



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1765/2008

In the matter between:

JOSEPH SAMBO

Applicant

vs

ALFRED MABANGA

Respondent

Neutral citation: *Joseph Sambo vs Alfred Mabanga (1765/2014) [2015]*
[SZHC 22] (20th February 2015)

Coram: **MAPHALALA PJ**

Heard: 31st October 2012

Delivered: 20th February 2015

For Applicant: Mr. S. Dlamini

For 1st Respondent: Mr. S. Masuku

Summary: (i) Before this court is an enquiry on the quantum after the owner of the property obtained an order against the person occupying the property to be ejected.

- (ii) The Supreme Court of Swaziland ordered that the parties call their expert witnesses to assist the court to come to a proper measure of damages.
- (iii) The court heard testimonies of the expert witnesses and has preferred the testimony of the Respondent's expert witnesses and disqualified the testimony of the Applicant's expert witness on a number of grounds.
- (iv) In the result, the Applicant is ordered to pay the Respondent compensation for value of the property as has been enhanced by reason of the improvement at E502,000.00; plus all municipal rates paid this far.
- (v) Furthermore this court orders that costs to be at the ordinary scale.

Legal authorities cited

1. **Hoffman et al, The South African Law of Evidence 4th Edition at page 100.**
2. **Fletcher vs Bulawayo Motor Works Company Limited 1915 AD 630, 681.**

JUDGMENT

Introduction

[1] As a prelude to this judgment I wish to cite the legal authority in the case of **Fletcher and Fletcher vs Bulawayo Motor Works (supra)** cited by

both attorneys in this case to the following principles by **Buis Ellen Berger, The Valuer's Manual** South African Institute of Valuers 2nd Edition to the following:

- (a) **The equitable principle in such the law awards compensation for improvements is that no man should be allowed to enrich himself at the expense of another. Both elements must clear, bought to the claimant and detriment to the improver and both must be brave in mind in assessment the amount.**
- (b) **Both a *bona fide* possessor and *bona fide* occupied are entitled to compensation for the improvement made by them.**
- (c) **The general basis, in regard to useful expenditure, is no extent to which the property has been enhanced in value thereby.**
- (d) **The value of the use of the improvements to which the right of detention is related cannot be set off against the value of such improvement.**

[2] The issue before this court ought to be decided on the above equitable principles of law to award compensation in the circumstances of this case.

The issue for decision *in casu*

[3] For decision by this court in this judgment is what was ordered by the Supreme Court in its judgment of the 31 May, 2011 as follows:

“1.1 The appeal is allowed with costs.

1.2 The order made in the court below, which is contained in paragraph 8 of the judgment dated the 29th October 2010, is set aside and the matter is remitted to the High Court for the hearing of oral evidence on the following issue: what is the amount in respect of which the Respondent enjoys a *lien* over Lot No.9, Mathendele Township by reason of the necessary and useful improvements effected by him on the said property?

In determining the said amount the court shall determine the amount by which the value of the said property has been enhanced by reason of the said improvements and the amount of the actual expenditure incurred in effecting such improvements, the amount in respect of which the lien is enjoyed being the lesser of the two amounts.

[4] From what is stated above in paragraph [3] of this judgment it is for this court to determine “What is the amount in respect of which the Respondents enjoys a **lien** over Lot 9 Mathendele Township by reason of necessary and useful improvements effected by him on the said property?”

[5] In assessing that amount the court shall determine the amount of which the value of the said property has been enhanced by reason of the said improvements and the amount of the actual expenditure in effecting the

improvements. The amount in respect of which the **lien** is enjoyed being the lesser of the two amounts (see paragraph at page 41 of the Respondent's bundle for the Supreme Court judgment.

A brief background to the present quantum enquiry

[6] The background of the matter is clearly outlined in the closing submissions of the Respondent at page 1 to 6 as follows:

- “1. The Applicant initially brought an application under Civil Case No.1701/2004 as it appears at page 23 of the Respondent's bundle of documents on record. The Applicant sought to eject the Respondent from Lot 9 Mathendele Township, Nhlngano, a property occupied by the Respondent but registered in the name of the Applicant. The Respondent had also bought the same property from the Swaziland Government and had gained occupation since 1983. Applicant also sought costs of suit at attorney and own client scale.**

- 2. It suffices to say that the court ruled in favour of the Respondent (as seen at page 31 of the Respondent's bundle) by granting the Applicant's counter application which he had sought on the same papers to declare and confirm that he was a *bona fide* possessor of the property and therefore, held a retention/retrenchment *lien* over Applicant's property pending compensation for useful and necessary improvements he had effected whilst he occupied the property. Respondent was granted costs including certified costs of counsel qualified in terms of Rule 68 of the High Court Rules. The judgment was delivered on 15th April 2005. We must mention**

for purposes of the present enquiry that the Applicant paid all costs as ordered by the court.

3. Sometime in 2008 under Civil Case No.1775/08 the Applicant brought another application before this Honourable Court. This time he sought to eject the Respondent, this time around on the basis that the Respondent had been offered a certain sum of money as compensation for useful and necessary expenses which he had recouped and as such his right of retention over the premises had been lost. The Respondent raised a *res judicata* point *in limine* in that based on the judgment between the parties delivered on the 15th April 2005 the court in essence declared the Respondent a *bona fide* possessor entitled to be compensated and to the right of retention until compensated. That the issue to be determined is quantum for compensation for the Respondent.

The result was that the Respondent's point *in limine* of *res judicata* was upheld and the question of costs reserved until the determination of the quantum to be dealt with by testimony of expert reports from experts which was to be filed within thirty (30) days of judgment. The judgment was delivered on the 16th July 2010. This judgment is to be found at pages 32-35 of Respondent's bundle.

4. Following High Court judgment on the 16th July 2010, the parties proceeded to file reports as ordered by the court. On the 29th October 2010, the court delivered yet another judgment after considering the reports ordered the Applicant to compensate the Respondent in the sum of E250, 000.00 (two hundred and fifty thousand Emalangen) to relinquish the Respondent's right of retention over the property. The Applicant was ordered to pay the costs of that application which he did not because he appealed the entire judgment including costs. This judgment is to be found at pages 36-38 of the Respondent's bundle.

5. **The decision of the 29th October 2010 was appealed by the Applicant, *inter alia*, on the ground that the court erred in finding that a fair amount of compensation should be E250 000.00 (two hundred and fifty thousand Emalangeni) in favour of the Respondent. The appeal was upheld with costs which have been taxed by the Applicant and await execution against the Respondent's property. The decision of this Honourable Court of the 29th October 2010 contained in paragraph 8 therein was set aside and the matter remitted back to the High Court for hearing of oral evidence."**

[7] I wish to put it on record at this stage that when I started writing the judgment in this matter a need arose that I capture the essence of the expert witness testimonies. I was informed that the record of proceedings was damaged such that I could not listen to the tape of such testimonies. I then called the attorneys of the parties with a view to reconstruct such testimony on the 27th May 2014.

[8] Thereafter the attorneys of the parties filed their transcripts of the record of the testimonies of the expert witness for which I am grateful. I wish also to record at this stage that I wish to apologise to the parties for this long delay in giving judgment in this matter.

[9] The order of the calling of the evidence was that the Respondent's expert witness Lombe Chongo commenced the leading of oral evidence and was

duly subjected to lengthy cross-examination by the attorney for the Applicant. The Respondent then called the evidence of one Nomsa Mabanga who testified that she was responsible for the maintenance of the property. This witness was also subjected to lengthy cross-examination and I shall revert to some of her pertinent replies later on as I proceed with my analysis.

[10] The Applicant then called the evidence of the expert witness one Thabani Dlamini who gave his evidence and being led by the attorney for the Applicant. At the close of his evidence in chief the Applicant's expert witness was cross-examined searchingly by the attorney for the Respondent Mr. Masuku. I shall revert to pertinent answers later on in my analysis. The Applicant Joseph Sambo also gave evidence and was duly cross-examined by the attorney for the Respondent.

[11] I shall proceed to outline in brief for the record the salient features of the parties' testimony of the expert in the following paragraphs.

(i) The Respondent's witness

[12] First of all I wish to record that the decision of this court on the matter lies on the credibility of these two expert witnesses called by the parties

to support their opposite position in this matter. Therefore, it is important to sketch the salient features of the testimonies of these witnesses.

