IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1034/2016

In the matter between

DUDU ZIKALALA (NEE MOTSA)	**1st Applicant**
SIFISO ZIKALALA	**2nd Applicant**
and	
SINDI MASINA	**1st Respondent**
LOGOBA ROYAL KRAAL (Inner Council	**2nd Respondent**
NATIONAL COMMISSIONER OF POLICE	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

Neutral citation:	*Dudu Zikalala (Nee Motsa) & Another v Sindi Masina & Others* (1034/2016) [2016] SZHC 129 (20 July 2016)
Coram:	**MAMBA J**
Heard:	**15 July, 2016**
Handed down:	**20 July, 2016**

[1] Civil Law and Procedure – application – grounds of urgency to be set out in the founding affidavit and certificate of urgency. Where the respondent takes the law into his own hands and demolishes a building structure, this is sufficient ground for urgency to obtain an interdict against such destruction.

[2] Practice and Procedure – application for a final interdict or injunction – three requirements thereof restated; a clear right, an infringement or reasonable apprehension of infringement thereof and the lack of an alternative adequate remedy.

[3] Civil Law and Procedure – application – dispute of fact arising. Where disputes of fact that are irresoluble on the papers, the court has a discretion either to refuse the application or to refer the matter for oral evidence on the disputed issues.

[4] Civil Law and Procedure – application for an injunction to stop building on Swazi Nation Land. Ownership of land indispute. More than one traditional authority claiming sole jurisdiction over the disputed land. Matter for traditional authorities to resolve and not this court. Application dismissed.

[1] By Notice of Motion dated 08 June 2016, the applicants sought and obtained an *ex parte* order in the following terms:

> '1. The usual forms and procedures of the rules of this Honourable Court relating to service, time limits and hearing the matter urgently are dispensed with.
>
> 2. Applicant's non-compliance with the rules of this Honourable Court is hereby condoned.
>
> 3. That a Rule Nisi do hereby issue and returnable on the 24th June, 2016 calling upon Respondents to show cause why an order in the following terms should not be made final;
>
> 3.1 That the 1st Respondent be and are hereby interdicted and restrained from continuing and doing further construction works on the building (shop) belonging to the Applicants and Zikalala family situate at KaKhoza area, Manzini under Logoba Royal Kraal in

the Manzini District pending finalization of the matter in the relevant structures.

4. Directing the Royal Swaziland Police Force to ensure compliance with the order of this Honourable Court.
5. That prayers 3.1 and 4 above operate with immediate interim relief pending finalization of the matter.
6. That the order of this Honourable Court be served simultaneously with the notice of motion upon the 1st Respondent."

[2] The *ex parte* order was also based on the allegation that the matter was urgent and that the first respondent had threatened violence on the applicants or anyone acting on their behalf. An allegation that the first respondent was in the process of constructing or erecting the building complained of was also used as justification for the alleged urgency.

[3] After service of the rule nisi (obtained *ex parte* by the Applicants), the first respondent filed her opposing papers wherein she challenged, *inter alia*, the urgency in the matter and also the fact that the papers failed to satisfy the requirements of an injunction or interdict. The first respondent also stated that this was a matter that should properly be dealt with by the traditional authority that has jurisdiction over the land in question. She

argued that the applicants had failed to exhaust the local remedies available to them before bringing or filing this matter before this Court.

[4] In response to the challenge on urgency, the applicants in reply simply failed to address the issue. They have stated that this issue '…has been overtaken by events and the Honourable Court [has] deemed fit and appropriate in the circumstances to order that the matter be heard as an urgent application and granted prayers 1 and 2 thereof.' This assertion or submission is clearly incorrect. By permitting to hear the matter in the manner it did and issuing the order referred to above, the court was in no way closing the door to the respondents from challenging or contesting the issue. However worded or framed the court order may have been, it was not final. The respondents were at liberty to contest the urgency issue notwithstanding the preliminary or *prima facie* view of the court.

[5] On the issue of urgency, the applicants have stated that the first respondent has recently started the building of the shop and is in the process effectively destroying the family building. Without deciding the general or overall issue of jurisdiction, I am inclined to hold that this allegation or fact is a sufficient ground for urgency in the circumstances of this dispute.

[6] It is common cause that the building or shop that is under construction and in issue in these proceedings is situate on Swazi Nation Land in or around Logoba area in the Manzini region. It is also common ground that the land in question was originally allocated or allotted by the relevant authority to the family of the first respondent. This was way back before 1996. Both parties are also in agreement that the family of the first respondent concluded or entered into an agreement with the applicants' family whereby the latter was mandated to erect a shop building on the disputed site. This was in the late 1990s. The parties are, however, sharply in disagreement on the terms of this agreement. That is the bone of contention herein.

[7] It is the applicants'contention that the land and building of the shop was given to their family by the Masina family and this allocation of the land was reported to and approved by the Logoba Royal house which was the rightful local authority in the area. First respondent on the other hand disputes this. She states that the applicants' grandfather was authorized to erect the shop on behalf of her family. She states further that, it was a material term or condition of the said agreement that the Zikalala family would, after erecting and completing the shop structure, use it for its own benefit without actually paying rentals for a period of five years. This was or would compensate the applicants' family for whatever expenses or

monies expended on putting up the building. The first respondent states further that the agreement was entered into before 2000; that being the year that her father informed the Zikalala family "…to remove the shop structure as they had failed to adhere to their agreement as he wanted to proceed building rental rooms as per his initial idea. The Royal Kraal, … told my family that the land was designated as a business area so the shop would not be destroyed.' (see page 34 paragraph 9.3). To this assertion, the applicants lamely state that these "contents .. are denied as if specifically traversed and respondent is put to strict proof thereof.'

[8] The parties are also in disagreement as to which local traditional authority has jurisdiction over the area in question between Logoba and Masundvwini. Both authorities feature prominently in these proceedings; each ostensibly claiming authority over the area. For instance, the Masundvwini Royal Household claims that the disputed land and shop belongs to the first respondent whereas, earlier documentary material seems to reflect the applicants' family as the owner of the shop. The latter of course may, I guess, be explained in that the applicants' family were granted authority to operate the shop in the area, but not necessarily that the land belonged to that family. This, I think, would not be inconsistent with the first respondent's assertion that the Zikalala family

was authorized to run the shop for the first five years after completion of the building.

[9] I have highlighted the above controversies to show that this is certainly not a matter that can be dealt with by way of application. The said disputes of fact cannot be resolved on the papers before me. The controversies or disputes between the parties are not new. It is evident or indeed plain that both Royal Households mentioned above have in the past dealt with this matter in one way or the other in the past. Masundvwini seems to favour the claim by the 1st respondent whilst Logoba appears to be on the other side. At the end of the day, it is not for this court to adjudicate which of these traditional structures have the sole jurisdiction over the disputed land. Swazi traditional law and custom would appear to me to be the appropriate forum to resolve this apparent impasse. I say this of course mindful of the first respondent's statement that the Logoba traditional administration was dissolved and does not exist any more. Again, whether this is true or not, is a matter for another forum or another day.

[10] For the above reason – serious disputes of fact – I would discharge the rule nisi herein.

[11] The sharp or serious disputes of fact obviously have an impact on whether the applicants have satisfied the requirements of an interdict. The first and primary requirement or essential element of an interdict is that the applicant must establish that he has a clear or prima facie right to the subject matter of the dispute. Secondly, an infringement or reasonable apprehension of infringement of that right and thirdly an absence of an alternative remedy. (*See Universe (Pty) Ltd v Bongani J. Motsa N.O. and 3 Others (1574) [2014] SZHC 399 (21 November 2014*) and the cases cited therein). It stands to reason, I think, that where he has failed to establish this requirement on account of there being no factual basis upon which this claim of right is based, he has to fail in his application.

[12] Finally, since the dispute between the parties has served before the traditional local structures and has not been concluded thereat, it is totally not desirable for this court to make a pronouncement thereon. If a party is dissatisfied with the ruling of these traditional structures or fora, an appeal, I would believe, is still provided in terms of or under those structures, and not this Court. Forum shopping is not countenanced in this Court.

[13] These then, are my reasons for discharging the rule nisi issued by this Court on 10 June 2016.

MAMBA J

For the Applicants: Mr. M.V. Dlamini

For the 1st Respondent: S.K. Dlamini Attorneys & Co