IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO. 7/2005

1st APPELLANT

2ND APPELLANT

3RD APPELLANT

4TH APPELLANT

NHLAVANA MASEKO KHOKHELA TFUMBATSA AARON

SLOMBO CBD BUSINESS DEVELOPMENT FOUNDATION

(PTY) LTD

and

GEORGE MBATHA **1ST RESPONDENT**

TERRENCE REILLY **2nd RESPONDENT**

JUDGMENT

Zietsman J.A.

This is an appeal against a decision of the High Court dismissing an application for a spoliation order. The trial judge in the court ***a quo*** dismissed the application on the grounds that the affidavits disclosed serious disputes of fact which could not be determined on the papers, and that this situation should have been foreseen by the applicants at the time when they launched the application.

The factual disputes concern the rights of the parties to occupy an area of land known as Mashiyazimile. The case for the applicants (the appellants) is that they were in peaceful and undisturbed possession of the land and were forcibly removed from the land by the respondents. The order they sought from the court **a *quo*** was stated in the following terms:

> (c) That a ***rule nisi*** returnable on a date and time to be determined by this Honourable court do issue calling upon the respondents to show cause why an order in the following terms should not be made final.
>
> > (i) That a spoliation order be and is hereby made against the respondents in terms of which the respondents are prohibited to deprive and/or disturb and/or interfere with the possession by the applicants of a piece of land known as Mashiyazimile - situated in Gomane between the Imbuluzane river and the road from Ngomane Township to Simunye.
>
> (d) That prayer C (i) operates with full and immediate effect pending the return date.
>
> (e) That respondent be ordered to pay costs of this application.
>
> (f) Further and/or alternative relief as this Honourable Court deem fit.

At the hearing of the matter in the court ***a quo,*** and on appeal before us, several issues were argued on behalf of the respondents. The answers to

two of these issues are, in my opinion, decisive of the matter. The two issues are:

(a) whether the application should have been dismissed on the ground of a failure by the applicants to join parties who have a substantial interest in the matter; and

(b) whether the applicants succeeded in establishing that they were in peaceful and undisturbed possession of the land when they were forcibly removed therefrom.

Many of the allegations made in the affidavits by both parties are disputed. For the sake of convenience, I will deal firstly with the facts alleged by the respondents.

The first, second and third applicants allege that they are members of the fourth applicant which is a company duly incorporated in terms of the company laws of Swaziland. The members of the company are all Swazi indigenous people. The applicants allege that the company was formed to co-ordinate the ploughing of sugar cane by indigenous Swazis. These allegations are admitted by the respondents.

The main factual dispute on the papers concerns the question whether the fourth applicant had the right to occupy the land known as Mashiyazimile. The respondents deny that the fourth applicant ever had that right.

The first respondent, George Mbatha, is described by the applicants as an adult Swazi "employed by Big Game Parks, a wild life business undertaking……..as a matter of fact, a wild life empire running the Hlane Royal National Park, Mlilwane Wildlife Sanctuary and Mkhaya Game Reserve ." The second respondent is described by the applicants as an adult Swazi male and Chief Executive Officer of Big Game Parks "and cited herein in his capacity as such and/or in his personal capacity." The respondents allege that although the second respondent is the executive officer, he is merely an employee of Big Game Parks Trust, as is the first respondent.

I come now to deal with the respondents' allegations concerning the land in question, known as Mashiyazimile.

The second respondent alleges that on or about 25 July 1967 he was appointed by the late King Sobhuza II to supervise the control of game on land known as Ehlane. This land was later gazetted to be a game sanctuary and is now known as Hlane Royal National Park and it is administered in trust by Big Game Parks Trust.

A corporation known as the Royal Swaziland Sugar Corporation, appointed by King Sobhuza II, from as early as 1977 leased and occupied adjacent land which land included Mashiyazimile. Around 1999 the Royal Swaziland Sugar Corporation wanted to expand its cane growing area and by agreement the Ngwenyama Trust was requested to amend Royal Swaziland Sugar Corporation's lease to exclude Mashiyazimile and to include Hlane Riverside, part of the land occupied by the Hlane Royal National Park. This request was agreed to and in the result the Hlane Royal National Park took over land, including Mashiyazimile, in exchange for Hlane Riverside which was then included in the Royal Swaziland Sugar Corporation's lease. Documentary evidence confirming these arrangements is attached to the respondents' opposing affidavit.

