IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL N0.15/2003

In the matter between:

JOHN BOY MATSEBULA 1st APPELLANT

NICHOLAS MATSEBULA 2nd APPELLANT

NDABAZEZWE NXUMALO 3rd APPELLANT

KHUZWAYO DLAMINI 4th APPELLANT

AND

CHIEF MADZANGA NDWANDWE 1st RESPONDENT

INGCAYIZIVELA FARMERS'

ASSOCIATION LIMITED 2nd RESPONDENT

CORAM LEON JP

TEBBUTTJA

ZIETSMAN JA

JUDGMENT

Leon JP

The four appellants were the unsuccessful applicants in the court a quo. Proceeding by way of an urgent application, the appellants sought the

following further relief:

"3. That a rule nisi do hereby issue calling upon 1st and 2nd respondents, their servants or agents to show cause why they should not be interdicted and restrained from invading, ploughing and/or taking over fields which are owned and in the lawful possession of the applicants and situate between the Inkomazi and Mnyokayoka rivers, and stretching from the Ngonini area up to the Balegane Prison farm boundary (hereinafter referred to as the disputed area), pending the determination of an appeal filed by the applicants to His Majesty, the King Mswati III against the first respondent's decision to disown the applicants of the aforesaid fields.

4. That pending the return day to be set by the above Honourable Court, prayer three (3) hereof should operate as an interim order with immediate effect.

5.Costs of suit.

6. Granting further and/or alternative relief."

A rule nisi was granted by Sapire CJ which, according to the judgment of the court a quo, was extended from time to time.

On the extended return day the matter came before Maphalala J who, after reserving judgment, dismissed the application with costs. It is against this dismissal that the appellants have appealed.

It will be convenient hereinafter to refer to the parties, as they were in the court a quo, as the applicants and the respondents respectively.

The judgment which is appealed against deals only with points in limine to which I shall presently refer.

It was the applicants' case that each of them owned land in the disputed area in terms of Swazi law and custom and that they were entitled to the beneficial use thereof in terms of Swazi law and custom. The 1st respondent had made a decision to disown them of their land and the 2nd respondent had wrongfully and unlawfully invaded the fields of 1st and 2nd applicants.

The main point made by the respondents in their opposing affidavits is that the disputed land is situated on Swazi Nation Land which no one can own but it is common cause that that dispute between the parties is the subject of an appeal which is pending before His Majesty the King. The applicants filed replying affidavits.

However, the respondents also raised points in limine and those are the matters dealt with by the learned Judge a quo and which are the subject of this appeal.

The points in limine are as follows:

"This Honourable Court has no jurisdiction over this matter on the following grounds:

1. The dispute the applicants have brought to this Honourable Court is pending for a decision by His Majesty: it is, therefore pendente lite.

2. The dispute related to Swazi Nation Land (Sicintsi) whose allocation, use and enjoyment is governed by Swazi law and custom. Therefore this Honourable Court is not the competent arbitor in this dispute.

3. The applicants have not exhausted the local conflict-resolution mechanism obtaining under Swazi Law and Custom.

4. There is an inherent dispute of facts in this matter which cannot possibly be resolved in an application of this nature in as much as oral evidence is required to clarify and possibly resolve the dispute of facts as above stated

in as much the responsibilities and powers of the 1st respondent to administer and allocate land to its subjects are obtaining from and governed under Swazi Law and Custom."

After referring to, and considering all the arguments on the points in limine, the learned Judge dismissed the point concerning the alleged disputes of fact. However he held that the applicants had failed to make out a prima facie case.

The Court held that it was the King and he alone who had the power to grant final relief in this matter and that it had not been shown that he could not grant interim relief. It held further that by operation of the doctrine of submission the applicants' cause has to be determined by the King as they had submitted themselves to his jurisdiction.

On behalf of the unsuccessful applicants (now the appellants) is it contended that the court a quo erred both on the question of lis pendens and on its views on the doctrine of submission.

It is claimed that the court a quo misdirected itself in law in that in the absence of any legislation and/or other applicable law the High Court of Swaziland has unlimited jurisdiction to deal with any matter which has been placed before it for adjudication. It was further contended that the court a quo erred by failing to consider that the applicants were not seeking an order which would affect the rights of the parties as is the case before His Majesty the King. It is urged that the applicants' application was not for determination of the rights of the parties in so far as the ownership of the land is concerned but was for an interdict pending the determination of those rights by the appropriate authority i.e. His Majesty the King.

Before I refer to the facts in this matter I must point out that the respondents replies in their opposing affidavits

are highly unsatisfactory. In the main they consist of bare denials, and, as I shall show later, some material matters are not dealt with at all. The 1st respondent has also alleged, in some instances, that he has no knowledge of matters plainly within his knowledge. On a fair reading of the respondents' affidavits they appear to be preoccupied with the question of the ownership of land in the disputed area which has caused them not to place properly in issue two cardinal matters i.e.

1) The applicants' undisputed possession of land in the disputed area, and

2) The respondents' improper invasion of some of that land;

By way of example, I shall presently refer to certain allegations in the first applicant's founding affidavit and the replies thereto.

Having set out his reasons for claiming that he is the owner of the land in question, the first applicant alleges the following in paragraphs 5.6 and 5.7 of his founding affidavit:-

"5.6 a meeting was convened between the landowners and the 1st respondent in his official capacity wherein a formal request to convert to commercial sugar cane farming was made.

5.7 the 1st respondent gave his consent and the landowners were tasked with obtaining all the necessary resources to implement the project. However I (we) have continued to use the fields undisturbed for general purpose farming."

All that the first respondent says in reply appears in paragraph 13 of his answering affidavit which reads:

"AD PARAGRAPHS 5.4 TO 5.7

The contents of these sub-paragraphs are denied. And the first applicant is put to the strict proof thereof."

The first respondent does not make it clear whether he denies that the applicant was ever in possession or

whether he is denying that any such possession was undisturbed. Moreover the first respondent makes no attempt to adduce evidence to the contrary.

In the result the denial remains an unsatisfactory, unexplained, bare or bald denial.

In SOFFIANTINI V MOULD 1956(4) SA 150 (E) PRICE J.P. said the following at page 154 F-H:-

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung by the most simple and blatant stratagem."

And in the leading case on this topic of ROOM HIRE CO (PTY) LTD V JEPPE STREET MANSIONS (PTY) LTD 1949(3) SA 1155 (T) MURRAY AJP said the following at page 1165:

A bare denial of applicant's material allegations cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court...to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard."

Similar criticisms can be levelled against the opposing affidavits of the respondents in the examples which follow.

In paragraph 5.35 of his founding affidavit the first applicant alleges that:

"On or about the 20th October, 2002 tractors bearing South African registration plate (sic) invaded my fields to

plough under the instructions of the 1st and 2nd respondents. I am reliably informed that the fields of other landowners are being ploughed."

In reply to that allegation the first respondent alleges in paragraph 28 that :-"The contents of this sub-paragraph are not known to the 1st respondent and the 1st applicant is put to the strict proof thereof.

But it is the 1st and 2nd respondents who are alleged to have authorised the invasion. How could the first respondent have no knowledge of this? Either he did or did not authorise the invasion.

The second respondent's assistant secretary, Mr. Masuku, does not reply to paragraph 5.35 in his answering affidavit. However, in paragraph 9 thereof he states:-

"... any stoppage by way of an interdict or otherwise will cause irreparable financial and investment harm and prejudice to the 2nd respondent and all other concerned parties in as much as the applicants have brought proceedings out of spite and malice in order to disrupt commercial operations in the disputed land."

That answer amounts to an admission by this second respondent that, through it, commercial operations are being conducted on the disputed land.

In paragraph 5.22 of the first applicant's affidavit he alleges that the first respondent convened a meeting in April 2001 at a primary school the purpose of which was to address the first respondent's refusal to grant membership to landowners in the disputed area.

In reply the first respondent states that he has "no knowledge" of these allegations and puts the first applicant to the "strict" proof thereof. But this is not an answer at all. The 1st respondent surely knew whether or not he

convened such a meeting.

Even worse is to follow in the 1st respondent's answering affidavit.

In paragraphs 5.15 to paragraphs 5.22 of his founding affidavit the first applicant refers to the history of what took place after the concerned landowners approached the first respondent to protest at his decision to dispossess them of their fields. The matter was referred to the Governor of Nkambeni area who convened a meeting which was attended by representatives of the second respondent, the "disowned" landowners and others. At that meeting the second respondent's representatives made it clear that they were not concerned with the grievances of the landowners as the first respondent, as chief, was responsible for the allocation of land. However, the Governor resolved that the 1st respondent had acted unfairly and that the 2nd respondent had no right to take over the said land. That decision did not go down well with the 1st respondent who advised all landowners in this disputed area to join the second respondent but when he and the second applicant attempted to do so their applications were turned down on the ground that the membership was full. The first applicant reported the second respondent's refusal to the first respondent who admitted that the refusal was wrong and undertook to call a meeting. That is the meeting referred to in paragraph 5.22 of the first applicant's affidavit to which I have referred.

Lumping all these sub-paragraphs together, all that the first respondent says in paragraph 16 of his answering affidavit is this:-

"The contents of these sub-paragraphs are denied and the 1st appellant is put to the strict proof thereof." This amounts to no proper reply at all.

Mr. Masuku, in his answering affidavit deals only with the rejection of the first applicant's application for membership of the 2nd respondent. He alleges that his application was rejected because he failed to meet the

requirements of the second respondent in terms of its constitution.

For the sake of completeness I should refer to the fact that, in supporting affidavits, the 2nd, 3rd and 4th applicants have supported the 1st applicant's case.

The 2nd applicant, who is a younger brother of the first applicant, alleges that he owns land in the disputed area. He claims that the 1st respondent's decision to "disown" him of his land is unlawful in terms of Swazi Law and Custom. So, too, is the invasion of his land by the 2nd respondent and those claiming to act under its authority. He refers to the pending appeal before the King.

The third applicant also claims to own land in the disputed area. He states that the second respondent and, those acting under its authority, have invaded fields in the disputed area causing him a reasonable apprehension that his land will also be invaded to his prejudice. The 4th applicant makes similar allegations to those of the third applicant.

Mr. Maziya, who appeared for the respondents at the hearing of the appeal submitted that it is necessary, for the grant of an interim interdict, that an applicant must have a prima facie case even though it may be open to some doubt. I have no quarrel with that. However, he contended that the applicants did not have a prima facie case because the first applicant had failed to show that, at the material time, he was in undisturbed possession of the land in question. In this regard he relied upon.

1) The first applicant's founding affidavit.

2) The first applicant's replying affidavit, and

3) The affidavit of the 2nd respondent's assistant secretary, Mr. Masuku.

I am wholly unpersuaded by Mr. Maziya's submission. The first applicant has expressly averred in his founding affidavit that, at the material time, he was in undisturbed possession of the land in question to which there has been no proper reply.

I have re-read all the affidavits. There is nothing in the first applicant's founding affidavit which casts any doubt upon his claim in paragraph 5.35 that he was in undisturbed possession nor, in my view, is there anything in his replying affidavit which conflicts with, or weakens that assertion.

With regard to the affidavit of Mr. Masuku, Mr. Maziya relied on paragraphs 5, 6 and 7 of his affidavit which read as follows:

"5. The land in dispute is not owned by any one including the applicants as it is situate on Swazi Nation Land.

6. The land in dispute was re-settled by the Government of the Kingdom of Swaziland so that commercial farming activity can be undertaken on it.

7. All those affected including the applicants participated in the community meetings whereat it was resolved to have the land resettled and used for commercial farming in particular for the production of sugar cane and it belongs to no one including the applicants."

Not only are the above allegations couched in the most general terms but they do not deal at all with the position which obtained on or before the 20th October, 2002 as set out in paragraph 5.35 of the 1st applicant's founding affidavit. If, as a matter of fact, the first applicant was not in undisturbed possession on the 20th October 2002 it would have been a matter of ease for Mr. Masuku to say just that, but he has failed to do so.

On the affidavits the respondents have made their bed and they must lie in it.

I am satisfied, on a consideration of all the affidavits that it has been shown:-

1) That, on the 20th October 2002 the first applicant was in undisturbed possession of the land in question as were the other applicants.

2) On the 20th October 2002 he was deprived of such possession by his land being invaded on the instructions of the first and second respondents and the land of the second applicant was also so invaded.

Although the position of the 2nd, 3rd and 4th applicants is not precisely the same as that of the first applicant, all their cases were treated as one and it was not suggested that this court should differentiate between them. Moreover, there is no reason to do so.

In the leading case of NINO BONINO V DE LANGE 1906 TS 120 Innes CJ

said this at page 122: "... no one is permitted to dispossess another forcibly or wrongfully and against his consent, of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do so as a preliminary to any inquiry or investigation into the merits of the dispute."

That case has been applied and followed in a large number of cases. I shall refer to one of them. In ADMINISTRATOR, CAPE AND ANOTHER VS NTSHWAQELA 1996(1) SA 705 (A) NICHOLAS AJA said the following at page 718A-B:-

"It is common cause that a spoliation was committed, and the rights and wrongs of the applicant's possession, and the difficulties which the respondent faced have no bearing on the question whether a spoliation order should have been granted."

It is clear from the above that a spoliation order could have been obtained in order to protect the status quo. Those dispossessed had a clear right to obtain such an order. Instead they proceeded by way of an interim interdict.

But I am of the view that the form of relief sought does not make any difference and, indeed, is perfectly justified.

In my opinion the applicants had a clear right to remain in undisturbed possession of their property, And, subject to a consideration of lis pendens (to which I shall later refer) had the right to obtain an interdict in order to protect such possession.

Indeed there is clear authority for the proposition that, in a case such as this, an applicant is entitled to an interdict.

In SETLOGELO V SETLOGELO 1914 AD 221 Innes JA (as he then was) said at page 227:-

"The requisites for the right to claim an interdict are well known; a clear right, injury committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. Now, the right of the applicant is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it for himself and he is entitled to be protected against any person who against his will forcibly ousts him from such possession."

An injury was committed against the first and second applicants and reasonably apprehended by the 3rd and 4th applicants.

And in that case, which is particularly relevant to the present one, the applicant was also prevented by law from owning land (which the respondents contend is the position here because the disputed land is Swazi Nation Land which cannot be owned by anyone) but as a possessor of it was entitled to the relief claimed.

There remains to be considerea the question of lis pendens upon which the court relied as did counsel for the respondents on appeal.

In HERBSTEIN AND VAN WINSEN THE CIVIL PRACTICE OF THE SUPERIOR COURTS OF SOUTH AFRICA (2nd edition) the following is stated at page 162:-

"The requisites of a plea of Us pendens are the same with regard to the person, cause of action and subject matter as those of a plea of res judicata which, in turn, are that the two actions must have been between the same parties.... concerning the same subject matter and founded up on the same cause of complaint."

There was no disagreement between Mr. Mabila for the applicants and Mr. Maziva as to the requisites of a defence of lis pendens. They differed as to whether it applied to the facts of this case.

It was Mr. Maziya's contention that as the dispute between the parties had been referred to the King it was he and he alone who should decide this matter and not the High Court. He urged further that it had not been shown that His Majesty could not grant a temporary interdict.

In my view Mr. Mabila is correct in contending, for the reasons given by him, that, lis pendens has no application in this case.

What has been referred to the King is the determination of the rights of the parties to the disputed land. What the

applicants sought to protect was their undisturbed possession (which was clearly established on the papers) pending the determination of the rights of the parties by His Majesty the King. The applicants did not seek an order from the High Court to determine those rights.

No argument was addressed to this court on the doctrine of submission. But, whatever may be its precise limits and effect, it cannot possibly apply where what has been submitted to the King is not the relief sought in this case.

In my judgment the appeal must be allowed with costs and the judgment of the court a quo altered to one granting an order in terms of paragraphs 3, 4, and 5 of the Notice of Motion.

R.N. LEON

JUDGE PRESIDENT

I AGREE

P.H. TEBBUTT JUDGE OF APPEAL

I AGREE

N.W. ZIETSMAN JUDGE OF APPEAL

DELIVERED IN OPEN COURT ON THIS 14th DAY OF NOVEMBER 2005.