



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1218/2010

In the matter between

**DUDU DLAMINI
BUSI DVUBA**

**1st Applicant
2nd Applicant**

and

**GRACE FOLELA
ZABI DLAMINI
CHIEF MATATAZELA N.O.
ATTORNEY GENERAL
CLIFFORD DLAMINI**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent**

Neutral citation: *Dudu Dlamini & Another v Grace Folela & Another*
(1218/10) [2013] SZHC 197 (09th September 2013)

Coram: Mamba J

Heard: 18 July, 2013

Delivered: 09 September, 2013

- [1] Civil law – Person cited by applicant as her co-applicant – such other person filing no papers to confirm this. Such other person not party to the proceedings and no order affecting her rights if any, in these proceedings may issue (against her)
- [2] Civil law and Procedure – application for vindicatory relief or interdict – requirements thereof – presumption of clear right and irreparable harm.

- [3] Civil law and Procedure – Application for vindicatory right – claim for possessory right to land governed under Swazi law and custom. Respondents claiming that the land was never occupied or possessed by applicant and was surrendered to the *umphakatsi* for re-allocation. Applicant failing to dispute this factual allegation. Such non-denial entitles court to treat the allegation as factually truthful. This is fatal to the applicant’s case. Application dismissed.
- [1] The applicants who are both female adults and siblings, are the granddaughters of the late Justinah Zwane of Nhlambeni Area who died in 1987. Their mother, Daisy Dlamini, was her daughter and she died in 2002.
- [2] Daisy Dlamini was married to Mr Shabalala, a Mozambican national, and they had their matrimonial home at Nhlambeni as well. It is, however, common cause that Mr Shabalala later left this place to settle somewhere else with another wife or fiancée. She left Daisy at their marital home and when Daisy died, the applicants were living with her at this home.
- [3] It is not clear on the papers herein whether this home was situate on a piece of land that was allocated to Mr Shabalala by the traditional local authority or it was land allocated to Daisy by her mother, (Justinah).
- [4] The 2nd respondent is the daughter of the 1st respondent who is a widow of the late Dingane Dlamini. Dingane Dlamini was one of three children of

Justinah Zwane. He died in 2009. The third respondent is the Chief of the area in question and the 5th respondent is one Clifford Dlamini who was allegedly sold the disputed land rights by the 1st respondent upon the death of her husband.

[5] The second applicant has only been cited in this application by her sister, the 1st applicant and has not filed any papers to confirm her participation in these proceedings. There is no indication that she is aware of these proceedings either. The first applicant asserts in her founding affidavit that the 2nd applicant is married and is employed as a police officer within the Royal Swaziland Police Services.

[6] As this application was filed in 2010, I have my doubts about the 2nd applicant's locus standi to sue herein in view of her marital status. She has, however, in reality not sued as she has filed no papers herein and therefore I need not make any finding on her standing in these proceedings. She is simply not a party herein and no order shall be made regarding her or any of her rights, if any, in these proceedings.

[7] It is common cause that the dispute over the land in question herein started before the death of Dingane and still persists unto this day; at least when the papers were filed herein about three years ago.

[8] The first applicant states that when Dingane wanted to evict or eject her from the land in question, the matter was in the first instance reported by her and decided in her favour by the family Council, by the *Umgijimi*, in the second instance, and lastly, by the Chief or Umphakatsi. She states further that notwithstanding these three rulings or decisions in her favour, Dingane insisted that she should vacate the relevant land and these acts of harassment have been inherited by the first and 2nd respondents herein. Consequently, she has approached this court for the following relief:

‘1. That the 1st and 2nd applicants’ right to the possession and occupation, of the land situated adjacent to the homestead of the Honourable Member of Parliament, Mr Frans Dlamini at Nhlambeni, Manzini Region, be confirmed.

2. That a rule nisi be issued calling upon the 1st, 2nd and 5th respondents to show cause on a date to be set by the Court why the 1st and 2nd and 5th respondents should not:

- 2.1 be interdicted and restrained from further harassing the 1st and 2nd applicants.
- 2.2 be interdicted and restrained from alienating the property described in paragraph 1 above.
- 2.3 be interdicted and restrained from developing, erecting or extending any building on the property described in paragraph 1 above.
- 2.4 pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to be costs on the attorney and own client scale and to include the costs consequent upon the employment of counsel.

3. That pending finalization of this application, an interim interdict be issued in terms of prayers 2.1, 2.2 and 2.3 of this notice.'

[9] Upon hearing the matter on 4th June, 2010 this court granted a rule *nisi* that 'the 1st, 2nd and 3rd respondents maintain the prevailing... or existing [condition] with regard to the land which is the subject of the dispute between the parties, pending hearing [and finalization] of this matter.'

- [10] My understanding of the above order, which is rather inelegantly couched, is that the respondents mentioned therein are interdicted and restrained from
- (a) harassing the applicants;
 - (b) alienating or disposing of the property in question and carrying out or erecting any buildings or structures thereon.
- [11] Mr Mazinyo Philemon Dlamini, who was at the material time, the *umgijimi* of eNhlambeni area confirms the rulings by the *umgijimi* and the *umphakatsi* attested to by the first applicant.
- [12] The 5th respondent has objected to the filing of the affidavit of Mr Mazinyo Dlamini because the 1st applicant has not referred to it in her founding affidavit. Whilst it is always prudent and indeed good practice for a deponent to refer to any annexure to his or her affidavit; a failure to do so in my judgment does not render the annexure inadmissible or not receivable in evidence. There is, therefore, no merit in this objection. It is certainly a technicality that does not address the real issues in this application. It is unmeritorious. It is refused.

[13] The 3rd and 4th respondents have not filed any papers in this application. That does not mean, however, that the court should as a matter of course, find against them. The 1st applicant must, notwithstanding this lack of opposition, still make out her case on the papers before me to justify the relief that she claims.

[14] In *limine*, the respondents assert that the first applicant has failed to meet the requirements of an interdict; namely that she has a clear or prima facie right to the disputed land. Again, I mention this point just to dismiss it. The 1st applicant has stated in her affidavit that the land in question was inherited by her and her siblings from their mother who in turn received it from Justinah Zwane. She has also stated that the re-allocation or assignment of the land to her mother was reported and approved by the relevant local authority. She is supported in her averments by the local Chief's runner. These allegations are, in my judgment, although they may be open to doubt or rebuttal, sufficient to ground a prima facie or even clear right in support of an interdict. See *Spintex Swaziland (Pty) Ltd v Nolwazi Charity Motsa and 11 others*, case 2142/12 (unreported judgment delivered on 30 April, 2013 and the case cited therein).

[15] It should also be borne in mind that the interdict sought here is in the nature of a vindicatory right. The 1st applicant alleges that the property in question belongs to her and her siblings. C.B. Prest, *Interlocutory Interdicts*, (1993) at 71 states that

‘The general rule is that the court will not grant an interim interdict without evidence of irreparable injury. In the case of vindicatory or quasi-vindicatory claims, however, it is factually presumed, until the contrary is shown, that the applicant will suffer irreparable harm if the interdict is not granted.

The principle is that the court is entitled to ensure that the thing which is the object of the interdict will be preserved until the dispute is decided. Where the application for a temporary interdict is based on the ground that the applicant is the owner of the thing sought to be interdicted, there is a presumption of irreparable injury if the interdict is not granted, but it is open to the respondent to defeat the claim for the interdict by rebutting the presumption.

It follows that the plaintiff in a vindicatory action to recover property held by the defendant under a claim of ownership is entitled to an interdict, *pendente lite*, restraining the defendant from alienating or encumbering the property and it is not necessary for the plaintiff, in

applying for such an interdict, to allege apprehension of irreparable damage or even intention on the defendant's part to alienate or encumber the property.'

[16] The 1st and 2nd respondents deny that the property in question belongs to the Applicants. The 5th respondent states that he never purchased any property from the 1st or 2nd respondent. He avers that he acquired the property by *kukhonta* – which is a Swazi traditional way of being allocated a piece of land by a chief – upon one being accepted as a subject of that particular chief. This has not been denied by the first applicant.

[17] The 1st respondent avers that the land in question was never ever owned by the Applicant's mother but by their grandmother Justinah. She avers further that after the death of her husband Dingane there developed a dispute over that piece of ground and the family then decided to surrender it back to the *umphakatsi*. It is her evidence further that the said surrender was accepted by the *umphakatsi*, which later redistributed or re-allotted it to someone else. This disputed land is different and separate from that land that was given to the 1st applicant and her husband, or her mother.

[18] The 1st applicant has not disputed the factual allegations made by the 1st respondent herein on the status of the land; namely that this land was never owned by the applicants or their mother but that it belonged to Justinah and has since been surrendered to the *umphakatsi* by the family. In turn the *umphakatsi* has since re-assigned or re-allotted it to someone else. The 1st applicant has not denied these crucial facts. Her failure to deny them, amounts, for purposes of this judgment, to an acceptance of them – as being truthful. This is fatal to her case. If the land was never ever hers or that it never belonged to her mother (Daisy), the edifice upon which her claim is based crumbles and her application cannot succeed. It must fail.

[19] Again, if the land belonging to her grandmother was surrendered to the *umphakatsi* by the family and the *umphakatsi* accepted it back as per Swazi customary law, it cannot lie in her mouth that such land belongs to her and her siblings. It belongs to the *umphakatsi* and in law, she has no greater claim or right over it than the *umphakatsi*.

[20] For the foregoing reasons, the rule *nisi* herein is discharged and the application is dismissed with costs.

[21] For the avoidance of doubt, the 2nd applicant is not a party in these proceedings as she was merely cited by the 1st applicant.

MAMBA J

For 1st Applicant : **Adv. Carmichael**

For 1st & 2nd Respondents : **Mr M. Dlamini**