According to the respondents' allegations, therefore, the land known as Mashiyazimile was lawfully occupied by the Royal Swaziland Sugar Corporation from 1977 and by the Hlane Royal National Park from around 1999.

I now come to deal with the applicants' allegations.

The applicants allege that from as early as the 1960's they formed themselves into a farmers association with the intention of ploughing sugar cane. At a certain stage (no date is mentioned) they were removed from the land they occupied which was taken over by the Royal Swaziland Sugar Corporation. They were however given the undertaking that after 5 years they would be able to return to their fields. They allege that in April 1994 King Mswati III stated that the indigenous people of Mashiyazimile would be allowed to plough sugar cane in certain listed areas which included Mashiyazimile. The applicants allege, therefore, that they have the right to occupy Mashiyazimile and they deny that Mashiyazimile is part of the Hlane Royal National Park.

What is clear from the papers is that both parties have for a long period of time claimed the right to occupy Mashiyazimile and this has resulted in a long-standing dispute between them.

The following facts appear to be common cause:

In the year 2002 or 2003 the applicants started clearing bush on Mashiyazimile and were stopped from doing so by persons representing the Hlane Royal National Park. The applicants were told that Mashiyazimile belonged to the Hlane Royal National Park. On 11 July 2003 attorneys representing the applicants wrote a letter to the station commander at the police station in Simunye complaining that they had on several occasions been stopped by the first respondent from farming on the disputed land. On 1 October 2003 the applicants, through their attorneys, wrote a letter to the managing director of the Royal Swaziland Sugar Corporation complaining of the fact that rangers from the Hlane Royal National Park had interfered with their operations on the land. In the letter they stated that they had been instructed that the Royal Swaziland Sugar Corporation was taking over the land and was in the process of erecting a fence on the land. They allege in the letter that the Royal Swaziland Sugar Corporation has no right to take over the land. On 6 October 2003, in response to the said letter, the general manager of the Royal Swaziland Sugar Corporation wrote to the applicants' attorneys advising them that the land in question was part of the Hlane Royal National Park and that the fence line demarcated the boundary between its leasehold land and the land occupied by the Hlane Royal National Park. The applicants on 27 October 2003 wrote another letter to the station commander at Simunye stating that they had advised their clients to proceed with their activity of clearing the land for the purpose of farming thereon. They stated that any interference therewith by the Hlane Royal National Park rangers would be unlawful. On 12 December 2003 the second respondent wrote a letter to the applicants' attorneys stating unequivocally that Mashiyazimile formed part of the Hlane Royal National Park and stating that any invasion of the land by the applicants would constitute a criminal offence.

Despite what is stated above, the applicants allege that in January 2004 they again went onto the land and started clearing bush on Mashiyazimile. On 11 March 2004 they were forcibly removed from the land by the respondents' game rangers.

It is clear from what is stated above that the applicants' right to occupy Hlane Royal National Park was at all relevant times disputed by the respondents, and that this was communicated to the applicants several times.

I come now to deal with the two issues referred to earlier in this judgment namely the question of non-joinder and the question whether the applicants succeeded in proving that they were in peaceful and undisturbed possession of the land when the dispossession took place on
II March 2004.

The applicants chose to join only two respondents in their application, namely, the executive officer of Big Game Parks Trust and an employee of that Trust. The second respondent, the executive officer of the Trust, is cited by the applicants in his capacity as the executive officer and/ or in his personal capacity.

It is clear from the papers that the applicants were repeatedly told that Mashiyazimile was claimed to be part of the Hlane Royal National Park. This Park is administered in trust by the Big Game Parks Trust. No attempt was made by the applicants to join, as respondents, the Hlane Royal National Park or the Big Game Parks Trust, both of which have a direct and substantial interest in the disputed land. Mr. Dlamini for the applicants (appellants), pointed out that a trust is not a juristic person and that all its assets rest in the trustees. What is clear, however, is that legal proceedings can be brought by and against a trust. In such a case all of the trustees must be joined. See e.g. **Goolam Ally Family Trust v. Textile Curtaining and Trimming 1989 (4) S.A. 985 (C); Mariola and Others v. Kaye-Eddie N.O. and Others 1995 (2) S.A. 728 (W).** In the present case the failure to join, as respondents, the Hlane Royal National Park and the Big Game Parks Trust is a clear case of non-joinder. See **Prospect Investment Co. Ltd. v. Chairman, Community Development Board and Another 1981 (3) S.A. 500 (T).** See also **Safcor Forwarding (Jhb) (Pty) Ltd v. National Transport Commission 1980 (3) S.A. 108 (W).**

In the circumstances the orders sought by the applicants could not be granted without the Hlane Royal National Park and Big Game Parks Trust being joined as parties in the application.

