



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 06/2008

DANIEL KHUMALO

Applicant

And

SAMSON MHLANGA

1st Respondent

JOHN MAGAGULA

2nd Respondent

MTHULI SIMON NGWENYA

3rd Respondent

SIKELELA LOGWAZELA TSABEDZE

4th Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. MNGOMEZULU

For the Respondent

MR. T. MASEKO (For the

Intervening Party)

JUDGMENT

12th March 2009

[1] On the 29th February 2008, the Applicant filed an

urgent application before this court for an order in the following terms:

1. That the Rules of the above Honourable Court relating to form, manner of service and time limits be dispensed with and that the matter be enrolled and heard as one of urgency.
2. That the Applicant be hereby condoned for more compliance with the Rules of the above Honourable Court.
3. That a rule *nisi* returnable on a date to be fixed and determined by the above Honourable Court do hereby issue calling upon the Respondent to show cause why an order in the following terms should not be made final.
 - 3.1 That the Respondent is hereby directed and ordered to forthwith restore the possession of the following cattle to the Applicant within 24 hours of service upon him of this order.
 - 3.1.2 That the Applicant be directed to keep the under mentioned cattle in safe custody and/or that the cattle be kept by the Deputy Sheriff pending the final adjudication of this application.
 - 3.2 That failing compliance with 3.1 above, the Deputy Sheriff be directed to forthwith cease, attach and return to the Applicant the under-described cattle and their progeny:
 - 1 x black cow.
 - 1 x black cow with white stripe on its back.
 - 1 x black cow with white spots.
 - 1 x brown and white calf.

- 3.3 That members of the Royal Swaziland Police Force be ordered to assist and ensure a proper execution of this order.
4. That prayers 3, 3.1.2, 3.2 and 3.4 operate with immediate interim relief.
5. That the Respondent pays the costs of this application at attorney and own client scale.
6. Granting the Applicant such further and/or alternative relief.
7. That the Deputy Sheriff be ordered to effect service of this application an interim court order upon the Respondent within twenty-four hours.

[2] For some reasons I do not understand earlier on the 11th January 2008, the Applicant obtained a rule *nisi* before Mabuza J on the following terms:

1. The Rules of the above Honourable court relating to form manner of service and time limits is hereby dispensed with and the matter is enrolled and heard as one of urgency.
2. The Applicant is hereby condoned for none compliance with the Rules of the above Honourable Court.
3. A rule *nisi* returnable on the 25th January 2008 is hereby issued calling upon the Respondent to show cause why an order in the following terms should not be made final.
 - 3.1 The respondent is hereby directed and ordered to forthwith restore the possession of the following cattle to the Applicant within 24 hours of service upon his of this

order.

3.1.2 The Applicant is directed to keep the under mentioned cattle in safe custody pending the final adjudication of this application.

3.2 Failing compliance with prayer 3.1 above the Deputy Sheriff is directed to forthwith cease attach and return to the Applicant the under described cattle and their progeny:

1 x black cow

1 x black cow with white straps on its back

1 x black cow with white spots

1 x brown and white calf

3.3 Members of the Royal Swaziland Police Force are ordered to assist and ensure a proper execution of this order.

4. That prayers 3, 3.1.2, 3.2 and 3.4 operate with immediate interim relief.
5. The Respondent pays the costs of this application.

[3] The Founding Affidavit of the Applicant is filed outlining the relevant facts in this dispute. According to the Applicant on or about the 11th November 2004, he entered into an oral agreement with the Respondent. The material terms of their agreement, *inter alia*, were:

- 5.1 I would purchase cattle from various places and I would place the Respondent in possession thereof in accordance with the

“sisa” system.

5.2 The Respondent would remain in possession of my cattle until such time that I advise him to the same and their progeny to me.

5.3 Whilst my cattle were and/are in the possession of the Respondent he remained at liberty to utilize same in ploughing his field and would milk the cows whenever he so desired.

5.4 The Respondent would advise me whenever any of my cows was in calf and would even point out their progeny to me.

[4] The material facts of what transpired thereafter are outlined in paragraph 6 to 12 of the Founding Affidavit. The gist of Applicant’s case is that Respondent does not come out clearly as to the number of progeny of his cows. The Respondent has suddenly become very un-cooperative and denies him any audience. However, he has eight cattle with the Respondent. Six of these are at his place of residence and two i.e a cow and its calf are at certain Magagula homestead at Malindza area. Applicant then reported the matter to the police to assist him in getting his cattle back from the Respondent.

[5] On the 18th March 2008, 2nd to 4th Respondents filed an application in terms of Rule 12 (1) of the Rules of Court for an order joining these Respondents as intervening parties respectively in these proceedings. Further, in prayer 2 thereof discharging the interim order made on 11th January 2008.

[6] The Applicant filed an Answering Affidavit to the above to the general proposition that the intervening party has no direct and substantial interest in the main application.

[7] When the matter came for arguments the intervening parties raised a point *in limine* to the proposition that there is a dispute of fact on the affidavits, hence the matter cannot be resolved on motion proceedings. This point was raised in terms of Rule 6 (12 (c) of the High Court Rules.

[8] The dispute according to the intervening parties is in relation to whether the cattle the Applicant alleges were purchased by the 1st Respondent were the same as those purchased by the 3rd and 4th Respondents respectively. The other fact is that the ownership of the cattle in question clearly belongs to the intervening parties.

[9] In my assessment of the arguments and the affidavits of the parties it would appear to me that the Respondents are correct that *in casu* there is a dispute of fact incapable of resolution by motion proceedings. In this regard I find that the arguments of the Respondents are correct. There is a real dispute in relation to whether the cattle the Applicant alleges were purchased by the 1st Respondent, were the same as those purchased by the 3rd and 4th Respondents, respectively.

[10] See the case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)* at 1162. It is my considered view that this is a triable matter.

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

S.B. MAPHALALA
PRINCIPAL JUDGE