



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.485/14

In the matter between:

FREDDY DLAMINI

Applicant

vs

SIKHAKHANE DLAMINI

Respondent

Neutral citation: *Freddy Dlamini vs Sikhakhane Dlamini (485 /2014) [2014]*
SZHC 132 (20th June 2014)

Coram: **MAPHALALA PJ**

Heard: 02 February 2014

Delivered: 20th June 2014

For Applicant: Mr. B. Zwane

For Respondent: Mr. M. Madzinane

Summary: (i) *An Application directing the Respondent to maintain and keep the peace towards Applicant.*

- (ii) Respondent has raised six (6) points **in limine** that **inter alia** this court does not have jurisdiction as the cause of action is founded on Swazi law and custom.
- (iii) This court upholds the jurisdictional point as Applicant himself contends the point at paragraph 10(ii) of his Heads of Arguments. That by this averment the Applicant has shot himself on the foot, as it were and therefore, the Application is dismissed with costs without any further ado.

Decisions referred in judgment

1. **Michael Mvungana Mahlalela vs Miriam Dlamini, High Court Case No.11/2013.**
2. **Phildah Khumalo vs Mashovane Khumalo, High Court Case No.2023/2007.**

JUDGMENT

The Application

[1] Serving before this court is an Application in the long form by the Applicant for the following orders:

- “1. Directing the Respondent to maintain and keep the peace and order towards Applicant.**
- 2. Interdicting and restraining the Respondent from interfering and harassing the Applicant from use and occupation of land allocated to him (applicant) adjacent to Respondent’s home.**

3. Directing the Respondent to reconstruct, avail all funds, and material for re-construction of Applicant's house unlawfully demolished by Respondent in the year 2012 and which funds are estimated at E729, 000,00 (seven hundred and twenty nine thousand Emalangeni)."

[2] The Founding Affidavit of the Applicant Freddy Dlamini is filed setting out the background facts in the dispute between the parties. The Confirmatory Affidavits of one Desmond Ndosini Dlamini, Jerry Makhosonkhe Dlamini and also Thembinkosi David Nkambule are filed in support of the averments in the Founding Affidavit. Further relevant annexures are also filed in support thereto.

[3] The Respondent opposes the Application and has filed an Answering Affidavit to the averments of the Applicant in the Founding Affidavit. Relevant annexures are also filed in support thereto.

[4] A Replying Affidavit is also filed in accordance with the Rules of this Court.

[5] I must mention for the record that the two parties in this Application are related to each other in that the Applicant is a son of the Respondent.

The Points *in limine*

[6] The Respondent has raised points *in limine* in his Answering Affidavit and by agreement of the attorneys of the parties the court commenced hearing the points *in limine* raised on behalf of the Respondent and thereafter the merits of the case.

[7] The points *in limine* raised in the Respondent's Answering Affidavit in paragraphs 5 to 5.5 paraphrased are as follows:

1. Jurisdiction:
2. Requirements of an interdict:
3. Disputes of fact:
4. Lack of urgency:
5. Failure to satisfy the requirements of Rule 6(25) (c) of the Rules of the High Court.
6. Irregular procedure.

The arguments of the parties

(a) Respondent's arguments

[8] The attorney for the Respondent Mr. Madzinane advanced arguments for the Respondent and filed Heads of Arguments for which I am grateful. I shall merely summarise his arguments for purposes of the record of this judgment in the following paragraphs.

(i) Lis pendens

[9] The attorney for the Respondent commenced his arguments in this regard by introducing another point from the bar being that of *lis pendens*.

[10] The argument in this regard is that the Applicant instituted peace binding proceedings before the Manzini Magistrate's Court under case no.MP 85/2014 seeking a Peace binding order against the Respondent which is the same as prayer 1 of the Notice of Motion herein. That accordingly this court should refuse to entertain this Application in particular prayer 1 pending finalization of the matter at the Manzini Magistrate's Court.

[11] In support of this argument the attorney for the Respondent cited what is stated by the learned authors *Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 474 and the judgment of *Phildah Khumalo vs Mashovane Hezekiel Khumalo, High Court Case No.2023/2007*.

(ii) Ad jurisdiction

[12] The arguments under this head are two fold. On one hand that this court does not have jurisdiction to hear Peace binding proceedings in

accordance with section 341 of the *Criminal Procedure and Evidence Act, 67/1938*. On the second level that this court does not have jurisdiction to hear this matter as the dispute between Respondent and the Applicant relates to land situated in Swazi nation land at Logoba such that this court does not have jurisdiction to grant prayers 1 and 2 of the Notice of Motion.

[13] In support of these arguments the Respondent's attorney cited a *plethora* of decided cases by the High Court including the cases of *Michael Mvungana Mahlalela vs Miriam Tjengile Dlamini vs 2 Others, Civil Case No.17/2013; Phildah Khumalo vs Mashovane (supra)* and that of *Maziya Ntombi vs Ndzimandze Thembinkosi, Appeal Case No.2/2012*.

(iii) Ad disputes of fact

[14] The attorney for the Respondents then advanced arguments on the issue of disputes of fact at paragraph 5 of his Heads of Arguments to the general proposition that Respondent disputes the claim by motion proceedings of E728,000.00. Further, Respondents contend that it is disputed that Applicant was allocated the land in respect of which he is seeking an interdict, Applicant had always been aware but elected to proceed by way of motion proceeding. In this regard the court was

referred to Rule 6(17) of the High Court Rules and the legal authority in *Herbstein and van Winsen, The Civil Procedure in the Supreme Court of South Africa* at pages 385-366.

[15] The last point raised is that of requirements of an interdict at paragraph 6 of Mr. Madzinane's Heads of Arguments citing the case of *Setlogelo vs Setlogelo (supra)*. I shall proceed to outline these arguments in detail as I proceed with my analysis later on in this judgment.

The Applicant's arguments

[16] Mr. Zwane who appeared for the Applicant filed two sets of Heads of Arguments and advanced the case for the Applicant for which I am grateful.

[17] I shall summarize the arguments of the Applicant in the following paragraphs to a better understanding of the issues for decision.

Ad issue of court's jurisdiction

[18] The essence of the arguments of the Applicant in this regard is that the Applicant did not approach the court to seek for determination of a

dispute over the land which issue would rightfully be for the traditional structures. That Applicant simply seeks to have Respondent adopt legally provided means to claim the land occupied by Applicant if he feels it has been improperly dispossessed of him. Respondent seeks to have the court believe he reported a dispute with the Royal Kraal Fanukwente Dlamini. That Respondent does not allude to a meeting where such dispute was deliberated on and in any event if he had reported over the land this he acknowledges that Applicant occupies it.

[19] Further arguments are advanced at paragraph (iv) to (vi) of page 5 of the Applicant's Heads of Arguments.

[20] The Applicant's attorney then dealt with the merits of the case.

The court's analysis and conclusion thereon

[21] Having considered the able arguments of the attorneys of the parties it is my considered view that the first port of call is a determination of the points of law of *lis pendens* and secondly to consider the point of law of jurisdiction before dealing with the other points *in limine* outlined by the Respondent. I proceed to do so in the following paragraphs.

(i) Ad lis pendens

[22] The kernel of the argument of the Respondent in this regard is that the Applicant instituted peace binding proceedings before the Manzini Magistrate's Court under case no. MP85/2014 seeking a peace binding order against the Respondent which is the same prayer 1 of the Notice of Motion herein. That accordingly this court should refuse to entertain this Application in particular prayer 1 pending its finalization of the matter at the Manzini Magistrate's court.

[23] On the other hand the Applicant contends in reply to this argument advanced above in paragraph [22] of this judgment that the proceedings at the Manzini Magistrate's court were concluded whereby Respondent was ordered to allow Applicant access to his household goods and that Respondent to offer how he builds Applicant's house. In this connection the Applicant has cited a letter that was written by the Respondent's attorney found at page 136 of the Book of Pleadings quoted *in extenso* as follows:

“6th January 2014

SLM/td/SLM-4067

**Mr. Freddy Dlamini
c/o Logoba
MATSAPHA**

WITHOUT PREJUDICE

Dear Sir,

Re: YOURSELF/ALFRED SIKHAKHANE DLAMINI

- 1. We act for our client Alfred Sikhakhane Dlamini.**
- 2. Our client has instructed us that without admitting any liability, to make you an offer towards the issue of the house in full and final settlement.**
 - 2.1 That our client shall build you the house he demolished at Logoba at another place of your choice beside at Logoba where he demolished it. Our client shall build the house to the same level and the same plan of the house he demolished. According to client your house was a three bedroom house, kitchen, sitting room and bathroom and it was at roof level.**
- 3. Our client has instructed us that the building of the house offer is made on the following conditions and the acceptance of the offer is not divisible.**
 - 3.1 You move out of his homestead at Logoba and shall not have any other claim from him nor reason to be at his homestead thereafter.**
 - 3.2 You will show our Mr. Madzinane the place where you want the house to be built and it is your responsibility to secure a place where the house is to be built and the clearing of the land.**
- 4. Kindly note that our client is desirous to resolve this matter once and for all between you and him and move on with his life.**

We kindly await your response.

**Yours faithfully,
MADZINANE ATTORNEYS”**

[24] In my assessment of the arguments of the parties it appears to me that on these facts the arguments of the Applicant holds sway that the issue therefore is not pending before the Manzini Magistrate and therefore the point of law of *lis pendens* fails.

(ii) Ad jurisdiction

[25] In my assessment of the arguments of the parties in this regard the issue of jurisdiction is two pronged as canvassed by the Respondent. The first prong is an argument by the Respondent that this court does not have jurisdiction to deal with peace binding proceedings. That Peace binding proceedings are provided by section 341 of the *Criminal Procedure and Evidence Act No.67/1938* to be heard by Magistrates in this country.

[26] The second prong of the jurisdictional point is the contention by the Respondent that as the land dispute between him and the Applicant relates to land situated at Swazi nation land at Logoba area. This court does not have jurisdiction to grant prayer 1 and 2 of the Notice of Motion.

[27] The Applicant on the other hand at paragraph 10(ii) of the Heads of Argument of the attorney for the Applicant contends that Applicant did

not approach the court to seek for determination of a dispute over land which issue would rightfully be for the traditional structures.

[28] It appears to me that the submission by the Applicant as stated above in paragraph [27] is the basis on which a right to an interdict is founded. One cannot separate these two aspects of the matter.

[29] The Applicant as stated above that the right is to be determined under Swazi law and custom. It would be without legal foundation for this court to decide the peace binding interdict in these circumstances. It is for this reason therefore that I come to the conclusion that this matter falls to be determined in terms of Swazi law and custom. In this regard I find what was stated in the High Court cases *Michael Mvungana Mahlalela vs Miriam Dlamini Case No.11/2013* and that of *Phildah Khumalo vs Mashovane Khumalo Case No.2023/2007* apposite.

[30] On the other points *in limine* that of dispute of fact and requirements of interdict I rule *obiter dictum* in view of what I have said on the jurisdiction point in paragraph [28] and [29] above that to the Respondents is correct in his arguments regarding these two points *in limine*.

[31] Lastly, I also agree with the arguments of the attorney for the Respondent that it was not proper to seek prayer 3 of the Notice of Motion in Application proceedings. Such a prayer can only be determine in trial proceedings where evidence is led to establish the efficacy of the claims of the parties and therefore this prayer is accordingly dismissed.

[32] In the result, for the foregoing reasons the point of law of jurisdiction succeeds and the Application is accordingly dismissed with costs on the ordinary scale.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE