



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 3336/10

In the matter between:

JOSEPHINE MHLALELWA MAMBA

First Applicant

EMMELINAH SIBOLILE MAMBA

Second Applicant

and

ZABULON MBINGO

First Respondent

THE COMMISSIONER OF POLICE NO

Second Respondent

THE ATTORNEY GENERAL

Third Respondent

Neutral citation: *Josephine Mhlalelwa Mamba & Others vs Zabulon Mbingo & Others 3336/2010 [2012] SZ HC 31(24 February 2012)*

Coram: **MAPHALALA PJ**

Heard: **21 April 2011**

Delivered: **24 February 2012**

Summary: **Plaintiff's action against the Defendant for eviction from the Plaintiff's piece of land at Sihlangwini area. Defendant raised the defence of *res judicata* in his plea. The court finds for the Defendant on the points *in limine* with costs.**

The Application

[1] The Applicants have filed before this court an Application in the long form for an order in the following terms:

1. That the Respondent and/or acting under his instruction be forthwith interdicted and restrained from effecting any development in the form of any building or structures on the land situate at Sihlangwini area pass Lavundlamanti High School across Mhlathuzana River, lawfully belonging to the Applicants, pending the outcome of the eviction action instituted by the Applicants.
2. That the 2nd Respondent assists in effecting this order.
3. That Phumelele Malindzisa be appointed *ad hoc* Deputy Sheriff for the District of Lubombo to effect service of all process in this matter.
4. Costs of suit.
5. Further and/or alternative relief.

[2] The Founding Affidavit of the First Applicant is filed in support of the Application where she has outlined all the material facts in this matter.

[3] The First Respondent has filed a Notice of intention to oppose the Application dated 23 September 2010 where preliminary points are raised at paragraph [3] thereof. These points are the following:

“3.1 The Applicants have got no clear right protect in this Application. The Respondent is the lawful occupant and possessor of the land in question since some thirty years ago. The issue of the land was deliberated at the Ngudzeni Royal Kraal wherein a verdict was issued that the Respondent should remain in occupation and possession of the land and his homestead. The Applicants are aware of this verdict and actually are wasting the court’s time. The verdict of the Ngudzeni Royal Kraal hereto attached has not been appealed or reviewed.

3.2 The matter is *res judicata* in that it was finalized through the traditional structures. The Applicants should have followed the structures open to them through the traditional route that is the Regional Administrators Office, Nkhanini offices and the King at Ludzidzini Libandla.”

[4] Respondent’s Counsel added a third point *in limine* from the bar in paragraph 2.3 of Respondent’s counsel posed a question to the following effect:

“Is there no dispute of fact in this matter?”

The arguments of the parties

[5] There was no appearance for the Applicant as the First Applicant and Second Applicant were duly served with the Notice of set down by the Respondent’s Counsel and I allowed him to address me on the points *in limine* raised by the Respondents.

- [6] The attorney for the Respondent premised his arguments on the proposition that Applicant does not have a clear right over the land in question. That this is so on the following facts. Firstly, that the Respondent states that the land in question was allocated to him. This issue has not been denied by the Applicants. Secondly, the Respondent has attached a letter from the Ndvushulweni Royal Kraal where it was ruled that the land in question was allocated to the Respondents.
- [7] The letter was handed to the court and was entered as an exhibit in this case. I find it imperative to reproduce this letter for a better understanding of the case. The letter reads as follows:

“Ndvushulweni Royal Kraal
P.O. Box 350
Hlatikulu

19 September 2010

Dear Sir/Madam

The matter between Moses Mamba and Zabulon Mbingo was deliberated by the Royal Kraal wherein a complaint about a fence that was too close to Moses Mamba’s was raised.

The Headman’s Council which amongst others was Phephetha sent a delegation to inspect the fence complained of, and of course they came and reported that it has since been removed from where the neighbours wanted it removed.

When questioned on their relationship with Timothy during the removing of the fence, Zabulon he mentioned that he stayed at Timothy’s Mamba’s homestead for a period of 19 years, when he was still herdboys and ended up seeking for land on which to build his own home. It is then that Timothy went to negotiate for such land from Mr. Mfanyana Magagula. Magagula allocated him and he built his home in the year 1969.

On the issue of the removed fence a further complaint was raised by the Mamba's [Moses] to the effect that they wanted the homestead removed. The council responded that it did not have authority to remove a homestead because once a person has been allocated, it can't be removed, considering also the costs of building the council refused to remove the homestead. It further based its refusal on the Mamba.

This matter was concluded by the Council, using three [3] delegates by the name Magwaza, Shongwe and Genge Mavimbela by the instructing them to remove the fencing so that it is not closer to Timothy Mamba's homestead.

The Royal Kraal ordered that Moses Mamba should never talk on the land issue ever and Mbingo to settle in his place and keep his peace.

That is the order by the Mamba's Royal Kraal. The council offered its praises. Matter was heard on the 14th of October 2000.

Yours faithfully,

AMOS MAMBA
SECRETARY [76132216]"

- [8] The Respondent contends that it is clear that the Applicants have no clear right to protect since the land in question does not belong to them or they have no clear title to the land in question. To support this proposition the Respondents have cited the landmark decision in the case of *Setlogolo vs Setlogolo 1914 AD 221* at 227 to the following proposition:

“It is well established that the pre-requisite for an interdict are a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by another remedy.”

[9] On the second point the Respondents contend that the matter is *res judicata* as the traditional structure of Ndvushulweni Royal Kraal has deliberated on the matter. To support this proposition has cited a letter written in *SiSwati* at page 21 of the Book of Pleadings.

[10] Counsel for the Respondent then cited a plethora of legal authorities to support his argument on “*res judicata*”. He cited the case of *Bofokeng Tribe vs Impala Platinum Ltd, Jabulani Mangethe Zwane vs Fuleko Masuku and 3 Others*. (citation)

[11] The third point raised is that there are dispute of facts in this matter as follows:

11.1 Whether or not the Applicants are entitled to possession of the disputed land as they contend;

11.2 Whether or not the Respondent are interfering with the rights of the Applicant in the disputed land in view of the ruling of the Ndvushulweni Royal Kraal.

[12] The Respondent has cited the case of *Plascon Evans Paints Ltd vs van Riebeck Paints (Pty) Ltd (3) SA 623 (A)* at page 634 – 635 and that of *Ellon Masilela vs Wrenning Investments (Pty) Ltd and Thomas Moore Kirk Civil Case No.1768/08*.

The court’s analysis and the conclusions thereon

[13] The first issue for decision is whether Applicant had a clear right over the land in question. The second issue in the matter is whether the matter is *res judicata* since it was finalized through the traditional structures at Ndvushulweni Royal Kraal. Lastly, and thirdly whether there is a dispute of fact in this matter.

[14] I shall address these questions *ad seriatim* in the following paragraphs.

(i) Clear right

[15] It is contended on behalf of the Respondent that the Applicant does not have a clear right over the land in question. That this is so on the following facts. Firstly, the Respondent states that the land in question was allocated to him. That this issue has not been denied by the Applicant. Secondly, the Respondent has attached a letter from the Ndvushulweni Royal Kraal where it was ruled that the land in question was allocated to the Respondent.

[16] Having considered the facts in this matter I am in agreement with the Respondents contentions that on the facts it is clear that the Applicants has no clear right to protect since the land in question does not belong to them or they have no clear title to the land in question. In this regard I find the principles of law in the case of *Setlogolo vs Setlogolo 1914 AD 221 AT*

227 apposite to the proposition that it is well established that the pre-requisite for an interdict are a clear right injury actually committed or reasonably apprehended and the absence of a similar protection by another remedy. I find therefore, for these reasons that this point *in limine* succeeds.

(ii) res judicata

[17] The second issue for decision is whether this Application is *res judicata*. The Respondent contends that it is deliberated having been dealt by the traditional structure of Ndvushulweni Royal Kraal. To support this proposition the Court was referred to the letter outlined at page 21 of the Book of Pleadings. That the Applicant should have appealed or applied for review of the traditional authorities. To support this argument the court was referred to the South African case of *Bofokeng Tribe vs Impala Platinum (supra)* and that of *Jabulani Mangethe Zwane vs Fuleko Masuku, High Court case*.

[18] Having considered the arguments as outlined above in paragraph [17] *supra* I have come to the considered view that the point *in limine* of *res judicata* also succeeds. The dispute was heard by the traditional structure of Ndvushulweni Royal Kraal. Applicant should have either filed an appeal or applied for review of the said order.

(iii) dispute of fact

[19] Having considered the affidavits filed by the parties I come to the view and I agree with the Respondent that there are disputes of facts in this matter. (See *Plascon Evans Paints (Pty) Ltd vs van Riebeck Paints (Pty) Ltd 1984(3) SA 623 (A)* and the case of *Elmon Masilela vs Wrenning Investments (Pty) Ltd and Thomas Moore Kirk, Civil Case No.1768/08*.)

[20] In the result of for the foregoing reasons the Application is dismissed with costs.

STANLEY B. MAPHALALA
PRINCIPAL

For the Applicants: In absentia
For the Respondents: Mr. S.P. Mamba