IN THE HIGH COURT OF SWAZILAND

RULING

Reportable

HELD AT MBABANE **Civil Case No. 261/17**

In the matter between:

NKOSINATHI MAPHOSA **Applicant**

VS

SIFISO MANANA **Respondent**

Neutral citation: Nkosinathi Maphosa vs Sifiso Manana (261/17) [2017] SZHC 46 (24th February, 2017)

CORAM: MAPHANGA J

HEARD: 24th February, 2017

DELIVERED: 24th February, 2017

The Application

[1] All too often litigants will approach the Court on urgent motions wherein the Applicant makes an application on papers where either without prior service to the Respondents or although served the notice of application

requires them to file paper and respond upon severely truncated and impractical timelines**.**

[2] Often the Applicant seeks some holding or temporary order or interdict under a rule nisi returnable on a date to be given by the court upon hearing the matter, failing which some form of final injunctive relief is the ultimate pain. Practically there scarcely any difference between these applications from ex-parte applications in the sense that if the Respondent does not make a swift intervention the Applicant, armed with the hybrid device of urgency and a rule nisi will attain tactical advantage and with an advance remedy of an intermediate relief without the other party being heard.

[3] Nonetheless the Court retains its discretion in these matters and in the exercise thereof it must test such applications on their own merits in assessing whether they pass muster and make a case for the sought relief.

[4] Before me is such an application. The applicant has launched the application under a Certificate of Urgency that is scanty on the grounds therefore the notice of motion was sued out on the ……. and served on the Respondent on ……. The Respondent was given only until the …… to file any notice if he opposes the application.

[5] On the 24th February 2017, I dismissed the application.

[6] I reserved my reason which I hand down at this time.

[7] In terms of the notice of motion the Applicant has sought the following orders;

The Application

[1] **"Directing and ordering the Respondent or anyone under his employ or instruction to desist or refrain from constructing or performing any act on the Applicant's piece of land situated at Mahlabatsini pending finalisation of these proceedings".**

[2] I say final because certainly the Applicant is not moving the court for an interlocutory/or interim interdict in the sense such a relief is understood in civil proceedings as practice as being a proceeding *pedente lite.* That the order is being prayed for in the form of a rule nisi does not change the "finality" of its character.

[3] It is apparent from the facts set out by Applicant in his own founding affidavit that he is seeking to assert ownership rights and that in effect the application is some vindicatory device. To found his claim he deposes to the following averments as essential to the application as appears in the founding affidavit:

> ***"On or about the 19th February, 2014 I bought a piece of land with a structure on it situated at Mahlabatsini, Matsapha, District of Manzini from one, Muzi Dlamini for the sum of E55, 000.00 (fifty-five thousand Emalangeni). I attach annexure "A" as proof thereof.***
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> ***Upon acquisition of the piece of land I was introduced to the Logoba Royal Kraal by my forerunner (lincusa) Gideon Tsabedze where I khontaed for the sum of E7, 000.00 (Seven thousand Emalangeni).***
>
> ***Sometime during October, 2016 it came to my attention that the Respondent who is my neighbour at the said premises was tempering with the structure in my piece of land. Upon enquiry from the Respondent why he was tempering with my structure, he apologized and proposed that I lease out the rooms as the structure was almost complete to which I refused.***
>
> ***The Respondent has taken advantage of the fact that I live at Pigg's Peak and rarely come to Mahlabatsini as such; see an opportunity to make profit on my piece of land by leasing out the rooms without my knowledge and consent.***

It has on the 18th February, 2017 through the neighbours come to my attention that the Respondent has put a makeshift roof on my structure and that he intends to lease out the rooms to people who are unknown to me.

The matter is urgent by virtue of the fact that I am the lawful owner of the piece of land and the structure on it having bought same from Muzi Dlamini and khontaed thereon. The Respondent is unlawfully infringing upon such right".

Ownership

It is evident that the property or piece of land that is subject to this application is situated on land controlled by the traditional authorities or Swazi nation area (Swazi nation land). It is not Private Title or Freehold Title Land. This much was acknowledged by the Applicant's Attorney, Mr Nhlabatsi, when he appeared before me.

As this application is predicated on "ownership" this brings to the fore two questions;

a) Whether an individual can claim ownership of land situated on Swazi nation land; and

b) Whether it is competent in this court to grant the relief sought in the form it is brought.

[4] It is important to distinguish the basis for Applicant relief for an interdict from that of a *mandament van spolie* where protection or restoration of a possessory right is sought to restore the status quo ante.

[5] He is clearly not asserting he was in peaceful and undisturbed possession (occupation) of the premises in question for in his own words he states that the errant neighbour takes advantage of the fact he "lives in Pigg's Peak". It appears that the premises were not occupied by him at the material time. Such would have been a prerequisite condition in spoliation recourse. *See John Boy Matsebula & Others vs Chief Madzanga Ndwandwe & Another.*

Ownership

In the legion of disputes over rights to land in the Swazi nation land that have come before our courts, the question of ownership of such land is dealt with as

an unequivocally settled by the provisions of Section 211 of the Constitution Act as follows:

> ***"…. All land (including ……..) in Swazi land, are privately held title land, shall continue to rest in Ingwenyama".***
>
> *(see Hadebe v Khumalo & 3 Others (25/20120 [2013] SZCS 39 (31st May, 2013); also.*

[6] On this basis Applicant's claim of ownership in the premises is untenable.

[7] Although he alleges that he purchased the piece of land in question the entire transaction of series of transactions have the hallmarks of acquisition of land in a Swazi nation area. The claim for ownership also gives rise to other practical if not procedural difficulties.

[8] The property in question is not a distinct and identifiable unit of land as a designated and defined entity in the sense of a surveyed parcel of land. It is to be expected with such the character of a parcel of land allocated by the traditional authorities unless a system of surveying and demarcating property units have been put in place. This is not the situation in cash.

[9] It is apparent that the Applicant is not claiming that the land in question has been allocated to him by way of grant with diagram (Crown Grant) or that he holds such certificate and deed nor is the land in question severable from communal lands under the control and administration of the Chief responsible for the Mahlabatsini area.

[10] Had this been an application for a spoliation order it would have been a different matter; the latter being a device for the protection of a possessory right and right of occupation. As stated earlier such is not the situation here.

[11] It does not require much imagination to see that although the interdict shrouded under a prayer for a rule nisi, is in effect final in nature but only thinly disguised as an interim or interlocutory order; for it is far from seeking intermediate relief pending some final determination of rights in another forum *pedente lite.* It is intended to vest some finality do the …. on the return date to be designated by the court.

[12] In support of his ownership claim over the land in question the Applicant has in part, attached a certain document as annexure. This documents

whose legal value is at best questionable. It bears the heading ***"Memorandum of Agreement"*** and is attached presumably as evidence of an agreement of sale of certain 'land in Mahlabatsini'.

[13] This it seems is not the only basis on which he bases his ownership claim; for he goes on to aver that he khontaed (a colloquial reference to a formal allocation of the land under the traditional structures of the area, presumably under the aegis of the responsible Chief). In the latter regard he refers to a certain forerunner which he names as the official responsible presumably for foliating the process although this is not stated as much as it can be inferred. He does not however even attempt to attach any confirmatory affidavit in that regard. So far the Applicant equivocates as it becomes unclear whether the ownership claim, is one grounded on acquisition of the land through purchase or by virtue of allocation of the same in terms of the traditional system of settlement.

[14] From the Applicant's founding affidavit it appears as if he is seeking a prohibitory interdict presented as if temporary yet the relief he is seeking in the motion is interdicting the Respondent or any person acting under him as an out and out relief which is not intended as an interim step to any further process but an ultimate relief. It is however, nothing less than a final interdict.

[15] The requirements for a final interdict are now well established as set out in the *Setlogelo v Setlogelo (……)* a leading case that has been followed time and again in our jurisdiction on the set of requirements for a litigant to succeed in obtaining a final interdict.

[16] It has been said that the Applicant has to show a clear right, and a threat to such right (in instances of prohibitory interdicts) and further that he has no alternative remedy to the order sought.

[17] In this case in view of the fact that the Applicant alleges rights of ownership it is clear that implicitly he is seeking to protect such rights against the alleged encroachments or invasion by his neighbour by recourse to the application for the prohibitory interdict. It is some form of vindicatory process.

[18] It is clear that he is not proceeding from the premis of protecting possessory rights nor has he attempted to set our circumstances to show he was in occupation or in possession of the site at the material time which he would be seeking to restore as an interim step; the so-called restoration of the status quo ante pending final determination or grant of

final relief. Such would have been a scenario of an interim or interlocutory interdict.

[19] I find the following definition of an interlocutory interdict in the context of the case of *Andries Pieters v Hendrik Klaasten and Ano.,* and the analysis of the principles in the context of the comparable circumstances of that case illustrative instructive if not compelling on the matter at hand:

> **"The interlocutory interdict is a provisional order sought to protect the rights of the parties. It enforces the prima facie right for a period of time, at the end of which a clear right must still be proved and, failing which, the interlocutory interdict will be discharged. The granting or refusal of the interlocutory interdict lies in the exercise of judicial discretion by the court.**
>
> **In exercising this discretion, the court must take account of the balance of convenience in relation to both the Applicant and the Respondent and also any potential prejudice to third parties".** (*219/2013 para 13; also Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban 1986 (2) SA 663 (A) at 681 D-F.*

[20] Perforce, the learned Judge goes on to explain the application and ambit of the rule in the context of an assessment of the singular merits of an

application such as the one in *casu.* He clarifies that the Applicant must show, on his own or admitted facts, that there is a reasonable prospect that he will succeed on appeal but most importantly that *'proceedings which address the principle dispute between the parties …….. Are intended or pending'.* In that regard he relies on another case of ***Saidex v The Minister of Minerals and Energy (49/10) [2011] ZASCA 102 (1June 2011) par [7].***

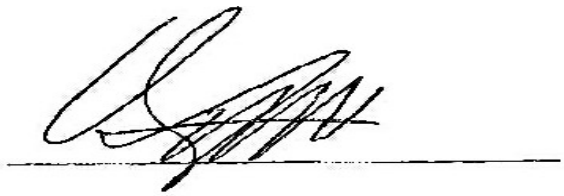
[21] In the *Pieters* case cited above as in the instant matter, the Applicant in his founding affidavit had failed on a balance of probabilities to show either the existence of a clear right in keeping with the final form of relief he prays for or a prima facie right as would entitle him to an interlocutory or interim relief even if he had expressly craved such in his Notice of Motion. Two glaring facts stand out from the case on his founding affidavit:

a) He was neither in occupation of the premises or land in question when the facts complained of occurred (in fact the occurrence probably was due to the vacancy of the land in question) as to show some form of undisturbed and peaceful

possession typifying interlocutory prohibitory interdict and their protective purpose; nor

b) Has he attempted to provide credible proof to establish ownership of the said land in the form of title or a lesser aggregation of rights as would at least set up a prima facie case to a right to possession of the land in question as a unit allocated to him in terms of the traditional tenure procedures. As stated earlier there is no confirmatory affidavit by the appropriate authorities in support of the claim that he said piece of land was indeed allocated by the local authorities who vouch for him; and

[22] There is no indication that the dispute over the land in question has been referred to an adjudication forum either before the traditional authorities responsible for the allocation and parcelling the land or that such referral is either under way or intended nor is there any indication that either an action or further application is intended or contemplated for final determination of the conflict.



MAPHANGA J

For the Applicant: Mr. V. Nhlabatsi