



IN THE HIGH COURT OF SWAZILAND

Consolidated case numbers. 899/2011
900/2011, 901/2011 and 902/2011

In the matter between:-

UMBANE (PTY) LTD

Plaintiff

and

SOFI DLAMINI & 3 OTHERS

Defendants

Neutral citation: *Umbane (PTY) LTD v Sofi Dlamini and 3 others*
(899/11,900/11,901/11 and 902/11) [2013] SZHC19
(13th February 2013)

Coram: HLOPHE J

For the Plaintiff: Mr. T. M. Mlangeni

For the Defendants: Mr. S. Gumedze

Heard: 28/12/12 & 29/12/12

Delivered: 13th February 2013

JUDGMENT

- [1] The Plaintiff instituted action proceedings against each one of the four Defendants seeking an order of this court directing or authorizing that each such Defendant vacates or be evicted from the Plaintiff's immovable properties fully described as the Remainder of Farm 670, Manzini District; portion 8 of Farm 45, Manzini District and portion 6 of Farm 45 Manzini District, occupied respectively by the Respondents. For the sake of clarity, it must be stated that on portion 6 of Farm 45 there are two homesteads situated there, being that of Kevin (Gavin) Khumalo and Lucas Mhlanga. The other two are situated on the Remainder of Farm 670, Manzini, and portion 8 of Farm 45, Manzini and are occupied by Sofi Dlamini and Jabulani Dlamini respectively.
- [2] In the event of the Defendants failing to vacate the Plaintiff's properties as directed, an order of this court authorizing the Deputy Sheriff for the Manzini Region to evict the Defendants from the said properties with the assistance of the Police if need be, was prayed for.
- [3] The allegations founding the actions are similar in all the matters just as the defences raised by the Defendants are also similar. Furthermore all the Defendants are represented by the same attorney. I have no doubt it was because of these considerations that an order consolidating the four

initially distinct action proceedings was granted by consent of all the parties.

[4] Otherwise the Plaintiff's case as pleaded and eventually advanced in court during the trial of the matter was as set out herein below. Such case was advanced in evidence by one Veronicah Dlamini, the only witness for the Plaintiff who informed the court that the latter, to whom she was a member of the executive, purchased the farms forming the subject matter of these proceedings sometime in 1999 from a company known as Usuthu Pulp Company LTD. Although the Plaintiff's initial aim was to establish a housing estate for its members on the land purchased, they were later to learn that Government, through the relevant ministry did not approve of that aim, advising that all the Farms around the Malkerns area were meant or reserved for farming purposes.

[5] Having taken appropriate advice on the proper use of the land concerned, the Plaintiff decided to use it for cane growing. At some stage the Plaintiff realized that there were certain homesteads or structures situate within the precincts of the Plaintiff's land or farms. They first enquired from the entity from whom the land concerned was purchased – Usuthu Pulp Company Limited the circumstances under which the homesteads came to be established there. The company informed them that the owners of the said homes had asked for permission to set up temporary structures so that they could be closer to their working places at Bhunya, Usuthu Pulp Company Limited premises. I must hasten to clarify that other than Miss Dlamini's say so, no evidence by Usuthu

Pulp Company Limited was led to confirm this or even to clarify how as a fact the land in question was allocated to the Defendants if it ever was.

[6] Otherwise Veronicah Dlamini went on to inform this court that they on behalf of the Plaintiff and while in the company of one Siphon Dlamini, a late member of Plaintiff's executive, went to each one of the homesteads where they informed the Defendants or the people they found there that Plaintiff was the owner of the land on which the Defendants had built their homes including informing them to vacate the said land as they wanted to grow sugar cane thereat. This witness informed this court that the Defendants refused to vacate the said premises hence the current proceedings, in terms of which a directive by this court ordering the Defendants to vacate the said premises failing which an eviction order was being sought, were instituted.

[7] Before this witness could be cross-examined on behalf of the Defendants, and in view of the fact that the Plaintiff had pleaded as follows at paragraph 7 of the particulars of claim:-

"7. The Plaintiff has complied with the relevant provisions of the Farm Dwellers Act, alternatively that the Farm Dwellers Act, does not apply to the Defendant",

I enquired from Plaintiff's Counsel if they were not going to address this aspect of the matter at all. The answer was that same was irrelevant and was deliberately not being commented upon.

