

HIGH COURT OF SWAZILAND

Held at Mbabane

Mantathu Ngwenya

Applicant

vs

Isaac Sgulugwane Zwane

1st Respondent

Deputy Sheriff

2nd Respondent

Civil Case No. 1538/08

Coram
For Applicant For
Respondent

MAPHALALA PJ MR. J.
MAVUSO R. B.
SIMELANE

JUDGMENT

10th July 2009

[1] Before court is an application brought under a certificate of urgency for an order in the following terms:

"1. **Dispensing with the rules of court and hearing this matter urgently.**

2. **That a *rule nisi* do issue calling upon the Respondents to show cause on a date to be fixed by the Honourable Court, why;**

1) **The attachment of 6 herd of cattle by the 2nd Respondent in execution of the writ hereto annexed marked "A" should not be declared illegal and set aside.**

2) **That the cattle be returned and/or Applicant be allowed to collect, wherever same may be found.**

3) **The Respondents should not jointly and severally, the one paying for the other to be absolved, be ordered to pay the costs of this application.**

4) **Further and/or alternative relief.**

3. **That pending the finalization of this matter, paragraph 2(b) operates with immediate interim effect."**

[2] The founding affidavit of the applicant is filled where she relates the material facts in this dispute. The essence of this case is that she is not a party to the proceedings which culminated in the issuance of annexure "A".

[3] The Respondent opposes the application and has filed an Answering Affidavit to this effect.

[4] I must mention that the Respondent had raised a *point in limine* of urgency. But in view of the passage of time where undertakings of the parties were made in May 2008 not to dispose of the cattle pending the finalisation of the case the issue of urgency is now academic.

[5] On the merit of the application the first issue I need to address is the argument raised by the Respondents that Applicant has

set out a skeleton case in his supporting affidavit, that any fortifying paragraphs in his replying affidavit will be struck out.

[6] In this regard the Respondent has submitted the following at paragraph 1.1 to 1.4 of his Heads of Arguments:

"1.1 It is our humble submission that *in casu* Applicant has made a skeleton case in her founding affidavit and has sought to fortify her case in her replying affidavit by bringing in fresh evidence of other witnesses, especially Manguluza Tsabedze, knowing well that Respondent will not have a chance to answer to it.

5) **Applicant, it is submitted should have filed the supporting affidavits of Mphikiseni Ngwenya and Mangaluza Tsabedze with her founding affidavit so that Respondent should get a chance to investigate the allegations deposed to in their affidavit and answer to them.**

6) **Applicant in her founding affidavit simple said the cattle attached belonged to her as they were registered in her name at Magonswana dip tank under dip number 46. She should have supported her evidence with that of Mangaluza Tsabedze to corroborate her so that Respondent could be in a position to answer to it.**

7) **As it stands, it is submitted that the evidence of Mphikiseni Ngwenya and Mangaluza Tsabedze should be struck out".**

[7] According to *Herbstein van Winsen, "The Civil Practice of the Superior Courts in South Africa"4th Edition* at page 366 the following is stated:

"The general rule which has been laid down repeatedly is that an application must stand or fall by his Founding Affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the Respondent is called

upon either to affirm or to deny. The Appellate Division has held that it is not permissible to make out new grounds for an application in a Replying Affidavit. If the Applicant merely sets out a skeleton case in his supporting affidavits, any fortifying paragraphs in his Replying Affidavit will be struck out. But if facts alleged in the Respondent's Answering Affidavit reveal the existence of possible existence of a further ground for the relief sought by the Applicant, the court will allow the Applicant in his Replying Affidavit to utilize and enlarge upon what has been revealed by the Respondent and to set up a additional ground for relief arising from the Answering Affidavit."

[8] After assessing the affidavits of the parties and the arguments by counsel it appears to me that the evidence of Mphikiseni Ngwenya and Mangaluza Tsabedze should be struck out. The replying affidavit introduces fresh evidence of other witnesses, especially Mangaluza Tsabedze when Respondent could not reply to those facts. The Applicant should have filed the supporting affidavits of Mphikiseni Ngwenya and Mangaluza Tsabedze with her Founding Affidavit so that Respondent could investigate the allegations deposed to in their affidavits and answer to them.

[9] Applicant in her Founding Affidavit simple said the cattle attached belong to her as they were registered in her name at Magunswana Dip Tank under Dip Number 46. She should have supported the evidence with that of Mangaluza Tsabedze to corroborate her so that Respondent could be in a position to dispute it.

[10] I am inclined to agree with the Respondents on the facts of the matter. Respondent in the answering affidavit and supporting affidavit has related to the court the circumstances under which the cattle were attached and how they were identified as belonging to Mphikiseni Ngwenya. The following facts in

paragraph 2.1 to 2.3 of the Respondent's Heads of Argument are stated in this regard:

"2.1 First Respondent states at paragraph 3 of his answering affidavit that the cattle were initially attached but not removed on the 17th December 2007 without any protest from Applicant.

8) **He states at paragraph 5 that these cattle were attached at Mphikiseni Ngwenya's homestead and that in fact these cattle were attached after the two family members, Lindiwe Ngwenya and Mdubeni Ngwenya, have taken their cattle from Mphikiseni Ngwenya's kraal and after they were told that the remaining seven (7) belonged to Mphikiseni Ngwenya.**

9) **First Respondent has also mentioned the fact that he knows the Ngwenya homesteads as he is also a resident of the area and that in fact the cattle were at Mphikiseni Ngwenya's homestead and not Applicant's.**

[11] It appears to me that First Respondent's version of the events leading up to the attachment is reasonably true because Applicant should have filed or obtained evidence of Lindiwe Ngwenya and Mdubeni Ngwenya to refute what is alleged by First Respondent. Her failure to do so is fatal to her case.

[12] The First Respondent's evidence that the cattle belonged to Mphikiseni Ngwenya is further corroborated by the Deputy Sheriff, Sandile Myeni at page 20 of the Book of Pleadings where he stated that when he removed the cattle Mphikiseni Ngwenya asked him to leave the cattle as he was to organize the money he owed in terms of the writ of execution.

PRINCIPAL JUDGE

[13] In the result, for the foregoing reasons the application is dismissed with costs.



S.B. MAPHALALA