



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1976/2019

In the matter between:

CHIEF ZWIDE NXUMALO	1 st Applicant
INDVUNA MDUDUZI VILANE Applicant	2 nd
And	
BERNARD NXUMALO	Respondent
And	
SENAELO PARADISE FARMERS ASSOCIATION	Applicant
And	
TRIOMF ESWATINI (PROPRIETARY) LIMITED Respondent	1 st
CHIEF ZWIDE NXUMALO Respondent	2 nd
INDVUNA MDUDUZI VILANE Respondent	3 rd
THE MINISTRY OF AGRICULTURE Respondent	4 th
THE ATTORNEY GENERAL	5 th Respondent
In Re:	
CHIEF ZWIDE NXUMALO	1 st Applicant
INDVUNA MDUDUZI VILANE Applicant	2 nd
And	
BERNARD NXUMALO	Respondent

Neutral Citation: *Chief Zwide Nxumalo & Another v Bernard Nxumalo (1976/2019) [2020] SZHC 37 (11th March 2020)*

CORAM: **N.M. MASEKO J**

FOR THE APPLICANT: **S. DLAMINI**
(Attorney General's Chambers)

FOR THE RESPONDENT: **K. SIMELANE**
(Henwood & Company)

HEARD: 20th December 2019

DELIVERED: EX TEMPORE JUDGMENT 24th December 2019

DELIVERED: SUBSTANTIVE JUDGMENT 11th March 2020

Preamble: *Civil law - Pleadings - Plea of lis pendens advanced where the Supreme Court directed in May 2014 that the matter goes for trial to deal with the triable issues raised in the defence of a Summary Judgment. In December 2019, the Applicant who is the Plaintiff in the pending matter, filed motion proceedings against the same Defendant in the action proceedings which are pending - the parties are the same, the subject matter is the same and the cause of action is the same - the defence raised in the action proceedings is the same as the one raised in the motion proceedings - there are serious and material disputes of facts as regards the acquisition of Farm 324 Shiselweni District and such can only be resolved through trial.*

JUDGMENT

[1] On the 3rd December 2019, the 1st Applicant Chief Zwide Nxumalo and 2nd Applicant Indvuna Mduduzi Vilane instituted urgent motion proceedings against Respondent Bernard Nxumalo seeking the following orders:

- a. Dispensing with the normal time limits prescribed by the Rules of this Honourable Court and condoning the Applicant's failure to comply with the Rules of Court and hearing this matter as one of urgency as provided for by Rule 6 (25) of the High Court Rules.
- b. Interdicting and restraining the Respondent or anyone acting on their behest from continuing with ploughing, cultivation or any activity on Farm No. 324 in the Shiselweni District pending finalisation of this matter.
- c. Interdicting and restraining the Respondent or anyone acting on his behest coming near a radius of 500m (five hundred metres) distance from Farm No. 324 in the Shiselweni District.
- d. An order be and is hereby granted to remove and destroy any foreign material or crops unlawfully put or planted by the Respondent or anyone who was acting under his authority.
- e. The National Commissioner of Police through the Hluthi Police Station and/or Jericho Police Post Officers be

directed and ordered to assist the Applicant's in the execution of the order to be granted by the above Honourable Court.

- f. Ordering and directing that prayers (b) and (c) operate with interim and immediate effect.
- g. Costs of suit.
- h. Further and/or alternative relief.

[2] The Founding Affidavit of 1st Applicant was filed in support of this application and 2nd Applicant filed a Confirmatory Affidavit. A number of Annexures were attached in support thereof.

[3] On the 5th December 2019, the Respondent filed a Provisional Answering Affidavit wherein he also raised the following points *in limine*; namely lack of urgency, presence of disputes of facts and non-joinder of association called Senabelo Paradise Farmers Association. The Respondent went on to file the substantive Answering Affidavit on the 8th December 2019.

[4] The 1st Applicant filed his Replying Affidavit on the 9th December 2019. The pleadings were closed in this main application and Applicant's Counsel prepared a Book of Pleadings, which was filed in

Court on the 18th December 2019. For ease of reference this Book is marked as VOLUME 1 because on the 10th December 2019, the Senabelo Paradise Farmers Association launched interlocutory proceedings and a Book was also compiled and is marked as VOLUME 2.

[5] In the interlocutory application, the Association was seeking the following order as contained in its Notice of Motion.

1. Interdicting and restraining the 1st Respondent from ploughing Farm No. 324 pending finalisation of the appeal noted by the Applicant.
2. Staying execution of the 2nd Respondent or 3rd Respondent pending the appeal of such decision noted by the Applicant.
3. Costs of suit against the Respondents jointly and severally, the one paying the other to be absolved;
4. Further and/or alternative relief.

[6] In this interlocutory application the deponent to the Founding Affidavit is Bernard Nxumalo in his capacity as Chairperson of the Applicant Senabelo Farmers Paradise Association, and who is otherwise the Respondent in the main action. The 1st Respondent is Triomf Eswatini (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Kingdom of

Eswatini. The 1st Respondent is alleged to be the company that is engaged in a joint venture with the community of Ezikhotheni to utilize Farm 324. I must point out that Mr. Bernard Nxumalo is also a member of that community.

[7] In the interlocutory application there is the 4th Respondent being the Ministry of Agriculture which facilitated the acquisition of Farm No. 324 on behalf of the Zikhotheni community.

[8] The matter was argued before me on the 20th December 2019 and on the 24th December 2019 I handed down the orders pending these reasons, which I now deliver.

[[9] On the 5th December 2019, the Respondent filed his Provisional Answering Affidavit to the Main Application, wherein he raised the following points *in limine*;

- (i) Lack of urgency.
- (ii) Dispute of facts.
- (iii) Non-joinder of Senabelo Paradise Farmers Association.
- (iv) Failure to satisfy the requirements of an Interdict.

[10] The fifth point *in limine* of *lis pendens* was raised in the substantive Answering filed on the 8th December 2019 and is found at page 130 of the Book of Pleadings Volume 1.

[11] I must point out at this stage that the points *in limine* were argued simultaneously with the merits of the Main Application. The Interlocutory Application was also argued simultaneously with the Main Application.

[12] It is for that reason that the order that was handed down on the 24th December 2019 relates both to the Main Application and to the Interlocutory Application.

[13] For ease of reference I hereby re-state the order of the 24th December 2019;

(i) The Main Application is hereby dismissed with costs on the basis of the Supreme Court Judgment of 30th May 2014, and for other reasons that shall be advanced in the main judgment to be delivered in due course.

(ii) The Interlocutory Application is hereby granted in terms of prayers 1 and 2 only.

(iii) Prayer 3 in the Interlocutory Application is hereby resaved pending the outcome of the Appeal before the Shiselweni Eswatini National Court.

[14] At page 99 of the Book of Pleadings Volume 1 there is a Combined Summons being an Annexure to the Respondent's Provincial Answering Affidavit, wherein the Attorney General is the Plaintiff and Bernard Nxumalo is the Defendant. It bears the Registrar's stamp of the 7th November 2012. The particulars of claim are as follows:

1. The Plaintiff is the Attorney General of the Attorney General's Chambers, Mbabane cited herein in his capacity as nominal party in actions mounted by the Swaziland Government.
2. The Defendant is Bernard Nxumalo an adult male farmer employed, within the Court's area of jurisdiction, by Swaziland Tobacco Co-operative Company Limited at Nhlanguano, Shiselweni.
3. The Plaintiff is the Registered owner of Farm 324 in the District of Shiselweni (the Property).
4. The Defendant is occupying and ploughing in the farm.
5. In this premises the Plaintiff is entitled to an order ejecting the Defendant from the property.

WHEREFORE the Plaintiff prays for an order;

- (a) Ejecting the Defendant from the property,
- (b) Costs of suit; and
- (c) Further and/or alternative relief.

[15] It is common cause that the Respondent filed a Notice of Intention to Oppose Action on the 13th November 2012. Then on the 23rd November 2012, the Applicant lodged an Application for Summary Judgement. This Application for Summary Judgment was supported by the Founding Affidavit of Dr. Roland Xolani Dlamini who was Acting Principal Secretary at the time, wherein he stated that the Respondent had filed the Notice of Intention to Defend the Action to delay the action and that he (Respondent) did not have a *bona fide* defence.

[16] It is also common cause that on the 12th December 2012 the Respondent filed an Affidavit Resisting Summary Judgment wherein he briefly outlined his defence to the action as can be seen from page 116-118 of the Book of Pleadings Volume 1 at paragraphs 5, 7, 8, 11, 12, 13 and 14 as follows;

‘(5) Before I get to my defence I wish to state that it is improper to single me out for eviction from the farm because the farm is being used by numerous members of eZikhotheni Community for reasons that will become apparent from what I advance as grounds of defence.

- (7) I concede that the Crown holds the title deed over the property. I add, however, that the farm was purchased for the exclusive use of members of my clan (the Ndwandwas) at eZikhotheni, at the instance of His Majesty the King.**
- (8) I attach hereto, marked "BN1" a copy of a letter dated the 13th December 2006 from the Principal Secretary for Agriculture to Swazi Bank. At paragraph two of the said letter the writer states in unequivocal terms that "---the Ministry has it in command from His Majesty the King to buy this farm for exclusive use by the Zikhotheni Community ---" The present users are none other than eZikhotheni Community.**
- (11) The decision by the Head of State to purchase the farm for my Community was the culmination of a number of meetings, all of which I attended, some of which took place at the Head of State's residence at eMbangweni in the Shiselweni Region.**
- (12) In keeping with the original plan, on the 21st April 2010 the present Minister of Agriculture, Hon. Clement Dlamini, came to eZikhotheni Chiefdom to hand the farm over to the community. He did not say anything about any change or intended change in the use of the farm.**
- (13) As a matter of fact, a total amount of E25 000-00 was paid by Senabelo Paradise Farmers' Association as deposit for the farm after successfully bidding for it. Then the Government bought it for exclusive use by the eZikhotheni Community.**
- (14) It is my respectful and humble view that this matter would best be resolved upon the intervention of His Majesty the King.'**

[17] It is also common cause that this Application for Summary Judgment was argued before this Court and same was granted in favour of the Plaintiff (the Attorney General) wherein an order was issued ejecting the Respondent from the said Farm 324 Shiselweni.

[18] It was against this judgment that the Respondent appealed the grant of the Summary Judgment to the Supreme Court.

[19] The appeal was allocated Civil Appeal Case Number 50/2013 and was heard before the Supreme Court on the 15th May 2014 and on the 30th May 2014 the judgment was delivered in the following manner:

- (a) The appeal is allowed with costs.
- (b) The order of the Court *a quo* is set aside.
- (c) The Defendant/Appellant is granted leave to defend the action.

[20] The Supreme Court was constituted of His Lordship Dr. B.J. Odoki JA, His Lordship M.M. Ramodibedi CJ (as he then was) and His Lordship MCB Maphalala JA (As he then was) and their judgment was unanimous.

[21] At pages 13-15 paragraphs 29-32, Dr. B.J. Odoki JA stated as follows:

[29] In the case of ZANELE ZWANE v LEWIS STORES (PTY) LTD t/a BEST ELECTRIC (supra), this Court emphasized the point that the remedy of summary judgment is a stringent one, as it has the effect of closing the door to the Defendant without a trial. Since it has potential of causing injustice, it must be confined to the clearest of the cases, where the Defendant has no bona fide defence and where appearance to defend has been made solely for the purpose of causing delay. In that case, Ramodibedi CJ, observed:-

“[8] It is recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is so because it closes the door to the Defendant without trial. It has the potential to become a weapon of injustice unless properly handed. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the Defendant has no bona fide defence and where the appearance to defend had been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a Plaintiff’s claim against a defendant to which there is a clearly no valid defence. See for example MAHARAJ v BARCLAYS NATIONAL BANK LTD 1974 (1) SA 418 (A), DAVID CHESTER v CENTRAL BANK OF SWAZILAND COURT OF APPEAL CASE NO. 50/03”.

[30] In the present case, the issue is whether this was a proper case in which to grant summary judgment given the fact that the Appellant defence raised a

triable issue. Rule 32 (4) (a) of the High Court Rules 1954, provides:-

“(4) (a) Unless on the hearing of an application under sub rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the Plaintiff against the Defendant on the claim or part as may be just having regard to the nature of the remedy or relief claimed”.

[31] It is clear from the above provision that the Defendant need not prove his defence at this stage. All that is required is to raise a triable issue. In the instant case, the Appellant raised the defence of usufruct of the farm in question; and that SENABELO PARADISE FARMERS ASSOCIATION of which he was a member and contributed towards the purchase price of the farm. The letter purporting to give the Appellant the right to use and enjoy the farm was written on 13 December 2006. But according to the Respondent the farm was transferred to the Government in 2008. Therefore, according to the Respondent the Appellant had no right to use and enjoy the property.

[32] In view of the above contentions, the issue whether the Appellant was entitled to use the land or whether the Respondent had a right to take it away, was a triable issue which could only be fairly and justly ventilated if the Appellant was given an opportunity to defend the action.’

[22] I have taken the trouble to reproduce the judgment of the Supreme Court in an effort to demonstrate firstly that there is a bona fide defence of usufruct which has been raised at this stage, in that, as clearly demonstrated above and further that such defence raises a triable issue.

[23] In the circumstances the Supreme Court allowed the Appeal and granted leave to the Respondent to defend the matter.

[24] It therefore becomes extremely difficult to appreciate how the Applicant came about to institute these motion proceedings whilst this matter is pending before this Court as per the judgment of the Supreme Court. Further it is difficult to appreciate why these proceedings were instituted through motion proceedings owing to the glaring material disputes of facts in this matter. This is certainly not the kind of a matter than can be litigated upon through motion proceedings. This matter has a long history which, primarily proves the noble intentions of the highest authority in the land to acquire the said Farm 324 Shiselweni District for agricultural purposes by the eZikhotheni Community. There is also no doubt as to the allegations by the Senabelo Farmers Paradise Association that it contributed financially to the purchase of the farm for the agricultural purposes of the eZikhotheni Community on the

instruction of His Majesty the King. It is the Ministry of Agriculture and Co-operatives which carried out the mandate of His Majesty.

[25] It was because of the long history associated with the acquisition of the farm why the Supreme Court ordered that the matter be referred to a trial as opposed to the summary judgment procedures.

[26] I must highlight that the High Court Case Number in the action proceedings matter is 1874/2012 and when it was enrolled before the Supreme Court on appeal, it was allocated Case No. 50/2013.

[27] It is clear that this matter is pending before this Court as per the order of the Supreme Court. I say the matter is pending because of the following reasons:

- (i) In Case No. 1874/2012 the Plaintiff is the Attorney General and the Defendant is Bernard Nxumalo. The Affidavit in the Summary Judgment proceedings was deposed to by the then Acting Principal Secretary Dr. Roland Xolani Dlamini and a Confirmatory Supporting Affidavit was filed by Chief Zwide Nxumalo, the Applicant in *casu*.

On the other hand in these proceedings the Applicant is Chief Zwide Nxumalo and the Respondent is Bernard Nxumalo.

- (ii) The subject matter in both proceedings is the said Farm 324 Shiselweni District.
- (iii) In both matters, the cause of action is the same, and that is the eviction and interdicting the said Bernard Nxumalo from Farm 324 Shiselweni District.

[28] In the case of **KAREEM ASHRAF & ANOTHER v CIGATEH (PTY) LTD**, Ota J stated as follows at pages 3-5.

'The learned authors HERBSTEIN AND VAN WINSEN in the text, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA (4TH EDITION) 249-250, elucidated the requisites for a successful plea of lis pendens, in the following language:

"The requisites of a plea of lis pendens are the same with regard to the person, 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 --"

It follows from the foregoing exposition, that three ingredients must be evident in both claims to sustain a successful plea of lis pendens, namely:-

- 1) The parties must be the same***
- 2) The subject matter of the claims must be the same***
- 3) The cause of action must be the same.'***

[29] I have no doubt in the proceedings in *casu* that all that the Applicants did was change tactics by launching motion proceedings instead of pursuing the action proceedings per Case No. 1874/12 as it is clearly pending before this Court as per the directive of the Supreme Court. The issues of material disputes of facts which pertains to how the farm was eventually purchased by Government as instructed by the Head of State for the people of eZikhotheni can never be resolved through these motion proceedings.

[30] Oral evidence must be led in order to clarify all these material disputes which were found to be triable issues by the Supreme Court on the judgment delivered on the 30th May 2014.

[31] In his Founding Affidavit at pages 22-31 of the Book Volume 1, the 1st Applicant has attached a Notarial Deed of Lease No. 90 of 2019 between the Head of State and the Zikhotheni Community.

[32] The Interpretation Section - Clause 1 clearly defines the Lessor as the Ingwenyama in Trust for Swati Nation and the Lessee as the Zikhotheni Community. The Respondent is a member of the Zikhotheni Community and it has not been disputed in these

pleadings in *casu* that he was involved in the procurement of Farm 324 Shiselweni.

[33] Clause 2.1 of the Notarial Deed of Lease found at page 25 of the Book Volume 1 states as follows:

‘This Lease shall commence on the date of signing of this Lease Agreement which date shall not be later than the 27th October 2011 and shall continue for a period of fifty (50) years terminating on the 26th October 2061’.

[34] Clause 4 of the Notarial Deed provides that the Lessee shall occupy the property without having to pay rent, and Clause 5 provides that the property is let to Lessee for the purpose of agricultural projects.

[35] Clause 14.1 of the Notarial Deed provides that,

“Either party may at any time after the commencement of this Agreement notify the other of his intention to terminate this agreement in respect of the property (provided firm reasons are advanced) the subject matter hereof provided that such notification is in writing and ninety (90) days in advance of such proposed termination”.

[36] There is no evidence adduced by the Applicants that there has been compliance with Clause 14.1. All that is alleged by the 1st Applicant is that the eZikhotheni Community entered into a joint-venture with

Triomf Eswatini during mid-2019 for the utilization of Farm 324. Further that on the 21st September 2019 he announced in a community meeting that the farm was now being handed over to the investors Triomf Eswatini, and also that no community member was allowed to farm on their portions of land. This is strenuously disputed by the Respondent in his Answering Affidavit and as such raises material disputes of facts.

[37] I must also highlight that from pages 33 to 43 of the Book Volume 1, there is an unsigned Notarial Deed of Trust purportedly founded by 1st Applicant, Nhlanhla Raymond Nxumalo, Mduduzi Nicks Dlamini, Zakhele Richard Hlophe and Khanyisile Rena Simelane.

[38] At pages 44-46 of the Book Volume 1 there is a document titled Declaration of Trustees, which is also unsigned, and at pages 47-54 there is a document titled Management Services Agreement purportedly entered into between Triomf Eswatini Holdings (Pty) Ltd and Triomf - Ezikhotheni Community JV Trust Company (Pty) Ltd and has also not been signed by the supposedly contracting parties.

[39] As I indicated all these three documents are unsigned and thus it is difficult to address their contents. There is no explanation why these crucial documents have not been signed by the parties who

allegedly executed them and most importantly these documents are denied by the Respondent in his Answering Affidavit.

[40] I must mention that it was these triable issues and material disputes of facts that pertains to the acquisition and purpose of Farm 324 Shiselweni that resulted in the Supreme Court handing down that judgment of the 30th May 2014. These disputes were alive then and are alive even today; and can only be adjudicated upon fairly through oral evidence of the parties concerned.

[41] At page 312 of the 5th Edition by **HERBSTEIN AND VAN WINSEN** in their book titled **THE CIVIL PRACTICE OF HE HIGH COURTS OF SOUTH AFRICA**, the Learned Authors state as follows as regards the plea *of lis pendens*, and I quote:-

“A plea of lis pendens is valid although the two actions in questions are pending in the same Court. To bring two actions in one Court with regard to the same matter is prima facie vexatious, and the Court will generally put the plaintiff to an election. Likewise, the commencement of the second action is prima facie vexations when the two suits are brought in different courts of the same country, for the remedy and the procedure in both are practically the same”.

[42] I am alive to the fact that the plea of *lis pendens* is one that is dependent on the discretion of the Court. In exercising the discretion the Court has regard to the equities and the balance of

convenience and the ultimate consideration being the interest of justice. It is my considered view that the proceedings in *casu* cannot be allowed to run concurrently with the proceedings in Case No. 1874/2012 because of the plea of *lis pendens*. It cannot be that a matter of this kind is allowed to run simultaneously through **action** and **motion** proceedings. I am of the view that the best course in the circumstances is the action proceeding that are obviously pending in Case No. 1874/2012 as per the order of the Supreme Court in the Appeal Case No. 53/2013.

[43] As regards the Interlocutory Application, I am of the considered view that the Respondent was perfectly entitled to lodge the appeal with the Shiselweni Eswatini National Court structures and that such structures must be respected and afforded the space to deal with the matter if the need arises. I do not see any conflict in that regard.

[44] Consequently, in view of the above reasons I hereby hand down the following judgment:-

1. The Main Application is hereby dismissed with costs on the basis of the Supreme Court Judgment of 30th May 2014.

2. The Interlocutory Application is hereby granted in terms of prayers 1 and 2 only.

So ordered

A handwritten signature in black ink, appearing to read 'Nkosinathi Maseko', is enclosed within a large, hand-drawn oval shape. The signature is written in a cursive style.

**NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT**