



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1895/2013

In the matter between:

ELIZABETH TOBHANE DLAMINI

Applicant

vs

MFANIMPELA GAMEDZE

1ST Respondent

FELELE DLAMINI

2ND Respondent

JOHANE DLAMINI

3RD Respondent

Neutral citation: *Elizabeth Tobhane Dlamni vs Mfanimpela Gamedze & 2 Others (1895/2013) [2014] [SZHC 33] (7th March 2014)*

Coram: **MAPHALALA PJ**

Heard: 6th December 2013

Delivered: 7th March 2014

For Applicant: Mr. M. Gamedze

For Respondent: Mr. B. Tsabedze

- Summary:
- (i) *Applicant has filed an Application for an interdict over a piece of land under Swazi Law and Custom.*
 - (ii) *The Respondent has raised a preliminary objection that this court has no jurisdiction to entertain the Application.*
 - (iii) *This court finds in favour of the preliminary point that it does not have jurisdiction.*

Decided cases referred to:

1. *L.F. Boshoff Investments (Pty) Ltd vs Cape Town Municipality 1969(2) SA 256 (C) at 257A-F.*
2. *Minister of Law and Order vs Nordien 1982(2) SA 894 at 896.*
3. *Ntombi Maziya vs Ndzimandze High Court Case No.1159/2006.*
4. *Congo Motsa and 62 Others vs Vusi Dlamini and 2 Others Case No.3967/2005 (unreported)*

JUDGMENT

The Application

[1] Before court is an Application brought under a Certificate of Urgency for an order in the following terms:

- “1. *That this Honourable Court dispense with the normal requirements relating to time limits, manner of service, form and procedure in applications proceedings and deal with this matter as one of urgency in terms of Rule 6(25) (a) and (b) of the High Court Rules.*

2. *That this Honourable Court condones the Applicant's non-compliance with the Rules of Court.*
3. *That a rule nisi be issued, calling upon the Respondent to show cause on a date and time to be determined by this Honourable Court why the prayers set out below should not be confirmed and made final.*
4. *That pending the finalization of this matter, the Respondents, their agents, successors in title and/or assignees be interdicted and restrained from interfering with the Applicant's peaceful occupation, use and enjoyment of Swazi Nation Land situated at Maphatsindvuku area or the peaceful possession, use and/or enjoyment of the land by those assigned by the Applicant.*
5. *That pending the finalization of this matter the Respondents, their agents, successors in title and/or assignees be interdicted and restrained from removing or tempering with the fence that is being erected by the Applicants or those assigned by her which fence demarcate the boundary of the land belonging or under the control of the Applicant.*
6. *That pending the finalization of this matter the Respondents, their agents, successors in title and/or assignees be interdicted and restrained from interfering with the cultivation of crops by the Applicant or those assigned by her on the land, which is Swazi Nation Land situated at Maphatsindvuku area.*
7. *That prayer 4, 5 and 6 above be granted to operate with immediate and interim effect.*
8. *That the Respondents be ordered jointly and severally each paying for the other to be absolved to pay costs of this application.*

9. *That the Applicant be granted any further and/or alternative relief which this Honourable Court may deem just in the circumstances.”*

[2] The Founding Affidavit of the Applicant is filed outlining the background of the dispute between the parties. A number of confirmatory affidavits are also filed in support of the Applicant’s Founding Affidavit.

[3] The Respondents oppose the Application and has filed an Answering Affidavit of one Johane Wilson Dlamini who is the chief’s runner (Umgijimi) of KaLanga chiefdom answering to the averments in the Founding Affidavit. A number of supporting affidavits pertinent to the case are also filed thereto.

[4] The Applicant then filed a Replying Affidavit in accordance with the Rules of this court.

The arguments of the parties

[5] The matter appeared before me on the 18th December, 2013 where I heard arguments of the attorneys of the parties. The Applicant is represented by Mr. M. Gamedze who filed comprehensive Heads of Arguments on the matter for which I am grateful. The Respondents are represented by Mr.

Tsabedze who also filed comprehensive Heads of Arguments for which I am grateful. I shall therefore, outline in brief the contentions of the attorneys in the following paragraphs for a better understanding of the issues for decision.

(i) The Applicant's arguments

[6] The Applicant's attorney prefaced his arguments with an introduction to the Applicant's case as well as the case for the Respondents at paragraph 1 of his Heads of Arguments. In paragraph 2 he dealt in great detail with the law applicable for the grant for an interim interdict citing the case *L.F. Boshoff Investments (Pty) Ltd vs Cape Town Municipality 1969(2) SA 256 (C)* at 257A-F on the requirement of an interim interdict to the following legal proposition.

- “(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;*
- (b) that if the right is only prima facie established, there is well-grounded apprehension if irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
- (c) that the balance of convenience favours the granting of interim relief;*
- (d) that the applicant has no other satisfactory remedy.”*

- [7] The Applicant's attorney then advanced arguments of the establishment of a *prima facie* in paragraph 2.1 of his Heads of Arguments and I shall adopt the pertinent paragraphs later as I proceed with my analysis of the argument of the parties.
- [8] The attorney for the Applicant then made submissions on the aspect of an injury actually committed or reasonably apprehended at paragraph 2.2 of his Heads of Arguments. The court was referred to the case of *Minister of Law & Order vs Nordien 1982(2) SA 894 (A)* at 896E-I in support of his arguments under this Heads of Arguments.
- [9] In paragraph 2.3 of the Heads of Arguments an argument on the balance of convenience is made that it favours the granting of the interim interdict.
- [10] The final argument for the Applicant is canvassed in paragraph 2.4 of the absence of an alternative or similar remedy. It is contended that Applicant has no alternative remedy and therefore this court ought to grant the order prayed for in the Notice of Motion.

(ii) The Respondent's arguments

[11] Mr. Tsabedze for the Respondents also advanced very helpful arguments for which I am grateful. The attorney for the Respondent commenced his argument by raising a preliminary question of whether this court has jurisdiction since the dispute between the parties relates to a piece of land on Swazi nation land. That this court (High Court) has on a number of occasions expressed itself on this issue whether it has jurisdiction to deal with a matter requiring the application of Swazi Law and Custom.

[12] That the Applicant may have the right to possess land (which the Respondents disputes she has any in this matter) but does not have any right to allocate or lease any land. The power to allocate land to new settlers vests in the Chief of the area who exercises such power through his functionaries i.e. the Inner Council and Bandlankulu.

[13] To support the above contention the Respondent's attorney has cited the provisions of section 7(1) of the Swazi Court Act No.80/1980 which confers the Swazi National Court with jurisdiction to exercise civil jurisdiction, to the extent set only in it warrants and subjects to the Act, over causes and matters in which all the parties members of the Swazi

nation and the Defendant is ordinarily resident, or the cause of action shall have arisen within the area of jurisdiction of the court.

[14] In support of the above arguments the attorney for the Respondents cited a *plethora* of decided cases in this court including that of *Ntombi Maziya vs Ndzimandze High Court Case No.2/2012*; *Beauty Jumaima Thomo vs Kenneth Harold Vilakati and Another 1159/2006 per Sey J*, and that of *Congo M. Motsa and 62 Others vs Vusi Dlamini and 2 Others Case No.3967/2005*.

[15] The legal principle enunciated in these authorities is that if a matter is one that fails exclusively within Swazi Law and Custom, then the court has no jurisdiction to entertain the matter and the court is precluded from proceeding on the merits of the contentions and is in fact duty bound to dismiss the suit.

[16] The second preliminary point raised for the Respondent is that of non-joinder that the *Umphakatsi* of KaLanga should have been joined in the Application as it has a direct and substantial interest in the matter.

[17] On the merits of the case the attorney for the Respondents raised two arguments, first that there is a dispute of fact as to who owns the property in question. Secondly, that therefore the Applicant has not proved a clear right for the interest she is seeking. In support of these arguments the attorney for the Respondent has cited the High Court case of *VIF Limited vs Vuvulane Irrigation Farmers Association (Public) Company (Pty) Ltd and Another, Appeal Case No.30/2000* and that *Daniel Dinabantu Khumalo vs The Attorney General, Appeal Case No.31/2010*.

The court's analysis and conclusions thereon

[18] Having considered the able arguments of the attorneys for the parties I shall proceed to decide the dispute between the parties under two heads being first the question of whether his court has the jurisdiction to hear this matter. Secondly, to consider the merits of the case if I had found that this court has jurisdiction. I shall proceed therefore to do so in the following paragraphs.

(i) The jurisdictional threshold

[19] The first-port-of-call as I have stated above is a jurisdictional determination whether or not the Applicant ought to have proceeded by way of Swazi Law & Custom in line with the provisions of section 7(1)

of the Swazi Court Act No.80 of 1950 or this court has jurisdiction to hear the matter.

[20] It is common cause between the parties that this dispute has arisen because the parties are disputing over a piece of land which is under a Chief. The Applicant contends that the piece of land is her inheritance from her late father. The Respondents on the other hand are of the view that the land belongs to them being allocated by the late Chief of KaLanga.

[21] In my assessment of the parties arguments aforesaid I have come to the considered view that the Respondents' arguments is correct that this matter ought to be dealt with in terms of Swazi Law and Custom. The dispute between the parties revolves on matters of customary law. In this regard I am fortified by cases before this court including what is stated by *Annandale J* in the case of *Congo Motsa and 62 Others vs Vusi Dlamini and 2 Others Case No.3967/2005 (unreported)* where the following *dicta* was enunciated:

“National land, administered by appointed chiefs on behalf of the King or Ingwenyama who is the custodian-in-trust on behalf of the nation, has its own set of rules and norms which differ from the legal traditions followed and

applied by the High Court. It is for this reason that the 2005 Constitution explicitly requires such matters to be dealt with by the traditional authorities.'

The learned Judge went on to state that –

'The inherent jurisdiction of the High Court is not undermined by this. Specialized structures to deal with special issues, such as chieftainship and allocation or designation of national land requires knowledge and understanding that does not form part of the formalized legal structures such as the High Court...nor is it deemed to be appropriate to resolve such issues in the forum of the High Court of Swaziland.'

[22] It also appears on the facts deposed by the parties that the Applicant has been called several times to answer to the allegations of illegally selling Swazi nation land and settling people without the authority of KaLanga Umphakatsi. Furthermore, that Applicant has been tried by the Swazi Court of Siteki for defying summons by KaLanga Umphakatsi. She was called to answer to allegations of selling Swazi nation land and allocating other people's lands in complete disregard of the KaLanga Umphakatsi.

[23] It would also appear to me that second preliminary point raised by the Respondent that of non-joinder should be upheld. The allocation of Swazi nation land is the sole preserve of a Chief of that particular area. The records as to who was allocated the land in question are kept by the KaLanga *Umphakatsi*. I agree with the Respondents' arguments that the

competent authority of KaLanga *Umphakatsi* has not been cited in these proceedings yet it has a direct and substantial interest in the matter.

[24] For these reasons the Application ought to be dismissed and on the merits I can only mention *obiter dictum* that the Applicant cannot succeed in view of the dispute of fact stated above.

[25] In the result, for the foregoing reasons the preliminary point of jurisdiction is upheld with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE