



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.490/2007

In the matter between:

MESHACK SHONGWE

Applicant

v

RAPHAEL MKHABELA

Respondent

Neutral citation: *Meshack Shongwe vs Raphael Mkhabela (490/2007)*
[2013]SZHC 107 (107 June 2013)

Coram: **MAPHALALA PJ**

Heard: **04 June 2013**

Delivered: **11 June 2013**

Summary:

- (i) Application brought under a Certificate of Urgency for interdict.
- (ii) The court finds that Applicant has no *locus standi* to make the Application in view of an order issued rescinding the order the Applicant was relying upon.
- (iii) The court also orders that Applicant pays costs at a punitive scale.
- (iv) Therefore, it would be grossly unjust to order Summary Judgment in these circumstances.

The application

[1] The dispute between the parties has some history but for decision by this court presently is an Application brought under a Certificate of Urgency for orders in the following terms:

- “1. That the Rules of the above Honourable Court in relations to service, form and time limits are hereby dispensed with and that the matter be enrolled and heard as one of urgency.
2. That the Applicant is hereby condoned for non-compliance with the Rules of the above Honourable Court.
3. That a *rule nisi* do hereby issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why an Order in terms of the following should not be made final;
 - 3.1 The Respondent or anyone acting under his instruction and/or advice be restrained and/or interdicted from collecting any rentals from the aforementioned immovable property belonging to the Applicant which is situate at Logoba area, within the District of Manzini.
 - 3.2 The Respondent or anyone acting under his instruction and/or advice be restrained and/or interdicted from collecting any rentals from the aforementioned property belonging to the Applicant which is situate at Logoba area, within the District of Manzini.

3.3 The Respondent or anyone acting under his instruction and/or advice be restrained and/or interdicted from harassing and/or violating the rights to dignity and privacy of the tenants who are renting rooms on the aforementioned immovable property belonging to the Applicant which is situate at Logoba area, within the District of Manzini.

4. That the *rule nisi* operates with immediate effect.
5. Costs of this application.
6. Ordering the Royal Swaziland Police (Matsapa Police Station) to effect this Order and if necessary serve the same”.

[2] The Applicant one Meshack Shongwe has filed a Founding Affidavit setting out the background of the matter and also attached pertinent annexures in support of his case.

[3] The Respondent one Raphael Mkhabela opposes the granting of the prayers cited in paragraph [1] above and has raised two points *in limine* and answered on the merits of the case.

[4] The matter came before me for arguments on the 4 June, 2013 where both attorneys made submissions and filed very comprehensive Heads of Arguments for which I am grateful.

The arguments of the parties

(i) For the Applicant:

- [5] I must mention for the record that although the Respondent has raised points *in limine* by agreement of the attorneys the Applicant commenced with the arguments on both being the *points in limine* and the merits of the case.
- [6] The attorney for the Applicant commenced his arguments with the proposition that the Respondent has opposed the Application on the grounds *inter alia* that Applicant does not have a cause of action since the court order he relies upon was rescinded by this court. That the basic question that falls for determination is whether or not the order of this court dated 26 February, 2007 which was granted in favour of the Applicant was rescinded.
- [7] The attorney for the Applicant further contended that if the order of this court mentioned above was not rescinded then whether or not the Applicant has satisfied the requirements of an interdict. The attorney submitted that the order of this court of the 26 February, 2007 was never rescinded. That not only was the foregoing order not rescinded but the judgment of the 7 December, 2007 was also not rescinded. That annexure “RM1” relied upon by the Respondent does not rescind the order of this court of the 20 February, 2007 that annexure “RM1” is in relation to a motor vehicle.
- [8] The attorney for the Applicant then dealt at some length with the interdict being sought in paragraphs 5 to 5.3.2 of this Heads of Arguments.

[9] In paragraphs 6 to 6.2.1 the Applicant's attorney dealt with the issue of urgency.

[10] Finally at paragraph 7 the Applicant's attorney made submissions on disputes of fact. That *in casu* there are no disputes of facts and that the matter was resolved by the traditional authorities and this court.

[11] I must also add that the attorney for the Applicant also advanced further arguments outside his Heads of Arguments that the Respondent approached this court with "dirty hands" and has contravened the doctrine of "clean hands".

(ii) For the Respondent

[12] The attorney for the Respondent also filed very useful Heads of Arguments and also put his finger on the dispute that the crux of the opposition is that the order relied upon was rescinded and set aside by this court on the 16 February, 2009. That the order for rescission appears at page 57 of the Book of Pleadings. The order was rescinded after the Respondent moved an application before this court dated 28 May, 2008. In support of these facts the court was referred to the Book of Pleadings dated 30 May, 2008.

- [13] The attorney for the Respondent further contended that annexure “RM1” to the Answering Affidavit does relate to a motor vehicle and the issue of the alleged motor vehicle is not known to the Respondent.
- [14] The second leg of the opposition is that the matter was adjudicated and decided under the Swazi traditional structures as the land in question is under the authority of the chief or is on Swazi nation land. That the matter started at Logoba Royal Kraal and then to the Swazi National Court in Manzini and now in Swazi Court of Appeal as Applicant allegedly appealed.
- [15] The attorney for the Respondent furthermore contended that while the matter was pending before the traditional structures the Applicant “stealthy approached this court and on an *ex parte* basis” obtained a declaratory order and an interdict against the Respondent. That the purpose of the *ex parte* Application was to deny Respondent his Constitutional right of being heard by this court and as such the principles of natural justice were compromised. That to further put salt to injury even the *ex parte* Application was not served upon the Respondent. The *rule nisi* was confirmed by the court without proper service.
- [16] The attorney for the Respondent then made submissions that in the first place this court was not supposed to deal with this matter at all. The matter was rightfully before the traditional structures who were at the time dealing with it.

That the matter was before these structures cannot be ignored and it is clear on the papers before this court.

[17] In support of these arguments the attorney for the Respondent cited a *plethora* of decided cases by this court including that of *Maziya Ntombi vs Ndzimandze Thembinkosi, Appeal Case No.2/2012; The Commissioner of Police and Another vs Mkhondvo Aaron Maseko, Appeal Case No.3/2011* and that of *Beauty Jumaima Thomo vs Kenneth Harold Vilakati and Another Case No.1159/2000*.

[18] On the points *in limine* the attorney for the Respondent did not advance arguments in support thereto but relied on what is reflected in the opposing affidavit of the Respondent.

[19] Finally, a further argument on costs is advanced for the Respondent at paragraph 9 of the Heads of Arguments of the attorney for the Respondent. That on the circumstances of the case this court ought to order for cost in the punitive scale against the Applicant.

The court analysis and conclusions thereon

[20] Having considered the facts of matter and the arguments of the attorneys of the parties I shall first consider the two points *in limine* raised by the Respondent and then proceed to deal with the merits if the points *in limine* fail.

[21] Starting with the point raised by the Respondent that of urgency I have examined the averments in the Applicant's Founding Affidavit in paragraphs 25, 25.1, 25.2, 25.3, 25.4 and 25.5 and I am satisfied that the Applicant has shown urgency in accordance with the Rules of this court. Therefore, this point *in limine* is dismissed without any further ado.

[22] The second point is that the Deputy Sheriff has not been cited in this Application. I have assessed the arguments of the parties and I rule in favour the Applicant and therefore the point fails. I agree with the arguments of the Applicant.

[23] I now proceed with the merits of the case. It is common cause between the parties that the nub of the matter is a determination whether or not the order of the court dated 28 February, 2007 which was granted in favour of the Applicant was rescinded. If the order of this court was not rescinded then whether or not the Applicant has satisfied the requirements of an interdict.

[24] In order to answer this question it is important to first outline the said order and thereafter trace subsequent events in this dispute.

[25] On the 23 February, 2007 the Acting Chief Justice Annandale (as he then was) issued the following order:

“WHEREUPON hearing Counsel for the Applicant

IT IS ORDERED:

1. Dispensing with the usual forms and procedures relating to the institution of those filings and allowing the matter to be enrolled and heard as one of urgency in terms of the provisions of the above Honourable Court.
2. Condoning Applicant’s non-compliance with the Rules of Court.
3. That a *rule nisi* issued on the 13th February 2007 returnable on the 23rd February 2007 calling upon the Respondents to show cause why an order in the terms set out hereunder should not be made final:
 - 3.1 declaring certain immovable land situate in the Logoba area, district of Manzini belonging to the Applicant;
 - 3.2 1st and 2nd Respondents be hereby interdicted and restrained from collecting any rentals from the aforesaid land pending finalisation of the matter.
 - 3.3 1st and 2nd Respondents be hereby interdicted and restrained from entering upon the aforesaid land pending finalisation of the matter.
 - 3.4 the 2nd Respondent be ordered forthwith to vacate the flat he presently occupies upon the aforesaid land.
4. That the *rule nisi* operates as an interim order with immediate effect.
5. Costs of this application.
6. Ordering the Royal Swaziland Police (Matsapa Police Station) to effect this order and if necessary, serve same.

7. That the Respondents be entitled to anticipate the above order within 24 hours of service of same.
8. Further and/or alternative relief.
9. *Rule nisi* confirmed”.

[26] Two years later on the 16 February, 2009 the matter appearing before me were Mr. Ndzima appeared for the Respondent who was Applicant then. There was no appearance for the Respondent who is the Applicant in the present Application the court recorded the following order:

“in the circumstances where Respondent’s counsel has been given an indulgence since yesterday an application is granted in terms of prayers (b) (c) & (d) of the Notice of Motion of the 28th May 2008. Costs to be costs in the normal scale”.

[27] The above order reads as follows:

“IT IS HEREBY ORDERED THAT;

- a) That the final Court Order with the Registrar stamp dated 26th February 2007 is hereby rescinded and set aside.
- b) That the writ of execution issued by this Honourable Court dated 10th April 2007 is hereby stayed and/or set aside.
- c) That the Respondents are hereby ordered to pay costs of suit in the ordinary scale”.

[28] In my assessment the submission regarding annexure “RM1” does not apply to the facts of this case as this is in relation to a motor vehicle.

[29] Therefore in view of the above orders outlined in paragraph [24], [25], & [26] above the arguments of the Respondent ought to succeed without any further ado. It is clear on the tenor of these orders that the Applicant has no *locus standi* to advance any case on this subject matter before this court.

[30] The only remedy that the Applicant would have had was to appeal the order outlined in paragraph [27] of this judgment.

[31] It would appear to me also that the attorney for the Respondent is correct that this matter ought to be heard by courts in the Swazi law and Custom regime where it is still pending.

[32] The submission by the attorney for the Respondent that “Applicant stealthy approached this Honourable Court and on *ex parte* basis obtained a declaratory order and an interdict against” seem to be correct on the facts of this case.

[33] I now proceed to address the issue of costs.

[34] Mr. Ndzima for the Respondent posed a question as to why Applicant would bring the present Application instead of bringing contempt proceedings against the Respondent if indeed he acted contemptuously. That this is an abuse of the court process and an order for costs in the punitive scale would be proper in the circumstances and Respondent would so apply. On the other hand it is contended for the Applicant that costs should be levied at the ordinary scale.

[35] The award of costs is a matter within the discretion of the court. But it is a judicial discretion and must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at (*see Leubin Products (Pty) Ltd vs Alexander Films SA (Pty) 1954(4) SA 225(BR)*).

[36] In leaving the Magistrate (or Judge) a discretion:-

“the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties and if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle. I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion”. (**See** *Herbstein & van Winsen, The Civil Practice of the Supreme Court of South Africa*, page 704)

[37] In the present case I have reached a considered view that the Applicant acted contemptuously against the Respondent in view of the fact that the order relied upon had been rescinded as shown above. Therefore I order that Applicant pays wasted costs at a punitive scale.

[38] Before the commencement of the arguments of the parties Mr. Ndzima for the Respondent applied for an order that the monies collected for rentals of the disputed premises be collected by an independent person chosen by the parties. That pending the decision by the traditional court such monies be kept in the custody of such person. Further, on the facts of this case I do not think Respondent contravened the doctrine of “clean hands” as contended by the Applicant. Therefore, this point raised by the Applicant fails.

[39] In the result, for the foregoing reasons the Application is dismissed with costs at a punitive scale. Further this court orders that the monies collected as rent from tenants be collected by a person appointed by both parties. Furthermore, that pending a final decision by the traditional courts such monies be kept in the custody of such person.

[40] By agreement of the attorneys for the parties the person appointed in terms of paragraph [39] *supra* is VJR Estate Agents.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For the Applicant : Mr. Bhembe

For the Defendant : Mr. Ndzima