

RANOTH MATSHAZI

Versus

JOEL MLOTSHWA

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 2 JULY 2010 & 17 FEBRUARY 2011

T Khumalo, for plaintiff
K Lubimbi, for defendant

Civil Trial

NDOU J: The 1st respondent, aged 88 years, (hereinafter referred to as “Mlotshwa”) is maternal uncle of the plaintiff (hereinafter referred to as “Matshazi”). After the death of Matshazi’s parents, Mlotshwa became his custodian. Mlotshwa was neither married nor blessed with children of his own. When Matshazi attained age of majority, he weaned himself off of his dependence on Mlotshwa. By some verbal agreement in 1991, Matshazi relocated from Bulawayo and went to stay on Mlotshwa’s farm being number 127 Gwatemba Purchase Area. Matshazi commenced farming operations and also looked after the farm. According to Matshazi he understood Mlotshwa’s position to be that he was going to surrender this farm back to the state if there was none of his relatives who was prepared to go and reside thereon. It is for that reason that he agreed to go to stay on the farm. It is common cause or at least beyond dispute that Matshazi made some necessary improvements on the farm. These included setting up a homestead, an orchard, contour ridges, a garden, a watering well and roads. At the time of these proceedings, the improvements on the farm were *inter alia*;

- One two bed roomed homestead with a kitchen and comprised of brick wall under zinc sheets;
- Five (5) round huts;
- An open well;
- 7 hectare arable land
- Orchard;
- Three granary huts; and

- Toilet and foul run

Mlotshwa sold this farm to one Pardon Mbondia for US\$8 500,00 on 26 May 2009. Matshazi, in his wisdom did not cite the said Mbondia as a party in these proceedings. There are three main issues for determination i.e.,

- (a) Did Mlotshwa verbally grant Matshazi a lifelong usufruct in respect of the farm?
- (b) Whether or not Mlotshwa gave a right of first refusal to Matshazi; and
- (c) Whether or not Matshazi made any necessary and *bona fide* improvements and if any, what compensation should accrue to him.

I propose to consider the testimony of the witnesses in turn focusing on these issues.

Ranoth Matshazi (the plaintiff): He said Mlotshwa neither married nor bore children. Mlotshwa brought him up. He said after Mlotshwa discussed the issue of the farm with other family members he approached him with a proposal. At that time he was no longer staying with Mlotshwa. He had his own family at Old Lobengula, Bulawayo. He discussed the proposal with his wife and she agreed to go stay on the farm. He said Mlotshwa proposed that he (and his family) stay on the farm until his (Mlotshwa's) death. He proceeded to the farm in 1991. It was a bushy area. He cleared the area and built the homestead. He first constructed two huts. He thereafter, constructed further three huts. One hut is pole and dagga and the rest are made of moulded bricks. These are all grass thatched. There is also a four roomed grass thatched house. He also built a flat asbestos roofed house comprising two bedrooms and a living room. He said he was responsible for the resources for the construction of these dwellings. He also erected contour ridges. He also cleared the bushes and established two fields. He also created an orchard wherein he planted oranges, mangoes and peach trees. He disputed Mlotshwa's assertion that when he got to the farm in 1991 there were improvements. He, however, testified that he is unable to place value on the improvements until he is given time to do so. Under cross-examination he conceded that there was no agreement between him and the defendant entitling to a right of first refusal in the event that the farm is sold. He, however, stated that he should have been offered the farm first in recognition of his labour since he moved onto the farm in 1991 and the above-mentioned improvements were made even in the absence of a specific agreement of right of first refusal. He further said that his agreement with the defendant was that he (plaintiff) builds a hut for the defendant and thereafter build other huts for use by family members when they visited the farm. He conceded that the defendant built the toilet on the farm and rectified another house which was built by another builder. He said the life usufruct arrangement was witnessed by his wife when the defendant approached him at his house in Lobengula. He conceded that the defendant gave him two cows in 1996 but disputed that this was a compensation for his effort in looking after the farm. He said for his

labour in looking after the farm he expected forty (40) head of cattle. The plaintiff was adamant that he was given the two head of cattle as a token of appreciation by the defendant and not as compensation for looking after the farm. He said after he started staying on the farm he took a scotch cart there in 1992. There was already another scotch cart on the farm belonging to the defendant. He said the two cows that the defendant gave him multiplied. He said he used the same earmark as the defendant's for his cattle. He said he was not paying lease fees for staying on the defendant's farm because the defendant asked him to stay there as a member of the family. It was for that reason that he went on to build dwellings on the farm. He said he is prepared to pay US\$10 000 for the farm if it is sold to him.

Sibekiwe Matshazi: She is the plaintiff's wife. She basically confirmed what plaintiff said that the defendant approached them. He invited them to go and reside on his farm until he passes on or they pass on whichever occurred first. She said the defendant told them that he had already had a meeting with the Mlotshwas and it was agreed that the plaintiff should go and stay on the farm to prevent it from being sold. She then went to the farm and started the improvements referred to by the plaintiff using resources from the plaintiff. She assigned her nephew Nkululeko to build the huts. The latter built two huts. Thereafter, the defendant introduced her to one Philip Nxumalo who constructed three (3) dwellings. One of the houses had a defect and she asked the defendant (who is a builder) to correct the defect. He did that. She described, a total of seven structures built on the farm. She said she stayed on the farm whilst the defendant would visit occasionally as he was ordinarily resident in Bulawayo. She said the reason why they invested so much resources on the farm was because the defendant said they could stay there as long as he lived. It was her understanding that the defendant and plaintiff agreed that the farm would not be sold until such time that they died. When asked what they agreed in the event that the defendant pre-deceased the plaintiff, she said it was agreed that the farm would not be sold but would remain property of the Mlotshwa family. About the two cows referred to by her husband, she said the defendant in fact gave the two cows to her as a token as she was his daughter-in-law. She said the defendant was not supposed to sell the farm without consulting other members of the Mlotshwa family. She concedes that the farm belonged to the defendant. She did not give any basis why he had to consult other relatives before selling his farm. In her testimony nothing is said about the right of first refusal that the plaintiff is claiming to have.

Nkululeko Mhlanga: He is related to the parties. He used to stay on the farm with his late father and other members of his immediate family. He remained on the farm after the death of his father until 1991 when the defendant evicted him and the rest of his family. Thereafter, the plaintiff's wife came to the farm and started clearing the land. She thereafter put up structures already described above. He confirmed what the last witness said about the erection of

structures. He built two huts at the behest of the plaintiff for free. He said the defendant inspected the huts when he was busy constructing them. He has no knowledge about the alleged agreement between the plaintiff and the defendant in terms of which the latter took occupation of the farm.

Leonard Mlotshwa: He is the plaintiff's cousin and they grew up together. The defendant is his paternal uncle. The little that he knows about the matter is that the plaintiff was staying on the defendant's farm as per their agreement. He was not privy to the agreement. His testimony does not take the matter any further.

Raymond Mlotshwa: He gave a brief history of how the defendant became the owner of the farm in question. He was not hundred percent sure of the dispute between the parties. He said he was however, involved in certain processes by the family to try and ensure that there was accommodation between the parties. He had been approached by his cousin Absalom Mlotshwa to try and settle the dispute. He had occasion to discuss the issue with the parties. He called a family meeting for that purpose. These meetings and the resolutions therein have no legal co-sequences. They were held when the dispute had already arisen and in any event, do not confer any legal rights to the plaintiff.

For the defendant's case the following witnesses testified.

Joel Mlotshwa (the defendant): He claimed ownership of the homestead on the farm. He said that the plaintiff built some of the structures without his consent. He said had the plaintiff and his wife treated him well he would have let them stay on the farm until his death. He decided to sell the farm on account of the plaintiff's behavior of failing to properly look after it and the above-mentioned ill-treatment. He said that there was no need to compensate the plaintiff for the improvements on the farm as he had stayed on the farm for years without contributing anything.

His version of how the plaintiff ended up settling on his farm can be summarized as follows. The plaintiff owned a house in Lobengula. He later got married and decided to have a rural home as well. He sought a rural homestead in Emaguswini without success. He (i.e. defendant) had a farm but had no wife nor children so a relative suggested that he let the plaintiff and his family settle on the farm until such time that they get their own rural homestead. He agreed to the suggestion as his farm would not remain vacant as he had just evicted members of the Mhlanga family. When the plaintiff moved onto the farm he moved into his (defendant's) homestead. He said when the plaintiff pegged a new homestead away from the Mhlanga homestead he and the plaintiff's family were staying together. He said he built the homestead with assistance of plaintiff. He said the plaintiff built a big dwelling

structure outside the homestead. Except for this latter structure the defendant claims that all the other huts in the homestead. Under cross-examination he said when he told the plaintiff to go and settle on the farm the agreement was the following:

- “A - When I told him to go and settle, I was anticipating that when I got old I would proceed to stay on the farm with them (plaintiff and his family). They were going to look after me and the farm. But on the contrary they did not look after me well as a result I sold the farm.
- Q - If they had treated you well and lived with you well you wouldn't have sold the farm?
- A - I would not have sold it. ...
- Q - Your explanations are consistent with a set up whereby you and plaintiff did not anticipate the farm would ever be sold.
- A - Yes I did not anticipate that and neither did I have anyone to sell the farm to. The reason I sold it was due to ill-treatment.”

Headman Mlotshwa: The plaintiff is his cousin and the defendant his paternal uncle. He said that he knows as a fact that the defendant built a four roomed structure and a kitchen hut. The defendant approached him to fit doors onto these structures. The doors were carved by his (witness') father at the behest of the defendant. He, however, said he does not know who built the rest of the structures on the farm.

Priscillah Dax Moyo: The plaintiff is her cousin. There was a time that the defendant asked her and another relative to accompany him to the farm to collect his farm title deeds. At the farm they found the plaintiff present. At that meeting the defendant requested that he be given back the title deeds of the farm. The plaintiff declined to hand over the title deeds alleging that they were not in his custody. He said they were in the custody of his wife and undertook to bring them to Bulawayo. The plaintiff did honour his promise. There was a meeting of the Mlotshwa family occasioned by the parties' dispute. The meeting was in Mzilikazi and she attended. The defendant informed the meeting of his intention to sell his farm. There was no resolution to whom he should sell the farm to.

I am satisfied that the plaintiff constructed some of the structures on the farm and the defendant others. As the plaintiff had his family in occupation it is without doubt that he built most of the structures for their benefit. As the defendant did not have a wife or children he would have no reason to build many structures. The two structures mentioned by Headman

Mlotshwa were on a balance of probability, built by the defendant. That explains why he had doors made for them and contracted Headman to fit them. Mr *Khumalo*, for the plaintiff has rightly conceded that the plaintiff has not adduced evidence on the existence of the right of first refusal. It is unlikely that the parties on their own would have negotiated and concluded a verbal right of first refusal. In any event, the parties are close relatives and were accommodating each other in that context. Even plaintiff's wife, Sibekiwe, who was privy to most of the meetings never mentioned the existence of a right of first refusal. All she said was that the family agreed that the farm would remain a Mlotshwa property [and not Matshazi property]. She said it was agreed that the defendant would not sell the farm without consulting the rest of the Mlotshwa family.

There is no evidence of an agreement of life usufruct either. In any event, if the plaintiff seriously wanted to exercise such right he would have to cite and involve the purchaser Mbondia in these proceedings. The latter seems to be a *bona fide* third party purchaser. If the plaintiff believed otherwise, he would have joined him in these proceedings. The only issue left is one of the improvements. There is evidence, as alluded to above, that the plaintiff built structures on the farm which enhanced the value of the farm as evinced by the valuation report that the defendant obtained and used to sell the farm to Mbondia. Mr *Khumalo* has suggested that I use this evaluation to determine the damages suffered by the plaintiff. I think this is a fair approach considering that it is the defendant who obtained this evaluation and indeed used it to determine the value of the farm at the time he sold it to Mbondia. When determining the value of damages sight will not be lost of the fact that the plaintiff was staying on the farm without paying any lease rentals. Further, the defendant also gave the plaintiff two cows during the period he was in occupation of the farm.

In his submissions, Mr *Lubimbi*, for the defendant, conceded that the plaintiff should be compensated for some of the structures that he built and the orchard. It is just and equitable that the plaintiff be compensated for the following improvements:

- (a) Brick wall under zinc homestead;
- (b) The orchard;
- (c) 50% of the open well (with no casing);
- (d) Four round huts;
- (e) Granary, and
- (f) Road

These improvements enhanced the value of the property. It is trite that the possessor's right to compensation for improvements to the property of another is determined according to

his status as a possessor i.e. whether he is *bona fide* possessor, *mala fide* possessor, lawful occupier, *bona fide* occupier or *mala fide* occupier.

In casu, the plaintiff is a *mala fide* possessor i.e a person who holds a thing *animo domini*, but who is fully of the fact that he is not the owner there – *Silberberg and Schoeman's The Law of Property* (3rd Ed) by D G Kleyn and A Boraine at 149-153. The plaintiff is therefore entitled to claim necessary expenses (*impensae necessariae*) which were incurred for the preservation or protection of property, Voet 5.3.21, 23. The right to compensation for useful expenses has not yet been authoritatively settled in our law though the weight of authority seems to be in favour of the view that he is so entitled – *Spencer v Gastelow* 1920 AD 636; *Lechoana v Cloete* 1925 AD 536 at 547-548; *Raba v Ngoma* 1913 EDL 469 and *Standard Kredietkorporasie Bpk v JOT Motors (Edms) Bpk hla Vaal Motors* 1986 (1) SA 223 (A) at 235. I hold the view that the plaintiff is entitled to useful expenses (*impesae utiles*). In this regard it is not sufficient that there is an increase in the market value of the property, but the expenditure must result in an actual tangible improvement of the land – *Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd & Ors* 1985 (1) ZLR 77 (HC). The above listed improvements fall in the category of necessary expenses and useful expenses – *De Beers Consolidated Mines v London and SA Exploration Co* 10 SC 359.

As alluded to above, the plaintiff did not pay rent or any consideration for the occupation of the farm. Necessary expenses may be recovered in full. The necessary expenses *in casu* are the road and the well which were incurred for the preservation or protection of the farm. It is beyond dispute that the plaintiff was successful in the preservation and protection of the farm – *Nortje v Pool* 1966 (3) SA 96 (A) at 131F. As far as the rest of the improvements are concerned, these are useful expenses. In the circumstances the plaintiff is entitled to recover either an amount equal to the value by which the farm has been enhanced or the actual expenditure incurred whichever is lesser – *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648; *Nortje v Pool, supra*, at 131G and *Rademeyer v Rademeyer* 1967 (2) SA 702 (C) at 706 H. The defendant may be released from liability to compensate if the improvements were not useful to him and the expenditure excessive regard being had to his means and position. Using these principles and evaluation obtained by the defendant when he sold the property I consider an amount of US\$2 500 to be a fair and reasonable amount for the compensation for the above necessary and useful expenses incurred by the plaintiff.

Judgment No. HB 25/11
Case No. HC 769/09
X REF HC 776/09 & HC 1651/09

Accordingly, it is ordered that:

1. The defendant pays the plaintiff the sum of US2 500,00 as compensation for the improvements together with interest thereon at the prescribed rate of 5% from the date of this order to date of payment in full.
2. Each party to bear its own costs.

Khumalo & Co, plaintiff's legal practitioners

Kenneth Lubimbi & Partners, defendant's legal practitioners