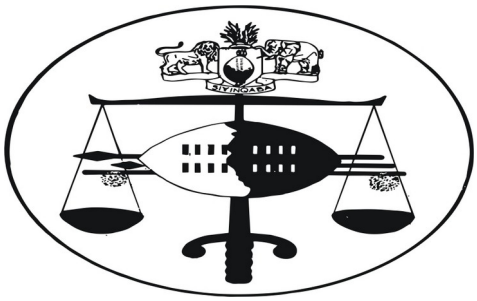

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL NO. 26/11**

In the matter between

ALICE FIKILE TSABEDZE AND 45 OTHERS
APPELLANTS

AND

SWAZILAND NATIONAL PROVIDENT FUND **1ST RESPONDENT**

NATIONAL CHILDREN C0-ORDINATING UNIT **2ND RESPONDENT**

SOCIAL WELFARE DEPARTMENT **3RD RESPONDENT**

GOVERNMENT OF SWAZILAND **4TH RESPONDENT**

ATTORNEY GENERAL **5TH RESPONDENT**

CORAM **:** **RAMODIBEDI CJ**
FARLAM JA
MCB MAPHALALA JA

HEARD **:** **29 NOVEMBER 2011**

DELIVERED : 30 NOVEMBER 2011

SUMMARY

Interdict – Principles thereof – Prima facie right – The appellants, as applicants in the High Court, applying for an order interdicting their eviction and demolition of their homesteads built on a certain farm owned by the first respondent – The High Court dismissing the application on the ground that no clear right established – On appeal the appeal dismissed with costs on the ground that the appellants failed to establish a clear right entitling them to the final interdict sought. The appellants also failed to establish a prima facie right for the interim relief sought.

JUDGMENT

RAMODIBEDI CJ

[1] The appellants brought an application in the High Court interdicting the respondents from evicting them from first respondent's Farm No. 319, Manzini. They also applied for an order interdicting the respondents from demolishing their homesteads situated on the farm. The basis for the application was that the eviction and demolition of the homesteads respectively contravened the provisions of sections 18 and 29 of the Constitution in that these acts were a threat to the education of the appellants' children and were, therefore, inhuman and degrading.

[2] The appellants also sought an order that the second and third respondents be directed to conduct an impact and mitigation assessment and prepare a report that would be used by the Government to ensure that the education of the children was not jeopardised. Similarly, they sought an order that the Government of the Kingdom of Swaziland should be directed to implement the report in question.

[3] Finally, the appellants sought an order that, pending the finalisation of the matter and the completion of the proposed impact assessment as well as the implementation of the mitigation recommendations by the Government, the first respondent and/or its agents should be interdicted and restrained from evicting the appellants' children as well as demolishing their homesteads situated on the farm in question.

[4] After hearing submissions the High Court (Hlophe J) came to the conclusion that the appellants had failed to establish "their entitlement to the orders sought." By that I understand the court to be saying that the appellants failed to establish a clear right for an interdict in respect of the relief sought as fully highlighted in paragraphs [1] and [2] above. Similarly, the court sought to convey that the appellants failed to

establish a *prima facie* right in respect of the interim relief sought as fully set out in paragraph [3] above. Accordingly, the court dismissed the application with costs. Hence this appeal.

[5] Before dealing with the merits of the appeal it is necessary to say something about the several postponements which the court granted at the instance of the appellants. The appeal was first enrolled for hearing on 11 November 2011. When the matter was called the appellants, acting through the first appellant as their spokesperson, applied for a postponement on the ground that their attorney, **Mr Gumedze**, was affected by the lawyers' boycott. The Court considered the importance of the constitutional point raised by the appellants on the merits of the appeal and accordingly postponed the matter to 21 November 2011.

[6] On 21 November 2011 the attorney **Mr. Dlamini** who is **Mr Gumedze's** partner appeared for the appellants. Surprisingly, he was, however, not prepared to make submissions as he argued that this was **Mr Gumedze's** matter. The case was once again postponed to 25 November 2011.

[7] On 25 November 2011 **Mr. Gumedze** appeared for the appellants. He, however, informed the Court that following a motor accident in which he had previously been involved he was feeling "dizzy." He told the Court that he was not in a position to make submissions and that he would rather withdraw from the case. By consent the matter was once again postponed to 29 November 2011.

[8] On 29 November 2011 neither **Mr. Gumedze** nor his partner **Mr. Dlamini** made any appearance in Court. No explanation was furnished for treating the Court in this cavalier manner. What was further puzzling was that **Mr. Jele** for the first respondent informed the Court that he, too, was not approached by the two attorneys in connection with their non-appearance.

[9] What then happened was that the appellants once again applied for a postponement to the next session. The application was fiercely opposed by all the respondents. After hearing submissions from both sides the Court dismissed the application for postponement which, as can be seen from the chronology set out above, merely amounted to delaying tactics. The Court has on several occasions bent over backwards in order to accommodate the appellants and

their attorneys in this matter. A case cannot be postponed indefinitely if an attorney is unavailable while other attorneys are available. Indeed, it is unacceptable that while they thought about their own convenience, the appellants never paused for a moment to consider the inconvenience caused to the respondents and the Court. These are people who are alleged to be illegal squatters on the first respondent's farm in the first place. Therein lies the test.

[10] The appellants also sought to rely on s 21 (2) of the Constitution. That section, however, does not deal with civil cases. It specifically deals with "[a] person who is charged with a criminal offence." The appellants' right to legal representation is to be found in section 21 (1) which provides for a "fair" hearing in the determination of civil rights and obligations. But even so, the right to legal representation depends upon the attorney sought being available. It was, therefore, astonishing to hear the forty-sixth appellant, Themba Mamba, make the following submission before this Court:-

> *"As appellants we held a meeting and resolved that the only person who can represent us is Mr. Gumedze."*

As to the general principles applicable in an application for postponement see, for example, **McCarthy Retail Ltd**

v Shortdistance Carriers CC 2001 (3) SA 482 (SCA).

[11] I turn now to the merits of the appeal. But before doing so, it is important to record that both **Mr Jele** and **Mr Nxumalo** for their respective clients stood by their heads of argument. They did not offer any submissions. Thus, the equality of arms was maintained. The two attorneys must be commended for adopting this professional approach in the circumstances. The Court on the other hand has duly considered the heads of argument filed of record by **Mr Gumedze** on the appellants' behalf. They are very full heads indeed.

[12] The requisites for granting an interdict were aptly laid down in the landmark decision in **Setlogelo v Setlogelo 1914 AD** 221 at 227. These are:-

(a) a clear right;
(b) an injury actually committed or reasonably apprehended and

(c) the absence of an adequate alternative remedy.

[13] Insofar as an interim interdict is concerned the principle was succinctly stated by Holmes JA in **Erickson Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973 (3) SA 685 (A)** at 691 in the following terms:-

> *"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in Setlogelo v Setlogelo 1914 AD 221 at 227."*
>
> See also **Ferreira v Levin NO And Others 1995 (2) SA 813 (A)**.

[14] Applying these principles to the present matter, it seems to me that in order to succeed in the relief outlined in prayers [1] and [2] above the appellants *bore the onus* to establish a clear right. Insofar as the relief outlined in paragraph [3] above is concerned, they had to establish a *prima facie* right. It is on the basis of these principles that I approach the matter.

[15] In determining whether the appellants have a clear right in the present matter it is of fundamental importance to record that the first respondent is the undisputed registered owner of the farm in question. Indeed, the appellants do not dispute the respondents' case that they are illegal occupiers of the farm. They are simply illegal squatters who have not a colour of right to be in occupation. In paragraph 12 of the first appellants' replying affidavit, the appellants claim that they were duped by a certain Malangeni Dlamini into settling on the farm in question. They were not aware of the first respondent's title until the latter drew their attention to it.

[16] In these circumstances, I have no hesitation in coming to the conclusion that the appellants have failed to establish a clear right for the relief sought as outlined in paragraphs [1] and [2] above. See, **Setlogelo v Setlogelo** (supra).

[17] But, as indicated above, the appellants raised a collateral constitutional point that the eviction and demolition of their homesteads respectively contravened sections 18 and 29 of the Constitution. In relevant parts, these sections provide as follows:-

"18. (1) The dignity of every person is inviolable.

(2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.

.

.

.

29. (2) A child shall not be subjected to abuse or torture or other cruel inhuman and degrading treatment or punishment subject to lawful and moderate chastisement for purposes of correction."

[18] In determining fundamental rights and freedoms of the individual in this jurisdiction it is instructive to note that these are always subject to respect for the rights and freedoms of others and for the public interest. In this regard, s 14 (3) of the Constitution provides as follows:-

"(3) A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but <u>subject to</u> respect for

the rights and freedoms of others and for the public interest." (Emphasis added.)

[19] As was correctly said by the Full Bench of 11 Judges in **S v Marwawe 1982 (3) SA 717 (A)**, the words "subject to" convey that "that to which a provision is 'subject' is dorminant." On this construction, therefore, it follows that the first respondent's right as the registered owner of the farm in question prevails over the appellants' perceived constitutional rights including those of their children to education.

[20] The appellants have sought to rely on the South African case of **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) at 46 (CC)**. A proper reading of that case shows, however, that it does not assist the appellants. On the contrary, the case stresses the principle that parents cannot hide behind their children. I agree. At paragraph [77] of its judgment the court held that subsection 28 (1) (a) of the Constitution of South Africa "contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking." Similarly, the court held at paragraph [79] of its judgment that there was "no obligation upon the State to provide

shelter to those of the respondents who were children and, through them, their parents" in terms of subsection 28 (1) (c) of the Constitution. In order to appreciate the full import of these two subsections it is necessary to reproduce them. They read as follows:-

> *"Every child has the right –*
>
> *(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*
>
> *(c) to basic nutrition, shelter, basic health care services and social services."*

[21] It requires to be noted that **Grootboom's** case is distinguishable from the present matter in at least one material respect. That case was based on s 28 (1) (c) of the South African Constitution which provides for shelter or housing. There is no corresponding section in our Constitution. Mrs Irene Grootboom and others illegally occupied someone else's land earmarked for low-cost housing. They were subsequently evicted and left homeless. The eviction order was never challenged. Instead, they applied to the High Court for an order requiring Government to provide them with

adequate basic shelter or housing until they obtained permanent accommodation. As can be seen, that case did not involve an interdict as the present one does. Indeed, unlike the present case it was not a dispute between the owner of the land in question and the illegal squatters. It was purely an attempt to enforce constitutional rights.

[22] On the facts of the present matter, the appellants have failed to establish a *prima facie* right for the interim relief

sought as fully set out in paragraph [3] above. As I have said before, and as I repeat now for emphasis, the children's rights under sections 18 and 29 of the Constitution are subject to respect for the rights and freedoms of others. In *casu* those rights are subject to the first respondent's right as the registered owner of the farm in question.

[23] It follows from the foregoing considerations that the appeal must fail. It is accordingly dismissed with costs, including the wasted costs incurred by the respondents on 21 and 25 November 2011.

_____
M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

_____

I.G.FARLAM
JUSTICE OF APPEAL

I agree

MCB MAPHALALA
JUSTICE OF APPEAL

For Appellant : Mr. S. Gumedze

For 1st Respondent : Mr. Z.D. Jele

For 2nd to 5th Respondents: Mr. M. Nxumalo