

IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 317/2020

HELD AT MBABANE

In the matter between:

BERNARD MPHIWA MASINA

1st Applicant

EMMELINAH MASINA

2nd Applicant

And

THOMAS MOORE CARL KIRK N.O

1st Respondent

DIESEL SERVICES (PTY) LTD

2nd Respondent

CENTRAL FARM DWELLERS' TRIBUNAL

3rd Respondent

COMMISSION FOR HUMAN RIGHTS &

PUBLIC ADMINISTRATION

4th Respondent

LAND MANAGEMENT BOARD

5th Respondent

THE ATTORNEY GENERAL N.O

6th Respondent

Neutral Citation: *Bernard Mphiwa Masina and Another vs Thomas Moore Carl Kirk N.O and Others (317/2020) [2023] SZHC 325 (16/11/2023).*

Coram: **M.S. LANGWENYA J; J.M. MAVUSO J AND Z. MAGAGULA J.**

Heard: 28th June, 2022
Delivered: 16th November, 2023.

SUMMARY: *Civil law – Application for a declaratory order sought by Applicant, seeking to have his constitutional right to compensation declared, in the event of his being evicted – Order sought notwithstanding a ruling of the District Farm Dwellers Tribunal directing that he be compensated in the event of his being evicted – Prior to instituting these proceedings, the Court found that there was no matter pending before it or any Court regarding the eviction of Applicant from Respondents’ farm – A court will not determine a constitutional issue where a matter may be properly determined on another basis – Based on the principle of ripeness the Court found that the matter was prematurely and improperly before it – The application for a declaratory order was refused with no order as to costs.*

JUDGMENT

LANGWENYA – J

INTRODUCTION

[1] This matter has a long chequered history. Between April – May 2007 Applicant and the Respondents herein appeared before a District Tribunal where the eviction matter of Applicant and his mother was heard. The District

Tribunal ruled that Applicants, should be compensated in the event they are evicted or relocated by first and second Respondents, herein¹.

[2] In 2014, at the Manzini Magistrate's Court, Second Respondent instituted action proceedings against 2nd Applicant (Emmelinah Masina and Donald Masina then respectively cited as 1st and 2nd Defendants, in Manzini Magistrate Court, Civil Case Number 4253/14) for an eviction order against plaintiff and his mother, from Portion 56 (a portion of Portion 47) of Farm Number 1270 in the Manzini District² (*the farm*). On the 14th of December 2014, the Magistrate's Court granted the eviction order³. On the 16th December 2014, the Order was stayed pending finalization of the matter⁴. Absent any Court papers withdrawing and removing the matter from the Magistrate Court's Roll, it would seem same, is still pending at the Magistrate Court.

[3] On 14th February 2020 Applicant was served with a letter demanding that he vacates the land in issue. The letter was served on Applicant by the Second Respondent. Through this letter, Applicant was given an ultimatum to vacate

¹ See Tribunal's ruling at page 28-30 of the Book of Pleadings.

² See 'BMM5' being Summons dated 18 November 2014 Page 44-50 of the Book of Pleadings.

³ See Court Order of 15 December 2014, Paragraph 1 of the Order. Page 73 of the Book of Pleadings.

⁴ See Court Order of 16 December 2014, Paragraph 1 of the Order. Page 69 of the Book of Pleadings.

the property by 26th February 2020. Applicant did not vacate the property. Instead of vacating same, on 19 February 2020 under Case No. 317/2020, Applicant moved an urgent application before the High Court praying for an order in the following terms:

- “1. That the Rules of the Court relating to time limits, forms and manner of service be dispensed with and that the matter be heard as one of urgency;*
- 2. That the Applicants’ non-compliance with the Rules of the Court be condoned;*
- 3. That the First and the Second Respondents be hereby interdicted and restrained from unlawfully and unconstitutionally evicting and/or threatening to evict the Applicants from their place of dwelling being portion 56 (a portion of Portion 47) of Farm Number 1270 situate in the district of Manzini, Eswatini measuring 24 397 (Twenty Four Thousand, Three Hundred and Ninety Seven Hectares) without compensation;*

4. *That the rule nisi do hereby issue, in terms of prayers 1, 2 and 3 returnable on a date to be determined by this Honourable Court, calling upon the Respondents to show cause, if any, why:-*

4.1 *An Order in terms of prayer 3 should not be made final and;*

4.2 *The Respondents should not pay costs of this application at attorney and own client scale, in the event of unsuccessful opposition.*

5. *Granting the Applicant further and/or alternative relief.”*

[4] In the urgent application before Court, Counsel for Applicant submitted that the application raises a constitutional question. Counsel was then granted leave to distil and crystalize the constitutional question before the matter could be heard. Respondents were also granted leave to respond to Applicant's amended papers.

[5] On 24th June 2022 Applicant filed an amended notice of application, wherein the constitutional question was couched as follows:

"1. Declaring the eviction or threat of eviction of Applicant by First and Second Respondents without compensation from his place of dwelling being portion 56 (a portion of Portion 47) of Farm Number 1270 situate in the District of Manzini, Eswatini (measuring 24 397 hectares) to be unconstitutional."

THE PARTIES

[6] First Applicant, Bernard Mphiwa Masina is an adult male LiSwati and a resident of Malkerns, residing on portion 56 (a portion of Portion 47) of Farm Number 1270 situate in the District of Manzini. Second Applicant, is First Applicant's mother. When the application was instituted, Second Applicant was bedridden and residing at the same dwelling place as First Applicant, her son. Second Applicant is now deceased and for this reason, in this Judgment, only the First Applicant is referred to.

[7] The First Respondent is Thomas Moore Carl Kirk an adult male LiSwati of Matsapha situate in the District of Manzini. First Respondent is cited in his capacity as a director, of the Second Respondent.

- [8] The Second Respondent is Diesel Services (Pty) Ltd, a company duly registered and incorporated in accordance with the laws of the Kingdom of Eswatini, having its principal place of business at Matsapha.
- [9] Third Respondent is the Central Farm Dwellers Tribunal established in terms of the Farm Dwellers Act 1982. Its principal place of business is situated in Mbabane, in the District of Hhohho.
- [10] Applicant avers that he was born and bred on Second Respondent's farm, for a period of about sixty-eight (68) years. He states that he lived on the farm with his mother and other family members as farm dwellers, as defined by the Farm Dwellers Control Act, (*supra*). It is not in dispute that the farm has had various owners, at different times and that the current owner of the farm, is the Second Respondent. Applicant argues that he and his family have been in peaceful co-existence with the previous owners of the farm until Second Respondent became the owner. As soon as Second Respondent acquired ownership, it initiated the eviction process, which is the subject of these proceedings. Second Respondent acted through First Respondent in initiating the eviction process. Its *modus operandi* is said to have been to threaten and harass Applicant, in different ways-so the argument goes. Applicant avers

that the harassment complained about degenerated into inhumane and degrading treatment. Respondents destroyed Applicant's fruit trees, source of water and further, prevented Applicant and his family from drawing water from an irrigation canal on the farm, for domestic purposes.

[11] It is not in dispute that the eviction issue was adjudicated upon by the Central Farm Dwellers' Tribunal (*'the tribunal'*). The tribunal ruled that Applicants were farm dwellers, who should be compensated in terms of the law, in the event they were evicted or relocated. It is further not in dispute that the ruling of 'the tribunal' was not appealed nor reviewed. An evaluation of Applicant's home on the farm was prepared by the Ministry of Natural Resources and Energy, in aid of Applicant's compensation if evicted or relocated.

[12] It is not in dispute that on 14th February 2020, Applicant was served with a letter demanding that he vacates the farm on or before 26th February 2020 failing which Respondent would re-institute eviction proceedings before the Magistrate Court, in Manzini⁵. Prior to 14th February 2020, the Magistrate's Court had issued an order evicting Applicants. The eviction order was subsequently rescinded.

⁵ See 'BMM1' at page 17 of the Book of Pleadings.

[13] The pleadings reflect that Second Respondent bought the farm from Guy Paul Mabuza in June 2006. At the time, Applicant and other people were resident on the farm, as farm dwellers⁶. Respondents want to develop the farm and carry out, goat farming business, among others. When Respondents attempted to evict Applicant, from the farm, they met with resistance. As farm dwellers, the rights of the Applicants, are governed by provisions of the Farm Dwellers Act, 1982.

[14] It is averred by Respondents that in May 2012, the farm and other properties within its environs was declared an urban area or a town, in terms of section 11 of the Urban Government Act⁷. The farm is now in an urban area and falls under the jurisdiction of the Malkerns Town Board. By extension, this means that the Central Farm Dwellers' Tribunal no longer has jurisdiction over matters concerning it (the farm), including the issue of *'farm dwellers'*, thereon – so the argument goes. It is also pleaded that, in the ruling of the Central Farm Dwellers Tribunal on 21st May 2007, Applicants were declared to be neither tenants nor farm dwellers on the farm, absent a written lease agreement, stipulating the rent they would have paid if they were tenants. This

⁶ See paragraph 8.2 of Respondent's Answering Affidavit at page 92 of the Book of Pleadings.

⁷ No:8 of 1969 through Legal Notice 49 of 2012.

avermment is not quite correct in that the tribunal stated that Applicants herein were in farm dwellers⁸. Respondents' lamentation is that there is no legal justification for Applicants to remain on the farm because they do not pay rent.

[15] It is Respondents' contention that prior to the farm being declared, to be within the urban area of Malkerns, Applicants' stay on same was supported by the ruling of the Central Farm Dwellers Tribunal of May 2007. This, however is no longer the case because of the application of the maxim: *cessante ratione legis cessat ipsa lex* which came into effect when the farm became part of the urban area. Effectively the maxim, means that the ruling of the tribunal became obsolete and inoperative when the farm became part of the urban area in Malkerns.

[16] Second Respondent complains that since it acquired the farm, it has not derived any benefit from it; it has also not been able to comply with the Town Board's regulations because Applicants' structures on the farm are not in conformity with Town Board's standards and regulations, pertaining to buildings in an urban area. It is averred that Applicants' structures consist of

⁸ See the ruling of the tribunal on page 29 of the Book of Pleadings.

a consultation room or *indumba*, a steam room, pit latrines and other makeshift shelters and that all these structures are a nuisance on Respondent's farm⁹. The reason the notice to vacate was issued in February 2020 was to allow present Applicants to comply with the Town Board's laws and regulations as well as to afford Respondents an opportunity to develop the farm.

APPLICANT'S SUBMISSIONS

[17] It was argued by Mr. Nhlabatsi on behalf of the Applicant that Applicant's impending eviction, violates his rights to property. It was argued that if Applicant is evicted from the farm he is entitled to compensation because the Constitution protects a person's right, from deprivation of property without compensation. Eviction without compensation is inhumane and unconstitutional – so the argument goes. It was argued that the threat to evict Applicant and his family violates section 14, 19 and 211 of the Constitution of the Kingdom of Eswatini (*'the Constitution'*).

[18] It was further contended that the impending eviction of Applicant from the farm will negate, his right to dignity and subject him, to inhuman and degrading treatment. Applicant has a home and other property on the farm.

⁹ See paragraph 8.11 of Respondents' Answering Affidavit at page 94 of the Book of Pleadings.

It was argued that evicting him will result in impairment of his dignity as he will be rendered homeless – so the argument goes. It was submitted that in terms of the Constitution, Applicant's right to dignity, is inviolable.

[19] It was submitted further, that in terms of the Farm Dwellers Act and in terms of the ruling of the tribunal, Applicant is an "*umnumzane*" on Respondent's farm. If he is entitled to compensation, as aforesaid, it was submitted that Second Respondent should further bear the cost of his relocation, in terms of the provisions of the Farm Dwellers Act, 1982.

[20] Although Applicant does not dispute that the Second Respondent is the owner of the farm and has rights over it, Applicant submits however, that Respondent's right over the farm should be exercised in such a way that provisions of the Farm Dwellers Act, read with the constitutional provisions, as well as relevant international and regional human rights conventions are complied with, especially those which this country is a signatory to.

[21] It was submitted further that the Universal Declaration of Human Rights (UDHR) guarantees that everyone has a right to a standard of living adequate to their health and wellbeing including the right to socio-economic rights¹⁰.

[22] It was further submitted that the International Covenant on Civil and Political Rights (ICCPR) protects people against arbitrary or unlawful interference with their right to privacy, the family, the home and correspondence, as well as protects people from unlawful attacks on their honour and reputation. It was urged also that the International Covenant on Economic, Social and Cultural Rights (ICESCR) enjoins State parties to guarantee the enjoyment of socio-economic and cultural rights without discrimination and to also commit maximum available resources to progressively ensure the full realization of these rights.

[23] It was contended that by threatening to evict Applicant without compensation, Second Respondent was violating Eswatini's international human rights obligations as espoused in the UDHR, ICCPR and ICESCR being human rights instruments that protect people from eviction.

¹⁰ See paragraph 7.3 of Applicant's Founding Affidavit at page 14 of the Book of Pleadings.

[24] Lastly, the Court was urged to implement and enforce the recommendations of the Commission on Human Rights and Public Administration's report of 15 February 2019. The Commission recommended that immediate and practical steps should be taken by government to put a moratorium on forced evictions through concrete actions and ensure settlement of the '*land issue*' as stated in section 56(6) of the Constitution. It was urged that because the Commission is a constitutional body, its recommendations should be enforced by the Court.

RESPONDENTS' SUBMISSIONS

[25] Respondents raised points *in limine* which they argued were dispositive of the matter. They submitted that Applicant has no *locus standi* to claim compensation, if evicted. This, it was argued is because Applicant is not the owner of the farm that he presently inhabits nor of the structures which he calls his home. It was thus argued because the structures were built by Applicant's father. It was submitted also that the Malkerns Town Board ought to have been joined in these proceedings because they have an interest in the matter now that the farm has been designated an urban area. It was submitted also that the matter is not ripe to be heard as the constitutional question has been raised prematurely before the offending action of the Respondents was

completed. For good measure, Second Respondent, through the answering affidavit, deposed to by the First Respondent, submitted that there was misjoinder of the First Respondent in this matter. It was contended that the Second Respondent is the owner of the farm and in law it can sue and be sued; that there was therefore no need to join the First Respondent.

ISSUE FOR DETERMINATION

[26] The issues for determination as I understand them are; first, whether the preliminary issues raised are dispositive of the matter and second, whether the relief sought is competent and lastly, whether the threat to evict the Applicant without compensation from his dwelling place is unconstitutional.

REQUIREMENTS FOR A DECLARATORY ORDER

[27] In order for the Court to grant declaratory relief, the Applicant has to show on a preponderance of probabilities that he has a right that this Court should protect. In deciding the question, the words of Eloff, JP in **Government of the Self-Governing Territory of KwaZulu v Mahlangu**¹¹ are apposite namely that the nature and scope of the right might be inquired into, and the Court has jurisdiction if there is proof of such right *'or at least a contention*

¹¹ 1994 (1) SA 626(T).

that there is a right'. In constitutional matters, as discussed below, locus standi is liberally interpreted and applied.

[28] In the case of Family Benefit Friendly Society v Commissioner for Inland Revenue¹² the following was said:

“The question whether or not relief should be granted under this section has to be examined in two stages. Firstly, the jurisdictional facts have to be established. When this has been done the Court must decide whether the case is a proper one for the exercise of its discretion.”

[29] The object of the enquiry in the present matter is the compensation of the Applicant for his property on Respondents' farm if he is evicted. In that regard, it is crucial to underline the fact that the Applicant has not approached the Court to challenge the ruling of the District Farm Dwellers' tribunal which has pronounced itself on the matter.

¹² 1995(4) SA 120(T) at 124E, see also *Gecko Salt (Pty) Ltd v The Minister of Mines and Energy* (HC-MD Civ-MOT-REV-201/00307)[2019] NAHCMD 187 (12 June 2019).

[30] It is trite that a declaration is a discretionary order that ought to be granted with care, caution and judicially, having regard to all the circumstances of the case at hand. A declaratory order will not be granted, for instance where the relief claimed would be unlawful or inequitable for the Court to grant¹³.

[31] The principles applicable when declaratory relief is sought are; (1) the applicant must be an interested person in the right (or obligation) inquired into. (2) there must be a right (or obligation) which becomes the object of the enquiry; and the right may be existing, future or contingent, that is contingent in the narrow sense of the '*conditional*'; that is, in contradistinction to '*vested*'. (3) The requirement of an existing and concrete dispute between the parties as modified in *Ex parte Nell*¹⁴. (4) The rule that a party is not entitled to approach the Court for what amounts to a legal opinion on an abstract or academic matter. (5) The Court will not make a declaration of rights unless there are interested persons on whom the declaration would be binding; lastly, when a Court has to determine whether it should exercise its discretion in favour of a declaratory order considerations of public policy come into play.

¹³ Halsbury Laws of England 3ed Vol 22 para 1611 at 749-750; see also *Kennedy & Another v Minister of Safety and Security and Others* 2020 (3) NR 731 para 19.

¹⁴ 1963 (1) SA 754 (A) at 759H-760A.

[32] In my view, the requirement of an existing concrete dispute between the parties has not been satisfied. This, I say because there is currently no pending matter before the Court of the eviction or threat to evict the Applicant from Respondent's farm. The last time the issue was pursued by the Respondent was through a letter of its intention to evict Applicant in 2020. Two years later, Applicant files for a declaratory order that he be compensated if he is evicted – the relief sought appears to be academic in nature considering the time lapse and the fact that there is a ruling from the District Farm Dwellers tribunal on the issue.

[33] Applicant, in the present matter seeks a declaratory order notwithstanding the fact that the tribunal found in his favour in its ruling of May 2007. The parties have not sought to have the tribunal's finding, set aside.

APPLICANT HAS NO *LOCUS STANDI IN JUDICIO* TO CLAIM COMPENSATION

[34] The Respondents argue that the Applicant has no *locus standi in judicio* to claim compensation because he is neither the owner of the farm which he currently inhabits nor of the structures which he calls home because his father and not himself built those structures. Respondents contend also that the structures that Applicant seeks compensation for are not improvements on

Second Respondent's farm, for the reason that they are sub-standard and not compliant with urban government construction regulations.

[35] On the contrary, the Applicant argues that by virtue of being a lawful occupier and *umnumzane* on Respondent's farm he has standing to institute the current proceedings. It is argued that since the Respondents know nothing about Applicant's father they cannot argue that it is Applicant's father who built the structures that are a home of the Applicant on Respondents' farm.

[36] In the founding affidavit, Applicant is described as '*an adult male Swazi citizen of Malkerns area...a lawful occupier and dweller of...land now belonging to the Second Respondent*'¹⁵. The Applicant's *locus standi* is predicated on him being a farm dweller on Respondent's farm. That the Applicant is a farm dweller on Respondent's farm is confirmed by the Respondent in its answering affidavit¹⁶. In terms of the ruling of the District Farm Dwellers' tribunal of 21 May 2007, Applicant is a farm dweller and not a tenant on Second Respondent's farm. This ruling was not taken up on appeal or review by the Respondents and is of full force and effect.

¹⁵ See paragraph 1 of the Founding Affidavit at page 6 of the Book of Pleadings.

¹⁶ See paragraph 8.2 of Respondent's answering affidavit at page 92 of the Book of Pleadings.

[37] In terms of the ruling the District Farm Dwellers' tribunal, Applicant and the Respondents were ordered to find a peaceful and amicable solution in the removal and relocation of Applicant to a suitable place and that such removal and relocation should be accompanied by compensation in terms of the law¹⁷.

[38] What is common cause is that Applicant is currently in occupation of the Respondent's farm at Malkerns. It is also common cause that Respondent is desirous of evicting Applicant from the farm. Applicant herein is not resisting eviction in as much as he is requesting that if he is evicted or relocated elsewhere that he should be compensated. As a victim of the impending eviction, the Applicant argues that he has a right to compensation in terms of section 19(2)(b)(i) of the Constitution Act 1/2005. If a bearer of a basic right cannot vindicate the right in a Court of law, then such right is of no value. Where it is alleged that his right to compensation for such deprivation has allegedly been violated, the person has, in my view the requisite standing to move an application. In constitutional matters, *locus standi* is, as a general rule, liberally interpreted and applied.

¹⁷ District Farm Dwellers' tribunal ruling of 21 May 2007 at page 2 of the Book of Pleadings.

APPLICATION NOT RIPE FOR HEARING

[39] The Respondents argue that by instituting the present application, Applicant, to use a pedestrian language – jumped the gun. According to the Respondents, Applicant should not have approached the Court when he did and before the offending action by the Respondents as finalised. In this vein, Respondents contend that the constitutional question has been raised prematurely much against the doctrine of ripeness. It is Respondents' averment that they intend to follow due process before they evict the Applicant and that Applicant will be afforded a chance to state his defence at the appropriate time. The reality is that there is presently no matter pending before the Courts regarding the eviction of Applicant from Respondent's farm. The Respondent has, however as far back as 2020 issued a letter of its intention to evict Applicant without compensation much against the ruling of the District Farm Dwellers' tribunal.

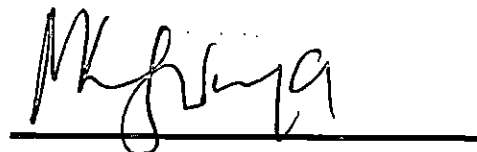
[40] The principle of ripeness relates to the timing of the application. It is a principle borne out of a more fundamental principle that the Courts should decide only cases entailing a '*real, earnest and vital controversy*'¹⁸ between litigants and not entertain merely '*hypothetical*' cases or cases that are only of '*academic*' interest. This principle is, in turn generated by the higher-level

¹⁸ Ashwander v Tennessee Valley Authority 297 US 288 (1936) (Brandeis J).

principle of avoidance. This is the idea that the judicial resolution of constitutional issues should only take place as a matter of last resort. Put differently, the principle of constitutional avoidance provides ‘...that a Court will not determine a constitutional issue where a matter may properly be determined on another basis’¹⁹. The question of Applicant’s compensation if evicted was addressed in his favour by the tribunal’s ruling. The ruling was not appealed or reviewed by the Respondents. It stands. There is presently no proceeding filed by Respondents about evicting Applicant without compensation, pending before any Court. There is, however the ruling of District Farm Dwellers’ tribunal that if Applicant is evicted he should be compensated in terms of the law. This point *in limine* is therefore upheld and it is dispositive of the matter.

[41] For the above reasons:

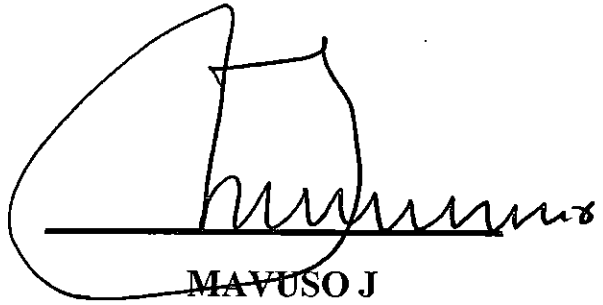
1. The application for a declaratory order is refused.
2. There is no order of costs.



LANGWENYA J

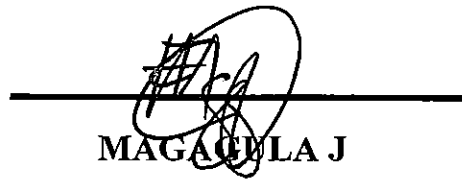
¹⁹ Daniel Didabantu Khumalo v The Attorney General [2010] SZSC 6 (30 November 2010) at para 3 and the cases therein cited.

I agree



MAVUSO J

I also agree



MAGACHA J

For the Applicant: MR. M.S. NHLABATSI

For the Respondents: MR. D. HLETA