IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.1659/2015

In the matter between

REGINA MARIA SANTOS **APPLICANT**

AND

ISHMAEL MOHAMED **1ST RESPONDENT**

THE NATIONAL COMMISIONER OF POLICE **2ND RESPONDENT**

THE ATTORNEY GENERAL **3RD RESPONDENT**

Neutral Citation: *Regina Maria Santos Vs Ishmael Mohamed and 2 Others (1659/2015) [2020] SZHC 29 (26 February 2020)*

Coram: Hlophe J.

For the applicant: Miss H. Mkhabela

For the respondent: Mr S. G. Dlamini

Summary

Application proceedings - Eviction of First Respondent from a certain homestead sought- Applicant holder of a 99-year lease over property concerned - Lawfulness or otherwise of First Respondent's sought relief discussed - Whether a case made for the relief sought.

Counter application by the Respondent seeking cancellation of 99-year lease issued in applicant's favour- Whether First Respondent entitled to occupy the said premises - Whether counter application appropriate in the circumstances - Whether Respondent entitled to the order sought.

JUDGEMENT

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[1] The applicant approached this court seeking the following orders: -

1. *The first Respondent be and(is) hereby directed to cease and desist from unlawful occupation and restore possession to the applicant forthwith of the immovable property more fully described hereunder:*

   Certain: - Lot No.188, situate in Nkwalini township in the Hhohho District of Swaziland

   .

2. *That the 1st Respondent and all those holding or claiming title under him be evicted from the said (sic) property described as lot No.188, situate in Nkwalini Township in the Hhohho District of Swaziland*

3. *That the 2nd Respondent, through the station commander of the Mbabane Police Station be authorized to assist the Deputy Sheriff for the Hhohho District in effecting the eviction order.*

4. *That the 1st Respondent pays the costs of this application.*

5. *Granting applicant such further or alternative relief.*

[2] It is an undisputed fact that the applicant is a holder of a long-term lease agreement (a 99-year lease agreement) over a certain property known as Lot No 188, Nkwalini Township, Hhohho District. This lease agreement is in writing and records the applicant as the lessee over the said property.

[3] It is on the basis of this fact that the applicant has, without more, approached this court seeking the orders referred to above. I only make the observation that out of the several orders sought, it is clear that the main order to which all the others are ancillary to, is that ordering the eviction of the First Respondent and those holding under her from the said property because it is registered in her name thus leaving no doubt, at least in law, on who has the

title to the property in question. Of course, a corollary to this observation is the effect in law of this title to anyone who occupies such property other than with the permission of the said title holder.

[4] The applicant's application is permeated by allegations made by the applicant to the effect that the First Respondent and those holding under him are in unlawful occupation of the property concerned in so far as they do not do so with her permission or authority as the person to whom the property is leased.

[5] The First Respondent who not only seeks to oppose the application but also files a counter application, does not deny the existence of the registered title of the applicant over the property in so far as she holds the long-term lease over it. Instead he claims, as I understand him, that it should not have been so registered because according to him, there was already some dispute over who was entitled to the property concerned between him and the applicant's father (and therefore by extension), the applicant herself.

[6] According to the First Respondent, the applicant suppressed some information known to her about the facts of the matter. He contends that on two previous occasions both in 1999 and 2001, under case Numbers 651/1999 and 1353/2001 respectively, the applicant's father in the first matter who acted with applicant in the second matter, instituted proceedings,

in each instance for the eviction of the First Respondent from the property concerned.

[7] With regards the first matter (that is the 1999 one), it was dismissed after the grant of an absolution from the instance with costs. This was allegedly after the applicant's father (who ex facie the papers in that matter was not the current applicant), had failed to prosecute it. The second one, that is the 2001 matter, was stayed following an objection by the First Respondent, that it be so stayed until the applicants then (who were identified as the father to the current applicant and the applicant), had paid the costs in that matter which had been taxed and allowed at a sum of E3,354.82. This in keeping with the longstanding principle of our law that a party would not be allowed to take forward a matter, and by extension to institute similar proceedings, unless he had settled the outstanding costs.

[8] I only make the observation that it is not in doubt that the applicants in those proceedings were, except for the second matter (that is the one filed in 2001), were different from the current one. This factor is compounded more by the fact that at the time the title under which the current application has been brought, the registered longterm lease, was not there during the institution of proceedings in those matters. The title to the property was only registered in 2015 which was some fourteen or so years after the institution of the last of the two earlier proceedings. It also cannot be disputed that at

the time of those two matters the title of the property was based on some disputed or unsettled contention which is not the case presently.

[9] Based on the aforesaid fate of the said two previous applications, the current First Respondent raised several points of law, which according to him had to individually lead to the dismissal of the current application or proceedings. The points of law concerned entailed Res Judicata, lis pendens, Non-joinder of an essential party to the proceedings, the existence of disputes of fact; failure to observe rules relating to pleading, and the alleged lack of locus standi in judicio by the applicants.

[10] With regards the point on res judicata, it was contended that the issue forming the basis of the current proceedings was decided by the High court in 1999 when it dismissed the application by the father of the applicant following its upholding the application on absolution from the instance. In fact, the matter had not only had the absolution upheld, but the subsequent application still seeking the eviction of the First Respondent from that property had to have its being prosecuted stayed pending the payment of outstanding taxed costs. I will revert to each one of the points later on in this judgment.

[11] The other point taken was that the current applicant had failed to join the Municipal Council of Mbabane in these proceedings notwithstanding her

allegedly being conscious of the fact that the said Municipal Council had long been made aware of the dispute surrounding the title to the property in question. It was contended that because of this awareness, the Municipal Council of Mbabane should not have allowed the registration of the lease in the applicant's name.

[12] On the point that there were disputes of fact which the applicant was aware of before even instituting these proceedings, it was contended that the applicant had instituted the current proceedings notwithstanding his awareness they were unsuited because the applicant was alive to the fact that the title to the property concerned was in dispute between herself and the first applicant. It was contended further that applicant knew the issues involved could not be decided without first hearing oral testimony. I note that the First Respondent sought to suggest that the land or property in question had been allocated to his mother when she khontaed in the area.

[13] It was argued as well that the applicant had failed to observe the rules relating to pleading inter alia because the form adopted by the applicant was not the appropriate one as it did not among other things inform the Respondent on what to do upon receiving the papers particularly on when to file the notice to oppose as well as when to file the answering affidavit.

[14] The last point taken was allegedly that the applicant had no locus standi because she had been stopped by the High court from proceeding with the matter as it granted the absolution and also in so far as she could allegedly not say how the property got to be registered in her name despite the objection by the Respondent. I now have to deal with these points seriatim.

Res judicata

[15] It is common cause that the proceedings instituted in 1999 by the applicant's father were not based on the lease which was not there at the time. It may well be that there was at that time a room for a dispute on who had better title to the plot of land in question. This question is no longer in dispute because the person who has title is confirmed in writing in the long-term lease (that is the 99-year lease) itself. That person is the applicant. In a way therefore the 1999 proceedings were not realistically about the plot in question which has since been unequivocally and formerly handed over to the applicant.

[16] This takes one to the point that those 1999 proceedings were not about the same parties as these of today. Today's proceedings do not say anything and indeed need not do so, about the previous proceedings because they are brought by the registered lease holder, the applicant who has been given the rights to utilize the property as he pleases subject only to law and the conditions of the lease. As long as the lease is there, then the applicant is the only person entitled in law to seek its protection if anyone was unlawfully interfering with it, which is what the current proceedings are about. It shall

be remembered that the applicant is not instituting them as some sort of a representative of the applicant in the 1999 proceedings.

[17] A matter becomes res judicata when the cause of action in the previous matter is the same as in the subsequent one. It must further concern the same subject matter just as it must be between the same parties.

[18] Having set out that the basis for the 1999 proceedings were different from those of the current ones; they were legally and realistically not over the same property in so far as no legal instrument registered the property in the applicant's name at the time and the fact that it was not between the same parties. I cannot possibly understand how one could realistically raise res judicata as the applicable point of law.

[19] The First Respondent's point on res judicata is further complicated by the fact that the merits of the 1999 application, at least from what this court has been told about, were not dealt with. In other words, the court never decided that the First Respondent was the person who owned or was lawfully entitled to keep or be in control, of the plot concerned. Those proceedings seem to have been decided on the point that the applicant then had failed to prosecute them than that the property belonged to or was lawfully under the control of the First Respondent and that any future applicants challenging his occupation of it had no entitlement to do so.

[20] In our law, a matter becomes res judicata where the merits would have been determined once and for all, particularly with regards who in law was entitled to control the property concerned. If the merits have not been decided, then res judicata cannot be raised as an objection because the real dispute was never determined fully and finally.

[21] I am for these reasons convinced that res judicata as an objection cannot possibly be upheld, which means that the applicable point raised ought to be dismissed.

Non – Joinder

[22] In law the Municipal Council of Mbabane has to be joined in the proceedings if it had a direct and substantial interest in the order sought or where such an order cannot be or sustained carried into effect without it adversely or prejudicially affecting such a party. See in this regard **Amalgamated Engineering Union V Minister Of Labour 1949 (3) SA 637.** It is unclear how the Municipal Council of Mbabane stands to be affected adversely or prejudicially by the order sought if it was granted as prayed. The reality is that the property has been leased to the Applicant for a period of 99 years by means of a registered lease. If it was not properly so

registered it did not lie with the applicant to challenge the Municipal council which has passed tittle to her.

[23] If the First Respondent contends that the property concerned was improperly leased to the applicant, it lied with that party to challenge the conclusion or grant of the lessee rights to the applicant before an appropriate court.

I am of the view that there is no merit in the point of non – joinder raised. Accordingly, this point has to be dismissed as I hereby do.

Lis Pendens

[24] The facts of the matter reveal that the matter stayed by the High Court in 2001 is different from the present one for various reasons. It is also not about the same property nor is it based on the same cause of action. This position of the law was stated in the following words in **Hassan & Another V Berrange N.O. 2016 (6) SA 329 (SCA**): -

> *"Fundamental to the plea of lis alibi pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause."*

[25] It cannot be said that the current application is against the same subject matter arising out of the same cause of action, even if it could be argued that the parties were the same just because the current applicant had been cited as one of the parties in one of the previous proceedings referred to. For instance, the basis of the 2001 application was not the lease which the applicant seeks to enforce herein. The property was also not the same as it was not at the time registered nor did it formerly have the same plot number which only happened after it was registered and leased to the applicant.

[26] There cannot be merit in the Respondent's lis pendens objection to the application concerned. Accordingly, this point has to be dismissed as well.

Dispute of fact

[27] As I understand it, the current application is based on upholding or enforcing an existing lease agreement, which is a right the law accords a lessee. The lease being enforced is in existence. It is therefore not for this court in the course of the present proceedings to enquire into how the lease was acquired. The First Respondent is in law entitled to challenge the acquisition of the lease by the applicant. This she however is entitled to bring in appropriate proceedings challenging the proper party.

[28] This means in my view that such a challenge would have to be before an appropriate court and must challenge the party who leased the same property

to the applicant. The beneficiary to the lease concluded between him and the lessor is not the person to challenge in appropriate proceedings.

[29] There is therefore no dispute that there is in existence a lease agreement granting applicant a 99-year tenancy over the property in question and that the applicant is entitled in law to enforce same. Whether the person or entity which purported to lease it had the power or authority in law to lease it, is a question to be answered in an enquiry directed against that particular entity. The counter – claim brought in these proceedings is not such an inquiry when considering the fact that the lessor who would be in a position to explain where he got the right or authority to lease same, is not a party. Without limiting the First Respondent's options in challenging the lease in question, it seems to the it would have been one such option to stay the current proceedings and then seek an order nullifying the lease in question assuming there were grounds to do so in law.

[30] As things stand the lease is in existence and was registered in favour of the applicant such that there is no dispute about this fact and the applicant's concomitant right to have it enforced in law. The fact that the Municipal Council took a decision to grant the lease over the property in question to the Applicant and not to the First Respondent, means that such a decision has to be overturned first which will be a process directed against the said Municipal Council in the main. The counter claim brought is not such an application.

[31] The position of our law is that for a dispute to result in a matter being referred to oral evidence or even being dismissed must be real. A mere allegation of the existence of such a dispute coupled with bare assertions and or denials does not amount to a real dispute of fact so as to defeat the conclusion of a matter on the papers filed of record. The judgements in **Mthethwa N.O. Vs Winile Dube and 4 Others Case No. 79/2012 [2013] 31 SZ** and that of **Nokuthula N. Dlamini V. Goodwill Tsela (11/2012) [2012] 28 SZSC** are instructive in this regard. In other words, not every dispute raised would result in a matter being non – suited to be decided on the papers.This principle was stated in the following words in **Nokuthula N. Dlamini V Goodwill Tsela** judgment:

> *"The established and trite judicial practice which now determines the approach of the courts world wide, to be found in a long line of cases across jurisdictions, is that a court cannot decide an application on the basis of opposing affidavits that are ireconcillably in conflict on material facts. Where the facts material to the issue to be determined are not in dispute, the application can properly be determined on the affidavits. It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the affidavits. The Court has a duty to carefully scrutinize the nature of the dispute with microscopic lens to find out if it is a proper dispute of fact."*

Failure To Observe Rule 6(9) and 6(10) of the High court Rules.

[32] The contention on the alleged failure to observe the provisions of Rule 6(9) and 6(10), has been explained to be the failure by the Applicant in his papers to notify the First Respondent as to when he should file his notice of intention to oppose as well as when to file an answering affidavit. This objection came about as a result of failure by the applicant to utilize the appropriate form of the notice of motion.

[33] It is a matter of fundamental importance that the rules relating to notifying a respondent on when to do what upon receipt of court papers should be observed as they relate to the smooth functioning of the litigation machinery. It is because of this recognition that courts would one way or the other show their disapproval of a failure to observe these rules. It is however equally fundamental to realize that litigation is not synonymous with a score card where the appropriate boxes on what has or has not been done has to be ticked. Instead litigation is a process fundamentally concerned with the dispensation and/or attainment of justice. It is therefore for a court seized with a particular matter to determine whether in the circumstances of such a matter the failure to adhere to all the requirements of the rules particularly failure to follow a certain form would result in an injustice.

[34] In recognition of what has just been said, Schreiner JA had the following to say in the South African case of **Trans–African Insurance Co. Ltd Vs Maluleka 1956 (2) SA 273 at page 278**: -

"No doubt parties and their legal advisers should be encouraged not to become slack in the observance of the rules, which is an important element in the machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious decision on their real merits."

These views of the then South African Appellate Division of the Supreme Court were echoed in approval by our then Court of Appeal in **Shell Oil Swaziland (Pty) Ltd V Motor World (Pty) Ltd T/A Sir Motors (23/2006) [2006] SZSC 11 (21June 2006).**

[35] Whereas in terms of the applicable law the major consideration in matters of technical objections is whether or not the objecting party has been occasioned prejudice; there is no prejudice shown to have been suffered by the First Respondent in this matter as a result of not being notified when to file either the notice of intention to oppose or an answering affidavit. Indeed, the First Respondent is shown to have filed the said notice just as he has been shown to have also filed an answering affidavit.

[36] Consequently, the point on failure to observe Rule 6(9) and 6(10) of the High court Rules, cannot stand. It is dismissed on account of the Respondent having suffered no prejudice as a result of the applicant's failure to adhere to the appropriate form.

The Merits

[37] The merits of the matter are primarily about the ejectment or eviction of the First Respondent from the premises forming the subject matter of these proceedings. The plot comprising premises herein has been leased to the applicant by the entity or the authority that owned the land or that was tasked by law to allocate it to individuals or entities it considered deserving.

[38] The lessor, the Mbabane Municipal Council, following its procedure decided to enter into a long-term lease over the property with the applicant. The decision it took still stands therefore and has not been set aside or reviewed or corrected if it was wrong.

[39] Now that the applicant is the registered lessee over the plot in question, she is entitled to all the rights that accrue to a lessee ex lege upon the conclusion of a lease. A lessee's object in entering into a lease is to use and enjoy such property subject only to the law and the terms of the lease. On the other hand a lessor is under an obligation to ensure that the lessee shall use and enjoy the property leased for the duration of the lease. This right of the lessee and the corresponding duty of the lessor was put in the following words in **Cooper's; The South African Law of Landlord and Tenant, Juta and Company; 1973 at page 107:-**

> "A lessee's object in hiring being to acquire the right to use and enjoy property, a lessor is under a corresponding obligation to

ensure that for the duration of the lease, the lessee has the use and enjoyment of the property let to him. To this end a lessor_

a) is under an obligation to refrain from doing anything that will disturb the lessee in his use and enjoyment and

b) warrants that no person with a superior title will disturb the lessee's use and enjoyment of the property let to him."

[40] Whereas there is a warrant against disturbance of the lessee by no persons with a superior title, the situation is even stronger in the lessee's favor in the case where the disturbance is by third parties without superior titles. In this scenario, Cooper's, the South African Law of Landlord and Tenant states the following at page 113:-

"A lessor does not warrant the lessee against unlawful disturbance by third parties, i.e. by persons without title to the property. Consequently a lessee who is disturbed by such a party has no claim for damages against the lessor nor can he claim cancellation of the lease or remission of rent. The lessee's remedy is to proceed against the wrongdoer himself to have his use and enjoyment of the property returned to him or an interdict and claim such damages as he may have sustained. The lessor need not be joined in such proceedings." *(Emphases*

have been added). See also ***Maasdorp V Malan 1875 Buch 136*** *on this principle.*

[41] There cannot possibly be a dispute that in as far as the enforcement of a lease is concerned; the First Respondent is a third party or a person without title against the applicant who is a registered tittle holder. The above except empowers the person in applicant's position herein, to proceed against a person in the First Respondent's position and claim back his use and enjoyment of the property leased to him.

[42] It was in my view in observation of this principle when the applicant approached this court for the reliefs set out in the notice of motion which in their annals amount to the applicant taking or claiming back the limitation on the use and enjoyment of his property as taken by the First Respondent when he sought to occupy such premises without a lease or any other right superior to the lease.

[43] As can be seen from the above excerpt, the applicant in pursuing his rights against an unlawful occupier, need not join the lessor in the proceedings. This is what has happened herein. The lessor has not been joined in the proceedings because there was no basis for joining him in law.

[44] That the First Respondent contends that at some point the land was allocated to his mother as opposed to the applicant's father is not a matter

for consideration by this court in the course of this matter. For whatever reason (and these reasons are contained in a document annexed to the Replying Affidavit from pages 67 to 71 of the book of Pleadings) the Municipal Council and the Swaziland Government through the relevant Ministry, heard both sides and came up with a decision that the lease be concluded with the Applicant and not the First Respondent. It was for the First Respondent to challenge that decision according to law if he was not happy therewith. It would be disingenuous of him to try to challenge this decision now when he could or should have done so much earlier.

[45] We are here only concerned with the fact that there is in existence a lease leasing the property forming the subject of these proceedings to the Applicant who is entitled in law to approach court and claim back the rights that accrue to him ex lege from a person interfering with his right to enjoy the lease.

Counter Claim

[46] The counter claim brought by the First Respondent has fundamental problems. It is brought against the lessee who is a documented title holder and not in the form of a review challenging the decision of the Municipal Council. Further, such an application cannot be brought based on the grant of an absolution from the instance; as that by its nature did not fully and finally decide the issue on who was entitled to have the property transferred or leased to him. The stay of the subsequent proceedings pending the

payment of taxed costs did not determine the fundamental question between the two competing parties at the time – a question that was later resolved or settled by the lease applicant seeks to enforce. That question was according to the document referred to above decided by the appropriate body responsible for such matters acting under the auspices of the Ministry of Housing and Urban Development, the Municipal Council of Mbabane and the Hhohho Regional Administrator.

[47] It seems to me that the counter application is misdirected as it is not directed against the party or parties who did the land allocations or the grant of the lease agreement to the lessee or the applicant herein. The counter application can therefore not succeed in these circumstances.

[48] Accordingly, I have come to the conclusion that the applicant's application succeeds and that the First Respondent's counter application which does not succeed, is dismissed. To that end I make the following order:-

(a) The applicant's application succeeds.

(b) The 1st Respondent and those holding under him are directed to cease and desist from unlawfully occupying the property fully described hereunder and to instead restore possession of same to the applicant forthwith:

Certain: Lot No. 188,

Situate: Nkwalini Township, Hhohho District.

(c) The First Respondent and those holding under him be and are hereby forthwith evicted and/or ejected from the property described as Lot 188, situated at Nkwalini, Mbabane, Hhohho District.

(d) The Second Respondent, through the Station Commander, Mbabane, be and is hereby directed and authorized to assist the Deputy Sheriff for the District of Hhohho in the execution of this order.

(e) The First Respondent be and is hereby ordered to pay the costs of these proceedings.