land did not belong to the plaintiffs herein, was not a farm but was in fact Swazi Nation Land. It was the pleading of the first defendant that he had been born and nurtured on the land, knowing all the while, in the forty-six years he had occupied same without interruption, that the land was Swazi Nation land. The second defendant pleaded that she had been in occupation of the land for sixty-six years and that her husband Jandu Shongwe grew up, married second defendant and built a matrimonial home for her on the land in question. The defendants in what seemed to be an alternative plea, pleaded that they had acquired the land through acquisitive prescription having lived on the land openly as if they were the owners thereof for more than thirty years. In spite of the latter pleading, the defendants did not counterclaim for ownership of the land.

Testifying in court, the first defendant in an apparent about-turn, alleged that he had come onto the land sometime after the country gained independence, when he married the daughter of the second defendant. Before then he had lived at Etindwendweni at Lavumisa. He alleged also that he was given the land on which he built his homestead by King Maja II the King of the Mambas and that the land remained Swazi Nation land which belonged to the said King. He denied that the defendants had been put off the land at any time, alleging that when between 1994 to 1996, Samuel Sibandze attempted to do so, the whole community resisted him, alleging the land to be Swazi Nation Land before the Lubulini Police. He alleged that on that occasion, Isaac Mavimbela had been on their side in their contention that the land was Swazi

Nation land and that Samuel Sibandze had dropped his claim. During cross-examination, although he at first denied that there was any trouble in 1986, he later admitted that Sibandze's claim had indeed been in 1986. Although the first defendant denied that the plaintiffs had invited the defendants to a meeting, or had informed them that they were the new owners or had given them instructions on how to occupy the land, the first defendant testified that the plaintiffs started laying claim to the land in 1995. During cross-examination, the first defendant who was confronted with matters he swore to in an affidavit in support of a previous application before the court, denied all the contents of the affidavit. He further disparaged his attorneys Maphalala and Co. who had represented him in that application. He denied that he had told his attorney in that application, any of the matters contained in his affidavit. He also alleged that the attorney wrote the matters contained therein wrongfully, and made him sign the affidavit without disclosing the said matters to him.

Among the matters contained in the court documents filed in that application described as Case No. 1980/00 admitted in evidence as exhibit D (which the first defendant denied knowledge of), were: first, that the defendants herein had filed an application by which they sought to interdict the plaintiffs herein from evicting them from the land they occupied. Furthermore, that the first defendant swore to an affidavit in which he had deposed that he had been born and nurtured on the land. He also deposed that the land they occupied which was the subject of the dispute, was described by them as Farm 474 and that that the farm belonged to Mr. and Mrs. Henwood.

The first defendant denied all of these. He further denied knowing that the said application had been dismissed with costs, or that a firm of property consultants Chiyanda Property Consultants had been engaged by the attorneys on their behalf to survey the land in dispute, or that he had been informed that the report of the said property consultant showed that the land in dispute was described as Farm 474.

The second defendant testified that she was born on the land in dispute which had her ancestral home on it and on which her own mother lived and died. She alleged also that she, grew up on it, got married and had her homestead built on it by her husband for her. Denying that it was a farm or that she had ever been evicted from it, she testified that she had lived on it all her life without interruption. Concerning adverse claims regarding the land, she testified that Sibandze once alleged the land to be a farm and that the plaintiffs later alleged that they had bought the land from Sibandze. She testified that she made a report of the plaintiffs' claim to King Maja to whom the land belonged and who wrote a letter to the plaintiffs telling them to leave her alone. In spite of her bold assertions, the second defendant during cross-examination gave conflicting, incoherent answers, at once alleging the land in dispute to be Swazi Nation land belonging to King Maja, and saying in the same breath that she did not know who the land belonged to,

She testified that once when the plaintiff's laid claim to the land, she engaged an attorney who prepared papers for her to thumbprint after she gave him instructions. She alleged that eventually they went to the High Court although they never returned to court as the other party failed to prepare their papers.