[13] I shall first outline in brief the evidence of the Respondent's witness Lombe Chongo who was led in-chief what his understanding was of the Supreme Court Directive on how he should proceed carrying out his instructions. What he understood by having **“to determine the amount by which value the said property has been enhanced by reason of the said improvement effected by the Respondent on the said property.”**

[14] The Respondent's expert testified that he understood it to be requiring him to use the “market value” approach which he said is defined as the estimated amount for which a property should exchange hands on the date of valuation between a willing buyer, willing seller in an arms length transaction after proper marketing wherein the parties has each acted knowledgeably and prudently. In this regard he referred the court to page 15 of the Book of Pleadings being his Valuation Report that defines this concept.

[15] The witness testified that one has to estimate the value of the property at its current state to arrive at its market value. In this regard he referred the

court to paragraphs 1.4 to 2.2 of the testimony of the Respondent's expert witness. In paragraphs 3 to 8 of the said Heads of Arguments dealt with various approaches of valuations being first the **"income/investment approach"** in paragraph 3 thereof. In paragraph 4 with the **"cost approach"**, in paragraph 5 dealt with **"insurance method"**. In paragraph 6 dealt with the **"profit methods"**. In paragraph 7 dealt with **"residual method"** and lastly dealt with the **"discount cash flow method"**. In paragraph 8 thereon.

[16] The Respondent's witness was cross-examined searchingly by the attorney for the Applicant and I shall revert to his replies later on in my analysis and conclusions.

(ii) The Applicant's expert witness

[17] It is common cause that Applicant also brought in his expert, Mr. Thabani, who testified in-chief on the report dated 15 June 2005 attached to his Founding Affidavit at page 33 of the Applicant's bundle. He testified at great length on his report entitled "anticipated extra costs" undated found in page 57 of the Applicant's bundle. He was cross-examined at great length on his latest market value report dated 27 September 2011.

[18] The Applicant was only asked to commit on the two reports being the report dated 15 June 2005 and then extra costs report arising from encroachment. These reports were admitted as exhibits in this court.

[19] The Respondent's attorney outlined at length a useful survey of the Applicant's expert witness understanding of the Supreme Court Directive at paragraphs 17.1, 17.2, 17.3, 17.4 and 17.5 of his Heads of Arguments and I shall refer to pertinent aspects later on as I proceed with my analysis in this case. The above are the essential features of the evidence of Mr. Thabani Dlamini for the Applicant he was subjected to relentless cross-examination by Mr. Masuku for the Respondent.

[20] The above are the brief summaries of the expert witnesses in this case. I shall in turn briefly outline the salient features of the attorneys' arguments in the following paragraphs in order for one to understand the issues for decision by this court. Thereafter I shall outline in brief the evidence of Nomsa Bulunga and that of Joseph Sambo being the Applicant.

(a) The Applicant's arguments

- [21] The attorney for the Applicant filed comprehensive Heads of Arguments with the Registrar's stamp of the 4th October 2013 for which I am grateful.
- [22] In the said Heads of Arguments titled "Applicant's written submissions" commenced with an introduction in paragraph 1 to 3.3 framing the question for determination by this court.
- [23] The second segment dealt with the Respondent's expert report in paragraph 4 to 6.1 of the Applicant's Heads of Arguments and I shall revert to pertinent arguments later on in my analysis on the question for decision.
- [24] In paragraphs 7 to 7.5 the attorney for the Applicant dealt with Applicant's expert report in its Heads of Arguments.
- [25] Various other topics are covered to include the decision of the salon in paragraphs 8 to 8.2 thereof. "**encroachment**" in paragraphs 9 to 13 of the said Heads of Arguments. Further in paragraphs 14.1, 14.2, 14.3, 14.4, 14.5 with the issue of "**Encroachment and Compensation**". The last topic covered is that of costs and I must also mention that the

attorney for the Applicant cited the case of **Fletcher vs Bulawayo Motor Works Company Limited 1915 AD 630, 651** also cited by the attorney for the Respondent as I have already mentioned in the introduction of this judgment.

