



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1834/2012

In the matter between:

HUNTER SHONGWE

Applicant

And

PRISCILA DLAMINI

1st Respondent

OUPA LAPIDOS N.O.

2nd Respondent

WILSON NDLAVELA MAVIMBELA N.O.

3rd Respondent

Neutral citation: Hunter Shongwe v Priscila Dlamini and 2 Others 259
(1834/2012) [2012] SZHC (13th December 2012)

Coram: M. Dlamini J.

Heard: 7th December 2012

Delivered: 13th December 2012

Application proceedings – points in limine - jurisdiction – powers of chiefs to deliberate on issues properly before them - their decision binding until set aside on review or appeal – prima facie right as one of the requirements of an interlocutory

interdict – dispute of facts – circumstances showing foreseeability.

Summary: The applicant filed an application under a certificate of urgency seeking for an interim interdict against the respondents, pending action proceedings to be instituted against the 1st respondent.

[1] The applicant has averred that he had been collecting rentals on behalf of the 1st respondent in respect of the house in which he now occupies for a period of 20 years. Upon the house being vacant, applicant was approached by Royal Swazi Spar to lease the house on condition that renovations are effected on the said house. An oral agreement was entered between applicant and 1st respondent that applicant would renovate the house and 1st respondent reimburse him. The house was duly renovated. However, when Royal Swazi Spar was invited to take over occupancy, it declined on the basis it had since concluded a lease agreement with a third party as renovations had taken long to complete. Applicant contends that at that stage, 1st respondent requested him to occupy the house in a bid to stop her brothers from occupying the house. He duly did in July 2009. However, to his surprise, applicant deposes, 2nd respondent came to the house and ordered the 1st respondent's family to evict him from the premises. The action of 2nd respondent, a community police, were precipitated by applicant who had assisted two members of the community against an eviction order issued by 3rd respondent who is the headman of the community where he resides. Again later on, the 2nd respondent came in the company of 1st respondent who demanded that he vacate the house to give way to another tenant as he had occupied the house without paying rent. He (applicant) informed 1st respondent that he would vacate the house on

condition that she (1st respondent) pays him the renovation costs of E100,000.00. This seems to have fallen on deaf ears as on 3rd November 2012, the group resurfaced and threatened to demolish the house on 4th November 2012. Applicant moved the present application.

[2] The respondents in their answer are disputing the genesis of events as highlighted by applicant, viz. that he has been collecting rent for such extended period and that he occupied the house for purposes of preventing 1st respondent's brothers from taking over the house. The 1st respondent alleges that she leased the house to applicant at rentals of E1,500 per month. Applicant has never paid any rentals since 2009, the date at which he first became a tenant. 1st respondent admits that the applicant did renovate the house but informs the court that in a meeting between applicant and her brothers where she was also present, applicant was asked as to the cost of the renovations and that he should produce invoices for the same. She contends that applicant informed the meeting that the amount due to him was E15 000.00 but failed to produce invoices in support of his claim despite demand. 1st respondent raises a counter-claim in respect of rental arrears for the sum of E70 000.00. It was her evidence that she solicited the assistance of her brothers to compel the applicant to either pay rent or vacate the premises but to no avail. She then approached 2nd respondent, traditional authority to have the applicant who had since turned into violence, to be ejected.

[3] The respondents have also raised points *in limine*.

[4] The points of law could be summarised as follows:

- a) lack of jurisdiction by this court;
- b) dismal failure to satisfy the requirements of an interim interdict;
- c) matter is fraught with foreseeable material dispute of facts;

[5] I now deal with the points of law *ad seriatim*.

[6] 2nd and 3rd respondents were represented by Mr. V. Kunene from the office of the Attorney General which is mandated to make legal representation on behalf of 2nd and 3rd respondents by virtue of their office as they are part of the traditional authorities of this Kingdom.

[7] Mr. V. Kunene quotes Section 152 of Constitution of Swaziland (2005). He submits that a decision was taken by 3rd respondent to have the applicant ejected from his jurisdiction. That decision, whether correct or wrong, stands until set aside by an appellate court. “The applicant ought to have either appealed or reviewed the decision”, so argues Counsel for 2nd and 3rd respondents.

[8] The submission by Counsel raises the question as to whether 3rd respondent has jurisdiction to adjudicate upon the complaint raised by 1st respondent. If the answer is to the affirmative, then this court can only entertain an application for review or appeal.

[9] Applicant defines 3rd respondent as:

“ ...adult male of Ezulwini area in the Hhohho District and is sued herein in his capacity as the Indvuna Yemcuba of Ezulwini Umphakatsi.”

[10] It is apposite to point out from the onset that the applicant and respondents reside at Ezulwini area under Mr. Sifiso Mashampu Khumalo as Chief:

[11] Swazi nation land is governed by persons appointed in terms of sections 7 of the Swazi Administrative Order No. 6 of 1998. Drawing from section 233(1) of the constitution, **Ota J.** in describing such persons states in **Mariah Duduzile Dlamini v Augustine Divorce Dlamini and 2 others(550/2012) [2012 SZHC] 66** as:

“the footstool of iNgwenyama..”

[12] These persons are commonly referred to as Chiefs and as per section 233(1) of the constitution;

“ ..iNgwenyama rules through the Chiefs.”

[13] Their function is spelt out in the Swazi Administrative Order *supra*. Pertinent to this application are section 11(a), 11(h), 13 and 29 which read:

“11(a) exercise his powers under this Order to promote the welfare of the community in his chieftdom;

11(h) perform such other functions as may be conferred on him by or under this Order or any other law;

13(1) Subject to section 14, a Chief shall promote the prevention of the commission of any offence within his chieftdom;

29(1)A person shall not, 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”.

[14] Sections 14 and 16 confer the Chief with both criminal and civil jurisdiction respectively.

[15] The Chief discharges his duties through an Inner Council which is chaired by “*indvuna*” or “*indvuna yemcuba*” as the case may be, appointed by the Chief in terms of section 38 of the Order (*op. cit.*) and *in casu* the Chief of Ezulwini appointed the 3rd respondent. I must highlight however *orbiter*, that Ezulwini is an area that falls under the category of traditional leaders who, due to the vast history, traditions and customs of this Kingdom, play more than the role of chiefs in the office of the *iNgunyama* and for that reason the chief of Ezulwini is one of those who holds a title higher than that of a chief and that is “*indvuna yesigodlo*” usually referred by commoners as “*Friend of the Kings*”.

[16] *In casu* it is not in issue that the applicant was summoned by 3rd respondent in order to adjudicate on the complaint raised by 1st respondent. Applicant replies as follows in regard to this matter:

“3.1.2 On the contrary when I was summoned by the emissary I raised the issue of the Umphakatsi’s jurisdiction to try a case against me since I am not their subject and custom demands that

they should approach my Chief and request him to send an emissary (lincusa) to accompany me as my Chief's representative to see to it that justice is done to me and report back to my Chief what the outcome of the case was.

3.1.7 I would also aver that the respondents have no jurisdiction over civil matters involving large amounts such as E100,000.00 (one hundred thousand Emalangeni) or even E15,000.00 (fifteen thousand Emalangeni) and that they should have left this matter in the hands of the feuding parties i.e the applicant and the 1st respondent to deal with in the proper forum.

3.1.8 They just should never have entertained it all and should have advised the complainant to approach the competent court for redress.”

[17] I have already alluded to the functions and powers of the Chiefs under the Order, viz. that he is to promote the welfare of his constituency, prevent crime, decide on the residency of his subject and adjudge both criminal and civil cases where all the parties are Swazis.

[18] The applicant has described himself and the respondents as Swazis. The applicant in his reply has refuted that there was any decision taken against him as he was in *absentia*. However, it is clear from his replying affidavit that he elected to be absent from the proceedings. He cannot therefore complain once a decision is taken in his absence. Applicant cannot further hold that there was no such decision because he states in his founding affidavit *supra* that the 2nd and 3rd respondents

are cited in their official capacity as community police and headman respectively. This demonstrates clearly that the applicant was fully aware that the 2nd and 3rd respondents when they came to his residence were carrying out a decision taken after he was summoned.

[19] The Order *op. cit.* further highlights the hierarchical structures of appeal in the event a litigant is dissatisfied with the decision of a Chief's court under section 25. Applicant however prays for an order:

*“3.1 That the Respondents, their employees and/or agents and/or servants and/or anyone acting through or under them be and are hereby interdicted from evicting or ejecting the Applicant from a house or premises occupied by the Applicant at Ezulwini area known as **kaDlamini** pending finalization of an action to be instituted by the Applicant against the 1st Respondent ...”*

[20] From the prayer, it is clear that applicant is not praying for this court to review or set aside the decision of the 3rd respondent. Adjudicating on a similar question, Ota J. in **Mariah Duduzile Dlamini's** case, *supra*, wisely quotes from **Clement Nhleko v MH Mdluli's Company and Another, 1393/09** pages 11-13 as follows:

“So long as the judgment is not appealed against, it is unquestionably valid and subsisting. This is no matter how perverse it may be perceived. It is binding and must be obeyed by all including this Court. This is because a Court is powerless to assume that a subsisting order of judgment of another Court

can be ignored because the former, whether it is a superior Court in the Judicial hierarchy presumes the order as made or the judgment as given by the latter to be manifestly invalid without a pronouncement to that effect by an appellate or reviewing Court.”

[21] The Order *op. cit.* goes beyond granting a litigant the right to appeal but informs him that should he:

“believe that the matter cannot be equitably adjudicated upon by the Court..”

may apply to the hierarchy of courts available for his matter to be transferred from that Court as per section 24 of the Order *op.cit.*

[22] It was therefore incumbent upon the applicant to request for his matter to be transferred if the allegations in his founding affidavit are anything to go by as he avers:

“This episode(apparently by the 2nd and 3rd respondent ejecting him from the premises)came as soon and after I had successfully assisted two clients who were being unlawfully evicted by the 2nd and 3rd Respondents at Ezulwini without a Court Order and after they had gone to Court to apply for their eviction and I told them to await the outcome of that application.” (words in brackets, mine).

[21] In the circumstance this court has no jurisdiction to entertain applicant’s application.

[22] Mr. V. Kunene and Mr. B. Mndzebele, Counsel for respondents both submitted that applicant has dismally failed to satisfy the requirements of an interim interdict. They argued that the applicant cannot claim a better title over the premises than the 1st respondent who holds ownership, that the applicant has dismally failed to allege let alone prove that the balance of convenience favour that an interdict be granted and that the applicant has another remedy in a form of a claim for the money expended under renovations. Mr. B. Mndzebele for the 1st respondent carried the argument further by stating that at a close scrutiny of applicant's prayer, the interdict sought has no interim effect in that the application was lodged on the 3rd November, 2012 and the matter argued on 7th December, 2012. In the lapse of a period of over a month, applicant has failed to file the action proceedings.

[22] In the interest of justice, one may assume as argued by the applicant that the interdict is interlocutory and therefore proceed to enquire whether the requirements of such an interdict have been proved on the tilt of the scales of justice.

[23] **Winkelbauer & Winkelbauer v Minister of Economic Affairs 1995(2)SA 570(T)** at 574 his Lordship Botha J. states in relation to temporary interdicts:

“The purpose of interim relief pendete lite is to obviate an injustice to a party who prima facie has been wronged, but who needs time to obtain redress through the due process of law.”

[24] The requirement of an interim interdict is *inter alia*, a *prima facie* right. As mentioned by Innes J. A. in **Setlogelo v Setlogelo 1914 AD 221** at 227, citing Van der Linden's Institutes that a *prima facie* right is one that is:

“open to doubt”

[25] **Ferreira v Levin NO; Vryenhoek v Powell NO 1995(2) SA 813(W)** at 817 it is stated:

“It has, up to now, been accepted that in order to establish a prima facie right entitling an applicant to an interim interdict, an applicant has to make out a case that he is entitled to final relief. If on the facts alleged by the applicant and the undisputed facts alleged by the respondent a Court would not be able to grant final relief, the applicant has not established a prima facie right and is not entitled to interim protection.”

[26] The applicant fails to state his *prima facie* right in his founding affidavit. The court is called upon to glean. This court has read the founding affidavit over and over in an attempt to ascertain applicant's *prima facie* right. Applicant deposes as follows on the contrary:

“8.8 When the renovations were completed Royal Swazi Spa no longer wanted the house as they said they had already found alternative accommodation as we had taken too long to finish the renovations;

8.9 *I informed the 1st Respondent upon which she said I should stay in the house in order to safeguard it or preserve it from her brothers who wanted to take it.*

8.10 *I did so and since about June 2009 I have stayed in the house without any problems from the 1st Respondent.”*

[27] He continues further:

“8.19 When I opened the door the 1st Respondent demanded that I vacate the house immediately as she has someone else to lease the house to.

8.20 *The 1st Respondent told me that she didn’t care that I had renovated the house as I had stayed in the house for almost 5(five) years without paying anything.*

8.21 *I told her I am willing to vacate the house if she paid me the E100 000.00(one hundred thousand emalangeni) I had spent on the renovating the house as agreed.”*

[27] Applicant fails to inform the court as to the reason he asserts a better title over the premises. In his own showing, he states that there is no landlord-tenant relationship between him and the 1st respondent. He, however, avers that the 1st respondent is the owner of the premises occupied by him. On the contrary, he informs the court that he is occupying the house because there is a debt due and owing to him by the 1st respondent. This, I am afraid cannot hold water. There is absolutely no right let alone *prima facie* one from the totality of the averments by applicant. Surely the right must be recognized by law as propounded in **Minister of Law and Order, Bophuthatswana, v**

Committee of the Church Summit of Bophuthatswana 1994(3) SA 89(B) at 98 as follows:

“The right which the applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common law or statutory law.”

[28] **KUMLEBEN J. in Airoadexpress v Chairman, LRTB, Durban 1984(4) SA 593** at 600 hit the nail on the head as he wrote:

“In the rule nisi judgment this right was held to be the maintenance of the status quo ante having regard to the nature of, and manner in which, the business of applicant was being conducted. But in my view any right to maintain the status quo by way of an interim interdict can properly refer only to the preservation of an alleged, though disputed, legal right and not to the preservation of commercial interests generally.” (words underlined, my emphasis).

[29] In the premises applicant has dismally failed to establish even a *prima facie* right let alone any right in law. In fact in the totality of applicant’s averment, this court cannot protect applicant. On the contrary the conduct of applicant to cling on the house on the basis that the 1st respondent is owing him, is tantamount to taking the law into his own hands and the court cannot protect his unlawful conduct.

[30] The third point of law raised by respondents is that the applicant’s application is fraught with material dispute of facts. Mr. Mndzebele for the 3rd respondent submitted that the mere fact that applicant seeks an

order *pendete lite* is an indication that there are disputes of facts. I doubt whether this is a general position although I understand that it was meant for the case *in casu*.

[31] I am alive to the *dicta* in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 SA (A) 623** at 624 that:

“Where there is a dispute as to the facts, ..interdict should be granted only in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted, requires clarification and perhaps qualification. In certain cases the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.”

[33] In the present case, it is clear that when applicant filed in this court the application for an interdict, the 1st respondent had been to the traditional structures on the same issue of continual to reside in the premises without paying rentals and that the 1st respondent was refusing to pay him the sum of E100 000.00. He ought therefore to have foreseen that there were disputes of facts in this matter. In his founding affidavit applicant reveals a number of contentious averments as I hereby demonstrate:

“8.13 For that reason I have not paid any rent for living in the house neither have I charged the 1st Respondent for

guarding her house. The 1st Respondent herself has never demanded rent from me for staying in the house.

8.18 Then on or about the 13th day of October, 2012 the 1st Respondent and members of the 2nd Respondent came to my house and kicked the doors and banged the windows of the house demanding entry to the house.

8.19 When I opened the door the 1st Respondent demanded that I vacate the house immediately as she has someone else to lease the house to.

8.20 The 1st Respondent told me that she didn't care that I had renovated the house as I had stayed in the house for almost 5(five) years without paying anything."

[34] The above averments clearly demonstrate a situation of acrimony between the applicant and 1st respondent. That should have informed the applicant that the 1st respondent would raise a dispute in his allegation that he was not entitled to pay rent. On applicant's own showing therefore, the material dispute of facts ought to have been foreseen.

[35] In the totality of the above, I enter the following orders:

- (i) Applicant's application is dismissed;
- (ii) Applicant is ordered to pay costs.

M. DLAMINI
JUDGE

For Applicant : Mr. L. Malinga
For 1st Respondent : Mr. B. Mndzebele
For 2nd and 3rd Respondent : Mr. V. Kunene