The next point I will deal with is the question whether the applicants succeeded in proving that they were in peaceful and undisturbed possession of the land when they were removed therefrom.

Long before they moved onto the land in the year 2004 the applicants had already been removed from that land and were aware of the fact that their right to occupy the land was disputed. They were further aware that if they attempted to do so they would again be forcibly removed therefrom.

An applicant claiming a spoliation order must prove that when he was dispossessed his possession was peaceful and undisturbed. His possession must have been a sufficiently firm and established possession. The remedy is not open to a person whose ***de facto*** control is not an accomplished fact, and who is in effect being dislodged by the person already in possession of the property. In such a case his dislodgement amounts to a justifiable counter-spoliation. If the recovery of the property is ***instanter*** in the sense of being still a part of the **res *gestae*** of the act of spoliation, it is a continuation of the breach of peace which already exists. See in this connection the case of **Mbangi and Others v. Dobsonville City Council 1991 (2) S.A 330 (W).** See also **De Beer v. Firs Investments Ltd 1980 (3) S.A. 1087 (W); Ness and Another v. Greef 1985 (4) S.A. 641 (C).**

In the present case the land was being occupied by the Hlane National Park and the applicants were aware of the fact that their right to come onto the land was disputed and would be resisted. It cannot in the circumstances be said that when they again moved onto the land they were in peaceful and undisturbed possession thereof. For this reason also their application, seeking a spoliation order, could not succeed.

In view of the above findings it is not necessary for us to deal with a further submission made on behalf of the respondents, namely that the applicants were merely ***detentors*** attempting to advance the interests of the indigenous people, and did not have ***locus standi*** to bring the application.

There are two further matters to which I wish to refer.

A point taken by the respondents is that the application, brought as a matter of urgency, should not have been entertained by the High Court as it was in fact not an urgent matter and therefore did not justify a noncompliance with the rules of court. Bearing in mind the fact that the right of the applicants, or the persons whom they purported to represent, to occupy Mashiyazimile was the subject of a long-standing dispute I would agree that there was no justification in bringing the matter before the court as a matter of urgency. The actions of the applicants in going onto the land, knowing that their right

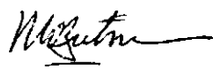
to occupy the land was disputed and that they would in all probability be forcibly removed therefrom, and then when they were removed bringing the matter before the court as a matter of urgency, cannot be justified.

The final point I wish to deal with concerns the heads of argument filed by counsel for purposes of this appeal.

This matter was set down to be heard in this Court during the Appeal Court session starting on 13 June 2005. The matter was in fact heard

on 16 June 2005. The appellants' heads of argument, which should have been filed 28 days before the hearing of the matter, are dated 8 June 2005. The respondents' heads of argument are dated 13 June 2005. There was no application by either counsel for condonation of the late filing of the heads of argument, and no written reason given for this failure to comply with the rules of this Court. This disregard for the rules is becoming prevalent. In a circular dated 21 April 2005 practitioners were again warned that failure to comply with the rules in respect of the filing of heads of argument would be regarded with extreme disapproval by this Court and might be met with an order that the appeals be struck off the roll or with a punitive cost order. This warning is hereby repeated.

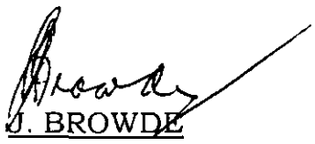
For the reasons set out above the appeal in this matter is dismissed with costs.



N.W. ZIETSMAN

JUDGE OF APPEAL

I agree



J. BROWDE

JUDGE OF APPEAL

I agree

J.H. STEYN

JUDGE OF APPEAL

Delivered on the day of June 2005.