



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 2155/94

In the matter between:

ZACHARIA DLAMINI	1st Applicant
JOHN MKHATSHWA	2nd Applicant
MSHWALA MKHWANAZI	3rd Applicant
ABEL NHLABATSI	4th Applicant
MANDLENKHOSI SIMELANE	5th Applicant
JOTAM MKHATSHWA	6th Applicant
ISAAC MKHWANAZI	7th Applicant

and

TYRONE LAPIDOS MHLONGO	1st Respondent
ROMAN DLAMINI	2nd Respondent

CORAM:	Hull, C.J.
FOR THE APPLICANTS	Mr. Littler
FOR THE RESPONDENTS	Mr. Flynn

Order
(7/2/95)

This is an application to rescind a court order obtained by the first respondent against the applicants in the High Court on 3rd December 1993 in Civil Case No. 1763/93 and to stay, pending the outcome of this present application, the execution of a writ of ejectment that the first respondent has issued against the present applicants in that case.

Several issues arise on the present application. The respondents here have objected in limine that the applicants' founding papers fail to disclose that they have any good defence in Civil Case No. 1763/93. There is a dispute of fact (inter alia) as to whether the present applicants were duly served with the notice of application in that case. What the present applicants are seeking to have rescinded is a rule nisi that was in fact subsequently confirmed on 10th December 1993.

When the present application came before me on 27th January 1995, however, a more fundamental issue arose, which was whether the High Court had jurisdiction to entertain the proceedings in Civil Case No. 1763/93. It is the present applicants' contention that they are farm-dwellers within the meaning of section 2 of the Farm Dwellers Control Act, 1982 (No. 12 of 1982) and that by reason of section 9(1) of that Act, this court had no jurisdiction to hear the dispute in the case.

The present applicants have not, in their notice of application, founding and supporting affidavits, or replying affidavit pleaded explicitly (or really, in my view, by any very clear implication) that they dispute this court's jurisdiction on that basis. Nevertheless it was agreed on 27th January that the matter should be considered as a preliminary issue, for if the submission were correct, it would dispose of the case. The present application was accordingly postponed until 3rd February 1995 to enable counsel to consider and argue the point fully.

Having heard the further submissions, I am of the view that the issue of jurisdiction cannot be resolved without oral evidence.

Section 9(1) of the Act is expressed in the following way:

"(1) No court shall have jurisdiction
to hear or determine any dispute
between an owner and an unnumzane
concerning any rights and liabilities

under this Act or as to who are dependants of an umnumzane or to order the cancellation of an Agreement or removal of an umnumzane or his dependants from any farm."

The word "umnumzane" is defined by section 2 to mean "a person recognised by Swazi law and custom (as) the head of a homestead" and may include a woman.

The same section defines the expression "farm-dweller" as a person who resides on a farm but it also excludes certain classes of persons, including in paragraph (c) of the definition "a lessee under a written agreement of lease", from the meaning of "farm-dweller."

The long title or preamble to the Act states that it is "to regulate and control relations between owners of farms and other persons residing on such farms."

The scheme of the Act was analysed by Hannah C.J. in Twala v. Sikhondze 1982-86(II) S.L.R. 424. An umnumzane who immediately before the commencement of the Act was a farm-dweller (i.e. as defined in section 2) or is after the commencement of the Act permitted by the owner of a farm to reside on it was or, as the case may be, is entitled within ninety days to obtain a written agreement complying in form and substance with the requirements set out in section 4 of the Act and was or is to take reasonable steps to have the agreement entered into within that period.

The agreement under section 4 is to be in writing and to be made between the farm owner and the umnumzane and is to be expressed as conferring on the umnumzane and his dependants the right to reside on the farm for a definite period. It must also contain information that is set out in the schedule to the Act.

The statute establishes District Farm Dwellers Tribunals and a Central Farm Dwellers Tribunal for its administration, including the resolution of disputes between any farm owner and umnumzane. There is

an eventual right of appeal to the Minister for Home Affairs. The reason for this is, no doubt, that it is considered that issues arising between farm owners and people who live on farms in the traditional manner may be politically sensitive and are better administered through such tribunals and, eventually, by appeal to the Minister, rather than in the civil courts of law.

Section 10 of the Act contains provisions that restrict the ejection of farm-dwellers from the land on which they reside, except by an order of a Tribunal which may only be made in circumstances set out in that section.

This present case and others like it appear to have given rise to some confusion as to the nature of questions of jurisdiction, and in particular the jurisdiction of the High Court of Swaziland.

Mr. Littler contended that the court itself should consider in every case whether it has jurisdiction to entertain a case. I do not disagree in principle. In the present case, it appears that the judge who granted the rule nisi did raise the issue of his own motion, and that he was at that point of time satisfied by the submissions made on behalf of the person who is now the first respondent in these proceedings.

Nevertheless, the practicalities must be kept in view. The High Court, as a superior court, ordinarily has an unlimited jurisdiction to hear and determine disputes about land. If it were otherwise of course, section 9(1) of the Act now in question would not have been necessary. Where on the face of the papers filed in any proceedings, the court apparently has jurisdiction, and there is no reason to think otherwise, then in practical terms there is of course a risk that it will proceed until the objection is taken and sustained, or it subsequently becomes aware itself that it has no jurisdiction.

Where a defendant is represented by a lawyer, the lawyer should object to jurisdiction expressly and as early as possible.

I appreciate that some cases - even perhaps in many cases - involving rural dwellers, they may not have legal representation. In such

circumstances, it is in my view always open to the Attorney General, in the public interest, to intervene on their behalf if he sees fit to do so. Properly, however, he should intervene formally in the legal proceedings themselves.

Where the High Court is satisfied that as a matter of law it does not have jurisdiction to hear and determine a dispute, it will not entertain the matter. If it has already begun to do so, it will decline to continue on it.


Whether or not the High Court does have jurisdiction is nevertheless itself an issue which it will entertain. It will consider whether or not its jurisdiction is limited by law. It will also consider whether on the facts of a case before it, such as the present one, the legal limitation on its jurisdiction is applicable.

On the present application there is a dispute of fact that is relevant to the issue of jurisdiction. The present respondents contend that the applicants now before the court are not farm dwellers because they fall under paragraph (c) of the definition of the expression in section 2 of the Act. The applicants disagree. The issue will have to be resolved on oral evidence. There may also be in my view a need to clarify by further evidence whether or not each of the present applicants is an unnumzane. They do not say so in the affidavits expressly, though it may be that this is an oversight.

The issue of jurisdiction must be resolved before the matter proceeds further.

I therefore direct that the application should go to oral evidence on that issue. In the first instance, I will postpone it until 10th February 1995 before me in case it can be heard within one hour and that suits the convenience of the parties.

In the meantime the interim order staying execution will continue.



DAVID HULL
CHIEF JUSTICE