IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CIVIL CASE NO. 2452/10

In the matter between:

CHIEF NDZIMANYE DLAMINI **Applicant**

And

DOCTOR DUBE **1st Respondent**

THE COMMISSIONER OF POLICE **2nd Respondent**

Coram Hlophe J

For Plaintiff Mr. T. Vilakazi

For Respondent Mr. M.Z. Mkhwanazi

JUDGMENT

HLOPHE J

[1] The Applicant who described himself as a Chief of Mhlabubovu, an area he said is situate at LaMgabhi area, in the Manzini region, instituted these proceedings by way of motion seeking inter alia an order of this Court interdicting and restraining the First Respondent or anyone else from constructing or continuing with the construction of a structure at Mhlabubovu

area which he contends is under LaMgabhi area in the Manzini region, until such time that the permission to build same had been granted by the lawful authority of the area who he contends is him.

[2] The Applicant further sought an order compelling the Royal Swaziland Police to ensure that the order sought is effectively complied with including their being compelled to assist in its service upon the First Respondent.

[3] The application is founded on the affidavit of the Applicant who informs the Court that in May 2010 the First Respondent started clearing a piece of land at LaMgabhi area in preparation to build a house. He was allegedly engaged by the authorities of the area through its Bandlancane (Inner Council) who advised/informed him not to continue with the exercise as he had not obtained the permission of the appropriate authorities to do so.

[4] The First Respondent is said not to have heeded the call by the Inner Council as he was observed during the month of June 2010 delivering sand, and concrete bricks in readiness to build as he also started digging a foundation. According to the Applicant, it was because of this exercise that he instituted these proceedings under a certificate of urgency for the releifs *inter alia* referred to above.

[5] The Applicant's case is that the piece of land in which the First Respondent is building his house/structure falls under his authority, such that it is his Inner Council (Bandlancane) that should or can lawfully allocate First Respondent the said piece of land in terms of Swazi Law and Custom. Since the First Respondent was not allocated such piece of land by the Applicant's Inner Council, he should, according to the latter be interdicted from continuing with the construction of the said structure. The Applicant alleged as well that he would suffer irreparable harm should First Respondent complete the structure concerned as other people will ignore his instructions in the area,

leading to the erosion of his authority. The Applicant also claimed not to have an alternative remedy.

[6] In opposing the application, the First Respondent filed an answering affidavit, sworn to by the First Respondent himself. In the said affidavit, the First Respondent raised several points *in limine* before dealing with the merits of the application.

[7] At the hearing of the matter it was agreed that the said points *in limine* be argued together with the merits of the application. The points in question were:-

(i) The non-joinder of the Attorney General,

(ii) The existence of disputes of fact which were foreseeable at the time the application proceedings were instituted.

(iii) An allegation/contention that the matter was not urgent.

(iv) That this Court has no jurisdiction to hear and determine the matter.

[8] I now have to deal with the points in limine individually as indicated herein below:

(1) Non-joinder of the Attorney General

The significance of this point has to be understood from the background in this matter which starts with the realization that the Applicant is herein represented by the Attorney General. This was said by Mr. Vilakati to be in terms of the Constitution of the Kingdom of Swaziland which entitles Chiefs to representation by the Attorney General.

The Police Commissioner as Officer of the Government of General. It is a practice in this jurisdiction to cite the Attorney General in all matters where a ministry, department or official of the Swaziland Government is cited in an official capacity in Court proceedings.

[9] The point taken by the First Respondent was therefore that a necessary party, in the Attorney General had not been cited in the proceedings and that such failure was fatal to the proceedings as they stand.

[10] Taken at face value this point also has, in my view, the tendency to embarrass the Attorney General's office in that it prepared Court papers and cited its own client as a party in the proceedings in the form of the Police Commissioner and that it is indirectly also being called upon to cite itself as a party against an application by itself, a position that would be untenable indeed.

[11] The First Respondent countered this point through contending that the Police Commissioner does not have a direct interest in the proceedings and that he was merely cited for purposes of attaining an order ensuring that he serves the order required upon the First Respondent only, which is no more than asking him to perform his daily duties. There was therefore no substantive order sought against him, just as he has no substantial interest in the proceedings. It was further contended that the Attorney General was in any event entitled or authorised to represent a Chief in terms of the Constitution of Swaziland, which gave him the right to choose on who he represents

between two conflicting parties otherwise capable of representation by him.

[12] As I understand it, the position is that there is no duty on an Applicant to cite the Attorney General in matters brought against the Government, its department or Officer as the position of the Attorney General's Office is not different from that of a firm of attorneys representing a party in proceedings, which otherwise does not have to be cited alongside its client.

[13] If the objection raised in this regard was being upheld it would have meant that the Attorney General withdraws from the matter as it was instituting proceedings against its own client. This however cannot be in my view. As soon as an Attorney chooses to represent one of the conflicting parties in a matter where he is not shown to be conflicted in exactly the same matter, he is at liberty to choose to represent such a party whilst the other one has to look for a neutral attorney if he opposes the matter and there is no duty on the said attorney to withdraw from the proceedings.

[14] In this matter the position is complicated by the fact that the Police Commissioner has not opposed the application, and would not have done so, as he is in my view a nominal Respondent against whom no contentious order is being sought other than an order that confirms he has to provide his statutory functions or those of the Police.

[15] In any event, and even if the point was being upheld, the point is one of non-joinder which would have led to the postponement of the matter to enable the party not joined to be so joined. This is not what both parties would favour in this matter as I understand the position. See in this regard Peacock v Marlev 1934 AD 1 .

> See also Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 186 where, whilst discussing the objection of non-joinder, which they emphasised is taken in abatement, the learned authors had the following to say:-

"*where such a plea (in abatement/non-joinder) is upheld, the action is not dismissed but is stayed until the proper party has been joined.*"

[16] Consequently I cannot uphold the point on non-joinder which I hereby dismiss.

(ii) <u>The Existence of disputes of fact which were foreseeable at the time the application was made.</u>

The First Respondent contends that this application ought to be dismissed because the Applicant was aware of the existence of disputes of fact as at the time the application was moved. It was contended that a party who institutes motion proceedings when he is aware or should have realised during the launching of such proceedings that there would arise disputes of facts risks having such proceedings dismissed. In fact Herbstein and Van Winsen in their book, <u>The Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta</u> put the position as follows at page 383:-

> "The *application may be dismissed with costs when the Applicant should have realised when launching his application that a serious dispute of fact was bound to develop.*"

[17] It was submitted that when instituting the proceedings the Applicant was aware that there was a dispute of fact as regards who the appropriate Chief over the piece of land in question was between Chief Lembelele Dlamini and Chief Ndzimanye Dlamini.

[18] On the other hand, following the contention by the Respondent that there had been a dispute on who, between the two Chiefs, had the authority over the land concerned, the Applicant had in his replying affidavit denied that at the time he instituted the proceedings there existed a dispute on who the appropriate Chief over the piece of land concerned was. Applicant contended that such a question had long been settled as the King or Ingwenyama had long decided that the area on which the piece of land fell was under the authority of the Applicant. This he contended was resolved in 1991 and confirmed in 2008. To this end there was annexed to the Replying Affidavit confirmatory

affidavits of the Chairman of Liqoqo, the Advisory Body to His Majesty the King as well as Prince Masitsela, in his capacity as the Regional Administrator for the Manzini District, who also attached a letter written on the 20th October 2005, by him clarifying the position concerning that issue.

[19] It was agreed between the parties that although the affidavits proving the resolution of the matter in favour of chief Ndzimanye together with the aforesaid letter, appeared in a replying affidavit, same did not amount to a new matter so as to necessitate such affidavits to be struck out, because it was brought as a direct answer to a contention in the Answering Affidavit. In fact it was agreed these affidavits and letter could not be struck out but a further affidavit in response could have been filed which was not done.

[20] The question is, in the light of these developments, and given the fact that there is nothing on record disputing the fact that the land in question was determined to be falling under Chief Ndzimanye by what is indisputably the appropriate authority in

such matters, can it be said that there is a dispute of fact? I must clarify that it is common cause that the land forming the subject matter of these proceedings, is a part of the one to which the affidavits and the letter referred to above relate -Mhlabubovu.

