

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3566/07

In the matter between:

CAIPHUS DLAMINI

APPLICANT

AND

ZWELITHINI DLAMINI

1st RESPONDENT

VUSI MAMBA

2nd RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: MR S. MNGOMEZULU

FOR RESPONDENTS: MRS. MASUKU

RULING 24th JULY, 2008

[1] A rule nisi was issued by this court on the 11th October, 2007 in favour of the Applicant. The rule nisi ordered inter alia that

"the Respondents and all those acting on their instructions are hereby interdicted and restrained from constructing structures and or interfering in any way whatsoever with the Applicant's

fields and or home situate at Sigombeni within the Manzini Region."

[2] In his application in support of the order sought and rule nisi obtained, the applicant made the following factual allegations.

1. In June 1993 he was allocated per Swazi law and custom, a piece of land on Swazi Nation land at Sigombeni area by the then Chief of the area, Msukusuku II.
2. He erected wooden poles to mark the beacons or boundaries of the property. He wanted to build a house thereon. He remained in peaceful and undisturbed possession of the piece of land" until sometime in September 2007 when the respondents invaded his land and removed the barbed wire fence he had erected thereon and commenced some excavation works in preparation for building a community school on the land. He alleges that this is an act of spoliation by the respondents.
3. The 1st Respondent is the Chief of Sigombeni area and the land in question falls under his jurisdictional control.

[3] In defence, the respondents make the following factual allegations, namely:

- (a) A piece of land which is about 500 metres away from the land in question was allocated by the late Chief to LaThemba, the wife of the Applicant. This was around 1973.
- (b) LaThemba did not fence off the land given to her until she died in the 1980s.
- (c) In the year 2005 or 2006, land adjacent or adjoining that allocated to LaThemba was given to the Methodist Church for purposes of building inter alia an orphanage and Primary School thereon.
- (d) In 2007, the community under the leadership of the 1st respondent indicated to the Applicant that it wanted the land allocated to his wife to be part of the land to be developed by the said Church, but the Applicant refused and immediately started fencing it off but went

beyond the boundaries of the land allocated to his late wife. He unlawfully encroached on land belonging to the Community and was immediately told to remove the encroachment. He refused.

(e) The Respondents then allocated to the church another piece of land adjoining that allocated to LaThemba and this is the land that the Applicant claims he has been illicitly dispossessed or despoiled of. In other words, the land in question is not within the boundaries of the perimeter fence erected by the Applicant around the land allocated to his late wife and it is not land owned or allocated to the Applicant. In summary the Respondents' answer to the Applicant's claim is that:

"We have not tampered with the land that the Applicant claims is his. Applicant can still develop the land that was allocated to his wife." (per paragraph 12 of 2nd Respondent's answering affidavit).

And later in paragraph 14.1 the Respondents make the point that;

"Applicant was never in possession of the land where the construction is taking place. The construction is taking place on land adjacent to the one fenced off by Applicant.

[4] In reply, the Applicant insists that the construction works are being done on land allocated to him and that no land was ever allocated to his late wife.

[5] There is clearly a real dispute of fact in this application. First, the exact extent or boundary of the piece of land allocated either to LaThemba or the Applicant himself is not ascertainable on the papers herein. This is perhaps understandable in view of the fact that this is on Swazi Nation land. The land is unmarked. At the end of the day the Applicant says the activities he complains of are taking place on land allocated to him. This is denied by the Respondents. There is nothing further to identify this piece of land. This dispute is central to the success or failure of this Application. It is, however, irresolvable on the papers before me.

[6] Secondly, and linked to the first dispute, is the issue of whether or not the Applicant was in occupation of the property and thus entitled to a

mandament van spolie. I do take note of course that the rule nisi he obtained was an interdict and not a spoliation order.

[7] In view of the glaring and real dispute of fact herein, I could not confirm the rule nisi and it was accordingly discharged with costs. See **PLASCON EVANS PAINTS v VAN RIEBECK PAINTS (PTY) LTD 1984 (3) SA 623 (A). ROOMHIRE CO (PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD 1949 (3) SA 1155 (T)**. The Applicant is at liberty to file an action to vindicate his rights, should he be so minded.

[8] An unwritten judgment herein was handed down in open court immediately after arguments on the 7th December 2007. I have since been requested to provide a written one. This is it.

MAMBA J