,

THE HIGH COURT OF SWAZILAND

NHLAVANA MASEKO AND 4 OTHERS

Applicants

And

GEORGE MBHATA

1 Respondent

TERRENCE REILLY

2nd Respondent

Civil Case No. 1104/2004

Coram:S.B. MAPHALALA - J

For the Applicants : MR. M. DLAMINI

For the Respondents:MR. K. MOTSA

RULING

(On points of law) (04/03/2005)

[1] The application before court which was brought under a Certificate of Urgency relates to spoliation ante omnia and Respondents have taken points in limine as follows:

"2.1 Non-joinder. 2.1.1. Big Game Park

2.1.1.1. The Applicants refer to me as the Chief Executive of Big Game Park but have failed to join the said entity in either their founding affidavit or supplementary affidavit..."

2.1.2 Royal Simunye Sugar Corporation.

The Applicants makes reference to the Applicants Simunye Sugar , Corporation (RSSC), but fails to join it as party as according to them it prepared the "CBD".

2.1.3 Hlane Royal National Park.

The Applicants have further failed to join the Hlane Royal National Park to whom control of the area known as Mashiyazamile was transferred during or about February 2001, being the rightful possessors and controllers of this area.

2.2 Urgency

2.21 The Applicants say this matter is urgent and Respondents submit that the Applicants have not been candid with this Honourable Court and submit that this matter is not urgent.

2.2.2 The applicants started making claim to the land Mashiyazimile on or about 4th July 2003 and Respondents request that this Honourable Court consider paragraphs 3.10 - 3.10.3 as if specifically incorporated herein.

2.3 Spoliation

2.3.1..... The Applicants are merely detectors and as such not entitled to bring a claim under the mandament van spolie as they are claiming ; possession of the property o secure the interests of the indigenous..... people.

2.4Dispute of fact and hearsay evidence.

2.4.1 Respondent further submits that this application raises disputes of fact in particular paragraphs 4.2, 4.3, 4.4 and others ..."

[2] This judgement relates to the examination of these points and they will thus be treated ad seriatim hereinunder as follows:

(I) Non-joinder.

[3] It is contended on behalf of the Respondent in this regard that the Applicants are seeking redress from the Chief Executive Officer of Big Park Trust, (hereinafter refereed to as "Big Game Parks") and an employee of Big Game Parks, but failed to join Big Game Park which is a separate legal entity entitled to sue and be sued in its own name through trie' joinder of the trustees of the Trust through whom the trust acts. Further that it is unclear why Applicant have cited the I[S] Respondent, as he is merely an employee of Big Qame Parks. Therefore, the application is ill-conceived in that an order against the first and second Respondents would, in law, have no effect as regards to the actions taken by the trustees of Big Game Parks.

[4] Per contfci arguments were advanced by Mr. Dlamini who appears for the for the Applicants that

the issue of non-joinder does not arise in casu because Big Game Parks Trust as a Trust is not a juristic person. To this end the court was referred to the cases Van Der Westthuiszen vs Van Sandwyk 1996 (2) S.A. 490 and the local case of Lawyers for Human Rights and another vs Minister of Justice and another Civil Case No. 1822/2001. In the present case the Chief Executive Officer is not sued as trustee, but as a Chief executive Officer of an unjuristic person.

[5] In this regard I am inclined to agree with the submissions made on behalf of the Applicants that the 2nd Respondent is being sued by virtue of his appointment by the King not as a trustee of Big Game Parks. The letter by King Sobhuza II, the Ingwenyama of Swaziland dated the 25th July 1967; at page 45 of the Book of Pleadings attest-to this fact. Further in paragraph 2.2 of the Applicant's Founding affidavit 2nd Defendant is cited in his capacity as Executive Officer and/or in his personal capacity. "Furthermore, the letter by the Ngwenyama of Swaziland appoints the 2nd Respondent in his personal capacity.

[6] Coming' to the non-joinder of the Royal Simunye Sugar Corporation and Hlane Royal National Park I find that on the latter Mr. Dlamini is correct that this is not a juristic person and cannot be sued in a court of law. In respect of the former I find that there was no need for the joinder of Royal Swaziland Sugar Corporation in view of the letter 'fro'rh the General Manager Agriculture of the Corporation dated the 6th October 2003.

[8] In the totality of what I have said above, I find that the point of law of non-joinder cannot be

sustained on the facts.

(ii) Urgency

[9] It is contended for the Respondents that the Applicants have not shown that there is any urgency in the matter at hand. The Applicants allege that they started making claims to the land as far back as the 4th July 2003, when they were first removed from the land, and have failed to take any action up to now.

[10] In my assessment of the Applicants' Founding affidavit urgency has been established in this case when one has regard to paragraphs 4.4, 4.5 and 4.6 thereof. I am satisfied that the requirements of Rule 6 (25) (a) and (b) have been met in casu. Although it has become academic to consider this point in view of the fact that I heard arguments in this matter on the 23rd November 2004, when the application itself had been launched itr'April 2004. The averments contained in the Founding affidavit conformed to Rule 6 (25) (a) and (b) on urgency. Therefore the point of law in limine in this regard could not have succeeded had the point been taken in April 2004.

(iii) Spoliation

[11] The point taken in this regard is that the Applicants are merely detectors and as such are not entitled to bring a claim under the mandament van spolie, as they are claiming possession of the property to secure the interests of indigenous people. The Applicants have not shown that they hold the property for their own personal benefit, but contrary to the requirements of the mandament van spolie, indicated that the land is being held on behalf of the indigenous people of Swaziland, and as such are

not more than a negotiorum gestor and does not qualify for a mandament van spolie. (see Pieter vs Midler 1973 (4) S.A. 126 (E) 128; Bank Van Die ous vs Rossiuw 1984 (2) S.A. 644 (c) 648; Zulu vs Minister of Works, Kwazulu 1992 (1) S.A. 181 D; Engling vs Bosielo 1994 (2) S.A. 388; Elastocrete (Pty) Ltd vs Dickens 1953 (2) S.A. 644 (SR) and Nienaber vs Stuckey 1946 A.D. 1049).

[12] Mr. Dlamini countered this argument by contending that this point is not well taken because it requires reference to the body of the main application. A further argument is premised on the dicta found in the case of Marais vs Engler Earthworks (Pty) Ltd 1998 (2) S.A. 450 where the following was said:

".. Mandamentvan spolie protected possession purely and it mattered not that the property in question belonged to a third party or even to the spoliator. All the person claiming spoliation need to prove was factual possession".

[13] It would appear to me that Mr. Dlamini is correct in his first argument that this point is not well taken because it requires reference to the body of the main application. The determination of whether the present application is a spoliation is the crux of the matter and in my view, falls to be addressed on the merits.

[14] For the above-mentioned reasons I find that this point of law in limine cannot succeed.

(iv) <u>Dispute of fact and hearsay evidence.</u>

[15] The argument advanced on behalf of the respondents in this regard is that there is a dispute of fact on the affidavit presented before court such that the matter cannot be resolved on the papers. The dispute of fact is that the Applicants allege that they were granted certain rights, but rely on hearsay evidence to support the claim. Unlike the Respondent who has attached his appointment by His Majesty, King Sobhuza II, the Applicants makes wild allegations with regards to a similar appointment. No affidavit confirming the allegations made by the Applicants are given by either the Ingwenyama nor his senior officers and it is therefore denied that any such evidence exist. The Respondents further directed the court to paragraphs 4.3, 4.4 and 4.5 in the Founding affidavit where hearsay evidence is adduced without any verifying affidavits.

[16] Mr. Dlamini for the Applicants offered au contraire argument the effect of which is that there are no dispute of facts and that even if the court finds that there are disputes the court can direct that viva voce evidence be led to resolve those disputes of fact.

[17] In my assessment of the affidavit evidence and also the portions of the Founding affidavit as directed by Counsel for the Respondents I find that the Applicants' Founding affidavit is replete with disputes of facts and hearsay evidence.

The most notorious are :the issues that surrounds annexure "CBD" whether the area called Mashiyazimile is reflected therein. The issue of the lease by Royal Swaziland Sugar Corporation by the Ngwenyama and many other issues. The Applicants allege that they were granted certain rights, but rely on hearsay evidence to support the claim.

[18] The question that vexes the court presently therefore, is what is the next step in the proceedings? The legal position as regards this aspect of the matter was clearly enunciated in the South African case of Plascon - Evans Paints LTD vs Van Riebeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A) at 634 H - 635 B where the Appellate Division said the following:

"Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact ...If such a case the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court ... and the Court is satisfied, as to lhe inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the final relief which he seeks

[19] The procedure;therefore where, at the hearing of motion proceedings, a dispute of fact on the affidavits cannot be settled without hearing of oral evidence, the court may, in its discretion,

a) Dismiss the application;

b) Order oral evidence to be heard on specified issues in terms of the rules of court; or , .

c) Order the parties to trial.

[20] Mr. Motsa for the Respondents submitted that the court in casu ought to dismiss the application as Applicants should have realized when launching their application that serious disputes of facts were bound to develop (see Herbstein and Van Winsen, The Civil practice of the Supreme Court of South Africa, 4th Ed, Juta at page 241 folio 90 and the cases cited thereat). I tend to agree with Mr. Motsa that Applicants should have realized when launching their application that serious disputes of facts were bound to develop. This application is replete with disputes of fact as I have outlined above and I am obliged to dismiss the application.

[21] In the result, for the afore-going reasons I dismiss the application on the points of law in limine. Costs to follow the event.

S.B. MAPHALALA

JUDGE