



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 50/2012

In the appeal between:

JOSEPH MABHALANE MASUKU

Appellant

and

**SWAZILAND WATER SERVICES
CORPORATION**

Respondent

Neutral citation: *Joseph Mabhalane Masuku vs Swaziland Water Services Corporation 50/2012 SZSC 48 [2012] (30 November 2012)*

Coram: **M.M. RAMODIBEDI CJ**
A.M. EBRAHIM JA
DR. S. TWUM JA

Heard: **13TH NOVEMBER 2012**

Delivered: **30TH NOVEMBER 2012**

Summary: *Civil Appeal dismissed – Compensation in terms of section 5 of the Water Services Corporation Act 1992. Evidence led by Appellant, in conflict with the pleadings filed.*

EBRAHIM JA:

[1] In January 2003 the Respondent constructed a sewage pipeline across the property belonging to the Appellant. In terms of section 5 of the Water Services Corporation Act 1992 the Respondent is obliged to compensate the Appellant for the damage sustained on the property.

[2] The Appellant being dissatisfied by the conduct of the Respondent for the damage done to the property sued it, for the payment of E350 000-00, interest on the said sum and costs of suit.

[3] The Appellant pleaded in support of this claim in the following terms:

“5. Sometime in or about January 2003, the Defendant unlawfully placed sewerage (sic) pipeline across Plaintiff’s aforesaid property, rendering it of no value to the Plaintiff.

6. Defendant undertook to pay Plaintiff the value of the said property which undertaking it made and kept with those of Plaintiff’s neighbours whose properties had similarly been affected, except the Plaintiff who Defendant has unjustifiably refused to pay.

7. The value of the said property has been fixed by evaluation experts in the sum of E350 000-00 as shown in the expert report annexed hereto, marked “A”.

8. Notwithstanding demand for the payment of the said sum by the Defendant to the Plaintiff, the former fails and/or refuses

to pay Plaintiff the said amount. The said amount is now due, owing and payable by the Defendant to the Plaintiff.”

- [4] The Respondent did not dispute liability to pay compensation but asserted that the amount payable as compensation is E110 000-00.
- [5] Two witnesses were called for the Appellant, one being an expert witness, and the other being the Appellant’s wife who was substituted for the Appellant who had died before this matter came to court. The Respondent called, one witness, on “estate valuer” in support of its case.
- [6] The learned judge a quo rejected the evidence of this witness (the expert valuer). I will not dwell on her conclusions in this regard as nothing turns on this witness’ evidence in view of the findings of the learned judge a quo.
- [7] I believe it would be useful to highlight at this stage, the contents of the PRE TRIAL MINUTE which was filed as part of the proceedings before the court a quo. It reads:

“1. ISSUES IN DISPUTE

- A. Whether the Plaintiff is entitled to the sum of E350 000-00 based on the Valuation report of the 18th June 2012 as opposed to the sum of value of the property in 2003 in the sum of E110 000-00.

2. ONUS OF PROOF

A. The Plaintiff bears the onus to prove on a preponderance of probabilities the issues that he is entitled to the sum of E350 000-00.

B. The Defendants bear the burden to prove on a balance of probabilities the issue that Plaintiff is entitled to the sum of E110 000-00....”

[8] Against the background of this document it is understandable why the learned judge a quo then made the following observations:

“[17] The only question left to be answered is whether the Plaintiff has proved that the market value of the property is E350 000-00 and that he is entitled to be compensated in this amount.

[18] In proof of the allegation that the market value of the property is E350 000-00 and that this is the amount of compensation due to Plaintiff, PW1 testified. The Plaintiff also tendered exhibit A the valuation report of the said property and called PW2, the author of exhibit A to testify in proof of this fact.

[19] Let me say it straight away here, that I agree with Advocate Flynn that when juxtaposed with the Plaintiff’s pleadings and the testimony of PW1, the evidence of PW2 the expert witness is entirely unreliable. This is because the expert opinion of PW2, who prepared exhibit A contradicts the Plaintiff’s pleadings and the evidence of PW1. The expert evidence contradicts the pleadings as to what E350 000-00 represents.

[20] I say this because on one hand the Plaintiff says that the E350 000-00 represents the market value of the entire property.

My view on this point is informed by the fact that in paragraph 5 of the particulars of claim, the Plaintiff pleaded that the placement of the sewage pipe in the said property rendered it of no value. In paragraph 6, Plaintiff alleged that the Defendant undertook to compensate him in the value of the property, and in paragraph 7 Plaintiff alleged that the market value of the said property is E350 000-00. The take home message from these averments, is that the value of the entire property which had been rendered valueless by the placement of the sewage, is E350 000-00. PW1 testified that she is left with nothing now, because of the placement of the sewage pipeline on the said property. Under cross-examination, she told the court, that the sum of E350 000-00 claimed is the market value of the entire property and not for compensation for the damage done to the property. In her own words under cross-examination when asked by Advocate Flynn is the sum of E350 000-00 was for the total value of the property or compensation, PW1 responded as follows:

“It is for the total value of the property so that I can go and buy another property.”

[21] However, the expert evidence tendered in proof of these alleged facts, sang a different song. The expert evidence tells the court that the amount of E350 000-00 is the amount which could restore the Plaintiff to the full market value of the property and that the value of the property is actually E737 000-00. My understanding of the expert evidence is that the sum of E350 000-00 represents the extent of the value of the property adversely affected by the placement of the sewage pipe. This clearly contradicts the pleadings. The expert evidence is clearly inconsistent with the facts pleaded.

[22] The Plaintiff must fail or succeed on the strength of his case and cannot rely on the weakness of the Defendants case. The

Plaintiff has a duty in law to make a consistent case to show the basis of the claim of E350 000-00 as compensation. It is my considered view that the Plaintiff has failed to show what the sum of E350 000-00 claimed represents. My view is buttressed by the fact that while the Plaintiff alleges that the property was rendered of no value and he is thus entitled to the sum of E350 000-00 being market value of the said property, the expert evidence of PW2, however states that the entire property was not rendered valueless by the placement of the sewage pipe, as a percentage of it is still usable. He told the court that the placement of the sewage pipeline affected the plot by way of reduction in its value. That the placement of the sewage pipe diminished the usable area from 1672 meters, to 1150 square meters, that the difference in value from the original to the diminished area is in the region of E350 000-00.

[23] He who asserts must prove. It was not enough for the Plaintiff to allege that the market value of the property is E350 000-00, he was required to bring cogent and consistent evidence in proof of this fact. Since the Plaintiff has failed to prove what the sum of E350 000-00 claimed represents, there is therefore no basis for the claim of the said sum of E350 000-00.

[24] In the circumstances, the court has no choice than to accept the offer of E110 000-00 from the Defendants. That is the justice of the matter and I so hold.”

[9] In my view the reasoning of the learned judge a quo is unassailable.

[10] In the result I would dismiss the appeal with costs including the certified costs of counsel.

A.M. EBRAHIM
JUSTICE OF APPEAL

I AGREE : _____
M.M. RAMODIBEDI
CHIEF JUSTICE

I AGREE : _____
DR. S. TWUM
JUSTICE OF APPEAL

FOR APPELLANT : S.P. MAMBA

FOR RESPONDENT : ADVOCATE P.E. FLYNN