



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2728/1999

In the matter between:

ABEDNEGO MAKHEHLANE NXUMALO

PLAINTIFF

and

TIMOTHY MDLULI

DEFENDANT

Neutral Citation : Abednego Makhehlane Nxumalo v Timothy Mdluli 2728/1999
[2017] SZHC 35 (28 JUNE 2017)

Coram : MABUZA – PJ

Heard : 20/3/14; 23/6/14; 15/7/14;; 30/7/14; 30/7/14; 13/8/15; 6/10/16;
14/11/16; 13/12/16.

SUMMARY

Civil Law: Plaintiff suing for rental arrears – cancellation of lease agreement – Eviction – Interest and Costs – Defendant raises counterclaim in respect of improvements – Defendants claim dismissed with costs – Judgment entered in favour of the Plaintiff.

JUDGMENT

MABUZA -PJ

[1] The Plaintiff herein issued summons against the Defendant on the 9th November 1999 in which he sought the following prayers:

- (i) Cancellation of the agreement entered into by the parties.
- (ii) Ejectment of the Defendant from house No. 233, Two Sticks location Manzini.
- (iii) Payment of the sum of E24,000.00 being arrears rent.
- (iv) Interest thereon at the rate of 9% a *tempora morae*.
- (v) Costs of suit.
- (vi) Further and/or alternative relief.
- (vii)

[2] The matter is defended by the Defendant who having denied liability for the Plaintiff s claim has also filed a counterclaim in which he seeks the following prayers:

- (i) Payment of the sum of E1 9,036.94 (Nineteen thousand and thirty six Emalangeni, ninety four cents);
- (ii) Costs of suit; and
- (iii) Further and or alternative relief.

[3] In the pleadings filed off record the Plaintiff is described as Abednego Makhehlane Nxumalo an adult Swazi male of Mankayane in the Manzini District.

[4] The Defendant is described as Timothy Mdluli an adult male who resides at Two Sticks House No. 233 in the Manzini District.

[5] The Swaziland National Housing Board is described as the 1st Third Party.

[6] The Principal Secretary, Ministry of Housing and Urban Development is described as the 2nd Third Party.

Plaintiff.s case and Defendant's responses

[7] The Plaintiff's case as set out in the summons is that on or about 1974 Plaintiff was allocated a house by the National Housing Board at Two Sticks, Manzini

described as House No. 233 at a monthly rental of E13.50 (Thirteen Emalangeni fifty cents), which he occupied until 1994.

[8] That on or about July 1994 and at Mankayane Plaintiff and Defendant entered into an oral agreement, wherein the Plaintiff let and the Defendant hired house No 233, Two Sticks. The terms of the agreement were that: Defendant may take immediate occupation of the house; Defendant reconnects water and electricity supply to the house; and pay monthly rental to the Plaintiff of E400.00 (Four hundred Emalangeni); Payment of the rent be suspended for a period of a (three) calendar months to enable Defendant to attend to the water and electricity reconnections.

The Defendant's response is that he specifically denies the allegations herein and puts the Plaintiff to the proof thereof.

[9] That Plaintiff performed his part of the agreement by handing over the keys to the house to the Defendant during July 1994.

[10] Subsequently and in violation of the terms of the agreement, the Defendant

failed to pay the monthly rent to the Plaintiff when it fell due and payable on the 1st day of November 1994 and subsequent thereafter.

[10] The Defendant's response is that he denies the contents hereof and avers that the Plaintiff was not entitled to receive monthly rentals for the premises and that no lease agreement was entered into by the parties.

[11] That During December 1998 Defendant altered the building of Plaintiff s house by building an extension without the authority or consent of the Plaintiff.

The Defendant's response is that the extension or improvement to the premises were constructed with the full knowledge and consent of the Plaintiff.

[12] Plaintiff alleges that he is the lawful and a registered owner of the house as annexure "R1" and "R2" from the Swaziland National Housing Board fully disclose.

[13] The Defendant's response is that:

5.1 The agreement between Plaintiff and Defendant was that Defendant take up occupation of the house upon payment of the sum of E4,000.00 (Four

thousand Emalangeni) to the Plaintiff, which amount was duly paid to the Plaintiff.

- 5.2 Defendant further avers that the Defendant and Plaintiff agreed that when the owners of the property Swaziland National Housing Board decided to sell the premises the Defendant be given the option to buy the house and pay the Plaintiff a sum to be agreed between the parties in appreciation of the agreement.
- 5.3 It was further agreed between the Plaintiff and Defendant that the Defendant could make improvements to the property, as for all intents and purposes the house was then occupied by the Defendant.
- 5.4 Defendant avers that as a result of the agreement between himself and Plaintiff he made improvements to the property in the value of E15,036.94 (Fifteen thousand and thirty six Emalangeni ninety four cents) with the full knowledge of the Plaintiff.
- 5.5 Defendant pleads in the alternative that should he be ejected from the property, the Plaintiff be ordered to pay the value of the improvements to the property, in terms of the Defendant's counterclaim , and return of the deposit of E4,000.00 (Four thousand Emalangeni).

Defendant's counterclaim

[14] The Defendant's counterclaim is that during or about July 1994 Defendant

and Plaintiff entered into an oral agreement in terms of which Defendant was to be given option to buy house No. 233, Two Sticks, Manzini which had been allocated to the Swaziland National Housing Board.

- 2.1 It was a term of the agreement that the Defendant would pay to the Plaintiff the sum of E4,000.00 (four thousand Emalangeni) and take occupation of the house.
- 2.2 It was a further term of the agreement that upon taking occupation of the aforesaid house Defendant could make whatever improvements he would find necessary
- 2.3 It was further agreed between the parties that if the Swaziland National Housing Board decide to sell the property, the Defendant would pay the Plaintiff a sum to be discussed between the parties.
- 2.4 It was further agreed that should the Plaintiff decide to buy the house from the Swaziland National Housing Board, the Plaintiff would pay to the Defendant the deposit of E4,000.00 (Four thousand Emalangeni) and the value of all the improvements on the property done by the Defendant.
- 2.5 As a result of the agreement between the parties the Defendant paid to the Plaintiff the sum of E4,000.00 (Four thousand

Emalangeni) and made improvements to the value of E15,036.94 (Fifteen thousand and thirty six Emalangeni ninety four cents).

[15] The Plaintiffs response to the above allegation is as follows:

“The Plaintiff denies ever selling the house to Defendant and taking a deposit of E4,000.00 or any money at all. Plaintiff avers that he entered into an oral lease agreement with Defendant in terms of which Defendant would pay E400 per month as rent.

Plaintiff further denies ever entering into an agreement in terms of which he would reimburse Defendant E4,000.00 and value of improvements. The improvements were made by Defendant without Plaintiffs consent and knowledge. Plaintiff let the property to Defendant for rent.

Plaintiff further avers that he would not have sold the property to Defendant without a written agreement as this would be an unlawful agreement and in contravention of section 31 of the Transfer duty Act No. 8/1902. The resultant agreement thereof is invalid and of no force and effect.

Plaintiff further avers that what Defendant alleges as an improvement is of no value at all as Defendant failed to submit building plans for approval by the Manzini City Council as the property is in an Urban area and has no permit authorizing such construction. Such improvements are in contravention of section 10 of the Building Act of 1968 and the Manzini City Council is at large to demolish such structure”.

[16] The Defendant alleges that the Plaintiff has in breach of the agreement sought to evict the Defendant from the premises, without paying for the E4,000.00 (Four thousand Emalangi) and E15,036.94 (Fifteen thousand and thirty six Emalangi and ninety four cents).

[17] And that by reason of Plaintiff s aforesaid conduct Defendant is entitled to be paid the sum of E1 9,036.94 (Nineteen thousand and thirty six Emalangi and ninety four cents) being a refund of the deposit of E4,000.00 (Four thousand Emalangi) and the value of the improvements of E15,036.94 (Fifteen thousand and thirty six Emalangi and ninety four cents).

[18] The response of the Plaintiff to paragraph 15 and 16 above is that:

“He denies ever entering into the agreement alleged by Defendant and consequently denies any breach thereof and puts Defendant to strict proof thereof.

He further avers that he did not take receipt of E4,000.00 from Defendant nor did he consent to any improvements that Defendant made and puts Defendant to strict proof thereof. He denies owing the Defendant E4,000.00 plus E1 5,036.94 or any money at all and avers that Defendant owes him rent calculated at the rate of

E400.00 per month from July 1994 to date of judgment.”

The evidence of the parties

- [19] Oral Evidence was led by the parties in order to amplify and to prove their Respective claims. The Plaintiff paraded a total of four witnesses and the Defendant two witnesses.
- [20] Deed of Transfer No. 982/2012 in favour of the Plaintiff was filed during the hearing of the matter which hearing properly began on the 20th March 2014 before me. It reflects that the transfer to the Plaintiff was registered on the 11th December 2012.
- [21] Sihle Nicholas Dlamini (PW1) stated that he was employed by Swaziland National Housing Board (SNHB) as a sales and marketing officer. His duties involved selling stands allocated by the Government. He testified that Two Sticks, Manzini is under the SNHB which is an agent of the Government. He stated that the records of Two Sticks, Manzini were kept by the SNHB. According to the records Plot No. 504, House No. 233, Two Sticks, Manzini was sold to the Plaintiff. It was sold for E1 1,200.00 (Eleven thousand two hundred Emalangeni). He handed in copy of the agreement of sale which was marked Exhibit A.
- [22] Nothing much turns on the cross-examination of PW1.

[23] The Plaintiff (PW2) next gave evidence. He testified that he was now retired and lives at Mankayane. He used to work for the Department of Customs and Excise and used to reside at House No. 233, Two Sticks, Manzini. That house No. 233 was allocated to him by the SNHB when the houses were first constructed. He stated that he was now the registered owner of Plot 504, House No. 233. He handed in the Title Deed of Transfer No. 982/2012 (Exhibit B) which is in his name.

[24] He testified that when SNHB made him the offer to purchase house No. 233, he was asked to pay a deposit of E500.00 (Five hundred Emalangi) as a sign that he wished to purchase the property. He says that ultimately he paid the amount of E1,500.00 (Eleven thousand five hundred Emalangi).

[25] He testified that during 1994 he moved from Two Sticks to his traditional home at Mankayane. While at Two Sticks he lived at house No. 233. He had lived there since 1974 after the houses were newly built. He used to pay a rental of E1 5.00 per month payable to SNHB.

[26] SNHB advised the tenants that the houses now belonged to them and suggested that they pay for the plots. The Plaintiff says that is when he began paying for the plot.

[27] The Plaintiff says that during July 1994, the Defendant approached him and requested to stay at house No. 233. He says that he felt sorry for the Defendant who had informed him that he had been ejected from another house at Two Sticks. The Plaintiff says that he felt especially sorry for the Defendant's children who had nowhere to stay.

[28] The Plaintiff says that he agreed that the Defendant could stay at house No. 233 subject to payment of E400.00 (Four hundred Emalangen) rent per month.

[29] The Plaintiff testified that the Defendant approached him at his home in Mankayane. Before that the Plaintiff did not know the Defendant. However, the Defendant was accompanied by a Mr. Motsa who also resided at Two Sticks, Manzini and another man called Dovololo. He knew both men as fans of Manzini Wanderers Football Team.

[30] The Plaintiff says that the Defendant paid rent for three months and thereafter stopped. Each time the Plaintiff went to Two Sticks to collect rent, the Defendant would be away. The Plaintiff only found the Defendant's wife and children who used to tell him that the Defendant was outside the country.

[31] Ultimately, this unsatisfactory state of affairs led to a misunderstanding which led the Plaintiff to hire the services of a lawyer who was instructed to evict the Defendant.

[32] The Plaintiff says that up till now the Defendant has not vacated the property. At one time the Plaintiff sought the assistance of the police because the Defendant had extended the house without seeking permission from the Plaintiff to no success.

[33] The Plaintiff denied that the Defendant paid him E4,000.00 (Four thousand Emalangen) when he took occupation of house No. 233. The Plaintiff denied the existence of an agreement to give the Defendant first refusal of

house No. 233 if the SNHB ever sold to the Plaintiff.

[34] The Plaintiff refused to acknowledge alleged improvements to the house to the value of E1 5,036.94 (Fifteen thousand and thirty six ninety four cents) or that he was liable to pay this amount to the Defendant or the amount of E4,000.00 (Four thousand Emalangeneni).

[35] The Plaintiff was cross-examined by Mr. Mlangeni, the then attorney for the Defendant.

[36] It was put to the Plaintiff that there was a resident's committee at Two Sticks comprising of John Mtsetfwa: Chairman; Maseko: Vice-chairman. The Plaintiff responded that he did know Maseko who was his neighbor and Magagula who manned the office of the Swaziland National Housing Board at two Sticks where the tenants paid their rent and reported problems pertaining to the houses.

[37] It was put to the Plaintiff that when he left house No. 233 during 1994, the house was not in a habitable state in that there were no window panes and the roof leaked. The Plaintiff denied this, he responded that the house was

fine because he had recently occupied it and the doors and window panes
were
and the house had no leaks.

[38] It was put to him that there was no supply of water and electricity. The Plaintiff agreed that there was no supply of water and electricity, and they had agreed that the Defendant would reconnect the water supply.

[39] The Plaintiff re-iterated that he had not been paid rent for a period of almost twenty years except for the three months when he tried to look for the Defendant to make right the Defendant avoided him. The Defendant even evaded messengers of court who were sent to serve court process against him.

[40] The Plaintiff confirmed that he was aware of the improvements that had been effected on house No. 233. That he tried to find the Defendant in order to stop him when the wall was still low but could not find him. He was aware that his late lawyer Mr. Nxumalo and the messenger of court tried to effect service of court process on the Defendant but failed. He did not know whether it was an interdict to stop further construction or not.

[41] It was put to the Plaintiff that the Defendant paid him the amount of E4,000.00 (Four thousand Emalangeni) towards the purchase of the

property. The Plaintiff denied that the Defendant paid such an amount or that he was selling the property.

[42] It was put to the Plaintiff that the improvements had cost the Defendant the amount of E1 5,036.94. The Plaintiff responded that he could not deny this as the Defendant carried out the improvements on his own without the Plaintiffs consent.

[43] It was put to the Plaintiff that the E4,000.00 (Four thousand Emalangeni) that the Defendant paid was to fix a motor vehicle belonging to the Plaintiff which had broken down. The Plaintiff denied this.

[44] It was put to the Plaintiff that the Defendant went to Mankayane with Shongwe and not Motsa and Dovololo. The Plaintiffs response was that it happened he just could not recall who came first. During re-examination he conceded to the Defendant's version.

[45] Phumzile Madonsela (PW3) testified next. She stated that she was employed at SNHB as a sales and marketing manager. She has been there since

November 1994; first as sales officer; then senior sales officer and thereafter

to the current position. That her duties involved selling and marketing land and property which is owned by the SNHB. That she was also in charge of registration of property. That they also prepare agreements of sale between buyers and SNHB. That the files were kept at the Registry and there was a project department.

[46] She stated that the SNHB sold property after being instructed to do so by the Ministry of Housing and Urban Development. And to that end the Minister had designated an allocations Committee to sit and deliberate issues pertaining to the residents for allocation of the houses at Two Sticks, Manzini. She said that part of the stakeholders who sat in the Committee were Manzini Town Council and Two Sticks Committee who were representing the people who were already residing at Two Sticks.

[47] There was also an officer from the Ministry of Housing who sat as chairperson of the Ministry Committee and SNHB sat as the Secretariat. As the secretary was from SNHB it was never the same person at any given time.

[48] That the four organizations stated above used to sit and deliberate the issues of those who had applied to purchase the houses at Two Sticks.

[49] She stated that there was a written criteria that was used to allocate the houses at Two Sticks. She handed the criteria as part of her evidence and it was marked Exhibit MK 5.

[50] In terms of MK5, persons competing for the houses were divided into group A, B, C, D and E. Of particular note and relevant to the Plaintiff is the criteria for group A which states:

“Group A (1) Applicants who meet the following requirements are to be given first preference.

- Have names in initial allocation register;
- Have lease agreements;
- Have some receipts for paying rent;
- Have names in 1990 survey;
- Application not contested.

Persons who qualify in this category will be given a form to complete, sign and submit to SNHB for further processing.

Group A (ii) Where applicants meet all requirements under A (i) but their applications are contested the allocation committee will consult with the residents committee for clarification in solving the dispute. Final decision will be taken by

the allocations committee”.

[51] PW3 testified that the allocations Committee met with residents of Two Sticks on the 15th September 1995 to determine who would be allocated property. She was the secretary on that day. She says that the Allocations Committee allocated Plot 504 house No. 233 to the Plaintiff. PW3 also handed into Court the minutes of the 15th September 1995. These were marked Exhibit MK6.

[52] According to MK6 persons present were:

	SNHB (Chairman)
	- Mr. A.J. Dlamini
Mr. V.D. Msibi	- SNHB
Mr. P.B. Madonsela	- SNHB (Secretary)
Mr. B. Mchobokazi	- MHUD
Mrs. E. Wamukoya	- MCC
Mr. T. Kunene	- Manzini Two Sticks
Mr. J. Mthethwa	- Manzini Two Sticks
Mr. E. Magagula	- Manzini Two Sticks
Mr. S. Dlamini	- Manzini Two Sticks
Mrs. A. Mkhabela	- Manzini Two Sticks
Mr. E. Dlamini	- Manzini Two Sticks

[53] The minutes at paragraph 21 where house 233 is reflected shows that the Plaintiff was present at the meeting. She stated that the office records of SNHB showed that there were three applications that had been made for

house 233. These were from the Plaintiff, Mandla Dlamini and P Nkambule.

The Defendant did not put in an application.

[54] The minutes (MK 6) reflect the following:

“21. House 233
Abednigo Nxumalo

He said he knows Mr. Mandla Dlamini he did not stay in the house, he was allocated the house but did not occupy the house claiming that the house is too small. Then the house was allocated to her wife, Ms. P. Nkambule

Decision: The house was allocated to Abednigo Nxumalo. He asked to register it in his son, but was asked to do it later.”

[55] The Defendant is not reflected in the minutes.

[56] PW3 further testified that it was the Two Sticks Committee which compiled a list as to who occupied which house. The list was handed in as Exhibit MK9. MK9 recorded that the people who were living in house 233 were P. Nkambule (wife to Plaintiff) and the Plaintiff not the Defendant.

[57] PW3 also handed in Exhibit MK7 which reflected the contesting applicants as Mandla Dlamini and P. Nkambule. The Defendant’s name does not appear in MK7.

[58] PW3 handed in Exhibit MK8 which is headed “Manzini Two Sticks Report, 18 March 1999. It shows that the Plaintiff as on the 15th September 1995 was

in arrears in respect of rent in the amount of E1 35.00 (One hundred and thirty five Emalangeneni) which amount was confirmed in a letter to the Plaintiff Exhibit MK10 whose contents read:

“Housing
Branch P.O. Box
1173
MBABANE

Mr. P. Nxumalo
House No. 233
MANZINI

Dear Sir/Madam

re: Outstanding Rent arrears

This letter serves to remind you to remember that you are still owing the government a sum of E135.00 outstanding rent arrears for the house you were allocated by the defunct National Housing Unit. Therefore pay immediately.

Should you fail to abide with this demand or without any reasonable reasons, you will be declared for eviction after fourteen days, without any further notice.

Yours faithfully.

For: (ACT) HOUSING OFFICER”

[59] PW3 stated that after the meeting of the 15 September 1999, SNHB gave the Plaintiff an offer to buy Plot 504 which offer he accepted. She handed in the offer letter dated 27 January 1998 as Exhibit MK2.

[60] Pertinent extracts from Exhibit MK2 read as follows:

“Following the provisional allocation of the above plot to yourself, we are pleased to offer you the plot at E1 1,000.00 (Eleven thousand Emalangi)”

[61] She says that following this offer the Plaintiff signified his acceptance thereof by paying a deposit of E500.00 (Five hundred Emalangi) on the 3rd November 1998. A receipt therefor has been entered into evidence and marked Exhibit MK3.

[62] PW3 says that the Plaintiff later paid as follows:

E4,000.00	on	28/5/2007
E3,000.00	on	10/7/2008
E2,000.00	on	27/3/2009
E1,700.00	on	6/10/2010

[63] That after these payments the Plaintiff was made to sign a deed of sale and title was registered into his name under Deed of Transfer No. 982/2012 (Exhibit B).

[64] She was cross-examined by counsel for the Defendant. It was elicited from her that the Defendant’s name did not appear in the 1990 survey (MK7) and yet this was one of the criteria in Group A (i), that his name should appear in MK7. Asked what the purpose of the survey was, she said that it was to

ascertain who occupied the houses. And also because there were many Applicants who exceeded the number of houses. She also made it clear that at the time she had not joined SNHB.

[65] It was put to her that prior to the survey there was a public announcement that

anyone claiming a house at Two Sticks should immediately go and occupy the house so that they can be counted. She could not answer this question because she was not employed by SNHB at the time.

[66] And that according to the survey the Plaintiff was occupying the house. Her response was that she did not know anything but the announcement and that her records reflected that the Defendant was not residing in that area. She concurred that according to the records none of the contestants were in occupation during the survey. However, it was evidence that being in occupation was not the only criteria because the records as on the 18/3/99 showed that the Plaintiff was paying rent.

[67] It was put to her that there was a local Two Sticks Committee which had a local executive. That this committee dealt with internal matters and worked with the allocations committee comprising of the stakeholders that she

referred to in her evidence in chief. She responded that she did not know that. She just knew that there were members that came from Two Sticks who sat on the allocations Committee

[68] It was further put to her that it was the Two Sticks committee that recommended residents to be allocated houses and that without their recommendation a person could not be allocated a house. She agreed that the list of people to be allocated houses was drawn up by the allocations committee together with the Two Sticks committee. The matter was adjourned and upon resumption on the 6th October 2016, the Defendant was represented by Mr. Msibi who continued to cross-examine PW3.

[69] Mr. Msibi wanted to know what “not in survey” meant in MK7 and her response was that the people mentioned on the left column were not in occupation when the survey was conducted. She confirmed that the Plaintiff was “not in survey”.

[70] Asked why the Plaintiff was allocated house No. 233 when he was “not in survey”, she responded that the offer to purchase was made to him after a meeting that was held on the 15th September 1995. Those that had disputed claims were called to show cause why each house should not be given to a particular person on that date and the Plaintiff who was present gave

evidence before the allocation Committee and the latter made the decision that the house be awarded to him.

[71] It was put to her that at the time the offer of purchase was made to the Plaintiff the Defendant was already residing in house No. 233 and that the Plaintiff had made an offer of sale to the Defendant. She had nothing to say to this.

[72] She was further told that the Defendant would say that they had agreed with the Plaintiff that he (Defendant) would pay E4,000.00 (Four thousand Emalangeni) towards the purchase of the house and that Defendant could repair the house at his own expense. Her response was that if there was such a sale it was illegal as the house belonged to the Swaziland Government and not to the Plaintiff. She confirmed that she attended the meeting of the 15th September 1999.

[73] Mr. Msibi put to her questions relating to whether or not the Plaintiff had a lease agreement or not. She responded that when the houses were first let out, the lessor was the SNHB took over they used the lists that they found which showed the occupant, house number and how payment was made. There were no leases.

[74] Asked if the Plaintiff produced receipt as proof of payment of rent, she stated that SNHB did not require receipts as they were using the records but that the Plaintiff did pay something as the list produced in Court showed that he owed E135.00 (One hundred and thirty five Emalangi) rent.

[75] She stated that the Defendant did not appear in the documents in the office supporting why he should be allocated house No. 233.

[76] She was shown photographs of the state of disrepair of house No. 233. Her response was that she had nothing to say because she did not know if the pictures were of the house.

[77] She was asked what the policy was towards people who were not on the list but lived in the houses. Her response was that SNHB had published a notice that whoever was interested in buying the houses should come forward. That the Defendant had a right to come forward. She handed in a copy of the notice which appeared in the Times of Swaziland on the 29th December 1992 (MK11).

[78] She was asked if the people living in the houses were consulted regarding what the SNHB intended doing with the houses. She responded in the

affirmative and stated that after the publication of the notice a survey was conducted which showed who were the people occupying the houses.

[79] Mr. Msibi disputed her response stating that the Defendant was not aware of the intention of the SNHB because he would have done something about it. She stated that there were meetings held at week-ends to enable the occupants to attend and the survey was carried out door to door.

[80] Informed that MK2 had the effect of evicting the Defendant, she responded that the Defendant was not known at the offices of the SNHB.

[81] The legality of the sale was challenged to the effect that in terms of the Crown Land disposal Act, 1911 the only way that the Government can give people

land is by Crown Grant and that the sale was illegal. She responded that with regard to Two Sticks crown grants were issued and that SNHB was given a Special Power of Attorney to sell the land on behalf of the Government, therefore the sale was lawful. She handed in the Power of Attorney as Exhibit "MK12".

[82] Upon re-examination she revealed that the record indicated that the Plaintiff

occupied house No. 233 during 1974. And that the hand written list of occupants was drawn up by the Two Sticks committee and they did not list the Defendant as an occupant of house No. 233.

[83] PW4 is Vulindlela David Msibi. He testified that he used to be employed by SNHB as a sales marketing manager around 1980 to 2003. His duties included being responsible for policy implementation for selling houses and land. He said that the SNHB is a parastatal under the Ministry of Housing and Urban Development. The SNHB was mandated to sell houses at Two Sticks, Manzini; Nhlngano and Siteki. MK12 was specially signed by the Minister to implement this decision.

[84] He said that the Minister convened a meeting of all stakeholders of the three municipalities affected, the residents' community leaders and ministry officials. Previously the houses were leased out but now the Government wished to sell them.

[85] He says that SNHB formulated a criteria to use for allocating the houses which was that: the houses would be sold to Swazi Nationals, proof that they had stayed in the houses; paid rent; had a lease agreement being proof of occupation. Because there were challenges with regard to the latter, it was

divided that a survey be conducted in order to confirm that the people had actually stayed there. The Two Sticks had local committees and the SNHB used these to conduct meetings with residents on Saturdays and Sundays.

[86] The purpose was to discuss the Government's intention of selling as the people had stopped paying rent and the Government was not maintaining the properties. SNHB needed the peoples' input. Thereafter, SNHB did a public statement through the radio and the press (See MK11 paragraph 74, supra) The Committees were also asked to spread the news of the sale by word of mouth. Some houses were contested and some were not.

[87] He stated that where the houses were disputed, the Committees would advise them and the records would also indicate if someone had lived there at some point. That when people heard that the Government was selling even though they had left a long time ago, they resurfaced to claim ownership.

[88] He stated that in Manzini, John Mtsetfwa led the Two Sticks committee but had since passed away, and that the other members are reflected in MK6. He stated that the Plaintiff had stated that his wife P. Nkambule stayed in house No. 233. That even the hand written list prepared by the Two Sticks Committee reflected that P. Nkambule resided in house No. 233 even though

the Plaintiff was living there physically. He stated that the Defendant does not appear anywhere as a contestant in the records of the SNHB or in any form of interest to be allocated.

[89] He was cross-examined by Mr. Msibi. He stated that he was the author of MK2 and MK11. He stated that MK11 was directed to all Swazis including the Defendant but that the Defendant did not show any interest in house No. 233. Nor was he reflected in MK 7 as one of the people contesting house No. 233. He agreed that the Defendant was not consulted by them because they did not know that he was in occupation of house No. 233. That even the Two Sticks Committee did not alert them about his presence.

[90] It was put to him that the Plaintiff had sold his right to occupy the house to the Defendant. His response was that such a sale would have been illegal unless the consent of the landlord had been first obtained. He too confirmed the evidence of PW3 in that there were no lease agreements when the SNHB took over.

[91] It was put to him that had the SNHB been diligent enough they would not have offered house No. 233 to the Plaintiff without consulting the Defendant who was in occupation at the time of the offer. His response was that there

was no mishandling of the matter as the SNHB had no evidence that this house was ever contested by the Defendant or proof that he had entitlement.

[92] Mr. Msibi challenged the Power of Attorney as being improper but PW4 disabused him of that motion.

[93] It was put to PW4 that the Crown Disposal Act did not delegate power to anybody else but the Minister to dispose of any Crown Land. PW4 responded that for his purposes it was legal. He denied that the whole process from the Power of Attorney to the Title Deed was flawed as suggested by Counsel for the Defendant.

[94] The Plaintiff's case closed after this witness and the Defence case opened with the Defendant taking the witness stand.

[95] Timothy Mdluli (DW1) testified that he resided at house No. 233 Two Sticks, Manzini with his wife and family. He stated that he needed a house to stay in around Two Sticks, Manzini. He met a Shongwe man who told him about a vacant house that he had seen. He took him to house No. 233 which

was vacant.

[96] He stated that the house was not in a good condition as it was not habitable but he reckoned that he could fix it. He said that most of the fittings inside were damaged. There was no toilet; the top was not there. The toilet seat was damaged as were the doors. The kitchen sink was broken. There were no window panes. The house had an extended slab which had not been completed and he figured that he could complete it. The doors looked like they were beaten and you could see through the cracks. There was no running water. There was no electricity and no wiring. Later he installed the wiring himself.

[97] After inspecting the house, Shongwe took him to Mankayane to see the Plaintiff. He says that the Plaintiff informed him that he used to stay in house No. 233, Two Sticks, Manzini but that he was no longer staying there as he had built a home at Mankayane. The Plaintiff told the Defendant that he could go ahead and stay in the house and fix whatever had to be fixed and they would talk later. Nothing was said about paying rent.

[98] He says that after he had seen and talked to the Plaintiff at Mankayane, Shongwe took him to the Two Sticks Committee to introduce him. The

Chairman, John Mtsetfwa (now late) welcomed him. The Chairman and the secretary took him to view the house. After viewing the house they asked him if he would be able to fix the house and thereafter pay for it once the SNHB started selling the houses. And he responded in the affirmative. He says that later on he was surprised when he received eviction summons.

[99] He says that it was not true that the Plaintiff delivered the house keys to him. As the doors were broken it was easy for him to enter into the house.

[100] He says that he fixed the house, extended it, fixed the wiring, connected electricity and water and moved in with his family.

[101] He denied having agreed to pay a monthly rental of E400.00 (Four hundred Emalangeni). He further stated that he met the Plaintiff after he had fixed the house. The Plaintiff borrowed money as he had car problems. He says that he gave the Plaintiff the money in bits and pieces until it amounted to E4,000.00 (Four thousand Emalangeni).

[102] He denied that the Plaintiff had ever asked him to vacate the house but lawyers wrote to him later to do so. He could not recall how much he had spent on fixing the house. He used to record the amounts but the house burnt

and the documents burnt. However, the amount of E 15,036.94 (Fifteen thousand and thirty six Emalangeni, ninety four cents) that his lawyers counterclaimed

seemed to be about correct.

[103] He stated that the Plaintiff never repaid the amount of E4,000.00 (Four thousand Emalangeni). He further stated that he never saw anyone from the SNHB with regard to the sale of the houses nor did he see the advertisement in the Times of Swaziland of December 1992 (MK11) calling upon willing buyers to make offers to buy the houses at Two Sticks, Manzini.

[104] In conclusion he sought the prayers referred to in his counterclaim namely reimbursement of the money he spent repairing the house and the E4,000.00 (Four thousand Emalangeni) that he loaned to the Plaintiff.

[105] He was cross-examined by Mr. Simelane. He confirmed that he has not been paying rent from July 1994; and that he did not buy the house. He believes that he is the owner because he was granted permission to use it and to repair it. He also accepts that his staying there was after the agreement reached with the Plaintiff.

[106] He denied that any agreement was reached between him and the Plaintiff that

he should pay rent. The Defendant re-iterated that he no longer had proof of the amount he used to renovate and extend the house. That he did not have any proof for the amount of E4,000.00 (Four thousand Emalangeni) that he loaned to the Plaintiff.

[107] He was unable to state where his erstwhile lawyers got the figures in the counterclaim because he says that he never informed them of the amounts.

[108] He was asked when he became aware that the houses at Two Sticks were being sold and he responded that he was expecting to be told by the Two Sticks Committee. He confirmed that he never heard of the announcement in MK11.

[109] He stated that he normally was informed of happenings at Two Sticks by members of the Two Sticks Committee. He was informed by Mr. Simelane that the very Two Sticks Committee headed by John Mtsetfwa drew up a list of names who were contesting the houses and submitted it to the allocations Committee but his name was not included. His response was that he never heard about the list or the Allocations Committee.

[110] He stated that he took occupation of the house during 1993 or 1994

(possibly July 1993) he could not recall the exact date. It was put to him that when the meeting took place at the George Hotel on the 15th September 1995 he was already in occupation of house No. 233. He responded that he never heard of it.

[111] He was told that the SNHB stated that his name did not appear in any of their records and was asked why they would leave him out if he had a right of some sort. His response was that he did not know and that he had never appeared before the SNHB.

[112] He denied that PW4 called any meetings at Two Sticks relating to the purchase of the houses there. He said that he did not know PW4 and had never seen PW4 at any meetings that he (Defendant) had attended at Two Sticks.

[113] He stated that he never filed a plan for the extension to the house even though he agreed that in urban places plans had to be filed and approved. He stated that he built on a slab that had been approved but did not state by whom it was approved.

[114] The Defendant stated that he was very active at Two Sticks and did everything that the Chairman John Mtsetfwa told him to do and it now surprised him that it was the very Mtsetfwa who had submitted a list of occupants of the houses at Two Sticks and had excluded the Defendant's name.

[115] Asked to name other Two Sticks Committee members he named Mr. E. Magagula and Mr. Enock Nkambule (DW2) and Make Nhlabatsi. He was told that Mr. E. Magagula attended the meeting of 15th September 1995 at the George Hotel and asked why Mr. Magagula would leave him out if he was a deserving contestant as he knew the Defendant. His response was that he did not know.

[116] He was told about the survey that took place during 1990 by the SNHB in which they were checking who resided in the houses at Two Sticks, Manzini. His response was that he was not residing there then.

[117] Enock Nkambule (DW2) next gave evidence. Before he gave his evidence in chief, Counsel for the Defendant indicated that he wished to hand in certain photographs which the Defendant had taken of the house before it was renovated. These were handed in.

[118] DW2 testified that he had a house (No. 186) at Two Sticks, Manzini which he took occupation of during 1986. He told the Court that an advertisement was published in the radio and the print media to the effect that whoever wished to occupy the houses at Two Sticks, Manzini should go and complete forms at the Commissioner's offices in Manzini.

[119] He says that he completed the forms and was allocated a house (No. 186) by Mr. E.S. Magagula who is now late. He stated that the rent was E18.50 (Eighteen Emalangeneni and fifty cents)

[120] He said that he was aware of the existence of the Two Sticks Committee of which he was and still is a member and was currently its secretary. He became a member during 1982. He says that during 1985 the residents of Two Sticks stopped paying rent. He testified that initially they were informed that after ten years of occupation they would be given legal ownership of the houses but this did not happen and they raised a complaint during a residents' meeting.

[121] He stated that later on they were joined by a member of the SNHB, Mr. Msibi (PW4). PW4 advised them that he had come to talk about the houses; that the

Government was selling them; that the SNHB was selling them on behalf of the Government; that he was representing the SNHB.

[122] DW2 stated that for purposes of this matter he knew the Defendant. The Defendant had approached the Two Sticks committee during 1993 and informed them that he had identified a house at Two Sticks that he was interested in.

[123] The Committee went to view the house in the company of the Defendant and Jomo Shongwe (also late). The members asked the Chairman, Mr. John Mtsetfwa who the house belonged to and he responded that it belonged to the Plaintiff. DW2 says that the house was not in a good state. The toilet door was badly damaged, but the Defendant said that he could repair it. He says that the house looked like a place where culprits were residing. One of the two doors was no longer there and the remaining one was damaged.

[124] He stated that the house was unoccupied. It had no water, the pipes were damaged. Mr. Mtsetfwa thereafter instructed the Defendant and Jomo to go and look for the Plaintiff.

[125] He says that after a month and a half the Defendant returned and during one of the meetings informed the Committee that he had found the "owner"

(meaning the Plaintiff) who had informed him (the Defendant) that he was no longer interested in the house.

[126] DW2 says that he asked the Defendant if he had any documentary proof from the Plaintiff to the effect that the Plaintiff was no longer interested in the house and the Defendant replied that he had none because the Plaintiff had stated that he no longer wanted the house. DW2 asked the Defendant where he had found the “owner” of the house and the Defendant replied that he had found him at Mankayane. DW2 further testified that after that Mr. Mdluli, after an agreement with Mr. Mtsetfwa proceeded to renovate the house and occupied it.

[127] DW2 also stated that the committee used to convene meetings of the residents at Two Sticks on the 1st Sunday of each month. That the Defendant would attend and on the days that he could not attend he would send apologies to that effect.

[128] He stated that it was correct that PW4 had advised the Committee that the houses were being sold and that later on PW2 with a team of other people wrote to the residents in which they were advised that the houses were being sold and that some residents did pay for their houses.

[129] DW2 stated that he was aware that some houses were disputed. Of house No. 233 asked if he was present when the dispute relating to it was canvassed, he responded that he may not have been present because on some occasions meetings were held at the George Hotel and on some occasions at the Town Council.

[130] Asked about the 1990 survey he replied that a Mr. Jele from the SNHB would come to Two Sticks after working hours and would go from house to house enquiring who the occupants of the houses were.

[131] With regard to payment of rent, he stated that they instructed the residents to stop paying rent, some stopped and others continued.

[132] He was shown the photographs of a run down house, whom counsel for the said were of house No. 233 taken before it was renovated. And DW2 agreed that these were photographs of the house; photograph 1 was of a toilet; photograph 2 was of a broken window; and photograph 3 was of a room with broken bricks.

[133] DW2 was cross-examined by Mr. Simelane. He was shown a green broken wall on photograph 3 and it was put to him that it looked like a wall was

being built and not broken. His response was that it was a destroyed wall inside the house before the Defendant repaired it. When he was told that the Defendant did not mention a broken wall when he gave evidence, DW2 quickly changed his story and said that neither he meant a room with broken bricks on the floor.

[134] After DW1 was cross-examined the Defendant closed his case.

(a) The Lease Agreement

[135] Summons in this matter were issued during November 1999. Issue was joined on the 5th September 2006 when the final document (then) the pre-trial minute was filed. Truth be told, this is a very old matter, consequently the evidence with regard to any terms of the lease agreement have grown faint in the minds of both parties.

[136] The Plaintiff says that the oral agreement of lease entered into at Mankayane between him and the Defendant was that the Defendant could stay at House 233, Two Sticks for the rental amount of E400.00 per month. And that the Defendant paid rent for three months and thereafter stopped payments.

[137] On the other hand the Defendant denied the rental agreement of E400.00. Instead he testified that the agreement was that he could go ahead and stay in the house and fix whatever had to be fixed and they would talk later about the terms of his occupancy. He stated that nothing was said about payment of rent.

[138] Unfortunately there is no corroboration of either version because Mr. Shongwe with whom the Defendant travelled to Mankayane to see the Plaintiff is no longer alive in order to shed some light on the terms of the agreement.

[139] It is however difficult for the Court to comprehend how the Plaintiff could have leased the house for E400.00 (Four hundred Emalangeni) per month when he only paid E15.00 (Fifteen Emalangeni). This to me is an absorbitant amount considering that the alleged agreement was concluded during 1994 when general rental rates were low and that the house did not belong to the Plaintiff but to the Swaziland National Housing Board.

[140] Furthermore, the Plaintiff was not able to show the Court any proof that he had obtained permission from the Swaziland National Housing Board to sublet the house. The Court takes the view that there was no lease agreement between the parties and if there was any, it was illegal.

[141] Furthermore the Plaintiff has not shown the Court any proof of payment in respect of the three months he alleges that the Defendant paid and thereafter stopped paying.

[142] The Court therefore holds that there was no lease agreement between the parties consequently the following prayers by the Plaintiff fall away:

- (i) Cancellation of the agreement entered into by the parties’.
- (iii) Payment of the sum of E24,000.00 (Twenty four thousand Emalangeni).
- (iv) Interest thereon at the rate of 9% a tempore morae.

(b) Payment of E15,036.94.

[143] The Defendant says that he connected electricity and water and repaired the house to the amount of E15,036.94 (Fifteen thousand thirty six Emalangeni and ninety four cents). He wants payment of this amount. The Plaintiff denies that he is indebted to the Defendant in this amount because the Defendant never sought permission from him in order to fix the house.

[144] The Defendant says that after the meeting with the Plaintiff at Mankayane he was taken by Shongwe to the Two Sticks Committee in order to introduce him. The Chairman John Mtsetfwa and the current Secretary went with him to view the house. After viewing it they asked him if he could fix it and his response was that he would fix it. DW2, Enock Nkambule who is the Committee’s current secretary testified that he was an ordinary member when he, the Chairman, the Defendant and Shongwe went

to view the house. DW2 corroborates, the Defendant that the house was not in a good state. The toilet door was badly damaged, one of the two entrance doors was badly damaged, it had no water and the pipes were damaged.

[145] It is possible that the Defendant refurbished the house, but this was for his comfort and that of his family. There is no documentary proof to support this claim and no corroborative evidence. The Defendant filed some photographs in an attempt to provide such proof.

[146] It is not clear when the photographs were taken and by whom. Furthermore, they were never discovered. They seemed to turn up conveniently in order to bolster the Defendant's evidence. Their authenticity was never proved and cannot be allowed in evidence. They are hereby rejected.

[147] It is the finding of this Court that this claim fails and I so hold.

(c) Payment of E4,000.00

[148] The Defendant says that he paid an additional amount to the Plaintiff in the sum of E4,000.00 (Four thousand Emalangeni). He paid this amount in bits and pieces until it totaled E4,000.00. However, there is no evidence to corroborate the Defendant with regard to this amount. This claim falls away and I so hold.

[149] The claim for costs in respect of the counterclaim also falls away and I so hold.

(d) Ejectment of the Plaintiff

[150] The Plaintiff issued summons during November 1994. Paragraph 10 of the summons states that:

“Plaintiff is the lawful and a registered owner of the house as annexure “R1” and “R2” from the Swaziland National Housing board fully disclosed”.

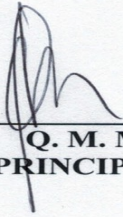
[151] However, at the time summons were issued he was not the registered owner of the house. He only became the registered owner on the 11th December 2012 when title was registered into his name under Deed of Transfer No.982 of 2012. He did however have a right of tenancy which was never revoked by his erstwhile landlord. I shall allow the eviction.

[152] However to enable the Defendant and his family time to relocate, the eviction order shall be operational after three calendar months from hereof. The said period shall run from the 1st July 2017.

[153] The order of the Court is as follows:

- (a) Prayers (i), (iii), (iv) of the Plaintiff's claim are hereby dismissed;
- (b) Prayers (a), (b), (c) of the Defendant's counterclaim are hereby dismissed;
- (c) Prayer (ii) of the Plaintiff's claim is hereby granted and the eviction is to take place three calendar months from this order. The said period to run from the 1st July 2017.

[154] Each party is ordered to pay its own costs.



Q. M. MABUZA
PRINCIPAL JUDGE

For the Plaintiff : Mr. B.J. Simelane
For the Defendant : Mr. K. Msibi