

BEN MASANGO N.O.

Applicant

And

AYANDZA EMADVODZA FARMERS ASSOCIATION

Respondents

Civil Case No. 201/2005

Coram

For the Applicant For

the Respondents

S.B. MAPHALALA - J

MR. C. NTIWANE MR.

B. MAGAGULA

RULING ON POINTS IN LIMINE

(31/01/2005)

[1] This application came under a Certificate of urgency last Friday for an order, *inter alia* that a rule *nisi* issue calling upon the Respondents to show cause on a date to be fixed by the court why they should not be interdicted and restrained from clearing and ploughing the land allocated to the 28 persons listed in annexure "A" of the Founding affidavit who are members of the Applicant association which land is situate at Sidvwashini, District of Hhohho pending an audience to be heard by the Applicant with the Ngwcnnyama and the traditional structure' and costs in the event the application is opposed

[2] The Founding affidavit of one Ben Manikina Masango is filed in support thereto. A supporting affidavit of one Khulile Mvila is filed thereto and that of Dzabukile Mvila. Various annexures are attached thereto.

[3] The Respondents opposed the granting of this order and have raised two points of law *in limine* from the bar stating that they were given short notice to file opposing affidavits. These points are the subject matter of this judgment. The first issue is that Applicant has not satisfied the peremptory requirements of Rule 6 (25) (a) and (b) of the Rules of the High Court as to urgency that the averments in the Applicants Founding affidavit fall far too short in meeting the requirements of the Rule. The second point raised is that the Applicant in the present case has not shown a *prima facie* right as one of the requirements for an interim interdict. In fact, so the argument goes, the Respondents */// c.asu* have a better right than the Applicant as they have an Order from a competent body allowing them to plough the land which is the subject matter of the dispute. In this regard the court was referred to the legal authority of *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 1077 and the case of *Ferreira vs Levin No. and others 1995 (2) S.A. 813 (W) at 817 F.H.*

[4] Mr. *Ntiwane* who appears for the Applicant advanced *au contraire* arguments stating that firstly, the Applicant has made sufficient averments in his Founding affidavit to pass the test set by Rule 6 (25) (a) and (b) and secondly, that the averments in the affidavit show that the Applicants have a better right than the Respondents in that they are the "owners" of the disputed land and he further urged the court to act with circumspect in view of the volatile nature of this dispute. In this regard he submitted that there has been a previous clash where violence erupted resulting in 11 of his clients being charged for assault.

[5] I shall proceed to address these two issues *ad seriatim*.

a) Urgency

[6] The matter is not urgent in that the Founding affidavit does not fully address the requirements of Rule 6 (25) (a) and (b) of the Rules of Court.

Rule 6 (25) reads as follows:

a) In urgent applications, the court or Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms 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 paragraph (a) 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 (that he could not be afforded substantial redress at a hearing in due course.

[7] Dunn J in the case of *Humphrey II. Henwood v Maloma Colliery and another - Civil Case No. 1623/93* held that the provisions of Rule 6 (25) (a) and (b) are peremptory and that they must be alleged and satisfied.

[8] Masuku J in the case of *Megalith Holdings v RMS Tihyo (Pty) Limited and another - Civil Case No. 199/2000 (unreported)* at page 5 stated as follows:

"The provisions of Rule 6 (25) (b) exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in 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 slate the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear *ex facie* the papers and may not be gleaned from the surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's Counsel".

[9] Sapire CJ stated the requirements of the Rule with absolute clarity in the case of *LLP. Enterprises (Pty) Limited v Nedbank (Swaziland) Limited - Civil case No. 788/99 (unreported)* at pages 2 - 3 where he states:

"A litigant seeking to invoke the urgency procedures must make specific allegations of fact, which demonstrate that the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but must give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow".

[10] The Rule requires the Applicant to fully state the grounds of urgency and the reason why they cannot be afforded substantial relief through a hearing in due course.

[11] The paragraph in the present case which purports to establish urgency is paragraph 9 thereof and reads as follows:

"The matter should be treated as one of urgency for the reasons set out in paragraph 7.2 hereof. Applicant prays that (sic) paragraph be regarded as if herein inserted. It is submitted that the Applicant association has made out a case for the relief applied".

[12] Paragraph 7.2 thereof reads as follows:

"It is submitted that the order referred to must be the order issued by Mr. Bhcka Mabuza on the 17th November 2004, as aforesaid in paragraph 4.7 hereof. •

[13] Clearly the above paragraph does not establish urgency. However in argument *Mr. Ntiwane* contended that paragraph 7.2 found in paragraph 9 was typing error it was supposed to have been paragraph 8.2 thereof. Having considered arguments on this point I accept that it was a typing error. That the relevant paragraph is paragraph 8.2.

[14] The said paragraph 8.2 reads as follows:

"Applicant fears that Respondent will continue with the intended action as aforesaid in paragraph 5.7.2 hereof. Applicant also fears that its members feel strongly about being evicted from their land no order to that effect having been served on them. There is a real likelihood of further violence as was the case on the 21st January 2005. Paragraph 5.3 and 5.7.1 hereto refers",

[15] In my assessment of the affidavit evidence I cannot say that the above paragraph establishes urgency as required by Rule 6 (25) (a) and (b) of the High Court Rules. It appears from the affidavit that it is the Applicants who are the instigators of the violence which is being feared. It appears also that the Applicant does not want to accept the Order issued by the Swazi National Council through its Secretary Mr. Bhcka Mabuza. It would appear to me that before that order is set aside it is

presumed to be a lawful order. It is not for this court to enquire as to its validity or otherwise in these proceedings. Therefore it follows that on the facts of this case the Respondents has a better right in the form of an order from a competent traditional authority. As to how it came about this is not known to (his court.

[16] On the basis of the above-mentioned reasons I cannot issue the Order sought. I can only urge the Applicants to follow the appeal procedures set out in terms of the traditional law and not take (he law into their on hands as they did on the 21st January 2005.

[17] In the result, the points of law *in limine* are upheld. Costs to follow the event.