IN THE HIGH COURT OF SWAZILAND

Held at Mbabane | Case No.: 774/2014

In the matter between

MANDLA MATSENJWA | **Applicant**

And

SIPHO ZWANE | **1ST Respondent**

LUHLOKOHLA UMPHAKATSI | **2ND Respondent**

Neutral Citation: *Mandla Matsenjwa v Sipho Zwane & Another (744/2014) [2018] SZHC 45 (15 March 2018)*

Coram: Hlophe J.

For the Applicant: Mr J.M. Mzizi

For the 1st Respondent: Mr N.D. Jele

For the 2nd Respondent: No Appearance

Summary

Application Proceedings –Interdict –Requirements of an interdict –Whether requirements met –

Applicant seeks an order interdicting and restraining the Respondents from building on Swazi Nation land allegedly given to him as a gift by one of the previous occupiers of same –Respondent allegedly allocated same land previously given applicant by the other members of the family that had right of occupation over it –Allocation of land to the Respondent confirmed by the Umphakatsi following a customary law land allocation called Kukhonta –

Whether applicant has made a case for an interdict –Whether this court has jurisdiction to entertain the matter – Applicant has not established a clear right – Interdict must accordingly fail –Owing to the peculiar facts of the matter, each party is to bear its own costs.

JUDGMENT

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[1] The applicant instituted these proceedings under a certificate of urgency seeking inter alia an order of this court interdicting and restraining the First Respondent from engaging in construction works on a piece of land he described as his obtained (through what he calls customary possession of land) as well as another one ordering or directing the First Respondent, or in

his failure to do so, the deputy sheriff for the Manzini District to forthwith demolish whatever structures the First Respondent had put up on the land forming the subject matter of these proceedings. These prayers were initially sought to operate with immediate and interim effect pending finalization of the application. There was further sought a costs order against the First Respondent.

[2] It must be pointed out that following the fact that the matter was opposed when mentioned in court together with the nature of the relief sought when viewed against the backdrop of the nature of the law regime that governed the land in question, which is to say the strength or otherwise of the case brought to Court, this court would not grant the interim order sought. This resulted in only the time limits for filing further papers and the final hearing date being set.

[3] It is otherwise imperative that I record my regret at the time it has taken for the judgement to be prepared and availed. The reality is that owing to the amount of work load at the time including this Court being then seized with a lengthy criminal trial, this matter and others took a back sit and there were

no reminders on the Judgement having to be issued. This was later compounded by the transfer of the Clerk of Court to whom I depended for reminders on outstanding matters. The situation was eventually changed by the reminder brought to my attention by the Respondent's attorneys through the Registrar for which I am highly indebted.

[4] The common cause background to the matter is that the applicant was given the piece of land forming the subject matter of these proceedings as a gift by a certain elderly member of a Ndzinisa family which occupied the land in question through Swazi Law and Custom. She was allegedly known as Phiwangubani Sarafina Ndzinisa (Nee Nhleko). This gift is said by the applicant to have seen in recognition of the latter's having built the said Phiwangubani Sarafina Ndzinisa a house.

[5] Other than an allegation that the said Phiwangubani Ndzinisa had as a widow obtained or inherited the possession of the land concerned through Swazi Law in Custom, it is not explained what position she held in the Ndzinisa family including her competence or qualification in terms of Swazi Law and Custom to inherit and be able to donate or give other members of

the public such land as a gift or simply put, her entitlement to alienate such land in terms of Swazi Law and Custom including the effect of such a gift.

[6] Whatever can be said in the giving of such land to the Applicant by Phiwangubani Ndzinisa, it is not alleged nor is it proved that he ever Khontaed for the land in question to the local traditional authority in keeping with Swazi Culture on matters of land governed through Swazi Law and Custom. Applicant seems to have contented himself with alleging that he informed a certain Samuel Siyeyi Simelane whom he defined as Sibondza Sendzawo (An elderly Overseer of the area) about his gift. Indeed the said Mr Simelane did file an affidavit confirming this contention. They however say nothing about the Applicant having Khontaed for the land in question with the Umphakatsi. The question to revert thereto eventually is whether or not it was enough, in keeping with the relevant law, for the Applicant to simply accept a gift of that nature without bringing to the attention of the Chief and eventually paying the Khonta price for it.

[7] According to the Applicant, this was the position when on the 3rd June 2014 he found the First Respondent busy with construction on the same piece of

land he contends had been given to him as a gift. Phiwangubani Ndzinisa, Samuel Simelane and the Inner Council's Secretary knew nothing about the person who was busy constructing a structure on the piece of land applicant considered his. Having been advised by the Police that he needed to seek relief from this Court, the applicant says that he instituted these proceedings seeking the reliefs referred to in the first paragraph herein. This was after he had failed to obtain relief from all the other structures of the area including the area's Indvuna, according to him.

