IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 1131/2017

In the matter between:

CAL'SILE BEALE NEE MNISI **APPLICANT**

and

CHARLES VAN WYK **RESPONDENT**

Neutral Citation	:	Cal'sile Beale Nee Mnisi vs Charles Van Wyk (1131/2017) [2017] SZHC 182 (19 SEPTEMBER 2017)
Coram	:	MABUZA - PJ
Heard	:	10 AUGUST 2017
Delivered	:	19 SEPTEMBER 2017

SUMMARY

Civil Procedure – Applicant filed an urgent application for interdict – Held: Urgency self created – Abridged time limits to be reasonable and commensurate with the circumstances – Requirements for interdict not proved – Application refused and dismissed with costs.

JUDGMENT

[1] This matter came by way of urgency and I heard it on the 10th August 2017.

The Applicant sought an order in the following terms:

1. Dispensing with the usual forms and procedures relating to the institution of proceedings and the formal notices regarding service of processes and allowing that the matter be heard as one of urgency.

2. Condoning Applicant's non-adherence to the rules of court as pertain the institution of process.

3. An order interdicting and restraining the Respondent from interfering in anyway or form with the Applicant's ownership and/or possession of the piece of land falling under Portion 26 (a portion of portion 20) of Farm No. 51 situate at Ezulwini area, Hhohho District.

4. The Respondent be hereby ordered to remove forthwith any fencing material or building material blocking the right of way connection Portion 26 (a portion of portion 20) of Farm No. 51 situate at Ezulwini area, Hhohho District to the main road.

5. That the Respondent hereby removes any fencing or developments encroaching on Applicant's land under Portion 26 (a portion of portion 20) of Farm No. 51 situate at Ezulwini area, Hhohho District.

6. That prayer 4 of the application operates with immediate interim terms pending finalization of this application.

7. That the Respondent be ordered to pay the costs of this application on a punitive scale as between attorney and own client;

8. Further and/or alternative relief.

[2] The application is opposed by the Respondent.

[3] The founding affidavit is deposed to by the Applicant who has described herself as Cal'sile Beale nee Mnisi an adult Swazi female of Mantenga area, Ezulwini, Hhohho District. Together with her husband Micheal Austin Beale the couple operate a shop under the trading style 'Mantenga General

Dealer' and are owners of the title deed on which the business is situate (portion 26 – a portion of portion 20) of Farm No. 51 Ezulwini.

[4] The Respondent is Charles Van Wyk, an adult male Swazi of Ezulwini area, a son of the late A. J. Van Wyk who has been the known owner of the property which is now utilised by the Respondent. He has been cited in these proceedings by virtue of him being the person remaining in charge of the premises adjacent to the Applicant belonging to the late A.J Van Wyk and which the Applicant seeks to interdict herein.

[5] The Respondent raised critical points *in limine* which led to the demise of the application and urgency. I discuss these below.

[6] The time limits given by the Applicant to the Respondent were that he was to file his notice of intention to oppose on or before 16.30 pm on the 8th August 2017 and his answering affidavit on or before 9.30 am on 9th August 2017. The application was set down for hearing on the 9th August 2017 at 9.30 am. It was served on the Respondent's on the 8th August 2017 at 1.00 pm, the same date on which it was stamped by the Registrar.

[7] The Respondent says that he only saw the application at 3.45 pm after his return from South Africa and this forced him and his legal representatives to consult and to prepare his answering affidavit overnight and early hours of the morning of the 9th August 2017.

[8] He says that the notice was so short as to constitute no notice at all, called for a knee-jerk reaction and served as an ambush, thereby constituting an abuse of the process of the above Honourable Court. I agree.

[9] In paragraph 8.2 of the Founding Affidavit it is alleged that the Applicant only learned of the fencing and the gate on or about the **3rd August 2017**.

[10] However, in annexure **'MB 2"** to the Founding Affidavit, being the Applicant's attorneys' letter to the Respondent dated 19th July 2017, express reference is made to the closure of "the servitude" and the fencing and that the discovery was made by "we" (plural).

[11] The allegation that the Applicant only learned of the gate and fencing on the **3rd August 2017** is therefore denuded of any credibility and constitutes a misstatement of the true facts.

[12] There is no explanation for the delay in bringing the application as an urgent one; instead, the Applicant attempts to pull the wool over the eyes of this Honourable Court by alleging that she only learned of the alleged violation of her rights 5 (five) days before bringing the application.

[13] The application was filed 3 (three) weeks after said attorneys' letter.

[14] In addition to the above, when the parties first appeared before me on the 9th August 2017, the Respondent had filed his answering affidavit and Mr Mamba for the Applicant requested time to prepare and file a replying affidavit. I agreed and ordered him to file it within similar time frames as he had given to the Respondent. Alas, he was unable to comply and the affidavit was filed out of time. The lesson brought home to learned counsel for the Applicant was that condonation of non-compliance with the rules is not a right but an indulgence sought from the Court and the corollary that "do unto others as you would wish them to do unto you" is a sound adage which learned counsel should bear in mind whenever they abbreviate time to ridiculous and impossible limits.

[15] Abridged time periods must be reasonable and commensurate with the circumstances. To contend as the Applicant did that a four week delay does not matter where notice of less than half a court day had been given, is frivolous and mischievous, to say the least and cannot be accepted.

Disputes of fact

[16] I requested learned counsel for the parties to address me on both the point(s) *in limine* and the facts which they did.

[17] The Applicant described the Respondent as the owner of the property next to hers. As it turns out the property is not owned by the Respondent but by a trust. The Respondent filed proof per Deed of Transfer 712/2009 (the title deed) which is in favour of Mbhilibhi Family Trust.

[18] The Applicant's submission was that it was now that after the passing of AJ Van Wyk that his son the Respondent has wantonly reneged from the terms of the court order as applicable to the premises adjacent to hers in one or more of the following ways.

[19] On or about the 3rd August 2017 the Applicant discovered that the Respondent had erected a fence and which fence encroached into her property thus taking a chunk of our title deed land. The fencing has literally blocked the servitude of right of way connecting our shop and the main road. Actually the Respondent has erected a gate which he keeps locked at all material times much to our greater prejudice. I submit that this servitude has been in existence for as long as I can recall; ever since I was born I have known of this road.

[20] The Respondent denied that any servitude had been registered in favour of the Applicant and indeed the title deed has many servitudes recorded in it but the Applicant's property is not mentioned therein. A simple search in the Deeds Registry by the Applicant or her counsel would have revealed these facts and that the Applicant's application has no legal basis.

[21] The Respondent denied and says as regards the closure of the road by way of a gate, as aforestated, the gate is not on the Trust property and the Trust and I had and have nothing to do with it. The gate is on my brother's property, being the Remainder of Portion 20.

[22] At paragraph 10 of her founding affidavit the applicant states:

> "All the more the fence that the Respondent has erected not only blocks our right of way but has encroached to our land much against the positioning of the pegs which we were shown by a Surveyor not so long ago. It is my humble belief that the conduct of the Respondent is deliberate and full of malice in every respect."

[23] The Applicant fails to file a confirmatory affidavit from the said surveyor confirming the positioning of the pegs. Counsel for the Applicant conceded in argument that without the surveyor's confirmatory affidavit it was difficult to know the boundaries of the Applicant's property.

[24] The Respondent disclosed further information that the Applicant has failed to disclose to the above Honourable Court that their property and shop front onto the Ezulwini main road, with unrestricted access from said road.

[25] He also had the following information to impart:

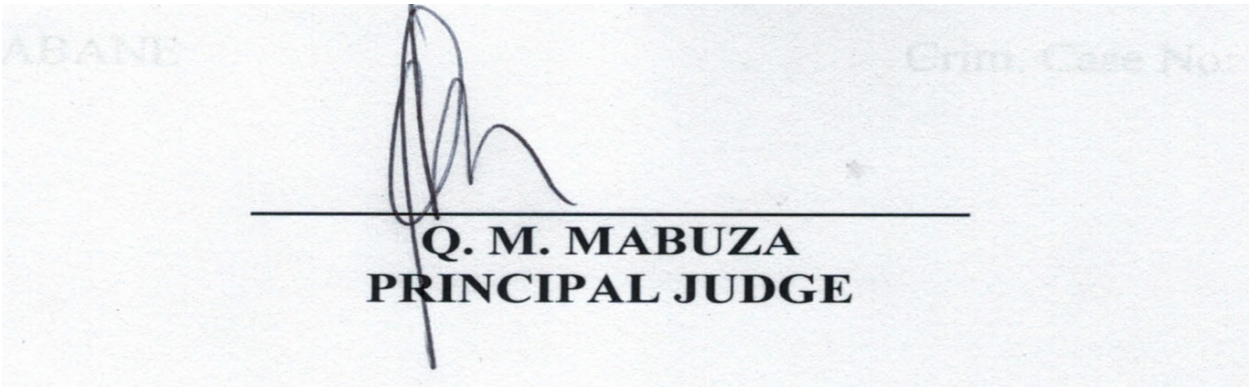
> " I respectfully refer to the copy of an aerial map attached hereto marked annexure **"CVW 2,"** marked out by the surveyors Route Geographic Consultants Swaziland (Pty) Ltd (hereinafter referred to as "Route") which:
>
> (a) shows that the Applicant's shop (circled by me) is close to the Ezulwini main road, approximately 25 (twenty five) metres;

(b) shows the boundaries in red and that the alleged servitude road (partially hidden by trees but clearly depicted on the upper section of the Trust property) runs over the Trust's property and my brother's property."

"As regards the fencing, same is on the Trust property, in accordance with the surveying pegs planted by Route some three months ago, and same does not encroach on the Applicant's property. Due to the severe time constraints imposed herein, I was unable to approach these surveyors for a confirmatory affidavit. As set out above, the Applicant's husband had been made fully aware of the above. He even requested that the surveyor shows him the pegs and his request was conveyed to them."

[26] It is clear to this Court that the Applicant launched this application where there are material disputes of fact which were not only forseeable but fully known at the time.

[27] The Applicant has in my view failed to prove the requirements of an interdict and the application is refused and dismissed with costs including the certified costs of counsel in terms of Rule 62 (2).



For the Applicant	:	Mr. T. Mamba
For the Respondent	:	Advocate M. Van der Walt