[21] An answer to the above question is obviously in the negative, and that is to say it cannot be said that there is a dispute of fact. Notwithstanding this fact on the basis of which I could have acted in deciding the matter, I decided that because the said affidavits and letter had come under a replying affidavit, the Respondent could be given an opportunity to contradict same if there was any genuine material on which that could be done. I was alive to the fact that a bare denial alone would not suffice. Indeed the First Respondent and his Attorney acknowledged the position would not change through the filing of a further affidavit as it could assert a bare denial. It was acknowledged this would do none of the parties any good as it would only delay the matter.

[22] This then entitles this Court to find, that there is no merit on this point which I should dismiss in terms of the rule in Plascon - Evans Paints Ltd v Van Riebeeck Paints (Ptv) Ltd 1984 (3) SA 623 (A) which is expressed as follows in **Herbsten and Van Winsen's Civil Practice of the Supreme Court of South Africa, 4th Edition Juta, at page 393;**

> "*Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some form of relief may be granted if those facts averred in the Applicant's affidavits that have been admitted by the Respondent, together with the facts alleged by the Respondent justify such an order.*"

[23] I have no hesitation that the facts alleged herein do not disclose a dispute of fact that would justify a conclusion being made that the matter may not be decided on the papers as they stand.

[24] Consequently the point *in limine* raised that there was a-foreseeable dispute of fact at the inception of the matter so as to justify a dismissal of the matter, is hereby dismissed.

(iii) Contention that this matter is not urgent

The Respondent contended in terms of this point that the matter was not urgent and that such urgency as could be found was of the Applicant's own making. It was further contended that the Applicant had not shown what prejudice he was going to suffer and that he had been aware of the fact that the First Respondent had khontaed in the area for years now and that therefore, the Applicant failed to comply with Rule 6 (25).

[25] I must start from the premise that urgency in a matter like this one is a discretionary issue of the Court seized with the matter even though I am fully aware that same has to be exercised judicially.

[26] In this matter I am of the view that there was some delay in the Applicant's institution of the proceedings when it eventually did so. This does not however, mean that the application falls to

be dismissed on this point alone. There is no denial that the Respondents were afforded time to oppose same as best they could as not even the Rule was granted on the day of its first mention in Court, but after a period of more than a month of its launch and after Respondent had already filed its answering affidavit. Clearly it cannot in my view be said realistically that the Respondent was ever prejudiced in his answering affidavit, particularly when considering that the matter had been postponed to about a month later.

[27] Furthermore the position has since crystallised that where this Court hears the matter to the point of granting an interim relief as was the position herein, it would be difficult for another Court to find that the matter was not urgent. The position exposed in the Hellenic Football Club V. The National Football Association of Swaziland and Others Case No. 1751/2010 is instructive in this regard.

[28] Furtherstill, if this Court were to dismiss this matter at this stage and when all papers are already before Court, without

hearing the merits, it would no doubt be falling into the trap cautioned against by the Supreme Court in the Shell Oil Swaziland Ltd vs Motor World (Ptv] Ltd T/a Sir Motors Civil Appeal Case. There the Court decried the failure to decide matters on their merits through insisting on some technical grounds. I am convinced that given the facts of this matter, urgency as a point *in limine* at this stage would be no more than a technical point which could only frustrate the interests of Justice. I must say I did not understand Mr. Mkhwanazi to be realistically and seriously contending otherwise.

[29] I consequently have no hesitation in dismissing this point as well.

(iv) Jurisdiction

[30] The Respondent contended further that this Court has no jurisdiction to hear and determine this matter because the land in question is Swazi Nation Land which is to be determined in terms

of Swazi Law and Custom, particularly taking into account the Constitutional position that matters of Swazi Law and Custom fall under the office of the Ingwenyama.

[31] This is not a matter I need to decide in these proceedings because of what was said by the Supreme Court in the Appeal Case of Daniel Dinabantu Khumalo v The Attorney General Appeal Case 39/2010 to the effect that a constitutional question ought not be decided in a case where the matter could be decided upon other points. See also Jerry Nhlapho and 24 others v Lucky Howe N.O. fin his capacity as liquidator of VIF Limited in Liquidation] Civil Appeal Case No. 37/07 as well as Mntomubi Simelane and Another v Makwata Simelane and Others Civil Case No. 4286/09.

[32] Because of the decision to which I have come to on this issue as expressed in the foregoing paragraph, I can only mention that the relief sought by the Applicant is an interdict which thrives mainly on a clear right. It was in my view only in that realm that the issue of the authority over the land in question arose and this

Court was not being called upon to determine who the rightful Chief is or under whose authority the land concerned falls as these questions have to be determined by an appropriate forum. This Court can only confirm if such questions were decided by the appropriate forum. Consequently the point on jurisdiction is also dismissed.

In The Merits

[33] In the merits, the First Respondent contended that the land in question was under the authority of Chief Lembelele of Eluyengweni chiefdom and not under Chief Ndzimanye of LaMgabhi area. He further stated that it was this Chiefs Inner Council that had allocated him the piece of land aforesaid. For these reasons he contended that the Applicant was not entitled to the relief he sought. He further contended that he had already notified the Applicant through his Inner Council (Bandlancane) that he had been allocated the land in question by Chief Lembelele's Inner Council, to whom the land belonged.

[34] Following these contentions, and as set out above, the Applicant filed the affidavits by the Chairman of the Kings's Advisory Council, Liqoqo as well as that by the Manzini Regional Administrator who both supported the Applicant's contention that the dispute over the area concerned was decided in 1991 and 2008 where it was confirmed that the area fell under the authority of the Applicant. This it was clarified by the Chairman of Liqoqo, Prince Logcogco to have been explained to Chief Lembelele as recently as the 13th October 2008.

[35] The question for decision is whether in light of the foregoing, it can be said that the Applicant has established his entitlement to an interdict preventing the First Respondent from constructing a certain structure at Mhlabubovu area which the Applicant contends is under his jurisdiction hence the interdict sought.

[36] The Applicant's case is that the piece of land in which the First Respondent is building his house/structure falls under his jurisdiction, such that it is his Inner Council (Bandlancane) that should or can lawfully allocate First Respondent the said piece of

land. Since the First Respondent was according to Applicant, not allocated such piece of land by the Applicant's Inner Council, he should be interdicted from continuing with the construction of the said structure. The Applicant contends further that he will suffer irreparable harm should First Respondent complete the structure concerned as other people will ignore his instructions in the area, leading to his authority being eroded. The Applicant also claimed not to have an alternative remedy.

[37] In opposing the application, the First Respondent filed an answering affidavit, sworn to by himself and not supported by any confirmatory affidavits. In the answering affidavits aforesaid First Respondent contended that the land in question falls under the jurisdiction of Chief Lembelele Dlamini of Luyengweni umphakatsi. It was this Chiefs Inner Council (Bandlancane) that allocated him the piece of land in question. He further alleged that this Court had no jurisdiction to determine under whose jurisdiction such land fell.

[38] There cannot in my view be a question at this stage and on these papers whether or not the Applicant has proved its case.

[39] It is indisputable in my view that the dispute over the land in question was decided in Applicant's favour. This is because his contention that same was decided in his favour in 1991 and in 2008, has not been disputed particularly after the filing of the confirmatory affidavits by Prince Logcogco and Prince Masitsela in their respective capacities respectively chairman of Liqoqo, which allegedly communicated the said decision and Manzini Regional Administrator, who liaises with Chiefs in a region on a daily basis.

> In my view it would be possible to grant the interdict on both the positions set out in the cases of Room Hire Co. (Ptv) Ltd v Jeppe Street Mansions (Pry) Ltd 1949 (3] SA 1155 (T) at page 1165 as well as that set out in Plascon - Evans Paints v Van Reebeck Paints 1984 (3) SA 623 at 634.

[40] In Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pry) Ltd (Supra) the position is put as follows :-

> *"A bare denial of Applicant's material averments cannot be regarded as sufficient to defeat Applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by Respondent to enable the Court to conduct a preliminary examination.... And to ascertain whether the denials are not fictitious intended merely to delay the hearing."*

The First Respondent cannot in my view positively attest as to the Chief under whose jurisdiction the land concerned falls. He only gives a general account on why he says same is under the jurisdiction of Chief Lembelele as opposed to that of the Applicant. In fact he has no answer to the contents of lthe Replying Affidavit which clearly sets out that the Chiefs jurisdiction over the land concerned was decided in 1991 and confirmed in 2008. His contentions therefore amount to a bare denial which as observed in the above extract cannot be used to defeat Applicant's right to an interdict as established in the papers as they stand.

[41] On the fact that even if there was no reliance on the bare denial concerned, the position was ably put in the Plascon Evans case where the following was stated :-

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the Court to give such final relief on the papers before it is however, not confined to such a situation. In certain instances the denial bu the Respondent o f a fact alleged bu the Applicant man not be such as to raise a real, genuine or bona fide dispute o f fact."*

Further still, and in magnifying the above position the Court per Corbet J.A. had the following to say at page 635:-

> *"Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials o f the Respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."*

[42] From the foregoing considerations of the Plascon-Evans Paints v Van Riebeeck Paints case it is clear that in certain situations even where the facts alleged by Applicant are denied by the Respondent, the Court will be justified in rejecting them where they are obviously far fetched or are clearly untenable. This I find to be the position as regards the assertions of the First Respondent herein. That this was the case can be seen from the fact that Chief Lembelele, who First Respondent seeks to suggest is in charge of the land concerned is said to have been present when the decision under whose jurisdiction between the two Chiefs the land in question fell was delivered which he has not denied. It clearly becomes farfetched for him in my view to claim as he does that the land in question belongs to Chief Lembelele simply because he was allocated same by the latter's Inner Council. There is in my view no real, genuine or bona fide dispute of fact to defeat the interdict sought by the Applicant.

[43] Otherwise there can be no doubt that the Applicant does have a clear right to entitle him to a final interdict. I further agree

with Mr. Vilakati for the Applicant that such a right stems from Section 10 bis of the Swaziland Administration Act 1950 as amended by Act No. 6 of 1979 which puts the position as follows :-

> "*No person shall, without the permission of the competent authority, build a homestead in a Swazi area or remove such homestead from one place to another in any Swazi area.*"

[44] The interpretation Section of the Swazi Administration (amendment) Act 1979 defines both "Competent Authority" and "Swazi Area." Competent authority is defined as follows:-

> "*Competent Authority*" *means a person appointed by the Ngwenyama in Libandla for the purpose of administration in a Swazi area and includes a Chief appointed under Section 1 of this Act or any person holding such offices.*"
>
> "*Swazi area*" *is defined as* "*any area of land as so defined in the Definition of Swazi Areas Act, (Act No. 41 of 1916) or any other area of land held by the Ngwenyama in trust for the Swazi nation.*"

[45] It was common course as I understood the argument that the land in dispute was a Swazi area. It also cannot in my view be disputed that the Applicant is a competent authority for LaMgabhi and Mhlabubovu just as it cannot be disputed that Chief Lembelele is the competent authority of Luyengweni.

[46] Since I have found in this matter that the evidence establishes that the area on which the First Respondent has constructed or is constructing the structures concerned, is under the authority of the Applicant, and it having been so decided by the appropriate authority, he then has the right to be protected and such a right does in my view lay the foundation for the interdict sought.

[47] Dealing with the significance of a clear right in Applications for interdicts, Otta J, observed as follows at page 17 of the unreported judgment of Mntomubi Simelane and another and Makwata Simelane and Others Civil Case No. 4286/09.

> *"It is my opinion that of the three requfrements for an interdict namely clear right, an injury occurring or reasonably apprehended and absence of an alternative remedy set out in Setlogelo ante, (Sethlogelo v Sethlogelo 1914 AD 221) clear right is of the most paramouncy to such an application. This is because the question of injury actually committed or reasonably apprehended, as well as alternative remedy are all predicated on the presence of a clear right to the subject matter of the dispute."*

[48] I must say I associate myself fully with these observations and therefore note that already a major aspect of the application has already been answered even though I still have to consider the other two requirements given that in this case I have found that there does exist a clear right.

[49] The Applicant has in my view further demonstrated that he is bound to suffer harm. I also do not believe he has an alternative remedy and if there is any, it is not sufficient.

[50] Consequently I have come to the conclusion that the Applicant's application succeeds. I accordingly make the following order: -

50.1. The First Respondent and those acting at his behest be and are hereby interdicted and restrained from constructing or from continuing with the construction of the structure or house at Mhlabubovu area unless permitted to do so by the Applicant or his Inner Council.

50.2. The Royal Swaziland Police be and are hereby directed, through the Second Respondent, to ensure compliance with this Court Order and assist the Applicants in its service.

50.3. The First Respondent be and is hereby ordered to pay the costs of this application on the ordinary scale.

Delivered in open Court on this the 9th day of March 2011.

N. J. Hlophe
JUDGE