IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **APPEAL CASE NO. 12/2009**

In the matter between:

FILE PHILDAH KHUMALO **APPELLANT**

and

MASHOVANE HEZEKIAL KHUMALO **RESPONDENT**

CORAM FOXCROFT, JA EBRAHIM, JA MASUKU, AJA

FOR THE APPELLANT FOR THE RESPONDENT MR. T. MLANGENI MR. Z. MAGAGULA

JUDGMENT

FOXCROFT, JA

[1] This is a disturbing case in which a mother, supported by at least one of her sons, is pitted against another son.

It appears that this is not the first time that a litigious dispute has arisen between the brothers. The relief sought by the mother who applied for an interdict against her son, the respondent, was for the eviction of the respondent from her home, the banning of his return, and the prevention of respondent from ploughing and/or using the applicant's farming fields.

[2] The applicant failed in the court a quo when the plea of ***Us pendens*** succeeded with costs, the court holding that this dispute had first to run its full course before the Chiefs Council of Esandleni where the matter was still pending. The unsuccessful applicant now appeals to this court against the ruling of ***lis pendens.***

[3] The first question which arises is whether the granting of the "special plea" of ***lis pendens*** raised ***in limine,*** is an appealable order. As Mr. Mlangeni, for the appellant correctly submitted at the commencement of his written Heads of Argument,

J.

> **'The *special plea of "lis pendens" is said to be merely dilatory in that it is not decisive of the issues between the parties.*[9]**

That being so, the ruling of the Court ***a quo*** was an interlocutory order without any final effect and in terms of section 14 (1) (b) of the Court of Appeal Act No. 74 of 1954, is appealable only by leave of the Court of Appeal. No such leave has been sought or granted. See: LUCKY MAHLALELA v GILFILLAN INVESTMENTS (PTY) LTD Civil Appeal 28/2005.

[4] Even if the matter were properly before us, and on the authority of LUCKY MAHLALELA (supra), final interdictory relief could not have been granted on the papers.

See also the South African decisions in Administrator, Transvaal and Others v THELETSANE 1991 (2) SA 192 at 196 I to 197 C, and Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 E-633 C.

Every factual allegation relevant to the dispute was denied by the respondent. Oral evidence would have been required to establish the allegations made by the appellant in the Court ***a quo.***

[5] A further affidavit filed by the respondent detailed certain relevant events which had occurred since he had filed his answering affidavit in the application for an interdict. It appears that the Inner Council of Kontjingila met and deliberated on the dispute reported by the appellant to the Umphakatsi. The Council visited the Khumalo homestead

and made certain decisions affecting the parties. These events of 22 September 2009 are also described in supporting affidavits of two members of the Inner Council under Chief Inkhosatana Gelane Simelane, Nqaba Gwebu and Elizabeth Dlamini.

[6] The appellant responded to these fresh allegations, admitting that they were "generally true". She added that the traditional authorities had been sitting on this matter

for several years without finalising it, and that in any event the Chief and/or Inner Council have no authority to order sub-division of her home and premises. This is a clear admission that the Council is still dealing with the matter which is substantially the same as the interdict application brought in the High Court. Accordingly, the raising of the law point ***in limine*** of ***lis pendens*** was well founded. As I have already said, an interdict could never have been granted on the papers in any event. The appeal will be struck from the roll with costs.

J.G. FOXCROFT

JUSTICE OF APPEAL

I agree.

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree.

T.S. MASUKU

ACTING JUSTICE OF APPEAL

JUDGMENT DELIVERED IN OPEN COURT ON 20™ NOVEMBER, 2009.