

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO.2331/23

In the matter between:

ENDUMA DEVELOPMENT CORPORATION (PTY) LTD Applicant

And

SALAPHI DLAMINI 1ST Respondent

SAM DLAMINI 2nd Respondent

ABC MINISTRY 3rd Respondent

GERRY RITCHER 4th Respondent

ROBYN RITCHER 5th Respondent

ATTORNEY GENERAL 6th Respondent

JUDGEMENT

*Neutral citation: Enduma Development Corporaton vs Salaphi Dlamini
and four others(2331/2023) SZHC 317 (8TH November
2023)*

Coram: S.M. MASUKU J

Date of heard: 25th October 2023

Date delivered: 08th November 2023

Flynote: *Roman-Dutch Law on Interdicts- Application for final interdict – requirements to grant final interdict considered.*

Summary: *The Applicant signed a Notarial Lease with Ingwenyama In Trust for the Swazi Nation for a period of 45 years, Land being farm1031 situate in the Hhohho district sharing boundaries with Eswatini Nation Land under Chief Siphon Shongwe of Motshane. An application to interdict the Respondents from encroaching, occupying and/or ploughing the leased land. The Respondents claimed that the High Court lacks jurisdiction to hear and determine the matter and that the matter should be dealt with by Eswatini Traditional Authorities.*

Held: *The High Court exercises inherent and original jurisdiction on interdict matters, a remedy that is not effectively available under Eswatini Traditional Authorities. The court only concerns itself with the requirements of a final interdict. Held further that the Applicant has not established a clear right in the property. Its application dismissed with costs at ordinary scale.*

Introduction

- 1] A notarial Deed of lease 111/2017 between Ingwenyama In Trust For The Swazi Nation and Enduma Development Corporation Limited was signed and executed on the 30th October 2008 before a Notary Public.
- [2] Enduma Development Corporation Limited ('the Applicant' herein) was duly represented by **Makhosi Nxumalo** in his capacity as agent of the company duly authorized thereto by virtue of a Power of Attorney and resolution passed at a meeting of the Board of Directors held at Mbabane on the signature and execution date. It should later become apparent in this judgement why the agent's authority is crucial where a corporate entity engages in litigation.
- [3] The Notarial Lease ('the Lease') describes the Lessor as Ingwenyama in Trust for the Swazi Nation, leasing out Farm 1031 situate in the Hhohho, Eswatini to the Lessee (the Applicant in the lease). The Lease period is (45) forty five years, commenced from the 1st October 2008.
- [4] The Lessee agreed to pay rentals to the Lessor for the period of (45) forty five years for the use of the leased property ('the property').
- [5] Some of the material terms of the lease cited as relevant to this application are *inter alia* that the Lessee shall be in breach of the lease if a) *'it fails to commence within six months to carry out the purposes of which the property has been leased... then in any of such events the Lessor shall hold this lease cancelled without further recourse to the Lessee and without prejudice to any other claim of any nature whatsoever which the Lessor may have against the Lessee as a result thereof.'*(clause 16.1).
- [6] Clause 16.3 states that; *'should the Lessee abandon the property or fail to observe and perform any of the terms and conditions of this agreement binding on the Lessee to the fullest potential stated under Clause 6 then the*

Lessor shall be entitled to cancel the lease agreement without prejudice to any of its rights under the lease agreement or at law’.

- [7] On Jurisdiction, clause 19 states that; *The High Court of Swaziland shall have original jurisdiction to hear and determine any matter arising out of or in connection with this lease agreement;* (underlining my own).
- [8] The parties in a typical freedom to contract, deliberately entered into this Notarial Lease with the intention that the terms and conditions of the lease binds them. Notarial Leases of this kind are quite common in our times, concluded for both agricultural land and mineral mining. Once signed, the administration of the land shifts from the Chief’s administration under Eswatini Nation Land if it was previously administered by the Chief under that land tenure and is subjected to the terms and conditions of the lease.
- [9] Notarial Leases are registered under the Deeds Registry Act 37/1968 by virtue of leased land for a period of not less than (10) ten years. The position is also that they became real rights upon registration outside of the Eswatini Law and Custom’s Land tenure.
- [10] The application before court is however not about the contestation of the Notarial Lease. The contents of some of the clauses considered to be material are introduced here as a background reference to a number of key points raised in *limine* by the Respondents. It is also relevant to the main interdict application before court.

The Notice of Motion

- [11] On the 5th October 2023 the Applicant moved an urgent application for several interdict orders against the Respondents to stall what it described as a

'construction that was looming' at the leased land in farm 1031 District of Hhohho.

[12] The Applicant prayed *inter alia* for orders as summarized in the following;

12.1 enrolling the matter as one of urgency;

12.2 pending determination of this application, the 1st Respondent is interdicted and restrained from allocating land leased to the Applicant under farm 1031 District of Hhohho;

12.3 the 2nd Respondent is interdicted and restrained from cultivating and ploughing the land leased to the Applicant under farm 1031 District of Hhohho;

12.4 the 3rd, 4th and 5th Respondents are interdicted and restrained from undertaking construction in the land leased to the Applicant under farm 1031 District of Hhohho...;

12.5 that the Respondents be ejected from the land leased to the Applicant under farm 1031 District of Hhohho;

12.6 directing the 1st, 2nd and 3rd Respondents to pay the Applicant's costs of suit at attorney-and-client scale;

12.7 that the Respondents be called upon on a date to be determined by this Honourable Court why the above Prayers should not be made final.

[13] The application was first heard on the 6th October 2023 and after hearing arguments from the Applicant and the Respondents on the interim relief, the 6th Respondent (Attorney General) applied to be joined to the party so as to represent the 1st Respondent as acting Chief of the area where the leased land is situate.

[14] The court held that the Applicant had not made a case for an interim interdict simple because the Applicant had not disclosed the full nature and details of the irreparable harm that it was suffering or had suffered on the 'construction that was looming' at farm 1031 District of Hhohho. In fact when the court probed counsel for the Applicant on his understanding of what was going on in the farm, he submitted that he had not had the chance of checking and did not have instructions of same. He undertook to so do if he was to be given the opportunity. He asked for leave to supplement his application.

[15] Having heard the parties, the court issued the following orders;

15.1 The court enrolled the matter as one of urgency with orders;

15.2 granting the Applicant leave to supplement its application by 9th October 2023.

15.3 The Respondents to file their answering affidavits by 12th October 2023. The Applicants to file its heads and book of authorities on or before 17th October 2023. The Respondents to file their heads of argument and book on or before 19th October 2023. The matter was set down for argument on the 25th October 2023 at 14h15;

15.4 A party wishing to join the proceedings was granted leave to so do.

[16] On the return date for argument the Applicant had filed an amended Notice of Motion with an additional prayer asking the court to direct the 3rd, 4th and 5th Respondents to restore the Applicant's land to the condition it was prior to their activities on the leased land. The amended notice was accompanied by a supplementary founding affidavit which Applicant submitted it should stand

as the Applicant's Founding Affidavit to be responded to by the Respondents without the need to refer to the initial one.

- [17] It is a trite elementary principle in pleadings that a supplement differs from an amendment. Pleadings in action proceedings such as particulars of claim, a plea, etc can be amended. The Merriam Webster dictionary for example defines 'amend' as; 'to make minor changes to (a text) piece of legislation etc in order to make it fairer or more accurate, or to reflect changing circumstances. Whereas supplement is defined as; 'a thing added to something else in order to complete or enhance it.
- [18] The latter simple means the original founding affidavit is still evidence of the Applicant on record which cannot be wished away or substituted by the supplementary affidavit. The supplement enhances or completes the founding affidavit on record.
- [19] The supplementary founding affidavit, in *casu* is deposed to by one **Bangwayini Shongwe** who describes herself as 'an adult female Liswati resident of Enduma at Motshane... a Director and major shareholder of the Applicant. She proceeded to say she is duly authorized to institute these proceedings for and on behalf of the Applicant...'
- [20] The founding affidavit was also couched in similar format. What is to be noted is that **Bangwayini Shongwe** is not the same person who represented the Applicant as its agent or authorized person in signing the Notarial Lease. One **Makhosi Nxumalo** signed it by virtue of a Power of Attorney and Resolution passed by the Board of Directors. **Bangwayini Shongwe** did not produce her authority in any form to act on behalf of the company in her founding papers. It was only when the Respondents challenged her authority that she produced it in her replying affidavit. The effect of this move is

canvassed later in this judgement as it became a point on *locus standi* taken by the Respondents.

- [21] The Applicant states in the affidavit that farm 1031 ('the property/farm') covers 120,0156 hectares of which a significant portion is prime land along Mbabane/Ngwenya Highway. It also traverses the Motshane/Pigg's Peak road. It lies within the precept of Motshane area under Chief Siphon Shongwe. This means it lies within, along or shares boundaries with Eswatini Nation Land of Motshane.
- [22] The Applicant sought the interdicts against the 1st Respondent because the property is earmarked for substantial commercial projects to commence in the 'next few months' and it now requires the land which the Respondents have encroached and are ploughing and carrying on their projects on the farm.
- [23] The Applicant averred that the 1st Respondent is in the business of allocating land at Enduma where she holds herself as acting Chief when she was ousted by the King in September 2018. The 1st Respondent, (it says) does not recognize the Notarial Lease of the Applicant which she contends was cancelled with the result that the land reverted to Enduma Royal Kraal.
- [24] As against the 3rd to 5th Respondents, the Applicant averred that they are liable to be interdicted from pursuit any of the construction of activities going on in its property and are to be ejected from the property. They should also be ordered to restore the land to the condition they found prior to their activities.
- [25] The Applicant stated that apart from its general knowledge of the boundaries of the leased land that the Respondents have encroached, it hired a professional land surveyor to measure the amount of encroachment. The 2nd

Respondent's encroachment covers an area measuring 1.49 hectares, whereas the 3rd to 5th Respondent's encroachments covers an area measuring 5775 square meters.

[26] On the other hand the 1st Respondent's submission on the merits is that one of the requirements for a final interdict is that the Applicant must establish a clear right in order to obtain that relief. In the present application, the Applicant has failed to prove title over the land in question. The lease it sought to rely on was cancelled in 2009.

[27] 1st Respondent relies on clause 16.1(c) of the lease by submitting that the Applicant failed to commence construction of the Mall, a hotel, golf course etc on the leased property. The Lessor held the lease cancelled without further recourse to the Applicant and without prejudice to any other claim that it may have against it. The 1st Respondent submitted that the Applicant's claim over the land was therefore unenforceable in law.

[28] The 3rd, 4th and 5 Respondents submission on the merits is that the Applicant's prayer for a final interdict should fail because the Applicant has not met the requirements of a final interdict in that;

28.1 The land under contention is subject to the Chieftaincy of Enduma Royal Kraal and the same land in the Notarial deed remains in contest and that diminishes any clear right that is claimed by the Applicant.

28.2 There is no injury committed or reasonably apprehended by the Applicant since the Respondents were rightfully allocated the land and the Applicant or its members have always been aware of the presence of the Respondents within that area.

- 28.3 The Applicant's 'earmarked project' has been pending for a period of (18) eighteen years with nothing ~~significant~~ substantial happening. No urgency and no prejudice it can rely on after all these years.
- 28.4 There is a hosts of remedies at Applicant's disposal in the event the issue to the rightful authority to the land is confirmed.
- 28.5 The 3rd Respondent asserted its right over the land it occupies within the leased premises for it followed due process of *kukhonta*. It claims lawful title over the land. It submitted that there are competing rights or interest thus the Applicant cannot assert a clear right over the land to the exclusion of the Respondents who also assert their rights over the land.

Objection in Limine

- [29] At the hearing of the matter the parties raised Preliminary points in *limine* which I intend to deal with from the on set. The Applicant raised an objection against the Attorney General's (6th Respondent's) appearance as legal representative for and on behalf of the 1st Respondent. The Applicant submitted, albeit in reply that the 6th Respondent's scope of powers to represent parties in legal proceedings is circumscribed by section 77 of the Constitution Act 2005. The Applicant stated that the 1st Respondent is not a Chief as contemplated by section 77 (3). She cannot therefore be represented by the 6th Respondent. If she gets to be represented, that would be a contravention of the constitution.
- [30] The Applicant's objection is not sustainable for two reasons, the first is that this court has already issued an order that 'any party wishing to join the

proceedings is granted leave to so do'. Although the 1st Respondent was already a party to the proceedings she was entitled to be represented by an Attorney of her choice in the proceedings. The 6th Respondent announced its interest in partaking as the 1st Respondent's Attorney and as representative of the Lessor (Ingwenyama in Trust for the Swazi Nation). I did not find any valid reasons not to allow the office to carry out its duties and functions.

- [31] The second reason is that the Supreme Court of Eswatini in the case of Rodgers Bhoyana Du-pont vs Swaziland Building Society and 2 others(07/2015)[2016] SZSC 79 (5th August 2016) had occasion to decide on almost a similar objection, where the Attorney General was set to represent a private ordinary citizen in Rodgers Du-Pont.
- [32] The objectors' argument was materially similar to the one raised by Applicant. The Attorney General's *locus standi in judicio* to bring proceedings on Du-Pont's behalf and to represent him was challenged.
- [33] After reference to South African decided cases on the powers of the Attorney General, the Supreme Court of Eswatini stated that the answer lies in the Law Officers Act No.8 1966. Section 3 reads "Notwithstanding anything to the contrary contained in any other law, any person appointed Attorney General or crown counsel, shall in so far as he continues to hold office, be entitled, and every person who shall have been appointed Attorney General or crown counsel shall be deemed to have been entitled, ex-officio, to perform any work of an advocate and attorney, and shall be entitled, to appear as counsel in all courts in Swaziland in which counsel may appear."
- [34] The court concluded this point by stating that 'the Attorney General is clothed with power to perform any work of an advocate and attorney. In this country

it is trite that an advocate appears on instruction and an attorney on a direct mandate. In *casu*, the Attorney General has been directly hired by the Applicant,... 'section 4 clearly demonstrates that the Attorney General does not only represent the Government, a general view held by many but also 'any other party' so eloquently expressed by the legislature in section 4 (1) of the Law Officers Act'.

- [35] A question of prejudice was posed by the court in the Supreme Court to counsel objecting, as to whether there was any likelihood of prejudice to be suffered by the respondents if the Attorney General represented the applicant. The response was that the Respondents need not suffer prejudice for a *locus standi* challenge to succeed. The court however held that prejudice must be established, especially in an application where the right to legal representation guaranteed by the constitution is challenged.
- [36] In *casu*, the 6th Respondent's application to join the proceedings and represent the 1st Respondent was on the allegation and basis that the Crown considered the 1st Respondent as Acting Chief of Motshane where the leased land is situate. I am totally mindful of the fact that this assertion is strenuously opposed by the Applicant to the extent that it attached a resolution from the Traditional Authorities that the total powers of the affairs of Enduma were returned into the hands of *Lusendvo Lwaka-Shongwe*.
- [37] The application before this court is not however about who the rightful chief or the acting Chief of the area is, but whether or not the Applicant has established its right to a final interdict. The 6th Respondent is confident that it is cloth with the mandate to protect the interest of the 1st Respondent whom he says is Acting Chief. I see no prejudice that Applicant would suffer if the

1st Respondent's rights are represented by the 6th Respondent. To the contrary I see that the 1st Respondent stands to suffer prejudice should the court oust the Attorney General's representation.

[38] In any event, the 6th Respondent represents all matters pertaining to Ingwenyama in Trust for the Swazi-Nation even with regards to the rights emanating from the Notarial Lease. The court granted leave to the 6th Respondent to join in the proceedings when the matter was first heard and nothing should change.

Respondents' points in limine on jurisdiction

[39] The 1st, 3rd to 5th Respondents raised jurisdictional points albeit different grounds. I have already alluded to the point by the 1st Respondent. It is that the existence of the lease was dependant on the fulfilment of clause 6 read together with clause 16.1 (a) which subjects the lease to a suspensive condition which if unfulfilled renders the lease not binding. The 1st Respondent submitted that since there are no rights and obligations flowing from the lease the property in question the land has reverted back to the Ingwenyama In Trust for the Swazi Nation administered in terms of Eswatini Law and Custom. As such the High Court has no original jurisdiction to determine the matter.

[40] The 3rd to 5th Respondents contended that it was allocated the land they occupied within the notarial lease through the Kukhonta process by Enduma Royal Kraal. Effectively, it was argued that the present matter is subject for determination under Swazi law and custom.

[41] The Applicant's argued *per contra* that there could never have been a termination of the lease as proposed by the 3rd to 5th Respondent. This being

a notarial registered lease (it was argued) it is registered and protected by the provisions of the Deeds Registry Act 37/1968. In particular section 77 (1) of the Act which stipulate that '*registered deeds not to be cancelled except upon an order of court*'. This provision prohibits the Registrar of Deeds from cancelling a registered deed except with the order of court.

- [42] Whilst I accept the common law principle on suspensive conditions in the law of contract as expressed in the South African case of Murphy and another v Durie 2006 JDR 0690 where the court stated at paragraph 31 that;

[31] "*The effect of a suspensive condition in the contract is to suspend either partly or wholly the operation of the obligations flowing from the contract pending the occurrence or non-occurrence of a particular specified event... If the suspensive condition is not fulfilled by the agreed date the contract falls away.*"

- [43] The statutory provisions as alluded by the Applicant on cancellation or termination of Registered deed cannot be ignored. The Legislation overrides or augment the principle. In *casu*, a conclusive cancellation requires an order of the court.
- [44] The Applicant has further referred the court to sections 76 and 77 of the Deeds Registry Act under the subtitle '**Registration of leases and sub leases.**' Section 77 (1) refers to termination of registered lease or sub-lease, it reads. '*(1) When a registered lease or sub-lease has terminated, the Registrar shall, on written application by the owner of the land affected thereby, or the holder of the lease and, as the case may be, accompanied by proof of the termination of the lease or sub-lease...if produced that the lease or sub-lease as the case maybe has been terminated.*'

- [45] Even if the lease has been cancelled on lapse of certain registered rights such as the failure by the lessee to make regular and/or periodical payments, a written application accompanied by an affidavit by the lessor or grantor of the registered right must be submitted to the Registrar to cancel the registration of the lease, servitudes or contract.
- [46] This is however not what this court is called upon to determine but to the extent that the 1st Respondent contends that the lease has fallen away per the *dictum* of Murphy (*supra*), it has not been cancelled not unless compliance with the said provisions of the Deeds Registry Act are met.
- [47] The Jurisdiction of this court over rights consequential to the Notarial Lease have been spelt out deliberately by the parties in clause 19 of the lease. The clause states that the High Court shall have jurisdiction to hear and determine any matter arising out of or in connection with this agreement. The court will certainly be abdicating its duties and consequently compromising the parties mandate to the court if it were to refer the interdict application to the Eswatini Traditional Authorities. In fact there is no interdict remedy that I know of similar to the Roman –Dutch common law remedy that can effectively be provided by Eswatini Traditional Authorities.
- [48] A point is to be made further that this Court and the Supreme Court in Eswatini have dealt with in a number of interdict applications on similar Notarial Land leases and Mining or Mineral Land leases. I have in mind the case of Bernard Nxumalo and another vs Principal Secretary-Ministry of Agriculture and 2 others (42/2021) [2022] SZSC 21 (09 June 2022). The Supreme court heard an appeal from the High Court where the proprietary of Paradys farm in the Shiselweni Region sought an interdict against the residents of Ezikhotheni chiefdom who had been allocated pieces of land by

their Chief on leased land. The High Court heard the matter and interdicted their activities on the said leased farm.

[49] The farm is registered in the name of Ingwenyama in Trust for Emaswati. The High Court found jurisdiction to deal with the interdict sought similarly, the Supreme Court dealt with the matter irrespective of the fact that the farm was registered in the name of Ingwenyama in Trust for Emaswati.

[50] Without further ado, I find that the 1st Respondent's objection on the jurisdictional issue should fail for the aforesaid reasons. Similarly the 3rd to 5th Respondent's objection should also fail. The relief sought by the Applicant in the form of interdicts is only limited to an enquiry of whether the Applicant has established the requirements of the interdict sought. (see also Chief Zwide and Another v Bernard Nxumalo (1976/2019) [2020] SZHC 37 (11TH March 2020), and VIF Limited v Vuvulane Irrigation Farmers Association (Public) company and another Appeal case No.30/2000

Non- Joinder of Enduma Umphakatsi

[51] The Respondents objected to the Applicant's failure to join Enduma Royal Kraal under whose auspices the 3rd Respondent was allocated the land. They contended that the Royal Kraal has a direct and substantial interest in the matter. They contended that the Non-joinder is fatal to Applicant's case.

[52] This argument has become academic after the Courts' pronouncement that a party wishing to join the proceedings is granted leave to do so. It has been overtaken by events, and cannot be pursued and should fail.

Locus standi in judicio and dispute of facts.

- [53] The Respondents contended that the deponent has no direct and substantial right or interest in law to bring the present proceeding for and on behalf of the Applicant. They argued that there is no resolution and/or letter of authority mandating the deponent **Bangwayini Shongwe** to act for the Applicant. In as much as one **Mkhosi Nxumalo** appeared as the agent of the Applicant in the Notarial deed of Lease by virtues of a power of attorney and resolution from its Board of Directors. No such power of attorney or Resolution was attached by the deponent to prove her authority in the founding affidavit. This they contend makes its application defective and on that point must be dismissed.
- [54] The Respondents emphasized that the deponent's authority in the form of a resolution should have been produced in the founding affidavit and/or at least in the supplementary founding affidavit and not in the replying affidavit. They contended that nothing justifies this late production especially because when the matter was first brought to court on the 6th October 2023, the Applicant's Attorney of record Mr Sabela Dlamini submitted that he was not privy to all factors of the matter and what was prevailing on the ground in terms of the harm that the Respondents were causing or had caused to rush the Applicant to court for an interim interdict. He pleaded for an opportunity to take instructions and to supplement the Applicant's papers thereafter. No interim order was granted for that reason and Applicant was allowed to supplement its papers.
- [55] Despite such an opportunity, the deponent in an attempt to cure the defect filed a resolution in Annexure 'BS6' which reflect that deponent **Bangwayini Shongwe** and Attorney of record Mr Sabela Dlamini were the only directors

present in a meeting of the 5th October 2023. A day preceding the first hearing of the matter where a resolution to institute legal proceedings against the Respondents was taken to vindicate the Applicant's rights under the lease. The deponent was authorized to institute legal proceedings and sign all documents on behalf of the Applicant. The Resolution is signed by both the deponent and the Attorney of record.

- [56] It would require much effort for the court to ignore these facts. The Respondent's activities on the land as said to have been going on much longer, for years since the lease was signed (18) eighteen years back. If indeed there was damage or harm that the Respondents were causing or had caused of concern to the Applicant, the Attorney of record should have easily recalled the discussions of the meeting of the 5th October 2023 and filed the resolution. The opportunity was there to file the resolution not only on the 1st founding affidavit, failing which in the supplementary affidavit. If all was missed for some reason, an explanation in the reply as to why it was missed in the founding affidavits should have been ventured. One surely would have expected in a project of this magnitude per the Notarial Lease an explanation as to why **Makhosi Nxumalo** the agent and authorized signature of the lease was no more available to deposed to the founding affidavits.
- [57] The Applicant sought to justify this shortcoming by resorting to legal authority (Shell Oil Swaziland (pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors SZSC) which states that; where the deponent's authority is challenged or denied in the answering affidavit, it would obviously be grossly unfair not allow the deponent to set out the source of his authority. Fairness to the parties dictates this (See also Holmes J, as he then was, in Milne N.O. v Fabric House (Pty) Ltd (3) SA 63 (N) at (65A)).

- [58] The cited *dictum* cannot assist the Applicant in a case where he has to establish a clear right in a final interdict application. The shilly-shallying by the Applicant in establishing the deponent's authority is not helpful to an Applicant who must without hesitation establish *locus standi* or clear right in the protection of his or her interest. This may as well be viewed as an afterthought and falls to compromise the well established principle in motion proceedings that an Applicant must make the appropriate allegations in its launching or founding affidavit to establish its *locus standi* to bring an application and not in the replying affidavit. (see Ben M.Zwane v The Deputy Prime Minister and Another, Swaziland High Court case No. 624/2000.
- [59] *Locus standi* and dispute of facts are material enquiry where an Applicant seeks a final interdict in motion proceedings. The court of Appeal (as it was known in Swaziland) in the case of VIF Limited (supra) Tebbutt JA, (Shearer, Sapire JJA concurring) in this regard had this to say; 'It is equally well established that where there is a dispute of fact on the papers a final interdict should only be granted on the notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such order. (see Stellenboch Farmers Winery (pty) Ltd Stellenvale Winery (Pty) Ltd 1937 (4) SA 234 C... What the appellant was claiming a *quo* was a final interdict. One of the requirements of a final interdict is that the Applicant for such relief must have the necessary *locus standi* to bring such application. Another is that it must establish a clear right (see Setlogelo v Setlogelo 1914 221) in order to obtain the relief. This must be a legal right (see Lipschitz v Watrus 1980 (1) SA 662 (1) at 6730. It must do so in the founding papers...'. The court in that case went on to conclude that; 'The Learned Judge a *quo* was therefore correct in holding that

the appellant had failed to establish any *locus standi* or entitlement to the relief claimed by it and, accordingly, was correct in discharging the *rule nisi* with costs.’

[60] In the most recent case in the South African constitutional court – NDPP vs Zuma 2009 (2) SA 277 (SCA) at [26] and [27] the court restated the position as follows;

“[26] Motion proceedings unless concerned with interim relief, are all about the resolution of legal issues based on common facts. Unless circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon – Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant’s (Mr Zuma’s affidavits), which are admitted by the Respondent’s version consists of bald and uncrediworthy denials, raises factious disputes of fact, is palpably implausible, far fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the GNDPP’s versions”.

[61] The approach that appeals to this court on the facts of the case in *casu* should in the first place speak to whether or not the Applicant has established the necessary *locus standi* to be entitled to a final interdict. Secondly, whether there are serious disputes of facts which would be a bar to the final relief sought(see VIF Limited case (*supra*).

[62] There are a number of issues that remain unresolved in this application which have been raised by the Respondents. a) the question of whether there still exist a valid Notarial lease in light of the suspensive conditions raised, juxtaposed with the Applicant’s argument that it could not have been

terminated without an order of court, b) the question of who has the lawful authority over the land to which the 3rd Respondent claims was allocated to it by Enduma Royal Kraal, c) whether the Applicant does have a valid notarial lease over the land as against the claim that the Respondents also lay over the same land. All these issues are not for the resolution of this court in an interdict application. They are however genuine issues that exist and are a challenge to the clear right of the Applicant.

[63] Similarly, the contention by the Respondents that the area is subject to the Chieftaincy of Enduma Royal Kraal *vis-a vis* the Applicant's firm assertion that the Notarial Lease over the same property is valid, affects the establishment of Applicant's clear title over the land. The right that forms the subject matter of a claim for a final interdict must be a legal right and one that is enforceable in law. (see Lipchitz case(supra).

[64] In the present application, the clear right that ought to be established by the Applicant, entitling it to a final interdict is a right of possession or at most authority over the land in question.

Discretionary Remedy

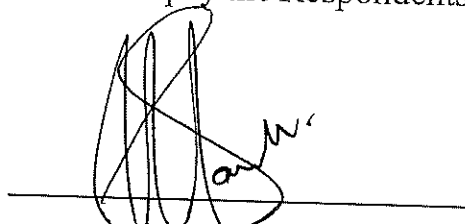
[65] The interdict remedy is discretionary. The discretion must be exercised judiciously. It is granted against the background of whether the Applicant has any other suitable remedy that would in due course, provide it with adequate redress.

[65] Harms LTC in his commentary on interdicts in LAWSA discussing the decision in Transvaal Property and Investment Co Ltd and Reinhold and Co v SA Township Mining and Finance Corp Ltd and the Administrator 1938 TPD 512 at 521, takes the position that the discretion of a court to deny

granting a final interdict is limited and 'depends exclusively upon the question whether the alternative remedy is adequate'. To this end, this court concludes that there are remedies available to the Applicant emanating from the Notarial Lease it has signed with the Lessor in which the interdict remedy may be exercised pending the determination of those rights.

- [66] In the premises, the Applicant has not established a clear right in the property and in the absence of a clear right, there can be no irreparable harm either actual or apprehended. Consequently no final interdict may be granted against the Respondents. The application stands to be dismissed.
- [67] It follows that the other prayers such as the Respondents' ejection from the leased land, the interdict against the 2nd Respondent and the restoration orders are also dismissed.
- [68] The following orders are issued;

1. The application is dismissed.
2. The Applicant is ordered to pay the Respondents' costs at an ordinary scale.



S.M. MASUKU J

JUDGE - OF THE HIGH COURT

For the Applicant: Mr S.Dlamini of Magagula & Hlophe Attorneys.

For the 1st and 6th Respondents: F.Mhlanga from Attorney General.

For the 2nd, 3rd, 4th and 5th Respondents: H.Magagula of Dynasty Inc. Attorneys.