THE HIGH COURT OF SWAZILAND

JOSEPH SAMBO

Applicant

And

ALFRED MABANGA

1st Respondent

PRINCIPAL SECRETARY - MINISTRY OF HOUSING & URBAN DEVELOPMENT

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

Civil Case No. 1701 A/2004

Coram	S.B. MAPHALALA - J
For the Applicant	MR. S. DLAMINI
For the Respondents	ADVOCATE P. FLYNN (Instructed by Maphanga, Howe, Masuku and Sibandze)

JUDGMENT

(15/04/2005)

[1] In Ibis case the Applicant seeks ejectment of the 1st Respondent from his immovable property which was sold to him by the 2nd Respondent in 1970 and in respect of which the Applicant has registered title. The Applicant is also seeking for costs of suit at the attorney and own client scale.

[2] The 1st Respondent opposes the granting of the application and has in fact filed a counter application in which he seeks declaration and confirmation of his alleged retention/enrichment *lien* over the Applicant's property pending determination of his counterclaim in an action in which the Applicant has sued the 1st Respondent for delivery of the fruits acquired during his unlawful occupation of the Applicant's property, alternatively damages for the use and enjoyment thereof.

[3] The Applicant is the registered and lawful owner of Lot 9 situate in Mathendelc Township in the Shiselweni district under Crown Grant No. 50/1970. On or about the year 1986, he became aware that Ist Respondent had unlawfully set up a complex consisting a butchery, a bottle store and a hair salon at the premises aforesaid. The l^{sl} Respondent has refused to vacate the land even after a number of requests by Applicant to do so. Therefore according to the Applicant the 1st Respondent is merely a *mala fide* occupier.

[4] On the other hand the 1st Respondent in his answering affidavit deposes *inter alia,* that on or about 30th April 1970, the Government of Swaziland through the Ministry of Natural Resources allocated to the Applicant a piece of land which was thereafter transferred to the Applicant's name on the 29th June 1970. Applicant paid E60-00 only. On or about September 1983 (about 13 years later) 1st Respondent approached the Land Supervisory of the Ministry of Natural Resources at Nhlangano to purchase a business stand and unknown to him, the same property was allocated to the Applicant. He paid the Government the purchase price in full. He immediately developed the property by building a mini shopping complex with a trading store, two shops, a bar and a detached salon. He waited for the exchange transfer by the 2nd Respondent and was indeed surprised by 2nd Respondent's denial to effect transfer when Applicant launched his application under Case No. 28/1998. He contends that he is a *bona fide* possessor who has preserved and improved the property in question.

He further contends that he qualifies for a real *lien* over the property for purposes of securing the amount of necessary and useful expenses incurred. Furthermore he denies that he is a *mala fide* possessor or occupier and contends that he is a *bona fide* possessor. Therefore, it is only just and equitable that the Applicant should not be allowed to become wealthier to the loss and injury of another.

[5] *Mr. Dlamini* who appeared for the Applicant premised his argument on a number of legs. First, that in the counter-application the 1st Respondent has not disclosed a cause of action in that in law enrichment *liens* are a mere weapon of defence to a vindicatory action (see ***Oldham vs Kerns 5 N.L.R 40; Wilhen Estate vs Shepstone 1878 N.L.R; Brooklyn House Furnishers (Pty) Ltd vs Knoetze and Sons 1970 (3) S.A. 264 (A) 270).*** The Respondent has not set out the essential allegations required to sustain what is essentially an interdict (see ***Setlogelo vs Setlogelo 1914 A.D.221).***

[6] The second pillar of the argument is that annexure "AMI" and "AM2" in the l^{bt} Respondent's answering affidavit constitutes hearsay evidence and is therefore not admissible. In this regard the court was referred to the judgments in ***Pountas Trustee*** *vs* ***Lahanas 1924 WLD 67; Levin vs Saidman 1930 WLD 256*** and the case of ***Wholesalers LTD vs Cash Meat Wholesalers 1933 (1) P.H. A. 24 D.***

[7] The third argument advanced on behalf of the Applicant, in sum is that the Respondents has failed to produce even a Deed of Sale evidencing the alleged sale to him of the property whereas Section 31

of the Transfer Duty Act No. 8 of 1902 provides that no contract of sale shall be of any force or effect unless it is in writing and signed by the parties thereto. Further, that an owner who has been deprived of his property against his will is, as a general rule, entitled to vindicate it from any person who is in possession of it. This is so irrespective of whether that person is a *bona fide or mala fide* possessor or occupier and he need not compensate him of its value even where the latter has acquired it *ex causa onerosa.* (see ***Silberberg and Schoeman, The Law of Property, 3rd Ed. (1993)*** at page ***276).***

[8] The fourth ground advanced for the Applicant is directed at the 1st Respondent's alleged *lien* and in this regard the court was referred to a number of

South African decided cases including the case of ***Acton vs Motav 1909 T.S. 841*** at ***847*** where the following was propounded, thus:

> "In ***De Beers Consolidated Mines v London and South African Exploration Co. (3 C.T.R. 438)*** it was stated that a *mala fide* possessor of land was not entitled, after demand made by the owner to retain the land until compensated for necessary expenses. And in the course of his judgment Sir Henry De Villiers is reported to have said "I am inclined to agree with those writers who regard *mala fide* possession as being in the nature of spoliation, and who hold that the land spoliation, and who hold that the land should first be restored before any question of compensation can arise".

[9] For the above the court was further referred to the cases of ***Bellingham vs Bloommetje 1874 Bitch 38*** at ***39, Rubin vs Botha 1911 A.D. 568*** at ***577; Rademeyer vs Rademeyer 1967 (2) S.A. 702 (c)*** at ***706 - 7; Fletcher & Fletcher vs Bulawayo Water Works Co. Ltd 1915 A.D. 636*** at ***649; Gouws vs jester Pools (Pty) Ltd 1968 (3) S.A. 563 (T)*** and ***Graham vs Ridlet 1931 T.P.D. 479.***

[10] A further point under this head was that the illegality of the purported sale of the Applicant's property to the Respondent by the 2nd Respondent as *per* Section 31 of the Transfer Duty Act and the constructive notice of the Applicant's registered title leads to the same result as if the Respondent had knowledge of the Applicant's title. Trollip J in ***Mlombo vs Fourie 1964 (3) S.A. 350 T*** approves Innes CJ statement in ***Morobane vs Bateman 1918 A.D. 460*** at ***446*** as follows:

> "Here it may be said there was no such knowledge (i.e. of the seller's tainted title). But the illegality of the contract leads to the same result as if there had been knowledge. Because it prevents any justification of the admitted handling and disposal of the owner's property. The Respondent removed from the farm and sold certain cattle which belonged to the Appellant; and he can only justify his action by setting up a transaction which is void and criminal. The law will not allow him to do. And that being so, he must make good the value of the animals. Nor can be complain; for if he had not contravened the statute, but had demanded a certificate of ownership, the arrangement could not have gone through. It was his disregard of the law that rendered possible the fraud upon the Appellant".

[11] The fifth head is directed at the issue of enrichment that it must be unjustified (see ***Auby and Pastellides (Pty) Ltd vs Glen and Odendall vs Van Oudtshoorn 1968 (3) S.A. 433 (T)*** and that of ***Grueneland vs Mathais 1925 S.W.A. 117, 122)*** at *litis contestatio* even a *bona fide* possessor is deemed to become *mala fide* and has no rights to fruits subsequently produced.

[12] The alternative argument advanced for the Applicant is that even if the court were to find that the Respondent has a *lien,* the Is' Respondent would be entitled only to the expenses actually incurred in erecting the building or to the amount by which the value of the property has been enhanced, (see ***Belingham vs Bloommetje (supra), De Beers Consolidated Mines vs London and South African Exporation Co. 1893 (10) S.C. 359, Rubin vs Botha*** *(supra).* If there be doubt whether there is an existing right enforceable against the owner, the right of ownership must prevail (see ***Chetty vs Naidoo 1974 (3) S.A. 13, 23G-H).***

[13] *Mr. Flynn* appearing for the 1st Respondent has advanced arguments *au contraire* to the effect that on the facts before court it has been shown that the Is' Respondent became a *bona fide* possessor of the property in 1983. That according to ***Silberberg & Schoeman, The Law of Property, 3rd Ed*** at page ***149*** a *bona fide* possessor is a person who *bona fide* but mistakenly believes that he is owner of a thing in his control. The Is' Respondent developed the property at the time that he was a *bona fide* possessor and he acquired an enrichment *lien* from that time which entitled him to remain in possession of the improved property until compensated from both his necessary and useful expenses (see ***Silberberg & Schoeman*** *(supra)* at page ***151 - 152*** and the case *o f* ***Erasmus vs Minister Van Wet en Orde 1991 (1) S.A. 453 (o) 458).***

[14] The issue for present purposes is the counter application by the Is' Respondent declaring or confirming that he has an enrichment *lien* over the property pending his counterclaim for compensation under Case No. 1701B/2004. Before addressing this aspect of the matter it is necessary to first consider the other two matters raised by the Applicant *viz* that the counter application does not disclose a cause of action and that annexures "AMI" and "AM2" to the 1st Respondent's answering affidavit constitute inadmissible evidence. I shall consider first the issue of admissibility and then that of the cause of action.

[15] The Applicant in his replying affidavit at paragraph 7.3 thereof avers as follows:

> "The memorandum annexed to the Is' Respondent's affidavit marked "AM2" is not authentic due regard being had to the preceding sub-paragraph and also constitutes inadmissible evidence inasmuch as there is no supporting sworn evidence before this Honourable Court in respect thereof and an appropriate application will be made at the hearing of this application to have same struck out".

[16] The legal argument advanced by *Mr. Dlamini* in attacking this piece of evidence is premised on what is said by ***Hoffman & Zeffert, The South African Law of Evidence, 4th Edition*** at page ***390*** and

the cases cited thereat. The proposition put forth in this regard is that no evidence is ordinarily admissible to prove the contents of a document except the original document itself.

[17] It would appear to me that the argument advanced by Mr. Flynn in this regard is the correct one that these offending documents cannot be ruled as hearsay by any stretch of the imagination. These receipts are official documents which were handed to the P[1] Respondent by officials of the 2nd Respondent in the course of official business. The P[1] Respondent had them in his possession after he had duly made payments in respect of the plot. The memorandum *viz* annexure "AM2" also fall in the same category in that it came in 1st Respondent's possession in the course of an official business between the P[1] Respondent and the 2nd Respondent. There is no suggestion on the affidavit that these documents were obtained fraudulently. The affidavit by Sibusiso Dlamini for the 2nd Respondent does not take this matter any further in that he deposes therein that he is unaware how the 1st Respondent came to occupy the said piece of land. From the totality of all this, therefore it cannot be said that these documents constitute hearsay evidence. I find that they are admissible evidence.

[18] I now turn to the issue of whether a cause of action has been disclosed by the P[l] Respondent. The argument for the Applicant is that no cause of action has been disclosed in *casu* as an enrichment *lien* is a mere weapon of defence to a vindicatory action. Further, it is contended in this regard that the 1st Respondent has not set out the essential allegations required to sustain what is essentially an interdict. I tend to agree with the submissions made by *Mr. Flynn* in this regard that indeed, such *liens* are a mere defence to a vindicatory action but in *casu* since l[sl] Applicant is praying for a declaratory order pending a full determination at trial where a cause of action will come to the fore. All in all, I agree in *toto* with the submissions on behalf of the 1st Respondent in this regard.

[19] I now turn to the main issue, *viz* the l[st] Respondent's alleged *lien.* In order to determine whether 1st Respondent was a *bona fide* or *mala fide* possessor whichever the case may be, it is imperative to sketch the sequence of events in this matter. The Applicant states that he became aware in 1986 that l[st] Respondent had established a "complex" on his property. The 1st Respondent alleges that he was allocated the land in 1983 by 2nd Respondent. He paid the purchase price and developed the property by building a mini-shopping complex. In 1986, after developing the property, the 1st Respondent discovered that it was registered in the name of the Applicant. The 1st' Respondent was called to a meeting with the Applicant. Evidence of this meeting is contained in the memorandum marked "AM2".

[20] The above-mentioned annexure "AM2" is important in understanding the state of mind of the 1st Respondent *vis a vis* the disputed property. The said annexure is a memorandum from the Land Supervisor/Nhlangano of the 2nd Respondent dated the 7th May 1986 to the Land officer in the Ministry of Natural Resources, Mbabane (2nd Respondent and it reads *in extenso* as follows:

ALLOCATION OF A COMMERCIAL PLOT NO. 9 EXTENSION 1 MATHENDELE TOWNSHIP TO MR. ALFRED MABANGA.

I wish to report that the above-mentioned Plot was on the 30lh April 1970 allocated to Mr. Joseph Sambo Crown Grant No. 50/1970 dated 29lh June 1970 price of E60-00 only.

It has transferred that during the month of September 1983 the same Plot was allocated to Mr. Alfred Mabanga at the purchase price of E435-00 who without any delay developed the said Plot, which in fact was the property of Mr. Joseph Sambo.

According to the receipts produced my Mr. Alfred Mabanga only E123-00 was paid to the Government in reality and E200-00 was fraudulently misappropriated by the late Mr. Maphalala who was Land Supervisor at that time.

Following our discussions which occurred in your office on 2" and 5l May 1986, with the two parties, Mr. Sambo is prepared to transfer the Plot NO. 9 Extension 1 to Mr. Alfred Mabanga on condition that Government compensate him with another business Plot at Mathendele Township or any other residential Plot.

Your co-operation will be highly appreciated witli due respect. **M.B.**

VILAKATI

LAND SUPERVISOR/NHLANGANO

[21] The 1st Respondent alleges that he was waiting **"for the exchange by the 2nd** Respondent" when the Applicant instituted proceedings twelve years later in 1998. The 1st Respondent had been paying rates since 1994 to date. Annexure "AM3" being receipts are filed in support thereto.

[22] It appears to me from the assessment of the above facts that the 1st Respondent became a *bona fide* possessor of the property in 1983. In this regard I agree with *Mr. Flynn 's* submission when he cited the authority in ***Silberberg & Schoeman*** *(supra)* that a *bona fide* possessor is a person who *bona fide* but mistakenly believes that he is the owner of a thing in his control. I find that in *casu* on the basis of the affidavit evidence the lsl Respondent had all the attributes in the statement by the learned authors. I find further that the 1st Respondent developed the property at the time that he was a *bona fide* possessor and acquired an enrichment *lien* for that time which entitled him to remain in possession of the improved property until compensated, for both his necessary and useful expenses. The authority in ***Silberberg & Schoeman (op*** *cit)* at page ***151-152*** and the case of ***Erasmus vs Minister Van Wet en orde 1991 (1) S.A. 453 (o) 458*** are apposite in this regard.

[23] For the afore-going reasons I find that the 1st Respondent was a *bona fide* possessor. I must further add that even if lsl Respondent were a *mala fide* occupier, the Applicant cannot simply evict him in the

circumstances of this case. The Applicant has been extremely dilatory in pursuing his rights. He concedes knowledge of 1st Respondent's occupation since 1986. (see ***Quarrying Enterprises (Pty) Ltd vs*** *John* ***Viol (Pty) Ltd 1985 (3) ZHC*** at ***581 - 582).***

[24] I now turn to the Applicant's averment that 1st Respondent has failed to produce even a Deed of Sale evidencing the alleged sale to him of the property whereas Section 31 of the Transfer Duty Act No. 8 of 1902 provides that no contract of sale of land shall be of any force or effect unless it is in writing and signed by the parties thereto. Further, that the illegality of the purported sale of the Applicant's property to the 1st Respondent by the 2nd Respondent as per Section 31 of the Transfer Duty Act and the constructive notice of the Applicant's registered title leads to the same result as if the Respondent had knowledge of the Applicant's title. In my considered opinion the former argument does not hold because the 1st Respondent is claiming to be a ***bona fide*** possessor not an owner of the property. This argument would have held if 1st Respondent was claiming to be the owner of the disputed property. The 1st Respondent has always acknowledged Applicant as the owner of the property. On the latter argument, that of "constructive notice" I agree with ***Mr Flynn*** that it will be asking too much on the 1st Respondent in view of the fact that he is a layman not a lawyer to have perused the records at the Deeds Registry in the manner suggested by ***Mr. Dlamini*** is his arguments.

[25] I further hold that the case cited by ***Mr. Dlamini*** that of ***Mlombo vs Fourie 1964 (3) S.A. 350 T at 356*** does not apply to the facts of the present case.

[26] In the result, for the afore-going reasons an order is granted in terms of prayers (a), (b) and (c) of the counter-application. Costs to include costs of Counsel qualified in terms of Rule 68 of the High Court Rules.

S.B. MAPHALALA

JUDGE