



**IN THE HIGH COURT OF SWAZILAND**

Civil case No: 824/2013

In the matter between:

**ELGIN MAGUDUZA MAKHUBU**

**APPLICANT**

**AND**

**DONALD MANDLAKAYISE NDLOVU**

**FIRST RESPONDENT**

**LUCKY NDLOVU**

**SECOND RESPONDENT**

**MRS MAKHOSAZANE DLAMINI (BORN NDLOVU**

**THIRD RESPONDENT**

**MRS ZANELE ZWANE (BORN NDLOVU)**

**FOURTH RESPONDENT**

**MRS NYAMALELE DLAMINI (BORN NDLOVU)**

**FIFTH RESPONDENT**

**MARGARET NDLOVU**

**SIXTH RESPONDENT**

**COMMISSIONER OF POLICE**

**SEVENTH RESPONDENT**

**ATTORNEY GENERAL**

**EIGHT RESPONDENT**

Neutral citation: *Elgin Maguduza Makhubu v. Donald Mandlakayise Ndlovu & Seven Others (824/2013) [2014] SZHC 220 (22<sup>nd</sup> September 2014)*

**Coram:**

**M.C.B. MAPHALALA, J**

**Summary**

Civil Procedure – interim interdict – application to interdict and restrain the respondents from evicting and taking over their business with recourse to a court – the requisites of an interdict considered – held that the High Court has jurisdiction to determine an application intended to preserve the status *quo ante* pending determination of the dispute before Traditional Authorities in accordance with Swazi Law and Custom – application accordingly granted.

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**JUDGMENT**  
**22<sup>nd</sup> September 2014**

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[1] This application was brought on a certificate of urgency for an order interdicting and restraining the respondents and any other person acting on their instructions, or behest from closing down, blocking entry into and in any way whatsoever interfering with the normal business operations of Luyengo bus terminal within the Manzini region. He further asked for an order directing the Malkerns Police Station to assist and ensure a proper execution of this order and to keep the peace at the aforesaid shop. He also sought an order for costs against the respondents at attorney and own client scale, the one paying the other to be absolved in the event of unsuccessful opposition.

It is common cause that on the 31<sup>st</sup> May 2013 a rule nisi was issued operating with immediate effect as an interim order calling upon the respondents to show cause why the rule should not be made final. The interim order is effective pending finalisation of the matter.

[2] The applicant alleges that in the early 1960's, his brother's father Reuben Makhubu, a resident of Luyengo was granted authority by Indvuna Benson Makhubu to operate a grocery shop to cater for the daily shopping needs of the community. He alleges that the said Benson Makhubu was at the time the Traditional Authority in the area as the King's Overseer. The said Reuben

Makhubu operated the shop from the 1960's until his death in 1983. The shop was taken over by the deceased's wife Emelinah Makhubu who also operated the shop until her death in 1993.

- [3] The applicant further alleges that during the winding up of the estate of Emelinah Makhubu, the family resolved to appoint his brother David Makhubu to take over the daily operations of the shop which was then trading under the style Ikhwezi Grocery. In 2001 the said David Makhubu applied to the Swaziland Commercial Amadoda for consent to expand the business to a Supermarket; at the time the business was experiencing meaningful growth. The consent was duly granted.
- [4] The applicant alleges that in January 2013 David Makhubu informed the family of his desire to retire from operating the shop due to his poor health at the time which was deteriorating. The family resolved to lease the shop to Lincoln Motsa after effecting renovations, and, Mr. Motsa agreed to this arrangement.
- [5] Whilst renovations were in progress to upgrade the building to the status of a supermarket the first respondent informed the applicant that the land on which the shop is situated belongs to his family; he threatened to demolish the shop if the renovations were not stopped. The applicant's family resolved to keep the peace and offered in writing another piece of land in exchange of the land in question. The Ndlovu family wrote back on the 7<sup>th</sup> March 2013 and declined

the offer; they further advised the Makhubu family that the offer constitutes an admission that the land in question belongs to them.

[6] The applicant contends that after taking legal advice they became aware that the proposed exchange of the piece of land was unlawful on the basis that ownership of land under chiefs vests in the iNgunyama in-trust of the Swazi Nation. They were further advised that the allocation of land on a Swazi Nation land is a prerogative of the Chief with his Inner Council. The respondents were accordingly advised in writing of said legal advice.

[7] Thereafter, the applicant's family reported the matter to the Traditional Authorities at Luyengo Royal Kraal. The Chief's headman Mbalekelwa Ndzimandze is alleged to have been seen driving together with the first respondent prior to the hearing of the matter. During the hearing of the matter the Chief's headman is further alleged to have refused to hear the applicant's side of the story but merely directed the Makhubu family to vacate the shop and allow the Ndlovu family to take over the shop.

[8] The applicant then requested minutes of the meeting as well as reasons for the decision so that he could appeal the decision of the Chief's Inner Council; however, this was not availed to the applicant. He further alleges that when the Chief was approached on the matter, he distanced himself from the proceedings

of the meeting of the 13<sup>th</sup> April 2013 on the basis that he had not sanctioned the said meeting and that he was not even aware of the deliberations.

- [9] The applicant alleges that on the 1<sup>st</sup> May 2013, the first and second respondents came to his homestead and informed him to instruct the Makhubu family to vacate the shop and cease all business operations at the shop by the 30<sup>th</sup> May 2013. They made it clear that they would thereafter take over the operations of the shop.

He further alleges that the Chief's Inner Council subsequently advised him that the matter would be deliberated again; this was after they had sought audience with the Umphakatsi for the matter to be deliberated again. This was in May 2013. However, nothing was done. He argues that they have instituted the present proceedings for fear that the respondents would carry out their threats of evicting them from the shop and taking over the business operations.

- [10] The applicant contends that the balance of convenience favours that the relief sought be granted to preserve the status quo ante pending determining of the matter by the relevant traditional authorities on the following basis; firstly, that the shop has been renovated to completion and the tenant Lincoln Motsa has commenced business operations on the shop. Secondly, that the tenant has since stocked the shop to full capacity and a forceful eviction by the respondents would be disastrous. Thirdly, that it is in the best interest of the

Luyengo Community to preserve the status quo ante and allow the shop to continue its operations.

Lincoln Motsa has deposed to a confirmatory affidavit stating that he is currently lawfully trading at the supermarket; and, he has annexed a copy of the trading licence. He further states that the eviction threats by the respondents if carried out would prejudice him financially.

The application has attached the consent which was granted by the Swaziland Commercial Amadoda to David Makhubu to expand the business to a Supermarket. The consent was signed by Chief Lembelele Dlamini, the traditional authority at Luyengo Royal Kraal as well as the Regional Administrator of the Manzini region.

- [11] The application is opposed by the first to the sixth respondents. During the hearing the court directed counsel to argue the point of law simultaneously with the merits. In *limine* the respondents raised certain points of law: firstly, that the application is not urgent and that it was self-created on the basis that they were advised to vacate the shop on the 1<sup>st</sup> May 2013 but waited until the 31<sup>st</sup> May 2013 to move the present application. However, it was apparent during the hearing that this point of law has been overtaken by events.

[12] The respondents argue that this court lacks jurisdiction to entertain this matter on the basis that the dispute pertains to Swazi nation land and should be dealt with by the Traditional Authority of the Luyengo Royal Kraal. Suffice to say that the application is for an interim interdict pending the finalisation of the substantive dispute between the parties which is pending before the Traditional Structures at Luyengo Royal Kraal. This court does have jurisdiction to determine this application. It is worth mentioning that this court is not called upon to determine the merits of the land dispute since this is a preserve of the Chief of Luyengo and his Inner Council. In the circumstances the point of law relating to lack of jurisdiction cannot succeed and it is dismissed.

[13] The respondents do not deny or dispute that the applicants obtained the land lawfully from the Traditional Authority of Luyengo in the early 1960s; and, that they constructed the grocery shop from which they traded and operated their business from the mid 1960s to January 2013. At that state the proprietor of the shop advised the family that he was retiring from the business on medical grounds; hence, a tenant was secured to operate the business. The tenant demanded that the shop should be renovated. Meanwhile the applicant's family had secured a licence to operate a supermarket and had further extended the shop to accommodate a supermarket. After the tenant had taken over the shop, put stock and commenced trading, the respondents suddenly threatened to evict the applicant's family from the shop and take over the business on the basis that the land on which the shop is built belongs to their family. No

reasonable explanation has been given by the respondents why it took them so many decades to claim the land given that the parties reside in the same vicinity at Luyengo area under the same Chief. The allegation by the respondents that there was an agreement between the two families on the operations of the shop has not been substantiated and is certainly not supported by the evidence.

[14] It is apparent from the evidence that the application is intended to preserve the status quo ante pending the final determination of the dispute by the Traditional Structures in terms of Swazi law and Custom. By so doing this court has not usurped the powers of the Traditional Structures. This court has jurisdiction to entertain an interim interdict which is intended to preserve the status *quo ante* pending the determination of a dispute before Traditional Structures in accordance with Swazi Law and Custom. It is not in dispute that the matter of ownership of the land upon which the business is situated is pending before the Luyengo Royal Kraal.

[15] The respondents have threatened to evict the applicant's family from the shop without a court order; such conduct is unlawful. The Court of Appeal of Swaziland, as it then was, in the case of *John Boy Matsebula and three Others v. Chief Madzanga Ndwandwe and Another* Civil Appeal No. 15/2003 at page 24 quoted with approval the leading case of *Nino Bonino v. De Lange* 1906 TS 120 at 122 where Innes CJ stated the following:



**"... no one is permitted to dispossess another forcibly or wrongfully and against his consent, of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do so as a preliminary to any inquiry or investigation into the merits of the dispute."**

[16] In the case of *John Boy Matsebula and three Others v. Chief Madzanga Ndwandwe and Another* (supra), the Supreme Court dealt with a dispute of ownership of land on Swazi Nation Land. The appellants had instituted an urgent application before the High Court seeking a *rule nisi* interdicting and restraining the respondents from invading, ploughing and/or taking over fields owned and in the lawful possession of the applicants pending the determination of an appeal filed by the appellants to the iNgwenyama against the decision of the first respondent to disown them the land. The *rule nisi* was granted. However, the court *a quo* subsequently discharged the rule nisi and dismissed the application; hence, the appellants lodged an appeal before the Court of Appeal, as it then was.

The judgment which was appealed dealt only with a Point in *limine* raised by the respondents that the disputed land is situated on Swazi Nation Land whose allocation, use and enjoyment was governed by Swazi law and Custom. To that extent it was argued that this court had no jurisdiction and was not competent to determine the dispute between the parties. It was further argued by the respondents, that the appellants had not exhausted the local conflict-resolution mechanisms obtained under Swazi law and Custom. Similarly, the

respondents argued that there were disputes of fact in the matter which required the hearing of oral evidence. The respondents also felt that the appellants should not have brought the application before the court *a quo* on the basis that the dispute between the parties was pending a decision by the iNgwenyama, and, therefore *lis pendens*.

The Court of Appeal held that the appeal should be allowed on the basis that the applicants had a right to protect their possession pending the determination of the land dispute before iNgwenyama.

[18] I dealt with the requirements of the an interim interdict in the case of *David Themba Dlamini v. Sylvian Longendo Okonda and Seven Others* Civil Case No. 1995/2008. At para 14 I stated the following:

**“14. It is well-settled that an applicant who seeks an interim interdict should establish the following essential requirements: firstly, a right which is though *prima facie* established is open to some doubt, namely, that he has a *prima facie* right. Secondly, a well grounded apprehension of irreparable injury if the interim relief is not granted. Thirdly, that the balance of convenience favours the grant of an interim interdict. Fourthly, that there is no other satisfactory remedy.**

**See cases of *Setlogelo v. Setlogelo* 1914 AD 221 at 227; *Erickson Motors Ltd v. Protea Motors and Another* 1973 (3) SA 685 AD) at 691.”**

[19] It is trite that the High Court has jurisdiction to determine an application for an interdict to preserve the status *quo* pending the determination of a dispute over the ownership of land under the jurisdiction of a chief in terms of Swazi law and Custom. The applicant has established the prerequisites of an interim interdict, and, he is entitled to the relief sought.

[20] Accordingly, the application is granted with costs.

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

For Applicant  
For First to Fourth Respondents

Attorney Sabelo Mngomezulu  
Attorney Mduduzi Mabila