IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 660/2012

In the matter between:-

MSIMISI DLAMINI **Applicant**

and

PRINCE MAHLABA DLAMINI **1st Respondent**
THE MINISTRY OF HOUSING AND
URBAN DEVELOPMENT **2nd Respondent**
THE ATTORNEY GENERAL **3rd Respondent**
SILENCE GAMEDZE N.O. **4th Respondent**

Neutral citation: *Msimisi Dlamini v Prince Mahlaba Dlamini and others* (660/12) [2012] SZHC157 (27th July 2012)

Coram: HLOPHE J
Heard: 22/07/12
Delivered: 27th July 2012
For the Applicant: Mr. S. Magongo
For the Respondents: Mr. L. Vilakati

Summary

Civil Procedure – Stay of Execution Pending Appeal – Application not necessary as notice of appeal engenders an automatic stay of execution of judgment –Allegations that application

necessitated by threats –An Interdict application appropriate provided requirements are met –Notice of Appeal itself challenged as a nullity on the basis that it has no prospects of succeeding –Not for this court to comment on the propriety of the appeal as that is matter for the Appeal Court –Application to be dismissed on the basis that it has no basis as well –Issue appealed against and forming basis of this matter res judicata – Further ground of not part of the issues before court issuing judgment –Its raising at this point involves unfairness to the otherside –In any event point should have been/ covered in the pleadings –Applications vexatious and /or frivolous –Application for stay of execution dismissed.

Declaration of rights –Land in dispute a controlled area –Land becoming a controlled area after order ejecting applicant had already been granted –effect of the order granted *vis – a –vis* controlled area.

Interdict –Requirements of – clear right –Absence of.
Amendment of Pleadings –When allowed.

JUDGMENT

[1] On the 2nd July 2012, the Applicant instituted proceedings under a certificate of urgency seeking an order of court in the following terms:-

1.1 Waiving the usual requirements pertaining to the time limits and service of motion proceedings and hearing this matter as one of urgency.

1.2 Condoning the non – Compliance with the rules of the above Honourable court.

1.3 The execution of the Order granted on the 19th June 2012 by the above Honourable court in favour of the First Respondent be stayed pending hearing and determination of the Appeal filed by the Applicant.

1.4 Granting Applicant leave to amend his plea within three days upon grant of this order.

1.5 Declaring that the land in dispute herein is a controlled land or area under the jurisdiction of the Second Respondent and not a Swazi Nation Land.

1.6 The First Respondent or any person or persons acting on his instructions be restrained from unlawfully interfering with the Applicant's right of occupation, use and enjoyment of the land in question pending final allocation and determination by the 2nd Respondent how such plots are to be acquired by any person interested in them.

1.7 A rule nisi in terms of Prayers 1, 2, 3,4,5 and 6 be issued with immediate effect as an interim relief pending finalization and determination of this matter calling upon the 1st Respondent to show cause why prayers 3, 4 and 5 should not be made final and that the 1st Respondent be ordered to pay costs of this application.

1.8 Any such further and/or alternative relief this Honourable court deems appropriate.

[2] The application is founded on the affidavit of the Applicant in terms of which he sets out both the background to the matter as well as the basis for the reliefs sought. It is undisputed that the current Applicant is the son of Mhlatsi Dlamini, who was the first to challenge the First Respondents ownership or entitlement to use and enjoy the land in dispute. It is as a result of the said Mhlatsi's death that Applicant took over and continued from where his late father left.

[3] It is clear that the matter has a long history and as such most of its contents are common cause and are to the effect that, in 1999 the 1st Respondent instituted proceedings against the Applicant's late father aforesaid where he sought and obtained an interdict against the latter. The order granted then interdicted the current Applicant's father from continuing to build a shop and other structures on the land forming the basis of the current dispute which the then Applicant contended it belonged to him. This court also granted the then Applicant, (now First Respondent) another order in terms of which it interdicted the Applicant's father from interfering with the company or contractor engaged by the First Respondent, then Applicant, to fence the land in question.

[4] In 2003, the current Applicant's father, Mhlatsi Dlamini, brought an application against the current First Respondent. In this application an order was sought interdicting the First Respondent from fencing a certain piece of land situate at Mhlaleni. Though its judgment was delayed, this court in 2010 delivered it in terms of which it dismissed the application for an interdict instituted by the current Applicant. It actually found, subsequent to oral evidence led and an inspection in loco it had conducted, that the interdict being sought related to the same piece of land from which this

court, in 1999, had inter alia interdicted the current applicant from interfering with the fencing then being installed by the First Respondent. This court found per Justice Maphalala PJ that this court was *Res Judicata* in this regard as the cause of action was the same one relating to the same subject matter between the same parties.

[5] In the same year 2010, the current applicant noted an appeal against the aforesaid Judgment of Judge Maphalala PJ. This appeal was dismissed by the Supreme Court which found that there was no merit in it and further that the matter was finalized in 1999 per the Judgment of Masuku J when he interdicted the current Applicant's father from continuing with building over the land concerned including from interfering with the fencing of the same land.

[6] Subsequent to the Supreme Court Judgment the First Respondent contends that he instructed a Deputy Sheriff to execute the Judgment of this court by ejecting the applicant's sons from the said land, only to find that the Police could not assist the Deputy Sheriff as they claimed they needed a specific court order directing them to do so. In fact First Respondent contends it ended up having to move two such applications under case numbers 1832/2011 and 660/2012. In fact the order under 1832/2011 had stated that the Police assist the Deputy Sheriff in executing the Judgment of the court without specifying what this execution entailed. This it is alleged prompted the Police to insist on an order that would call for them to assist in the demolition of the Applicant's structures including the ejectment of the current applicant from the land concerned. Those orders were both granted by this court with the latter, under case number 660/2012 having been granted on the 19th June 2012.

[7] The Applicant reacted to this latter order or Judgment by noting an appeal to the Supreme Court. It having been noted, this appeal is pending before the Supreme Court and I am of the view that there is very little this court can do about it irrespective of what its merits or demerits are. Of course the position can only change if the First Respondent were to file an application to execute the Judgment or court order notwithstanding the appeal noted. Short of this application, this court cannot do much where there is noted an appeal as the merits or demerits of it including its propriety can only be dealt with by the Supreme Court.

[8] By way of clarity, it must be stated that the position of our law is that once noted, an appeal engenders or brings about an automatic stay of execution. This position it has been stated is the common law position, which is operative in this Jurisdiction as we do not have a rule similar to Rule 49 (11) of the South African Rules. The case of ***United Reflective Converts (PTY) LTD v Levine 1988 (4) SA 460 (W) at 463*** is instructive in this regard. Commenting on this position, ***Erasmus and others in his book; Superior Court Practice 1996 Service, Juta***, says the following ***at page B 1- 368***:-

> *"The accepted Common Law rule of practice in our courts is that generally the execution of a Judgment is automatically suspended upon the noting of an appeal, with the result that pending the appeal the judgment cannot be carried out into and no effect can be given thereto. The purpose of the rule as to the suspension of a judgment on noting of an appeal is to prevent irreparable damage being done to the intending Appellant, either by levy under a writ of execution or by*

execution of the judgment in any other manner appropriate to the nature of the judgment appealed from."

[9] This position amounts to a restatement of the common law and is applicable in Swaziland even though there is no rule in this jurisdiction akin to Rule 49 (11) of the South African Uniform Rules of Court. The recent case of ***Swazi MTN vs Swaziland Post and Telecommunications Supreme Court case no.19/2011*** is instructive in regard, See also ***Swazi MTN vs E- Top up and MV Tel High Court case no. 7/2006***

[10] I have to restate the foregoing position because of what happened in this matter which I found to be strange. This is that having noted his appeal to the Judgment of this court delivered or handed down on the 19th June 2012, the Applicant filed the current application seeking mainly, an order staying the execution of the said Judgment or order pending appeal. This, whatever the position, was in my view unnecessary because he was effectively asking this court to grant him what he already had in the hope that perhaps it was now going to be stronger, which is not real.

[11] Trying to explain this anomaly Mr. Magongo for the Applicant stated that his client found himself having to institute the current proceedings because the First Respondent had threatened to execute the court order by ejecting the Applicant from the premises irrespective of the pending appeal because the First Respondent was of the view that the appeal concerned was frivolous, vexatious or put differently, had no merit. I am certain that whatever threats were directed at the Applicant, such did not entitle him to seeking a stay of execution which he already had even though it could have entitled him to some other remedy like

an interdict provided he could satisfy its requirements. See in this regard ***MTN Swaziland vs Swaziland Post Telecommunications Appeal Case no. 19/2011.***

[12] By way of comment, I must say it would have been very unfortunate for the first Respondent to have threatened to deal with the matter outside the law if it is true he did make the threats complained of. The importance of having to act according to law at all times need not be over emphasized for I am of the firm belief that the law accords every party with a relief even though at times such would call for patience.

[13] As indicated above, the first Respondent was not left remediless if it was true that the Applicant had noted the appeal concerned for purposes of delay as same allegedly had no merit or prospects of success. The remedy in such circumstances would lie in the first Respondent having to institute proceedings to execute the order of court notwithstanding the appeal noted. This is because the court which granted the Judgment appealed against, has a wide discretion to control its processes. Whether or not to grant leave to execute pending appeal, the court would, in its discretion, determine what is just and equitable in all the circumstances. In doing so the court would have regard to the following factors:-

1. The potentiality of irreparable harm or prejudice being sustained (i) by the appellant on appeal if leave to execute were to be granted and (ii) by the Respondent on appeal if leave to execute were to be refused.

2. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the

bona fide intention of seeking to reverse the judgment but for some indirect purpose, such as to gain time or to harass the other party.

3. Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

The case of ***South Cape Corporation (PTY) LTD v Engineering Management Services (PTY) LTD 1977 (3) SA 534 at 545 B – G*** as well as ***Erasmus and others, Superior Court Practice, Service 6 1996, Juta at pages B1 – 369 to B1 – 370***.

[14] In his opposition to the application for stay of execution and the rest of the prayers to this application, the First Respondent contended that the application had no basis and ought to be dismissed because the Judgment forming the basis of the appeal was either *res judicata*; it having been dealt with, with finality by the Supreme Court; just as what forms the basis of the alleged appeal was an issue not raised before the court that made the Judgment appealed against. It was contended it is not competent to raise an issue for the first time in the court of appeal, just as it was not competent to appeal an issue that the Supreme Court has already decided.

[15] As concerns the contention that the matter purportedly appealed against was *res judicata*, it was contended that the Applicant's appeal in this application was based on the ground that the land from which First Respondent sought to have him ejected from the land at Mhlaleni was the fact that the land in question had since become a controlled area since 2007 and that therefore the First Respondent had no right to eject Applicant from the said land. It

was contended the Supreme Court decided the appeal in the manner it did in 2010, after the said point had already been placed before it through the pleadings in that case.

[16] First Respondent contended that in the appeal Applicant had moved in 2010 against the Judgment of Maphalala PJ, it had been alleged in the affidavit supporting the application for condonation for the filing of the record of appeal that the land in question had since become a controlled area which allegedly deprived the First Respondent of any right to eject the Applicant therefrom as it now supposedly had no right to do so as it was no longer the owner of the land in question. It was argued that notwithstanding the fact that such information was now before the Supreme Court, the latter had dismissed the current Applicant's appeal and concluded that the matter of the land ownership (or should I say the matter of the right to the land) had been interned or buried through or by the Judgment of this court in 1999 when it interdicted the Applicant's father from continuing to build on that piece of land.

[17] This according to the First Respondent, meant that the Supreme Court, in so far as it decided the matter in the manner it deed notwithstanding its being fully aware of the said point, had become *res judicata* and that the stay of execution pending the outcome of the appeal has no basis now that the point appealed against was decided by the appeal court against the same party as it was aware of it.

[18] For my own, I cannot help but agree with Mr. Vilakati for the crown that the issue of the land in question now being a controlled area is *res judicata* in so far as the Supreme Court came to the decision it did notwithstanding that such a point had been placed before it to influence the decision it made and therefore to conclude that

the Supreme Court did consider the said point and did not uphold it which is why it is now *res judicata*. I am supported in this view by what ***Herbestein and Van Winsen*** say in the ***Civil Practice of the Supreme Court of South Africa, 4th Edition, at page 249-250*** when they explain when a matter or issue forms part of a cause action in a case. They stated the position as follows:-

> "*For a plea of res judicata to succeed, however, it is not necessary that the 'cause of action' in the narrow sense in which the term is sometimes used as a term of pleading should be the same in the latter case as in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be res judicata in any subsequent action between the same parties in respect of the same subject matter*."

[19] As concerns the other point that the application has no sound basis, it is contended that the point forming the basis of the appeal was not raised in the pleadings leading to the Judgment that Applicant is appealing against. This is the point that Applicant claims that the land in dispute is no longer under the control of the traditional authorities but is now, with effect from 2007, under the authority of the Ministry of Housing and Urban Development. It is common cause that this point was not raised in the papers of the application leading to the judgment being appealed against as instead the direct opposite was there contended. The position is trite that a Court of Appeal can only deal with matters or issues

that were pleaded before the court whose decision is being appealed against as it is confined to the record. It therefore cannot deal with an issue raised for the first time on appeal and not covered in the pleadings leading to that judgment. Herbstein and Van Winsen put the position as follows in the book, ***The Civil Practice of the Supreme Court of South Africa at page 912 – 913 of the 4th edition***:-

> *"A second requirement for the raising of a new point on appeal is that the point must be covered by the Pleadings. Where it is not clear that the point has been fully investigated (sc that all the evidence which might have been placed before the court if the point had been taken was in fact led), the court will not allow a new point to be raised for the first time on appeal."*

[20] As I understood it, it was common course that the issue of the land now being under the control of the 2nd Respondent was not raised before the court that dealt with the matter leading to the Judgment being appealed against. That is this allegation, whilst a part of the ***Supreme Court*** matter under ***Appeal case no. 15/2010***, it was not a part of the subsequent application under ***High Court case no. 660/2012,*** which is the matter under appeal.

[21] In fact it is common course that under the said latter case, the applicant had alleged the opposite, which is to say, that the land in question was under the control of the chief and was part of Swazi Nation Land. This therefore would necessitate that if an appeal is filed, it is confined to those allegations which were before the High Court and not the new ones now being raised for the first time on appeal.

[22] I therefore agree with Mr. Vilakati, that a point which is not part of the record serving before the court whose decision is being appealed cannot be raised to found an appeal. For this reason the basis for the stay of execution being sought is unsound for this reason as well.

[23] For the foregoing reasons I am of the view that the application for stay of execution is frivolous and or vexatious. This makes the application fallible to be dismissed as was stated in ***Bisset and others vs Boland Bank Ltd and others 1991 (4) SA 603 at 608 C –E*** where the position was expressed as follows:-

> "*The court has an inherent power to strike out claims which are vexatious ...Vexatious in this context means frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant.*"

[24] I further take into account the fact that the vexatiousness of this application is not only construed from a balance of probabilities but is a matter that is apparent from the papers as was stated ***by Booysen J*** in the same ***Bisset and others vs Boland Bank Ltd and others (SUPRA) at page 608 F- G***, when he stated;

> *"Whilst an action which is obviously unsustainable is vexatious, this must appear as a certainty and not merely on a preponderance of probability."*

[25] Notwithstanding this conclusion to which I have come, it is important for me to deal, at least briefly, with the other prayers other than the one for the stay of execution I have dealt with above. These are the prayers for the amendment of the pleadings

before this court leading to the Judgment being appealed against as well as the interdict being sought against the first Respondent including the declaratory order sought.

[26] I am of the view there is no merit in these prayers and they cannot be granted by this court. For instance, as concerns the prayer for the amendment of the plea, I do not see how that can be feasible in a case where a judgment has already been made. The general rule governing amendments is that stated in ***Herbstein and Van Wansen 4th Edition at page 574*** which is that "*the court has a discretion to allow a party to amend his pleadings or in the case of an application, to file further affidavits at any time prior to judgment*." Clearly applicant's intended amendment would be against this rule because the pleadings he seeks to have amended have already resulted in a judgment which is the one he now seeks to appeal. I have no doubt such an amendment would occasion prejudice to the other side and it was argued as much on his behalf. A salutary rule of practice in our courts is that amendments would be allowed in instances where they can be done without prejudice being occasioned the other side.

[27] As concerns the interdict being sought the position is now settled that the party claiming such a remedy should have among other requirements, a clear right to the item in dispute. That Applicant has no right to the land in question was decided by this court way back in 1999 and reiterated in all the other proceedings since then.

[28] It was in my view not possible for the Applicant to then obtain title to the land concerned simply because same was declared a controlled area well after his having been ordered to vacate same.

Indeed the 2nd Respondent has not supported Applicant's contention.

[29] The same considerations apply as concerns the declaratory order sought. The Supreme Court has already decreed that the first Respondent has title to the land in question. It therefore cannot avail this court to contradict the conclusion reached by the Supreme Court. It should be borne in mind that it is a sound policy that litigation must come to an end at some stage. In any event the Applicant is apparently urging this court to declare a fact which it cannot do as it is only required to declare rights.

[30] The Applicant tries to appeal to the raw emotion that it had already developed the land in question and therefore it will suffer irreparably if the ejectment were to be effected or carried out. The reality however is that the Applicant would have continued to build and develop the land in question notwithstanding an order of this court and the Supreme Court stopping him from doing so having issued way back in 1999.

[31] Having stated the foregoing, this judgment should be understood in context as merely dealing with the present application and not the appeal filed which, unless an application to execute pending its outcome was made and granted by this court, can only be dealt with by the Supreme Court of Appeal.

[32] For the foregoing reasons, I make the following order:-

1. The Applicant's application be and is hereby dismissed.
2. The Applicant is ordered to pay the costs of these proceedings.

Delivered in open court on this the …..day of July 2012.

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N. J. HLOPHE

JUDGE