



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.786/2014

In the matter between:

DANDANE MALINGA

Applicant

vs

PATRICK MYENI & 3 OTHERS

Respondent

Neutral citation: *Dandane Malinga vs Patrick Myeni & 3 Others (786/2014)*
[2014] [SZHC 209] (24th October 2014)

Coram: **MAPHALALA PJ**

Heard: 3rd July 2014

Delivered: 24th October 2014

For Applicant: **Mr. Z. Magagula**

For Respondent: **Mr. T. Fakudze**
(for 1st Respondent)

Mr. B. Maziya
(for Attorney General)

- Summary:
- (i) *Before court is an Application ordering the eviction of the Applicant in terms of the Farm Dwellers Act to be null and void of no legal effect.*
 - (ii) *The Applicant contends **inter alia** that the said eviction was executed outside the preview of the **dicta** in the Supreme Court case of **Hoageys Handicraft (Pty) Ltd and Another/Rose Marshall Vilane Case No.52/2011.***
 - (iii) *The Defendant opposes the Application and has raised a point **in limine** that the court has no jurisdiction to hear the matter citing a **plethora** of decided cases.*
 - (iv) *This court find that it has jurisdiction to hear the matter on the basis a number of decided cases including the **Rose Marshall** decision cited above in paragraph (ii). Further, this court finds on the facts that the actions of the Tribunal which heard the matter were **ultra vires** the **dicta** in **Rose Marshall** (supra).*
 - (v) *In the result, the Application is granted in terms of the Notice of Motion with costs.*

Decided cases cited in the judgment

1. **Dandane Malinga and Another vs Florence Msibi NO and 9 Others, unreported High Court Case No.1374/ and 1375/2012.**
2. **Hoageys Handicraft (supra)**
3. **Eagles Nest (Pty) Ltd and 5 Others vs Swaziland Competition Commission and Another, Civil Appeal Case No.1, 2014.**

JUDGMENT

Introduction

[1] As a prelude to this judgment I wish to quote from paragraph 11 of the Ruling of the Final Appeal Forum in terms of Farm Dwellers Control Act where the Honourable Minister of Natural Resources and Energy, Princess Tsandzile stated the following:

“11. In conclusion I wish to state and recognize that land disputes are naturally complex and sensitive because they are characterized by a mixture of fundamental legal, social, historical and economic elements. This is to be expected as land is not just a factor of (economic) production but a source of life sustaining agricultural endeavour and accommodation. It is therefore imperative that as we settle these disputes we are not unreasonable, extremist, technical or unfair, particularly because the country must be urgently aided to eliminate the farm dwelling system, landlessness, poverty without turning the concept of property ownership useless.”

[2] The Application before this court ought to be decided within the above cited background as eloquently stated by the Honourable Minister.

The Application

[3] On the 13th June, 2014 the Applicant Dandane Malinga an adult Swazi female of Dwaleni (Power) area, the Manzini District filed an Application under a Certificate of Urgency against the cited Respondents, more

particularly one Patrick Myeni an adult Swazi male of Mhlume area in the Lubombo District for orders in the following terms:

- “1. Dispensing with the usual forms and procedure relating to the time limits, manner of service applicable in the institution of proceedings.**
- 2. Condoning Applicant’s non-compliance with the said rules and procedures and allowing this matter to be heard as an urgent one.**
- 3. That a *rule nisi* returnable on a date to be determined by this Honourable Court calling upon the Respondents to show cause why;**
 - 3.1 The eviction of Applicant and demolition of her homestead by the 2nd Respondent should not be declared and unlawful.**
 - 3.2 The 1st Respondent should not be ordered to rebuild within 5 days as much of Applicant’s homestead as was demolished by the 2nd Respondent.**
 - 3.3 The Respondent should not pay the costs of this Application on the scales as between attorney and own client.**
- 4. That pending the finalisation of this Application prayer 3 to operate as an interim order with interim relief.**
- 5. That the 1st Respondent be and hereby ordered to return all the household goods removed from the Applicant’s homestead forthwith and at his own costs.**
- 6. Further and/or alternative relief.”**

- [4] The Applicant has filed in support of this Application a Founding Affidavit outlining the facts giving rise to the dispute between the parties. Various pertinent annexures are also filed in support of the averments in the Founding Affidavit.
- [5] The 1st Respondent opposes the Application and has filed the requisite Answering Affidavit against the averments of the Applicant in the Founding Affidavit. Various pertinent annexures are also filed in support thereto.
- [6] The Applicant then filed a Replying Affidavit to the averments of the 1st Respondent's Answering Affidavit in accordance with the Rules of this court.
- [7] The attorneys of the parties then advanced arguments in respect of their clients and filed very useful Heads of Arguments for which I am grateful.

The arguments of the parties

[8] At the commencement of arguments of the attorneys of the parties a *tit for tat* arose as to the sequence of the arguments of the attorneys as Mr. Fakudze has raised a point *in limine* from the bar that this court has no jurisdiction to hear the matter. It was, however agreed that Mr. Z. Magagula for the Applicant advance his arguments on the merits and that Mr. Fakudze was to address the point *in limine* together with the merits. Finally, that Mr. Magagula was to reply and address the court on the jurisdictional point and the merits of the dispute.

(i) The Applicant's arguments

[9] The attorney for the Applicant Mr. Z. Magagula filed comprehensive Heads of Arguments and cited relevant legal authorities.

[10] The attorney for the Applicant outlined the pertinent facts in the dispute in paragraphs 2, 3, 4 and 5 explaining the history of the disputes from paragraph 7 to 10 of the Heads of Arguments and dealt at great length with the matter before court. The nub of the Applicant's case is found in paragraph 7 of the Heads of Arguments of Mr. Magagula where he contended as follows:

“7. The Applicant contends, and it will be argued on her behalf that the removal of her goods from the homestead and the demolishing of her houses were unlawful because it was not authorised by a court of law nor by any other body that has authority to make such an order.

7.1 The ruling by the 3rd Respondent is at best vague and at worst unlawful. It is vague because it enjoins the Applicant to consult with her attorney on or before 3rd June 2014 and thereafter sign the agreement. The purpose of meeting with the legal advisor, it will be argued is for obtaining legal advice on the suitability or lawfulness of the agreement not merely a matter of procedure. Page 10.

7.2 The Applicant states that she met with the legal advisor who advised her against signing the agreement because it was predicted upon information that was not correct.

7.2.1 The agreement provided that the Chief of Mphini chieftdom had allocated land to the first Respondent to build Applicant a homestead. Page 88. The chief denied this to me, he said he would allocate land to me, on which the first Respondent would then build me a home. Pages 102 – 103.

7.2.2 The agreement was also premised on an incorrect fact that there was alternative accommodation prepared by the 1st Respondent when there was no such accommodation. Page 88.

7.2.3 The agreement was vague because it required or compelled the Applicant to sign an agreement that would have rendered the Applicant homeless, with

no alternative land to build a homestead, assuming that she had the mean to do so.

7.2.3.1 The agreement was also premised upon an incorrect fact that the valuation or compensation determined by Fore Fort Property Consultants had been instigated by the Applicant. The correct position is that the valuer was sourced by Sandile Dlamini, who to the knowledge of the Applicant was an agent for the Nkhosi-Dlamini Trust and later for the 1st Respondent. Pages 71 and 98.”

[11] At paragraph 7.3 of the Heads of Arguments of the attorney for the Applicant contends that the Ruling of the 3rd Respondent was unlawful in that it was against or not in accordance with section 10(1) (c) (i) and (ii) of the Farm Dwellers Act 12 of 1982. The attorney for the Applicant took the court through the provisions of the Act as stated above in a painstaking exercise to show the unlawfulness of the Ruling by the 3rd Respondent. I shall revert to the pertinent arguments later on as I proceed with my analysis and conclusions thereon. For purposes of the record the said arguments are found in paragraph 7.3, 7.4, 7.5, 7.6 and 7.8 of the Heads of Arguments of the attorney for the Applicant.

[12] The final arguments for the Applicant on the merits of the case is based on the *dicta* in the Supreme Court decision in **Hoageys Handicraft (Pty) Ltd and Another vs Rose Marshall Vilane, unreported Case No.52/2011** where the Supreme Court at paragraph [19] outlined the circumstances under which an eviction may lawfully take place in Swaziland to be the following:

“... There must be

- 1. A judgment of a court of competent jurisdiction granting an order for ejection or eviction as the case may be;**
- 2. A valid warrant directing the Sheriff or her Deputy to evict the Respondent from the premises in question;**
- 3. A valid appointment and authorisation of a Deputy Sheriff for the express purpose of executing a Warrant of Ejection or Eviction and specifying the action which the appointee is authorised to take.**
- 4. Execution Action only as authorised in the Warrant of Ejection or Eviction.” Per Moore JA.**

[13] On the point of law raised by the Respondents that this court has no jurisdiction to hear this matter it is contended for the Applicant in the subsequent paragraphs.

[14] The Applicant contends that this court is seized with jurisdiction to entertain this matter by virtue of the fact that the cause of action arose wholly within Swaziland and cited section 2 of the High Court Act No.20 of 1954.

[15] The attorney for the Applicant cited section 9(1) of the Farm Dwellers Control Act No.12/1982 that oust the jurisdiction of the court that the High Court jurisdiction is ousted only as a court of first instance but does not refer to matters that have been dealt with by the District Tribunal or Central Tribunal.

[16] In support of the above position Mr. Z. Magagula for the Applicant cited the High Court case of **Dandane Malinga and Another vs Florence Msibi NO and 9 Others, unreported High Court Case No.1374 and 1375/2012** and the **Supreme Court Case of Hoageys Handicraft (Pty) and Another vs Rose Marshall Vilane, unreported Supreme Court Case No.52/2011.**

[17] In conclusion, the attorney for the Applicant contended that his client be granted the orders in terms of the Notice of Motion with costs.

(ii) The 1st Respondent's arguments

[18] The attorney for the 1st Respondent, Mr. Fakudze also filed comprehensive Heads of Arguments on the merits and filed a Notice to raise points of law with the Registrar's stamp of the 15th July, 2014.

[19] The first argument on the point *in limine* is that this court does not have jurisdiction to hear and determine this Application as it is a dispute between an owner and *umnumzane* relating to rights and liabilities under the Farm Dwellers Control Act of 1983. That section 9(1) of the Farm Dwellers Tribunal Control Act 1983 provides as follows:

“No court shall have jurisdiction to hear or determine any dispute between an owner and an *umnumzane* concerning any right and liabilities under this Act or as to who are dependants of an *umnumzane* or to order the cancellation of an Agreement or removal of an *umnumzane* or his dependants from any farm.”

[20] Further arguments are advanced in paragraph 2.1, 2.2, 2.3, 2.4, 3, 3.1, 3.2, 3.3, 4 of the Notice to raise points of law and in paragraph 5 thereof Respondent's attorney contends that the Minister is the highest authority in the determination of such issues and in this case the Minister did hear and decide the matter and applied section 6(h) in so doing and since the matter was resolved by the Minister. It was brought to finality hence the

Applicant cannot re-open the determination of the issue approaching this court.

[21] The attorney for the 1st Respondent filed comprehensive Heads of Arguments on the points *in limine* expanding on the principles of law mentioned in the Notice to raise points *in limine* referred to in the above paragraphs of this judgment. Pertinent arguments are advanced. In the Heads of Arguments of the attorneys for the 1st Respondents in paragraph 1 to 12 thereof. The attorney for the 1st Respondent also cited the High Court cases of **Florence Ntshalintshali vs The Central Farm Dwellers Tribunal and 3 Others, High Court Civil Case No.1776/10; Zephania Ntshalintshali vs Minister of Home Affairs and 5 Others, Supreme Court Civil Case No.40/2008** and that of **Dandane Malinga and Another vs Florence Msibi NO and 9 Others (supra)**.

[22] On the merits of the case the attorney for the 1st Respondent filed comprehensive Heads of Arguments advanced in paragraphs 1 to 14 thereof. I shall revert to pertinent submissions later on as I proceed with my analysis and conclusions later on.

[23] The nub of the argument of the 1st Respondent is that the Applicant has failed to comply with the Ruling and she has no intention of doing so and she also stated that she does not have witnesses. She was with the Tribunal up until the 13th day of June 2014. That the Applicant further refused to sign the agreement even after the Tribunal went to her place of residence (see pages 21, 22, 114, 142 – 144 of the Book of Pleadings which showed that the Tribunal even went to the extent of undergoing a fact finding mission and in order to explain the agreement to the Applicant.

[24] The above therefore are the arguments of the 1st Respondent and the court was urged to dismiss the Application with costs on the point *in limine* and on the merits of the case.

Court's analysis and conclusions thereof

[25] Having considered the able arguments of the attorneys of the parties the first port-of-call is a determination of the point *in limine* that of jurisdiction whether this court can hear this case in view of the provisions of the Farm Dwellers Act. Then the court will then determine the merits of the case if, I find that this court has the requisite jurisdiction. If on the

other hand I find that this court has no jurisdiction then I shall dismiss the Application without any further ado.

(i) The jurisdictional threshold

[26] Having considered the arguments of the attorneys of the parties to and from I have come to the view that this court has jurisdiction to hear this matter that the jurisdiction of this court is ousted only as a court of first instance but does not refer to matters that have been dealt with by the District Tribunal or Central Tribunal.

[27] In this regard I refer to two cases of this court including the High Court Case No. **Dandane Malinga and Another vs Florence Msibi NO and Nine Others, unreported High Court Case No.1374 and 1375/2012 (consolidated)** where the Applicants in that case approached this court successfully following the demolition of their homesteads ostensibly following an order of the District Tribunal.

[28] The second decision being that of the Supreme Court case of **Hoageys Handicraft (Pty) Ltd and Another/Rose Marshall Vilane; (unreported) Supreme Court Case No.52/2011** where the Respondent

as Applicant in the court *a quo* approached the High Court without even having gone through the District or Central Farm Dwellers Tribunal. The matter was heard by the High Court, finding in favour of the Applicant and the Supreme Court also found in her favour on appeal.

[29] The **Rose Marshall** case cited in paragraph [28] above is a *locus classicus* pertaining to evictions or ejections in Swaziland.

[30] Furthermore, it was held in the Supreme Court Case of **Eagles Nest (Pty) Ltd and Five Others vs Swaziland Competition Commission and Another, Civil Appeal Case No.1/2014** at paragraph [11] that:

“In practice, it may be noted that many statutory schemes contain their own remedies, example, by way of an appeal, say to a Minister. There may then be a choice of alternative remedies either under the Act or according to the ordinary law. On the other hand it may be held that the statutory scheme impliedly excludes the ordinary remedies. If its language is clear enough, it may exclude them expressly.”

[31] In conclusion on the point of law of jurisdiction the point raised by the 1st Respondent fails and I now proceed to address the merits of the dispute.

(ii) The merits

[32] In considering the merits I refer to paragraph 19 of the Supreme judgment case of **Hoageys Handicraft (supra)** which provides a blue print of the circumstances under which evictions may lawfully take place in Swaziland. I therefore will proceed to reproduce these circumstances for a thorough examination of the arguments of the parties.

