IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 89/2023**

In the matter between

ENDUMA DEVELOPMENT CORPORATION

(PTY LTD **APPELLANT**

AND

SALAPHI DLAMINI	**1ST RESPONDENT**
SAM DLAMINI	**2ND RESPONDENT**
ABC MINISTRY	**3RD RESPONDENT**
GERALD RICHTER	**4TH RESPONDENT**
ROBYN RICHTER	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

Neutral Citation:
ENDUMA DEVELOPMENT CORPORATION (PTY LTD v SALAPHI DLAMINI AND 5 OTHERS (89/2023) [2025] SZSC 133 (31 JANUARY, 2025).

Coram: S.B. MAPHALALA, M.D. MAMBA et J.M. CURRIE JJA.

Heard: 28 OCTOBER, 2024

Delivered: 31 JANUARY, 2025

[1] Civil Law- Appeal- Application for final interdict. Three requirements thereof restated- clear right, infringement or threat thereto plus no alternative remedy.

[2] Civil Law and Procedure- Application for an interdict- dispute of fact alleged. Lessee seeking to eject Respondents from leased property. Respondents claiming lease cancelled due to suspensive condition. Lessor not party to proceedings and not having cancelled lease. No dispute of fact. Whether lease cancelled or not question of law based on interpretation of lease agreement, Court obliged to interpret lease.

[3] Civil Law- Eswatini Customary Law- Jurisdiction of chief over private farm- unless specifically granted or authorised, chief has no administrative oversight over private farm.

MAMBA JA.

[1] The Appellant is Enduma Development Corporation (Pty) Ltd, a company duly registered and incorporated in terms of the company law of Eswatini. It is represented herein by some of its directors.

[2] The 1st Respondent is Salaphi Dlamini, an adult female person and resident of Motshane area. She is the biological mother of the late Chief Sipho Shongwe of Motshane. The 2nd Respondent is Mr. Sam Dlamini, an adult male person of Motshane area, in the Hhohho region, and so are the 4th and 5th Respondents. The 3rd Respondent is a non-profit making organisation and it has its principal place of business in Motshane, Hhohho region.

[3] On or about 30 October, 2008, the Appellant was granted a Notarial Deed of Lease by the Ingwenyama in Trust for the Emaswati Nation over Farm 1031, situate Motshane in the Hhohho region. The farm measures about 120,000 hectares. The lease is a long term one, spanning 45 years with effect from the 1st day of October, 2008. It is referred to as lease 2 on the said farm and bears the Number 111/2017 from the office of the Registrar of Deeds.

[4] It is common cause that at all times material hereto, the 2nd, 3rd, 4th and 5th Respondents were in one form or another, in occupation of the said farm and thus on or about October 2023, the Appellant filed an urgent application before the Court *a quo* seeking, *inter alia*, the following reliefs:

> '1. Dispensing and considering the [Appellant's] non-compliance with the Rules of this Honourable Court as relate to procedure, time limits and manner of service and hearing this matter as one of urgency.
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> 2. An interim Order, operating effectively and with immediate effect, is granted as follows:

2.1 The 1st Respondent is interdicted and restrained from allocating land leased to the [Appellant] under Farm 1031 District of Hhohho.

2.2 The 2nd Respondent is interdicted and restrained from cultivating and ploughing the land leased to the [Appellant] under Farm 1031 District of Hhohho.

2.3 The 3rd, 4th and 5th Respondents are interdicted and restrained from undertaking any construction or any activity in the land leased to the [Appellant] under Farm 1031 District of Hhohho.

3. The Respondents are called upon, on a date to be determined by this Court why prayers 2, 2.1, 2.2 and 2.3 should not be made final.

4. That the Respondents are ejected from the land leased to the [Appellant] under Farm 1031 District of Hhohho.

5. The 3rd, 4th and 5th Respondents are directed to restore the [Appellant's] land to the condition it was in prior to their activities in the land leased to the [Appellant] under Farm 1031 District of Hhohho.

6. Directing the 1st, 2nd, 3rd and 4th Respondents to pay the [Appellant's] costs of suit at attorney-and-client scale.'

[5] In support of its application, the Appellant stated that the 1st Respondent was holding herself out or pretending to be the chief of Motshane area and had, acting on this pretended status, unlawfully allocated pieces of the leased property to the 2nd, 3rd, 4th and 5th Respondents. It was averred by the Appellant that the 2nd Respondent started ploughing the piece of land in question about 8 years ago. The Appellant stated further that it had earmarked the land used by the 2nd Respondent 'as a substantial commercial project to commence in the next few months' and therefore it required that the 2nd Respondent be evicted therefrom and be restrained from ploughing it.

[6] The Appellant averred further that it had recently discovered, on 02 October, 2023 that the 3rd, 4th and 5th Respondents had also been unlawfully allocated pieces of land on the leased property, by the 1st Respondent. These Respondents were in the process of setting up some 'development project' on the relevant land.

[7] The Appellant stated that the 1st Respondent was not a chief in the area and thus had no power or jurisdiction to allocate land to anyone in the area, let alone on the leased property. Appellant averred further that the

rightful authority had, in 2018, settled the issue of chieftainship in the area in accordance with Eswatini Customary Law. Appellant stated that '. . . the total powers of the affairs of Enduma were vested in [other persons] who are opposed to the 1st Respondent.'

[8] It was the Appellant's submission that the land in question was a farm and as such it fell outside the control, administration or jurisdiction of the Motshane chiefdom. Lastly, Banjwayini Shongwe one of the directors of and a major shareholder in the Appellant, informed the Court that the late Chief Sipho Shongwe had given her written permission to operate a supermarket on the property in question. This was in August 2004; before the long lease was granted to the Appellant. The first 5 Appellants had treated the lease agreement with utter scorn or contempt when it was brought to their attention.

[9] The application was opposed by all the Respondents except the 2nd (Respondent). The 1st Respondent raised two points in *limine*; namely that the long lease had expired because the Appellant had breached the terms thereof by failing to start developmental projects on the land within 6 months of the signing of the lease as agreed and secondly, the

deponent to the Appellant's Founding Affidavit had not filed a resolution by the Appellant authorising her to file the application. On the merits, the 1st Respondent stated that she was the lawful acting chief of the area and had, in Libandla and in terms of Eswatini Law and Custom, allocated the pieces of land to the 3rd, 4th and 5th Respondents. She also informed the Court that when these allocations were done, there were no complaints, protestations or challenges from anyone in the area. She stated also that this application was nothing but a veiled challenge by Banjwayini to her authority as chief of the area. Her final submission was that 'this matter is a matter involving land having a bearing on the office of the Ingwenyama and as such should be dealt with by traditional structures.' She also stated that the 'land in question is under Eswatini Customary Law and therefore the Court cannot interfere with rights conferred as such.'

[10] The other or further Respondents also raised a few preliminary legal issues such as pertaining to urgency, non-joinder of Nduma Royal House and lack of jurisdiction by the Court. It was submitted that these Respondents had the land allocated to them by the Umphakatsi through the customary kukhonta system and therefore it was regulated by

Eswatini Law and Custom. 3rd, 4th and 5th Respondents also submitted that there were material disputes of fact in the matter and these disputes could not be resolved in application proceedings. It was their submission further that the Appellant had failed to show that it had a clear right to the land in question. For this reason, it was argued the Appellant had failed to satisfy the Court that it had a right to the injunction sought.

[11] The Court *a quo* handed down its judgment dismissing the application, on 08 November, 2023. As stated by Mr. Dlamini, Counsel for the Appellant, the *ratio decidendi* of the Court is in the following final paragraphs of the said judgment:

> '[61] The approach that appeals to this Court on the facts of the case *in casu* should in the first place speak to whether or not the Applicant has established the necessary *locus standi* to be entitled to a final interdict. Secondly, whether there are serious disputes of fact which would be a bar to the final relief sought (see *VIF Limited case (Supra).*
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> [62] There are a number of issues that remain unresolved in this application which have been raised by the Respondents. a) the

question of whether there still exist a valid notarial lease in light of the suspensive conditions raised, juxtaposed with the [Appellant's] argument that it could not have been terminated without an Order of Court, b) the question of who has the lawful authority over the land which the 3rd Respondent claims was allocated to it by the Enduma Royal Kraal, c) whether [Appellant] does have a valid notarial lease over the land as against the claim that the Respondents also lay over the same land. All these issues are not for the resolution of this Court in an interdict application. They are, however, genuine issues that exist and are a challenge to the clear right of [Appellant].

[63] Similarly, the contention by the Respondents that the area is subject to the chieftaincy of Enduma Royal Kraal vis-à-vis the [Appellant's] firm assertion that the notarial lease over the same property is valid, affects the establishment of [Appellant's] clear title over the land. The right that forms the subject matter of a claim for a final interdict must be a legal right and one that is enforceable in law. (See *Lipchitz case (Supra).*'

After stating that the Appellant, as applicant, must also show or establish as a matter of law that it has no alternative remedy to the injunction sought, the Learned Judge continued;

> '. . . to this end, this Court concludes that there are remedies available to the [Appellant] emanating from the notarial lease it has signed with the lessor in which the interdict remedy may be exercised pending the determination of these rights.
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> [66] In the premises, the [Appellant] has not established a clear right in the property and in the absence of a clear right, there can be no irreparable harm either actual or apprehended. Consequently, no final interdict may be granted against the Respondents. The application stands to be dismissed.'

[12] This appeal is against that judgment of the Court. The Appellant has raised the following grounds of appeal:

> 'that the Court erred in fact and in law in:
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> 1. Finding that the Appellant had not established a clear right to the interdict or relief it sought.

1.1 finding that there were disputes of fact which dis-entitled the Appellant to the final relief sought. The Court *a quo* actually contradicted itself by upholding the notarial lease suspensive condition which it had already rejected as subservient to the Appellant's real right secured by the registration of the notarial lease under the Deeds Registry Act 37 of 1968.

2. Holding that the Appellant had an alternative remedy which dis-entitled it to the interdict it sought. In fact, the Court *a quo* did not even specify this alternative remedy.
3. In the exercise of his discretionary power in the refusal to grant the relief sought by the Appellant. The Court *a quo* particularly mis-directed itself in its failure to exercise a judicial discretion and invoking wrong principles which influenced its decision not to grant the relief sought.
4. Not, at least, granting the Appellant the interim relief sought.

5. Permitting the 6th Respondent to represent the 1st Respondent in violation of Section 77 of the Constitution.'

[13] On the issue of factual disputes in an application the general rule is that it is not every dispute in an application that ought to be referred to trial. A referral to trial would only be on a dispute that is genuine, relevant or pertinent and necessary for the just conclusion of the matter. In *Horus Properties (Pty) Ltd v Mar and Dar Swazi GRC (Pty) Ltd and 2 Others (485/2020) [2020] SZHC 187 (21 September, 2020),* the Court stated as follows:

> '[27] It is not every dispute of fact though that would render the matter inappropriate to be decided or determined in application proceedings. The dispute of fact must be material and genuine. Its materiality must go to the root of the issue in dispute or which is central to the just conclusion of the matter. The matter is governed by Rule 6 (17) of the Rules of this Court.
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> [28] *In Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] 28 SZHC (31 May 2012),* the Court had this to say on the issue of dispute of fact in an application:

'[28] It is for the Court to decide whether such application can properly be decided on the Affidavits. The Rules do not provide guidelines on how to determine this question. There is nothing in the Rules prescribing situations that indicate when application proceedings cannot properly be decided on the Affidavits filed by the parties. The absence of such guidelines in the Rules, leaves the Court with a wide discretion to decide when such a matter cannot properly be decided on the Affidavits.

[29] The established and the trite judicial practice which now determines the approach of the Courts world wide, to be found in a long line of cases across jurisdiction, is that a court cannot decide an application on the basis of opposing Affidavits that are irreconcilably in conflict on material facts. So where the facts material to the issues to be determined are not in dispute, the application can properly be determined on the Affidavits. It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a Court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the Affidavits. The Court has a

duty to carefully scrutinise the nature of the dispute with microscopic lense to find out:-

(i) If the fact disputed is relevant or material to the issues for determination in the sense that it is so connected to it in a way, that the determination of such issue is dependent on or influenced by it.

(ii) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the terms of the Affidavits.

(iii) If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits.

(iv) If the dispute as to a material fact is a genuine or real dispute.

[30] A fact is material or relevant where the determination of a claim is dependent on or influenced fundamentally by it. Not all facts in a case are material. So it is only those that have a bearing on the primary claim

or issue for determination in a way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application can be decided on Affidavits. If the conflict or dispute is not a material fact, the application can be decided on the Affidavits. If the dispute or conflict on a material fact but the dispute is of such a nature that it is reconcilable or resolvable on the Affidavits, then the application can be decided on the Affidavits. If the dispute on the material fact is of such a nature that it cannot prevent the proper determination of the application on the Affidavits, then the Court will decide the application on the Affidavits. If the dispute on a material fact is not genuine or real, then the application can be determined on the Affidavit. This can arise where the denial of fact is vague, evasive or barren or made in bad faith to abuse the process of court and vex or oppress the other party. A frivolous denial raised for the purpose of preventing a determination of the application on the Affidavits or to instigate a dismissal of

the application or cause a trial by oral or other evidence thereby delaying and protracting the trial as a stratagem to discourage or frustrate the applicant is a gross abuse of process. We cannot close our eyes to the high incidence of abuse of court processes. Parties often times do not show readiness to admit liability even when it is obvious that they have no defence to an application or a claim. Such a party, if he or she is a defendant or respondent, tries to foist on the plaintiff or applicant through the frivolous denials. The objective of Rule 6 is to avoid a full trial when there is no basis for it and avoid delayed and protracted trials in such cases. It is the duty of a Court to ensure that a law meant to facilitate quicker access to justice through the expeditious and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claims.'

[14] I must observe from the outset that whilst it has been disputed by the Appellant that the 1st Respondent is the rightful acting chief of the area, the issue for determination in this appeal is whether she has unlawfully

interfered with or violated or infringed the occupational rights of the Appellant over the property in question. Whether she has acted in her capacity as the acting chief or in her private capacity is inconsequential in this case. It is of no moment. The crux of the matter is that the Appellant has a long term notarial lease over the property. It was not just signed before a notary public but it was notarially registered with the Registrar of Deeds. As, it is often said, it is a right against the whole world. The acts complained of by the Appellant were, it is common cause, committed after the conclusion of the lease.

[15] It is significant to record that the land in question is not Eswatini Nation Land (sicintsi) but it is a farm, although registered in the name of the Ingwenyama In Trust For The Emaswati Nation. Because it is a farm, it is not under a chief unless specifically so designated or placed under a chief by the appropriate authority. There is no such designation in this case. Consequently, the 1st Respondent either qua acting chief or otherwise has no authority over the land in question. The 1st Respondent stated, *inter alia*, that

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'I state that all land allocations done under my leadership are done in accordance with terms of Eswatini Customary Law within the Swazi area under my administration.'

She continues to mention other persons and entities who are in occupation of the farm and says these are ploughing and conducting businesses there. This, however, cannot be a defence to the case of the Appellant. If these other persons are there illegally and are interfering with the occupational rights of the Appellant, that is a matter for the latter to decide and not the Respondents. The lease tacitly acknowledges that there are farm dwellers on the property and thus clause 7.4 of the lease provides that in the event the Appellant requires additional land for its own use, within the farm, it shall negotiate with the farm dwellers and resettle them somewhere else at its own expense.

[16] There is no controversy concerning the location of the farm and the encroachments that have been made thereon by the Respondents. Additionally, the Appellant had submitted a pictorial diagram compiled by a land surveyor depicting the exact intrusions by the Respondents. These diagrams also show the size of the encroachments. (See *BS9-BS11).*

[17] One of the major defences raised by the Respondents and dealt with by the Court *a quo*, is the status of the lease and consequently the occupational rights of the Appellant over the property. The Respondent submitted that the lease was cancelled because the Appellant failed to honour or abide by one of the terms thereof. Reliance was placed on the provisions of clause 16.1 (a) of the lease which stipulates that should the Appellant fail to start and carry out the purposes for which the property has been leased within 6 months of signature thereto, 'then in any of such events, the Lessor shall hold this lease cancelled without any further recourse to the Lessee and without prejudice to any other claim of any nature whatsoever . . . .' The Respondents have stated that the Appellant has not commenced any development on the farm since the execution of the lease and therefore the lease was cancelled, or at best for them, must be deemed to have been cancelled by operation of law. (See para 3.1.1 of the Answering Affidavit at page 42 of the Record of Appeal).

[18] In dealing with the question of whether the lease was cancelled or not, the Court *a quo* said that this was one of the issues in dispute. With due respect, I cannot agree. The Respondent did not say that the lease was cancelled by any of the parties to it. Had that been the submission, that would have been a question of fact. But, the Respondents based their submission purely on the wording of the relevant clause. The factual background, namely the failure to commence work on the project within the stipulated time, is a question of fact and there is no controversy about it. The Court had to interpret the clause in order to determine the legal validity of the defence. This interpretation is a question of law not fact. Clause 16.1 (a), erroneously quoted as 16.1 (c) by the 1st Respondent, merely empowers or grants the Lessor the right to declare the lease cancelled if the facts justify such declaration. The cancellation is not automatic or by operation of law. I would think that this is the same with most breaches of contract. In any event, such cancellation or termination of the registration of the lease must be done or noted by the Registrar of Deeds on the Deed of Lease. (See Section 77 (1) of the Deeds Registry Act 37 of 1968. Had the parties desired or intended to have an automatic cancellation clause in the agreement, they would have expressly stipulated such a clause.

[19] For the foregoing reasons, it is my conclusion that the defence on the cancellation of the lease agreement ought to have been determined and dismissed by the Learned Judge. In addition, there was no dispute of fact on the existence of this clause. It is there in the lease. The issue was purely legal or a question of law and the Court was obliged to deal with it in application proceedings.

[20] Again, because of the conclusion above, the Appellant had in my view established that it had a right to occupy the land leased to it. The lease had not been cancelled. The right to occupy the land was granted to the Appellant by the registered owner of the property. The notarial Deed of Lease was and is the instrument evincing such right of occupation. This is a clear right and it satisfies one of the requirements for a final interdict. Secondly, the undisputed occupation of the leased property by the Respondents is evidence of the infringement or violation of the occupational rights of the Appellant. The occupation constitutes a violation because it has not been granted by the lease holder, the Appellant. The encroachment by the Respondents has not been denied by the Respondents. In fact they admit that they are in occupation of the land but say they are there lawfully.

[21] The Court *a quo* held that there were other remedies available to the Appellant to address the invasion or violation of its rights. Regrettably, the Court did not say what these alternative remedies were, neither did the Respondents point these out. The Appellant said it had no alternative remedy. Therefore, the Court had to accept that there was no alternative remedy available to the Appellant, unless of course the Court in its wisdom determined that there was such an alternative remedy, and specified it.

[22] On the 3rd and 4th grounds of appeal, the Appellant argues that the Learned Judge in the Court *a quo* failed to exercise his discretion properly in refusing to grant the injunctive relief. This is not entirely correct. The Court simply concluded that the Appellant had failed to establish any of the requirements for an injunction and consequently dismissed the application. There was no judicial discretion to be exercised in this regard. I am of course mindful of the fact that the final segment of the judgment of the Court *a quo* is headed 'Discretionary Remedy', but the Court did not say that it had a discretion to exercise in the matter.

[23] The final ground of appeal alleges that the Court should not have allowed the office of the Attorney General to represent the 1st Respondent in this case. Counsel for the 1st Respondent submitted that the office of the Attorney General is a public office and is at liberty to act for or represent any litigant in Court. He submitted further that this legal proposition has been confirmed or sanctioned by this Court. I have my doubts about the correctness of this view. However, because I consider this question or argument to be irrelevant in this appeal, I shall not attempt to deal or answer it. The 1st Respondent stated or alleged that she was the acting chief of Motshane. This was disputed by the Appellant. This was therefore not for the Court *a quo* or this Court to decide. For the Court to disallow the office of the Attorney General from representing the 1st Respondent, the Court would have had to decide that she is not the rightful acting chief of Motshane. That would not have been proper or even relevant in this case as I have demonstrated above that this appeal is not about who the rightful chief of Motshane is.

[24] For the sake of completeness of this appeal, one further point deserves mention here and it is this: the Appellant has submitted substantial material detailing that the traditional structures or authorities duly deliberated upon and made a decision on the chieftaincy dispute at Nduma. This material, tends to confirm that the 1st Respondent is not the acting chief of the area. So, even if I am wrong in concluding that the farm in question is not under the administration of Enduma in terms of Eswatini Customary Law, still the 1st Respondent would not have had the power of an acting chief and consequently could not have legitimately allocated the land to her co-respondents. This is, however, purely obiter.

[25] There is no ground of appeal on the question of costs but Counsel for the Appellant did submit before us that an order for costs at a punitive scale as sought in the Court below should be granted in favour of the Appellant. His justification for such an order is that the Respondents have acted maliciously in these proceedings. There was no further reason forwarded to us for such an order. I do not think that there is enough justification for this Court to depart from the general rule of awarding costs on the ordinary scale.

[26] For the above reasons, I would uphold the appeal and make the following Order:

26.1 The Appeal is upheld.

26.2 The Order of the Court *a quo* delivered on 08 November, 2023 is hereby set aside and substituted with the following Order:

(a) The 1st Respondent is hereby interdicted and restrained from allocating land leased to the Appellant under Farm 1031, Hhohho District.

(b) The 2nd Respondent is interdicted and restrained from cultivating and ploughing the land leased to the Appellant under Farm 1031, Hhohho District.

(c) The 3rd, 4th and 5th Respondents are interdicted and restrained from undertaking construction or any activity in the land leased to the Appellant under Farm 1031, Hhohho District.

(d) The Respondents are hereby ejected or evicted from the land leased to the Appellant under Farm 1031, Hhohho District.

(e) The 3rd, 4th and 5th Respondents are ordered to restore the Appellant's land to the condition it was in prior to their occupation of the said land under Farm 1031, Hhohho District.

(f) The Respondents are, jointly and severally, ordered to pay the costs of the application at the ordinary scale.

26.3 The Respondents are ordered to pay the costs of this appeal, jointly and severally, at the ordinary scale.

M. D. MAMBA
JUSTICE OF APPEAL

I AGREE.

S.B. MAPHALALA
JUSTICE OF APPEAL

I ALSO AGREE.

J.M. CURRIE
JUSTICE OF APPEAL

FOR THE APPELLANT: MR. S.K. DLAMINI

FOR THE 1ST AND 6TH RESPONDENTS: MR. F. MHLANGA
(With him V. Gumedze)

FOR THE 3RD TO 5TH RESPONDENTS: MR. H. MAGAGULA