



## IN THE HIGH COURT OF SWAZILAND

### JUDGMENT

Civil Case No.1819/12

In the matter between:

**GCINAPHI NONKULULEKO NKOSI**

**1<sup>st</sup> Appellant**

**THABSILE MBALI NKOSI**

**2<sup>ND</sup> Appellant**

and

**DANDANE MALINGA**

**1<sup>ST</sup> Respondent**

**VELAPHI MALINGA**

**2<sup>ND</sup> Respondent**

**Neutral citation:** *Gcinaphi Nonkululeko Nkosi & Another vs Dandane Malinga (1819/12)*

*SZHC 271 [ 21 December 2012]*

**Coram:** **MAPHALALA PJ**

**Heard:** **26 OCTOBER 2012**

**Delivered:** **21 DECEMBER 2012**

**Summary:** (i) Application where the court finds that the Applicant has failed to prove the requirements of urgency in accordance with Rule 6(25) (a) (b) of the Rules of the High Court.

- (ii) Secondly, the Applicant initially applied for an interim order and in the replying affidavit changed to a final interdict.
- (iii) As a result, the Application dismissed on the points *in limine* with costs.

### **The Application.**

[1] On the 26 October, 2012 the Applicants filed under a Certificate of Urgency an Application against the two Respondents for an order in the following terms:

- “1. Dispensing with the forms and services prescribed by the Rules of this Honourable Court and directing that the matter be heard as one of urgency.
- 2. Condoning Applicant’s non-compliance with the Rules of Court.
- 3. That a *rule nisi* do hereby issue calling upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to show cause, on a date to be set by the above Honourable Court, why”

3.1 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents (and all those claiming to be dependants of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) should not be permanently restrained and interdicted from entering, ploughing and/or cultivating crops on any portion of the 1<sup>st</sup> and 2<sup>nd</sup> Applicant’s properties, being portion 42 (a portion of portion 2) of Farm Calaisvale II No.693 situate in the District of Manzini, and portion 45 (a portion of portion 2) of Farm Calaisvale II No.693 situate in the District of Manzini, respectively.

3.2 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents (and all those claiming under them) should not be permanently restrained and interdicted from

interfering in any way with the 1<sup>st</sup> and 2<sup>nd</sup> Applicant's access to, possession and/or ownership right of portion 42 (a portion of portion 42) of Farm Calaisvale II No.693 situate in the District of Manzini, and portion 456 (a portion of portion 42) of Farm Calaisvale II No.693 situate in the District of Manzini respectively.

4. That prayers 2 and 3 above operate as an interim order with immediate effect pending the finalization of these proceedings.
5. Costs of suit.
6. Further and/or alternative relief.”

[2] The founding affidavit of the 1<sup>st</sup> Applicant is filed in support of the Application where various pertinent annexures are also attached thereto.

[3] The Respondent opposes the granting of the above orders and has filed an answering affidavit deposed to by the 1<sup>st</sup> Respondent Dandane Malinga. In the answering affidavit points *in limine* are raised. These being firstly urgency, secondly *lis pendens*, thirdly failure to satisfy the requirements of an interdict.

[4] On the 2<sup>nd</sup> November 2012 the attorneys of the parties recorded before the court an undertaking to the effect that the Respondent are not to plough or cultivate the fields

in portion 42 a portion of portion 2 of Farm Calaisvale II No.693 situate in the District of Manzini.

[5] In arguments before me on the 8<sup>th</sup> November 2012 both the attorneys for the parties field Heads of Arguments in support of their parties' arguments.

**The arguments on the points *in limine*.**

[6] Mr. du Pont for the Respondents advanced the first point *in limine* that of urgency that the Application herein is definitely not urgent. That the alleged urgency is self-created, misconceived and is an abuse of the court process in that the Applicants have failed to be candid with this court. That Applicant have not told the court when they became aware that the Respondents were ploughing and cultivating crops on the land in question.

[7] In support of the above point *in limine* Mr. du Pont cited pertinent decided cases by the High Court and the Court of Appeal being the case of *Nhlanhla Maseko and 2 Others vs George Mbatha & Another Appeal Case No.7/2005*; *Yonge Nawe Environment Action Ground vs Nedbank & 4 Others Civil Case No.4165/2007*; *Humphrey Henwood vs Maloma Colliery & Another Civil Case No.1623/94* and that of *Prime Minister & Another vs Ben Zwane Civil Case No.199/99*.

[8] Mr. du Pont further cited the High Court cases of *Jacquiline Taft vs Nigel Alfred Taft & Others Civil Case No.268/2006*; *HP Enterprises (Pty) Ltd vs Nedbank Swaziland Ltd Case No.788/1999* and that of *Nogalith Holdings vs RMS Tibiyo (Pty) Ltd & Another, Civil Case No.1999/2000*.

[9] Mr. du Pont argued furthermore in support of the second and third points *in limine* that of *lis pendes* and failure to satisfy the requirements of an interdict.

[10] I must mention for the record that when the matter was argued on the 8 November 2012 the attorney for the Applicant conceded that the Applicants had grounded their Application on an interim interdict yet in their replying affidavit have changed their tune and sought a final interdict. When the attorney for the Applicant was pressed on this by the court he conceded that Applicants have failed to advance a proper case but prayed the court to exercise its discretion on the matter.

**The Applicant's arguments against the points *in limine*.**

[11] The attorney for the Applicant Mr. Khoza also filed Heads of Arguments answering to all the points raised by the Respondents. He also cited pertinent cases to support his arguments.

- [12] On the first point of urgency the grounds of urgency must be clearly set out in the affidavit and that it is not necessary that they be set out separately but must appear from the affidavit as a whole. In support of this proposition he cited the South African case of *Sikue vs SA Mutual Fire & General Insurance 1927(3) SZ438*.
- [13] Further on this point the attorney for the Applicant contends that the criteria to which the court will have regard in determining whether to treat as urgent under the rules are the prejudice that an Applicant might suffer by having to wait for a hearing in the ordinary course. For this proposition Mr. Khoza cited the textbook by *Prest: The Law and Practice of Interdicts* at page 230 and the case of *Maron Caterers (Pty) Limited vs Greater Mans Ltd & Another 1984(4) SA 108*.
- [14] On the second point *in limine* that of *lis pendes* Mr. Khoza argued that the *onus* of establishing the requisites of this defence rests upon the party raising the defence. That it is for the party who instituted the second proceedings to satisfy the court that the proceedings is not vexatious since the balance of equity and convenience favours the second case. For this proposition Mr. Khoza cited the case of *van As vs Appullus 1993(1) SA 606 ©* and that of *Miller vs Cook 1973(2) SA 247*.

- [15] The attorney for the Applicant also cited *Joubert, The Law of South Africa* page 142 in support of the above argument.
- [16] On the last point *in limine* that of the requirements of an interdict that Applicants have satisfied the requirements of an interdict being firstly a clear right, secondly, an injury and thirdly no alternative remedy. The court was referred to the cases of *Setlogelo vs Setlogelo 1914 AD*; *Francis vs Roberts 1913(1) SA 507*; *Minister of Law and Order Bophuthatswana & Another vs Committee of the Church Summit of Bophuthatswana & Others 1994(3) SA 89*; *Lenz Township Co. (Pty) Ltd vs Lorents 1961(2) SA 450 (A) 455*.
- [17] At paragraph 4.2 of the Heads of Arguments of the attorney for the Applicant dealt with the provisions of the Constitution of Swaziland. The argument advanced is that the High Court is usually mandated by the Constitution to fulfil its protective role, and further that in the current circumstances there is no need for relief from the executive to be exercised before recourse to the High Court. To support his proposition the court was referred to the case of *Nkomo vs Attorney General Zimbabwe 1994(3) SA* at page 38.
- [18] A further argument by the Applicant's attorney on the Constitution is that where fundamental rights or freedoms are conferred upon individuals under the Constitution, derogations therefrom, as far as their language permits should be narrowly or strictly

construed. For this proposition Mr. Khoza cited the cases in the *Minister of Home Affairs Dabangwa 1982(4) SA 301, ANC (Border Branch) vs Chairman Council of State of Ciskei 1992(4) SA (CR 447)*.

**The court analysis and conclusions thereon.**

[19] Having considered all the arguments of the parties and the decided cases cited to support those arguments it is my view that the points *in limine* raised by the Respondent ought to succeed. I say so for two reasons. Firstly, the Applicant has failed dismally to prove urgency in accordance with the preremptory requirements of Rule 6(25) (a) & (b) of the Rules of Court.

[20] The averments by the Applicants which seek to prove urgency are found in paragraph 34.1 and 34.2 of the Applicant's founding affidavit and fall short in proving urgency as required by Rule 6(25) (a) & (b) of the Rules of the High Court. Even the Certificate of Urgency does not say anything at all on the question of urgency. The court followed the invitation by the attorney for the Applicant to look at the whole body of the founding affidavit and I was not able to find a single averment dealing with this very important aspect of the matter. I am therefore duty bound to find that Applicants have failed to prove the preremptory requirements of Rule 6(25) (a) & (b) of the High Court Rules.



[21] Secondly, in arguments before me the attorney for the Applicant conceded the point that it is not clear on the papers what form of interdict is applied for. On one breath the Applicants are applying for an interim interdict and in their replying affidavit they changed tune and seek for a final interdict. In arguments before the attorney for the Applicant urged the court to exercise its discretion on the matter. Therefore, in my view the Applicants have failed even on this aspect of the matter.

[22] In the result, for the foregoing reasons the Application is dismissed on the basis of these two points *in limine* and to also to pay costs.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**

**For Applicants** :

**For Respondents** :