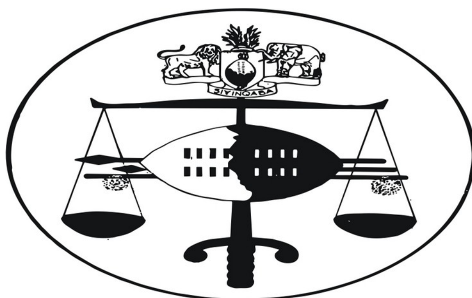

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **APPEAL NO.15/2010**

CITATION: [2010] SZSC 2

In the matter between

MHLATSI HOWARD DLAMINI **APPELLANT**

AND

PRINCE MAHLABA DLAMINI **1ST RESPONDENT**

WILLIAM KELLY – DEPUTY SHERIFF **2ND RESPONDENT**

CORAM : **RAMODIBEDI J.A.**
MOORE J.A.
FARLAM J.A.

FOR APPELLANT : **MR. S. MAGONGO**

FOR RESPONDENT: **MR. L. VILAKATI**

HEARD: **15 NOVEMBER 2010**

DELIVERED: **30 NOVEMBER 2010**

Summary

Allocation and occupation of land in accordance with Swazi Law and Custom of Kukhonta – Application for Interdict granted on 24th August 1999 – Application concerning same land dismissed on12th March 2010 - whether absolution from the instance properly ordered – whether ***res judicata*** *applicable in the circumstances.*

JUDGMENT

S.A. MOORE JA

–

OPENING

[1] By Notice of Appeal dated 31st March 2010, the Applicant/Appellant has sought to overturn the judgment of S.B. Maphalala, Principal Judge, dated 12 March 2010, upon the grounds set out therein which are reproduced hereunder.

"1. The Honourable Court erred in dismissing the appellant's case at the end of its case in as much as the first respondent bore the onus of proving that the matter was ***res judicata.***

2. *The first respondent being the one who raised the point of* ***res judicata*** *has the burden of prove (sic) to sustain it and as such, there was serious irregularity in the procedure which resulted in a failure of justice in that it was the first respondent who should have started giving evidence in this matter not the applicant.*

3. *The first respondent has not advanced evidence to prove the defence of* ***res judicata*** *in as much as the trial court had ordered that oral evidence be heard on the question of* ***res judicata***.

4. *It was not opportune for the trial court to grant the absolution from the instance in a case where the evidence was clear and sufficient to establish a* ***prima facie*** *case*.

5. *The trial court in not giving reasons why the absolution from the instance is granted in the presence of the clear evidence presented by the applicant."*

[2] The litigious history of this matter goes back to the early nineteen seventies. The contending Dlaminis have been engaged in several rounds of litigation

during the intervening years concerning an area of land at Mhlaleni. A major judgment in this seemingly endless saga, and which has a direct bearing upon the instant appeal, was delivered as long ago as the 24th August 1999.

[3] In case No. 252/98 the Applicant Prince Mahlaba Dlamini, hereinafter Prince Mahlaba, who is the 1st Respondent in this appeal, prevailed against Mhlatsi Dlamini, hereinafter Mhlatsi, the applicant/appellant herein, The Swazi Commercial Amadoda, and the Licensing Officer – Manzini. Masuku J granted the following order:

> *"1. Interdicting and restraining the 1st Respondent from continuing to build a shop and other structures on the land at Mhlaleni which is allocated and occupied by the Applicant in accordance with Swazi law and custom of Kukhonta.*
>
> *2. The 1st Respondent and/or his agents are prohibited from interfering with the fencing of the Applicant's area.*
>
> *3. The 1st Respondent be and hereby ordered to pay the costs of this application."*

The above order of Masuku J dated the 24th August 1999, notwithstanding, the appellant filed a Notice of Motion dated 17th November 2003 – over 4 years later - claiming the following reliefs against the 1st and 2nd respondents:

1. *Pending finalization and or determination of this matter the first and second respondents and all those who are acting under their instructions be interdicted and or restrained from continuing to erect or put steel fencing poles on the land at Mhlaleni adjacent to Caltex Filling Station which was allocated and is occupied by the applicant in accordance with Swazi Law and custom through Kukhonta.*

2. *Directing the first and second respondent and all those acting on their instruction to remove the already fixed steel fencing poles from the said land belonging to the Applicant.*

3. *Directing the first Respondent and or his agents or all those who operate on his instruction to vacate the applicant's land adjacent to Caltex Filling Station.*

   Failing which

4. The Sheriff or his Deputy be authorized to remove such steel fencing poles and to evict the first Respondent, his agent and all those acting in his instructions from the said land.

5. Costs of the Application.

[4] On the 12th March 2010, S.B. Maphalala Principal Judge dismissed that application with costs. The initiating Notice of Motion was dated the 17th November 2003. It is not clear from the photocopy on the court record when it was actually filed. Suffice it to say that the gulf in time between the legible date on the notice of motion, and the delivery of judgment, was sufficiently yawning that Maphalala Principal Judge, substituting his judicial robes for sackcloth and ashes, apologetically tendered his *mea maxima culpa* to the parties for the inordinate delay.

[5] Every trial judge must be alive to the possibility that some mischievous case may descend beneath the radar, or slither on to the back burner, and thus escape notice until an over large effluxion of time. It is for these reasons that the current efforts of the Honourable Chief Justice to introduce a system for monitoring outstanding judgments are to be warmly commended.

[6] After a careful evaluation of all the evidence before him, including the report of the inspection *in loco,* Maphalala PJ succinctly set out the grounds upon which he dismissed the application at paragraphs [21] - [23] of his judgment.

> *"[21] It appears to me on these facts that this matter was finally decided and disposed of by this court in its judgment under case No. 252/98. I agree with the Respondent's contentions that the Applicant seeks to review the decision of that court which is untenable. The Applicant should have appealed that judgment by Masuku J.*
>
> *[22] It is common cause that Applicant brought its application eight (8) years after the judgment was delivered and it was way out of time even to lodge an appeal.*
>
> *[23] I agree in* ***toto*** *with the Respondent's contention that if the Applicant was not satisfied with the judgment of this court under case No. 252/98, it should have appealed the decision not to bring an application before court eight years later,*

which application seeks to review a judgment of this court."

[7] Those reasons were based upon the judge's justifiable finding that:

> *"[17] After hearing the arguments of the parties and the facts established on the papers and the report of the inspection in* ***loco*** *I have come to the considered view that the position adopted by the Respondent is the correct one on the facts of this case."*

[8] The position of the respondent to which the judge refers, as set out it his opposing affidavit, is that 'the High Court of Swaziland issued a final judgment on this matter on the 24th August 1999 and the same matter cannot be back to court." The issue before the court, as set out in paragraph [1] of the judgment was:

> *"whether the land in the present application is different from the land in the application before Masuku J in his judgment of the 24th august, 1999.*

That issue was correctly resolved by the trial court in favour of the respondent. The judge's finding is that the

land in the present application is not different from the land in the application before Masuku J.

THE APPEAL

[9] The Appellant's Heads of Argument contain four subdivisions which are:

(a) Prolegomenon
(b) Condonation
(c) Extension of time
(d) Merits

The first three grounds can safely be put to one side as they do not impact upon the merits. The substantive matters raised under (d) above are:

(i) The Honourable Trial Court erred in granting the respondents absolution from the instance in as much as sufficient evidence was placed before the Court.

(ii) There was an irregularity in the hearing in that the respondents had a duty to adduce evidence first because they were the ones who raised the point of ***res judicata***. So it

was improper to grant absolution without hearing their evidence.

ABSOLUTION FROM THE INSTANCE

[10] The law on this subject is to be found at page 681 of The Civil Practice of the Supreme Court of South Africa, 4 ed hereinafter Herbstein & Van Winsen, in the passage which reads:

> *"After the plaintiff has closed his case the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance. The lines along which the court should address itself to the question whether it will at that stage grant a judgment of absolution have been laid down in the leading case of* ***Gascoyne v Paul & Hunter****, which contain the following formulation:*
>
> > *'At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff?... The question therefore is, at the close of the case for the*

plaintiff was there a prima facie case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?'

It follows from this that the court is enjoined to bring to bear the judgment of a reasonable man, and

'is bound to speculate on the conclusion at which the reasonable man of [the court's] conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer.'"

[12] Upon the justifiable findings of the court *a quo* as reproduced at paragraph [6] *supra*, there is no scintilla of evidence upon which a reasonable man might find for the appellant. Put another way, there is no smidgen of evidence upon which a prima facie case could be based.

[13] The appellant has argued that absolution from the instance could not be ordered at the close of the applicant's case because:

(i) A sufficient prima facie case had been made out.

(ii) The court should have heard evidence from the respondent before ordering absolution.

(iii) Since the respondent had raised the issue of *res judicata*, absolution could not be ordered because the respondent had not been called upon to lead evidence to establish his plea of *res judicata*.

[14] The above arguments are all fallacious. First, a court is under no obligation to call upon a defendant if, at the close of the plaintiff's case, the plaintiff has clearly failed to prove the essential ingredients of the case he has set out to establish. In the instant case, the plaintiff's case was that there was still a live issue between the parties concerning the land in question.

[15] Upon the totality of the evidence before him, the trial judge rightly concluded that the controversy which had been cunningly resurrected by the appellant, complete with cerement, had been decently and judicially interred since the 24th August 1999 by the orders of Masuku J.

Secondly, in my view, the dismissal of the application by the trial judge did not amount to the granting of absolution but to judgment in favour of the

respondents. The onus to establish the plea of *res judicata having been on the first respondent, who was the first defendant in the court below, a order of absolution would not have been competent:* ***see Arter v Burt 1922 AD 303 at 306.***

Technically it may be said that the court *a quo* erred in dealing with the matter as it did when the respondent's attorney asked for absolution at the end of the appellant's case but in view of the evidence before the court at that stage if the respondent had closed his case the result would have been the same. It is important to notice (a) that the order was a dismissal of the application; and (b) the court *a quo* at no stage applied the well known test applicable when absolution is granted.

[16] The law relating to the plea of *res judicata* has been authoritatively stated at pages 249 – 250 of Herbstein & Van Winsen where the learned editors point out that:

> *"The requisites of a plea of lis 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 or their successors in title, concerning the same subject*

matter and founded upon the same cause of complaint. For a plea or res judicata to succeed, however, it is not necessary that the 'cause of action' in the narrow sense in which the term is sometimes used as a term of pleading should be the same in the later case as in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be res judicata in any subsequent action between the same parties in respect of the same subject matter."

[17] The above principles are eminently applicable to the facts and circumstances of this appeal. They vindicate the orders of the trial judge, and stultify the spurious submissions of the appellant.

ORDER

[18] It is accordingly ordered:

The appeal is dismissed with costs.

S.A. MOORE

JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI

CHIEF JUSTICE

Delivered in the open court on this .... day of November 2010.