[8] I make myself clear that I had to ask about this because I had taken note that the relief sought was drastic in its effect and I wanted to ensure that as pleaded, and to the extent of its relevance, this aspect of the matter was being addressed. In my understanding of the Farm Dwellers Control Act of 1982, the question whether a person residing on a Farm was a Farm Dweller or an illegal occupant was part of the disputes, which in terms of the Act concerned, were preserved for the decision or determination of the Special Tribunals established in terms of the Act. I deal at length with this observation later on in this judgment

[9] The Defendant's case as put to the aforesaid Plaintiff's only witness under cross – examination was that the Defendants had Khontaed in the area through traditional structures in the early 1950's and particularly that King Sobhuza II had allocated them the land to stay thereon together with one Princess Pholile whilst paying allegiance to Chief Malang'onke Fakudze.

[10] It was further put to the Plaintiff's witness aforesaid that the Defendants had never known nor acknowledged anyone as the owner of the land they each occupied. It was contended that the Defendants exercised all sort of rights and practices associated with ownership of the land without obtaining approval from any other person. These practices included keeping and grazing their cattle there as well as conducting burials of their deceased relatives.

[11] In line with the allegations contained in the pleadings, it was asserted that the Defendants acquired ownership of the land concerned through the notion of acquisitive prescription. ***Silberberg and Schoeman in their book: The Law of Property, 2nd Edition 1983, page 232***, define acquisitive prescription in the following words:-

“Acquisitive prescription, as a method of acquiring ownership, is a continuous process, namely the possession by one person of another person’s – movable or immovable – property for an uninterrupted period of thirty years, nec vi, nec clam nec precario (and with the intention of acquiring ownership) openly and as if he were the owner thereof...”.

[12] I only need to clarify that the thirty year period referred to in the foregoing except from ***Silberberg and Schoeman’s book*** referred to above is a result of an intervention by statutes in South Africa. Otherwise the period forming the basis of Acquisitive Prescription in terms of the Common Law is a third of a century which is equivalent to thirty-three years. For this position see the case of ***Welgernoed v Coetzer and others 1946 TTD SA 701at 712***.

[13] The Defendants’ approach to the matter was therefore not only to defend the eviction order sought by the Plaintiff but they also sought their own order in the form of a counter claim declaring them as having acquired ownership of the land they each occupied by means of the principle of acquisitive prescription.

[14] In an endeavour to defend the case against them whilst proving their own case, the Defendants led two witnesses namely Mrs. Siphwe

Mndzebele and Gavin Khumalo. It was otherwise common cause that the circumstances of all the defendants were similar such that the evidence given by these latter witnesses applied with equal force to all the other cases.

[15] According to Sipiwe Mndzebele the homesteads of the Defendants were established in the area in the early 1950's. She was certain about this because she was already in existence then and when she came to take note of her surroundings the homesteads were already there. Furthermore, her mother, she was certain of this, died in 1957 and by then all the homesteads were already at the place.

[16] Sipiwe Mndzebele further stated that during the time of their stay on the said farms, the Defendants did not recognize anyone as an owner of the land on which the Defendants had established their homes. They kept cattle there without requiring anyone's permission as a farm owner. They even went on to bury their loved ones who passed on without having had to obtain anyone's permission.

[17] Sipiwe Mndzebele's version was confirmed by Gavin Khumalo who gave evidence as the second defence witness. This witness emphasized that he knew of no other home than the ones from where the Plaintiff sought to evict them. This witness emphasized that they had exercised the rights of an owner in the area and acknowledged no one as an owner of the portion of land they occupied.

[18] In his submissions Plaintiff's attorney argued that although the evidence supported the notion of acquisitive prescription to the effect that the Plaintiff's had acquired ownership of the land in question, the law did not support same. He said this was because although the Defendants claimed to have openly exercised the rights of an owner openly, freely, and without stealth, such rights would have been exercised against a different owner as opposed to the current Plaintiff's who only came to own the said land in 1999 – 2000, and as such the current Plaintiff's had only owned the land concerned for thirteen years which precluded Defendants from claiming such ownership against the current Plaintiffs. The Plaintiff's contention being that whatever the number of years during which the defendants exercised the rights of an owner, such a period ought not be attributed to it, but was operating only against the previous owner.

