



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 10/2009

DIESEL SERVICES LIMITED

Applicant

And

**ZEPHANIA NTSHALINTSHALI
AND 7 OTHERS**

Respondents

**Coram
For the Applicant**

**S.B. MAPHALALA - J
MR. S. MNGOMETULU**

For the Respondent

MR. L. MAZIYA

JUDGMENT
12th February 2009

[1] The Applicant has filed an urgent application for an order *inter alia*, directing the Deputy Sheriff for the District of Manzini to attach the persons of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents and commit them to goal at

Zakhele or Sidvashini and/or Mawelawela Remand Centre for a period of thirty (30) days for contempt of the order of this court granted on the 9th January 2009 or until they purge their contempt.

[2] In prayer 4 thereof that the Respondents pay costs of suit on an attorney and own client scale. Further prayers are made in 5, 6, and 7 thereof including that paragraph 4.1 and 6 operate as a rule *nisi* to operate with immediate and interim effect pending the return of this application.

[3] The Founding Affidavit of the Applicant's Managing Director Thomas Kirk is filed in support with the relevant annexures.

[4] A rule *nisi* was granted by this court on the 9th January 2009, *per* Agyemang J.

[5] On the 15th January 2009, the Respondents filed their Notice of intention to oppose and on the 19th January 2009 they filed their Answering Affidavit.

[6] On the 20th January 2009, the Applicant filed a Replying Affidavit.

[7] The issue for decision by this court pertains to a point *in limine* raised by the Respondent's Counsel from the Bar to the effect that the matter is *lis pendens* as it was dealt by this court earlier on resulting in an appeal before the Supreme Court. The latter court ruled that the matter be heard by the Central Farm Dwellers Tribunal. The Respondents are now taken aback that this matter is now before this court when it should be before the Tribunal aforesaid.

[8] The only question for decision *in limine* is whether the matter is *lis pendens* as stated above in paragraph [7].

[9] *Mr. Mngomezulu* for the Applicant has argued that this is not so and he went further to distinguish the case before court and the one before the Supreme Court which according to him was a totally different case.

[10] It appears to me that the answer to this important issue is to examine the property in the Supreme Court case and the property that maintains in the present case. If I find that the property is the same on both instances the objection of *lis pendens* succeeds. However, if I find that these are two different properties the objection ought to fail and the matter stands to be determined on the merits.

[11] The Applicant has stated in the Founding Affidavit at paragraph 6.1 that the property in question is Portion 56 (a

Portion of portion 47) of Farm No. 1270 situated in the Manzini District of Swaziland.

[12] The Respondent on the other hand has stated at paragraph 7.6 as follows:

“I humbly submit that the piece of land where the cattle are currently grazing is not portion 56 (a portion of portion 47 of Farm 1270) at all. The Applicant even stated this under oath under case no. 4467/07. It has further been our stand point that, even if it were to be proven as a matter of fact that, the land we are occupying and where our cattle are grazing is a farm, we have acquired such land by acquisitive prescription. For over thirty years our cattle have been driven on the land in dispute and they have grazed on the land in dispute”.

[13] Further on at paragraph 7.10 of the Answering Affidavit the Respondent states that even if the land in question is not Swazi nation land, in terms of the Deed of Transfer 1021/2006 of Portion 56 (a portion of portion 47) of Farm No. 1270 situated in Manzini District, that piece of land is subject to special conditions one of which is that it is subject to all rights of way.

[14] After considering the contentions and averments in the parties affidavit it appears to me that there is a dispute of fact as to where the area belonging to the Respondents *vis a vis* portion 56 (of portion of portion 47) alleged to belong to the Applicant.

[15] It is trite law that an application may be dismissed with costs when the Applicant should have realized when launching his application that a serious dispute of fact was bound to develop. (see *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)*)

[16] It is on the above-cited *dictum* that this application ought to be dismissed. It would also appear to me that the Deed of Transfer 1021/2006 of portion 56 (a portion of portion 47) is subject to special conditions one of which is that it is subject to all rights of way.

[17] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHLALA
PRINCIPAL JUDGE