IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 31/2000

In the matter between

VIF LIMITED Appellant

And

MOSES MATHUNGWA First Respondent

AMBROSE MASUKU Second Respondent

PHILIP MAPHANGA Third Respondent

MPISI CONFORT DHLAMINI Fourth Respondent

AARON KHATWANE Fifth Respondent

SOLOMON MAGAGULA Sixth Respondent

MTHAKATI NKAMBULE Seventh Respondent

ALLETHA NKAMBULE Eighth Respondent

KELLINAH NHLANGAMANDLA Ninth Respondent

AGNES NGWENYA Tenth Respondent

JABULANE MAGAGULA Eleventh Respondent

Coram TEBBUTT, J A,

SHEARER, J A

SAPIRE, J A

For Appellant Ms J.M. van DER WALT

For Respondent Mr. L. Maziya

JUDGMENT

TEBBUTT, J A

The locus standi of the appellant to bring an application in the High Court for an interdict against the respondents was challenged by the

respondents. Matsebula J found the challenge well founded, holding that the appellant had not established the requisite locus standi and dismissed the appellant's application. It is against that finding that the appellant now comes on appeal to this Court.

The respondents are all farmers on plots of land in Vuvulane, Lubombo Region, Swaziland. The appellant, (the applicant in the High Court), is a company, V. I. F. Limited (VIF) with its principal place of business at Farm 860, Vuvulane. In the founding affidavit on its behalf by its General Manager, one Arnot, it averred, and I quote :-

"Farm 860, Vuvulane.....has been placed at the applicant's disposal for the purpose set out above".

That purpose, according to Arnot, is the following:-

"the applicant is a company formed with the aim and objectives of providing certain sugar cane farmers with access to parcels of land and other resources, to assist and enable such farmers to engage in productive and environmentally safe sugar cane farming, and the applicant is the coordinator of the Vuvulane Irrigated Farms Project under the auspices of Tibiyo Taka Ngwane."

Arnot went on to aver that the farm was divided into two broad categories, viz allocated and unallocated land. The former had been subdivided into 264 plots (generally referred to as "farms") and unallocated land had not been subdivided and was described as "Remainder of Farm 860". The respondents each occupy one of the

farms by virtue of leases between them and the appellant. They are all members of the Vuvulane Irrigation Farmers Association (Public) Co Ltd (VIFA). Arnot averred that:

"The allocation of plots to particular persons are (sic) within the discretion of the applicant as lawful custodian of the land and no individual may settle on or utilise the land, allocated or unallocated, unless same has been formally allocated to such person or such person has obtained express permission to do so. "

It is the appellant's case that since August 1999 the respondents have been cultivating sugar cane and other crops and have been engaged in other activities on unallocated land. Letters were addressed to the respondents on 3 November 1999 telling them that this was not allowed but, despite this, says the appellant, they have continued to do so. In early December 1999 appellant destroyed the sugar cane crops on the unallocated land but a week later the land was again being cultivated with sugar cane and other crops. Arnot stated that when they were destroying the crops adjacent to the farms of three of the respondents the appellant and its employees were confronted by a crowd of persons wielding axes, assegais, pangas, knives and sticks and were threatened with death and injury. The appellant then withdrew. On 27 January 2000 the respondents issued summonses against the appellant for damages for destroying their crops. Realising that the matter could not be amicably resolved, said Arnot, the appellant decided to apply for an interdict against the respondents. It did so by Notice of Motion dated 8 May 2000. The appellant alleged that it was entitled to an interdict in that it had a prima facie or clear right to do so being "the only person who may occupy, utilise, cultivate or otherwise make use of the unallocated land";

that it had a well-grounded apprehension of irreparable harm were it not to be granted; and that it had no other satisfactory remedy. It also alleged that the matter was one of urgency and that the balances of convenience favoured an interdict being granted. Although Arnot mentions Tibiyo Taka Ngwane no affidavit from it was filed, Arnot stating that appellant had not had time to get a properly attested one from it.

On 9 May 2000 the High Court issued a rule nisi, pending the finalising of the application, interdicting and restraining the respondents:-

(a) from entering onto any portion of Farm 860 Vuvulane other than those formally allocated to each of them and

(b) from hindering or impeding the appellant "in its control over the said farm".

The respondents opposed the application. Their opposition amounted, in essence, to the fact that the appellant had no locus standi to bring the application; that there were numerous material disputes of fact of which the appellant was aware and it was therefore not the proper procedure for appellant to have brought the matter by way of application but it should have done so by an appropriate action; that there was no urgency about the matter; and that the requirements for an interdict had not been satisfied on the papers by the appellant.

In regard to the appellant's locus standi - or lack of it - the respondents had this to say:

"the applicant has dismally failed to show on the papers what authority it has over the land in question. In fact it is appropriate

to clarify the position as follows. At its inception the architects of the project was the Commonwealth Development Corporation (CDC) which owned the land in issue. All the farmers who participated in this project were granted leasehold over the portions of the land allocated to them. In accordance therewith leases were drawn up at the instance of CDC and signed by all the farmers. The duration of the lease period was such that it terminated in 1987."

They went on to deal with the conditions of the leases laid down by CDC, including the payment of rental and the fact that each property would be used exclusively for crop production. They then said:-

"(i) these leases all expired in 1987 when the Ingwenyama in trust for the Swazi nation bought back the land from CDC.....

(ii) the late Ingwenyama, King Sobhuza II had assured farmers in 1981 that they would continue their farming operations on the land but would no longer pay rent.....(They would) resent the customary gifts (tetfulo) to His Majesty "....."

(iii) Save for providing water services to the farmers on hire, the applicant has absolutely nothing to do with the operations of the farmers on the land. " (the Ingwenyama is the King).

Finally they said:

"The applicant has, on the papers failed to show any relationship between it and the respective respondents. No contractual documents (Deed of lease) has been filed setting out the rights and duties of the respective parties especially in view of the averment that the applicant is a "coordinator" between the respondents and Tibiyo Taka Ngwane. No affidavit has been filed by Tibiyo confirming these allegations; nor has the applicant demonstrated how Tibiyo is involved in issues affecting the rights and duties of Swazis over natural resource that vests in the Ingwenyama on behalf of the Swazi Nation. "

The averments by the respondents prompted the filing by the appellant in the court a quo of a voluminous affidavit by one Ndumiso Mamba, the General Manager of Tibiyo Taka Ngwane ("Tibiyo"), which he described as a Swazi organisation established pursuant to a Royal Charter in 1968.

Mamba stated that the land on which Farm 860 Vuvulane is situated "belongs to Indlovukazi who holds all the shares in the applicant" (Indlovukazi is the Queen Mother). He said this:-

"The applicant operates under the auspices of Tibiyo, who was appointed by the Indlovukazi to protect the interests of the Ingwenyama and the Indlovukazi in the land in question ".

He attached a letter dated 21 March 1986 from the Indlovukazi, as Regent of the Kingdom of Swaziland, in which she directs (I quote the relevant passages):

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"That Tibiyo Taka Ngwane has full and sole responsibility for the direction and financing of the smallholder scheme known as Vuvulane Irrigated Farms. That Tibiyo Taka Ngwane may establish such companies or other legal bodies and may enter into such management or consultancy agreements with companies or other organisations as Tibiyo in its sole discretion may decide for the proper management and administration of Vuvulane Irrigated Farms. That Tibiyo Taka Ngwane shall have power to determine the terms upon which smallholders shall occupy land at Vuvulane Irrigated Farms ".

Mamba went on to aver that as Tibiyo was legally responsible for the appellant and its funding, Tibiyo had locus standi in the matter.

He also dealt in detail with the respondents' averments as to the non-payment of rental. He set out that the water services are not provided by appellant but the Inyoni Yami Swaziland Irrigation Scheme, although appellant coordinates the water flow. He also dealt with other aspects put in dispute by respondents. It is not necessary for the purposes of this judgment to refer to them.

At the hearing of the matter on the return day of the rule nisi the respondents applied to strike out thirteen paragraphs in Mamba's affidavit and the Indlovukazi's letter as constituting new matter which should have appeared in the founding affidavit or was irrelevant or was vexatious and prejudicial to respondents. Matsebula J, who heard the matter, did not come to any conclusion on the striking out application but said that

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"the court had to partly focus its mind to it as it is i.e. the application to strike out intricably (sic) interwoven with the question of applicants locus standi."

In the view I take of this matter it is also not necessary for this Court to deal with the striking out

application.

It is well established 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 affidavits (see Scott And Others v Hanekom 1980 (3) SA 1182c at 118 - 1189; Titty"s Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974(4) SA 362(T) and c.f. Ben M. Zwane v The Deputy Prime Minister and Another, Swaziland High Court case No. 624/2000).

It is equally well established that where there is a dispute of fact on the papers in an interdict application a final interdict should only be granted on notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order. (see Stellenbosch Farmers Winery (Pty) Ltd v Stellenvale Winery (Pty) Ltd 1957(4) SA 234(C), a decision of a full bench of the Cape Provincial Division of the South African Supreme Court which has been followed consistently and applied in numerous cases both in South Africa and Swaziland.) What the appellant was claiming in the Court a quo was a final interdict. One of the requirements for 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 in order to obtain the relief. (See Setlogelo v Setlogelo 1914 AD 221) This must be a legal right (Lipschitz v Wattrus 1980(1) SA 662(T) at 673D.) It must do so in its founding papers. What

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it has tried to do by filing Mamba's affidavit on behalf of Tibiyo is to make out an entirely new case in its replying papers.

The appellant has in my view not established a clear right. It says in the founding affidavit, as set out above, that it is a company formed "with the aims and objectives of providing certain sugar cane farmers with access to parcels of land.....to assist and enable such farmers to engage in productive sugar cane farming". It does not say that it allocated the farms to the respondents. The respondents say this was done by the Commonwealth Development Corporation. They say the land now is owned by the King in trust for the Swazi Nation. The respondents say that save in regard to the water services the applicant has nothing to do with the operations of the farmers on the land. The appellant does not say that it has any rights whatsoever over the unallocated land. The appellant merely says that it is the "coordinator" of the Vuvulane Irrigated Farms Project "under the auspices of Tibiyo Taka Ngwane". What being "the coordinator" means is nowhere set out by the appellant nor what "under the auspices" means and whether it involves anything more than Tibiyo keeping a fatherly eye over its activities. These aspects are made clear in the passage from the respondents' affidavit cited above.

Appellant avers that it is the "legal custodian of the land". It is nowhere set out by appellant how or why it makes such averment, and it can therefore have no probative value for the purposes of the appellant's application. Moreover, that averment is expressly denied by the respondents. The appellant has failed to show in its founding papers any nexus between it and the relief claimed.

The learned judge a quo was therefore perfectly correct in holding that the appellant had failed to establish any locus standi or entitlement

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to the relief claimed by it and, accordingly, was also correct in discharging the rule nisi, with costs.

The appeal is dismissed, with costs.

P.H. TEBBUTT, J A

I AGREE

D.L. SHEARER, J A

I AGREE

S.W. SAPIRE, J A

DATED AT MBABANE THIS. 13th.DAY OF DECEMBER, 2000