IN THE HIGH COURT OF SWAZILAND

In the matter between

JOHN MAGWAGWA	APPLICANT
And	
JUAKIM SHONGWE	1st RESPONDENT
JOSEPH KHUMALO	2nd RESPONDENT
MR. MATSEBULA	3rd RESPONDENT
Coram	S.B. MAPHALALA – J
For Applicant	MR. N. HLOPHE
For Respondents	MR. MDLADLA

JUDGEMENT

(26/03/99)

Maphalala J:

I issued a rule nisi in this matter on the 4th February 1999, with immediate and interim effect for an order in the following terms:

1. Dispensing with the normal provisions of the rules of this court as relate to form, service and time limits and hearing this matter as an urgent one.
2. Interdicting the respondents and those acting on behest from removing the applicants and his dependants from Plot 395, Mncitsini area, Msunduza Township, Mbabane.
3. Alternatively, interdicting and restraining the respondents and those acting at their behest from interfering with the applicant in any manner whatsoever.
4. Further in the alternative, reviewing, correcting and setting aside the decision of the respondents and those acting at their behest, removing applicant from the area.
5. Granting the applicant the costs of this application.

The application was supported by the founding affidavit of the applicant whose story simply put is that the respondent have constituted themselves in to what he perceive as a clandestine libandla of the area and they had ruled that he together with his dependants should vacate the area as his wife was implicated by a certain witness in a car theft case at the Magistrates court, Mbabane. He was given an ultimatum by this body to leave the area by the 4th February 1999. His gripe is that the so-called libandla has no jurisdiction in that area as the said area belongs to the City Council of Mbabane which has not told him to move from the area. He deposed that the plot where his homestead is built, Plot 395, was allocated to him by the City Council in 1993 after the area had been incorporated under the City Council around 1997. He was assured by the city council people of the area who were then allocated the premises would in due course be given title deeds in the meantime he was given a temporal building permit (annexure "JM1").

He further deposed that when the decision to remove him from the area was made, he was not given a chance to explain nor to defend himself and such an act amounted to the breach of the fundamental rules on natural justice in particular the audi alterant pattern rule.

The application is opposed by the respondents who filed opposing affidavits of the three respondents. In capsule their version is that they find it curious that applicant would refer them as a clandestine

libandla when in the past he has followed decisions made by this libandla on his behest. In any event the respondents have not charged the applicant with any offence in as much as there was no need to. They further deposed that the area in question is an informal settlement area which the government owned and the government entrusted the duty of running the area to the City Council which is to do so hand in hand with zone leaders (libandla). The area in question falls under Chief Mabedla Hlophe and the place has always been run by the libandla. The powers which are vested in the libandla go a long way back. These libandla has powers to settle individuals like the applicant who was granted permission to settle in the area by the libandla which was at the time headed by Zwane, there is a hierarchy which is made up of the chief of the area Mabadla Hlophe who delegated such powers to the libandla. The respondents annexed to their papers a numbers of minutes of the libandla involving the issue of the applicant.

The matter then came for arguments on the 12th March 1999. It must be noted that applicant did not file a replying affidavit to counteract material facts revealed by the respondents is their opposing affidavits.

Mr. Hlophe for the applicant submitted that the issue for determination was whether the libandla had the power to evict a person who was granted that land to settle in terms of the provisions of the Urban Government Act. He further contended that the affidavits of the respondents save that of Colin Shongwe are defective in that they do not conform to the prescribes of Section 4 of the Commissioner of Oath Act. To buttress this proposition he further directed the court's attention to the dicta in the Court of Appeal decisions in the case of The Director of Public Prosecutions vs The Law Society of Swaziland (Civil Appeal No. 28/98).

Mr. Mdladla for the respondents opposed the points raised by Mr. Hlophe. His view of the last point raised by Mr. Hlophe that the affidavits by the respondents are

defective cannot stand. He contends that the appeal court decision cited by Mr. Hlophe (Civil Appeal No. 28/98) is not in point.

He then went on to argue that in order for an interdict to be put in place all the requirements should be met. He referred the court to a book by Johan Meyer titled Interdict and Related Orders where the learned author citing a dicta in the case of Meyer vs Administrator, Transvaal 1961 (4) S.A. 55 (T.P.D.) Hiemstra J held at follows:

"...In addition to stating facts sufficient to set forth and embrace the essential requisites previously named, a section for an interdict must disclose all material facts relating to the matter and if there be omission or non-disclosure of any material facts the petition will be dismissed, either at the original hearing when the applicant move for the rule nisi, or on the return day when the applicant moves to make the rule absolute. The petition may be so dismissed by the court of its motion, i.e where it appears ex facie the documents that there has been an omission to disclose, or on the respondent showing or proving the omission. If however, there has been no intentional concealment or omission, the court may nevertheless, in its discretion, grant an interdict..."

In the case in casu Mr. Mdladla contends the applicant in its papers refer to the libandla as a so-called libandla as if he did not have prior knowledge of the said libandla and only had such knowledge after it had made the contentions decision. Respondents papers reveal that applicant had appeared on several occasions before this libandla and had acknowledged its authority and decisions. Mr. Mdladla argues that all facts were not placed before the court. In the circumstances the interdict ought to be discharged. There is nowhere in the applicant's affidavit where he alleges a balance of convenience. He does not even aver that he has a clear right. The contents of respondent opposing affidavits are not challenged in that no replying affidavit was filed and thus those material allegations made by the respondents in their opposing papers remain uncontroverted.

Mr. Mdladla further contends that once there is a dispute of fact an interdict cannot stand. Further that applicant does not allege that there is no available remedy. He submitted there is a hierarchy in that the decisions of the libandla can be taken to a superior committee by an aggrieved party.

On points of law Mr. Hlophe submitted that interdicts are granted in the discretion of the court. The area in dispute is under the control of the City Council in terms of Section 4 of the Urban Government Act No. 34 of 1968 where it is defined as a "controlled area "

These are the issues for determination. I agree with Mr. Mdladla in toto with his submissions. Firstly, the applicant has failed to meet the requisites for an interdict, viz, (a) to prove a right prima facie even open to some doubt, (b) a well-grounded apprehension or irreparable harm if the interim relief is not granted; (c) a balance of convenience in their favour; and (d) the lack of another remedy adequate in the circumstances. This is regarded as trite law. Applicant in the case in casu conceals material facts to the court and does not take the court is its confidence. These facts are only revealed by the respondent and tend to change the whole complexion of the issues. The applicant does not reply to them and want the court to determine points of law and thus jumping the gun (as it were). These courts are loathe to exercise their discretion in favour of an applicant when it is clear the applicant has concealed

material facts and wittingly failed to take the court in its confidence. It is clear from the papers before me that applicant had prior dealings with the libandla he is now denouncing as some clandestine cabal

I am not going to bother myself in determining whether the area is governed by the City Council or not. There is a clear dispute of fact and thus the application for an interdict ought to fail. The dicta in Meyer vs Administrator, Transvaal (supra) applies in this case. Further the point of the defective affidavit becomes academic. However, I must state the case cited by Mr. Hlophe is not relevant in this case counsel is advised to revisit it.

I thus discharge the rule with costs.

S. B.. MAPHALALA

JUDGE