IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE	Appeal Case No. 30/2000
In the matter between	
VIF LIMITED	Appellant
Vs	
VUVULANE IRRIGATION FARMERS	
ASSOCIATION (PUBLIC) COMPANY	
(PROPRIETARY) LIMITED	First Respondent
AMOS MHLUPHEKI MATHONSI	Second Respondent
Coram:	P.H. TEBBUTT, J A
	DL. SHEARER, J A
	S.W. SAPIRE, J A
For Appellant:	Ms J.M. van der Walt
For Respondent:	Mr. L. Mamba

JUDGMENT

TEBBUTT, J A

Deciding that the appellant, who had been granted a rule nisi by the High Court in an application for an interdict against the respondents, had no locus standi to have brought the application, Matsebula J discharged

the rule nisi on the return day, with costs. The appellant now comes on appeal to this Court against that order.

The appellant is a company V. I. F. Limited (VTF) with its principal place of business at VIF offices on Farm 860 Vuvulane, Lubombo Region, Swaziland. The first respondent is Vuvulane Irrigation Fanners Association (Public) Co. Ltd (VTFA) a company incorporated in 1989 with its principal place of business also at Farm 860, Vuvulane. The second respondent, to whom I shall refer as Mathonsi, is its managing director.

In a founding affidavit on behalf of the appellant, who was the applicant in the High Court for the relief to which I shall later refer herein, its general manager, one Arnot stated 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 stated further that Farm 860, Vuvulane had been "placed at appellant's disposal" and it was "charged with the responsibility and authority inter alia of leasing portions of land and/or buildings to other parties. The farm consists of land allocated for farming, some portions of which have dwellings on them, the VIF Senior Staff Village which is a residential village and a few other villages. The first respondent i.e.

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VIFA was formed by farmers to whom, so Arnot averred, farming land had been allocated by appellant.

During 1993 VIFA required an office and appellant agreed to let to it for use as offices, a house described as House 13, in the Senior Staff Village. Arnot said it was agreed that the premises would be used only as an office and not for residential or other purposes. It was further agreed that the lease would terminate once VIFA had obtained offices elsewhere. In 1995 VIFA obtained offices elsewhere but it was agreed to renew the original lease, the duration thereof being subject to the decision of the VTF Libandla, a committee appointed by the King to prepare a report on the future of the farms project. In November 1999 the Libandla advised that VIFA should cease its operations in House 13 but, said Arnot, attempts to get VTFA to move proved fruitless.

Arnot averred that over the years appellant had experienced difficulties with VIFA as a tenant including non-payment of rental and use of the premises for purposes other than an office. It was storing and allowing to be manoeuvred in the yard of the premises which was only 25 by 25 metres large, crane haulage rigs, loaders, including road digger front loaders, tractors, trucks, and trailers as well as a steel diesel storage tank with a capacity of about 10 000 litres and a fuel pump. The yard was being used to refuel vehicles and machines, with no fire precautions in place, with attendant security, accident and health risks. Letters addressed to VIFA requesting it to desist had been ignored. VIFA was advised that the gates to the village would be closed from 1 May 2000 and apart from permitting the removal of VTFA's vehicles, machinery and equipment, no further access by VIFA to the village would be allowed. On 2 and 3 May 2000, said Arnot, Mathonsi and others barricaded the

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access road to the village, with threats of violence to appellant and its employees. The barricade was removed on 3 May 2000 but the vehicles simply returned to the premises. On 5 May 2000 VIFA applied for a spoliation order against the appellant. This was, however, withdrawn on 8 May 2000. Appellant on the same day applied to the High Court for an interdict, the gist of it being as follows:

(a) restraining the respondents from entering the VIF Senior Staff Village for any purpose other than to proceed directly to House 13 or to remove their vehicles, equipment or other items from the premises.

(b) Restraining the respondents from bringing any further vehicles, equipment or other items on the premises;

(c) Restraining the respondents from causing any interference, obstruction or disturbance in the immediate vicinity of the village or hindering or impeding the appellant "in its control over the village ".

It also claimed in the same application an order.

(i) that the lease agreement between the parties in respect of the said premises be declared to be cancelled;

(ii) that the first respondent and all its office holders, staff,employees and representatives be ejected forthwith from the premises;

(iii) that the first respondent be directed to remove all its vehicles, equipment or other items from the premises.

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On 9 May 2000 the High Court granted a rule nisi, returnable on 19 May 2000, that pending finalisation of the appellant's application, the respondents be interdicted and restrained from bringing any further vehicles or other items on to the premises, from refuelling any vehicle on the premises and from hindering or impeding the appellant in its control over the village.

The Court did not make any order in respect of the issue of the lease or the ejectment of the respondents from the premises.

On the return day the respondents opposed the making final of the rule nisi and asked that it be discharged.

In essence their opposition was that the appellant had no locus standi to bring its application as the property in question was "held by the Ngwenyama in trust for the Swazi Nation" (The Ngwenyama is the King). They averred that "the Commonwealth Development Corporation had leased land to individual farmers, when it transferred the land to the Ngwenyama in trust for the Swazi Nation, the farmers continued in occupation of this land. Applicant was formed after the farmers were already in possession of the land in question".

They stated that appellant and respondents had entered into a written lease agreement on 16 July 1990 in respect of House 13 and took occupation of it during July 1990. They denied that it was to terminate when they obtained offices elsewhere. Respondents admitted keeping the vehicles, machinery and other equipment on the premises but denied that it was contrary to the lease agreement to do so, especially farm implements such as tractors. They denied having committed any breach

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of the lease agreement, or that the Libandla had advised VIFA to cease operations on the premises either during November 1999 or at any other time. The appellant had, they said, unilaterally and without just cause decided to evict them from the premises notwithstanding that the Libandla set up by the King was still preparing its report as to how the scheme was to be run. Respondents also denied erecting any barricades. They said that the appellant had locked the gates and the tractors on their return from the fields could not get back to House 13 and had to stop at the gates. There was a lot of confusion as to where the drivers should park them. It was this which had prompted respondents to apply for a spoliation order which they withdrew when appellant opened the gates.

The respondents went on to aver that their members had not harmed or threatened harm to anyone; that appellant's apprehended injury was imagined; and that there was no urgency about the matter. Moreover there was a considerable dispute of fact which the appellant should have anticipated and have proceeded by way of action rather than notice of motion.

In response Arnot on appellant's behalf filed a lengthy replying affidavit dealing with the respondent's denial that appellant had locus standi to bring the application and filed, in support of his allegations in regard thereto, a voluminous affidavit by one Ndumiso Mamba, the general manager of Tibiyo Taka Ngwane, which he described as a Swazi organisation established pursuant to a Royal Charter in 1968.

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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):

"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 ".

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

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Mamba's affidavit was one which VIF had filed in a related matter viz case no. 1270/2000, being V. I. F. Limited vs Moses Mathungwa and 10 others. Much of it related to that matter and not to the present one. It is accordingly not necessary for the purposes of this judgment to refer to the detailed allegations set out therein.

At the hearing of the matter on the return day of the rule nisi, the respondents raised a number of points in limine. the main ones being that the appellant had not established its locus standi. that the appellant had not established a clear right which was one of the pre-requisites for a final interdict and that there was a serious dispute of fact which was a bar to the relief being granted. Matsebula. J who heard the matter found that the points in limine were well taken and discharged the rule, with costs.

That rule, as set out above, did not refer to the ejectment application or the issues in regard to the lease between the appellant and VIFA. The learned judge added in his order the following:-

"It is left to the litigants what the next step will be ".

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 1182 C at 118 - 1189: Tittv'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 a final interdict should only be granted on notice of motion

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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 (see Setlogelo v Setlogelo 1914 AD 221) in order to obtain the relief. This must be a legal right (see Lipschitz v Wattrus 1980(1) SA 662(1) at 673D). It must do so in its founding papers. What it has tried to do by filing Mamba's affidavit on behalf of Tibiyo is to make out an entirely-new case in regard to its locus standi to bring interdict proceedings. The respondent's affidavits have raised disputes of fact as to appellant's entitlement to the land and to the exercise by it of any rights in regard thereto as contained in the founding papers and the Court cannot in the light of these find that it has the necessary locus standi. Moreover there are indeed serious disputes

of fact as to whether VIFA or its members are committing any transgressions which would entitle the appellant to the relief sought. In other words, it has not established a clear right.

The learned Judge a quo was therefore perfectly correct in holding that the appellant had failed to establish any locus standi or entitlement to the relief claimed by it and, accordingly, was also correct in discharging the rule nisi, with costs.

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As mentioned, the matter before the Court a quo did not concern the lease or ejectment issues.

In regard to them it would appear that the appellant had the requisite locus standi. Appellant avers that it had let to VIFA House 13 in terms of a valid lease agreement. VIFA admits that. Since a landlord warrants to his tenant no more than vacuo possessio the tenant is not permitted to challenge the landlord's title (see Clarke v Nourse Mines Ltd 1910 TPD 512 at 520 - 521).

The appellant claims in its notice of motion an order that the lease agreement be declared cancelled and that VIFA be ejected from the premises. That relief has not been the subject of a rule nisi or of the subsequent Court order and accordingly the notice of motion containing the application for such relief stands unaffected in the High Court. The High Court must therefore deal with it. It must be observed, however, that, once again, there are serious disputes of fact in respect of that application. It will be for the High Court in the circumstances to determine what order it should make i.e. to refer the matter for oral evidence or to make such other appropriate order as it may deem fit, including an order as to costs.

The following order is therefore made:-

1. The appeal against this decision of Matsebula J in Appeal No. 30/2000 discharging the rule nisi, with costs in case no. 1269/2000 is dismissed, with costs.

2. The application in Case No. 1269/2000

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(a) that the lease agreement between the parties in respect of the said premises be declared to be cancelled; and

(b) that the first respondent (VIFA) and all its office holders, staff, employees and representatives be ejected forthwith from the said premises, is referred back to the High Court for determination.

TEBBUTT, J A

I AGREE

SHEARER, J A

I AGREE

SAPIRE, J A

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