

THE HIGH COURT OF SWAZILAND MHLATSI HOWARD DLAMINI

Applicant

And

PRINCE MAHLABA

1st Respondent

WILLIAM KELLY

2nd Respondent

Civil Case No. 3057/2003

Coram: S.B. MAPHALALA-J

For the Applicant: MR. S. MAGONGO

For the Respondent: MR. L. VILAKATI

RULING

(On points of law *in limine*) (9th September 2005)

Introduction.

[1] This application is a sequel to an urgent application before Masuku J who delivered his judgment on the 24th August 1999, where Applicant therein sought various forms of relief, *inter alia*, interdicting and restraining Applicant (who was 1st

Respondent then) 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**. The learned Judge in that case granted the order in favour of the present 1st Respondent against the present Applicant, prohibiting him and/or his agents from interfering with the fencing of the disputed area.

[2] In the present application brought in the long form on motion, the present Applicant is seeking an order, *inter alia* restraining and/or interdicting the 1st Respondent in erecting or putting steel fencing poles on a land belonging to him which is adjacent to Mhlaleni Caltex Filling Station.

Points of law in limine,

[3] The 1st Respondent in his Answering affidavit raised preliminary points attacking the application on a number of grounds, namely; i) that this court issued a final judgment on the same matter and therefore the matter is *res judicata* ii) the Applicant has sought leave to Appeal the judgment of 24th August 1999; iii) the Applicant has not satisfied the requirements of an interdict; iv) the 1st Respondent has not been served with the Notice of Motion commencing these proceedings; and v) the Applicant is coming to court with dirty hands. I shall address these points *ad seriatim* hereunder, thusly;

i) *The issue of res judicata*

[4] In this regard it is contended for the 1st Respondent that this court issued a final judgment on this matter on the 24th August 1999 (*per Masuku J*) and the same matter cannot be back to court. The 1st Respondent has relied on what is said by the authors *Herbstein and Van Wins en, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at 479 to the legal proposition that for a plea of *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 the same question of law or issue of fact in the sense that the decision could not have been legitimately or 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 form an intergral part of it, and would be *res judicata* in any subsequent action between the same parties in respect of the same subject matter, (see also the cases of *Narchi vs*

Richod NO. and another 1984 (3) S.A. 926 (C) at 934 B - C, Horowitz vs Brock and others 1988 (2) S.A. 160 (A) at 178 H r).

[5] It would appear to me and I agree with Counsel for the Applicant in this regard that the paramount question is whether the judgment by Masuku J was in respect of land where the 1st Respondent constructed a filling station, general garage, butchery and convenient shops or on the land in dispute herein. In other words did the first judgment deal with a different piece of land from the one in the present application? If I find that the court on the 24th August 1999, resolved it, I ought to dismiss the application but if not, I may refer the matter to oral evidence.

[6] After listening to the arguments by Counsel in this matter I have come to the considered conclusion that there is a dispute of fact in this matter which cannot be resolved on the affidavits. The crisp issue as I have outlined earlier on at paragraph 5 above is whether the land in the present application is different from the land in the application before Masuku J. This is the crux of the present case and I would order that *viva voce* evidence be led on this point. Therefore an inspection *in loco* ought to be conducted in this regard.

[7] In the result, for the afore-going reasons I order that oral evidence be led on the specified issue refer to above on a date to be arranged by the Registrar of this court. The other points raised, to stand in abeyance for the time being. The question of costs also reserved for the time being

S.B. MAPHALALA

JUDGE