IN THE SUPREME COURT OF ESWATINI

Case No.21/2022

HELD AT MBABANE

In the matter between:

MFANASIBILI DLAMINI **Applicant**

And

P.J. MANZINI (PTY) LTD **Respondent**

Neutral Citation: *Mfanasibili Dlamini V P.J.Manzini (PTY) LTD (21 /2020) [2022] SZSC 53 (10th November 2022).*

Coram: **S.B. MAPHALALA JA, S.J.K MATSEBULA JA AND N.J. HLOPHE JA**

Date Heard: **22nd AUGUST 2022.**

Date Delivered: **10th November 2022.**

SUMMARY

Civil Appeal – Interdict – Whether clear right had been established to support the Judgment issued - Court a quo interdicts the then Respondent (now the Appellant) from raising a fence on the land he occupied which is a portion of a farm owned by the Respondent as well as interdicts appellant from establishing or building a permanent structure on the same land - Whether Court a quo committed an error when granting the interdict – Whether Appellant had established acquisitive prescription entitling him to own such land portion – Whether Court a quo entitled to refuse to grant an order on the papers as they stood.

JUDGMENT

HLOPHE J

[1] On the 28th day of March 2022 the High Court per Z. Magagula AJ (as he then was), handed down a judgment in terms of which it granted an interdict as sought by the current Respondent as the applicant. It restrained the Appellant from raising a fence and building a permanent structure on a portion of the current Respondent's farm known as Portion 7 (a Portion of Portion 1) of Farm "Droxford Estate" No. 1007, Hhohho District, Swaziland.

[2] It is not in dispute that the farm in question is owned by the current Respondent (the Applicant in the Court a *quo*), who purchased it from its previous owner, one James Noel Lawrence, in 1973. That the current Respondent is the owner of the property is confirmed by means of a Deed of Transfer annexed to the application itself as annexure "**P.J.M.1**".

[3] It is also not in dispute that the Appellant (the initial Respondent), has a home established on an undefined portion of the current Respondent's aforesaid farm. It is not clear how or even when the Appellant came to occupy the said portion of the Respondent's farm forming the subject of these proceedings. In clarifying why I say there is no dispute on who owns the farm on which the Appellant claims to have established his homestead it is because, as I understand Appellant's case from the papers, same is not about denying that the place where his homestead stands is actually inside the farm owned by the Respondent. It is to say that he acquired that portion of the farm as his through the Application of the principle of acquisitive prescription. A real dispute would therefore arise only if it were to be shown that the dispute sought to be relied upon was real or genuine, including that it was not farfetched. If it does not pass this test such a purported dispute would not stand as such for the stated reasons.

[4] Whereas the Respondent in its papers as the Applicant contended that the Appellant found himself on the said farm because he was a son to one of the farm dwellers who had been allowed by the previous owner to reside thereon with his family among other farm dwellers; the Appellant denied that in his papers. He particularly denied that he was a son to a farm dweller. He

instead contended that he, at least from 1973 when the Respondent came be on to the farm or got to own it, he was already on it. He contended that since then he never acknowledged the current Respondent or anyone to be the owner of the portion of the land he occupied. He further would not agree that his father, who was late as at the time the current dispute ensued, was a farm dweller on anyone's land. He contended that he was himself not a farm dweller. He said he was the owner of the land he occupied as demarcated by the perimeter of the fence he was trying to put up. I note that other than saying he was found by the Applicant on the farm he does not disclose how his father, from whom he took over on the farm, had come to be there, unlike the Respondent who states that he had been there as a farm dweller to the initial owner of the farm.

[5] He claimed to be an owner of the portion of the land he occupied, alleging to have come to own it by means of the principle of acquisitive prescription. It is not in dispute that in its real form, the principle in question advocates, that a person who comes to occupy a piece of land openly for a period exceeding 33 years, without acknowledging anyone as its owner, acquires such land for himself through the said principle. The Appellant contended therefore that he had acquired the portion of the land he occupied by means of the said principle, and claimed that he had stayed thereon for a period in excess of 40 years as at the time the dispute arose.

[6] I note that other than contending that he was found by the Respondent on the farm in 1973, when it acquired ownership of it, the Appellant does not disclose how old he was at the time. He also cannot say when his father came

to occupy the portion of the farm in question and how he himself would have come to know about that, taking into account the effect of the hearsay rule. He wants it to be accepted without question that since his father was already in occupation of the said portion of land in 1973, he was doing so by means of the acquisitive prescription. This becomes problematic when the other side assets that the Appellant's father had come about to occupy the piece of land in question through being allowed to do so by the previous owner of the farm who had only allowed him to do so as a farm dweller.

[7] The parties are agreed that sometime prior to 2007, the question of the occupation of the Farm concerned by the Appellant among other occupiers came to a head after the current Respondent reported a dispute to the District Farm dwellers Tribunal asking for an ejectment of the people who occupied its farm, as farm dwellers who included the Appellant. That this was prior to 2007 is confirmed by the fact that, in terms of a letter written by the chairman of the Hhohho District Farm Dwellers Tribunal "**PJM2**" to the application; as of the 15th September 2006, the said Tribunal had resolved that the occupiers of the farm in question, who included the Appellant, had to be ejected from the said farm. It is noteworthy therefore that as of 2022 January, the Appellant, at least in terms of the undisputed facts of the matter was only then trying to create a fence around his said homestead as a means of cementing his takeover of the portion of the farm on which the said homestead was built, which was only after he had been made aware that the Respondent was claiming ownership of the same portion of land as a part of his farm.

[8] The current proceedings came to be instituted when according to the Respondent, he noticed whilst passing by the Appellant's homestead on the 26th January 2022, that the latter was erecting poles to form some sort of a boundary line around the portion of the land he hitherto occupied on Respondent's farm. The Respondent clarifies that his attempt to engage the Appellant with a view to stopping him from doing so drew the latter's hostility towards him. Prior to this incident sometime in 2021, again while passing by the portion of the farm occupied by the Appellant, he noted that the latter was constructing a building or a permanent structure on his farm without his permission. He says when he engaged him, the Appellant was cooperative and when he stopped him, he complied as he did not pursue the construction. Whereas this act would have assured him that the Appellant was aware of his limitations on his farm, the act described earlier above, which is the most recent one, did not do so. Instead it left him in no doubt that the Appellant was belligerent towards him, as he is said to have become openly hostile by then.

[9] It was this hostility which prompted him to institute the proceedings culminating in this appeal as a matter of urgency before the Court *a quo*. He there sought, the following reliefs:-

1. *Interdicting the Appellant (as the 1st Respondent then) from continuing with building the house situated on the current Respondent's farm described as portion 7 (a portion of Portion1) of the Farm, Droxford Estate No.1007, Hhohho District.*

(ii) *Interdicting the Appellant (then 1st Respondent) from building and or constructing a permanent structure on the Applicant's immovable property fully described in the foregoing prayer.*

(iii) *Directing the Appellant (then First Respondent) to remove any recently erected or created fencing poles, fences, barriers and or obstructions on the boundaries of the land he currently occupies on the current Respondent's property (farm).*

[10] The application had been opposed by the current Appellant on the basis of what has been stated above, particularly through denial that he was a son of a farm dweller to the current Respondent's farm and that he himself was such a farm dweller. He maintained that he had occupied the said land of his own accord. He claimed to have exercised the rights of an owner thereon openly and above board and that he had occupied ownership of the land or portion of the farm in question by means of the principle of acquisitive prescription as known under the common law. After hearing argument the Court *a quo* granted the reliefs as prayer for, which in reality was the confirmation of a *rule nisi* it had earlier issued in terms of the three main prayers captured above.

[11] In its Judgment, the Court *a quo* dismissed the points in limine raised by the then Respondent, the current Appellant. These points in limine were that the then Applicant, now the Respondent, had no *locus standi* in *Judicio* and that the matter was infested with disputes of fact which were known to the Applicant even before it instituted the proceedings on motion and therefore that it should be dismissed for that reason.

[12] With regards the question of the locus standi in *judicio*, the Court *a quo* concluded that it had been established that the Applicant (the current Respondent) had a direct and substantial interests in the proceedings as a result of the fact that he was the registered owner of the farm in question, and was therefore entitled to bring the proceedings he did. I agree with this decision of the Court *a quo* and cannot fault it. There was not much challenge to it during hearing of the matter as well.

[13] As concerns the contention that there were disputes of fact which were known to the Applicant prior to the institution of the proceedings, the Court *a quo* took the view that there were no genuine or bona fide disputes of fact which would necessitate a dismissal of the application. The Court *a quo*, referred to the often cited excerpt from the celebrated case **of Plascon – Evans Paints ltd Vs Van Riebeeck (PTY) LTD 1984 (3) SA 623 (A) at 634 – 635** which provides that :-

> *"It is correct that , where in proceedings on Notice of Motion disputes of fact have arisen on the affidavits, a final order whether it can be an interdict or some form of relief, may be granted if those facts averred in the Applicant's affidavit which have been admitted by the Respondent justify such an order. The power of the court to give such a final relief on the papers before it, is however, not confined to such a situation. In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact. [see, in this regards,* ***Roam Hire (PTY) LTD***

vs Jeppe Street Mansions (PTY) LTD 1949 (3) SA 1155 (T) at 1163 – 5, - De Mata v OHIO No.1972 (3) SA 858 (a) at 882 D-H)

*In such a case the Respondent has not availed himself of his right to apply for the deponents concerned to be cross – examined under rule 6 (5) (g) of the Uniform Rules and the Court is satisfied of the inherent credibility of the Applicant's factual averments. It may proceed on the basis of the correctness thereof and include this fact among those which it determines whether the Applicant is entitled to the final relief which it seeks (**See Rikhotso V East Rand Administration Board And Another 1983 (4) SA 27 (W) at 283 E-H)***

Moreover there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are far-fetched or clearly untenable so that the court is justified in rejecting them merely on the papers"

[14] The Court *a quo* concluded as follows at paragraphs 26 and 27 of the Judgment on the question whether or not there were any disputes of fact in the matter so as to result in its dismissal:

"26. *I accept the inherent credibility of the Applicant's factual averments viz, that he is the registered owner of the farm, that the first Respondent's homestead is situated within the Applicant's farm and that the first respondent is extending his existing boundaries . It follows that I must reject the respondent's denials which do not raise a real, genuine or bona fide dispute of fact and are somewhat fictional and contradictory.*

27. *The Respondent argues that his homestead is not within the farm, but in the same breath argues that he has acquired the piece of land on which his homestead (stands) through the common law doctrine of acquisitive prescription".*

[15] Contending to have been dissatisfied with the judgment of the Court *a quo*, the Appellant noted an appeal to this court. He there contended that the Court *a quo* had erred in finding that the requirements of an interdict were met; that the Respondent's ownership of the land in dispute was being contested; that the Appellant had claimed to own the land where his home was situated because he had spent over thirty five years on it, without acknowledging anyone as an owner of it; that the Appellant adduced evidence before the Court *a quo* showing that he had exercised the rights of an owner of the land adverse to the rights of the Respondent; that the Court *a quo* had erred in granting a final interdict yet the legal rights of the Respondent over the land in question had not been clearly established and lastly that the Court a *quo* erred in law by granting a final interdict whilst avoiding to make a final determination of the legal rights of the parties over the land concerned.

[16] On the question whether or not the Respondent had met the requirements of a final interdict to be granted the relief he had sought, there does not seem to be an issue. It could not be denied that the current Respondent is the registered owner of the land in question. This means that the onus shifted to the Appellant to prove on a balance of probabilities that he was now the owner of the land in question. The Court *a quo* could not fault the Respondent's

title over the land because the Appellant could not raise a bona fide dispute with regards the Respondent's ownership of the land in question. In the circumstances of the matter, the allegations of the Appellant on how he had come to obtain the alleged ownership of the portion of Respondents' farm were found to be far-fetched and untenable just as they were found not to be capable of raising a real, genuine and *bona fide* dispute of fact. This conclusion of the Court *a quo* I agree fully with after having fully analyzed the facts of the matter.

[17] The Court *a quo* applied the principle enunciated in the **Plascon - Evans Paints LTD vs Van Riebeeck (PTY) LTD** (supra) case and I can't find fault with the said Court's Application of the principle concerned, particularly because I agree that the dispute sought to be relied upon by the Appellant is neither real nor genuine considered in the context of the circumstances of the matter as well as over and above its being fanciful and inconsistent with the circumstances of the matter as the Court *a quo* observed.

[18] In my view the Court *a quo* correctly rejected the contention by the Appellant that he had been in occupation of the land in question for over 40 years. Firstly other than his unsubstantiated say so, it is unclear for how long as a matter of fact, the Appellant had been in occupation of the land in question. In one breath he claimed to have been on it for over 90 years and later to have been on it for over 50 years as well as at some point to have been on it for over 40 years. It is apparent that if the appellant found himself on the portion of land he occupies, he realistically cannot say how he came to be in occupation

of the said portion without relying on hearsay. He not only needed to disclose such source but he also needed to have such averments confirmed by his source. The reality is that the Appellant does not even say when he was born from which it would be possible to tell for how long, he realistically had been on the said piece of land including whether as he commenced staying there he knew how he had come to be there. He therefore cannot tell the Court a story devoid of issues like hearsay evidence. There can be no doubt he cannot as a matter of fact know when he and his parents came to occupy the land concerned, hence the conclusion by the Court *a quo* that the dispute he raised was not a genuine or *bona fide* one .

[19] Whereas the Appellant claimed to adduce evidence showing that he had been exercising the rights of an owner over the land in question, there is no real evidence to prove that other than his claim in that regard it was the true positon. What the evidence seems to have established is the direct opposite. As to when and how he came to be in occupation of the land in question, what he says is clearly a result of hearsay evidence which is no evidence at all. Some of the averments he makes are, like the court found, far-fetched and unrealistic just as they are contradictory and or unreliable. On the evidence, he does not deny that he was, for the first time, establishing a permanent building on the premises when the Respondent stopped him from doing so, sometime in 2021. He is indeed shown to have yielded that intervention and stopped the construction in question. He is again shown as having attempted to establish a serious or real perimeter fence around his homestead, using treated poles when he was, in January 2022, asked not to proceed therewith by the owner only for this application to be instituted when he would not

heed that intervention. I therefore cannot agree that the Appellant has shown that he was holding himself out as an owner on the property in question. He only asserted that without pointing out to anything supporting that assertion. On this point alone it seems to me that he could not show that he ever held himself out as an owner of the property in question. In fact it is clear that when he attempted to do so, he was stopped and his refusal to comply resulted in these proceedings. The Court *a quo* cannot therefore be faulted for having concluded as it did.

[20] **In Umbane (PTY) Limted V Sofi Dlamini and Three others (13/2013) [2013 SZSC25 (31st May 2013)** the Supreme Court said the following which is pertinent in this matter:-

> *" I agree with the foregoing analogy. I have no wish to depart from it, save to add that there are exceptions to this rule as detailed in the case of* ***Malan V Nabygelegen Estates 1946 Ad 562 -574.*** *In that case the Court held that for this plea to be successful, the occupation must not be by virtue of a precarious consent" or in other words "not be by virtue of a revocable permission or be "not on sufferance". The Court further found that the occupation must not be by virtue of some contract or legal relationship such as a lease or usufruct which recognized the ownership of another.*

[21] In **Du Toit And Others V Furstenberg and other 1957 (1) SA 501** the Court dealing with a matter analogous to the present said the following which is apposite herein:-

"Dealing with the defence of prescription, it is clear from the evidence that the disputed land is presently registered in the name of Aunsie du Toit. That fact affords prima facie proof that she is legal owner and the onus is consequently upon the second defendant to prove that she acquired the disputed land by prescription and is accordingly the true owner. This onus, she is entitled to discharge on a balance of probabilities but the Court will of necessity, carefully scrutinize the evidence before it will deprive Aunsie du Toit of property registered in her name".

[22] I agree with the foregoing excerpt and also with the Court *a quo* that on the material before it, which is now before us, it is difficult if not impossible for this Court to conclude that the Appellant ever established that his occupation of the land in question, to which there is no issue it is part of that registered in the current Respondent's name, was not acquired by virtue of a revocable permission and/or "sufferance". It could not be disproved that it was not occupied, at the inception of the occupation, by virtue of some contract or legal relationship with the owner. I agree further that as soon as the Respondent showed that the land in question was registered in its name, the onus shifted on to the Respondent to prove otherwise on a balance of probabilities and that indeed the Court *a quo* was of necessity required to carefully scrutinize the evidence before it would deprive the current Respondent of property registered in its name.

[23] For the foregoing considerations I have come to the conclusion that the Court a quo's judgment is impeccable and that it cannot be interfered with on the material before Court.

[24] Accordingly, the Appellant's Appeal is dismissed with costs.

N.J. HLOPHE

JUSTICE OF APPEAL

I Agree

S.B. MAPHALALA

JUSTICE OF APPEAL

I Agree

S.J.K. MATSEBULA

JUSTICE OF APPEAL

For the Appellant: V.Z. DLAMINI ATTORNEYS

For the Respondent: M.J. MANZINI & ASSOCIATES