IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3009/10**

In the matter between:

MDOLI DLAMINI **1st Plaintiff**

AUDREY KELLY **2nd Plaintiff**

NTANDWENI FARMERS' ASSOCIATION **3rd Plaintiff**

SIKHUPHE FARMERS' ASSOCIATION **4th Plaintiff**

VINAH DLAMINI **5th Plaintiff**

ETIKHOVENI CHURCH IN ZION **6th Plaintiff**

AMOS HLATJWAKO **7th Plaintiff**

DUDU HLOPHE **8th Plaintiff**

MANDLA MALINDZISA **9th Plaintiff**

DANIEL SUKATI **10th Plaintiff**

And

THE MINISTRY OF PUBLIC WORKS AND TRANSPORT **1st Defendant**

THE SWAZILAND GOVERNMENT **2nd Defendant**

THE ATTORNEY-GENERAL **3rd Defendant**

Date heard: 29 March, 2011
Date of judgment: 30 March, 2011

Mr. Attorney O.J. Nzima for the Plaintiffs
Mr. Attorney V. Kunene for the Defendants

J U D G M E N T

CASE SUMMARY

PRACTICE: Application for summary judgment. Plaintiffs' land expropriated by the Government and claiming payment of compensation agreed upon. Defendants opposing application on basis of their policy not to give out money but to build houses for persons to be compensated - whether the said policy constitutes a defence on the facts to summary judgment in terms Rules of Court; Issues the Court must consider before granting summary judgment. Result - application for summary judgment granted as prayed with interest and costs.

MASUKU J.

[1] This is an opposed application for summary judgment. The *dramatis personae* are various individuals and voluntary associations of the one hand and the Swaziland Government of the other.

[2] The common thread that connects all the plaintiffs is that they previously occupied parcels of Swazi Nation Land around Mbadlane area, Lubombo District. This land was expropriated by the 1st defendant for purposes of the construction of the Mbadlane - Sikhuphe Airport (D42) Road. This expropriation was done in terms of the Roads and Outspans Act, No. 40 of 1931 as read with the Acquisition of Property Act No. 10 of 1961.

[3] It is common cause that the plaintiffs' various properties were evaluated by or at the Government's behest and the various plaintiffs were caused to sign a letter accepting payment of the determined amount as compensation in full and final settlement for the expropriated properties.

[4] For ease of reference, I will quote verbatim the letter signed under the hand of the erstwhile Principal Secretary of the 1st defendant, Mr. Evart Madlopha, dated 20 November, 2008, in respect of the 1st plaintiff by way of example. It reads as follows:

Ms. Mdoli Dlamini

Mbadlane

Re: Expropriation of Main House, Kitchen, Rondavel, 4 rooms. Two toilets, Diamond Mesh Kraal and 4 Strand barbed wire found on Swazi Nation land at Mbadlane

Dear Madam,
In terms of the Roads and Outspans Act No.40 of 1931 and the Acquisition of Properties Act No. 10 of 1961 you are hereby notified that your property as described above is to be expropriated by the Government of Swaziland for incorporation of the land into the Road Reserve of the Mbadlane-Sikhuphe Airport (D42) Road.

Further to the publication of Legal Notice No. 5 of 2001 in the Swaziland Government Gazette you are hereby notified that the Property Valuer has determined the total value of your properties to be E670,461-50 (Six Hundred and Seventy Thousand, Four Hundred and Sixty One Emalangeni and Fifty Cents)

Accordingly you will receive a cheque in the amount of E670, 461-50 AS Full and Final Settlement of your compensation for all your properties.

Please complete and sign the attached "Form of Agreement" and "Form of Acceptance of Compensation", to be signed in full by all the parties.

To enable us to proceed with payment, please return to the Ministry, within fourteen days of the date of this letter the two forms signed in full.

Yours faithfully,

SIGNED
M. E. MADLOPHA
PRINCIPAL SECRETARY

[6] Similar letters, accompanied by the two forms mentioned above, were written and transmitted to all the other plaintiffs and this is indeed common cause. There is no dispute that each of these plaintiffs signed the forms requested of them and returned same to the defendants as required. I reproduce below a list of the amounts determined by the valuer as being the amount of compensation due to each plaintiff:

Mdoli Dlamini - E670,461.50
Audrey Kelly - E 610,285.00
Ntandweni Farmers Association - E 360,000.00
Sikhuphe Farmers Association - E 368,536.00
Vinah Dlamini - E 672,914.00
Etikhoveni Church in Zion - E 462,432.00
Amos Hlatjwako - E 210,300.00
Dudu Hlophe - E 185,427.50
Mandla Malindzisa - E62,340.00
Daniel Sukati - E38,115.00

[7] It is common cause that the Government did not pay the various amounts promised to each of the plaintiffs. By combined summons dated 27 September, 2010, the plaintiffs jointly sued the defendants

for the total amount of compensation due to them from the 2nd defendant, namely E4, 921, 669-00, interest thereon at the rate of 9% per annum and costs of the suit.

[8] The defendants accordingly signified their intention to defend the claim, culminating in the present application for summary judgment. There is no doubt or argument that the claim properly falls within the provisions of Rule 32 of this Court's Rules, it being for a liquidated amount, nor is it contended that the application is formally or procedurally defective in any respect. The only question requiring determination is whether the defendants have, in their affidavit resisting summary judgment raised a triable issue that *prima facie* carries a prospect of success at the trial.

[9] In *National Motor Co. Ltd v Moses Dlamini* 1987-1995 (4) SLR 124 at 127 *(a)* - *(b),* Dunn J. succinctly stated the responsibility of a Court faced with the task of determining whether summary judgment ought to be granted as being: (a) whether the defendant has fully disclosed the nature of his defence together with the material facts upon which it is based; and (b) whether on the facts so disclosed, the defendant appears to have, as either to the whole or to a part of the claim, a defence which is both *bona fide* and good in law.

[10] This requires a consideration of the affidavit resisting summary judgment. There is no doubt that the defendants have complied with the first part i.e. they have disclosed the nature and grounds of their purported defence. The sole question is whether the requirements stated in (b) above have been met.

[11] Stripped to the bare bones, it is clear, from a reading of the said affidavit that the defendants do not contest the claim. That this is so can be seen from the following words occurring in paragraph 4.3 of the affidavit of the incumbent Principal Secretary, Mr. Paul Nkambule, who states:

> "Government does not deny the claim as such. Government is only concerned with the long term welfare of the claimants who are residents on Swazi Nation Land. Government's policy being to make resettled persons better than before. This policy is unlikely to be realized where the claimants are given cash as compensation. Government has the overall responsibility for the welfare of its citizens." (Emphasis added).

[12] It would appear that the above paragraph, which in part clearly states that the claim is not denied, also stipulates the Government

position on this very matter. The question is whether the welfare of the plaintiffs, as seen by the Government, constitutes a defence or at least raises a triable issue against the claim launched by the plaintiffs so as to entitle the defendants to unconditional leave to defend the matter?

[13] I say without equivocation that this concern by the Government, laudable and understandable as it may be, does not amount to a defence at all in law, let alone a good one. Sight must not be lost of the fact that it is the defendants, through the instrumentality of the office of the 1st defendant's Principal Secretary, which, as recorded in the letter set out above, promised to pay the claimants the amounts stated in their respective cases for loss of their land and property. They were asked to sign some agreements as signification of their acceptance of the compensation.

[14] By way of example regarding the 10th plaintiff in the "Agreement", at paragraph 1, under the heading '<u>Now the Parties Agree as Follows:</u>" states the following:

> "The Government of Swaziland will pay money in the amount of E38,115.00 (Thirty Eight and One Hundred

and Fifteen Emalangeni) to Daniel Sukati upon receiving:

(i) Proof of ownership of the affected property,
(ii) Legally acceptable Identification Documents, and
(iii) The 'Form of Agreement' and 'Form of Acceptance' signed fully and freely. . ."

[15] There is therefore no doubt in my mind that when the parties appended their respective signatures on the agreement, and having regard the terms of the letter quoted earlier and the promise therein contained, that the Government undertook to pay the amount of compensation determined to each claimant and by the same token, each claimant accepted and therefore expected to receive payment from Government, upon having fulfilled the conditions stipulated in the agreement and quoted immediately above.

[16] The defendants do not, in their affidavit, claim that any of the plaintiffs failed to fulfill any of the undertakings they had made and which would render them unfit to receive the compensation due in cash, as opposed to in kind, as undertaken. They simply rely on what they term to be "policy". This policy, if it be, has not been furnished to the Court and its terms are unknown i.e. who prepared it; when; where; and to govern which people; whether there was any

participation by those it was intended to govern, particularly the plaintiffs herein. These are material issues which are not placed before Court for scrutiny.

[17] More importantly, if it was the defendants' intention to subject the claimants to this policy, they should have stated so in clear terms in the agreement, considering that they, the defendants were the *prof evens* and as such, the *contra proferentem* rule comes back to haunt them. They cannot be allowed, however honourable their intentions may be, to seek, at this late stage, to impose new conditions and shift the goal posts as it were, regarding the payment and seek to rely on a policy which runs contrary to their written undertakings. No such material change in the agreement can be made unilaterally by the defendants.

[18] It must also not be forgotten, if the policy is indeed operational and binding, that not all the claimants are individuals. Two are voluntary associations and one is a church. It is unfair to tar them with one brush together with irresponsible natural persons. They are not natural persons, who would ordinarily be suspected (if there be good

reason), to spend the money paid out as compensation with both hands in riotous living, like the proverbial prodigal son referred to in the Scriptures and be without a roof over their heads once the "party" is over. It would therefore seem to me that the protective sheath of the policy was not meant for the organizations and churches.

[19] In any event, even the claimants who are natural persons, are adults in their own right and have the requisite legal and mental capacity, there being nothing to suggest or indicate otherwise. They must therefore be allowed to decide what they want to do with the compensation received for the expropriation of their property which they appear to have developed themselves without the intervention or assistance of the defendants.

[20] What they do with the compensation is, in my view, a private matter that should, as far as possible, be left to them as the individuals concerned to decide. Government may well offer them advice in this regard but cannot, in the circumstances of this case, particular regard had to the written agreement, prescribe for them what is to be done or

foist her will on adults, who are assumed to be responsible persons in any event.

[21] The 1st plaintiff has, for instance, stated on oath that she has already built herself a home and it would appear, from other resources. It would be preposterous, in the circumstances, for a house to be built for her by the Government when she already does have one. Furthermore, it is also clear that the amount of compensation offered in each case, took into account other features of the properties expropriated including fruit trees, kraals e.t.c. It would be grossly wrong for the defendants to then withhold the money and expend it on building a house or houses when the one compensated is alive and in full and sober senses and well placed to decide what will best suit him or her in the new environment.

[22] Whichever angle ones looks at this matter, it would seem to me that the defendants, laudable and praiseworthy as their concerns and remedial policy may generally speaking be, do not, unfortunately, constitute a defence in the instant matter. The defendants crafted agreements which they requested the plaintiffs to sign. Included was

an undertaking to pay to the plaintiffs compensation duly determined. For that reason, the maxim *pacta sunt servanda* i.e. that agreements must be kept should apply in this case.

[23] The compensation has been due for some time and the defendants are reluctant to comply with the very agreement they crafted. This they cannot be allowed to do. They simply have no leg to stand on (or to run away with), as the summary judgment hovers precariously over their heads, like the sword of Damocles, seeking to make them prey.

[24] Mr. Kunene, for the defendants, implored the Court, relying on the judgment of Tebbutt J.A. in *Musa Magongo u First National Bank of Swaziland* Appeal Case No. 38/99, to the effect that the Court has to exercise great circumspection before granting summary judgment for the reason that it is a drastic and stringent remedy that may cause an injustice.

[25] I am well alive to these concerns and have taken them on board in reaching the decision to be pronounced shortly. The question to be

asked is whether there is any injustice that may be sustained by the defendants in the present case as a result of granting summary judgment. The answer, in my view is very plain.

[26] The plaintiffs' claim is liquidated; all the necessary allegations that mandatorily have to accompany the affidavits in support thereof have been made; the defendants do not deny that the plaintiffs are entitled to the money but attempt to raise the issue of a policy which, for reasons advanced above, cannot preclude this Court from granting summary judgment in this very deserving case. Justice in this case actually demands that summary judgment be granted. Injustice would result from the opposite - granting the defendants leave to defend, which they do not even with great benevolence, on their very papers, deserve.

[27] In the premises, I have no option but to grant summary judgment as prayed, as I hereby do. I therefore issue the following Order:

(1) Summary judgment be and is hereby granted to each of the above-named plaintiffs, in the respective amounts set out in paragraph [6] above.

(2)The defendants be and are hereby ordered to pay the .....sums claimed with interest at the rate of 9% per annum *a tempore morae.*

(3) Costs of the suit are hereby granted to the plaintiffs as prayed in the application for summary judgment, jointly and severally, with the one defendant paying for the other to be absolved.

DELIVERED IN OPEN COURT IN MABABANE ON THIS 30th DAY OF MARCH, 2011.

T.S. MASUKU

JUSTICE OF THE HIGH COURT

Messrs. Nzima and Associates for the Plaintiffs
The Attorney-General's Chambers for the Defendants