



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 102/12

In the matter between:-

NDLALA INVESTMENT (PTY) LTD

Applicant

and

RICHARD THEMBA MBINGO

Respondent

Neutral citation: *Ndlala Investment (PTY) Ltd v Richard Themba Mbingo*(102/12) [2012] SZHC 71 (13th April 2012)

Coram: HLOPHE J

Heard: 15th February 2012

Delivered: 13th April 2012

For the Applicant: Mr. S. V. Mdladla

For the Respondent: Mr. N. Dlamini

JUDGMENT

- [1] The Applicant, a company registered in terms of the company laws of Swaziland, instituted application proceedings seeking an order of this court, *inter alia* evicting the Respondent and those holding under him from a certain farm described in the papers filed of record as Portion 12 of farm 1209, Ngwenya Industrial site, Hhohho District as well as the costs of the application.
- [2] The basis for the order sought are alleged to be a sale of the farm concerned to the Applicant by the Respondent on the 19th September 2011. In keeping with the legal requirements the sale of the farm in question was in writing and by means of a Deed of Sale which recorded all the applicable terms. It was provided *inter alia* in the said Deed of Sale that the Applicant as purchaser of the farm was going to take occupation of the property on registration of transfer on which date the seller was to vacate the property. The Applicant contends that notwithstanding the said property having been transferred to it by means of a Deed of Transfer dated 19th December 2011, the Respondent has failed to give Applicant occupation of the property concerned and has himself refused to vacate the premises as provided for in clause 4 of the agreement.
- [3] It is further contended that the Applicant has already paid Respondent the purchase price agreed upon between the parties through its financier known as FINCORP. It is also alleged that when FINCORP paid the Respondent it withheld certain monies due to it. It is however not

disclosed how much this amount held by FINCORP is and how it arose between it and the Respondent. There is annexed to the Founding Affidavit, a confirmatory affidavit of one Sikolemaswati Ntshalintshali, who claims to be the General Manager of the Applicant's financier, FINCORP and who confirms that the Respondent has been paid the full purchase price. He does not disclose the figures as well but contents himself with making general statements.

- [4] The application was instituted as an urgent matter by the Applicant who claimed that it was urgent because the Respondent had refused to vacate the premises yet Applicant had to start working on the farm to meet its obligations particularly because it was required to pay very high installments per month, which he alleges amount to over E 46 000.00. If the application was brought in the normal course, it is contended, the Applicant would suffer irreparable loss as it will not be able to pursue its business and meet its financial obligations.
- [5] The application is opposed by the Respondent who has *inter alia* raised a point *in limine* where he contends that the matter is not urgent. He also contends in the merits of his opposition to the application that the Applicant has failed to pay him the purchase price agreed upon. He further contends that although the property is now registered in applicant's name, such came about because he was asked to sign the transfer documents before receiving payment from the Applicant which was contrary to the agreement, because it was claimed that the Applicant's Financier required the said documents to be signed prior so that it could register a Mortgage Bond over the property before it could release the purchase price.

[6] The Respondent further contends that the Applicant has not complied with all the terms of the Deed of Sale in so far as there was an addendum to the agreement in terms of which the Applicant undertook to relocate Respondent's house to a new site at a capital cost of E 300 000.00. It was alleged by Respondent that in keeping with the said addendum he had since pointed or shown the Applicant the new site without it being relocated thereto however nor being paid the relocation amount. Respondent argues that he can only hand over and vacate the property concerned after having been relocated to the new site because he has nowhere else to go. According to Mr. Dlamini for the Respondent, payment of the agreed relocation amount would satisfy the relocation envisaged between the parties.

[7] Because of what is said in the foregoing two paragraphs, the Respondent contends that Applicant's application ought to be dismissed if the point *in limine* is not upheld.

[8] I have noticed one aspect of the matter which is shrouded in mystery from both sides and it relates to the payment of the purchase price. For some strange reason this court is not being told how much was paid to the Respondent as it is only told that the Respondent has been paid. There is however somewhere an indicator in the founding affidavit that this issue is much deeper than what is disclosed when it is contended that Respondent has been paid and that whatever issue there is; it is between him and Applicant's financier, which tends to suggest to that Respondent and FINCORP have other issues, whatever they are other than this matter. The Respondent himself does not disclose how much

has been paid if any has been or at least, how much the outstanding or unpaid amount is nor does it disclose the relationship between it and FINCORP so that the court can be kept in the know. The Respondent does not disclose as well why it is contended the money is not being paid to him. This approach by both parties makes it difficult for the court to appreciate the fuller facts of the matter so as to issue an informed order.

[9] On the point *in limine* raised, I do not agree that the urgency in the matter has not been disclosed or even that it is not properly pleaded. The Applicant has in my view not only set out why the matter is urgent but has also shown why it cannot receive redress in due course. Furthermore, there is no denying that this court entertained the matter as an urgent one and even issued a *rule nisi* operating with interim relief when the matter was first mentioned in court, which I have no hesitation was necessitated by the urgency entailed in it. Furthermore all the pleadings are now before court such that none of the parties is prejudiced in the approach adopted. Consequently, I cannot uphold the point *in limine* aforesaid, which I dismiss.

[10] When it comes to the merits of the matter I have to say that whatever the effect of the undisclosed facts, it cannot be disputed that the agreement is very clear on when the Applicant is to be given occupation of the premises including when the Respondent has to vacate the premises. This is at the time of registration of the property concerned in the name of the purchaser, the Applicant. On the same date the Respondent is expected to vacate the said premises. This is according to clause 4 of the agreement.

[11] Although clause 3 of the agreement provides that transfer of the property was to be done after compliance with clause two of the agreement which is securing a guarantee by a financier and that such transfer was to be passed by the Seller's conveyancers, M. J. Manzini Attorneys, it appears this ended up not being the case because the transfer of the property ended up being performed or conducted by Attorneys Robinson Bertram if one considers what appears on the letters annexed to the opposing papers, confirming registration of transfer as well as on the Deed of Transfer itself. In my view the parties amended this aspect of their agreement, at least by implication as there is no clause in the agreement preventing this.

[12] Because no issue whatsoever was taken with this aspect of the matter, I will take it that all that was done by agreement of the parties. Whilst that aspect of the Deed of Sale was apparently amended, there does not appear to have been an amendment of the clause requiring that the Respondent gives occupation to the Applicant upon transfer of the property into applicant's name or upon its registration in the latter's name. There is also no dispute that on the occurrence of such an event, the Respondent did not vacate the premises despite his being obliged to do so in terms of the agreement.

[13] The Respondent's reasons for not giving occupation to the Applicant or not vacating the premises, he claims, is because he has not been paid the agreed amounts. I have already alluded to the difficulty I have coming to this conclusion following the lack of information particularly considering the contention by the applicant and its

Financier that Respondent has been paid. Being that as it may however, the condition that entitles Applicant to occupation of the farm including obliging the Respondent to vacate the premises has already been fulfilled in as much as the property has since been registered in Applicant's name. This should in terms of their agreement, entitle Applicant to occupy the farm concerned and also obliges the Respondent to vacate same under normal circumstances and I would not hesitate to order this were it not for the following aspect of the matter.

[14] The Respondent contended that the Applicant has not complied with the addendum which required him to relocate the Respondent to a new site at a capital cost of E 300 000.00. The Applicant has not yet met this condition. The meaning of the word "relocate" according to the Compact Oxford English Dictionary is to "move to a new place and establish one's home or business there". My understanding is that such should happen before the relocating person can move into the area where the relocated person used to be. This is what I believe should happen prior to the Applicant taking occupation of the premises.

[15] If I am correct in this regard, it means that even though the Deed of Sale does not expressly say so, it was within the contemplation of the parties that the Respondent be relocated before the Applicant takes occupation of the premises. No sound reason has been given why this has not been done and I did not understand the Applicant's Counsel to be objectionable to his client being ordered to at least to pay the relocation amount to the Respondent so as to expedite its taking over occupation of the farm. I suggest this being fully aware that the

Respondent had not made a counter claim in this regard but consider that it would be fair and just to do so, so as to ensure that the Applicant who apparently requires urgent occupation of the property, can expedite his occupation of the farm. This means that as soon as he pays such an amount he be entitled to eject the Respondent from the premises and take over the vacant premises, without undue delay. It further ensures that the parties do not incur unnecessary costs.

[16] I take it that the practice in this court has crystallized that in certain instances, limited as they may be, and where the justice of the case so requires, it is appropriate to grant an order that has not necessarily been prayed for as the one for ordering the Applicant to pay the Respondent the relocation expenses so as to enable the former take over occupation of the farm and avoid the multiplicity of fresh proceedings and the costs that go with it. The judgment of this court in ***Tiyamike Rudolph Maziya vs The Senate of the University of Swaziland and Another civil case no. 2238/04*** is instructive in this regard particularly on the principle that this court may in certain instances grant an order it considers to be just. This approach was endorsed by the then court of Appeal of Swaziland in ***Senate of the University of Swaziland and Another vs Tiyamike Rudolph Nduna Maziya Appeal court case no. 51/2004***, the appeal version of the former case.

[17] In the circumstances I make the following order:-

1. The Applicant be and is hereby directed to pay Respondent the sum of E 300 000.00 as relocation costs in line with the addendum to their Deed of Sale dated the 19th September 2011.

2. The Respondent be and is hereby directed to give Applicant occupation and to vacate the premises forming the subject matter of this application, namely Portion 12 of farm no. 1209, Hhohho District, by no later than 30 days of the Applicant's having complied with order 1(one) herein above.
3. Should Respondent fail to comply with order 2 above after having been paid the relocation cost and the prescribed period having passed, the Applicant shall be entitled to eject the Respondent from the said premises.
4. Owing to the nature of the order made, each party is to bear its costs.

Delivered in open Court on this theday of April 2012.

N. J. HLOPHE
JUDGE