At the close of the pleadings the following stood out as issues to be determined:

1. Whether or not the land in dispute is Farm 474;
2. Whether or not the plaintiffs have title to the land in dispute;
3. Whether or not the defendants have acquired the land through acquisitive prescription;
4. Whether or not the plaintiffs are entitled to their claim.

The plaintiffs in their particulars of claim have asked that the defendants be evicted from Farm 474 which they occupy. The entitlement of the plaintiffs to the said relief sought is grounded on their assertion that they purchased the said farm. The plaintiff's attached to their papers a deed of transfer regarding the parcel of land that was transferred to the purchasers two of whom are plaintiffs herein and two of whom being late, are represented by the executors of their estate in the instant suit. The deed of transfer describes the land the subject of that transaction as Farm 474.

The defendants have denied that the land on which they live, and which is the subject of this suit is Farm 474 or a farm at all. They have both alleged that the land is Swazi Nation Land, on which the second defendant has dwelt from birth, and which the first defendant acquired from King Maja II in accordance with the Kukhonta system of land tenure.

Is the land the subject matter of the suit Farm 474? It seems to me from all the evidence led, that in all probability it is. I say this for the following reasons: Although the second plaintiff who gave evidence for himself and the other plaintiffs testified that the plaintiffs bought the land from Samuel Sibandze

whose name does not appear on the deed of transfer exhibited in this court, it seems to me that the deed of transfer exhibit C is referable to the land on which the defendants live. I say this for reasons appearing after hereunder: The second plaintiff testified that in 1992, the purchasers of the land in dispute who had previously bought same from Samuel Sibandze in 1982 for E35,000, also dealt with Mr. Henwood. He alleged that the said gentleman also demanded E20,000 for that same land as the previous owners of the land had allegedly failed to settle what they owed.

The weakness in the plaintiff's case was that the documentary evidence exhibit C which recited that the land was purchased by the plaintiff and others from the estate of Mr. And Mrs. Henwood, differed from the evidence of the second defendant in that the witness, while relying on exhibit C, nevertheless testified regarding a root of title that recited Sibandze as seller and not the Henwoods or their estate. Indeed, the second defendant in this regard only mentioned the involvement of the Henwoods rather obliquely and almost as an afterthought during cross-examination. Although in a case where a plaintiff seeks a declaration of title, or at least relies on a title superior to a defendant's, he is required to adduce cogent evidence of his claim and not rely on the weakness of the opponent's case, in the present instance, the difficulties with the plaintiffs' evidence seemed to have been helped by the defendants and in no uncertain way either. I say this having regard to the following: In application proceedings commenced at the High Court on 18th July 2008 by the defendants herein as applicants against the first and second plaintiffs as well as persons now deceased and represented in the present suit by executors, the defendants prayed that the court restrain the plaintiffs

herein as respondents, from evicting them from Farm 474 where the defendants had their homesteads. The depositions in the second defendant's affidavit in support of that application appeared to corroborate the plaintiff's case based on exhibit C. In that affidavit, the second defendant deposed that the land on which the defendants have their homesteads is Farm 474 and that (according to the report of Chiyanda Property Consultants a firm engaged by the applicants attorneys in that suit), it belonged to the late Robert Clarence and Laura Olive Henwood. The first defendant herein by a confirmatory affidavit, associated himself with the said matters deposed to as fact by the second defendant in the suit. The court documents in the said application proceedings were tendered and admitted in evidence as exhibit D. Contrary to the assertion of learned counsel for the defendants, the said piece of evidence was properly and appropriately introduced as evidence of matters regarding which the defendants had given contrary evidence in the instant case. The first defendant evidently caught providing the court with evidence contrary to his sworn affidavit in the previous suit, maintained that the contents of the affidavit were unknown to him. Having heard the first defendant and observed his demeanour as he answered questions during cross-examination, it seems to me that in his shiftiness, unprovoked aggressive mien, and inconsistent answers, that this was an unreliable witness upon whose testimony I will place little credit.

It seems to me that the matters aforesaid, contained in exhibit D were corroborative of the plaintiff's version, contradicting the defendants' assertion in the instant suit that the land in dispute is Swazi Nation land and not a farm. The said piece of evidence supports the documentary evidence exhibit C,

regarding the identity and nature of the land in dispute. Indeed, in that application, the applicants, firmly asserting that the land on which they had their homesteads was Farm 474, owned by the late Robert Clarence and Laura Olive Henwood, attached a survey report commissioned by them their assertion and their case in that suit.

The said contents of the sworn affidavits of the defendants were not successfully controverted by the defendants. Indeed, both defendants admitted that they gave instructions to counsel in that suit (although the first defendant in the same breath staunchly denied that he had instructed counsel in the matters contained in the affidavits).

I find that the contents of the sworn affidavits aforesaid stand as a solemn confession of the facts as known to the defendants regarding the nature and identity of the land in dispute. As evidence corroboratory of the plaintiffs' case, I find from the totality of the evidence that on a preponderance of the probabilities, the evidence led establishes that the land in dispute and on which the defendant have their homestead, is Farm 474. I hold the same to be a fact.

Do the plaintiffs hold title to the land in dispute? Before this inquiry gets under way, it is useful to point out that although the plaintiffs are not seeking a declaration of title to the disputed land in this suit, the reliefs they seek being inter alia, an eviction of the defendants from the land requires that they prove a title to the land that is superior than that of the defendants who have alleged a possessory title of Swazi Nation land, obtained through the Kukhonta system. The first plaintiff as aforesaid, gave evidence for himself

and for the other plaintiffs. He traced the plaintiff's root of title to one Vezati, their immediate predecessor-in-title being the said one Mr. Sibandze. The document exhibit C on which the plaintiffs rely, recite the executors of the estates of Mr. and Mrs. Henwood as those that sold the land in dispute Farm 474 to purchasers listed therein (the first and second plaintiffs and others who being deceased are represented by the executors of their estates). I have said before now that in spite of the apparent disparity between the first plaintiff's evidence and the documentary evidence offered by the plaintiffs, the transaction of the executors of the estates of the Henwoods with the plaintiffs will be held to be referable to the land in dispute. This is by reason of a reference made by the first plaintiff regarding the title of Mr. Henwood in the disputed land as corroborated by evidence of the defendants in previous sworn statements they made in affidavits before the High Court. In that circumstance, I will hold that exhibit C, a document showing a sale transaction on the land Farm 474, by which interest therein was transferred to named purchasers of the land and which was neither denied nor challenged by the defendants, will upon the application of the best evidence rule, stand as evidence of the transactions relating to that piece of land. Exhibit C evidences a transfer of interest and/or title of the estates of Mr. And Mrs. Henwood to the first and second plaintiffs herein, Isaac Mavimbela and Thisela Ndzimandze jointly.

I hold to be a fact that the plaintiffs are owners by purchase of Farm 474, land which per the sworn statements of the defendants in affidavits is occupied by them and is the land in dispute.

Are the defendants entitled to the land through acquisitive prescription?

It seems to me not. Indeed I must reiterate that the defence put up by the defendants was difficult to comprehend for in the same breath they seemed to have relied on mutually exclusive defences. This is because while they alleged the land they occupy to be Swazi Nation land belonging to King Maja II whose continued ownership they acknowledged, they also relied on acquisitive prescription.

A defence of acquisitive prescription requires a demonstration by the defendant who asserts same to prove certain matters which may lead the court to that conclusion, that is, he assumes the burden of proof of that matter alleged.

Of paramount importance in such an enterprise, is the demonstration of adverse possession by the defendants, see: per Watermeyer CJ in ***Malan v. Nabygelegen Estates 1946 AD 562.*** The first defendant, denying the allegation of the first plaintiff that she had been put off the land in 1953 by Vezati, alleged that she had lived on that land all her life, uninterrupted. She further pleaded that she had in fact lived on the land for sixty-six years. Even so, allegedly occupying the disputed land all her life or for sixty-six years (as the case may be), she admitted that she was not the owner of the land, nor had she occupied it with the intention of acquiring possession as it belonged to the Mambas. The following are typical of her answers during cross-examination: “I do not know who it belongs to. Maybe it belongs to the claimants. I just know that I live at the Mamba’s place. I do not know anything”; and “...I do not know of any farm. I only know that I live at King Maja’s place”.

Furthermore, to the question: Would it be correct to say that in your head, the land is tribal land, Swazi Nation Land?

She responded: “I know it to be so...”and then “...it belongs to the king”.

Surely, even if the other elements of acquisitive prescription (*nec vi nec clam nec precario)* obtained that is that the second defendant had occupied the land uninterrupted, peacefully and openly for more than thirty years, she did not demonstrate that it was *possessio civilis*, in that she lived on the land as owner as was alleged in the defendants’ plea. Clearly on her own showing, no matter her long occupation of the land, the user would not ripen into ownership as the land belonged to King Maja and was Swazi Nation land. Neither, according to her, did she intend to keep the land as if she were the owner, or to acquire ownership by continued occupation adverse to the title of the king.

But the second defendant did not adduce evidence of uninterrupted user or that same was peaceful. Although she denied having ever been driven from the disputed land, in face of the plaintiffs’ case that her occupation of the land had been interrupted from 1953 until 1968, it was important for her to adduce cogent evidence of uninterrupted occupation. Save for her bare assertion uncorroborated by even her co-defendant who had not been present at the time, no such evidence was adduced. The second defendant thus failed to demonstrate that it was peaceful and not precariously as the defendants who bore the burden of adducing evidence of regarding acquisitive prescription both admitted that in 1986 Sibandze laid claim to the land, and the present plaintiffs did so also in 1995.

And besides all this, both defendants averred that the land belonged to King Maja the king of the Mambas. The first defendant during cross-examination doggedly contending that the land belonged to King Maja, recognised the right of that traditional ruler to terminate same for he averred that even if the land was found to be farm King Maja would be the one to give them alternative land. By their own evidence therefore, the defendants were clearly not in adverse possession to the owner. The defendants evidently neither saw themselves as owners of the land they occupied, nor did they intend to acquire ownership by occupation, adverse to the title or interest of another, ***see: Morkel Transport (Pty) Ltd v. Melrose Foods (Pty) Ltd and Anor. 1972 (2) SA 464; also***, ***Albert Falls Power Co. v. Goge 1960 (2)SA 46 (N).***

Nor can the court find as a fact (in face of evidence), that the occupation of the second defendant was uninterrupted from birth as the defendants pleaded, or that it was not precarious, in that it was not subject to the right of their acknowledged owner, to terminate their possession.

I am satisfied that the defendants who relied on title through acquisitive prescription failed to discharge the burden placed on them to demonstrate on the preponderance of the probabilities, not only that they had occupied the land uninterrupted for more than thirty years, but that they did so openly and peaceably, and that they occupied same as owners, or intending to acquire ownership by occupation, see: *Morkel Transport's* case (supra).

I have already held that the land occupied by the defendants is Farm 474.

I hold that the plaintiffs have proven a better title than the defendants as they adduced documentary evidence of ownership by purchase with a consequent

transfer of title to the first and second plaintiff: Joel Mavimbela and Amos Ndzimandze, and the deceased persons: Abel Thishela Ndzimandze, Isaac Mashayinyoni Mavimbela whose estates are represented by the other plaintiffs.

I therefore find that the plaintiffs have proved their entitlement to the land in dispute.

The claim of the plaintiffs thus succeeds.

Judgment is accordingly entered for the plaintiffs for the reliefs contained in the particulars of their claim being:

a. An order of eviction of the defendants from Farm No. 474;
b. Costs of suit awarded to the plaintiffs including the certified costs of counsel.

MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE