



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1215/11

In the matter between:

IVAN SANELE MABUZA

APPLICANT

AND

BETTY LUKHELE

FIRST RESPONDENT

MANDLA MNDZEBELE

SECOND RESPONDENT

THE COMMISSIONER OF POLICE

THIRD RESPONDENT

ATTORNEY GENERAL

FOURTH RESPONDENT

In re:

Ivan Sanele Mabuza

Applicant

And

Betty Lukhele

First Respondent

Zandile Mvubu

Second Respondent

All Other Persons Intending to Burry

Alfred Lukhele at Applicant' Farm

Third Respondent

The Commissioner of Police

Fourth Respondent

Attorney General

Fifth Respondent

Neutral citation:

*Ivan Sanele Mabuza v Betty Lukhele & 3 Others
(1215/11) [2013] SZHC38 (2013)*

Coram:

M.C.B. MAPHALALA, J

For Applicant

Attorney D. Jele

For Respondent

Attorney S. Hlophe

Summary

Civil Procedure – Contempt of Court – application to commit first and second respondents to gaol for contempt of Court Order issued on the 1st April 2011 – the essential requirements of the offence discussed – both respondents found guilty of contempt.

JUDGMENT 28 FEBRUARY 2013

[1] An urgent application was lodged on the 1st April 2011 for a Rule *Nisi* to issue calling upon the respondents to show cause on the 8th April 2011 why the burial of Alfred Lukhele on applicant's farm at Sidwala area, being portion 2 of Farm Duurgenoeg No. 478 situate in the Manzini District should not be interdicted. They further sought an order against the Fourth respondent represented by the Station Commander of Gege Police Station and/or all police officers stationed therein to assist the ad hoc deputy sheriff Bhekithemba Dlamini or any other deputy sheriff to give effect to the said order. He also sought an order that the Rule *Nisi* operates with an interim and immediate effect pending finalization of the application. Costs were sought against the first and second respondents.

[2] The applicant is the owner of the farm in question and he has a Deed of Transfer No. 550/2010. He argued that he has lived on the farm all his life; he leased the farm from its owner in 2006 and only bought the farm in

2010. The first respondent, her deceased husband and the second respondent had been living on the farm as illegal squatters.
- [3] Pursuant to the purchase of the farm, the applicant caused the Central Tribunal in Nhlangano to invite all illegal squatters in his farm to come and sign Farm Dwellers Agreements; eleven of them signed the agreements, but the first respondent and her late husband refused. This was on the 21st October 2010. The signing of the agreements is in accordance with the Farm Dwellers Control Act. The Central Tribunal explained to all the people living on the farm that it was illegal to live on a farm without the requisite agreement with the owner of the farm.
- [4] On the 31st March 2011, the applicant learnt of the death of Alfred Lukhele, the husband to the first respondent; and, he witnessed the clearing of the yard within the first respondent's premises in preparation for the funeral on the 3rd April 2011. He alleged that the deceased was a subject of Chief Sicunusa Dlamini of the neighbouring community; and, that he should be buried there and not on his farm.
- [5] The matter was heard on the 1st April 2011 and a Rule Nisi was issued calling upon the respondents to show cause on the 7th April 2011 why an order should not be made final interdicting the burial of Alfred Lukhele on

the applicant's farm. The fourth respondent represented by the Station Commander for the Gege Police Station and/or all police officers based at the police station were ordered to assist the ad hoc deputy sheriff Bhekithemba Dlamini or any other deputy sheriff in giving effect to the Order. The Rule *Nisi* was ordered to operate with interim and immediate effect pending finalisation of this application.

- [6] The Rule *Nisi* was served upon the first and second respondents personally on the 3rd April 2011, and the deputy sheriff remarked that he served the Rule *Nisi* after exhibiting the original and explaining the nature and exigency of the process. In addition the deputy sheriff remarked on the Return of Service as follows:

“...Despite that the respondents were served with the Court Order restricting them from burying Alfred Lukhele at the applicant's farm they in full disregard of the Court Order proceeded with the burial at the premises. It is also worth mentioning that the respondents were being led by one Mandla Mndzebele who advised them that the Court Order meant nothing and could not stop them from continuing with the burial.

Even after I cautioned the respondents and the said Mandla Mndzebele in the present of Police officers from the Gege Police Station that their action amounted to contempt of court they

continued and buried the deceased in full defiance of the Court Order.”

[7] Subsequent to the defiance of the Court Order, the applicant lodged an interlocutory application against the respondents for them to show cause on a date to be fixed by the court why an Order in the following terms should not be granted: Firstly, that the first and second respondents are guilty of Contempt of Court for disobeying the Court Order issued on the 1st April 2011. Secondly, that the first and second respondents are ordered to exhume the body of the late Ephraim Lukhele popularly known as Alfred Lukhele who was buried on the applicant’s farm on the 3rd April 2011 in defiance of an Order of Court within two days of service of the Order. Thirdly, that the Station Commander for the Gege Police Station and/or his representatives are ordered to be present during the service of the Court Order on the first and second respondents as well as during the exhuming of the deceased with a view to assist the deputy sheriff in maintaining law and order. They further sought an order for costs at Attorney and client scale against the first and second respondents. Paragraph 9 of the founding affidavit states that the Order was served on the 3rd April 2011 and Annexure “SM3” reflects that the time of service was 1200 hours.

- [8] It is important to mention that the second respondent in the interlocutory application has been substituted by Mandla Mndzebele who is alleged to have incited the mourners to defy the Court Order, and he acted as the ring leader. The Rule Nisi in respect of the interlocutory application was issued on the 7th April 2011 calling upon the first and second respondents to show cause on the 11st April 2011 why it should not be confirmed.
- [9] The first respondent filed an answering affidavit in which she stated that the Order was only served upon her at 1300 hours on the 3rd April 2011. She further argued that the funeral had already taken place on the same day at 0600 hours; hence, they could not comply with the Court Order. In addition she argued that she could not understand the Court Order in so far as it referred to Alfred Lukhele whereas her husband's name was Ephraim Lukhele. According to the first respondent, the Court Order had been overtaken by events, and, that her non-compliance therewith was not wilful.
- [10] The second respondent filed a Notice to Raise Points of Law on the basis of misjoinder. He argued that he had not been properly joined in the proceedings because he was never joined as a party in the main application let alone being served with the main application.

[11] The applicant filed a replying affidavit denying that the Court Order was served on the 3rd April 2011 at 1300 hours, but, on the 2nd April 2011; he annexed an amended return of service. In addition, he argued that the deceased had introduced himself to him as Alfred Lukhele and that he had always been known by that name.

[12] The deputy sheriff also filed a confirmatory affidavit that the Court Order was served on the 2nd April 2011. Similarly, D/Sgt Phuess D. Lukhele of Gege Police Station deposed to an affidavit that the Court Order was served on the 2nd April 2011 at 1245 hours and that the respondents had refused to take it. This created a dispute of fact; hence, the matter was referred to oral evidence.

[13] The applicant's oral evidence in-chief was similar to his founding affidavits in the main and interlocutory applications save the allegation that he had issued an order that the deceased should not be buried on his farm partly because he was an illegal squatter and partly because the first respondent had not sought permission from him to bury the deceased.

[14] In addition the applicant stated in his evidence in-chief that he was no longer pursuing the detention of the first respondent because she was wearing mourning gowns and that she should only be ordered to pay costs

of suit; and, that only the second respondent should be detained for contempt.

[15] The deputy sheriff reiterated his oral evidence as reflected in the main and interlocutory applications. He added that he arrived at the deceased's homestead during midday on the 2nd April 2011 and found that preparations for the funeral were at an advanced stage and the tent for the night vigil had already been erected. He served the Court Order upon the respondents but they refused to take it; and, that Mandla Mdzebele and others wanted to assault him, and, the police intervened.

[16] The deputy sheriff further told the Court that on the 3rd April 2013, he learnt from Sgt Phureas Lukhele that the funeral had proceeded on the morning of the same day. He conceded that his earlier Return of Service dated 2nd April 2011 had stated that the Court Order was served on that day; however, he had since filed an Amended Return of Service stating that service was effected on the 3rd April 2013. He maintained his evidence under cross-examination.

[17] D/Constable Sibusiso Gama testified that he was present at the deceased's homestead together with other police officers. The deputy sheriff read the Court Order stopping the funeral and Mandla Mndzebele grabbed the Court

Order and manhandled the deputy sheriff; and he told them that they were at the wrong homestead. He disputed the evidence that service of the Court Order was made on the 3rd April 2011 and confirmed that it was on the 2nd April 2011. The Deputy Sheriff left the Court Order on the floor since the first and second respondents had refused to take it. He maintained his evidence under cross-examination.

[18] Counsel for the first and second respondents did not lead any witnesses after the applicant's case was closed, he immediately closed his case; thereafter, submissions were made by both counsel.

[19] It is apparent from the evidence before me that service of the Court Order was made by the deputy sheriff on the 2nd April 2011, and, that the Court Order was read out by the deputy sheriff in the presence of the police. It is further apparent from the evidence that the respondents together with certain people at the homestead openly defied the Court Order and even attempted to assault the deputy sheriff leading to the intervention by the police. In contempt of the Court Order, the funeral proceeded at 6 am on the 3rd April 2011.

[20] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of Court; and the object of these proceedings is the imposition of a

penalty in order to vindicate the Court's honour consequent upon the disregard of its order and to compel performance in accordance with the Order. The penalty may take the form of committal to gaol or the imposition of a fine. See *Herbstain & Van Winsen, the Civil Practice of the Supreme Court of South Africa, 4th edition, Van Winsen et al, Juta & Co. Ltd* at pages 815-818.

[21] *Dunn AJ* in the case of *Craw and Another v Jarvis* 1982-1986 SLR 218 (HC) at 219 stated the following:

“It is clear that an applicant in an application such as the present must show: (a) that an order was granted against the respondent; (b) that the respondent was either served with the Order, or was informed of the grant of the Order against him and could have no reasonable ground for disbelieving the information; and (c) that the respondent has either disobeyed the Order or had neglected to comply with it....

The purpose of service is for the process to be brought to the notice of the other part.”

See also page 825 of *Herbstein & Winsen* (supra)

[22] In order to establish Contempt, there has to be wilful or reckless disregard of the Court Order. However, once a failure to comply with an Order of

Court has been established, wilfulness will normally be inferred and the person who failed to comply with the order has to rebut the inference of wilfulness on a balance of probabilities. See *Herbstein & Van Winsen* (supra) at 819.

[23] It is apparent from the evidence that the first respondent is in Contempt of Court. However, she cannot be committed to gaol on the basis that the applicant in his evidence in-chief as well as under cross-examination emphasised that he sympathised with her because she was in mourning and that she should not be committed to gaol.

[24] The applicant further stated that only the second respondent Mandla Mndzebele should be incarcerated. Evidence was led during the trial that he was the ringleader and inciting the mourners to disobey the Court Order. He is alleged to have manhandled the deputy sheriff after he had read out and explained the Order to all those at the deceased's homestead; similarly, he attempted to assault the deputy sheriff together with others and the police had to intervene.

[25] In determining the position of the second respondent in the interlocutory application, it is necessary to mention that he filed a Notice to Raise Points of Law that there was a misjoinder since he was never joined as a party in

the main application let alone being served with the main application. I agree with the applicant that this argument has no merit and should be dismissed because the Court Order is clear that all other persons intending to bury Alfred Lukhele are interdicted to do so on the applicant's farm. It is clear from the evidence that the second respondent was served with the Court Order and that the contents thereof were fully explained to him.

[26] In the circumstances the following orders are made:

- (a) That the first and second respondents being Betty Lukhele and Mandla Mndzebele are guilty of Contempt of Court for disobeying the Court Order issued by the Court on the 1st April 2011.
- (b) That the second respondent Mandla Mndzebele is sentenced to a fine of E5 000.00 (five thousand emalangi) and that failing payment to two years imprisonment.
- (c) That the first respondent is sentenced to a fine of E2 000.00 (two thousand emalangi) and that failing payment to twelve months imprisonment. However, the whole sentence will be suspended

for five years on condition that she is not convicted of a similar offence during the period of suspension of sentence.

(d) No order as to costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT