

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CIVIL APPEAL NO. 31/2010

CITATION: [2010] SZSC6

In the matter between

DANIEL DIDABANTU KHUMALO

APPELLANT

and

THE ATTORNEY GENERAL

FIRST RESPONDENT

CORAM:

RAMODIBEDI, CJ

MOORE, JA

DR. TWUM JA

HEARD : 17 NOVEMBER 2010

DELIVERED: 30 NOVEMBER 2010

SUMMARY

Civil Appeal - The High Court dismissing appellant's application on three grounds, namely, lack of jurisdiction in terms of s151 (8) of the Constitution, failure to establish a clear right for an interdict and dispute of facts - The Court upholding a principle that a court will not determine a constitutional issue where a matter may properly be determined on another basis - Interdict - Dispute of facts - Appellant failing to establish a clear right for an interdict - Appeal dismissed with costs.

## JUDGMENT

RAMODIBEDI CJ

[1] The appellant's application for an order interdicting the respondent and others from ejecting him from his homestead at Ezulwini Valley, Hhohho District, was dismissed by the High Court (Hlophe J) on three grounds, namely:-

(1) That the High Court had no jurisdiction in the matter in terms of s151 (8) of the Constitution in as much as the point at issue concerned land which is administered in terms of Swazi Law and Custom. To that end, as the court found, the Ingwenyama had ruled that the appellant had not khontaed at Ezulwini.

(2) That the appellant had failed to establish a clear right for an interdict in as much as the “appropriate structures” had ruled that he had not khontaed at Ezulwini.

(3) That in any event, the appellant should have anticipated a dispute of facts whether or not he had khontaed in the area in question. Hence the appellant took a risk by proceeding by way of an application instead of an action.

[2] Insofar as the abovementioned constitutional point on jurisdiction is concerned the appellant makes the following submission in his heads of argument:-

“3.1.1.1 It is submitted that had the learned judge a quo applied this test [namely, that an ouster of jurisdiction clause applies only when action has been taken in terms of the section in question] he would have come to the conclusion that there was nothing before him that warranted the applicability of section 151 (8) of the Constitution”.

[3] It is strictly not necessary for this Court to reach a concluded view on whether or not the learned Judge a quo was correct in relying on lack of jurisdiction in terms of s151 (8) of the Constitution. It shall suffice merely to stress a fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis. See, for example, Jerry Nhlapo and 24 others v Lucky Howe N.O. (in his capacity as Liquidator of VIP Limited in Liquidation), Civil Appeal No. 37/07. This is undoubtedly such a case. The judgment in this matter, therefore, only focuses on two of the issues upon which the court a quo relied for dismissing the appellant’s application, namely, (1) failure to establish a clear right for an interdict and (2) dispute of facts. But before proceeding further, it is necessary to state the relevant facts, even if only in outline.

[4] It is not seriously disputed on the papers that on 25 March 2000, and following acrimony between the appellant and the Shongwe family over the disputed land at Ezulwini, the Ingwenyama ordered the appellant to vacate the land in question and to go and khonta at another chiefdom. Interestingly, it was submitted on the appellant’s behalf that the order in question did not exist because it was not shown to him. That submission defies logic. The fact that an order is not shown to the person to be evicted does not necessarily mean that it does not exist. It is not disputed that the appellant was advised to follow the customary procedure of kubonga eNkhosini in order to verify the existence of the order in question. This, he failed to do. It follows from these considerations that as a matter of overwhelming probability it must be accepted that the Ingwenyama did make the order in question.

[5] Crucially, the opposing affidavits of Thokozile Regina Shongwe, Bheka Mabuza and the appellant's own former wife, Sipiwe Maseko, were significantly met with no more than a bare denial. As a typical example, in paragraph 7 of his supporting affidavit Bheka Mabuza, who was admittedly a member of the Swazi National Council Standing Committee at the material time, deposed as follows:-

"7.

I confirm that the Ingwenyama concluded that the Applicant did not occupy land at Ezulwini through kukhonta and that the Shongwe family were the rightful occupiers of the land. I further confirm that the Ingwenyama ordered the Applicant to leave the disputed land and khonta at a different chiefdom".

[6] In paragraph 19 of his replying affidavit the appellant merely contended himself with the following statement:-

"19.

Ad Affidavit of Bheka Mabuza

I only admit that the matter was referred to Swazi National Council for advice but aver that the Swazi National Council was satisfied that I have properly khontaed at Ezulwini”.

As to the latter allegation it is important to note that on the appellant’s own admission, this was refuted by his own former wife as appears in paragraph [11] below.

[7] In this Court the appellant relied heavily on the affidavit of John Shaviela Mabuya who deposed that between 1980 and 1989 he was a member of Libandla of Ezulwini Royal Kraal and Indvuna yemajaha. He averred that the appellant khontaed at Ezulwini. The problem with this affidavit, however, is that it came at the replying stage when the respondent had no opportunity to deal with it. It is a matter of fundamental principle that an applicant must make out his case in the founding affidavit. Generally, a court will not allow an applicant to make out a case in reply. No acceptable explanation was furnished why the affidavit of Mabuya was not attached to the appellant’s founding affidavit in order to enable the respondent to respond to it. Be that as it may, the affidavit in question merely intensifies the dispute of facts in the circumstances. In fact it adds more fuel to the dispute.

[8] Now, as this Court stated in such cases as VIF Limited v Vuvulane Irrigation Farmers Association (public) Company (Proprietary) Limited and Another, Appeal Case No. 30/2000 it is well-established that where there is a dispute of facts on the papers, as here, a final interdict should only be granted on notice of motion proceedings if the facts as stated by the respondent together with the facts in the applicant’s affidavits justify such an order. See also Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) S.A. 623 (A) at 634 – 635. On this principle, therefore, and

there being a dispute of facts in the matter, the learned Judge a quo was justified in accepting the respondent's version and dismissing the appellant's application on that basis.

[9] The dismissal of the appellant's application was in my view also justified in terms of Rule 6 (17) of the High Court Rules. This Rule provides as follows:-

“(17) Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision”.

[10] As is plainly evident from Rule 6 (17), a court faced with a dispute of facts in an application has a judicial discretion either to dismiss the application or to make such order as it deems fit in order to bring about a just and speedy resolution of the matter. An appellate court is generally loath to interfere with such a discretion in the absence of a misdirection. It has not been shown that the learned judge a quo misdirected himself in any way. All that was submitted by Adv. Maziya on the appellant's behalf on this issue was that the learned Judge a quo should have called for viva voce evidence himself. But I consider that the ball was in the appellant's court to make the running and apply for viva voce evidence himself. This, he failed to do. Accordingly, he has got only himself to blame for the resultant outcome in the matter.

[11] Similarly, it is apparent from the facts in this matter that the appellant should have anticipated a dispute of facts arising in the matter. Thus, for example, in paragraph 13 of his founding affidavit the appellant made the following averments:-

“13

At that meeting they asked me if I know about the King’s Order ejecting me from my homestead at Ezulwini. I told them I was not aware of such an order. I told them that on 25 March 1999 the Swazi National Council had ruled that I had Khontaed at Ezulwini under the said Chief Mafelenkhosini to which my ex wife responded that what I was saying was not true”.

[12] In fairness to him, Adv. Maziya, conceded, and properly so in my view, that the appellant took a risk in these circumstances in proceeding by way of an application instead of an action. Counsel argued, however, that the appellant was entitled to move an application because of the urgency of the matter since the appellant was being evicted in two weeks’ time, as he put it. I reject this argument as untenable. It seems to me that there was nothing stopping the appellant from issuing summons and thereafter applying for an interim interdict pending the finalisation of the action on the basis of the alleged urgency. Whatever way one looks at it, it was, in my view, simply inexcusable for the appellant to proceed by way of an application in these circumstances.

[13] This brings me to the question whether the appellant succeeded in establishing a clear right for an interdict. As was stated in the landmark



case of *Setlogelo v Setlogelo* 1914 A.D. 221 at 227, the prerequisites for an interdict are (1) a clear right, (2) injury actually committed or reasonably apprehended and (3) the absence of similar protection by another ordinary remedy. See also *V.I.F. Limited v Vuvulane Irrigation Farmers Association (Public) Company and Another* (supra).

[14] In my view, the very fact that the appellant was evicted by the Ingwenyama from the disputed land means that he does not have a clear right for an interdict as long as the order by the Ingwenyama remains in force. At best for the appellant, according to his own version, there was a serious dispute of facts in the matter. On that version, therefore, it is evident that it was impossible for him to establish a clear right for an interdict.

[15] In the light of these factors it follows that the appeal must fail. It is accordingly dismissed with costs.

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

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S.A. MOORE

JUSTICE OF APPEAL

I agree

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DR. S. TWUM

JUSTICE OF APPEAL

For Appellant: Adv. M.L.M. Maziya

For Respondent: Mr. M.M. Vilakati