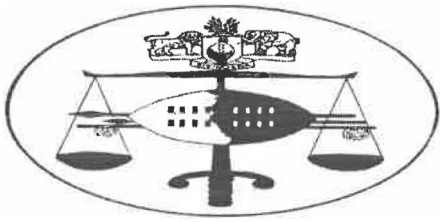

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No.: 93/2018B

In the matter between:

ETHEL DLAMINI (BORN GULE) Appellant

And

PRINCE CHIEF GASAWANGWANE Respondent

In re:

ETHEL DLAMINI (BORN GULE) Appellant

And

PRINCE CHIEF GASAWANGW ANE Respondent

Neutral Citation: *Ethel Dlamini (Born Gule) vs Prince Chief GasawaNgwane* (93/20 l 8B) [2019] *SZSC* 40 (*8 October 2019).*

Coram: M.C.B. MAPHALALA CJ, S.J.K.MATSEBULA AJA AND J.M. CURRIE AJA.

Heard: 17th September 2019

Delivered: 9th October 2019

SUMMARY: *Civil Procedure - Late filing of the record- - Application for condonation did not meet required threshold - Court mero motu, in the interests ofjustice granted Condonation - Costs awarded against attorney de boniis propriis for negligence of attorney - appeal for an interdict pending determination of complaint lodged to Regional Administrator - requirements for such an interdict considered-Held that Appellant had met the requirements of an interim interdict and entitled to same*

- Court hasjurisdiction to grant an interim interdict pending determination of a dispute by traditional structures.

JUDGMENT

CURRIE-AJA

INTRODUCTION

[1] The appellant filed an application in the Court *a quo* for an interim interdict pending the determination of a complaint made by the appellant to the Regional Administrator, Shiselweni Region. The appellant sought the following orders:

(a) That the respondent be interdicted from preventing the appellant from installing a fence around the old Umphakatsi of Qomintaba, Lavumisa where she resides;

(b) That the respondent be interdicted and restrained from preventing the appellant from constructing a new toilet at the old Umphakatsi where she resides;

(c) That the respondent: be ordered to restore the field he dispossessed the appellant of and that he re-install the barbed wire fence around the said field.

[2] The Court *a quo* refused to grant the application resulting in the instant appeal.

BRIEFFACTUAL BACKGROUND

[3] The appellant was married in 1977, to the respondent's brother, the late Prince Lomahasha in terms of Siswati customary law. Since her marriage the appellant lived at Qomintaba Umphakatsi and bore five children. She was given a field by Prince Tsekwane in which to grow crops which she did until 2015 and she enjoyed peaceful and undisturbed possession of the field. The Umphakatsi was fenced and access to the Umphakatsi was

through a gate which opened every morning to allow community members to enter.

[4] After the death of Prince Tsekwane the respondent was installed as Chief of Lavumisa and he constructed his homestead across from the old Umphakatsi and this became the new Umphakatsi where community meetings are held. Pursuant to this construction he removed the cattle kraal and the roof of the main hut, and ploughed the field which was in the undisturbed possession of the appellant, without informing the appellant or seeking her consent.

[5] The appellant is the only one left at the old Umphakatsi where she lives alone following the death of her husband, save that occasionally her children or grandchildren stay with her from time to time. In 2016 she began constructing a new toilet on the old Umphakatsi as the old toilet had filled up and had become a health hazard. The respondent, without notice to the appellant, sent men to fill the new toilet. The appellant feels that the respondent is intent on driving her out of her homestead.

[6] As a result of the actions of the respondent the appellant lives in a home that is neither safe nor protected. Domestic animals including goats,

donkeys and cattle roam around the homestead at will and defecate all over her property. She is also not safe from intruders.

[7] The appellant's children commenced fencing the homestead in order to protect her and her property whereupon she was immediately served with an order interdicting her from fencing the homestead. The appellant has also been deprived of her only field in which to plant crops.

[8] The appellant has lodged a complaint against the respondent with the Regional Administrator of the Shiselweni district, whose decision is still awaited. In the interim she does not live in a secure or hygienic environment. It is her case that she has a *prima facie* right to the homestead in that she has lived there since 1977 including the fields allocated to her by Prince Tsekwane.

[9] In the circumstances the appellant felt that she had no alternative remedy but to pursue an interim application in the High Court.

[10] The court *a quo* dismissed the application, finding firstly, that the relief sought by the appellant was final in nature. Secondly, that to grant such orders would usurp the powers of the Regional Administrator. Thirdly, that there was an alternative to remedy the prayers sought in that when the

court *a quo* held an inspection *in loco* it was discovered that it was intended to construct a joint perimeter fence which would encompass both the old Umphakatsi and the new Umphakatsi. There was a pit latrine toilet to be shared by both the old Umphakatsi and the new Umphakatsi as well as shared fields. Having discovered these facts the learned judge *a quo* came to the conclusion that the appellant does not suffer any prejudice pending the decision of the Regional Administrator.

CONDONATON

[11] The appellant had noted au appeal against the judgment of the court *a quo* on the pt November, 2018. The record was filed on the 12th February 2019, more than two months late and thus out of time in terms of Rule 30 (1) of this Court. There was no application for an extension of time in terms of Rule 16(1) and in accordance with Rule 30(4), the appeal was deemed to have been abandoned. The appellant filed an application for condonation in terms of Rule 17 for failure to comply with Rule 30 (1). The appellant's counsel sought leave to submit heads of argument in respect of the condonation application from the bar and the application was refused. The appellant's attorney submitted that the file was inadvertently archived and that this was the reason for the delay in filing the record. He argued that there are good prospects of success on appeal in that the court *a quo* held

that the application was for final relief whereas the appellant had only sought an interim interdict pending the final determination of the dispute by the Regional Administrator. These allegations were merely a re-statement of the notice of appeal and the applicant did not deal in detail with the prospects of success as required.

[12] The application was opposed by the respondent on the basis that the appellant has failed to demonstrate her prospects of success on appeal and had merely re-stated the grounds of appeal in the notice of appeal. Furthermore, the respondent contended that the appellant had not demonstrated that she would suffer irreparable harm if the interdict were not granted.

[13] The appellant has simply ignored the well established law in Eswatini and the application has been brought in defiance of the Rules of this Court and at the peril of the appellant. Not only was there not an application for extension of time to file the record in order to ward off a deemed lapse of the appeal but insofar as an application for condonation could be accepted instead, the appellant's application fell short woefully. There is a plethora of authorities regarding the requirements to be met by a party applying for extension or condonation which the appellant has ignored. The

requirements include that a party applying for condonation is required, as soon as becoming aware of the omission or commission, to launch an application for condonation, in which application the party must address fully the prospects of success and must give a reasonable explanation for the omission or commission. See De Barry Anita Belinda and A G Thomas (Ptv) Ltd Appeal Case No 30/2015) and in Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015, the Court referred to the dictum in Supreme Court case of Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No. 21/06 at paragraph 7 to the following: "It required to be stressed that the whole purpose behind Rule 17 ofthe Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter,

(2) the adequacy of the reasons given for the delay, (3) the prospects of success on Appeal and (4) the Respondent's interest in the finality of the matter."

[14] The appellant has been dilatory in prosecuting the appeal but has also been negligent in failing to {fle a proper application for extension and/or condonation together with heads of argument.

[15] The appellant is an elderly widow living on her own in a rural homestead and it appears, amongst others, that her safety and health is at stake and that there is a significant infringement of her dignity. Notwithstanding the defects in the applicant's application referred to above, the Court *mero motu* and reluctantly granted the application for condonation in the interests of justice, as is set out more fully hereunder and in order that the appellant would not suffer prejudice as a result of the negligence of her attorney.

[16] This case has extraordinary features and the leniency of this Court in granting the application for condonation in the particular circumstances of this case should not serve as a precedent for the relaxation of the requirements that a party ought to meet in order to be successful in an application for extension orcondonation, See **Mfanukhona Maduna and two others v Junior Achievement Swaziland (105/20170 (2018]** SZSC **31 (2018)** Civil appeal No. 105/2017.

APPELLANT'S ARGUMENT

[17] The appellant submitted that the dispute between the parties arose as a result of the respondent removing the appellant's fence, dispossessing the appellant of the field she had enjoyed and occupied for many years, and

the respondent's refusal to allow the appellant to construct a pit toilet on the old Umphakatsi.

[18] The appellant's counsel further argued that the appellant's safety is at risk from intruders and her home is not protected from domestic animals which roam around her homestead and defecate on her property. She does not have a field to plough as the field which was given to her by her father-in-law Prince Tsekwane has been taken away by the respondent. The old pit toilet has filled up, is unsafe and is a health hazard.

[19] The appellant is aware that her substantive dispute with the respondent is to be decided according to Siswati customary law by the traditional structures. All she is seeking is for the orders sought to be granted on an interim basis pending the final determination of the dispute by the traditional structures. Appellant relies on the case of John *Bov Matsebula & three others v Chief Madzandza Ndwandwe and Ingcavizivela Famers Assocation Limited - Case no. 15/2003 at page 13* where the learned Judge stated:

"What has been referred to the King is the determination of the rights of the parties to the disputed land. What the Applicants sought to protect was the undisturbed possession (which was clearly established on the papers) pending the determination of the rights of the parties by His

Majesty the King. The Applicants did not seek an order from the High Court to determine those rights."

Appellant's counsel argued that, with respect, the court *a quo*, was incorrect in finding that the orders sought would usurp the powers of the Regional Administrator.

RESPONDENT'S ARGUMENT

[20] The respondent has opposed the appeal and contends that the relief sought was essentially final in nature.

[21] The respondent further submitted that the issue of irreparable harm does not arise. The appellant has the use of a shared toilet within the new Umphakatsi, a joint perimeter fence will be constructed around both the old and the new Umphakatsi and there are shared fields.

[22] The Court *a quo* came to the conclusion that the court *a quo* had jurisdiction to grant interim interdicts whilst matters are adjudicated upon elsewhere, be it in traditional structures or in other subordinate jurisdictions.

[23] The learned Court a *quo* considered the requirements for an interim interdict and the relevant case law and came to the conclusion that the

appellant was seeking a final interdict and not an interim interdict. The Court *a quo 's* reasoning was that the appellant sought an order granting her the right to (1) install a fence around the old Umphakatsi, (2) construct a

new toilet and (3) have the field restored to her and that to grant such an order, would usurp the powers of the Regional Administrator and that the effect of the orders sought was final in nature.

[24] The learned Court *a quo* apparently was also of the view that a shared fence and toilet would cure the prejudice complained about by the appellant.

FINDINGS OF THIS COURT

[25] It is clear that the late filing of the record was clearly due to the negligence of the appellant's attorney. Furthermore, having discovered that the filing

of the record was out of time, he failed to prepare a comprehensive and detailed application for extension or condonation, the principles of which have been enunciated in this Court in many decisions. Even when he knew the matter was on the roll, he failed to file heads as required in terms of the law.

[26] Whilst the Court *mero motu* granted condonation in the interests ofjustice, it is the view of this Court that the attorney ought to be penalised for the dilatory manner in which he handled the appeal and for his generally

cavalier disregard of the Rules. His conduct therefore should be met with an appropriate costs order;

(27] The appellant has sought to protect her undisturbed possession of her homestead and field pending the determination of the rights of the parties by the Regional Administrator. She did not seek an order from the Court *a quo* for a final determination of these rights.

[28] The first ground of appeal is that the court *a quo* erred in fact and in law in holding that the Appellant sought a final interdict.

(29] In the case of *David Themba Dlamini v Sylvian Longendo Okonda and Seven Others* Civil Case No. 1995/2008 the learned judge stated the following:

"14. It is well-settled that an applicant who seeks an interim interdict should establish the following essential requirements: firstly, a right which is *thoughprimafacie* established is open to some doubt, namely, that he has a *prima facie* right. Secondly, a well grounded apprehension of irreparable injury if the interim relief is not granted. Thirdly, that the balance of convenience favours the grant of an interim interdict. Fourthly, that there is no other satisfactory remedy.

See cases of *Setlogelo v. Setlogelo AD 221 at 227; Erickson Motors Ltd v. Protea Moto:s and Another 1973 (3) SA 685 (AD) at 691."*

[30] The Court has jurisdictionto determine an application for an interdict to preserve the *status quo* pending a determination of a dispute over the ownership of land under 'the jurisdiction of a Chief in terms of Siswati customary law. The appellant has established the prerequisites of an interim interdict and was entitled to the relief sought. See *Elgin Maguduza Makhubu v Donald Mandlakayise Ndlovu and Seven Others,* Civil Case No. 824/2013 [2014] SZHC 220.

[31] The nature of the relief sought is not final in nature. In the event of the Regional Administrator finding in favour of the respondent it would be a simple task to remove the fence and fill up the toilet.

[32] Furthermore, the appellant is an elderly woman living on her own in a rural area and she is entitled to protect herself and her property from intruders whether they be human or animals. She is also entitled to the protection of her dignity and being forced to use a communal toilet is a violation of this right. The Constitution of 2005 provides as follows:

"18. (1) The dignity of every person is inviolable."

19.(1) A person has a right to own property either alone or in association with others.

(2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied - ...•.... "

[33] The appellant has been deprived in an apparent arbitrary fashion of the fields given to her by her father-in-law and is being forced to live in insanitary and degrading conditions whilst the outcome of the decision of the Regional Administrator is awaited. Refer The Government of Swaziland vs Aaron Ngomane Civil Appeal Case No. 25/2013 where it was stated:

"It is universally recognised that human dignity is directly the dignity of each human being as a human being. This encapsulates the viewpoint that human dignity includes the equality of human beings. Discrimination infringes on a person's dignity. Human dignity is a person's freedom of will. This is the freedom of choice given to people to develop their own fate. Human dignity is infringed if a person's life or physical or mental welfare is harmed. It is infringed when a person lives or is subjected to humiliating conditions which negate his

humanity. It envisages a society predicated on the desire to protect the human dignity of each of its members."

ORDER

[34] I accordingly make the following order:

1. The appeal succeeds.
2. The order of the Court *a quo* is set aside and substituted with the following order:

(a) The respondent is interdicted from preventing the Appellant from installing a fence around the old Umphakatsi of Qomintaba in Lavumisa.

(b) The respondent is interdicted and restrained from preventing the applicant from constructing a new toilet at the old Umphakatsi of Qomintaba in Lavumisa.

(c) The respondent is ordered to restore the field he dispossessed the

appellant of and the' Respondent is ordered to re-install the barbed

wire fence around the field.

3. No order as to costs.

J. M. CURRIE

ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

S.J.K. MATSEBULA

ACTING JUSTICE OF APPEAL

For the Appellant: Z. MAGAGULA

For the Respondent: N.J. DLAMINI