IN THE HIGH COURT OF SWAZILAND

CIV. CASE No. 2499/99

In the matter between

ROBERT CRABTREE	APPLICANT
And	
W. B. H. O. (SWD) LTD	RESPONDENT
Coram	SB. MAPHALALA- J
For Applicant	In absentia
For Respondent	Mr. P. Flynn (instructed by Robinson Bertram)

JUDGEMENT

(03/02/00)

Maphalala J:

The applicant moved an application inter alia for rule nisi to issue calling upon the respondent to show cause at a time and date to be determined by the court why a final order cannot be made declaring the actions of the respondent unlawful that of trespassing on the old Nkoyoyo quarry site, interdicting the respondent from any way interfering with the applicant's rights in and to the site and to the timber there, and in anyway interring with or damaging the applicant's wattle forest and timber at the said site. Further that respondent pay costs of this application as between attorney and client

The application is fully supported by the affidavit of the applicant with relevant annexures. The respondent who opposes this application filed an answering affidavit of one Mark Kevin Davy who is the contract Manager of the respondent. The answering affidavit is supported by pertinent annexures. The matter was enrolled in the contested motion of the 22nd October 1999, where a replying affidavit by the applicant was filed from the bar. Attached to the said affidavit was an application for condonation for late filing.

I am to pause here briefly to relate what happened in court on the 22nd October 1999, as this has a bearing on the events that took place subsequent to that date. Initially applicant was represented by P. M. Sbilubane & Associates although in my observation the founding papers were drawn by the applicant himself. The offices during the course of the week withdrew as attorneys of record. On the 22nd October 1999, applicant appeared in person and sought a postponement of the matter to

engage the services of another attorney to represent him. He applied to be given (10) ten days. This application was strenuously opposed by Mr. Flynn for the respondent contending amongst other things that applicant brought this matter as an extremely urgent application he cannot therefore be allowed to act as he pleases at the prejudice of the respondent. There was a lot merit in what Mr. Flynn submitted but I was inclined to oblige the applicant with a postponement and my motivation being that I felt for the just prosecution of this case the applicant deserved an attorney. I also considered the complexity of the matter which involved vexed constitutional issues. I granted the applicant a postponement to the 27th October 1999, with a caveat that the matter was to proceed with or without his attorney. I must say that applicant expressed concern on the short time given. But my view was that the time was sufficient to brief counsel

as all papers had been filed.

On the 22nd October 1999, applicant had filed a notice of withdrawal stating in this notice that he abandons the application and tenders costs to the respondent. He states in the notice that the reason for withdrawal is that if respondent had at the time replied to applicant would not have needed to apply to the court as respondent has in reality now admitted and averred that:

Respondent had and has no rights to bulldoze the timbers. Respondent has no rights to go into the old quarry site.

Respondent has stopped bull dozing and was stopped from doing so as it was not entitled to do it.

Respondent actions were on their own version unlawful.

Respondent can only have rights in the event that it obtains a mining lease, which it has not even applied for.

Respondent is off the site and is no longer damaging the applicant.

Respondent has implied that it will not again act illegally in this matter.

The applicant was not in court on the 22nd October 1999, and on enquiry it came out that his father was present and he informed the court that his son (applicant) was out of the country. The matter however proceeded in view of this new turn of events. Mr. Flynn for the respondent vigorously opposed the withdrawal making a number of submissions in that connection and I shall get back to them in due course. In fact, this is the only issue the court is to decide. Mr. Flynn applied that the application be dismissed with costs on a scale of attorney and own client together with costs of counsel to be taxed in terms of Rule 68 (2) of the High Court rules.

Before delving into the determination of the efficacy or otherwise of the proposed withdrawal I wish to briefly outline the cause of the dispute or imagined dispute.

The applicant is a businessman, residing in Mbabane. The respondent is a construction firm that was awarded the Oshoek - Mbabane MR 3 road contract and

goes by the acronym W. B. H. O. (SWD) Ltd formerly known as Wilson Bayly Homes (Swd) Limited in terms of its certificate of incorporation with the Registrar of Companies stamp dated the 17th March 1998. The applicant alleges that on the evening of Thursday 7th October 1999, he went to the old quarry site and found that part of it had been bulldozed and that trees had been damaged and bulldozed over. Applicant was informed by someone in the vicinity that the respondent had done it.

These actions by the respondent were unlawful, damaging and malicious. The actions were also illegal and done without applicant's permission and were done despite the applicant in writing having warned respondent not to act in such a manner. The land in which this took place in Swazi nation land under Chief Petros Dube. The claim of right the applicant has over the land which has a quarry and a wattle tree forest is based on a lease agreement he entered into with the said chief on the 2nd August 1998, for a rental of E250-00 covering an area described as "several hectares" in the lease agreement. Annexure 3 to applicant's founding affidavit). The applicant claims the wattle trees on the basis of a sale agreement with one Nicholas Masuku who sold the wattle trees on the area for E3, 000 - 00 payable at E500 - 00 per month. Another term of the sale agreement is that the timber to be removed by the end of 2001 and payment to be made in full before removal of wood.

This therefore, is the basis of the applicant right which motivated him to launch this application.

It appears from the papers that there has been a lot of correspondence and activity surrounding this issue.

The respondent's takes the view that the right applicant purports to have over the old quarry does not exist. Respondent fortifies its stance by citing a number of statutory provisions touching on the matter.

The first salvo by the applicant is that the area is a Swazi area within the meaning of a Swazi area as defined in the definition of Swazi Areas Act No. 41 of 1916. I was referred to Section 3 (1) of that Act.

It reads ippissima verba, as follows:

"subject to the powers conferred upon the Ngwenyama in Libandla by Section 94 of the constitution, the Swazi nation shall be entitled to the sole and exclusive use and occupation of Swazi areas..."

Respondent submitted that the Ngwenyama in the Libandla may exercise all rights of ownership over such land including the power to make grants, leases, or other dispositions, subject to such rights and interests and conditions as he may think fit (Section 94 of the constitution). The purported agreement of lease entered into between a chief and the applicant is invalid in terms of Section 94 of the constitution.

The third prong of the respondents attack is that the agreement is also invalid in terms of the safe guarding of Swazi Areas Act No. 39 of 1910 in that in terms of Section 3 of that Act no person other than a Swazi shall without the written permission of the Ngwenyama use or occupy any portion of a Swazi area. Furthermore that in terms of the Contracts by Swazi Chief Act No. 14 of 1924 Section 2 of that Act provides that no contract entered into or obligation undertaken by any Swazi chief shall be valid in so far as it affects the Swazi nation or portion thereof, unless the approval of the Ngwenyama thereto has been given in writing.

Respondent also is of the view that the agreement would in any event be invalid in that it is so vague as to be unenforceable. The area leased in terms of the purported agreement of lease is not properly described and its extent is vague and unascertainable.

It appeared from reading of the papers that respondent was stopped clearing wattle in the area by Mr. Duma who is the respondent's senior resident engineer for the project. The reason given by the respondent is that the procedures required by the Swaziland Environmental Authority has not been completed and no further clearing was done because of these requirements. A meeting was to take place at Nkoyoyo quarry site on Saturday the 10th October 1999, in order to allow members of the public to voice any concerns regarding the project for eventual input into the environmental impact assessment for the opening of the quarry. It also emerged that respondent require a quarry licence before it can begin to extract rock from the quarry. That respondent has taken steps to secure rights with regard to the quarry site. It also emerged in the papers that applicant owns a commercial quarry site. The papers also show that the applicant has obtained Swaziland citizenship through the "khonta" method on the 17th November 1982, under Chief Sipho Dlamini of the Esigangeni area.

Having outlined the facts of the matter I now proceed to determine the real issues in this dispute. The first issue to be determined is whether or not the withdrawal of the application was proper in terms of the rules. The second issue is whether the application for the dismissal of the application has any merit. The third and last issue which is intertwined with the latter issue is the question of costs to be awarded against the applicant in the event the court come to the conclusion that the application was ill conceived. I shall proceed to deal with the issues in seriatum.

I now proceed to determine the issue of the withdrawal. Mr. Flynn argued at great length on this aspect. The gravamen of his submissions in this regard is that the withdrawal does not conform with Rule 41 of the Rules of this court more particularly sub rule 1 (a). It appears to me that Mr. Flynn is correct that the applicant has not complied with the said rules. The rule provides that a person instituting any proceedings

may at any time before the matter has been set down and thereafter by consent to the parties or leave of the court. In the instant case this has not been done. I agree with Mr. Flynn 's submissions that this is a clear case of an abuse of the court process where a litigant after realizing the hopelessness of his cause opts to withdraw at the same time giving the court the impression that he was doing so as a result of the respondent conceding to certain facts. The applicant was well aware that the matter was to proceed but he elected to adopt this approach contrary to the rules. On the issue I rule that the applicant's Notice of Withdrawal dated the 25th October 1999, as invalid.

Now coming to the issue of the dismissal of this matter. Again I agree with the submissions made by Mr. Flynn in this connection. It is clear from the statutes cited by the respondent that the applicant has no right whatsoever on the land. It appears that the power to lease land on Swazi nation land lies with the Ngwenyama where the Ngwenyama in the Libandla may exercise all rights to ownership over such land including the power to make grants, leases, or other dispositions, subject to such rights and interest and conditions as he may think fit. These powers are conferred to the Ingwenyama by Section 94 of the Constitution. This means therefore, that the

purported agreement entered into between the chief and the applicant offends against Section 94 of the Constitution. Further, the statutes cited by the respondent are Apposite. These are Section 3 of the Safe Guarding of Swazi Areas Act No. 39 of 1910 and Section 2 of the Contract by Swazi Chief Act No. 14 of 1924 which provides that no contract entered into or obligation undertaken by any swazi chief shall be valid in so far as it affects the swazi nation or portion thereof, unless the approval of the Ngwenyama thereto has been given in writing. In the present case this has not been done.

Furthermore, the purported lease between the applicant and the chief is with respect so vague as to be unenforceable. The area leased in terms of the lease agreement is not properly described and its extent is vague and unascertainable. It is merely described in the lease agreement as "several hectares". This, I must say is vagueness in its extreme.

In sum, I agree in toto with the submissions made by Mr. Flynn on this aspect that the applicant has not proved a prima facie right to be entitled to an interim interdict. The applicant does not have any right whatsoever on the land on the basis of the statutory enactment cited on which I have already alluded to. The applicant brought an application which has backfired on him. It also appears from the papers and the various letters of correspondence filed of record that applicant has been trying to get the respondent to buy quarry from him. That this application was tailored to force the respondent to buy from his commercial quarry. Clearly, this is an abuse of the court process for one to seek a commercial advantage through the courts.

As an aside, it is my respectful view that since the court has found that the sale of the forest was invalid in law it would only be fair and equitable that the initial owner of the forest be adequately compensated by the respondent so that he may in turn compensate the applicant to the extent in which he had already paid for the forest after all in my view applicant bought the forest with a bona fide belief that the sale was valid in law.

Coming to the last issue for determination that of the costs to be levied as I have already concluded that the application should be dismissed. It is clear that this application was an abuse of the court process. I have already touched on some aspects of the abuse. An applicant in law is normally permitted to withdraw a claim, subject to an appropriate order as to costs, unless the withdrawal amounts to an abuse of the court's process (see Levy vs Levy 1991 (3) S.A. 614 (A) at 619 - 620 c).

My view on the matter is that this application was a clear abuse of the courts process and applicant should bear the brunt of punitive costs.

In the result, I dismiss the application with costs to be levied at attorney and own client scale and costs of counsel to be exempt from Section 68 of the rules.

S.B. MAPHALALA

JUDGE