SWAZILAND HIGH COURT

CHIEF MLIBA FAKUDZE & OTHERS

Plaintiff

vs

MINISTER OF HOME AFFAIRS & OTHERS

Defendant

Civ. Trial No. 2823/2000

Coram Sapire, CJ

For Plaintiff Mr. L, Maziya

For Defendant Mr. P. M. Dlamini

JUDGMENT

(06/10/2000)

This is an application in which the applicant seeks relief in terms of the notice of motion as follows:-

1. They want an order setting aside what they call purported undated removal orders of the Minister of Home Affairs being annexures B1, B2, B3 and B4 attached to the Founding Affidavit in support of this application.

Failing an Order in terms of (b).

2. An Order staying execution of the Eviction Orders pending the applicants' audience with Ingwenyama.

3. Costs on the Attorney-Client scale.

4. Further and/or alternative relief.

This application came before me some weeks ago and on the 5th September having heard the parties I made a ruling in terms of which I postponed this application

together with another involving related issues which was heard at the same time and I also made an order in terms of which the eviction of the applicants in terms of the order of the Minister was suspended until the applicants had had an opportunity of exercising their rights of review referred to in the act. The order I made was clearly interim and it is open to the court at any time to reconsider the interim order and to withdraw, vary or in some other way deal with it.

The applicant when this matter was set down for hearing today has filed a further affidavit and in which it is contested that the signature of Mswati III to the order instructing the Minister to issue eviction orders the authenticity of the signature of the Ingwenyama is questioned.

In order to determine this issue speedily the Attorney General was called as a witness and he testified that in the light of his knowledge of His Majesty's signature gained not only from the numerous documents signed by His Majesty in his possession but also from the circumstances from which the document was signed he is able to say that without any doubt this is the signature of His Majesty. This is not acceptable to the applicant and Mr. Maziya who appears on their behalf has asked for a postponement of this application to have this aspect of the matter and perhaps others investigated.

I am not convinced that there is any merit in the application for a postponement but in view of the request and in view of the seriousness of the allegations I will afford him the opportunity he seeks and the matter will be postponed.

The question now arises as to whether the interim order which I made previously is to stand. Counsel who appeared for the respondents have indicated in argument today that there is reason why this order should be withdrawn. Reference was made to arguments I had heard in the previous similar matter this morning and the question really arises whether my decision should not be altered in regard to the interim order.

Firstly it is argued that it is clear that this court has no jurisdiction in the first place to entertain the application as a whole. This is a matter on which I decided for the purposes of the interim application.

I accepted that the court did have jurisdiction. I have since had occasion to reconsider the import of Section 28(10). This Section reads:-

(10) A court shall not have jurisdiction to inquire into any order made under subsection (3),

Obviously that refers to the order of the Minister because the instruction of the Ingwenyama is not referred to as an order. The order is that of the Minister who makes it on directions of the Ingwenyama. The act makes it quite clear that a court which would include the present court shall not have jurisdiction to inquire into any order made under subsection 3. The subsection carries on to say :-

nor shall any court issue an interdict or otherwise order the stay of such an order as a result of an appeal against conviction under subsection (5).

The reference is to a matter where a person who has been ordered to move from a place fails to comply with the order. He may be charged criminally before any court in the land. That court may have to inquire into the validity of that order but presumably only to the extent to decide whether the accused has complied with it or not. If the accused may of course be convicted and appeal against his conviction. Once again this court or any other court may be seised of the matter as a result of an appeal against the conviction prevented from issuing an interdict.. The intention of the legislation is quite clear and that is that the ordinary courts of the land are to be excluded from adjudication on these orders and of their implementation.

If I am wrong in this interpretation which would mean that in fact this court has no jurisdiction to make the interim order it did, I must still consider whether this court should, if it did have the power so to do, make an order in effect staying the directive of the Ingwenyama and the order made upon his instruction pending the exercise of the right of review and declared in subsection (11) to exist.

It must be borne in mind that the order of the Ingwenyama in terms of subsection (3) is not a judgement or an order of court subject an ordinary appeal. Subsection (3) provides for a direction given by the Ingwenyama in Libandla. To know what Libandla is one has to have recourse expert evidence. But in any case this court is precluded from enquiring whether the Minister's order was properly made or not properly. If the direction for the issue of the order was made by the King, the maxim applies omne rite esse acta. All is presumed to have been done properly and beyond the enquiry of the court.

That being so it is not a judgment of a court where both sides have been heard. There is nothing before

me which suggests that the Ingwenyama in Libandla has to hear interested parties or where he is to take his information or advice. It appears to be what, used to be called administrative act.

The right of review which is given is the right of review known to the Swazi law as kwembula ingubo enkhosini. The question arises whether or not the administrative order given by His Majesty should be suspended while this right of review is exercised. The act does not provide for any stay and when the Ingwenyama makes an order it has immediate effect. It is not possible for this court to enquire into whether this order was properly made or whether there is any prospect of success on review. That would be the normal test where a judgement has to be either or stayed pending an appeal. If one had to consider the prospects of success if anything the indications on the papers are that His Majesty at least regards the matter as closed. Whether this is right or wrong it is difficult to say but on the papers as they stand it appears that His Majesty is of this view. That for this reason alone there is little prospect of success in a review by His Majesty on what has taken place already. It may be that this review has already been held properly or it may be that in fact the applicants have been prevented from exercising their rights of review in the sense understood by Swazi Law if it is the Swazi law that the parties must be present face to

face with His Majesty in order to have this question reconsidered and clearly that right has not been exercised.

But there is nothing to say that the Ingwenyama and his subjects must be present together to consider the review.

In view of this I have come to the conclusion that the interim order which I made which may have been fair to freeze the position while the application was pending on the understanding that the application would be heard very shortly and that it was open to any party to bring the matter to court as has been done by the Attorney General in this case. Now that there has to be a further postponement the question is different and the issues have taken on a different complexion.

For these reasons I will postpone the matter sine die and I recall the interim order previously made by me which shall no longer apply.

The costs will be reserved.

SAPIRE, CJ