IN THE HIGH COURT OF SWAZILAND

DUMA MSIBI

Applicant

And

ELINAH NGCAMPHALALA JELINA

NDLELA ELIZABETH MAMBA MAJU

MBHISHOBIMNGOMETULU

MARWICK SIMELANE Civil Case No.

3093/2006

Coram	**S.B. MAPHALALA - J**
For the Applicant	**MR.N FAKUDZE**
For the Respondents	**ADVOCATE LUCAS MAZIYA**
	(Instructed by V.Z. Dlamini
	Attorneys)

JUDGMENT

8th June 2007

[1] The Applicant has brought an urgent application seeking an order, *inter alia,* **to restrain and interdict the Respondents from cultivating in his farm being Farm 307 of Shiselweni District. Further restraining and interdicting the 4th and 5th Respondents from trespassing into Applicant's farm, the said Farm 307 of Shiselweni District. The Applicant has obtained an interim order** *ex parte* **in the form of a rule** *nisi* **with immediate effect for the prayers stated in the Notice of Motion.**

[2] The Respondents oppose the granting of the above-cited orders and their confirmation and to this end has filed Answering affidavits of the 1st Respondent, 2nd Respondent, 3rd Respondent, 4th Respondent and that of the

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5 Respondent. Thereafter, the Applicant filed his replying affidavit supported by the affidavit of Prince Mzweleni Dlamini who is the acting Chief of Lavumisa and the umphakatsi of Qomintaba.

[3] The Applicant is the registered owner of Farm 307 in the Shiselweni District by virtue of Title Deed No. 242/1988 and he states in his founding affidavit that when this property was transferred to him he found the 1st, 2nd and 3rd Respondents resident thereon as squatters. On or before the 5th September 2006, when he got to the farm he found that a certain portion of his farm was being ploughed and when he enquired from one Samson Ngcamphalala who stays at the farm he informed him that the land was being ploughed by the 4th Respondent without his permission or consent as registered owner of the said land. Samson Ngcamphalala informed him further that when he asked the 4th and 5th Respondent about their actions they told him that they were ploughing the fields for the 1st, 2nd and 3rd Respondent and further threatened him by saying they also have guns in case anyone stops them. The Respondents did not seek his permission to plough the land or any fields on the farm, nor did he allow anyone to use his farm for any purpose as he intended to use it

himself for commercial sugar cane cultivation.

[4] The Applicant further deposed in this affidavit that on the 7th September 2006, at about 0900hours he went to the farm and found the 4th

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and 5 Respondents busy ploughing at his farm. He did not approach them as they have a history of aggression and are prone to violent tendencies and feared that the confrontation could turn into a violent situation. Consequently the Respondents continued with ploughing the land in his farm. At paragraph 13 of his Founding affidavit averments are made to prove urgency and that he has no other remedy save that the Respondents be interdicted. At paragraph 14 averments are made to the effect that he has a clear right on the property and further at paragraphs 15, 15.1, 15.2 and 15.3 averments are made on the balance of convenience. Furthermore at paragraph 16 of the affidavit averments are made to the effect that he cannot be afforded substantial judicial redress at the hearing in due course.

[5] In opposition to the above claims the Respondents contended that when the Applicant approached them they have been helping in the ploughing of the fields which Applicant now seeks to interdict them from using because the late Mbalekelwa when he khontaed in 1948 the umphakatsi gave him to them to adopt per Swazi law and custom. The 1st Respondent avers that he personally knew the late Mbalekelwa Ngcamphalala who khontaed around 1948 and at that time he was a young man. When he khontaed at Qomintaba he became neighbours with his parental homestead he assisted him in the building of his new homestead. Since 1949 including 1977 when Mbalekelwa passed on to 2006 he knew the land where the second wife and descendants of the late Mbalekelwa belong to 1st, 2nd and 3rd Respondents live and ploughed the Swazi nation land and acquired by khonta system. Even when he had built a homestead of his own next to his parental

homestead, the 1st, 2nd and 3rd Respondent have occupied and used the land peacefully, without interference until Applicant came in 2006 and claimed the land to be part of his farm. He denies that this piece of land is a farm.

[6] In arguments before me it was contended on behalf of the Applicant that this application is one guided by the provisions as founded in the Farm Dwellers Control Act No. 12 of 1982 which clearly states that a farm dweller cannot engage in anything within the farm without the consent of the owner and regulates in detail the stay of farm dwellers therein. Applicant must have his rights as owner of the property duly protected including his agricultural plans for business or domestic purposes. The Applicant vigorously contest the allegation by the Respondents that the land in issue was their land duly allocated to them by the umphakatsi. The Applicant contends that the Respondents have no supporting evidence to this proposition.

[7] Further, it is contended on behalf of the Applicant that the Respondents cannot rely on having acquired the land through prescription because:

> **"(a) In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognize the ownership of another. The legal relationship between the Respondents and the Applicant disqualifies them from claiming prescription against the Applicant as defined and created by the Farm Dweller Act. Watermever CJ in** *Malan vs Nabygelegen Estates 1946 AD 562 at 577 - 574.*
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> **(b) They have not met the requirements of prescription more especially the** *animus domini* **with regards to the actual owner i.e. as it cannot be ascertained whether the prescription was running against the Umphakatsi or the Applicant"**

[8] In support of this argument the court was further referred to the textbook by *Silberberg and Schoeman, The Law of Property, 2nd Edition (1983)* **at page** *232,* **the cases of** *Welgemoed vs Coetzer 1946 T.P.D. 701, Morkels Transport (Pty) Ltd vs Melrose Foods (Pty) Ltd and another 1972 (2)S.A. 464* **at** *478 H.*

[9] The Applicant fired a final salvo that the right of the owner over the land and disposal by another third party is protected by the Constitution Act No. 2005 in Section 19 (2). That the common law principle has been repealed by the constitutional provisions by clearly providing for the procedure for disposal of land from the rightful owner with due process of the law.

[10] The Respondents as represented by Advocate Maziya contends otherwise. Firstly, it was contended for the Respondents that the Applicant in the present matter has dismally failed in his Founding affidavit to make out a case warranting the granting of a final interdict. The following reasons were advanced in Respondents' Heads of argument in paragraph 4 thereof as follows:

> **4.1 There is nothing in the Applicant's Founding launching papers to show that he has any interest in the piece of land that is being occupied by the 1st, 2nd and 3rd Respondents. All that he has been able to establish is that he is the owner of Farm No. 307 which he purchased from Enock Mandla Nzuza in 2006. The diagram that he has annexed at page 66 of the Book of Pleadings only shows that somewhere in the Shiselweni region there is some immovable property described as farm No. 307. When this diagram is considered along with the Deed of Transfer at page 70 of the Book of Pleadings it then becomes abundantly clear that Duma Cornelius Msibi is now the registered owner of this property. However all this does not show that the Applicant has anything to do with the piece of land being occupied by the 1st, 2nd and 3rd Respondents. The Applicant and Samson Ngcamphalala say this piece of land is part of farm 307: the Respondents say it is not. A dispute of fact of this nature could only be resolved by oral evidence during which the reliability of each one's testimony could be tested by cross examination. It would be extremely dangerous for the court to rely on the untested evidence of either the Applicant and Samson on the one hand or the Respondents on the other, since they are all interested parties. In deciding this important point the court would need the evidence of an independent expert witness such as the Surveyor general. There is nothing to show why the Applicant did not file**

a report from this office to accompany his Founding affidavit.

4.1.1 The argument that the factual dispute in this connection was only created by the Respondents when filing their Answering affidavits has no substance at all. This is because paragraphs 10, 10.1 and 12 of the Founding affidavit make it clear that the Applicant had every reason to foresee a probable dispute of fact arising over the ownership of the piece of land in question well before approaching the court. If indeed Samson did tell him that the 4th and 5th Respondents said "... they were ploughing fields for the 1st, 2nd and 3rd Respondents ..." it is submitted that this

should have alerted the Applicant that his title over that piece of land was being challenged. He thus should have filed an independent affidavit to prove title over that piece of land. In the absence of such independent evidence, it is submitted, he has not demonstrated that he has the requisite *locus standi* **to seek the relief of an interdict over that piece of land. It would therefore be proper for this Honourable court to follow the route that was taken by Tebbutt JA in the VIF matter by dismissing the application. After all, the test to be applied in determining whether to order that oral evidence be led or to dismiss the application is whether the factual disputes were foreseeable before going to court on motion, (see** *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)).*

4.1.1.1 By filing the affidavit of Acting Mzweleni in answer to the challenge of Applicant's *locus standi* **to litigate in respect of the piece of land occupied by the 1st, 2nd and 3rd Respondents, the Applicant was following the same route that was taken by VIF Limited when it attempted to file Ndumiso Mamba's affidavit in answer to the Respondent's challenge of VIF's** *locus standi* **to litigate over the unallocated pieces of land in that case. The fact that Tebbutt JA in that case upheld the dismissal of the application with even considering the "sticking out" application that had been made by the Respondents clearly shows that the court should dismiss an interdict application without or without a "striking out" application. All that has to be considered is whether the factual disputes were foreseeable at the time of the launching of the application. In fact in the VIF matter some explanation (though unsatisfactory) had been made as to why an affidavit from Tibiyo had not been filed along with the founding papers. The present case is even worse in that there is absolutely no explanation as to why Mzweleni's affidavit was not filed with the launching papers. It is highly inconceivable and improper that the Applicant had not been told by Samson before going to court that the 1st,2nd and 3rd Respondents were claiming some**

title over the piece of land having been allocated by the area's Umphakatsi. In fact to rely on Mzweleni's affidavit on the question of title over the piece of land in question would be to go against

Tebbutt JA's judgment since the learned Appeal Court Judge made it clear that such affidavits should form part of the founding papers.

4.1.1.1.1 Even assuming that there was no impropriety in filing Mzweleni's affidavit with the replying papers it is submitted that this affidavit further compounds the factual disputes problem in that the court is now not clear as to who actually owns the pieceof land that is being occupied by the lST , 2nd and 3rd Respondents. The court would still need to resort to oral evidence to be sure as to who is actually telling the truth between the two parties. It is such factual disputes that disqualify this matter from being decided on affidavit. This factor alone makes it impossible for the Applicant to get a final interdict in the light of the reasoning of Tebbutt JA, and the authorities cited in the VIF matter. It surely cannot be safely concluded that the Applicant has a clear right over the piece of land in question.

[11] In this regard the court was referred to many decided cases including the celebrated case of *Setlogelo vs Setlogelo 1914 A.D. 221* **at** *227, Prince Mahlaba vs Mhlatsi Dlamini and two others - Civil Case No. 252/98 (per* **Masuku** *J), Lipschitz vs Wattrus M.O. 1980 (1) S.A. 662* **at** *673 C-D, The Minister of Law's Order vs Committee of the Church Summit 1994 (3) S.A. 89* **at** *98 B - E, VIF Limited vs Moses Mathunjwa and 10 others - Appeal Case No. 31/2000.*

[12] It was further contended for the Respondents that the other factor militating against the granting of a final interdict in favour of the Applicant is the applicability of the common law doctrine of acquisitive prescription. According to this doctrine the possessor of landed property peacefully and openly for an uninterrupted period of thirty (30) years acquires ownership of the property *"ipso jure "* **immediately upon the expiry of that period. In this regard the court was referred to the legal authorities**

of *Voet* **41.3.1 and the cases of** *Smith vs Martins Executor dative (1899) 16 S.C. 148, Welgemoed vs Coetzer 1946 T.P.D. 701, Van Wyk vs Louw 1958 (2) S.A. 164 C* **and the legal authorities of** *Silberberg and Schoeman (supra)* **and** *The South African Law Journal (1972) Vol 89* **at page** *384.*

[13] As regards the Applicant's argument premised under the Farm Dwellers Control Act No. 12 of 1982 the Respondents contends that the Act does not apply for the simple reason that the said Act came into operation on the 4th November 1983 i.e. five years after the expiry of the prescriptive period. By that time the *dominium* **of the property had already vested in the Respondents by operation of the law. In other words as from 1979 the Respondents ceased to be "farm dwellers" and became common law owners of the piece of land in question. In this regard the court was referred to** *Silberberg and Schoeman (supra)* **at page** *251 - 252,* **the case of** *Ex parte Glendale Sugar Millers (Pty) Ltd 1973 (2) S.A. 653 (TV)* **at** *658 F-G* **and the textbook by Rabie PJ in his textbook** *The Law of Estoppel in South Africa* **1993atpage** *105.*

[14] The first issue for decision is the Applicant's argument premised under the Farms Dwellers Control Act to the general proposition that a farm dweller cannot engage in anything within the farm without the consent of the owner who regulates in detail the stay of farm dwellers therein. The

Respondents contends in this regard that the Act does not apply for the simple reason that the said Act came into operation on the 4th November 1983 i.e. five years after the expiry of the prescriptive period. By that time the *dominium* **of the property had already vested in the Respondents by operation of the law. In other words as from 1979 the Respondents ceased to be "farm dwellers" and became common law owners of the piece of land. It would appear to me that the argument by the Applicant is correct in this regard in that Respondents cannot rely on having acquired the land through prescription because "in order to create a prescriptive**

title, such occupation must be user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as a lease or usufruct which recognize the ownership of another". See Watermeyer CJ in the case *Malan vs Nabygelegen Estates 1946 A.D. 562* **at** *573 - 574.*

[15] The Respondents have not met the requirements of prescription more especially the *animus domini* **which regards to the actual owner i.e. as it cannot be ascertained whether the prescription was running against umphakatsi or the Applicant. (See also** *Silberberg and Schoeman, The Law of Property, 2nd Edition (1983)* **at** *232* **and the case of** *Welgemoed vs Coetzer 1946 T.P.D. 701.*

[16] Further it is also a requirement that the user of the land must have used it as if he/she was the owner clearly this has not been the case as even when they tried to build without the consent of the owner at the time they were stopped and at all material times the Respondents have used the main gate as entry into the known farm. Furthermore they have not fulfilled the requirements that such possession should be peaceful, *nec vi.* **They have further not fulfilled the requirement that such possession should be open,** *nec clam.* **In** *Silberberg and Schoeman supra* **at** *243* **the following is stated:**

> **".. .possession must be exercised openly. This means** *inter alia* **that it must be clear from the possessor's conduct that he is exercising control as if he were the owner. A lessee or some other relationship in terms of which the possessor acknowledges, either directly or indirectly, any rights of the true owner in relation to the property in question will normally not have the required intention".**

[17] In my considered opinion the *dicta* **by Waterwever CJ in** *Malan vs Nabygelegen*

(supra) **applies to the facts of the present case where he stated the following:**

> **". ..In order to avoid misunderstanding it should be pointed out here that mere occupation of property "nec vi, nec clam, nec precario" for a period of 30 years does not necessarily vest in the occupier a prescriptive title; such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognizes the ownership of another".**

[18] Lastly, I have come to the considered view that Section 19 (2) of the Constitution Act of 2005 applies to the facts of the present case.

[19] In the result, for the afore-going reasons the rule *nisi* issued by this court on the 8th September 2006 is confirmed in terms of prayers 1, 1.1, 1.2, 2 and 3 of the said Order.

S.B. MAPHALALA