[33] Following are those circumstances:

“... There must be

- 1. A judgment of a court of competent jurisdiction granting an order for ejectment or eviction as the case may be;**
- 2. A valid warrant directing the Sheriff or her Deputy to evict the Respondent from the premises in question;**
- 3. A valid appointment and authorisation of a Deputy Sheriff for the express purpose of executing a Warrant of Ejectment or Eviction and specifying the action which the appointee is authorised to take.**
- 4. Execution Action only as authorised in the Warrant of Ejectment or Eviction.” Per Moore JA.**

[34] In my assessment of the ratio in the above case that a guilty party may be compelled to put the innocent party in the position she was in before the eviction and/or demolition. The Applicant appeal against the High

Court's order that it should rebuild the demolished building in order to restore the status *quo ante* was dismissed.

[35] The Farm Dwellers Control Act No.12 of 1982 prohibits against eviction of Farm Dwellers where in section 10(1) the Act places a limitation on the instances upon which a Farm Dweller may be evicted from a farm by an order of a Tribunal and these are:

- (a) where the farm dweller is not entitled to an agreement in terms of section 3; or
- (b) the farm dweller has wilfully or without good cause committed a material breach of the agreement; or
- (c) the farm dweller has committed an Act, what in the opinion of that tribunal is an act which makes his continued residence on the farm undesirable;
- (d) the farm is reasonably required for intensive development.

[36] The Act further provides that a tribunal shall not make an order under this paragraph unless it is also satisfied that:

- (i) Reasonable alternative accommodation for the farm dweller is available; and
- (ii) Reasonable arrangements have been made by the owner to pay the farm dweller compensation for disturbance, including the value on unreaped crops and to provide or pay for the transport of the farm dweller to that accommodation.

[37] All in all I agree *in toto* with the arguments of the Applicant in paragraph 6 to 7.2.3 of the Heads of Arguments of Mr. Magagula reproduced at paragraph [9] or page 3 of this judgment. In the said paragraphs the sequence of events are painstakingly outlined starting from what happened to the Applicant and the circumstances which offends against the provisions of section 10(1) (c) (d) (i) and (ii) of the **Farm Dwellers Control Act No.12 of 1982**.

[38] I do not agree with the arguments of the 1st Respondent's which are not premised within the **Rose Marshall dictum** for effecting evictions in this country.

[39] Finally, I wish to put it on record that this court issued an interim order on this matter on the 29th August 2014 were I ordered that the Minister responsible be joined in these proceedings as it appeared to me that she was the source of the orders of the Tribunal. The Honourable Minister has since filed her affidavit stating her position in the matter.

[40] At paragraph 14 of the said affidavit the Minister avers the following:

“This is particularly so, because all the issues in this matter were dealt with to finality, including the fact that Applicant had to leave 1st Respondent’s property. The only aspect outstanding was the settling the precise relocation site. Now that the parties have reached consensus on Mphini area on Swazi Nation Land, with the 1st Respondent shouldering all the attending costs, as per the valuation report, the parties should conclude same.”

[41] On the 23rd October, 2014 I called the attorneys of the parties to advance their impressions on what the Minister has averred in her affidavit which was ordered by the court. Both attorneys of the parties agreed that the averments of the Minister cannot take this matter any further but the court to proceed to issue judgment based on the **Rose Marshal dictum**. I must also record for the record that this position was also expressed by Crown Counsel from the office of the Attorney General.

[42] I wish to comment **en passant** that the comments of the Honourable Minister as stated earlier at paragraph [1] of this judgment should be viewed and balanced by the **dictum** in **Rose Marshall (supra)**.

[43] In the result, for the foregoing reasons the Applicant is entitled to an order setting aside the eviction and the demolition of her homestead and is further entitled to an order that the 1st Respondent rebuild the Applicant’s house or houses as was demolished in the order to put her

back in the position she would have been but for the demolition and costs.

[43] The Application is accordingly granted in terms of the Notice of Motion with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE