IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 892/2006

In the matter between

MAKHALATSI SIMELANE **1st Applicant**

And

KOMATI BASIN WATER AUTHORITY **Defendant**

Neutral Citation: *Makhalatsi Simelane Vs Komati Basin Water Authority (892/2006) [2017] SZHC 106 (08th June 2017)*

Coram: Hlophe J.

For the Applicant: Mr M.E. Simelane

For the Respondent: Mr M.P. Simelane

Date Handed Down: 08th June 2017

Summary

Action Proceedings –Plaintiff claims a sum of E440825 -00 as compensation for resettlement of his homestead to accommodate the construction of Maguga Dam –Defendant allegedly failed to resettle him in an area having arable land for irrigation and allegedly to allow him "establish his homestead structures on good soil" –Whether case made for the reliefs sought –Foundations of the claim unclear whether based on a delict or a breach of contract –What the effect of an acceptance of a compensation in terms of the Resettlement Policies is – Absolution from the instance –When appropriate –Whether absolution from the instance appropriate in the circumstances – Court upholds application, dismisses Plaintiff's claim .

JUDGMENT

[1] The Plaintiff instituted action proceedings against the Defendant where he sought the following reliefs per his particulars of claim:

(a) An order compelling the Defendant to perform properly an underground drainage system.

(b) An order calling upon the Defendant to lay a concrete slab around the houses within a radius of 15 metres from each angle of the houses.

(c) That the Defendant be ordered to comply with prayers a and b within two months after judgement has been ordered against them.

(d) Failing compliance with prayers A, B and C the Defendant be ordered to pay E440 825 -00(Four hundred and Forty thousand Eight hundred and twenty five Emalangeni)

(e) Interest at the rate of 9% per annum a tempore moral.

(f) Costs at attorney client scale.

(g) Further and alternative relief.

[2] The prayers by the Plaintiff arise from a decision taken by the Swaziland Government way back in the early 2000's to construct the Maguga Dam. This decision resulted in the people who had homesteads around the affected area having their homesteads removed to be resettled elsewhere.

[3] The case of the Plaintiff from the papers filed of record and his evidence in Court is that his homestead was relocated from Ekwakheni area to Nyonyane, Meleti area around 2001. He claimed, without revealing the basis for it, that he was entitled to be compensated for the items listed in paragraphs 5.1 to 5.7. Whereas he states that the claims stated in paragraphs 5.3 – 5.7 were settled, he maintains that those in paragraphs 5.1 and 5.2 were

never settled or honoured by the Defendant. The Claims in paragraphs 5.1 and 5.2 respectively concerned what he loosely described as the Provision of arable land for irrigation to him and that his homestead structures be established on good soil. The court was not referred to any document providing that he was entitled to any of the listed items in paragraphs 5.1 to 5.7 of his particulars of claim. During his testimony in court, and whilst answering a question from this court on why he believed he was entitled to these claims, he was quick to say that these emanated from his mind.

[4] It must be mentioned at this point that when the trial commenced, the court was informed of an agreement reached between the parties' counsel in terms of which the hearing of the matter was to be divided into two segments, being firstly the determination of the liability or otherwise of the Defendant and secondly that if Defendant was found to be liable, the determination of the quantum of damages payable. The idea was obviously that if the court found there was liability by the Defendant, the parties would try and agree on a quantum of damages failing which the matter would be set down for the determination of same by the court.

[5] Amplifying the pleaded case in his testimony, the Plaintiff stated that when his homestead was resettled, it was given a portion of land that was water logged and not arable. Although he alleged he protested, he was nonetheless compelled to take the said piece of land and establish his homestead thereon. It should be pointed out at this stage that during his testimony; the Applicant agreed that the provision of arable land for irrigation was no longer being pursued. The only issue that remained for determination therefore was the fact that his structures had allegedly developed cracks because of the water for which he had to be compensated. The cracks on his aforesaid structures allegedly developed within a short space of time. This he said was attributable to the high water table level in the said area. Notable among these cracks was that said to have developed on the floor or slab of the main house. The cracks in question allegedly measured some 3 millimeters in width.

[6] The following observations merit mention or comment on the Plaintiff's case. Although he claimed to be entitled to establish his "homestead structures on good soil", the Plaintiff did not give any independent evidence confirming his said entitlement. This made it difficult to ascertain whether his case is based on delict or on contract. Even during the hearing of the

matter, the Plaintiff did not give this important basis or foundation to his case. This observation was complicated by the fact that no reference in support of this assertion by the Plaintiff was made to the document known as the Resettlement And Compensation Policy of the said Project which was handed into court and marked exhibit A1. The nearest reference so made to the Resettlement And Compensation Policy, dated November 1996 was to Paragraph 2.2. This paragraph provided as follows:

> *"Where displacement is unavoidable, the costs thereof shall be borne by the project and mitigatory measures planned and implemented as an integral part of the project. Provision shall be made for the monitoring and evaluation of (the) project impact, from the preparatory to the post resettlement stages."*

[7] The Plaintiff did not disclose in his papers that he was at some point paid some money as compensation. It transpired when he was led in court which he also confirmed under cross examination, that he had actually been paid a sum of E141, 423.30 as compensation for his being resettled. Given that in exercise of his choice the Plaintiff had chosen to engage his own builder, he was paid a sum of E90,487.99 for the materials meant to construct his

structures plus a sum of E50,955.31 he received as hard cash for his own use. This aspect of the matter is also significant for bringing to the fore that the Plaintiff had brought his own builder, whom he had to personally supervise for the structures he put up including their quality and compliance with building requirements. This was obviously bound to be difficult, given that it transpired during Plaintiff's testimony that he was not only just illiterate but had no building expertise as well.

[8] Whereas the Plaintiff claimed that the cracks on his structures were caused by the high water table level in the area on which he was relocated to build his homestead, there was no evidence to support this assertion. In fact according to the evaluation report prepared by an entity known as Consortium Projects (PTY) LTD and annexed to the Plaintiff's own papers, the cracks such as the big ones complained off as being on the slab of the main house said to be some 3mm wide, were a result of poor workmanship given that when they were built there was either no or there was poor reinforcement done. This was supported by the Plaintiff's own testimony during the hearing of the matter. This for instance is how the testimony went on this area:

"Q.The house developed cracks after twenty five days. Is there a reason why your papers do not disclose any such?

A. I think it was a problem of the contractor being in a hurry and this one (meaning his house having cracks) was rushed yet it was on a wet land."

[9] In my understanding of his testimony on this part, the Plaintiff was confirming that the wide cracks on the slab were attributable to the poor workmanship by the builder. In this sense, and him having not brought any unequivocal evidence that the cracks were caused by the high water level, such cannot be taken to be the only reasonable inference to draw from that set of facts. The law is long settled that if one seeks to reason by inference, the inference sought to be drawn ought to be the only reasonable one to so draw and that it should be consistant with all the proven facts. See in this regard the Principle in **R.V.Blom 1939 AD. 188** as covered in **D.T.Zeffertt and Others book titled, The South African Law of Evidence, 2003, Lexis Nexis at page 94.**

[10] Although it is stated in the same report that the vertical cracks were caused by the high water table level, it has not been testified that a professional construction of the structures applying appropriate measures and skill would not have met this particular challenge. I am obviously saying this because it did transpire during the cross examination of the Plaintiff that whereas the Defendant had offered to be the one constructing the structures using its own personnel who were to be monitored by it, the Plaintiff opted out and chose to use its own personnel which enabled him pocket some change. There was no evidence to the effect that the Plaintiff ever engaged any professional to counter check if the standards employed by his builder were proper. This is complicated by the fact that the Plaintiff had the onus to prove his case, even though on a balance of probabilities.

[11] A further case that transpired during the cross examination of the Plaintiff is that he had never reported his dissatisfaction with the entire relocation exercise to the Defendant including his reasons for such dissatisfaction. The Defendant, it transpired, had in terms of its Resettlement and compensation policy, established certain structures to deal with disputes that would arise from the exercise. These structures were said to be the Dispute Resolution Committee led by Prince Gcokoma, which had original jurisdiction. The

decisions by this committee are said to have been appealable to the Joint Water Commission, an appellate structure.

[12] It was put to the Plaintiff that whereas these committees had the duty and means to consider the complaint by the Plaintiff and to determine same in the merits or otherwise, they had not been approached. As such the Defendant had never had such a complaint subjected to its structures and therefore could not tell if the complaint was real or not. It therefore would be difficult for it to be ordered to compensate the Plaintiff without its matter having been subjected to these important structures so as to establish its authenticity. The Plaintiff had in fact not disputed his having not reported the dispute complained of in terms of these structures. He had contented himself with saying that he did not know about this procedure. He said he had expected his Chief to be the one to take the matter through the appropriate structures in line with her promises.

[13] It was with these issues having come up during the Plaintiff's testimony and after his case was closed that the Plaintiff made an application for absolution from the instance claiming that a prima facie case had not been made against

her and therefore that the Plaintiff's case be dismissed at this stage of the proceedings.

[14] An application of this nature is appropriate in a case where the Plaintiff is shown as having failed to establish a prima facie case against the Defendant. It has been stated that the test in such instances is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (and not should or ought to) find for the Plaintiff. See in this regard **Erasmus** on his work, **Superior Court Practice, 1996 Edition, Juta and Company at page B1 –292**. Clarifying on how the court should approach the evidence at this point, the learned author put the position as follows as he cites an extract from **Myburgh Vs Kelly 1942 EDL 202 at 206**:

> *"It follows that when absolution is asked for at the end of the Plaintiff's case, the court must bring to bear upon the evidence not his own but the judgement of a reasonable man. Renouncing for the time being any tendency to exercise a judgement of his own, he is bound to speculate on the conclusion to which a reasonable man of his conception not should, but might or could, arrive. This is the process of*

reasoning which, however difficult its exercise, the law enjoins upon the judicial officer".

[15] In **Gordon Lloyd Page And Associates Vs Rivera And Another [2000] 4 all SA 241 (AD) at 243 B**; the test for absolution was put as follows by Harms JA:

> *"This implies that a Plaintiff has to make out a Prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the Plaintiff…Having said this, absolution at the end of a Plaintiff's case in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice."*

[16] In **Claude Neon lights SA LTD Vs Daniel 1976 (4) SA 403 AD at 409 G-H** the test for absolution was captured in the following words:

"When absolution from the instance is sought at the close of Plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Plaintiff."

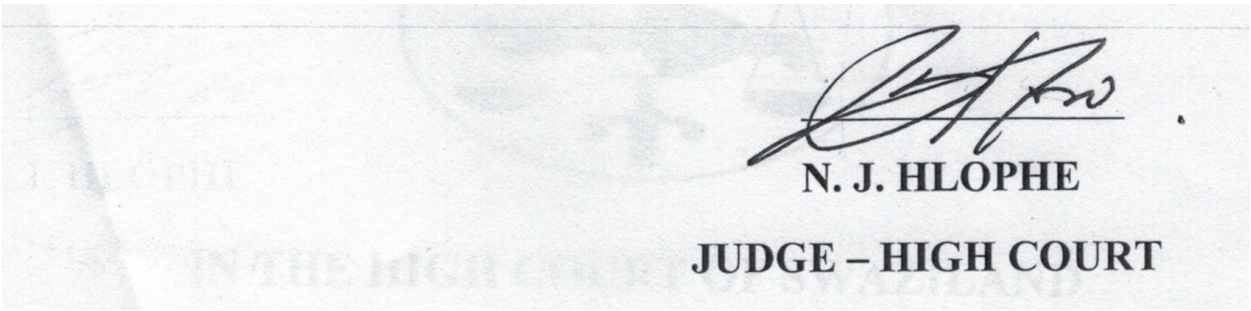
[17] Turning to the current matter, I am convinced that a Prima facie case has not been made and therefore that a reasonable court, applying its mind reasonably to the facts, could not find for the Plaintiff. This I say because for starters a case has not been made on what the foundation of the Plaintiff's claim is, that is, whether it is founded on delict or on contract. A case has also not been made attributing either a specific act of breach of contract or failure to discharge a delictual duty of care by the Defendant during the construction of the houses or structures at the Plaintiff's homestead. It in fact transpired that the builder was engaged by the Plaintiff himself and that the construction of the structures was not up to standards as can be seen on the Consortium Projects Report annexed to the summons and particulars of claim. Whereas there was evidence of poor construction by the builder of the structures through failure to properly reinforce the slab,

there is no evidence that had the structures been properly and professionally built there would still have been the cracks attributed to the high water table level. The point being made, is that strong houses are built on wetlands where proper structures are built or where proper building standards are employed or observed.

[17] Furthermore the cracks attributed to the high water table level, have not been shown to be as a result of any action or in action by the Plaintiff particularly when considering the Plaintiff's own testimony that he had accepted the piece of land allocated him and had further gone on to accept the amount paid as compensation, without reporting the dispute it had timeously in terms of the applicable procedures. If the Defendant had never had a complaint before it in terms of its structures, it cannot be faulted for not addressing a complaint it knew nothing about.

[18] I am therefore convinced that no reasonable Court could or might find for the Plaintiff in these circumstances and I accordingly hold that the application for absolution from the instance made by the Defendant

succeeds. The Plaintiff's claim is therefore dismissed. The Plaintiff is ordered to pay the costs of suit at the ordinary scale.



N. J. HLOPHE

JUDGE – HIGH COURT