SWAZILAND HIGH COURT

Chief Mtfuso II and another
Applicants

V

Swaziland Government
Respondent

Civ. Case No. 2685/2000

Coram	Sapire, CJ
For Plaintiff	P.R. Dunseith
For Defendant	Mr. P.M. Dlamini

JUDGMENT
(*13/10/2000)*

This was an application by persons who had been ordered in terms of the provisions of Section 28(3) of The Swazi Administration Order 1998[1] (the Order) to leave Ka-Mkhweli which they claim to have been their traditional home for generations. There has been an instruction in writing by His Majesty the Ingwenyama to the Minister for Home Affairs to make an order for their removal. Such order has been made and served. The applicant's have not left the area and have been under threat of eviction in terms of the Order

Sub-section (10) provides

[1] Order No6 of 1998

> "Any person whose removal has been ordered under subsection (3) or who has, in terms of subsection (6) been removed may, within a period of not more than thirty day (*sic*) from the date when the order was served upon him or such removal effected apply to the Ngwenyama (embule ingubo eNkosini) for the review of such order or removal"

The merits of the long-standing dispute, which culminated in the eviction order, are not in issue in these proceedings

The applicants came to this court on the basis that as the instruction of His Majesty is subject to the right of review, they sought a declaration that until this right had been afforded them, and exhausted, there is by necessary implication and by operation of law an automatic stay of the eviction order.

The relief claimed in the "Notice of Application" relevant to the present application, is an order

> "(b) Declaring the Removal Orders requiring the Applicants to leave Ka-Mkhweli area by the 5th September 2000, to be stayed and suspended, pending the final determination of the application to the Ngwenyama for review of such Removal Orders in terms of section 28(11) of the Swazi Administration Order, 1998
>
> (c) Interdicting and restraining the Minister of Home Affairs, the Royal Swaziland Police or any other Government authority from taking any action against the Applicants pursuant to the aforesaid Removal Orders pending final determination of the said application to the Ngwenyama for review of such Removal Orders."

When this matter first came before court as a matter of urgency, I called to my assistance two assessors in the expectation that questions of Swazi Law and Custom could arise.

No evidence of Swazi Law and Custom, (which in this court has to be treated in the same manner as foreign law, and proved by expert evidence as a matter of fact), was placed before us. The assessors were therefor not required to assist me in deciding issues this respect. In particular the nature, purpose and implications of "*embule ingubo eNkosini*" were not proved. As further affidavits were still to be presented and the application argued on the completed papers the application had to be postponed. Because of the imminence of the evictions, the question of interim relief then arose.

In the course of argument Applicants' counsel conceded that there were, because of the provisions of the Order, difficulties in granting the relief claimed in paragraph (c), but urged the granting of relief in the form of a declaration prayed for in paragraph (b). There is nothing in the Order itself which suggests an automatic stay of an eviction order if the person evicted takes steps to avail himself of *embule ingubo.*

We considered arguments in the papers then presented to us. I decided, in consultation with the assessors, notwithstanding that the decision on this aspect of the matter probably did not require their participation or assistance, that it would be proper to make an interim order, pending the filing of further affidavits and the outcome of this application after argument on augmented papers, suspending the order of the Minister until such time that the applicants had been able to exercise the right to have audience with the King.

Such an order was made. In making such order I impliedly assumed that the court had the necessary jurisdiction.

The Attorney General has once again placed the matter on the roll to argue that this court in terms of Section 28(10) of the relative legislation has no jurisdiction to enquire into the order made by the Minister let alone suspend or otherwise interfere with it. He sought the withdrawal of the interim order and the dismissal of the application.

Section 28 (10) reads

> "A court shall not have jurisdiction to inquire into any order made under subsection (3) nor shall any court issue an interdict or otherwise order the stay of such order as a result of an appeal against conviction under section (5)"

The second part of the subsection is not applicable in the circumstances of this case for there has been no conviction. The first sentence on the other hand excludes any adjudication on the minister's order. To make the declaration sought by the applicants would require inquiry into the order itself.

It was argued by the applicants or on their behalf that having made an interim order the issue of jurisdiction was *res judicata* and could not be again raised. The respondent countered this argument.

There is a fatal flaw in applicant's argument in that the order made by the court afforded the Applicants interim relief. It was not final and did not finally dispose of any issues between the parties. It was made to preserve the status quo until all the issues including that of jurisdiction could be finally decided. Any provisional finding so made can be later be reversed.

See *Alpeni v Minister of Law and others*[2]

Knox D'Arcy Ltd v Jamieson and others[3]

It is true that I could, and should not have made the interim order, if the jurisdiction of the court was excluded. There is however nothing which prevents me from correcting my error.

The application was then argued in the basis of the points raised by the respondent. On reconsideration of the wording of the Swazi Administration Order I come to the conclusion that it was the intention of legislature to exclude the jurisdiction of this court to deal with matters of this nature. The ordinary meaning of the words used is wide enough to indicate that the court may not make any declaration in regard to the order of eviction or in any way affecting it. The wording of the section refers to this court enquiring into any order made under the section. This refers to the Minister's order made on instructions of the Ngwenyama. This is specifically precluded. In order to give the applicants any relief in this matter the court would have to enquire into the direction given in sub-section 3 of the same section and the order made pursuant thereto.

Accordingly the application must fail and it is dismissed with costs. The interim order perforce lapses.

S W Sapire

Chief Justice

[2] 1989(1) SA 195 A
[3] 1995 (2) SA 579 (W)