THE HIGH COURT OF SWAZILAND

Civil Case **No. 135/03**

In the matter between:

DANIEL MKHONTA And **Applicant**

SITHUPHA MAMBA
LOKHUNDLA MAMBA
THE MBA GAMEDZE
DUMISA DLAMINI

1st Respondent
2nd Respondent 3rd Respondent 4th Respondent

CORAM **MASUKU J.**

For the Applicant	**Mr N.V. Mabuza**
For the 1st, 2nd & 4th Respondents	**Adv. L.M. Maziya (Instructed by Vilakazi & Co.)**
For the 3rd Respondent	**IVJs Lorraine Zwane**

JUDGEMENT **11th** March **2004**

Relief Sought

Serving before me is an application filed under a certificate of Urgency and in which the above-named Applicant claims an Order against the four Respondents *inter alia:* -

1. Dispensing with the usual time limits procedures and manner of service provided for in the Rules of the above Honourable Court and hearing this matter cs one of urgency.

2. Condoning the Applicant for non-compliance with the said Rules

-3. Directing the Respondents to remove forth with the fence ereeted on the----------------------
Applicant's piece of land situate at Mabhubukweni area in the Lubombo District.

4. Interdicting and restraining the Respondents from interfering, in any way or form with the Applicants' ownership and/or possession of the said piece of land.

5. Authorising the Station Commander (and/or his lawful subordinates) of Siphofaneni Police Station to ensure that the above Orders are effected.

6. Costs

7. Further and/or alternative relief.

It is clear from the foregoing prayers that the relief sought by the Applicant is a final prohibitary interdict against the Respondents. It is for me a matter of observation that in terms of prayer 5, this Court is required to authorise the Station Commander of Siphofaneni Police Station, or his lawful subordinates to ensure that the Orders sought are effected if the Court is pleased to grant them. Curiously, neither the Commissioner of Police nor the Station Commander have been cited in these proceedings, nor does it appear that they were served with the application, notwithstanding that they are required to give effect to the Order. Certainly, they have an interest in the Order or may have reason which they may wish to disclose to the Court why prayer 5 should not be granted, but they are effectively denied the right and opportunity to do so by the Applicant. This is unacceptable-and should not be repeated. All interested parties in any Order that the Court may be minded to issue must be cited and at the least, served with a copy of the application, fully setting out at the same time what their respective rights are, if they are desirous of opposing the granting of any relief sought against them.

The Applicant's case.

The Applicant's depositions are to the effect that he is the lawful 'owner' or possessor of a certain piece of land falling under Swazi Nation Land (hereinafter called "S.N.L."), which he acquired through the *Khonta* customary rite. I interpose to state that the use of the word "ownership" by the Applicant clearly is a misnomer, for this is not ownership in the

conventional sense. It is some form of perennial lease and in terms- of which the-land is leased to families virtually in perpetuity. That however does not crystallise into ownership ■ properly so - called.

The Applicant deposes further that sometime in October 2001, a dispute regarding the "ownership" of this piece of land arose between him and the Respondents and this dispute was submitted to the Madlenya *Umphakatsi,* under the chairmanship of Chief Madlenya Gamedze, the appropriate traditional forum for settling such disputes. He states further that a series of meetings ensued and which culminated in a decision in his favour, a written version of which was annexed to the papers.

It is the Applicant's further contention that the said decision was duly communicated to the Respondents but that notwithstanding, they cultivated the said land for their use and further erected a fence around, it thereby denying the Applicant and ingress thereto. The Applicant's case is that the Respondents' aforesaid actions are unlawful and wrongful and are not consonant with Swazi law and custom or the common law. The Applicant further deposed that he was unduly prejudiced by the denial of access to the land, particularly in view of a loan he secured from the Swaziland Development and Savings Bank, which stands in jeopardy of being cancelled byrthe Bank to his detriment if the Orders sought are not granted.

The Applicant also filed a supporting Affidavit, purportedly deposed to by Chief Madlenya Gamedze on the 29th January, 2003, and in which the latter confirmed the allegations in the Applicant's affidavit, in so far as they relate to him as true.

Respondents' Case

The Respondents initially raised points *in limine* regarding the urgency of the matter and the Court's jurisdiction to hear and determine this matter. These were no longer persisted in at the hearing of the matter and no further reference therefor needs be made in relation thereto.

On the merits, the 1st, 2nd and 4lh Respondents deny that the land in question was allocated to the Applicant. It is their case that the land was allocated to the Is' Respondent's family

focthree generations and that he is now the eldest member of his_family. Thejy further depose that the land was leased to the 3rd Respondent in 1999 and this consistent with the 3rdRespondent's own version.

The Respondents further deposed that some other piece of land was allocated to one Lofana Mkhonta through the *khonta* system but he did not cultivate the land in question. The 1st Respondent states that he is the one who until 1999 cultivated the land in issue. The Respondents emphatically deny that the land in question falls within the disputed pieces of land and in respect of which the disputants were the Applicant's uncle Lofana Mkhonta and one Phakama Dlamini, the 4th Respondent's father.

It is the Respondents' further deposition that it was after the demise of Chief Madlenya Gamedze that the Applicant then laid claim to the piece of land in question. The Respondents deny that the Order annexed was issued by the Inner Council of the *Umphakatsi,* the appropriate authority, but was actually an Order emanating from the Chiefs homestead and which was unilaterally handed down to them without hearing their side of the story. This, continue the Respondents, caused them to appeal against the said Order to the main Council *(Bandlankhuht),* in terms of Swazi law and custom.

The 1SI Respondent, in connection with the Affidavit purportedly deposed to by Chief Madlenya Gamedze, states that according to his knowledge, Chief Madlenya died and no successor has assumed that name. The Respondents further contend that the Applicant is not entitled to the interdict on account of his failure to establish that he has a clear right to the land. The latter is one of the issues to be decided in the course of this judgement.

The Applicant's Replying Affidavit does not merit much consideration as it mainly reaffirms the contents of the Founding Affidavit. The Applicant's main gripe is that the Order of the Chiefs Council in his favour stands and remains valid and operative until it is set aside. In consequence thereof, the Respondents' occupation of the land according to the Applicant in the face of the said Order, is therefor unlawful and entitles the Applicant to the final interdict as claimed in the papers.

Th£ Law applicable to Final Interdicts . -

. Innes J.A. carefully set out the law applicable to the granting of final interdicts in the celebrated case of SETLOGELO VS SETLOGELO **1914** AD **221.** These are the following: -

8. A clear right
9. An act of interference; and
10. No other remedy.

See also LIPSCHITZ VS WATRUS NO.**1980 (1)** SA **662** (TPD) at **673.**

C.B. Prest in his work entitled, "Interlocutory Interdicts", 1st Edition, Juta & Co. Ltd, 1993, at page 46-7 states the following, regarding the character of final interdicts: -

> *"Unlike an interim interdict, which does not involve a final determination of rights of the parties, a final interdict effects such a final determination of rights. It is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs '.' For the grant^ of such an order there are three requisites, all of which must be present".*

The said prerequisites have been stated above. All that remains is to investigate whether the Applicant herein has succeeded in establishing these. ■ "

Mr Maziya, in his able argument, submitted that the Applicant dismally failed to establish that he has a clear right to the property in question. This, Mr Maziya, submitted, was due to the fact that there were serious disputes of fact on the papers, which would render it improper for this Court to grant the final interdict. He referred the Court to some authorities in this connection.

Mr Mabuza, for the Applicant, on the other hand, initially insisted that his client had established all the requisites referred to above and that his client was therefor entitled to the Order he seeks. The force and authority of Mr Maziya's arguments, however left Mr Mabuza somewhat dazed as to how to respond.

Applying the Law to the facts

The starting point is to determine whether the Applicant has succeeded in establishing a clear right, together with the effect, if any, of the disputes of fact, which have ineluctably been proved to exist.

From the Applicant's depositions, it is clear that he alleges that the clear right emanates from the Ruling of the Chiefs Council, which ordered in part: -

11. The 3rd Respondent to desist from ploughing the land.

12. The 1st, 2nd and 4th Respondents to remove the fence and to stop interfering with the Applicant's use of the land in question.

The validity of the Order is challenged by the Respondents on the ground that the Applicant alleges that the deliberations on the matter were presided over Chief Madlenya Gamedze, whom the Respondents claim, died some time ago and could not, in view of his demise, preside over the said deliberations in 2003 and also depose to the affidavit as he was by then dead.

In reply to the above allegations, the Applicant made a bald denial without answering to the substance thereof i.e. whether or not the Chief did die. The denial is silent on this important issue and one cannot say that the Applicant's response raises a real dispute of fact. That could only be so if the Applicant reiterated that the Chief was alive at the time and further attested to the affidavit or if he stated facts that clearly and unambiguously controvert the Respondents' assertions. The Applicant's failure or refusal therefore to answer to an affidavit apparently deposed to posthumously does not deserve the criticism imputed by the Applicant.

In view of the foregoing, the conclusion is irresistible therefor that the Ruling itself is tainted with invalidity as the Respondent's claim that the Chief died cannot be gainsaid. It appears therefor that a person who is not the rightful chief masqueraded as one and chaired the meetings and further deposed to the affidavit. On this ground alone, I am of the view

that the Applicant cannot be said to have shown that he has a clear right and Mr Maziyals submissions should therefor stand.

It is well to also consider that the Respondents claim that the decision or ruling in question was not taken by the appropriate authority, which fact prompted them to appeal to the area's main council. The Applicant denies that any appeal was filed against the ruling to the best of his knowledge and states further that there is no affidavit by the *Indvuna* confirming that the appeal was lodged.

There is in my view no substance in the denial. The Applicant is not a member of the Appellate body and his ignorance regarding whether or not the appeal was lodged would be expected. I also take the view that the lodging of an appeal is a unilateral act of the appellant and does need the affidavit of the *Indvuna* to become a properly lodged appeal. Should I be not corcect in this regard, I hold the view that the question of whether or not the appeal was lodged at the least constitutes a dispute of fact, which should militate against the granting of a final interdict, as will be demonstrated in reference to case law below.

Besides the foregoing, it is abundantly clear that there is a clear dispute of fact regarding who the lawful occupant of the land in question is. There are two competing and mutually destructive claims before Court from the Applicant and the Respondents. The true history and lawful occupation of the land is clearly disputed on the papers and cannot be settled in this forum, moreso when according to the Respondents, the order on which the Applicant's case stands is at best limping and that an appeal against it remains pending.

It is worth noting that the dispute goes further than just the piece of land in question. In view of the Respondents' claim that the land allocated to the Applicant or his father is not the one that he now claims is the subject matter of the dispute. He was, according to the Respondents, allocated or had his father/uncle allocated some other distinct and separate property.

In VIF LIMITED VS VUVULANE IRRIGATION FARMERS ASSOCIATION (PUBLIC) COMPANY (PTY) LIMITED AND ANOTHER CIV. APPEAL CASE NO.3072000, Tebbutt J.A. had this to say at page 8 of the unreported judgement regarding the granting interdicts where disputes of fact exist: -

"It is equally well established that where there is a dispute of fact on the papers a final interdict should only be granted on notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order. "

See also the cases therein referred to.

A cursory glance at the papers filed of record, together with what I have observed above, lead to the only undeniable conclusion that the conflicting and irreconcilable contents of the Applicant's affidavit on the one hand and the Respondents Answering Affidavits on the other, do not justify such an Order being granted. This is especially so on such papers in the light of the numerous and material disputes of fact.

In ALIWAL NORTH MUNICIPALITY VS OVER AND SMITH (1375) 5 Buch 1308 at 140 - 1, Denyesen J. said: -

"It has not been shown that there is any clear right vested in the applicants which had been infringed as is essential to entitle them to an interdict. An interdict is a remedy of a summary nature, and to obtain this remedy a clear right must be shown. If the alleged right be of a doubtful nature, it is not fit to be decided upon in a summary manner, (my emphasis added).

The above excerpt perfectly sums up the position in this case. I am of the view that the Applicant has failed to overcome the first hurdle of establishing a clear right and it is clear at the least that the right he seeks to assert is doubtful. Furthermore, there are real and substantial disputes of fact which militate against determining this matter in a summary fashion. I do not, in the event, find it necessary or desirable, to consider whether the Applicant has succeeded to establish the balance of the prerequisites. I likewise find it unnecessary to consider Mr Maziya's other attacks on the Applicant's case.

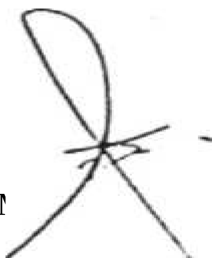
The Application be and is hereby dismissed with costs. I specifically order that the costs mulcted are in respect of Mr Maziya's clients only. 1 say this for the reason that Ms.

Zwane for the 3r Respondent, absented herself from the Court when the matter was argued, it having been stood down earlier. She therefore never made any sulMissTons during argument and on her late arrival never offered any explanation for her absence nor "did she tender her apologies to the Court. She only appeared when Mr Mabuza made his replies on points of law and quietly sat down without uttering a word. I order that she is therefor not entitled to recover her fees in respect of the hearing in question. Her example does not require or merit any disciples.

As an aside, I observe that this case was misallocated in the sense that it was referred to the Registrar for allocation of a date. The Registrar, on the parties' request, allocated it two (2) days when it was concluded in less than forty-five (45) minutes. More accurate estimates are necessary to redeem the time.

Another disconcerting aspect to this matter is that I had to deal with it in the mysterious absence of the original Judges' file. A new file had to be reconstructed specifically for the hearing and in the process, I was robbed the opportunity to read the Judges' notes and Orders on the file, which may have had an effect on the case. Happily, it does not appear so. Its whereabouts, notwithstanding a diligent search could not be ascertained. The security of files in this Court is becoming a matter of grave concern and this is not the first ,r incident in which I have faced. Strict remedial measures are therefor called for the arrest this cancerous tendency. A stitch in time saves nine.

Finally, I order that an investigation be launched into the identity of the person who deposed to the affidavit attributed to Chief Madlenya Gamedze, to ascertain whether or not a crime was thereby committed. I further order the Police and the Director of Public Prosecutions to take appropriate steps against any individual who may be found to have contravened the law in this regard.



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