IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Trial No. 511/2004

In the matter between:-

MAJAHONKHE HLETA Plaintiff

Vs

GCOKOMA DLAMINI 1st Respondent

MPHOSI NDZABUKELWAKO 2nd Respondent

GEORGE KHUMALO 3rd Respondent

MJAJI DLAMINI 4 th Respondent

Coram: Annandale, ACJ

For Plaintiff: Mr. Mdluli

For Defendant: Mr. Ntiwane

JUDGMENT

10/10/05

(Transcript of recorded judgment delivered in open court)

[1] In this matter the Applicants came to court by way of Notice of Motion which was dated the 19^ February 2004 and set down for hearing on the 23rd of February 2004 for the following relief:-

1. That a rule nisi was sought for an order to:

(a) Order the Respondents to remove a fence and restore possession of certain premises and where necessary, with the assistance of the Sheriff and the Police;

(b) To restrain and interdict the Respondents from further erecting a fence around the same property;

(c) To interdict and restrain the Respondents from interfering with the Applicant's lawful possession of the property;

(d) A restraining interdict to stop the respondents from intimidating, harassing or threatening violence to the Applicant and his family;

(e) To direct the police to do the necessary to ensure carrying out of the order;

(f) Costs

(g) Further or alternative relief.

[2] The Notice is addressed to the Registrar and also to each of the 4 respondents by name, c/o the Chief's Kraal or Umphakatsi. The Rules of Court that refer to applications under Sub Rule 6(2) state:-

"When relief is claimed against any person, or when it is necessary or proper to give any person notice

of such application the Notice of Motion shall be addressed to both the Registrar and such person otherwise it shall be addressed to the Registrar only."

Sub Rule 6(4) reads: -

"Every application brought ex parte by way of petition or Notice of Motion shall, save in matters of urgency, be filed with the Registrar and set down not later than midday on the day preceding the day on which the application is to be heard."

Further applicable is Sub Rule 6 (7) which reads:

"Any person having an interest which may be affected by a decision on an application brought ex parte may deliver a notice of an application by him for leave to oppose supported by an affidavit stating the nature of such interest and the ground upon which he desires to be heard whereupon the Registrar shall set such application down for hearing at the same time as the application brought ex parte."

[3]It is salutary practice and it is also an issue addressed in a practice directive issued by the former Chief

Justice, that all applications shall be served on the respondent/s with the exception of ex parte applications. Further, where the applicant or his attorney is of the view that the relief which is sought may be frustrated if the respondent gets notice of the application before it is before court, such as attachment of movables in a rent interdict, save for the few exceptions, all applications must be served

on the respondents. The Rules of Court also provide that where an application is brought ex parte it will normally not be served on a Respondent.

[4] The application that was before court, set down for the 23rd February 2004, does not contain a prayer for the relief to condone the non-service of the application on the Respondents, either by necessary implication or, as it is usually done, motivated on an affidavit in papers. It is not even stated that condonation is sought for non-compliance with the Rules of Court in so far as forms and service is concerned. This application does not contain such a prayer.

[5] Mr. Mdluli who appears for the applicant today the 10th October 2005, now seeks from the bar for this court to condone that aspect.

[6] The second sub-rule of Rule 6 is peremptory. It does require the respondent to be given notice of relief sought against him. As I have quoted in sub rule 7, such an affected Respondent, if not part of the ex parte proceedings, can then apply to be heard at the same time, to oppose the matter. But that was not done in the present matter.

[7] The founding affidavit of the applicant does not anywhere in it motivate or provide justification to dispense with notice to the Respondents. It does not seek to have the application heard ex parte. It does not say anywhere that if the respondents get to know about this matter by being served, the object of the exercise shall be frustrated.

[8] On the 23rd of February a rule nisi order was issued and authorized in the terms as sought in the Notice of Motion. It is common cause that only afterwards, once the court order had already been issued, that the Court Order, the founding papers and the Notice was served. This is evident from the return of service filed by an Acting Deputy Sheriff on the 28th April 2004 to say that on the 25th February he did what he did. I quote from the return, which reads:

"That on the 25th day of February 2004 was for serving (sic) the documents to the relevant respondents, after exhibiting the original, explaining the nature and exigencies of the said process, the 9th day of April 2004 the aforesaid fence was removed halfway by the subjects of the said Chief Gcokoma Dlamini of Embelebeleni chiefs kraal and the 13th day of April 2004 with the assistance of the Royal Swaziland Police from Manzini Regional Headquarters, the fence was removed completely by the subjects of Ensuka area and of Embelebeleni area for the second process, after the subjects had stopped removing the fence without any reason from the 1st process."

Although it may be common cause that the order and the founding papers may have been served the return of service that certifies it is certainly not so clear. It is not only grammatically crippled but also wanting about what was to be done because the heading reads - "Return of Service for Court Orders." Be that as it may, the very next day, the 26th February, the Respondents then filed a Notice of Intention to oppose.

[9] This application is firstly defective, in my view, due to non-compliance to the Rules of Court in that the respondents who were certainly affected by the relief were not given Notice as they were entitled

to. The second aspect impacts on the substance of the matter.

[10] What this application seeks is to have a fence which was erected around the Applicant's property removed. At face value it seems to be spoliation but when having regard to the further relief that was sought and obtained it concerns various interdicts and restraining orders all given under a rule nisi which has neither been confirmed nor set aside thus far.

[11] To obtain such relief a clear right needs to be shown. It is common cause that there is a dispute as to whether or not the Chief of the area where the land is situated is cited as one of the Respondents. It is common cause that there is a dispute as to whether the Chief cited as a Respondent has authority over the person of the applicant or not. Should the court entertain the application, it is not an application that can properly be resolved on the papers alone, as they are presently before this court. By necessity viva vocae evidence will have to be heard and it is further my view, despite address by both counsel who are appearing in this matter, that the Court will require the assistance of assessors who are versed with the dictates of Swazi Law 8b Custom. It is in issue whether a Chief does or does not have the authority over a person living on Swazi National Land, to tell that person to vacate his homestead and settle elsewhere.

[12] The Applicant contends that the respondent Chief does not have such authority, certainly not over him and certainly not without him first being heard at the Umphakatsi to state his case etcetera. The Respondent Chief says to the contrary that a Chief does have the authority over the subjects of himself to tell them where to stay, where not to stay, how to allocate the land and for what purposes Swazi Nation Land is to be used.

[13] It is common cause that the Applicant lives in his homestead on Swazi Nation Land. In the event that this matter was to proceed, it would, require evidence to be heard as to the factual disputes that have now become more than just academic in so far as the authority of Chiefs go, also which Chief has authority over the piece of land occupied by the Applicant, also to what extent does the Chief's authority hold good on the issue of resettlement. These are aspects to be determined by the Court on the hearing of evidence and not on the papers alone. Further, for that to be done by the court with assessors.

[14] I say this knowing that the High Court does have inherent and unlimited jurisdiction but also knowing full well that in the Kingdom of Swaziland, with a dual legal system, chieftaincy issues can be enormously contentious especially if adjudicated on by the High

Court. We have had ample demonstration of that in the recent past with the issues of Kamkhweli and Macetjeni, for instance. There are more. But that being a matter of policy, if I revert to the particular matter before me.

[15] It is trite that issues of dispute that cannot be readily resolved on affidavit are not commonly dealt with by way of application. Application proceedings in a matter like the one at hand are not the appropriate. Action proceedings when such factual disputes arise are required.

[16] The court has carefully considered this matter. I had an opportunity to go through the pleadings over this weekend and I raised from the bench some of these issues even before commencing with the hearing. Knowing that Swazi Law and Custom can very well come into play here and the issue of assessors on that aspect is but one concern. The technical defects in so far as non-compliance with the

rules go is detrimental to the application. This court will not now, more than a year later, condone non-service of the papers on the Respondents, which should have been done from the onset. With that in mind, plus the question of complicated and serious factual disputes, I am disinclined to agree that the matter is properly before me for adjudication on Application.

[17] Concerning prejudice, the Applicant's attorney argues, that it is the duty of the Respondents to indicate to the court in their answering affidavits what prejudice was occasioned by them in a matter like this. I do not have to determine whether the onus is correctly stated. I hold a different view, that it is for the Applicant to aver the absence of prejudice, but that is not necessary to decide. Prejudice by the Respondents is clearly shown in their affidavits filed of record. The Respondents clearly state that they are prejudiced, not only themselves personally but the community over which the Respondent Chief has authority over his subjects in that they cannot utilize the land for the purposes that has been determined at the Umphakatsi by the Chief. So, it is incorrect to say that there is no prejudice alleged by the Respondents.

[18] Be that as it may, it is the ruling of this Court that having considered the papers and argument and the law it is my considered view that the application presently before me is not to be heard in the manner in which is before me. The points raised in limine are good and valid in law. For the reasons aforesaid the Court orders that the rule nisi issued on the 23rd February 2004 under civil case number 511/2004 should be discharged and set aside. The Application is dismissed in limine, with costs.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE