

IN THE HIGH COURT OF SWAZILAND

Civ. Trial No.305/89

In the matter of

ENOCK GWEBU

VS

CHIEF NTUNJA MNGOMEZULU

CORAM

HANNAH, CJ.

FOR THE APPLICANT

MR. B. SIMELANE

FOR THE RESPONDENT

MR. A LUKHELE

JUDGMENT

Hannah, C.J.,

In this application the applicant seeks an order requiring the respondent to return to him four head of cattle seized . from the kraal of one Mhawu Makhanya on 31st January, 1989.

The respondent, as I understand it, admits that the four head of cattle were seized on the day in question, in his presence and were given into his possession but contends that the seizure was lawful in that it was done in execution of an order made by the Chief's Court for the Lubulini Area. His case, in a nutshell, is that in 1987 or early 1988 one of his cattle, a brahman cow, was identified as being in the kraal of the applicant's father, Luka Gwebu, and he thereupon initiated a complaint in the Chief's court for the recovery of that cow and her calf. Luka was one of his subjects and subject to the jurisdiction of his court and in the proceedings which ensued the respondent was successful.

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The court ordered the return of the brahman cow and its calf and also imposed on Luka a fine of one cow for being in possession of a stolen cow and when Luka failed to comply with the order fined him one further cow.

The Chief's runner then executed the order of the court and seized four of Luka's cattle from the local dipping tank and delivered them to the respondent. However the cattle strayed back to Luka's kraal and in about October 1988 he transferred these and 11 other cattle in his kraal to the applicant's name and in the following month the applicant transferred them to Mhawu's kraal. In retaking possession of the four head on 31st January 1989 the respondent was merely acting in accordance with the order of the Chief's Court.

So far as the brahman cow and its calf is concerned Mr. Simelane, for the applicant, has been' compelled to concede that on the evidence adduced it seems likely that they were originally the property of the respondent and that he may have a valid claim to them. The applicant says he purchased them from one Phenyane Tsabedze in 1987 but the evidence strongly suggests that Phenyane acquired them unlawfully. However, Mr. Simelane submits that it is for the respondent to prove that he took possession of those beasts pursuant to an order of a properly constituted and established court and, this, says Mr. Simelane, he has singularly failed to do.

It would appear from the evidence that the Chief's Court is commonly accepted as having the authority and jurisdiction to deal with civil disputes and minor criminal matters and to impose penalties but the fact that such courts exist and operate does not mean that they are clothed with proper authority. This court is entitled to know under what authority they exist and if no authority is shown this court

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can only conclude that none exists. A Swazi court can undoubtedly exist by virtue of a warrant under the hand of the Ngwenyama (see section 3 of the Swazi Courts Act, 1950) and as a Swazi Court is not defined it could include a Chief's court but this particular Chief's court has no such warrant. Where else is one to look? Mr. Lukhele has suggested that authority may be found in the Swazi Administration Act, 1950 but I have looked at the provisions of that Act for such authority in vain. That Act imposes duties and confers powers on the Chiefs to maintain order and good government in their respective areas but nowhere does it confer a power to hold court.

It may be that certain Chief's Courts have jurisdiction by virtue of the saving provision set out in section 41 of the Swazi Courts Act. This provides:

"41. Notwithstanding anything in this Act a Native Court in Swaziland exercising jurisdiction in accordance with Swazi law and custom at the commencement of this Act shall continue to exercise such jurisdiction until the Ngwenyama, by written notice, directs that such court shall no longer exercise jurisdiction, or unless a warrant under section 3 be sooner issued recognising or establishing such court as a Swazi Court under this Act."

However in the case of Chief Ntunja Mngomezulu the evidence is that he did not become a chief until long after this Act came into force and therefore section 41 is not a provision which he can pray in aid.

It is for the respondent to show that the court which made the order pursuant to which the seizure was made was a

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properly established court and in my view he has failed to do so. In these circumstances, the seizure of the cattle must be held to be unlawful.

I would add this. Even had the respondent shown that his court is properly established I would nonetheless hold that that part of the Court's order relating to the two cattle other than the brahman and the calf was a nullity. Even a properly constituted Swazi Court has well defined limits to its powers, limits set out, for example in section 17 and 18 of the Swazi Courts Act, and if it should exceed those powers its acts will be null and void. A Swazi Court is not empowered to forfeit cattle for contempt or as a penalty to enforce execution of its orders.

If the respondent wishes to pursue his claim to the brahman cow and its calf before a properly constituted court he is, of course, free to do so but in the meantime he must return them to the custody of the applicant.

It is ordered that the respondent deliver to the applicant at the kraal of Mhawu Makhanya not later than midday on Friday 29th September the four head of cattle first named in the list set out in the applicant's founding affidavit.

Respondent is to pay the costs of this application.

Delivered by the Chief Justice, Mr. Justice N.R. Hannah on 27/9/89