[8] Applicant argued that he was the only one to build over the land in question and that the First Respondent and those acting at his behest had to be interdicted forthwith from carrying on with the construction there, including an order for the destruction of whatever structures had already been built there.

[9] The First Respondent on the other hand denied having no right over the land in question. He contended that he was allocated the land in question by the Ndzinisa family subsequent to which he had Khontaed to the second Respondent as the Umphakatsi of the area on the 13th November 2011.

Confirming that he had Khontaed in that area, the First Respondent contended that his elder brother had to accompany him to the Umphakatsi for introduction purposes subsequent to which he was taken to the land in question by the Inner Council, for identifying same (kubopha lifindvo). This was followed by his paying the Khonta beast he says. It is not in dispute that the procedure as adumbrated herein above signifies the Khonta system and that such a procedure had the effect of according the person on whose behalf with certain strong possessory rights over the land in terms of custom.

[10] According to the First Respondent there later ensued a dispute between the two Ndzinisa Family factions as described above, with each faction claiming to have allocated the land in question to either of the parties. This dispute according to the First Respondent was resolved by the Umphakatsi and the Ndzinisa family through the applicant being given three fields while the First Respondent was allocated two fields. I note that this has not been disputed by either of the other parties which means that it is accepted as a fact.

[11] Having set out the background in the manner he did, the First Respondent took a point in limine in which he contended that this court had no

jurisdiction to hear and determine the present dispute between the parties as such a dispute allegedly concerned the application of Swazi Law and Custom which is the law regime that allegedly governs the land tenure system applicable herein.

[12] Whatever the merits or demerits of the current dispute being a matter for determination by Swazi Law and Custom or otherwise, the point here is that this Court is not really being called upon to determine the correct or proper possessor or owner of the land in question, than it is being called upon to by the applicant to interdict whatever harm is viewed to be occurring. I cannot agree that this Court has no power to determine the issue of a mere interdict, whose considerations should only be whether or not the requirements of an interdict are met.

[13] In other words I see no reason why an Applicant who can prove that he was lawfully allocated the land in question in line with the dictates of the appropriate law, should not be able to interdicted any unlawful interference, if anything pending the finalization of the major dispute by the appropriate authority.

[14] Concerning the issue at hand, the question should be whether the applicant meets all the legal requirements of a final interdict which in law are spelt out as follows in **Herbstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta and Company at page 1064-1065:**

> *"In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory an applicant must establish:*
>
> *(a) A clear right;*
>
> *(b) An injury actually committed or reasobly Apprehended; and*
>
> *(c) The absence of similar protection by any other ordinary remedy."*

See also: **Setlogelo Vs Setlogelo 1914 AD 221 at 227**.

[14] It is a settled position of Swazi Law and Custom that one acquires Swazi Nation land through the process of land allocation called Kukhonta. It seems to me that the Applicant would only be able to establish a clear right

to the relief he seeks if he can show that he had been allocated the land in question in terms of this custom. Indeed in his replying affidavit the applicant sought to suggest he was still going to engage on the process of formal land allocation called Kukhonta.

[15] Given that it is not in dispute that the process of Kukhonta can only be properly done if the traditional authority, namely the Chief or the Umphakatsi, has been formally approached through the Indvuna and Libandla by the person who intends to Khonta after which he is allocated such land, which is clearly identified followed by his having to pay the Kukhonta beast, there can be little doubt that where such a procedure has not yet been followed, then whatever rights the person given the land may have, they are very limited and cannot be recognized by the Umphakatsi and by extension the entire community until the entire process has been fulfilled. On how the Khonta process is effected, including its meaning and effect, I had occasion to cover same, albeit briefly in the case of **Dorah Magaret Matola V John Armando Matola High Court Case No. 1712/2013** where an expert in Swazi Law and Custom was called and confirmed it. I note that this procedure as adumbrated in that case has not been covered in the case of the applicant.

[16] It seems to me that it is not in dispute that if the applicant had not yet Khontaed, he obviously cannot seek a final interdict as he certainly has not established clear right over the land in question. Whatever rights vest in the Applicant following the gift he got with regards the land in question including its extent and effect are in my view matters to be determined by the appropriate traditional authority which this Court is not and cannot.

[17] The Applicant having failed to establish a clear right has not met the requirements of an interdict and should on this point alone not succeed. As indicated above whether or not each one of the parties was allocated such land are issues for determination by the appropriate Umphakatsi or Customary Law Court.

[18] Whereas the general rule is that costs follow the event, I note that such is not a rule of thumb as this Court has a discretion to exercise taking into account the special circumstances of each matter. In my view of the acknowledgement by the parties that the dispute between them was eventually resolved by the Ndzinisa family who had allocated both of them

the land in question in the first place, possibly with the involvement of the Umphakatsi concerned, and considering the fact that from that decision they are neighbours who reside next to each other and will always need each other therefore, I direct in the spirit of good neighborliness, that each party will have to bear its own costs.