THE HIGH COURT OF SWAZILAND

ISRAEL MFANYANA BHEMBE N.O. Applicant

And

SIBUSANI FORTUNATE LUSHABA

1st Respondent

CITY COUNCIL OF MBABANE

2nd Respondent

THE REGISTRAR OF DEEDS.

3rd Respondent

THE MASTER OF THE HIGH COURT

4th Respondent

Civil Case No. 336/2003

Coram	S.B. MAPHALALA - J
For the Applicant	MR. C. LITTLER
For the Respondent	MR. K. MOTSA

RULING

(on points of law in limine)

(28/08/2003)

Serving before court is an application brought under a certificate of urgency for an order as follows:

1. That the above Honourable Court dispense with normal and usual requirements of the Rules of the above Honourable Court relating to service of process and notices and that the matter be heard on an ex parte basis as a matter of urgency.

2. That a rule nisi do hereby issue calling upon the Respondents to show cause on a date and time to be fixed by the Honourable Court why the following orders should not be made.

3. That the registration of the property known as Portion 112 (a portion of portion 85) of farm No. 1117 situate in the Hhohho district measuring 583 square metres held by Sibusani Fortunate Lushaba by virtue of Crown Grant No. 69/1994 be set aside and/or declared to be of force and effect pending the final determination of an action to be instituted by the Applicant declaring the aforesaid transfer to be invalid and of no force and effect.

4. That the first Respondent be interdicted and restrained from evicting the
Applicant and any member of his family from the property and/or taking any action or performing any act

which will prejudice the Applicants lawful possession and occupation of the property.

5. Directing the second and third Respondent to transfer the said property to the estate of the late Emmah Bhembe.

6. That the second, third and fourth. Respondents pay the costs of this application only in the event that they oppose this application.

7. Further and/or alternative relief.

8. That orders 2, 3, 4, 5, 6 and 7 above:operate with immediate effect as an interim order pending the finalization of the matter.

The founding affidavit of the Applicant is filed in support of the application. Various annexures from "A" to "I" are filed in support thereto. A confirmatory affidavit of one Patricia Bhembe (nee Dlamini) is also filed.

The Respondents have joined issue and the answering affidavits of the 1st Respondent Sibusani Lushaba and one Meshack Kunene who is employed by the 2nd Respondent.

are filed in opposition. Various pertinent annexures are also filed. Further, confirmatory affidavits of Roseter Shabangu and Henry Shabalala are filed of record.

The Respondents have raised points of law in limine found in the 1st Respondent's answering affidavit as follows:

"4.1. The Applicant satisfy (sic) the elements of a final interdict hence the application
should fail on this basis alone.

4.2. Secondly, the application is not urgent". Further points of law in limine were raised in the Heads of Arguments as follows:

"1.1.1. The notice of motion is defective, in that it requires that the matter be heard on an ex parte basis. The Applicant however, is not the only person who is interested in the relief which is being claimed. The relief claimed, although on a temporary basis, is for imminent harm. The fear of legal action is not imminent harm;

1.1.2. The matter is one, which cannot be properly be decided on affidavit. There is a real dispute of fact which cannot be satisfactory determined without the aid of oral

evidence as the Respondents' affidavits raise real and bona fide disputes of fact and Applicant is, in terms of the general rule, bound to accept the Respondent's version
of the facts.

Plascon - Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A) at 634 H - I; Hudson vs The Master 2002 (1) S.A. 862 (T) at 870 B - D. 1.1.3. The court should dismiss the application as the Applicant should have realised when

launching his application that a serious disputes of fact, incapable of resolution on the
papers, was bound to develop. Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions
(Pty) Ltd 1949 (3) S.A. 1153 at 1163".

When the matter came for arguments counsel filed Heads of Argument for and against the points of law raised. Before delving on the issues I find it imperative to briefly sketch the history of the matter. The facts of the matter are as follows. The Applicant is the executor dative in the estate of the late Emmah

Bhembe"andresides at portion 112 (a portion of portion 85) of Farm No. 1117 Sandla Township. This property is the subject matter of this dispute. During or about October 1985 the late Emmah Bhembe purchased and was allocated the said property by the City Council cited as the 2nd Respondent. The 1st Respondent claims although this fact is hotly contested by the Applicant to have purchased this piece of land from the deceased Emmah

Bhembe. The Applicant claims the property and all rights accruing thereon to be the property of the deceased estate of Emmah Bhembe. On the other hand the 1st Respondent claims the property as a purchaser of the land from the deceased in her lifetime. There is a tit for tat around this property. The arguments advanced on behalf of the Respondents on the first point raised in limine is that the notice of motion is defective, in that it requires that the matter be heard on an ex parte basis. The Applicant however is not the only person who is interested in the relief which is being claimed. The relief claimed, although on a temporary basis, is for imminent harm. The fear of legal action is not imminent harm.

At paragraph 1.1.2 it is contended that the matter is one which cannot be properly be decided on affidavit. There is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence as the Respondent's affidavits raise real and bona fide disputes of fact and the Applicant is, in terms of the general rule bound to accept the Respondent's version of facts (see Plascon - Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A) at 634 H - I and Hudson, vs Master 2002 (1) S.A. 862 (T) at 870 B - D). It is contended that: the court should dismiss the application as the Applicant should have realised when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop (see Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1153 at 1162).

The second point raised in limine is that of urgency. In this regard it is contended that the Applicant does not set out explicitly the circumstances which render the matter urgent. An order has not yet been sought for the eviction of the Applicant, although the 1st Respondent has requested that the Applicant vacate the property. This application is therefore premature, as an eviction order has not yet been sought.

There is no imminent harm to the Applicant, other than a fear of legal action instituted for his eviction. The Applicant makes no. allegations that the first, Respondent has attempted to take the law into her own hands in order to evict: the Applicant from the property which first Respondent legally owns.

Further, on this point it is contended on behalf of the Respondent that the Applicant has created his own urgency, in that he has been aware of the factual situation, on his own version, during October 2002, which is approximately eight (8) months ago, but chose not to take any legal action at that stage. Only upon being faced with possible eviction does the Applicant now bring the application.

On the third point taken in limine it is contended for the Respondents that the Applicant has not satisfied the requirements for a final interdict. No discretion vests in a court to grant an interdict for the protection of an alleged right which it found does not exist (see Plettenberg Say Entertainment (Pty) Ltd vs Minister Van Wet's Orde 1993 (2) S.A. 396 (c).) If the relief sought is interim in form but final in substance, the Applicant must prove the requirements for the grant of a final interdict and questions such as balance of convenience do not arise (Masuku vs Minister Van Justisie (supra): Alum -Phos (Pty) Ltd vs Spatz 1997 (1).ALL S.A. 616 (w) 621). The court was further referred to the cases of Setlogelo vs Setlogelo 1914 A.D. 221 -227; Eriksen Motors (Welkom) Ltd vs Protea Motors Warrengton 1973,(3) S.A. 685 (A); Webster vs Mitchell 1948 (1) S.A. 1186(w) at 1189; Beecham Group Ltd vs B -M Group (Pty) Ltd 1977 (1) S.A. 50 (T) at 54; and Knox D'Arct Ltd vs Jameson 1996 (4) S.A. 348 at 361. In casu the application brought by the Applicant clearly does not comply with the requisites to enable him to successfully apply for an interdict to restrain the first Respondent from protecting her rights with regards to the property of which she is the registered owner.

Mr. Littler advanced arguments per contra He opened his submissions by directing the court's attention to prayer 3 of the Applicant's notice of motion where the court is asked to declare the registration of the said property to the name of the 1s. Respondent to be of no force and effect pending the final determination of an action to be instituted by the Applicant declaring the transfer to be invalid and of no force and effect. The argument here is that this is an application pendente lite to secure the status quo ante pending an action to be instituted. That in casu the Applicant is in possession of the property presently and therefore a clear right has been, established for purposes of an interdict. A right of possession is a clear right. Mr. Littler further went on to demonstrate the other requisites viz the Applicant has no other remedy; a

well grounded apprehension or fear; and that the balance of convenience favours the granting of the relief sought.

On the dispute of fact Mr. Littler urged the court to adopt a common sense and robust approach that in the final analysis there are no major disputes of fact/

These are the issues for determination. There are three points raised viz i) urgency; ii) whether there are disputes of facts; and iii) whether the Applicant has satisfied the requirements for an final interdict.

I shall determine the issues sequentially, thus:

i) The issue of urgency

The issue of urgency is governed by Rule 6 (25) (a) and (b) which states as follows cited ipsissima verba:

a) In urgent applications, the court or a Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place in such a manner and in accordance with such procedure (which of these rules) as to the

court or Judge, as the case may be, seems fit.

b) In every affidavit or petition filed in support of an application under paragraphs (b) of this sub-rule, the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course".

In the often-cited case of Humphrey H. Henwood vs Maloma Colliery and another Civil Case No. 1623/94, Dunn J (as he then was) held that the provisions of the above cited rule is mandatory. The provisions of (b) above exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall, in the affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at the hearing in

due course. These must appear ex facie the papers and may not be gleaned from surrounding circumstances brought to the court's attention from the bar.

In casu page 16 seeks to establish urgency and reads as follows:

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"Urgency

i) It is submitted on my behalf at the hearing that this matter has become one of
extreme urgency in as much as the first Respondent instead of negotiating a settlement of the dispute, has began threatening the Applicant with eviction from the property. The last and most serious of these

threats is contained in a letter addressed to my attorney by Robinson Bertram the attorneys for the first Respondent. I annex hereto a copy of the letter marked" 1".

ii) In the event of my failure to obtain the order sought in this application I will clearly suffer irreparable loss in as much as I have nowhere else to go with my children. Clearly therefore a hearing in due course will hardly be of any assistance to me".

The letter annexed as "I" is dated the 5th February 2003, and reads in part as follows:
"...Our intention are to request you to inform your client to vacate her property by the 14 day of February 2003, failing which our instructions are to institute eviction proceedings. The costs of the issue of the eviction proceedings will be for the account of tour client. We trust that this will not be necessary..."

It should be noted that the Applicant then launched this urgent application on the 21st February 2003; about 7 days after the deadline of the 14th February 2003 set by the Applicant. I agree in toto with Mr. Motsa 's submissions in this regard that an order has not yet been sought for the eviction of the Applicant, although the 1st Respondent has requested that the Applicant vacate the property. There is no imminent harm to the Applicant, other than a fear of legal action being instituted for his eviction. The Applicant makes no allegations that the first Respondent has attempted to take the law into her own hands in order to evict Applicant from the property.

It would appear from the facts before me that the Applicant has created his own urgency, in that he has been aware of the factual situation, on his own version, during October 2002, but chose not to take any legal action at that stage.

It is my considered view, that on the facts presented before me the Applicant has not proved urgency within the ambit of Rule 6 as cited above.

Therefore, the point of law in limine raised in this regard is good in law and I would thus sustain it.

ii) Whether there are disputes of fact.

The matter is one which cannot be properly be decided on affidavit. There are numerous disputes of fact which cannot be satisfactorily determined without the aid of oral evidence as the Respondents' affidavits raise real and bona fide disputes of fact and the Applicant is, in terms of the general rule bound to accept the Respondents' version of the facts.

One example of such dispute of fact is found at paragraph 5 of the 1st Respondent's affidavit where the 1st Respondent avers as follows:

"5 Background i) ACQUITTANCE WITH THE APPLICANT

5.1. I had met the Applicant sometime in 1991 outside the Swazi Bank Building,

Mbabane selling avocados.

5.1.1. I had asked Applicant where he got the avocados, as I wanted to
buy them and sell them at the Umhlanga Reed Dance.

5.1.2. The Applicant had advised me that there were plenty avocados at his homestead based at Sidvwashini, Mbabane and invited me to

come to his homestead as he was going to sell them to me. 5.1.3 I had later visited the Applicant at his homestead. Whilst he was collecting the avocados he asked me if he was interested in a certain portion based at Sandla Township, Mbabane.

5.1.4. I had advised him that if the price was good I was prepared to consider the offer to purchase. He then informed me that he was going to speak to his mother, one Emmah Bhembe (hereinafter as Emmah or mother) about selling the said property.

5.1.5. After a few days the Applicant visited me at my home Lobamba and advised me that his mother had agreed to sell the property for a sum of E8, 500-00.

5.1.6. He then further advised me that since the 2nd Respondent officials
were not going to accept the transfer of the property into my name, he was going to advise her mother to approach the 2 Respondent and advise them that I was Emmah's daughter".
To this the Applicant in his replying affidavit answered as follows:

"AD Paragraph 5 (1) to 5.1.6.

Save to admit that the 1st Respondent visited the deceased's homestead during or about 1991 on the pretext of buying avocado pears. The rest of the allegations contained in this paragraph are denied.

In particular I deny most emphatically the following:

a) That I advised 1st Respondent that my mother was selling the property at
Sandla Township......

b) That my mother agreed to sell at a price of E8,500-00 or at any price.

c) That I colluded with 1st Respondent in deceiving Meshack Kunene into believing that she was deceased's daughter."

The above clearly shows a dispute of fact in this matter. A further dispute of fact is in relation to whether the deceased Emmah Bhembe was illiterate and both deaf and blind. Following the decision in Plascon - Evans Paints Ltd vs Van Riebeeck Paints (Pty Ltd (supra) I have come to the conclusion that there are disputes of fact in this matter which cannot be satisfactorily determined without the aid of oral evidence. The Respondents' affidavits raise real and bona fide disputes of fact and the Applicant is, in terms of the general rule, bound to accept the Respondents' version of the facts.
In the circumstances the points of law in limine raised in this regard is good in law.

iii) Whether the Applicant has satisfied the requirements of a final
interdict.

It is trite law that if the relief sought is interim in form but final in substance, the Applicant must prove the requirements for the grant of a final interdict and questions such as balance of convenience do not arise. (see Masuku vs Minister Van Justisie (supra). It would appear to me on the facts presented to the court that the Applicant has not proved a clear right or prima facie right. The 1st Respondent has a better right than the Applicant in casu. Applicant's mother (the deceased) would have been in a better position than the Applicant. Even in her position she was merely an allocatee not the owner of the property.

In the circumstances I have come to the conclusion that the Applicant has not proved the requirements as enunciated in the celebrated case of Setlogelo vs Setlogelo (supra) and therefore the point of law in limine is upheld.

iv) Miscellaneous

It would also appear to me that the notice of motion is defective, in that it requires that the matter be heard on an ex parte basis. Clearly, the Applicant is not the only person who is interested in the relief which is being claimed. :

In the result, the application is dismissed with costs.

S.B. MAPHALALA

JUDGE