



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4397/2010

In the matter between:

JOBE MBONANI SENGWAYO

Plaintiff

And

M. M. & N. FARMERS ASSOCIATION

1st Defendant

GCINA SENGWAYO

2nd Defendant

Neutral citation: *Jobe Mbonani Sengwayo v M.M & N Farmers Association & another (4397/2010) [2013] SZHC 118 (11th June 2013)*

Coram: **M. Dlamini J.**

Heard: **30th May 2013**

Delivered: **11th June 2013**

action proceedings – trial – duty of practitioners to put defence story to a witness unless the evidence by that witness can be said to be “so much of a romancing character that the only cross examination would be to ask the witness to leave the witness stand”.

Summary: The proceedings commenced by motion where an interim order was granted pending the present action proceedings. The orders prayed for are that the 1st defendant be directed to pay all dividends in respect of portion 9 of Mankonjane Farm to plaintiff since December 2010 and that 2nd defendant be removed as a member of 1st respondent in respect of the said farm.

[1] The **plaintiff** gave evidence under oath. He was at that time 92 years old as he was born in 1920. He is the biological father of 2nd defendant. His evidence ran as follows:

[2] Having come to Sihhoye area for purposes of preaching the gospel, he was later allocated land by the Chief for purposes of agricultural products. He was, however, relocated to another piece of land as the King needed the said land to grow sugar cane. The said growing of the sugar cane was so successful such that he, together with other community leaders, decided to start a similar project of sugar cane growing. An association by the name of 1st defendant was formed. The Chief became a member. Membership was by virtue of one contributing a piece of land towards the project. His piece of land which he contributed was marked Portion 10. He maintained a portion where he grew maize. As time progressed, owing to his age, he could no longer afford to plough his maize fields. He approached the 1st defendant and requested to relinquish his right over the land in return for dividends from the profit of the produce. However, 1st defendant declined on the basis that its terms were that sharing of dividends should be divided in accordance with the number of members and not on the size of land. In other words, the fact that plaintiff had brought in additional land would not increase his allotment in shares. 1st defendant then advised the plaintiff to

bring an additional member who would receive dividends in respect of the said land. Plaintiff reluctantly agreed. He introduced the 2nd defendant.

[3] It was his evidence further that it was an agreed term of the contract that 2nd defendant would be a member of 1st defendant and would once dividends are paid out take the same to him. He would in turn give 2nd defendant what was due to him. This was, however, not to be so as 2nd defendant refused to take the dividends to plaintiff.

[4] I will turn to cross examination of this witness later in this judgment.

[5] The plaintiff closed its case. **2nd defendant** gave evidence in rebuttal. He stated as follows under oath:

[6] He acknowledged that plaintiff was his father. He was a member of 1st defendant. However, before that he had been in search for employment but in vain. When his mother passed away in 2000 plaintiff summoned them. He (plaintiff) stated that as their mother had passed away he would give each an inheritance. He gave him the right to join 1st respondent as a member and to enjoy dividends in respect of the maize field which were by then marked Portion 9. One of his brothers, Mfanasibili was given a right to join as a member in the dairy board association. His elder brother declined to accept any inheritance when offered by plaintiff.

[7] The plaintiff and his daughter then pleaded with 2nd defendant not to continue looking for work in order to be at home as their mother had passed on. A letter was written introducing him to 1st defendant. He was subsequently accompanied by plaintiff to the 1st defendant where he was introduced and the letter handed. In 2001 plaintiff voted him to be a

committee member. He then built a one room house, paid electricity bills and maids to worked in his parental fields. He would take care of plaintiff whenever he was ill by footing the bills. It was in 2008 that he received summons. Plaintiff never discussed the matter with him. He then decided to stop taking care of the family's overheads. The relationship between him and his siblings are now strained.

[8] The next witness on behalf of defendants was **Bhekimpi Thomas Mlahleki** who on oath informed the court as follows:

[9] He was a member of 1st defendant since 1993. Having been granted permission by the Chief, they commenced growing sugar cane. They brought their fields together as individual member and formed 1st defendant. Profits were shared equally. No member had a right to claim back the fields surrendered. Between 1999 and 2002 plaintiff brought 2nd defendant to be a member. He was the chair of 1st defendant by then. It was made clear that 1st defendant would be a member and received the same share of dividends as other members. Each member was to get an equal share as other members. No one member could get dividends for two or more persons.

[10] Under cross-examination he stated that plaintiff later brought additional land to the 1st defendant. He also informed the court that they advised plaintiff to bring a third person who would receive dividends in respect of the field that was subsequently surrendered by him as the terms of 1st defendant do not provide for one member to get dividends as more than one member.

[11] The last witness was **Edward James Nxumalo** who too, like **Mr. Mlahleki**, gave evidence on oath. His evidence was along similar lines as **Mr. Mlahleki**.

[12] From the evidence adduced it is common cause that:

- Plaintiff surrendered two pieces of land to 1st defendant. *wit.* Portion 10 and 9 respectively. There is no issue in relation to Portion 10. The bone of contention is with regard to Portion 9.
- Plaintiff intended to receive dividends in respect of portion 10 and 9 separately;
- This was discussed and because the 1st respondent's policy does not provide for such, plaintiff was advised to bring an additional member who would receive the dividends. This came out clearly under cross examination of 2nd defendant's witness *viz.* **Mr. Mlahleki**.

[13] Counsel for plaintiff posed:

Counsel: *“By virtue of him presenting that maize field, he desired to have dividends?”*

Mr. Mlahleki: *“As per the Association's procedure, he was advised to bring someone to be a member in respect of that piece of land.”*

Counsel: *It was the Committee that advised Sengwayo to fetch someone to be a member?*

Mr. Mlahleki: “Yes”

Counsel: “Could Sengwayo be able to introduce a new member if he didn’t have that piece of land?”

Mr. Mlahleki: “He wouldn’t be allowed.”

Counsel: “Why?”

Mr. Mlahleki: “This is because the land was divided equally to the members.”

[14] The only question left for determination is whether there exist a contract between plaintiff and 2nd defendant which is to the effect that 2nd defendant would receive dividends on behalf of plaintiff who would in turn pay him.

[15] During cross examination of 2nd defendant’s witnesses, it became apparent that 1st defendant could not assist the court in answering the above question.

[16] This is extracted from Counsel for 2nd defendant who posed the following questions:

Counsel: “Would I be correct to state that you are not aware of any agreement prior to Gcina being introduced to the Association which was between Gcina and Jobe?”

Mr. Mlahleki: “Yes”

Counsel: “Do you know of any agreements between Jobe and Gcina?”

Mr. Nxumalo: *“I don’t, but what happens is that once they conclude the agreements, we do not form part of those agreements. We only come in when they bring the land to the Association.”*

[17] The response by Mr. Mlahleki and **Mr. Nxumalo** who were witnesses for the 2nd defendant leads me to consider only the evidence adduced by plaintiff and defendant in order to ascertain the position of any existence of any agreement between plaintiff and 2nd defendant.

[18] Plaintiff has in his evidence in chief informed the court that following his inability to continue to plough his maize field, owing to his old age, he decided to surrender it to the Association. He stated further that it was his intention to be paid dividends in regard to this additional piece of land.

[19] **Mr. Mlahleki** and **Mr. Nxumalo** corroborates this portion of plaintiff’s evidence. **Mr. Mlahleki** testified that owing to the policy of the Association that dividends should be divided equally among members, they declined plaintiff’s request. They advised him that they could pay extra dividends provided plaintiff provided them with another person who would be an additional member. **Mr. Nxumalo** went further to support plaintiff and **Mr. Mlahleki** by informing the court that it was not until they were persuaded by the Chief who sent an emissary on behalf of plaintiff after plaintiff had solicited his assistance in convincing the Association to allow him extra dividends that they opted to allow plaintiff to introduce a member.

[20] This piece of evidence by **Mr. Mlahleki** and **Mr. Nxumalo** lends credence to plaintiff’s testimony that, at all material times he had desired to receive

dividends in respect of Portion 9. The only reason he introduced 2nd defendant was because he was so advised and he had agreed with 2nd defendant that his hands would collect the dividends for onward transmission to him.

[21] Turning to 2nd defendant's testimony, it turns that plaintiff had given him the right to be a member of 1st defendant and thereby enjoy dividends as part of the inheritance plaintiff had distributed to his children. This piece of evidence by 2nd defendant sounds plausible but fails for the following reasons:

- a) Plaintiff was cross-examined at length on behalf of 2nd defendant. However, the evidence adduced by 2nd was never put to plaintiff during this process.
- b) The evidence of the plaintiff that it was agreed between 2nd respondent and himself that 2nd respondent would transmit the dividends to him was not directly challenged. Instead, it was put to plaintiff that his action was tantamount to circumventing the 1st defendant's policy by demanding that 2nd defendant hands the dividends to him.

[22] **S. v P. 1947 (1) S.A. 581** at 582 is authority for the *ratio decidendi*

“It would be difficult to over-emphasise the importance of putting the defence case to prosecution witness and it is certainly not a reason for not doing so that the answer will almost certainly be a denial.

[23] **Macdonald J. P.** in **S. v P** *supra* at 582 eloquently proceeds:

“So important is the duty to put the defence case that practitioners in doubt as to the correct course to follow, should err on the side of safety and either put the defence case, or seek guidance from the court.”

[24] **Phipson on Evidence 10th Ed.** at 1542 states:

“As a rule a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witnesses, or in which he had a share...”

[25] The learned author highlights as an exception where the witness’s evidence is such that it is *“so much of a romancing character”* that the only step to take would be to ask him to leave the witness box. This rule of evidence has been applied in various matters in our jurisdiction. This rule of procedure was adopted by our court in **Mngomezulu and Others (94/1990)**, unreported.

[26] In that regard, this court cannot consider the evidence in rebuttal by 2nd defendant.

[27] In the totality of the foregoing, I enter the following orders:

1. Plaintiff’s cause of action succeeds.
2. 1st defendant is hereby ordered to pay plaintiff all dividends in respect of portion 9 of Mankonjane Farm situate at Sihhoye area within Lubombo region held by 1st defendant in terms of interim order issued by this Court in December 2010 up to date of payment.

3. 1st defendant is hereby ordered to remove 2nd defendant as its member to be replaced by plaintiff's new nominee.
4. 2nd defendant is ordered to pay plaintiff costs of suit including cost of interim order.
5. No order of costs against 1st defendant is entered

**M. DLAMINI
JUDGE**

For Applicant : Mr. L. Mzizi
For Respondents : Mr. S. Dlamini