[26] I must also mention for the record that the attorney for the Applicant also advanced various arguments on the various reports ordered by the court of the two expert witnesses and I shall revert to pertinent aspects later on as I proceed with this judgment.

(b) The Respondent's arguments

[27] The attorney for the Respondent also filed comprehensive Heads of Arguments for which I am grateful. The attorney also filed Heads of Arguments as directed by the court in respect of the evidence of the two expert witnesses mentioned above in paragraph [26] of this judgment.

[28] The attorney for the Respondent filed what he termed "Respondent's closing submissions filed with the Registrar of this court on the 4th October 2013 covering various topics as the Heads of the Arguments mentioned above.

[28] The first topic in paragraphs 1 to 6 related to the brief background to the present compensation (quantum enquiry). The second topic being “The Supreme Court order as an excellent guide on what the oral evidence is to determine at the High Court.” In paragraphs 7 to 10 of the said Heads of Arguments. The third topic by the attorney for the Respondent being “point of departure in the pre-trial minute in paragraphs 11.1, 11.2 and 11.3 of the said Heads of Arguments.

[29] In paragraphs 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 13.9, 13.10, 13.11 up to paragraph 22 dealt with the evidence of Respondent’s expert witness Lombe Chongo.

[30] In paragraph 23 of the Heads of Arguments of Mr. Masuku he dealt with the Respondent’s expert report and methods carried out in support by case law and Roman Dutch authorities in paragraphs 23.1, 24, 25 of the said Heads of Arguments.

[31] Further on dealt at some length with various topics being the effect of the encroachment of the bindings on the quantum for competition at paragraph 30 to 38.2 of his Heads of Arguments. Also, dealt with the third report filed by Applicant’s expert Mr. Thabani Dlamini in paragraphs 39 to 55 of the Heads of Arguments further dealt with the

evidence of Respondent's witness Nomsa Mabanga in paragraph 56 to 60 of the Heads of Arguments furthermore, dealt with the evidence of Joseph Sambo in paragraph 61.1 to 61.6 of the Heads of Arguments. The other topics are dealt with being the "Surveyor's fees and other fees" in paragraph 62 to 63.

[32] In paragraph 64 dealt with the "Salon Built in 1999" in paragraphs 64.1, 64.2 and 64.3 of the Heads of Arguments. Lastly the issue is also discussed at some length in paragraph 65 to 72 thereof.

[33] The Respondent prays for an order granting the Respondent compensation for the value of the property as has been enhanced by reason of improvement at E502 000.00 plus all municipal rates paid this far with costs at ordinary scale. That the amount of E502 000.00 being the less of the depreciated replacement costs of the bundle which is the amount actual expenses being E540 000.00.

The court's analysis and conclusions thereon

[34] Having considered the able arguments of learned attorneys first and foremost agree **in toto** with the framing of the case for decision by the

attorney for the Respondent in paragraphs 7.1 to 7.2 of the Heads of Arguments to be the following:

“The Supreme Court Order as an excellent guide on what the oral evidence is to determine at the High Court

7.1 The Honourable Court present is directed to determine: “what is the amount in respect of which the Respondent enjoys a lien over Lot No.9 Mathendele Township by reason of necessary and useful improvements effected by him on the said property”.

In determining the said amount the court shall determine the amount by which the value of the said property has been enhanced by reason of the said improvements and the amount of the actual expenditure in effecting the improvements, the amount in respect of which the lien is enjoyed being the lesser of the two amounts. See: Paragraph 2(a) page 41 of the Respondent’s bundle for the Supreme Court judgment.”

[35] As gleaned from above the parties were to call witnesses to support their contentions on what is to be compensation by this court. The Supreme Court set out the procedure on how the parties should exchange their reports and also ordered a meeting of expert witnesses to endeavour to reach an agreement on some of the matters that they give evidence and minutes of such meetings to be filed two days before hearing.

[36] In view of the above directive of the Supreme Court each party called its expert witness in accordance with the above. The crux of the matter therefore is a determination by this court as to which expert called by the Applicant and the Respondent is credible in the circumstances of the case.

