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IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 71/2000

In the matter between

JETHRO PHALESA NTSHANGASE

APPLICANT

VS

JOSEPH MAHLABA

VETERINARY ASSISTANT/FOBOBO TANK

ATTORNEY GENERAL

RESPONDENTS

Coram

S.B. MAPHALALA – J

For Applicant

MR. NZIMA

For Respondent

MR. SIMELANE

Maphalala J:

The applicant moved an application on the following grounds:

1. Waiving the usual requirements regarding service and notice of the application and dealing with the matter urgently;
2. Directing the Deputy Sheriff for the District of Lubombo to search and seize and attach forty nine (49) herd of cattle in the first respondent's possession and return them to the applicant;
3. Interdicting and restraining the first respondent from interfering with the applicant's possession of the said herd of cattle;
4. Directing the second respondent to deregister forty nine (49) herd of cattle ~~from the name~~ of the first respondent and register them under the name of ~~the applicant~~;
5. That prayer 2, 3 and 4 hereof operate as an interim relief pending the return date of the rule nisi to be determined by this court;

6. That a rule nisi do issue calling upon the respondents to show cause, if any, why;
 - a) Rules 2, 3 and 4 hereof should not be made final;
 - b) The first respondent should not be ordered to pay costs;
7. That pending the return date the first respondent be interdicted and restrained from disposing and/or alienating the cattle in any way.

The application is supported by an affidavit of the applicant, which spells out all the facts he relies upon. The founding affidavit is supported by the affidavits of one Mabilisa Ndzimandze and that of Siphon Ntshangase.

The respondent opposes this application and has in turn filed an affidavit of the respondent supported by that of Simeon Mngomezulu.

The matter came before the learned Chief Justice on the 19th January 2000, where an order was entered as follows:

"Having heard counsel for the applicant and respondents

It is hereby ordered that;

- a) The first respondent is hereby interdicted and restrained from alienating and/or disposing of the cattle, which are the subject matter of these proceedings pending finalization of this matter.
- b) That the application will proceed in the normal cause according to the rules".

Subsequently the matter was postponed a number of times and finally argued on the 17th March 2000.

Applicant avers that sometime in 1990 his natural father Enock Ntshangase died and was survived by his natural mother, Sarafinah Ntshangase (born Mngomezulu) and six (6) children. After his death his father left behind eighty five (85) herd of cattle under the care and control of his mother. Sometime in 1992, his mother sised twenty nine (29) herd of cattle to his uncle Simeon Mngomezulu who is still alive. In 1994 applicant left Lubuli area to settle at KaShoba area under Chief Sibengwane and his mother gave him ten (10) herd of cattle, which subsequently gave birth to fourteen (14) progenies. This brought the number to twenty four (24) herd of cattle. As he was making arrangements to settle at KaShoba area, the said cattle were registered in the name of the first respondent and he was using his dipping number 53 at Fobobo dipping tank.

Sometime in 1996, his mother fetched the cattle that were sised to his uncle and they were now thirty-eight (38) in number and sised them to one Joseph Mahlaba the first respondent. In October 1998 his mother passed away leaving the said cattle under his care and control in conjunction with his brother Siphon Ntshangase.

After the finalization of his khonta arrangements he then advised the first respondent to return to him all the cattle which were sised to him to be registered under his name

and to use his dipping number 82 and he refused to do so. The matter was then reported to the chief's court wherein an order directing the first respondent to return all the cattle to him was issued sometime in October 1999, which order first respondent failed to follow.

The first respondent in opposition avers *in limine* that applicant has no *locus standi* to move the application in so far as the cattle forming the subject matter of the proceedings form part of assets of a deceased estate and applicant is neither the executor nor curator of the deceased estate.

Secondly, a preliminary point was made that the applicant has failed to join the Master of the High Court in the matter, notwithstanding that the law requires him to do so in all cases involving the interest of a deceased estate.

On the merits the first respondent denies most of the averments made by the applicant in his papers. More importantly he places a number of issues in dispute. The first issue he places in dispute is that he denies that the applicant's cattle bore fourteen (14) progenies.

Secondly, he admits that the applicant registered the ten (10) herd of cattle he came with under his dip tank number. He however avers that such arrangement was only for dipping purposes and the cattle were always kept apart from his. To add on the number of cattle registered under his dip tank number he then stated that ten (10) herd of his own to the applicant. He stated that the other four (4) herds remained registered under his dip tank number.

Both counsel argued a lengthy filing detailed Heads of Arguments. The names submitted on behalf of the applicant that the said cattle were obtained through a court order, which was issued by the chief's court at KaShoba area after the matter had been only heard and decided upon by the court in October 1999. The applicant was in lawful and peaceful possession of the said cattle after he had obtained them through a court order in terms of the Swazi Administration Order. The respondents decided to take the law into his own hands and disobeyed the order of KaShoba chief's court irrespective of the avenues that were open to him. He did not appeal against the decision of the chief's court in terms of Section 25 of the Swazi Administration Order of 1998. He did not report the matter and/or transfer it to the Swazi Court if he had reason to believe that it was not going to be equitably adjudicated upon by the chief's court in terms of Section 24 of the said Act. He did not approach even this court for relief if he had reason to believe that he was unfairly treated by the chief's court.

On the point that applicant has not complied with Rule 6 (23) it was argued that applicant in the present case is not representing a deceased estate and no estate of a deceased person was ever reported to the Master of High Court in relation to this matter. Therefore, the applicant is entitled to approach this court in his personal capacity as the person who was responsible to look after the cattle. The applicant moved the application on the basis that the herd of cattle were taken away from him unlawfully and by a person who disobeyed and looked down upon a decision of court, which is established in terms of the laws of this country. Moreover, that person is a Swazi and is aware of the different avenues available to him if aggrieved by a decision of the court and nevertheless he took the law into his own hands without

respect. Mr. Nzima argued that this court cannot be expected to rally behind such disobedient person lest it create a bad precedent that people can take the law into their hands with impunity. He submitted further that respondent does not dispute that an order of the chief's court was issued to the effect that he was ordered to return the cattle to the applicant.

The respondent as represented by Mr. Simelane argued in the contrary. He submitted that applicant should have pursued the matter in terms of Rule 6 (23), which requires that all application in connection with an estate shall be served upon the Master of the High Court for consideration and report before they are filed with the Registrar.

On the merits it was argued on behalf of the respondent that the applicant has failed to set out his basis of ownership of the said cattle, which would have been the basis upon which he claims the cattle. To succeed on the basis of *res vindicatio* it is essential for a litigant to prove that he is the owner of the property in issue.

The fact that the chief's court issued an order that the cattle be given to the applicant does not take the matter further, and the applicant still has to prove that he is entitled to be given the cattle and that the chief's court was correct in deciding likewise. This is particularly so in view of the fact that, in dealing with this matter, the chief's court flouted well established principles of natural justice, especially the doctrine *ad alteram partem*. This court may not be used to rubberstamp the decision of the chief. It was further argued that applicant has failed to establish the jurisdiction of the chief's court in terms of Section 14 and 16 of Swazi Administration Order.

Further, it was argued on behalf of the respondent that the application as it stands has got a number of disputes of fact such that it cannot be decided on the papers *per se*. The application must therefore be dismissed with costs. To highlight this point the court was referred to the often-cited case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 at 1162*.

These are the issues before court. I have considered the papers before me and also the able submissions made by counsel. It appears to me without determining other aspects of this case that this matter cannot be decided on the papers as they stand, as they are a number of disputes of facts. The central one being the issue of the ownership of the cattle. The law has been settled in this regard. The case of *Room Hire Co. (Pty) (supra)* is instructive at page 1163 where Murray A.J.P. had this to say:

"It is certainly not proper that an applicant should commence proceedings by motion with the knowledge of the probability of a protracted enquiry into the disputed fact not capable of easy ascertainment".

In the present case two disputes of fact arose in the respondent's opposing affidavit. These I have already outlined in the body of this judgement. The applicant has not even attempted to file a replying affidavit to challenge these averments by the respondent. The purpose of replying is to reply to averments made by the respondent in his answering affidavit (see *Bayat & others vs Hansa & others 1955 (3) S.A. 547 (N), per Caney J at 553*). The applicant, naturally, must answer those statements of facts which he denies, or he may place on record further facts which would show that

the respondent's allegations are false, are incomplete or do not give a true reflection of the actual position.

That as it may. It is my considered view that in the interest of fairness and justice and in exercise of my discretion I direct that *viva voce* evidence be led to ascertain the disputed facts.

Costs to be costs in the cause.



S.B. MAPHALALA
JUDGE