IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 733/12

In the matter between

LOGOBA ROYAL COUNCIL **APPLICANT**

And

EVANGELICAL CHURCH
(BY CHRIST AMBASSADORS) **1ST RESPONDENT**
TIMOTHY MYENI **2ND RESPONDENT**

Neutral citation: *Logoba Royal Council v Evangelical Church & Another (733/12*) [2014] SZHC 42 (21 March 2014)

Coram: **M. S. SIMELANE J**

Heard: **7 March 2014**

Delivered: **21 March 2014**

Summary: **Civil procedure: Contempt of Court: principles thereof; Respondents acted in violation of a Court order; held in contempt, interdicts: principles thereof.**

Judgment

SIMELANE J

[1] The Applicant instituted these proceedings under a certificate of urgency seeking an order of this Court against the Respondents in the following terms:-

(1) Dispensing with the manner of service and time limits prescribed in the rules of this Honourable Court and hearing this matter as one of urgency.

(2) Condoning the Applicant's non-compliance with the said rules of Court.

(3) Directing and/or authorizing a duly authorized Deputy Sheriff for the Region of Manzini to dismantle and or demolish the pit latrine, fence and any other structure put up on the land in question at Mhlaleni, Logoba area.

(4) Interdicting and/or restraining the Respondents from raising any structure on the land in question pending finalization of the matter.

(5) Directing and authorizing the members of the Royal Swaziland Police to ensure that the order of the above Honourable Court is carried out and assist the Deputy Sheriff in so executing the order.

(6) That the Respondents be found guilty of contempt of Court.

(7) That the Respondents be directed to pay costs of application at attorney and own client scale jointly and severally the one paying to absolve the other.

(8) Any further and/or alternative relief.

[2] The Applicant filed a founding affidavit sworn to by one Mfanukwente Mabhareti Dlamini.

[3] The Respondents who are opposed to this application raised points *in limine* in their opposing affidavit as follows:-

IN LIMINE

"2.1 NO LUCUS STANDI

I do respectfully submit that applicant has no locus standi to institute this application by virtue of not being the lawful authority at Logoba area and as such

having no legal interest thereon as the proper authority is the Masundvwini Royal Council as more fully appears in annexure "A"being a letter from the lawful authority of the place in question. (more legal arguments to be made at date of hearing).

3. <u>LIS PENDENS HENCE INCOMPETENT PRAYERS</u>

It is further submitted that the issues forming the basis of the application by applicant are pending in court in the main application hence the prayers in particular prayers 3 and 4 are incompetent as they have effect of a final order disposing of the matter without the main application having been heard on similar terms. (more legal arguments on date of hearing.)

4. <u>DISPUTES OF FACT</u>

The application is fraught with material disputes of fact which were forseen by the applicant and the matter cannot be resolved without recourse to oral evidence. Such include but not limited to the numerous claims by different people as the proper and rightful authority of Logoba, the differing versions of the proceedings (meetings) between the parties and other factors. (more legal arguments on date of hearing."

[4] Let me first address these legal points before dealing with the merits if I need to.

[5] Now, *locus standi* simply means an interest in the subject matter of the action, which gives a person the right to bring the action. The term *locus standi* denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like "standing" or "title to sue". It has also been defined as the right of a party to appear and be heard on a question before any court or tribunal. Whether or not a party or plaintiff has *locus standi* in an action is easily decipherable from the pleadings. For a plaintiff to be said to have *locus standi*, the facts pleaded must establish his right and obligations in the suit. In other words the facts pleaded must demonstrate his interest in the action. It is therefore the interest in the subject matter of the action that gives the standing. See **Swaziland Development & Savings Bank V Martinus Jacobus Dewald Breytenbach N.O. and Six Others Case No. 2034/04, Case No. 1275/11 and Case No. 1276/11.**

The Respondents are saying it is the Masundvwini Royal Kraal that now has jurisdiction over Logoba area. They are therefore the rightful party to institute these proceedings and should have been cited. Be that as it may, it is clearly undesirable for me to pronounce on this issue at this stage of the proceedings, because it is the same subject matter that is pending before the traditional structures in respect of which Hlophe J gave the interim order which forms the subject matter presently before me.

[6] Similarly, I hold the same view on the point on *lis pendens*. I say this because the elements of a successful plea of *lis pendens* as a defence to an action is the same as that of a plea of *res judicata*. This was appositely stated by **S. A. Moore JA** in the case of **Mhlatsi Howard Dlamini V Prince Mahlaba Dlamini and Another Appeal No. 15/2010 para [16]**, as follows:-

> **"[16] The law relating to the plea of res judicata has been authoritatively stated at page 249-250 of Herbstein and Van Winsen, where the learned editors point out that:**
>
> > **'The requisites of a plea of Lis-Pendens are the same with regard to the personal cause of action and subject matter as those of a plea of res judicata; which in turn, are that the two actions must have been between the same parties or their successors-in-title, concerning the same subject matter and founded upon the same cause of complaint.' "**

[7] The defence cannot therefore succeed in this case. The issue before me is the order of Hlophe J issued on 20 May 2011 to hold things in *status quo* pending the finalization of the substantive suit before the traditional structures. The question of *lis pendens* does not arise.

DISPUTES OF FACTS

[8] The Respondents also contend that there are serious disputes of fact in this matter, such as the claims by different people as the proper and rightful authority of Logoba, the differing versions of the proceedings (meetings) between the parties and other factors. It is my considered view that on this question, it is not for me to say who the lawful authority for Logoba is since that matter is also still pending before the appropriate traditional authority.

[9] However, on the issue of the negotiations that arose after the order to maintain the *status quo* was granted, I am inclined to agree with the Respondents that there are certain disputes on facts on this question that cannot be resolved on the papers.

[10] The law on the question of disputes of fact has been settled in Swaziland. The learned authors **Herbstein and Van Winsen** in the **Text The Civil Practice of the Supreme Court of South Africa 4th edition, page 224** postulated this position of the law in the following terms:-

> **"It is clearly undesirable in cases in which facts relied upon are disputed to endeavor to settle the disputes of fact on an affidavit, for the ascertainment of the true facts is effected by the trial Judge on consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event it is more satisfactory that evidence should be led and**

that the court should have the opportunity of seeing and coming to a conclusion."

[11] It is apposite for me to state here, that the continued application of the foregoing principles in the courts of the Kingdom, has rendered them sacrosanct. The cases are legion. They include but are not limited to **Daniel Didabantu Khumalo v The Attorney General Civil Appeal No. 31/2010, Pauline Mnguni v City Jap Auto (Pty) Ltd and another Case No. 4728/09, Hlobsile Maseko (nee Sukati) v Sellinah Maseko (nee Mabuza) and others Case No. 381/10**, to mention but a few.

[12] In casu, the Applicant states as follows in para [6] of his founding affidavit.

"Subsequently to the order of maintaining the status quo my attorney together with respondents attorney went to Logoba area to inspect the area and we were called to a meeting to foster an amicable solution in resolving the issue. I state that at such meeting and/or discussion it was agreed that applicant and respondents discuss the issue in their respective forums and that such status quo be maintained. I wish to state that discussions are still pending and the matter was accordingly reported to the Manzini Regional Administrators office as it appeared that boundaries for two chiefdoms were at issue."

[13] The Respondents' reply appears as follows in paras [5.3]-[5.5] of the answering affidavit.

"[5.3] <u>AD PARAGRAPH 6</u>

The contents herein are denied. I do confirm visiting the area with our attorneys but never was it agreed that the status quo meant that services or the erection of temporary structures should not be done. I refer to the confirmatory affidavit of our Church Chairman Mr. David Mdaka on such fact. In the meeting it was specifically agreed that, since it was about to be the rainy season a temporary structure could be put up to shield the church members from the scorching heat and rain. I accordingly reiterate the point of law on disputes of fact that only oral evidence can cure up this conundrum due to the different versions.

[5.4] <u>AD PARAGRAPH 7</u>

The contents herein are vehemently denied. In all the discussions between the parties and in an address to the court by the parties' respective attorneys it was agreed that only temporary interim structures could be put up. There was no formal court order so to speak but the parties merely advised the court that they were to ensure that nothing permanent takes place.

In any case I wish to put the following facts before the court.

5.4.1 The so-called structures that are there are in line with the discussions between the parties. It would not be logically expected that church members would stand in the rain whilst worshipping in particular as no order was granted stopping services. For same to continue they had to be a structure albeit temporary.

5.4.2 Such structure is made of planks and the toilet is mobile and can be dismantled in a matter of minutes. It is respectfully submitted that it is basic hygiene standard that where people converge, a toilet should be present which was never denied in the discussions between the parties.

[5.5] <u>AD PARAGRAPH 8.1</u>

The contents of this paragraph are denied. I am advised by my attorneys that same was in line with the order and or suggestions advanced over bar in the discussion of the matter by the parties in court and actually adopted the suggestion that services could still persist undisturbed. I am advised and verily believe that the order frowned upon permanency in the structures so created as same would be problematic in removal in the event applicants won."

[14] In para [2] of the confirmatory affidavit David Mdaka states as follows:

"I have read the answering affidavit of 2nd respondent and wish to confirm its contents in so far as they relate to me.

[2.1] I do confirm in particular that in a site inspection by the parties and their attorneys of the land, it was agreed that services should go on as per the proceedings in court and that any act done is in line with the continuation of the services including a structure to shield members from bad temperature and had to be temporary.

[2.2] I also confirm that what has been erected is a shack, very temporary in nature and a mobile toilet to sustain sanitation standards and that there is no permanent structure erected anywhere in the land."

[15] In reply the Applicant states as follows in paras [9.1]-[9.2] of the replying affidavit.

"<u>AD PARAGRAPH 5.3</u>

[9.1] Contents thereof are denied. The deponent thereat was never present during such visit and discussions but one Mr Mdaka was present together with attorney Mr S. Simelane. On the other side it was myself, Mr Sandlasenkhosi Maseko and attorney M.S. Dlamini. The deponent is therefore guilty of perjury.

[9.2] I deny the agreement regarding the raising of church structures. In any event Timothy Myeni was never

present in the meeting and all he says is not true. No oral evidence is needed herein as there is clear evidence of contempt of court."

[16] It is clear from the above that the Applicant is not denying that there were negotiations after the Court order. The question of whether or not the parties agreed at the negotiations that temporary structures should be erected on the land notwithstanding the Court order, is seriously disputed in these proceedings. This issue runs like a thin thread through all the substantive reliefs sought by the Applicant. The question of the wilfulness and *mala fides* of violation of the Court order which forms an integral part of the contempt of Court order sought intertwined with this dispute. It cannot be resolved on the state of the papers before me. There is a need for *viva voce* evidence to be called in these circumstances.

[17] On these premises, I order as follows:-

(1) That the parties be and are hereby referred to oral evidence on the question of the negotiations undertaken after the interim order of Hlophe J.

(2) The Applicant shall pay the Respondents costs of this application.

M. S. SIMELANE

JUDGE OF THE HIGH COURT

For the Applicant	**:**	**M. S. Dlamini**
For the Respondents	**:**	**S. J. Simelane**