IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 03/2017**

In the matter between:

MFANFIKILE PATRICK DLAMINI **1st Appellant**
KENNETH FANA DLAMINI **2ND Appellant**

And

ZODWA DLAMINI **1ST Respondent**
THE PRINCIPAL SECRETARY MINISTY OF PUBLIC WORKS AND TRANSPORT **2ND Respondent**
THE ATTORNEY GENERAL **3RD Respondent**
THE REGISTRAR OF DEEDS **4TH Respondent**
THE MANGWANENI COMMUNITY COMMITTEE **5TH Respondent**

Neutral Citation: Mfan'fikile Patrick Dlamini & Another vs Zodwa Dlamini & 4 Others (03/17) [2018] SZSC 53 (30th November, 2018)

Coram: **SP Dlamini JA, MJ Dlamini JA and SJK Matsebula AJA**

Heard: **20th September, 2018**
Delivered: **30th November, 2018**

Civil law *– Agreement between family members, endorsed by the Local Community Committee – Second agreement entered into between the appellants and second respondent - Purpose of second agreement to secure compensation for lost property – Prayer that second agreement be cancelled – Claim for return to status quo ante – Claim for declaratory orders to compensation already made to other beneficiaries.*

Following an initial agreement between members of a family, another agreement was entered into between the appellants and second respondent resulting in the appellants becoming beneficiaries to a resettlement scheme

Held *that the appeal should succeed and the order of the court a quo be set aside;*
Held further *that the agreements cannot be cancelled.*

JUDGMENT

MJ Dlamini JA

[1] In her notice of motion, a quo, 1st respondent (as applicant) sought the following orders –

1. A declarator that houses situate on Plot 470 and Plot 472 at Mangwaneni Resettlement Township, Hhohho Region, 'belong to applicant';

2. "That any agreement entered into between 3rd respondent (now 2nd respondent) and 1st and 2nd respondent (now 1st and 2nd appellants) in relation to ownership and allocation of the houses as above described in prayer 1 is hereby cancelled";

3. "That the 3rd respondent is to enter into another allocation and settlement agreement in relation to the two properties as described in prayer 1 with the applicant";

4. "That the sum of E144, 435.00 given as top-up to the compensation against applicant's house situate at Plot 179, Mangwaneni, be paid by 2nd respondent to applicant and not to be included as part of the agreement between applicant and 3rd respondent in terms of the Court Order";

5. "The 5th respondent (now 4th respondent) be prohibited to register any Deed of Transfers or Title Deed and Mortgage Bonds in favour of 1st and 2nd respondents in respect of Plot 470 and 472 situate at Mangwaneni Re-settlement Township within the district of Hhohho pending finalisation of the matter".

[2] In her founding affidavit in the court *a quo,* 1st respondent alleges to be owner of a homestead with nine houses situated at Mangwaneni township, south of Mbabane City. It is common cause that as a result of a major bypass road construction project, 1st respondent's homestead was affected. In the result, some of 1st respondent's houses were destroyed making her entitled to compensation by 2nd respondent. She was also resettled elsewhere. 1st respondent alleges that she was entitled to full compensation for the destroyed houses from which she was earning a livelihood by way of rentals. 1st respondent states that she is an elderly widow and a retired civil servant.

[3] 1st respondent avers that since her houses were many, she could not be compensated for all. That was the policy of the Government, represented by 2nd respondent. She continues:

> "Upon advice and consultation with the 6th Respondent [The Mangwaneni Community Committee] that my houses were too many and thus I will not be adequately compensated for all of them, I resolved to register two of my houses being house 161 and 179 in the name of my elder sons i.e. the [1st and 2nd appellants] respectively. The two had no houses…" (at the homestead).

[4] The arrangement to register the houses in the names of the two sons was considered "a lawful and tactical move" to avert uncompensated damage. The 'tactical move' was agreed upon and adopted after several meetings with 5th respondent and at home with her two sons "though they did not own the houses". Nevertheless, ownership of the two houses remained with the 1st respondent. In support of 1st respondent, Tom Hlatshwako, a member of the 5th respondent, averred in a supporting affidavit, paras 3 and 4, as follows -

> 3. "I have been part of the meetings between the applicant and the two sons. I was sent by the (5th respondent) to go and listen to the discussion and they all agreed that house 161 and 179 be registered into the names of the two sons of applicant in order to maximise her compensation on the improvements she made on the property.
>
> 4. "I confirm that the applicant opted to register them as owners of house 161 and 179 because she would have not been compensated for the houses. The sons confirmed in my presence and before the main committee that they do not own the properties".

[5] It was argued during the hearing that the agreement to register the two houses belonging to 1st respondent in the names of her sons, the appellants, was a form of

'tax avoidance'. I doubt the example. If anything, I think the agreement was more of a tax evasion than tax avoidance. Its lawfulness is doubtful. To be sure, the arrangement as between mother and sons is welcome: what renders it dodgy is when it is said that 1st respondent is to be the lawful beneficiary from the compensation associated with those two houses instead of the sons as registered 'owners'. Government must have accepted the arrangement in good faith on the understanding that the sons, the appellants, would be the beneficiaries to the compensation. The Form of Acceptance which was signed by the recipients of compensation meant just that: it conferred on Government full power and authority to take over (expropriate) and destroy the surrendered property against the accepted compensation to the former owner.

Background

[6] 1st respondent, as applicant a quo, was affected by the Mbabane – Manzini By-Pass Road construction, a Government sponsored project, resulting in her losing her homestead situate at Mangwaneni, a traditional village or township adjacent to and south of Mbabane City. The homestead consisted of some nine house-structures. The Government, represented by the 2nd respondent, agreed to relocate and compensate persons affected by the road project. Under the prescribed scheme of compensation, affected persons could not be compensated beyond a number of houses/structures. Of the nine houses that 1st respondent owned, she retained five and the four were each given to one of her children including the appellants, who were allocated house 161and 179 in terms of an agreement. It was this agreement which led to the houses being registered in the names of the appellants while she supposedly continued to be owner.

[7] 1st respondent says that the mood was at all material times of the discussions good and conducive to the extent that *"23.3 In front of the committee members, my children confirmed that we agreed that the houses will belong to me whilst I am still alive and only when I am dead they will have full ownership…"*. On 14 August 2006, the Mangwaneni Community formally communicated the arrangement between 1st respondent and her children to the 2nd respondent. It is, however, not clear whether it was appreciated by all players concerned, in particular 2nd respondent, that the distribution of the houses among 1st respondent's family was intended to make it possible for 1st respondent to benefit from all the houses contrary to the prescribed policy. By letter dated 15th August, 2006 to 5th respondent, Mabila Attorneys confirmed the distribution of the houses among the family members, in particular, that the appellants 'owned' houses number 161 and 179, for which the appellants were entitled to compensation. The family agreement was attended and witnessed by Tom Hlatshwayo, a Community Committee representative.

[8] For the compensation for house 161 "on Government Land at Mangwaneni Township" 1st appellant was offered, if he signed the acceptance form, a Type 1 bedroom on Plot 470 at Mangwaneni Resettlement Township to the west of Mbabane city. For house 179, 2nd appellant obtained a Type 2 house, being a 2bed-room house on "Plot 472 at the Mangwaneni Resettlement Township plus money in the amount of E144,435.00 …" Paragraph 3 of the agreement signed between the recipients and 2nd respondent, to realise and effect the compensation was, *mutatis mutandis,* identical for all the beneficiaries. Accordingly, 1st appellant had a similarly worded agreement. The paragraph read as follows, for example:

"Kenneth Dlamini accepts and understands that by signing his name on the attached 'Form of Acceptance of Compensation' he is agreeing to the ***transfer of ownership*** *and thus surrenders to the Government of Swaziland all of his legal rights and title to all the affected building and land"*. (My emphasis).

[9] It is to be noted that it was not merely the ownership of the house or other structure but also the land on which the house or structure was built that was surrendered to Government. Even though the language of the Agreements points in that direction, it is still not absolutely clear that the settlers at the Resettlement Township would be given title deeds for the Plots allocated. Prayer 5 of 1st respondent presupposes that there will be such title deeds. In para 44 of her founding affidavit, 1st respondent touches on this issue and says that although it has not yet been done, she is *"advised that the Surveyor General is preparing a general plan in order to properly allocate the houses in a registrable form with diagrams"*. The 1st appellant signed for the terms of compensation at the end of 2010 and beginning of 2011, while 2nd appellant had signed for his in November and December 2009.

[10] Curiously, on 10th June 2006, the Mangwaneni Community (5th Respondent) wrote to the Principal Secretary, Ministry of Public Works and Transport, as follows:

"Dear Sir,

Re: Mbabane By-Pass Road Disputes On House 161 and 179

> *We the Mangwaneni Executive Committee hereby confirm that we met on the 10th June 2006 to deliberate on the issue of the house nos 161 and 179 which belongs (sic) to Mr.Mfan'fikile Dlamini and Kenneth Dlamini respectively.*
>
> *After a thorough scrutiny of the matter we came to the conclusion that the houses listed above rightfully belonged to the above named two people.*
>
> *We therefore request your office to process compensation directly to these two people".*

To be noted is that the communication to the Government regarding the two houses did not mention or indicate that 1st respondent had any continuing interest in the houses. Not surprisingly, therefore, compensation was made to the appellants, including the top-up payment of E144, 435.00. It could then be said that 2nd respondent was not aware of 1st respondent's claim to benefit from the two houses presented as belonging to the appellants. This may still be so even if 2nd respondent knew that the houses at some time were owned by 1st respondent.

1st Respondent's Change of Heart

[11] *"After I had registered the house to my children in 2006, my sons started to neglect me and went around saying that the houses belonged to them yet they never built them"*, says 1st respondent. As a result, and after discussing the matter with the Committee, *"in February 2009 I formally cancelled the agreement through my erstwhile attorney CZ Dlamini Attorney"*. 1st respondent says she was not aware that compensation of the top-up amount had been paid to 2nd appellant until much later. CZ Dlamini Attorney's letter dated 20 February 2009, informing the Committee of the cancellation of the agreement between 1st respondent and her two sons demanded of the Committee to *"write a letter to the Ministry of Public Works*

and Transport revoking and withdrawing your letter of 14th August 2006 to avoid any confusion …"

[12] Because she had reported the purported cancellation of the agreement with her children, in para 35 of her founding affidavit, 1st respondent states: *"The later transfer of the houses to my children's names and allocation of funds in 2010 and 2011 is null and void and they had no mandate to accept same because the letter from the attorney was served upon them personally"*. 1st respondent also says that she was not aware until much later that the cancellation she had given notice to had not been carried out because the allocation of the plots and payment of money had been made to the appellants. She wants all of that to be reversed as she stands to suffer prejudice if the reversal is not granted. With the cancellation of the earlier arrangement respondent now wants the sum of E144,435,00 transferred to her and the Plots at the Resettlement Township not to be registered in appellants' names.

[13] Another reason for 1st respondent cancelling the arrangement with the appellants is that the appellants neglect her, do not care about her welfare and she is now slightly paralysed following a car accident in 2011 and must attend physiotherapy sessions weekly, and the appellants do not bother to check on her: *"I am their only biological mother but they are treating me as a stranger"*. The houses in question are being leased, she laments, and *"in all honesty all the rent should be coming to me. … I now live like a beggar only to be assisted by Swelekile and Themba"*, (the other two of 1st respondent's four children). The story of her financial plight is confirmed on affidavit by Tom Hlatshwako, the Community representative.

Appellants' case

[14] 1st respondent's application was opposed by the two sons, the 1st and 2nd appellants on the basis, inter alia, that the area on which the said houses are located is Swazi nation land in respect of which there can be no ownership rights as asserted by respondent. Appellants allege that the land in question is under Chief Ngangaza of Mshingishingini Royal Kraal. The appellants further state that the application by the respondent to the High Court was neither an appeal nor a review, yet *"The dispute relating hereto has been heard and determined by a traditional structure of competent jurisdiction pertaining the land disputes obtaining under Swazi Nation Land, and which body has issued a ruling in the matter"*. On the foregoing points the appellants had prayed that the application *a quo* be dismissed with costs. The appellants had also pleaded to the merits.

[15] I think that the first point on the disputes being ownership of land on Swazi nation area should be dismissed on the simple basis that the Government has from the beginning of the resettlement of the affected residents of Mangwaneni been signing agreements conferring on the resettled individuals, ownership of some plots of land. No one has raised issue that what the Government was doing was unlawful. This Court is accordingly entitled to assume that in the scheme of compensation ownership per se could not be a problem. Otherwise the entire scheme would fall apart. And as to the involvement of Chief Ngangaza of Mshingishingini Royal Kraal, the record of appeal has a letter from that Royal Kraal disclaiming any desire to be involved in the matter of the road project and the resettlement of any affected residents. As to the matter being prematurely

brought before the High Court and a traditional structure having decided the dispute, both points must fail for lack of sufficient support. The appellants needed to be specific on the structure and decision referred to.

[16] In his answering affidavit, Kenneth, that is, 2nd appellant, *in limine*, averred that the application was defective for failure to exhaust local remedies in the form of the Board of Assessment in terms of section 10 to deal with land expropriation disputes arising under the Acquisition of Property Act, 1961. 1st respondent dismisses the Act as irrelevant because: *"The houses were expropriated and by agreement they were registered in the names of my sons but it was known that ownership of the replacement thereof belonged to me"*. I agree that the Act as referred to by Kenneth is not relevant to the present argument. But I do not agree with the argument by 1st respondent that 2nd respondent accepted (connived to) the arrangement as asserted by 1st respondent, that is, that notwithstanding the registration she was to be the beneficiary. But in all fairness, and that is where I agree with her, the issue here is not a dispute as envisaged under section 10 of the Act. It is not a dispute between 1st respondent as land owner and Government. In that case the Act would be relevant. Instead, the dispute concerns some subsidiary issue not directly involving Government.

[17] Kenneth then challenges the consistency of prayers 2 and 4 of 1st respondent's notice of motion, which he finds to be mutually destructive. Prayer 2 seeks cancellation of the agreement in terms of which the appellants became the 'owners' of the two houses; prayer 4 seeks that the top-up amount of E144,435.00 be paid to 1st respondent. In her reply, 1st respondent says that Kenneth/Mfan'fikile

is confusing the issues: *"All that I seek now is to correct the gift that I honestly and without any reservation had given to my sons. I do not seek to cancel the compensation agreement in totality but seek to substitute their names for mine"*. It is clear that 1st respondent is mistaken. What she wants to do just cannot be done. If she replaces appellants' names with her own name, no compensation would accrue. I am accordingly inclined to agree with the appellants.

[18] The cancellation of the agreements would revert the parties to square one: the compensation arrangement giving rise to the top-up payment would also be nullified and the amount paid returned to Government. In short, the agreement in terms of which the houses 161 and 179 were registered in the names of the appellants and in time subsequently compensated as such by Government cannot be cancelled or amended as proposed by 1st respondent. Such cancellation would only cause unnecessary confusion. Worse still, 1st respondent would not be compensated for the two houses in question and Government would have to reallocate the houses on Plot 470 and 472 to other persons. If 1st respondent could not benefit directly from ownership of house 161 and 179, she cannot indirectly benefit from Plot 470 and 472. It would be unlawful of the Government to pay 1st respondent anything in connection with the two houses as such would be in excess of her legitimate quota under the scheme of compensation. The arrangement whereby 1st respondent could find and register persons willing to be mere nominal owners of the two houses while she became the beneficial owner is a scheme beyond the contemplation of this Court; and no order can be granted by this Court in contemplation of such a scheme. 1st respondent is also not a party to the scheme of payment which she also wants to be cancelled or amended.

[19] If the appellants are in breach of any agreement with 1st respondent, then she may explore possible claim against the appellants in an appropriate action. The judgment in this case does not in any way close the door to the 1st respondent to exercise any rights of claim that she owned both the land and houses for which the appellants accepted compensation from Government. The judgment or conclusion reached in these proceedings is mainly based on the agreement between the appellants and 2nd respondent and influenced by the actions taken by the 2nd respondent following the agreement namely the compensation including top-up payment, the construction of the by-pass road which actions are now virtually irreversible. Too much water has passed under the bridge. But regarding the initial agreement between the respondent and the appellants, the parties are on their own to find a way to mutually accommodate one another, failing which to approach an authority of appropriate jurisdiction to resolve any outstanding issues.

General

[20] Whilst she pleads financial hardship, 1st respondent does not say what happened to the five houses for which she was entitled to be compensated. She may not have been allocated five plots at the Resettlement Township, but one surmises that there must have been a large sum of monetary compensation for at least four of the five houses. If Kenneth got Plot 472 plus E144,435.00, 1st respondent would most probably come out much better off.

[21] Even though technically the houses given to the appellants belonged to 1st respondent, from the point of view of the compensation policy those houses were a lost cause for the 1st respondent. 1st respondent was legally not entitled to be

compensated for them. A very good and motherly agreement was hatched whereby the excess houses were each given to the four children. May be the appellants proved to be the 'prodigal sons'; 1st respondent should remain the good mother and have faith that one day her sons will realise their mistake and contritely return to look after her. She should not dispossess them of the compensation: afterall, for better or worse, the appellants are still her children. Had it been applied for in time, the cancellation of the agreement would have had serious adverse effects on the road project: it would possibly have stalled progress which government could ill-afford in light of the possible cost escalation. Or, the houses could have been destroyed without any body being entitled to compensation. The reason for the agreement with the children was precisely because 1st respondent could not legally benefit directly from the excess houses: accordingly, she could not benefit indirectly.

[22] I move to consider the judgment *a quo*. The learned Judge, her Ladyship, M. Dlamini J. dismissed all the points *in limine* saying she found no merit in them. I have already dealt with the points covered by the learned Judge a quo: it must be evident that I partly differ from her Ladyship's findings. The learned Judge emphasized that an agreement written by an attorney cannot be interpreted by a customary court of appropriate jurisdiction, even if that agreement concerned matters of customary law like Swazi nation land. With respect, I am not aware of any rule of law to that effect. The attorney, the author of the agreement, need not appear before the traditional structure. But the agreement can be read and translated for the traditional court: and there is no reason why the attorney cannot be called as a witness to that court. The flip side of that argument is why should attorneys involve themselves in matters they cannot pursue to logical conclusion.

In my view, a matter otherwise sounding in customary law cannot be made the subject of the common law courts by the mere interference of an attorney. There has to be proper application for that. I do not by so saying mean that the High Court had no jurisdiction in the matter. These proceedings are not entirely steeped in customary law. But the appellants were correct in arguing that if the matter had been deliberated upon and pronounced by a traditional structure then it must come to these courts by way of appeal or review. This point, however, could not be supported.

[23] Furthermore, since 1st respondent states that in February 2009 she "formally cancelled the agreement", which was the agreement that the court still had to interpret? I cannot see how a cancelled agreement still continue to be the subject of interpretation by a court of law: this is like the agreement continuing to have effect beyond the dust-bin. At any rate, the 1st respondent also wanted the said agreement to be cancelled because it did not deliver as she had expected. Unfortunately, that has been overtaken by events. And for the reasons already given, such a course would be academic and unlikely to end in 1st respondent's favour.

Conclusion

[24] In conclusion, and for the reasons advanced, prayers 1, 2, 4 and 5 should fail. As far as prayer 5 is concerned, it should be stated that it is not the business of this Court to interfere in normal Government business. In any case this matter has been finalized as far as concerns the road project and associated resettlement and compensation of affected persons. Rather than cancel, 1st respondent can sue whoever has breached an agreement with her. There would be no point in

suspending registration of the Plots in the names of the appellants unless the Form of Acceptance signed by the appellants with 2nd respondent is shown to be defective and null. In my opinion, prayer 3 is beyond the competence of this Court to grant or refuse. In any case the prayer seems to have been overtaken by events, and for that reason should be dismissed.

[25] What also concerns this Court is the legal effect of the declaration prayed for. Can the High Court confer real rights to property over Swazi nation land? Section 151(3)(b) provides: *"Notwithstanding the provisions of subsection (1), the High Court, has no original but has review and appellate jurisdiction in matters in which a Swazi Court….has jurisdiction under any law for the time being in force".* As the appellants (as 1st and 2nd respondents, *a quo*) pointed out, the application for declaratory order is neither an appeal nor review. In para [15] of her judgment, the learned Judge declared: *"This land therefore has since ceased to be Swazi Nation Land as the Surveyor General is in the process of converting it into title-hold. In this circumstance, therefore, it would be folly to pursue the matter before traditional authorities"*. But on the evidence, was this finding justified? Surely, there must be a legal notice converting the land from continuing to be subject to traditional administration. We have not been referred to such a notice. The Surveyor General is not such legal notice.

[26] In the result, I make the following order-

1. The appeal succeeds;

2. The order of the court a quo is set aside;

3. No order as to costs here and below.

M.J. Dlamini JA

I Agree

S.P. Dlamini JA

I Agree

S.J.K. Matsebula AJA

N Manzini **for** **Appellants**

ME Simelane **for** **1st Respondent**