



**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

CASE NO 1536/20

HELD AT MBABANE

In the matter between:

GUGU MOTSA

APPLICANT

And

BONGANI AUSTIN DLAMINI

1st RESPONDENT

NATIONAL COMMISSIONER OF POLICE

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

Neutral Citation: *Gugu Motsa vs Bongani Austin Dlamini & 2 Others [1536/20]*
[2020] SZHC 202 (5 October 2020)

Coram: LANGWENYA J.

Heard: 24 August 2020; 26 August 2020; 28 August 2020

Delivered: 5 October 2020

Summary: *Practice and Procedure-application for final interdict-three requirements: a clear right; an infringement; and lack of alternative or adequate remedy.*

Civil law and Procedure-application-dispute of facts arising-where dispute of facts arise court can either refuse the application or refer the matter for oral evidence on disputed issues.

Civil law and Procedure-application that first respondent desists from interfering with applicant's possessory rights over land in dispute-more than one person claims possessory rights over land in question-matter for traditional structures to resolve-application dismissed-each party to bear own costs.

JUDGMENT

Introduction

[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 entering property situate at eSigodvweni, Mangozeni area, Matsapha in the Manzini district, which property, applicant contends belongs to her. Applicant prays also that the first respondent be interdicted and restrained from entering the said property with intention to collect rentals from applicant's tenants and also from harassing the said tenants in whatever manner; that the second respondents be directed to assist in

ensuring that the first respondent complies with any order which may be granted by this Court. There is further sought a costs order against the first respondent.

[2] The matter was argued on 28 August 2020.

[3] The first respondent raised a number of *points in limine* namely: that motion proceedings are a wrong procedure to resolve the matter as it is replete with disputes of fact; that this Court has no jurisdiction over disputes touching on land that is situate on Swazi nation land; that the applicant has failed to meet the requirements of an interdict; that the matter is not urgent; and that the application must fail for non-joinder of the Masundvwini royal kraal.

[4] I deal only with the first *point in limine* because I consider it to be dispositive of the matter.

Dispute of Facts

[5] The common cause background is that applicant and first respondent both claim to have obtained the land referred to herein from Masundvwini royal kraal. Applicant and first respondent have both attached letters of certification from the said traditional structure giving them possessory rights over the land in question. Applicant's letter bears the date stamp of 18 April

2018 while first respondent's letter bears date stamp of 10 October 2019. Both letters are signed by the chairman of Masundvwini royal kraal chairman of inner council-Samuel Mduna Phungwayo. The land in question is on Swazi nation land.

- [6] Applicant and first respondent argue that they each *khontaed* for the said piece of land. The effect of the traditional procedure of *kukhonta* is to give the person on whose behalf it is done, certain possessory rights over the land in terms of custom.
- [7] The land that is the subject of the dispute herein has flats that are leased out to tenants. Applicant and first respondent claim to have a right to collect rentals from tenants who occupy the flats in question by virtue of having possessory rights over the land.
- [8] The dispute between the parties herein is over Swazi nation land, between people who live and are governed by Swazi traditional law and custom. The Swazi law and custom is the most suitable legal regime to resolve the dispute and the traditional structures are better placed to handle this matter in as much as they are responsible for allocating land *esicintsini*.
- [9] I have highlighted the above controversies to show that this, in my view, is not a matter that can be dealt with by way of application proceedings. The

said disputes of facts cannot be resolved on the papers before me. It is evident that the Masundvwini royal kraal's Inner Council has in the past dealt with the issue of the land that is the subject of the dispute before me.

[10] When all is said and done, it is not for this Court to adjudicate which of the two people- applicant or first respondent- has possessory rights over the disputed land. Swazi traditional law and custom would appear to me to be the most appropriate forum to resolve this apparent impasse.

[11] If either party is not satisfied with the decision of the Inner Council, he/she is at large to appeal to the Chief who may, either confirm or reverse its decision. The office of *Ndabazabantu* also plays a role, I think in matters of land disputes of Swazi nation land. Thereafter decisions of the Chief's Inner Council are appealable to the Swazi Courts¹. It is trite that Swazi Courts have appellate structures for resolving complaints on appeal against lower authorities.

[12] The sharp disputes of facts outlined above have an impact on whether the applicant has satisfied the requirement of an interdict. The first requirement of an interdict is that the applicant must establish that he has a clear right to

¹ See *Beauty Jumaima Thomo v Kenneth Harold Vilakati & Another* (1159/2006) [2012] SZHC 125 (14 June 2012)

the subject matter in dispute; second, an infringement of that right; third, an absence of an alternative remedy².

[13] From the facts of this case, it is unclear who between the applicant and the first respondent has a clear right over the land in question. This is because both parties have letters certifying that they own the land in question and by extension, the flats constructed thereon. Consequently, where the applicant has failed to establish the first requirement of an interdict on account of there being no undisputed factual basis upon which this claim of right is based, she has failed in her application.

Jurisdiction to grant Interdict

[14] There is the small matter of whether or not this Court has jurisdiction to hear a matter where an interdict is sought. A point *in limine* was raised that this Court has no jurisdiction to hear this matter because it deals with land on Swazi nation land. Whatever the merits and 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 so much being called upon to determine the correct or proper possessor or owner of the land in question, than it is being asked to interdict whatever harm is viewed to be occurring on the land in question. I do not therefore agree that this Court is impotent to determine

² See *Universe (Pty) Ltd v Bongani J. Motsa N.O. & 3 others* (1574) [2014] SZHC 399 (21 November 2014); *Setlogelo v Setlogelo* 1914 AD 221 at 227.

the issue of an interdict whose consideration are whether or not the requirements of an interdict are met.

[15] In my view, there is neither rhyme nor reason why an applicant who can prove that she was lawfully allocated the land in question in line with the dictates of the appropriate law, should not be able to interdict any unlawful invasion of her right over the property she has possessory rights over. The present matter however, is not one where the clear right over the land has been established in light of the disputes of fact raised.

[16] An interdict is a discretionary remedy. The discretion must be exercised judiciously. The Court always has discretion to refuse to grant an interdict even though all the requisites for an interdict are present. This will be so if, for instance, the effect of the interdict which is being sought by the applicant is, indirectly to pronounce on who, between the applicant and the first respondent, has the possessory rights of the land situate on Swazi nation land-an issue that is outside the powers of this Court.

Costs

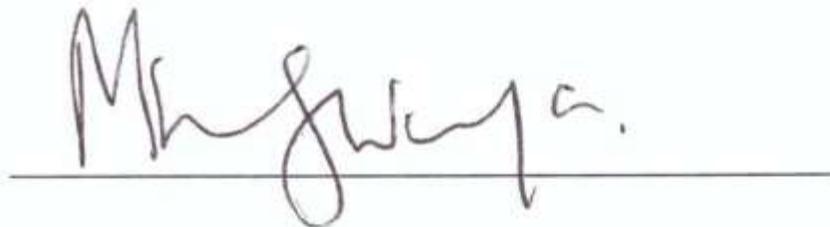
[17] The general rule is that costs follow the event. This, however is not a rule cast on stone as the Court has discretion to take into account special circumstances of each matter. Both applicant and first respondent pay allegiance to Chief Nkhosini. Both parties were 'allocated' the same portion

of land by the Masundvini royal kraal Inner Council. It is not their fault that they each hold letters certifying they have possessory rights over the same portion of land given them by the same traditional structure. For this reason, I direct that each party should bear own costs.

[18] In the result the following orders are made:

Application is dismissed.

Each party to bear his/her own costs.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written over a horizontal line.

M. LANGWENYA J.

For the Applicant: Mr. S. Gumedze

For First Respondent: Mr. T. Fakudze