[37] According to the learned authors **Hoffman et al, The South African Law of Evidence, 4th Edition** at page 100, it is the function of the judge to decide whether the witness has sufficient qualifications to be able to give assistance. The court must be satisfied that the witness possess sufficient skill, training or experience to assist it. His qualifications have to be measured against the evidence he had to give in order to determine whether they are sufficient to enable (him to give relevant evidence). The learned authors have cited a number of decided cases in this respect in folios 6 to 15 of page 1000 of the above cited textbook.

[38] The learned author's **Hoffman (supra)** has dealt with a number of topics on the subject of expert evidence and I shall revert to some aspects of their discussions as I proceed with this judgment.

[39] After the above short survey on the principles on how to treat such testimony by the court the next enquiry is to determine the efficacy of the two expert witnesses as who is a credible witness before the court. It will

also be useful to give a brief outline of the circumstances in the case of **Fletcher vs Fletcher (supra)** to give an overview of the issues for decision by this court.

[40] In that case the Defendant company leased from one S a piece of ground for a term of three years renewable for two successive similar periods, the lease entitling the lease to sink wells, by pipes and erect buildings and machinery upon the property. Thereafter the Defendant's company sunk a well within what it believed to be the boundary of the land leased and erected plant by means of which it pumped water for the use of the town of B for a period of some months. Infact the well and portion of that plot fell just beyond the boundary of the leased property and within the limits of Plaintiff's adjoining land. The Defendant company had continued to pump water from the well after it had discovered this fact but it had made no profit from the sale of the water.

[41] The Plaintiff having instituted an action for ejectment and damages and for an account of all water taken from the well and payment of profits the Defendant's company claimed to be entitled to retain possession of the land until compensated for improvements.

[42] It was held that the Defendant's company was entitled to be compensated for the improvements to the extent to which the value of the Plaintiff's land had been enhanced thereby and to return possession of the land until such compensation had been paid.

[43] On the damages claimed the court was not satisfied on the evidence that the pool had been drained by the well and as such the Plaintiff had clearly not sustained any loss by the mere trespass, he came to the conclusion that it had not been proved that the Plaintiff had sustained any actual damages.

[44] I have considered all the evidence led by the two expert witnesses and the argument advanced by the attorneys of both parties and it is my view that the expert witness called by the Respondent is more credible than that of the witness called for the Applicant. I say so for a number of reasons I shall outline **ad seriatim** in the following paragraphs.

[45] First and foremost it would appear to me that Respondent's expert understood the formula to be used as set out by the Supreme Court.

[46] The gravamen of the enquiry as directed by the Supreme Court is how does this court determine the necessary and useful improvements effected

on the property – the amount by which the value of the said property has been enhanced by the said improvements and the amount of the actual expenditure in effecting the improvements they seek of the two amounts.

[47] In this regard the evidence of the Respondent's expert witness Mr. Lombe Chongo when asked in his evidence-in-chief what his understanding was of the Supreme Court Directive on how to proceed carrying out his instructions what he understood by having to determine the amount by which value of the said property has been enhanced by reason of the said improvements effected by the Respondent on the said property.

[48] The Respondent's expert testified that he understood it to be requiring him to use the market value approach which he said is defined as the estimated amount for which a property should exchange hands on the date of valuation between a willing buyer willing seller in an arms' length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion. In this regard he referred this court to page 15 of the Book of Pleadings being the valuation report that defines the concept.

[49] Secondly, the expert witness for the Respondent took the court through a painstaking exercise of the various methods of valuation used were in

their profession. On the other hand the expert witness for the Applicant Mr. Thabani Dlamini did not demonstrate his knowledge of these different methods which should put into question his understanding of the Supreme Court directive.

[50] It also appears and it was shown in cross-examination of the Applicant's expert witness that the three reports that he filed in the case did not follow conventional principles of valuation supported by the valuation manuals. He contradicted the concept and considered in great deal costs likely to be incurred on a proposed demotion of the property which cannot be substantiated.

[51] Thirdly, on the evidence of the Applicant's expert witness under cross-examination he admitted that the determination of the market value is the valuer's language, is the basis which is to be adopted in resolving disputes. He also agreed that the actual amount expenditure incurred in what is envisaged in the Supreme Court's wording which is what he has termed replacement costs.

[52] Applicant's expert witness also admitted that the correct costs of replacing the building is as it stands at the terms of the valuation and not the costs incurred in 1986. In this regard I agree **in toto** with the

Respondent's arguments in paragraphs 30 to 38.2 regarding this aspect of the matter.

[53] Fourthly, the arguments of the Respondent's attorney from paragraph 39.1 to 64 of the Respondent's Heads of Arguments have not been answered by the Applicant where **inter alia** the Applicant's expert witness agreed under cross-examination that there was no clear date when the Valuation Report was carried and not also clear when the report was done.

[54] Fifthly, it would appear to me that the arguments by the Respondent's attorney at paragraph 54 to 55 of his Heads of Arguments that his qualifications as an expert are suspect in view of the clear discrepancies in the said qualifications. Applicant's expert witness informed the court that he obtained a Bachelor of Science in Land Survey (Land Property) in the year 2006. However, when he attested to his Founding Affidavit in the year 2008, he never mentioned his highest degree in his career but all he mentioned at page 49 of the Book of Pleadings was a Diploma in Quality Surveying at least eleven (11) year experience in property valuation.

[55] I further agree with the Respondent's attorney that is also striking is that he never mentioned in that affidavit that he was a member of a professional body of Land Surveyors but it was only in cross-examination when this fact was revealed.

[56] All in all, therefore for the above reasons I find that the expert witness for the Applicant was discredited and no credibility at all can be attributed to his evidence.

[57] I now proceed with three outstanding issues that of the evidence of Nomsa Mabanga, the evidence of the Applicant, Surveyor's fees and other fees, the salon built in 1999 and costs of the Application in the following paragraphs.

(a) Evidence of Nomsa Mabanga

[58] In this respect the Respondent led the evidence of Nomsa Mabanga who stated that she started in the year 2001 to manage the property in question on behalf of the Respondent. She testified that she was responsible for the maintenance of the property. She also attended to the payment of the municipal rates. That the property started paying rates in the year 1998/1999. She testified that she had paid the municipal rates diligently

from 1999 to todate. She went on to outline the various payments as stated in paragraph 56.3 of the Respondent's Heads of Arguments at page 30 thereon.

[59] The essence of her evidence is her prayer to the court to order a refund of these rates over and above the compensation that the court will order the Applicant to compensate the Respondent.

[60] The cross-examination of this witness by the attorney for the Applicant concentrated mainly on the encroachment of the building and on the letters or correspondence that exchanged between the attorneys.

[61] In my assessing of the issues in this regard I find that the statements and the evidence of this witness was not challenged by the Applicant in cross-examination.

(b) Evidence of Joseph Sambo

[62] The Applicant gave evidence under oath and he was cross-examination by the attorney for the Respondent where he portrayed to the court that he was "a man of straw" and could not afford the compensation sought by the Respondent.

(c) Surveyor's fees and other fees

[63] In examination-in-chief the Applicant testified that it would not be fair to him to be called to pay the Surveyor's fees, attorney's costs etc.

[64] In my assessment of this aspect of the matter I agree with the Respondent's arguments that the costs paid to surveyors for the property were all necessary to determine the parties' rights and each party has to pay its own costs.

(d) The salon built in 1999

[65] In this regard I agree **in toto** with the submissions of the Respondent as outlined in paragraph 64.1, 64.2 and 64.3 at page 34 of the Respondent's Heads of Arguments.

[66] Finally on the question of costs I have considered the arguments to and fro as to the scale of costs to be levied. The Respondent seek an order that the court orders costs at a punitive scale outlining his reasons at paragraph 66, 67, 68, 70, 71 & 72 of the Heads of Arguments of the attorney for the Respondent.

[67] I have considered these submissions and in exercise of my discretion would order costs to be on the ordinary scale.

[68] Having found that the expert witness called by the Respondent is more credible than the witness called for the Applicant I am duty bound to be persuaded by his evidence which I have adopted above and would in the final analysis order that the Respondent be compensated for the value of the property as has been enhanced by reason of the improvement at E502 000.00 plus all municipal rates paid this far which costs at ordinary scale. The amount of E502 000.00 being less of the depreciating replacement costs of the building which is amount actually expenses being E54 000.00.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE