

**IN THE HIGH
COURT OF SWAZILAND**

JUDGMENT

HELD AT MBABANE

Case No. 1021/2016

In the matter between:

FOOT THE BILL INVESTMENTS (PTY) LTD

Applicant

And

XOLILE GAMA

1st Respondent

THE DEPUTY SHERIFF HHOHHO DISTRICT

2nd Respondent

THE NATIONAL COMMISSIONER OF POLICE

3rd Respondent

THE ATTORNEY GENERAL N.O

4th Respondent

Neutral Citation: Foot The Bill Investments (Pty) Ltd v. Xolile Gama & others

(1021/16) [2018] SZHC 172 (30July 2018)

Coram: J.S Magagula J

Date heard : 11th July 2018

Date delivered: 30th July 2018

[1] This is an application in which the applicant seeks orders as follows:

“ 1. Ejecting and evicting the 1ST Respondent from:

1.1 CERTAIN: Lot No. 3013 situate in Mbabane, Extension No.11 (Thembelihle Township) District of Hhohho, Swaziland.....

2. Authorizing the 2nd Respondent to effect this order forthwith;

3. Authorizing and directing the 3rd Respondent to render such assistance as may be necessary;

4. Cost (sic) of suit against the 1st Respondent”

BACKGROUND

[2] On the 6th February 2014 a writ of attachment was issued out of this court directing the Deputy Sheriff for the Hhohho District to attach the property described in paragraph [1] hereof. The property was duly attached and eventually advertised for sale by public auction. When the public auction was eventually conducted, the property was bought by one Mphenduli Maguba Dlamini and it was transferred to him by virtue of a Power of Attorney granted by the Registrar of this court on the 22nd October, 2014.

[3] When the said Mphenduli Maguba Dlamini sought to take occupation of the property which had a dwelling house, he found the 1st Respondent in occupation and she maintained that she was the owner of the property. She however failed to produce proof of such ownership and it is now common cause that in fact she has no proof of such ownership.

- [4] The said Mphenduli Maguba Dlamini then instituted eviction proceedings against the 1st Respondent herein under case No. 792/2015. These proceedings were however eventually withdrawn by the said Mphenduli Maguba Dlamini on the 10th March 2016, having transferred the property to the applicant herein on the 30th October, 2015. It seems to me that Mphenduli Maguba Dlamini could not pursue the application under case 792/2015 after he had transferred the property to the Applicant since he then lacked the necessary *locus standi*.
- [5] On the 7th June 2016 the present applicant then instituted the current eviction proceedings as the new owner of the premises. In her response to the current proceedings the Respondent starts by raising six (6) points in *limine* as follows:

(i) FAILURE TO FILE RESOLUTION

Although raised in the opposing affidavit Mr.M. Mabila who appeared for the 1st Respondent during the hearing of the matter informed the court that this point was being abandoned since the resolution had been filed in the meantime. There is therefore no need for me to make a ruling on this point now.

(ii) FAILURE TO SEEK INTERVENTION UNDER CASE NO. 792/2015

Although not as elegantly spelt out as one would expect, the 1st Respondent seems to be contending under this point that the deponent to applicant's founding affidavit was aware of

the proceedings under case No.792/2015. By necessary implication therefore applicant itself should be taken to have been aware of those proceedings. The applicant should therefore have sought intervention under case No. 792/2015 instead of bringing a fresh application of its own.

There is no doubt in my mind that the deponent to the founding affidavit herein was aware of the proceedings under case No. 792/2015 since she even deposed to a confirmatory affidavit in that matter.

However Applicant clearly had no legal interest in the matter since the property had not been transferred to it at the time. I accordingly find no merit in this point in *limine* and I dismiss it forthwith.

(iii) DIRTY HANDS

Under this point Respondent alleges that the deponent to the founding affidavit in *casu* confirmed that Mphenduli Maguba Dlamini was still the owner of the property in dispute in an affidavit she deposed to on the 10th December 2015, whilst knowing very well that the property had already been transferred to the applicant as of the 30th October, 2015. The contention is therefore that the said deponent was therefore lying to the court in that case and the applicant is therefore approaching the court with dirty hands in the current case.

I must point out from the start that I find no logic in this point. Firstly whatever allegations the said deponent made in case No. 792/2015 have nothing to do with this case. Secondly whatever allegations the said deponent made in that case she clearly was not making them on behalf of the applicant and I cannot see how those allegations dirty applicant's hands in *casu*. Thirdly there is no where that the deponent confirms that Mphenduli Maguba Dlamini is the owner of the property in issue in the said confirmatory affidavit.

I accordingly find no merit in this point and it is also dismissed.

(iv) PIERCING THE CORPORATE VEIL AND FAILURE TO PAY PUNITIVE CONSTS UNDER CASE 792/2015

Although raised separately I find it convenient to deal with these points together.

The 1st Respondent contends that the corporate veil of the applicant ought to be pierced because Mphenduli Maguba Dlamini in an alter ego of the applicant.

The 1st Respondent goes further, and allege that the application by Maguba Dlamini has already been heard and dismissed by this court. Unfortunately although the 1st Respondent makes such allegation in her affidavit, she has

not filed any such dismissal order. To the contrary the applicant has filed proof that Mphenduli Maguba Dlamini withdrew his application. There is therefore no way that I can hold that the application of Mphenduli Maguba Dlamini under case NO. 792/2015 was dismissed. I therefore do not see what is wrong with the applicant bringing its own application in the circumstances.

Even if piercing the corporate veil would assist the 1st Respondent, the latter has failed to produce facts warranting the lifting of such veil. There is nothing suggesting that Mphenduli Maguba Dlamini has anything to do with the applicant. The fact that one of the directors of the applicant is married to Mphenduli Maguba Dlamini is no evidence that the latter therefore has relations with the applicant; particularly since the marriage of the two is out of community of property. The 1st Respondent ought to demonstrate that Mphenduli Maguba Dlamini is a shareholder in the applicant, a thing which she dismally failed to do. There is therefore no basis for piercing the corporate veil.

As regards the failure to pay punitive costs under case No.792/2015, this contention was obviously based on the misconception that such order was granted against Mphenduli Maguba Dlamini, which allegation has not been proved; and that Mphenduli Maguba Dlamini is an alter ego of the applicant, which 1st Respondent has also dismally

failed to establish. I accordingly find no merit in these points and I dismiss them.

(v) JUDICATA

This point is based on the contention that Mphenduli Maguba Dlamini is an alter ego of the applicant and that his application under case No. 792/2015 was heard and determined by the court. I have already found above that there is no basis for this presumption. This point is therefore also dismissed.

THE MERITS

- [6] Having dismissed all the points raised in *limine* it now remains for me to deal with the merits of the case. It is common cause that the 1st Respondent is neither an owner nor a lessee on the property. She however claims to be a bona fide occupier who has effected improvements on the property. She accordingly claims that she has an improvement lien on the property.

Narrating how she got to be in occupation and possession of the property, the 1st Respondent states that she bought the piece of land which was undeveloped at the time from one Dumisani Nkosinathi Dlamini. She was assisted with finance by her brother Jabulani Gama. She bought the vacant land for E220 000-00(Two Hundred and Twenty Thousand Emalangen).

- [7] Before the property was transferred to her, a three bedroom house was built by her on the property the finance thereof still provided by her said brother who was working in Ermelo, South Africa at the time.

The 1st Respondent further explains in paragraph 28 and 29 of her affidavit:

“ The rationale and approach was that we were building a family home for ourselves and our siblings.... and further more because in terms of our agreement with him I was going to be the registered owner of the same, he authorized me to assume occupation, possession and overall control of the property”.

[8] The 1st Respondent further states in paragraph 30 of her affidavit:

“ Since then I enjoyed undisturbed and peaceful occupation of the property without any interference from anyone. Furthermore from time to time and together with my brother we would engage the said Dumisani Nkosinathi Dlamini to have a Deed of sale between ourselves executed so that transfer and registration of the property into my name could be effected and he would tell us that he was busy (a fact which was visible to us as he was running a construction company which had a lot of work at the time) and we should not worry as he acknowledges his obligation towards us.”

[9] It is common cause that the property was never transferred to the 1st Respondent and that she never gained ownership thereof. Mr. Mabila who appeared for the 1st Respondent contended that the foregoing statement and in particular the last sentence is a clear indication that 1st Respondent took occupation of the property with the full knowledge and therefore implied approval of the then owner thereof,

Dumisani Nkosinathi Dlamini. He therefore maintained that the 1st Respondent was a bona fide occupier who had effected improvements on the property. Mr Mabila maintained therefore that the 1st Respondent was entitled to be compensated for the improvements she effected on the property by anyone wishing to eject her from the property and that the 1st Respondent therefore has an improvement lien thereon.

[10] There is an evaluation report attached to 1st Respondent's affidavit indicating that the value of the property as at the 11th April 2014 was E1 400 000-00(One Million Four Hundred Thousand Emalangeni). Considering that she had bought the empty plot for E220 000-00 the 1st Respondent maintains that the value of the improvements is E1 180 000-00 (One Million One Hundred and Eighty Thousand Emalangeni). She accordingly demands this amount before she can vacate the property and she requires the applicant to compensate her in this amount.

[11] In the case of MAKWANA AND OTHERS v. FAKUDE (17861/2013) [2015] ZAGPPHC 503 (5June 2015) Collis AJ define a lien at paragraph 22 as follows:

“ a lien (right of retention) is the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating to expenditure of money or something of monetary value by the possessor on that property until the claim has been satisfied ...”

The question is; should the 1st Respondent look to the applicant for compensation for the improvements she effected on the property? Does her improvement lien operate against the applicant? There is clearly no doubt that it operated against the person from whom she bought the piece of land.

- [12] In the South African case of DAVIS AND ANOTHER v. PURPLE FOUNTAIN PROPERTIES (PTY) LTD (30457/2015) [2016] ZAGPLD (28 July 2016) Vally J quoting with approval a passage from the case of GOUDINI CHROME PTY LTD v. MCC CONTRACTS (PTY) LTD 1993 (1) SA 77 (A) at 84 J – 85 F states:

“An improvement lien is a form of security for the payment of expenses which were necessarily incurred by one party for the preservation or protection of someone else’s property... or usefully incurred for its improvements, i.e the enhancement of its market value... It is immaterial whether the work was done in terms of a contract and if so, whether the contract was with the owner of the property. The party who did the work may retain possession of the property in respect of which his work was done against the true owner, against his counterpart in contract (if there is one) or against anyone else who claims it from him, until he has been

reimbursed of his expenditure or the amount by which the owner has been enriched, whichever is the lesser.”


(underlining added).

In fact the above – cited authority states expressly that an improvement lien is a real right. It is therefore enforceable against the whole world. The 1st Respondent is therefore perfectly entitled to raise it against the applicant in *casu*. The only issue that still needs determination is the amount payable by the applicant to the 1st Respondent since she is only relying on the enhancement value without stating her expenditure which could be less than the enhancement value in which case she would be entitled to the amount expended on the property and not the enhancement value.

- [13] The point of substance however is that the 1st Respondent is entitled to compensation for the improvements and the applicant is liable to pay such compensation to the 1st Respondent.
- [14] I may add that the applicant cannot be assisted by a complaint that it is not the one that benefited from the improvement since when it bought the property it also paid the improvements. By operation of the maxim caveat emptor, the applicant ought to have been aware when it bought the property that there was a claim for improvements on the property. This is particularly so in *casu* because the property was visibly and evidently occupied. Applicant was duty bound to enquire about the position of the occupant before it bought it.
- [15] Further, it is my view in *casu* that applicant was actually aware of 1st Respondent’s claim when it bought the property. The deponent to the

founding affidavit who is a director and therefore agent of the applicant, is a wife to Mphenduli Maguba Dlamini. The latter instituted legal proceedings under case NO. 792/2015 to evict the same 1st Respondent herein before he sold the property to the applicant. The said applicant's director cannot claim that she was not aware of the proceedings instituted by her husband against the 1st Respondent in 2015 and which proceedings were eventually withdrawn by her husband. Since she is also a director and agent of the applicant, the applicant should be presumed to have been aware of such proceedings and the 1st Respondent's claims on the property. In fact she even deposed to a confirmatory affidavit in those proceedings.

For the foregoing reasons, the application is dismissed with costs.



J.S MAGAGULA J

For the Applicant: Mr K. Simelane

For the 1st Respondent: Mr M. Mabila