

IN THE HIGH COURT OF SWAZILAND

Civil Case No. 3028/2006

JOEL MAVIMBELA 1st Applicant**AMOS NDZIMANDZE** 2nd Applicant**RICHARD MAVIMBELA** 3rd Applicant**BONGINKOSI WILLIAM NDZIMANDZE** 4th Applicant**DUDUZILE MABUZA** 5th Applicant

And

FOHLOZA ZWANE 1st Respondent**MADALA SHONGWE** 2nd Respondent

Coram: S.B. MAPHALALA – J

For the Applicants: MR. S.C. DLAMINI

For the Respondents: MR. S. MAGONGO

JUDGMENT20th July 2007

[1] Before court is an application for summary judgment for the eviction, of both Defendants from Farm No. 474 as well as costs of suit.

[2] However, for present purposes the Respondents have raised three points *in limine* that firstly, the Applicant's replying affidavit be set aside with costs on the ground that it was filed without the leave of court as envisaged by Rule 32 (5) (a) of the High Court (Amendment) Rules of 1991. The second and third points *in limine* are addressed in the Respondents affidavit resisting the application for summary judgment being secondly, that this matter in respect of the same parties

and cause of action is pending before this court under High Court case number 1980/2000 and thirdly, that the Plaintiffs are approaching this court with dirty hands in that since 1995 to date they are destroying Respondents crops which are growing and are threatening to demolish their homestead and locking the gates or pathway leading towards their homestead. However, this latter point was abandoned by the Respondents when the matter was heard. Therefore no further mention will be made to this argument in this judgment.

[3] Turning to the points of law *in limine* for decision I will start with the first point raised that Applicant has not complied with the provisions of Rule 32 of the High Court Rules. In arguments before me Counsel for the Applicant conceded that indeed the Applicant has not complied with the above cited rules of court but asked the court to condone this state of affairs. I have considered the arguments in this regard and I am inclined to grant the application for condonation as prayed for by the Applicant.

[3] Coming to the second and last point raised that this matter is *lis pendens*. In argument before me Counsel for the Respondent referred me to what is stated by the learned author *C. T. Harms, The Civil Practice of the Supreme Court* where the following is stated:

"The institution of second proceedings between the same parties and relating to the same subject matter while the first proceedings are pending is vexatious".

[4] The court was further referred to the South African case of *Friedrich Ground vs Continental Jewellery Manufactures 1993 (3) S.A. 76 at 83B* where the following was stated:

"The Defendant, however, has no right to a stay of execution. The court has a discretion to stay the second proceedings or to allow them to continue, the exercise of the discretion will depend on the grounds of convenience and fairness".

[5] After considering the arguments of the parties in this regard and having scrutinized what is stated in Civil Case Number 1980/2000 I have come to the considered view that this matter is *lis pendens*. The prayers in the Notice of Motion in the other case makes this plain that here we are dealing with the same parties and to some degree the same subject matter being Farm No. 474.

[6] In the result, for the afore-going reasons I order that this application be stayed pending the determination in Civil Case No. 1980/2000 and that costs to costs in the application to summary judgment at a future date.

S.B. MAPHALALA

JUDGE