[19] I do not think there is any merit in this argument as advanced by the Plaintiffs. As I understand it, the position is whether the Defendants have factually spent more than thirty three years in the area whilst exercising the rights of an owner openly and without stealth. It seems to me therefore that the point is that when they purchased the land in question in 1999; was the land as occupied by the Defendants still a part of the one they purchased? This is doubtful for if ownership passed in terms of the principle of acquisitive prescription, such would have happened in 1990. It then did so by operation of law at the end of thirty three years. In such a case Plaintiff cannot be heard to be saying that the land whose ownership had already passed to the Defendants was still a

part of the one it was to buy, nine years later after the Defendants had already acquired ownership of it according to law.

[20] The Plaintiff however did not end there, but went on to contend that the notion of acquisitive prescription as either a defence or basis for a counter claim is not conceivable in terms of our current law because it was contrary to the Constitution of Swaziland particularly article 19 (2) of the said Constitution. According to the Plaintiff the effect of section 19(2) of the Constitution was to outlaw any other method of acquiring land not spelt out in section 19 (2) of the Constitution. Section 19 (2), provides as follows:-

“A person shall not be compulsorily deprived of property or any interest in or right over the 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”.

For this contention, the Plaintiff relied on the case of ***Duma Msibi vs Elinah Ngcamphalala and three others High Court case no. 3093/2006***. In that case this court per the Principal Judge found that the notion or principle of acquisitive prescription is contrary to the Constitution in as much as it is not spelt out as one of the methods of acquiring land listed thereon. It does not appear *exfacie* this judgment that the court was addressed on what happens to a person who had certain rights accruing to him prior to the Constitution or even on whether the Constitution can apply retrospectively.

[21] In the peculiar circumstances of this matter, the question would be whether, even assuming the land cannot accrue to the Defendants on the basis of the Constitution, the Defendants ever acquired any rights to the property prior to the advent of the Constitution, and if they have did, whether they can be evicted without at least being compensated, in recognition of such right.

[22] To answer this question, it is an undisputed fact that the Defendants began occupying the land in question way back in the early 1950's and in any event by the year 1957 they were all settled there. By the year 1987 they had been there for thirty years and were thirty three years in 1990. Again at this time the Constitution was not in place and it appears to me there would have been some right at the least that then accrued to the defendants as afforded them by the hitherto applicable common law principle of acquisitive prescription which no doubt was part of our law then.

[23] If that is the case, and they had to be ejected from the Farms concerned, they therefore could not be deprived of their said rights in the land without at the least being compensated as contemplated by section 19 (2) (a) of the Constitution. It would therefore not be impossible to establish what the value of their rights in the said property would amount to as that could be ascertained from the structures put up there, including any other interest that could be lost as a result. Anyway this I was saying in reaction to the Plaintiff's argument that the Constitution dictates that ownership of a property can only be obtained according to section 19 of the Constitution. This therefore means that even if they could be evicted or ejected, this would only happen after they would have been compensated.

[24] There is however, in my view an even more compelling argument as regards whether or not ownership of the land on which the homesteads are built can accrue to the defendants. This is on the fact that if the principle of acquisitive prescription was ever a part of our law, and was so in the early 1950's and particularly by 1957, and the Constitution only took effect in 2005, then ownership in the land concerned accrued to the Defendants in 1990 at the most. This would mean that at the time the Plaintiff bought the land concerned in 1999, ownership in the portions of the land as occupied by the Defendants had long passed to them. I say this because the Constitution does not apply retrospectively. In this regard therefore, I am of the view that the advent of the Constitution had no bearing to the rights of ownership of the land that accrued to the Defendants in terms of the law prior to its advent.

[25] On the other hand I agree with Mr. Mlangeni that there is uncertainty as to the extent of the land occupied by the Respondents. I am however of the view that such uncertainty can only be more legal than factual. On a factual basis the portion utilized by the Defendants would be clear and certain and in any event it would have to be of a reasonable size. In short this aspect of the matter cannot in my view avail the Plaintiff to defeat Defendant's right which accrued to them more than twenty years ago. Consequently I find that ownership of the land in dispute or occupied by the Defendants passed to the latter in 1990 at the worst.

[26] When the Plaintiff led evidence nothing at all was said about the Farm Dwellers Act let alone compliance therewith. I took it upon myself to enquire from Plaintiff's counsel if their case was complete for the relief they sought (eviction or ejection of the Defendants from the farms concerned) without a reference to the said Act in their evidence. Counsel had indicated that was their only witness. Counsel argued no mention of the said Act was necessary as the Defendants had not claimed to be Farm Dwellers. He contended for that reason that the Act was not applicable. He contended further that the Defendants themselves placed no reliance on the Act as they said they recognized no one as an owner and claimed that their rights to remain on the farm accrued from the common law as opposed to the said statute.

[27] Considering the drastic nature of the relief sought and the need in my view to properly construe it so as to curb an abuse of the Act, I do not think it is proper for the Plaintiff not to lead evidence on the propriety of the relief as viewed from the context of the legislation in question. Infact

the Plaintiff insists on the relief because according to it the Defendants are not Farm Dwellers but squatters. If I grant the relief prayed, it would be because I agree with them in this regard. The question is can I decide the question of their status? According to the statute concerned whether or not the Defendants are Farm Dwellers would be a determination made by the appropriate authority in the form of the Farm Dwellers District Tribunal according to the Act.

[28] The definition of two words used in the Act which find relevance herein read together with section 9 of the Act influence my reasoning on why it is necessary to clarify on compliance with the said Act. The words in question are “farm dweller” and “umnumzane”.

[29] The term “Farm – Dweller” is defined as follows in the definition section of the Act:-

“Farm Dweller” means a person who resides on a farm other than:-

- (a) the owner thereof; or*
- (b) a usufructuary or fiduciary; or*
- (c) a lessee under a written agreement of lease ;or*
- (d) the holder of a registered servitude which gives the right of occupation; or*
- (e) the manager or agent of a person referred to in paragraphs (a), (b) ,(c) and (d); or*
- (f) a member of the family or a guest of a person mentioned in paragraphs (a), (b) ,(c) and (d) or (e);or*
- (g) a person who is in the full time employment of an owner if it is a condition of his employment that the owner shall provide him or his family with residential accommodation.*

[30] On the other hand the term umnumzane is defined as follows in the definition section:-

“Umnumzane” means a person recognized by Swazi Law and Custom as the head of a homestead and includes a woman”.

[31] Section 3 (1) on the other hand provides that any umnumzane (person heading a family) who is a farm – dweller (who resides on the farm as contemplated in the definition section referred to on the paragraph preceding this one herein above) who resided on the farm before the date of coming into effect of the Farm Dwellers Control Act of 1982 was deemed entitled to an agreement to reside there.

[32] Section 8 of the Farm Dwellers Control Act on the other hand provides that any resolution of a dispute between an owner and an umnumzane as relates to among other things the eviction or removal of an umnumzane and his dependants from a farm shall be the function of a District Tribunal. The dispute contemplated herein also contemplates in my view, the determination on whether the said person is a farm dweller or not.

[33] Section 9 (1) of the Act on the other hand excludes the jurisdiction of this court from determining any dispute between an owner and an umnumzane as regards any rights or liabilities under the Act, including the eviction of an umnumzane from a farm.

[34] Clearly if the Defendants can no longer be owners of the land in terms of the notion of Acquisitive Prescription in line with the advent of the Constitution in 2005 and considering that they were already resident on the Farm on the date of the coming into effect of the Farm Dwellers Control Act, which entitled them the status of a Farm Dweller, then their dispute should be dealt with by the District Tribunal established by the Farm Dwellers Control Act of 1982. I cannot close my eyes to the fact that the Plaintiff's case is that the Defendants were settled on the Farm by the permission of the then Farm owners, which would not entitle the Plaintiff to then remove the Defendants from the farm without the District Tribunal having heard the matter first and determined it in accordance with its mandate and discretion.

[35] For the foregoing reasons I do not agree with Mr. Mlangeni's contentions that the Farm Dwellers Control Act is not applicable herein. The Plaintiff's action would in my view not succeed on this point as well.

[36] For the foregoing reasons and considerations I have come to the conclusion that the Plaintiff's claim does not succeed and is hereby dismissed.

[37] As concerns the counterclaim by the Defendants, particularly the claim that they be declared owners of the land occupied by them I direct as follows:-

1. The claim of the Defendants succeed.

2. The land owned by each one of the Defendants shall be the one currently used by each one of the Defendants.
3. The Plaintiff is ordered to pay the costs of these proceedings.

Delivered in open court on this theday of February 2013.

N. J. HLOPHE
JUDGE