

IN THE HIGH COURT OF SWAZILAND

CASE NO. 252/98

IN THE MATTER BETWEEN:

PRINCE MAHLABA DLAMINI

APPLICANT

AND

MHLATSI DLAMINI

1st RESPONDENT

THE SWAZI COMMERCIAL AMADODA

2nd RESPONDENT

THE LICENSING OFFICER - MANZEVI

3rd RESPONDENT

CORAM

: MASUKU J.

FOR APPLICANT

: ADV. L.M. MAZIYA

FOR RESPONDENT

: MR. M. P. MNISI

JUDGEMENT 24/8/1999

This is an application in which the Applicant prays for an Order inter alia:-

1. Interdicting and restraining the 1st Respondent from continuing to build a shop and other structures on the land at Mhlaleni which is allocated and occupied by the Applicant in accordance with Swazi Law and Custom of Kukhonta.
2. Interdicting and restraining the 2nd Respondent from considering and recommending the issue of the King's consent to the 1st Respondent to obtain a trading licence from the 3rd Respondent.

2 3. Granting costs of this application to the Applicant.

On the 13th August, 1999, an unopposed application to join the Attorney-General as a party was granted, although it is necessary to mention that no papers were filed on behalf of the Respondents, other than the 1st Respondent. The attitude of the Attorney-General, as the 3rd Respondent's representative was to abide by the Court's decision, which ever way it went.

The Applicant's case, as stated in his Founding Affidavit is that he was allocated a piece of land at Mhlaleni, Logoba, under Chief Nkhosini, in accordance with Swazi Law and Custom. On the allocated land, the Applicant proceeded to erect some business structures, which include a filling station a general garage, butchery and what is referred to as a convenience store.

Prior to erecting the above-mentioned structures, the Applicant states that he approached the 2nd Respondent in or about May, 1996 in order to obtain the prerequisite recommendation which would culminate in the King granting a consent for the Applicants business to operate.

Indeed, the 2nd Respondent, by letter bearing stamp dated 6th May, 1993, and signed by its General Secretary, one Mr W.D. Sukumani addressed a letter to the 3rd Respondent and in which it recommended the Applicant's application for a service/filling station at Logoba/Mhlaleni.

In like manner, a letter to the Applicant was addressed and apparently signed by His Majesty, King Mswati III, in the following terms:-

Dear Sir,

Your application for a Filling Station, General Garage, Butchery and Convenient (sic) Store's rights to operate at Emhlaleni KaLogoba under Chief Nkhosini has had my consideration and I am pleased to consent to it on condition you adhere to number seven of the Swazi Commercial Amadoda constitution.

Yours faithfully,

HIS MAJESTY, KING MSWATI III

The Applicant proceeded to obtain trading licenses for the filling station and convenience shop. Copies of the licenses are annexed. The Applicant alleges that the 1st Respondent, since the erection of the above structures encroached on the Applicant's land resulting in disputes over boundaries between the two. Pursuant to the dispute, the matter was referred to the King's Libandla at Ludzidzini, which according to the Applicant, held in his favour and advised the 1st Respondent to identify a new site for erecting his shop.

The Applicant alleges further that the 1st Respondent is erecting his shop on a portion of land on which the Applicant intends to build a butchery and a shopping complex, the plans of which are annexed to the papers. It is the Applicant's further contention that he engaged a firm known as AGPF Construction (PTY) Ltd to fence his land but AGPF's employees, whilst erecting the fence were accosted by the 1st Respondent, who threatened to shoot them if they continued fencing the land. The Applicant contends that the 1st Respondent's actions are unlawful and will cause irreparable harm as he does not have any other land on which to build the proposed butchery and shopping complex.

The 1st Respondent, on the other hand contends that the Applicant operated a filling station at KaNdlunganye before the construction of the Mbabane - Manzini Highway. He contends that when the construction of the road took place, the Applicant's business was relocated to a place next to where it was originally and the Applicant was compensated therefor. The 1st Respondent has annexed a picture of the alleged new site.

The 1st Respondent's main contention is that the Applicant is trading unlawfully at Mhlaleni/Logoba and that the King's consent referred to earlier was issued unlawfully on the following grounds:-

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- (i) that the Logoba King's Council never allocated the said piece of land;
- (ii) the Manzini Swazi Commercial Amadoda, whose duty it was to recommend the issuance of the consent to His Majesty did not do so. The validity of the King's consent is therefor subject to much doubt;
- (iii) the alleged consent is invalid as it does not reflect "MIII" 's Royal Seal but reflects "SII", which represents King Sobhuza's letterheads.

I must mention that the 1st Respondent seems to confuse His Majesty's seal with the Coat of Arms. His contention here is with regards to the Coat of Arms which bears "S II" but is signed by His Majesty King Mswati HI.

The Respondent has proceeded to annex supporting Affidavits of Sandlasenkhosi Maseko and one Gideon Sayiwane Dlamini. Dlamini's affidavit is to the effect that the only place allocated to the Applicant is at Ndlunganye and not Mhlaleni. He proceeded to state that the Logoba King's Council, of which he is Chairman never allocated the land to the Applicant at Mhlaleni. Dlamini therefore contends that the Applicant's occupation of the land and the operation of the business is illegal.

Maseko, on the other hand, states in his affidavit that he is the 2nd Respondent's Chairman at the Manzini Branch and that in his aforesaid capacity, he knows that the Applicant was never allocated business premises at Mhlaleni but at KaNdlunganye. Maseko continues to state that the recommendation to His Majesty is unknown to him and that his organisation was never approached by the Applicant. He also attacks the validity of His Majesty's consent issued in favour of the Applicant for the reasons herein before set out.

Maseko then attacked the orders issued by the King's Libandla, since he (not the 1st Respondent) was not heard and he further denies that he threatened employees of AGPF Construction, when it

was never alleged in the Founding Affidavit that he did. I accordingly strike out the latter portions of Maseko's Affidavit as irrelevant as he is responding to allegations which do not refer to him in the Founding Affidavit, but are

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actually directed at the 1st Respondent. The 1st Respondent did not deal with them nor did he indicate that they were within Maseko's personal knowledge.

In reply, the Applicant stated that he was also allocated land at KaNdlunganye, in addition to the land in question. He also annexed a letter from the 2nd Respondent addressed to the Applicant recommending the grant of the Applicant's filling station and also bears the stamp of the Logoba Royal Kraal and a signature and stamp of the Regional Administrator. Furthermore, the Applicant filed a King's consent which bears His Majesty King Mswati III's seal.

It is worthy of note that the 2nd Respondent, notwithstanding proper service, did not oppose the grant of the application. It then becomes something of an enigma as to why the said Maseko should make the allegations deposed to, as the body of which he claims to be an office bearer, did not oppose the application. Furthermore, the Logoba King's Council of which Dlamini alleges he is Chairman never applied to be joined if it had any interest in the application.

In an application for a final interdict, the applicant must satisfy the Court of the following requirements, as set out in SETLOGELO v SETLOGELO 1914 AD 221 at 227.

- (a) a clear right;
- (b) an injury, actually committed or reasonably apprehended; and
- (c) the absence of similar protection by any other remedy

I will now proceed to examine, from the facts of the case whether the Applicant has made out a case for the relief sought and I will deal with the requirements set out in Sethgelo seriatim.

- (a) clear right

The right, which forms the subject matter for an interdict must be a legal right, which means that the alleged facts, if accepted, must establish a "legal right" vesting in the

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applicant - see in this regard LIPSCHITZ v WATTRUS N.O. 1980(1) SA 662 at 673 C - D. In MINISTER OF LAW AND ORDER v COMMITTEE OF THE CHURCH SUMMIT 1994 (3) SA 89 at 98 D - E, Friedman A. J. P. propounded the law relating to establishing a clear right as follows:-

"Whether the Applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which he has a clear or definitive right in terms of substantive law.... The right which the applicant must prove is also a right which can be protected This is a right which exists only in law, be it at common law or statutory law".

In casu, the right which the Applicant seeks to protect is the running of his business undisturbed, and which he runs, subject to a consent issued by His Majesty the King, pursuant to the provisions of Section 8 (1) the Trading Licences Order No.20/1975 (herein after referred to,as "the Order") and the proviso thereto, which reads as follows:-

"A licensing officer may grant or refuse an application for the grant, amendment or transfer of a license to conduct a business in a general business area:

Provided that no such application shall be granted, amended, or transferred if the business is to be carried on in premises situate on Swazi Nation land without the written consent there to of the

Ngwenyama or of any person in writing by the Ngwenyama either generally or specifically, to grant such consent."

As hitherto mentioned, the Applicant was granted such a consent signed by His Majesty to operate the business of a filling station, garage and convenience store at Mhlaleni/Logoba and this was annexed to the papers. The Applicant further annexed

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a letter marked PMD 2 addressed to the 3rd Respondent by the 2nd Respondent, confirming the recommendation of the grant of the King's consent. There is also annexed PMD 6, a letter from the 2nd Respondent to the Applicant (of which Maseko is a member), which confirmed that the applicant's application to operate a filling station at Mhlaleni was approved and it also bears the stamp of Logoba Royal Kraal which has Gideon Dlamini's stamp and the stamp of the Manzini Regional Secretary.

No allegations have been made by the 1st Respondent to the effect that these documents were fraudulently obtained. The only issue raised is that the Applicant was allocated land to operate his business at KaNdlunganye and not at Mhlaleni. In the light of the documents filed by the Applicant, especially the consent signed by His Majesty, King Mswati III, which clearly states the business is to operate at Mhlaleni, there is no evidence to buttress the 1st Respondent's allegations whatsoever.

The 1st Respondent further contends that the Coat of Arms used in the letterhead belong to King Sobhuza II and not to King Mswati III. In my view, this argument holds no water, especially because Mr Mnisi, when specifically asked by the Court, did not question the authenticity of the signature of His Majesty King Mswati III, which is accompanied by His seal in annexure PMD6. The use of the wrong stationery cannot be used to attack the substance of the letter. The original letter from His Majesty was exhibited to me and it indeed bears His Majesty's signature and Seal. I therefore find no substance in this argument.

The 1st Respondent also casts some doubt on the form used in the King's consent as he alleges that it is unusual. He further alleges that if the King signed the said consent, it would be tantamount to a waste of the King's time. I also find no substance in this argument, especially because the copy exhibited bears His Majesty's address, signature and His Royal Seal. That it is unusual for His Majesty to issue consents in the form in question is not tantamount to saying that His Majesty does not issue consents in that form.

I thus find that the Applicant has successfully established a clear right to operate a business at Mhlaleni/Kalogoba on a balance of probability. That Maseko and Dlamini claim to have no knowledge is immaterial especially because the 2nd Respondent and

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the said Logoba Royal Kraal did not challenge the application. Furthermore, both deponents do not allege that they represent the 2nd Respondent or Logoba Royal Council, nor do they allege or show that they were so authorised to represent the said two bodies. It is also not inconsequential that the Applicant has annexed letters of recommendation of the Applicant's business by the 2nd Respondent and the Logoba Royal Kraal.

(b) an injury, actually committed or apprehended

The Applicant, in his papers annexed plans, reflecting a shop that he intends to construct on the premises. The Applicant states that the 1st Respondent then started building a shop on the land allocated to him, which would be in direct competition to the Applicant's shop. As a result, the Applicant states that the matter was reported to Ludzidzini, where the Respondent was advised to find an alternative site for erecting his shop.

In the MINISTER OF LAW & ORDER v COMMITTEE OF THE CHURCH

(supra) at page 98, Friedman A J P stated as follows:-

"The phraseology 'injury' means a breach or infraction of the right which has been shown or demonstrated and the prejudice that has resulted therefrom.... It has also been held that prejudice is not equivalent to damages. It will suffice to establish potential prejudice."

In view of my comments above, it is my considered view that the Applicant has made out a case establishing potential prejudice, if the 1st Respondent is allowed to continue building a shop in the proposed area and which the Applicant claims encroaches on the land allocated to him and will offer direct competition to Mm.

(c) no alternative remedy

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In this regard, I refer to MINISTER OF LAW AND ORDER v COMMITTEE OF

THE CHURCH SUMMIT (supra) where the learned Judge stated that the enquiry becomes whether an interdict is the only relief or remedy to help the applicant, or there is satisfactory alternative remedy. This is a matter that is within the Court's general discretion. It is also trite, that the Court will generally be disinclined to grant an interdict, where the Applicant can be awarded adequate compensation or amends by way of damages.

From the allegations contained in the Applicant's Affidavit, (which are not denied), it is stated that the 1st Respondent has encroached on the Applicant's land, which land has been earmarked for some other project. Furthermore, the Applicant's right to use and enjoyment of his land is being curtailed and infringed upon. No other alternative remedy can be granted to the Applicant in the circumstances except a final interdict.

CONCLUSION

In the premises, I am of the considered view that the Applicant has made out a case for granting prayer (a). Under further and/or alternative relief, I find it proper to interdict the 1st Respondent and all who act on his instructions or for and on his behalf to desist forthwith from interfering in any way whatsoever with the fencing of the Applicants area by A G P F Construction (PTY) Limited or such other firm that he may employ for such purpose.

I am however disinclined to accede to grant prayer 2 of the Notice of Motion, as it appears to me to have been couched in very wide terms. As presently stated, it has the effect of barring the 2nd Respondent from ever considering and recommending the issue of a King's consent, virtually anywhere in the Manzini District. In my view, a regime for objecting to the grant of licenses by the 2nd Respondent is provided by the provisions of Section 7 (5) of the Order, there having been an advertisement of the application in terms of the provisions of Section 7 (3) of the same Order.

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If the 1st Respondent should file any application and it is advertised in terms of the provisions of the Order, the Applicant can then lodge an objection thereto and if dissatisfied with the decision of the licensing officer, he can exploit all the local remedies provided in the Order. Prayer 2 goes further than is necessary to protect the Applicant's interests in the circumstances and I accordingly refuse to grant it.

I therefore grant an Order in terms of prayer 1 together with the Order granted under further and/or alternative relief, prohibiting the 1st Respondent and or his agents from interfering with the fencing of the Applicant's area.

The 1st Respondent be and is hereby ordered to pay the costs of this application.

T.S. MASUKU

JUDGE