



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 870/2013

In the matter between:

SWAZILAND ELECTRICITY COMPANY

Applicant

VS

RAYMOND NHLEKO

Respondent

Neutral citation: *Swaziland Electricity Company V Raymond Nhleko (870/2013)*
[2016] SZHC 135 (3 August, 2016)

Coram: FAKUDZE, J

Heard: 26 July, 2016

Delivered: 3 August 2016

Summary: *Civil Procedure – Eviction Proceedings- Former Employee alleges that he is entitled to continue occupying the house belonging to his*

former employer – basis for such occupation that after accepting and being paid his dues under a voluntary exit arrangement, employer allowed him to occupy house because he was injured at work- Former employee makes a bare assertion or allegation of this fact – Since no evidence supporting his assertion or allegation, eviction allowed – A party who alleges must prove – it is not the responsibility of the Applicant to prove the existence of the arrangement – Respondent duty bound to do so because he is the one alleging that Applicant allowed him to continue occupying the house notwithstanding the termination of employer – employer relationship. Application upheld with costs at an ordinary scale

JUDGEMENT

- [1] This is an Application brought on Notice of Motion for an Order in the following terms:-
- (a) Ejecting the Respondent from the Applicant’s immovable property namely – Lot No. 34 of Portion No 5 Matsapha, Junior Staff Houses (next to Mshayazafe), House No. 6 A, 5th Avenue, Matsapha Town;
 - (b) Costs of suit; and
 - (c) Any further and/or alternative relief as the Honourable Court may deem fit.
- [2] The Respondent has filed the Notice of Intention to oppose and subsequent pleadings in the form of the Answering Affidavit and the Replying Affidavit.
- [3] I must at the outset, point out that this Application has rather taken a long time for it be heard and concluded. It first came before this court on the 28th November 2014 and there have been various postponements occasioned by the non-appearance of the Legal Representatives of the parties and the Representatives

asking for more time to file the necessary papers before same being ready for argument. The matter was finally heard on the 26 July, 2016.

APPLICANT'S CASE

- [4] The case for the Applicant is that the Respondent is a former employee of the Applicant having been so employed as a Tower Linesman. The Respondent was employed in 1990 and thereafter retired from the Applicant's employ on the 30th April, 2011.
- [5] Pursuant to the Respondent's employment by the Applicant, the Respondent was allocated a company house at Matsapha at Lot No.34 of Portion No.5 Matsapha Staff Houses (next to Mshayazafe), House No. 6A, Matsapha Town.
- [6] The Respondent ceased to be an employee of the Applicant on the 30th April, 2011, when the Applicant paid the Respondent his voluntary exit package which he had applied for. The voluntary exit package amounted to the sum of E313,809.96 (Three Hundred and Thirteen Thousand Eight Hundred and Nine Emalangeneni and Ninety Six Cents).
- [7] The Applicant alleges that it is on the 30th April, 2011, that the Respondent should have vacated the company house as the Respondent is no longer the Applicant's employee. Despite verbal demands to vacate, the Respondent refuses to vacate the company house, hence the Application before this Honourable Court.
- [8] The Applicant finally submit that the Respondent has no bona fide defence to the relief prayed for in the Notice of Motion.

RESPONDENT'S CASE

- [9] The Respondent's case is that, after being granted a voluntary exit package by the Applicant due to the Respondent's medical condition arising from an accident while the Respondent was on duty on the 11th September, 2000 and 22nd November 2001 respectively, an agreement was struck between the Respondent and the Applicant that the Respondent should continue staying in the Applicant's house indefinitely. The basis for this agreement was that the Respondent would be closer to hospital where he would receive physiotherapy which was imperative if his condition was to improve.
- [10] The Respondent further states that the Applicant's employers who were assigned to enter into the agreement is Mr. P.K. Mdluli and Bonginkosi Nsingwane. None of these gentlemen have denied the allegations by the Respondent by filing supporting Affidavits denying knowledge of it in support of the Applicant's case. The Respondent argues that this agreement is not peculiar to the Respondent as same was entered into between the Applicant and a certain Mr. Mxolisi Mbatha. This Mxolisi Mbatha was also injured in the Applicant's course and scope of duty.
- [11] The Respondent further argues that the Applicant cannot deny the agreement between the parties as evidenced by the length of time, from April, 2011 to July, 2013, when the Applicant had a change of heart and decided to cancel the agreement. The Respondent goes on to say that it is trite that one party to an agreement cannot unilaterally decide to cancel the agreement without the consent of the other party.
- [12] The Respondent finally argues that the Voluntary Early Retirement Memorandum entered into between the parties related mainly to the package thereof and not the

issue of the continued occupation of the house. The Respondent is therefore praying that the Applicant's case be dismissed.

APPLICANT'S REPLY

[13] The Applicant responds to the Respondent's allegations by stating that:-

- (a) The Respondent was the one who requested and accepted the voluntary exit package whose effect was to bring to an end the employer – employee relationship;
- (b) The Respondent alleges an agreement to the effect that he was to be housed at the Applicant's premises. The Respondent, through his attorney, requested that oral evidence be led to establish the existence of the agreement and the policy that once you are injured during the scope of employment with the Applicant, you are entitled to indefinitely occupy the Applicant's house that was allocated to you when you first took up employment with the Applicant;
- (c) Since the Respondent has alleged the existence of the agreement he must prove same;
- (d) The medical reports attached to the Respondent's papers prove that the Respondent was still in the employ of the Applicant at the time they were prepared; and
- (e) The house currently occupied by the Respondent belongs to the Applicant. The Applicant cannot utilise it due to the Respondent's actions of refusing to vacate same. The only available option is for the Applicant to institute the eviction proceedings.

THE APPLICABLE LAW

[14] In **Chetty V Naidoo 1974 (3) SA 13**, it was established that in eviction proceedings, once a plaintiff succeeds in proving ownership and that the defendant is in occupation, the onus shifts to the defendant to show that his occupation is lawful.

[15] The Court in **Chetty's Case (Supra)** stated in paragraph 20 A-E that:-

“The incidence of the burden of proof is a matter of substantive law (Tregae and Another V Godart and Another, 1939 A.D. 16) and in the present type of case, it must be governed primarily, by the legal concept of ownership. It may be difficult to define dominium comprehensively but there can be little doubt that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property where ever found from whomsoever is holding it.”

[16] The Court further observed that:-

“It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g a right of retention or a contractual right).”

[17] The Court finally observed that:-

“The owner in instituting a rei vindicatio, need therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res-the onus being on the defendant to allege and establish

any right to continue to hold against the owner. (See Jeena V Minister of Lands 1955 (2) SA 380 (A.D) at pp. 382 E 383).”

The case of **Green v Pillay and others (2314/2014) ZAKZDHC 32** is also quite instructive with respect to the issue that before this court.

COURT’S ANALYSIS AND CONCLUSION

[18] The first stage of the enquiry is whether or not the Applicant has proved that she is the rightful owner of the property that is the subject matter of this present litigation. It is not in dispute that the Applicant is the owner of the property which the Respondent occupies. In its papers, the Respondent does not dispute that. In fact, the Respondent states that in cases where a voluntary exit package has been paid, the person to whom it was so paid should vacate the premises because the employer and employee relationship would have ceased to exist. It can therefore be rightly concluded that, following the principles enunciated in the **Chetty’s case (Supra)**, the Applicant has established and proved ownership.

[19] The second stage of the enquiry is the defence raised by the Respondent justifying his continued occupation of the premises. The Respondent alleges that an agreement was entered into between himself and two employees of the Applicant that he should continue occupying the house because he was injured whilst at work. The Respondent does not state where the contract was entered into, when was it entered into and whether such contract was oral or in writing. If it was in writing, he should have attached a copy of the agreement in the court papers.

[20] The Respondent further argues that the aforementioned contract (which the Applicant denies) was entered into between himself and a certain Mr. P.K. Mdluli and a Mr. Bonginkosi Nsingwane. He has not attached any supporting documents

or even supporting Affidavits to establish this truth. The Respondent has gone further to justify that the agreement allowed him to continue occupying Applicant's house so as to be closer to hospital. He supports this assertion by attaching two medical reports dated 27th August, 2009 and 29th December, 2010. The effect of these two reports, as rightly pointed out by the Applicant's Attorney, prove that at the time of their preparation and submission, the Respondent was still in the employ of the Applicant. He was therefore entitled to occupy the Applicant's house. They do not in anyway assist the Respondent with respect to the issue at hand.

[21] In analysing the documents and papers forming part of this litigation, this court has failed to find any clause in the Voluntary Exit Memorandum allowing the Respondent to continue occupying the Applicant's house after receiving the voluntary exit package. The Respondent has stated that the issue of the continued occupation was discussed and agreed upon after he had applied and had received his voluntary exit package. He does not bring any evidence to establish this assertion.

[22] The Respondent further alleges the existence of a policy that if one is injured in the Applicant's employ, he is entitled to continue occupying the Applicant's house notwithstanding the non-existence of the employer-employee relationship. He cites the case of Mxolisi Mbatha to justify his argument. The Applicant has countered this argument by saying that Mr. Mbatha was injured in the course and scope of employment with the Applicant. After such injury, he continued in the employ of the Applicant; he never applied for a voluntary exit package. In the present case, the Respondent applied for a voluntary exit package.

[23] The cumulative effect of what has been said in paragraphs 19 to 22 is that the Respondent has failed to discharge the onus to prove any right to continue occupying the Applicant's house. It is trite that he "who alleges must prove."

[24] Given all what has been said above, this court is therefore entitled to come to the conclusion that the Applicant has established its case and therefore prayers (a) and (b) of the Notice of Motion are hereby granted with costs at an ordinary scale.

FAKUDZE J.
JUDGE OF THE HIGH COURT

For: Applicant: B. Gamdze

For: Respondent: L. Malinga