



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case NO.4161/07

In the matter between:

ELCAN DLAMINI

Applicant

and

**MTANANA NTSHALINTSHALI
MKHULUNYELWA MAVIMBELA
MTIWEMPHI MALINGA
MKHIPHENI NGWENYA
ALFRED MAVIMBELA
MOSCOW MATSENJWA N.O.
PS – MINISTRY OF AGRICULTURE
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent**

Neutral Citation: *ElcanDlamini vs Mtanana Ntshalintshali & 7
Others(4161/07) [2014] SZHC81
(15th April 2014)*

Coram: Hlophe J.

For the Applicant: Mr. L. M. Maziya (Instructed by Mr.
L. Malinga)

For the 1st – 5th Respondent: Mr. B. J. Simelane

For the 6th - 8th Respondent: Mr. V. Kunene

Heard: 15th July 2013

Judgment Delivered: 15th April 2014

JUDGMENT

- [1] The Applicant instituted application proceedings seeking a final interdict restraining the Respondents, their agents, servants or anyone acting through or under them from dipping cattle at the Dip Tank known as KaDinga Dipping Tank together with the costs of these proceedings.
- [2] The Applicant contends, by means of a founding affidavit, that the dipping tank in question poses a danger to his children through the poisonous water emitted therefrom owing to its proximity to his homestead. He is also concerned about what he terms soil erosion which he fears will be caused by the cattle attending the Dip Tank concerned including what he refers to as damage to his crops and fence around his fields which he claims will be caused by the cattle using the Dip Tank.

[3] The application is opposed by the Respondents some of whom are represented by Attorney Mr. B. J. Simelane while those from the government, namely the sixth to eighth Respondents, are represented by attorney Mr. V. Kunene from the Attorney General's Chambers. The Applicant on the other hand is represented by Advocate Lucas Maziya, on instructions from Malinga and Malinga Attorneys.

[4] The Respondents deny that the Applicant is entitled to the reliefs he seeks. They contend that as he is seeking a final interdict, he has to show that he has a clear right over and above the injury that is about to occur or one that is continuing together with the absence of an alternative remedy. It was argued that these requirements he needed to establish, and that on the facts of the matter, he had not been able to do so.

[5] It is alleged that it is not open to the Applicant to obtain or claim an interdict when considering that the Dip Tank in question is built on a private farm belonging to the Swaziland

Government. The latter, it was contended had commenced the construction of the Dip Tank concerned after liaising with all the affected community members who approved of the same project which they viewed as a relief to the frustration and difficulty they had been subjected to as a result of a Dip Tank that was hitherto, too far. Furthermore, the Applicant's homestead itself, it was argued, was situated on the said farm where he has no right of ownership. His rights are, so to speak, of a lower quality or standing to those of the farm owner who in law is entitled to enjoy his property as he pleases so long as his actions remain within the lawful confines, of which the establishment of the Dip Tank concerned is but one.

- [6] It is also contended that in any event the harm allegedly feared by the Applicant is imaginary and not supported by the facts firstly because the establishment of the Dip Tank there is a necessity when considering the area concerned together with the number of homesteads serviced by the Dip Tank. This includes the number of livestock that benefits from the Dip Tank services.

Furtherstill, the Applicant's home it is contended, is not the closest to the Dip Tank concerned to be complaining in the manner it is. Furtherstill, the Applicant's homestead and his fields are fenced around so that there is no foreseeable harm to his crops. It was argued further that the chemicals used are not so harmful unless consumed in large quantities. Such was the lack of toxicity in the chemicals used that even the ticks the chemicals are meant to control do not die from the consumption but are merely paralysed and rendered ineffective.

[7] In any event, it was argued as well that all the modern methods of controlling any possible danger from dipping chemicals were adhered to at the Dip Tank concerned. Furthermore the topography of the area was such as not to allow the spillage of the chemicals into the Applicant's home. These methods included the control of wet cattle which enables them to drip dry before they are released to the veld. This it was submitted eliminated the possibility of the chemicals being a danger to human beings through spillage on the grass or nearby ground so

as to end up affecting the Applicant and other members of the public.

[8] It is apparent that if the danger as feared by the Applicant was there, the Swaziland Environmental Authority would have stopped the construction of the Dip Tank concerned which it allowed to go ahead. It should be construed that the Environmental Authority approved the construction of the Dip Tank concerned after being satisfied it posed no danger to society or to human beings as it would not otherwise have allowed that to happen.

[9] When the hearing of the matter commenced it became clear that there were disputes of fact which could not be resolved on the papers particularly the issue of the distance from the Dip Tank to the Applicant's home, including what the topography of the area was like visa-vis the poisonous flow of water into the Applicant's home and soil erosion complained of. All the parties were agreed that an Inspection in Loco be conducted, to

enable the court assess all the surrounding circumstances on its own. The Inspection in Loco was subsequently followed.

[10] During the Inspection in Loco concerned, it was my observation that contrary to what was pleaded in the papers, the Applicant's home was not the closet to the Dip Tank concerned. In fact the Applicant's homestead was some 178 paces from the Dip Tank. It had its perimeter marked by means of barbed wire, which would obviously not allow any beast to go through. The fields were also enclosed within some barbed wire erected right round the said fields. This would not allow any beast to go through so as to interfere with either the crops or the Applicant's yard.

[11] I also noted that the topography of the land from the Dip Tank to the applicant's homestead did not allow the flow of any water into the homestead's compounds. In fact the route that goes past the Applicant's home from the Dip Tank was found to be more than 97 paces away as it is situated a few metres from the

boundary line which is situated some 97 paces from the Applicant's homestead.

[12] My observation established as well that there was no merit in the fears of soil erosion expressed by the Applicant when considering that the cattle travelled along the route or small road which as stated above is at least more than 97 paces away from the Applicant's home. From the layout of the area as observed I could not see how the alleged soil erosion on the said path would affect the Applicant as the route neither leads to his homestead nor does it go into his fields. It is worse if one considers the fact that whether there is any soil erosion on the path or the small road situated that far from the Applicant's home, has not been shown to have any bearing thereupon or even on him as he is not the owner of the land in question. Indeed the owner of the land concerned is shown as having approved the building of the Dip Tank concerned, fully alive to the risks involved.

[13] In the circumstances I am convinced that the Applicant has not established a clear right, which would entitle him to an interdict. I say this because whereas he tried to suggest there was a health hazard to his family which he would have been entitled to protection from, such was dealt a crucial blow in my view by the evidence led by the veterinary officers who are in the know and are better placed to tell if there was any genuineness on the health fears expressed. They all said that there was no threat to life or the health of Applicant as the chemical used would only be dangerous if swallowed in huge proportions. These health fears and any other harm that could be thought of as emanating from the establishment of the Dip Tank at the place in question were dealt a fatal blow by the evidence contained in the report by the Swaziland Environmental who approved of the project. In view of their legal duties a conclusion is inescapable they came to the conclusion they did after having satisfied themselves same did not have any adverse consequences on the Applicant's health and that of the neighbours

[14] It is again settled that where there was neither harm nor prejudice conceivable, an interdict was not a possible remedy. The same thing applies as stated above to a situation where there was no right as found above. This position has been a subject of numerous judgments of this jurisdiction and beyond such as *Sethlogel vs Sethlogels 1914 AD 221* as well as *Susan MyzoeMagagula vs African Echo. (PTY) LTD and Others High Court Case No.1727/2005* to mention but a few.

[15] I note that whereas the Applicant would not be left remediless simply because he was a farm dweller whose rights were lower than those of the farm owner, particularly in matters concerning the health of his family, I must say that the evidence led before me during the Inspection in Loco and even in terms of the papers, does not establish any threat to him and his family's health at all. In fact it became clear that Applicant is only complaining against a minor inconvenience when considering that there are other homesteads who are even closer to the Dip Tank than him but are not intent on interdicting the its operations

because they understand the value of the greater good brought about by the Dip Tank to the area. This greater good is evident when one considers the undisputed evidence that the Dip Tank services about 56 cattle keeping or rearing homesteads which between themselves share 917 cattle which use the Dip Tank in question. It was established as well that there were also 44 goats keeping homesteads with 618 goats, whilst there were 33 sheep as well.

[16] For the foregoing considerations, I am convinced that the Applicant has failed to establish a case for an interdict. This means that his application cannot succeed and is accordingly dismissed with costs.

Delivered in open Court on this the 15th day of April 2014.

**N. J. HLOPHE
JUDGE – HIGH COURT**