

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1264/2002

In the matter between

ABSALOM MAKHANYA

Applicant

and

BUSISIWE MAKHANYA

1<sup>st</sup> Respondent

THE ASSISTANT VETERINARY OFFICER

2<sup>nd</sup> Respondent

THE ATTORNEY GENERAL

3<sup>rd</sup> Respondent

In re:

BUSISIWE MAKHANYA

Applicant

And

ABSALOM MAKHANYA

1<sup>st</sup> Respondent

THE ASSISTANT VETERINARY OFFICER

2<sup>nd</sup> Respondent

THE ATTORNEY GENERAL

3<sup>rd</sup> Respondent

Coram: ANNANDALE, ACJ

For the Applicant: Mr. M.E. Simelane

For the 1<sup>st</sup> Respondent: Mr. Z. Magagula

For the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents: No appearance

## RULING

23 MARCH 2005

[1] The applicant seeks a variation of an Order of Court dated the 14<sup>th</sup> June 2002 to the effect that he and the 1<sup>st</sup> respondent must jointly transfer or dispose of cattle belonging to the joint estate and that the 2<sup>nd</sup> respondent only transfers these cattle if both parties signed and authorised the transfer certificate (lipasi).

[2] The order referred to confirmed an earlier rule nisi which the present 1<sup>st</sup> respondent obtained against the present applicant and which reads :-

"a) That the 1<sup>st</sup> respondent (the present applicant) be and is hereby interdicted and restrained from dispensing of or slaughtering the cattle which are the "assets of" the applicant and 1<sup>st</sup> respondent joint estate.

b) That the authority and name of the applicant (the present 1<sup>st</sup> respondent) be restored on the dipping tank registry.

c) Costs."

[3] In the course of their ongoing litigation, another order was obtained on a later date, the 25<sup>th</sup> February 2003, which reads that:-

"The applicant (again the present 1<sup>st</sup> respondent, my insertion) be and is hereby granted authority to deal with the head (sic) of cattle presently registered in the names of the 1<sup>st</sup> respondent (presently the applicant my insertion) and the applicant in the dipping tank register at Nyoninga Dipping Tank."

[4] I emphasise that the order sought at present is to vary the order of 14<sup>th</sup> June 2002 and not the order of the 25<sup>th</sup> February 2003.

[5] The import of the latter order is that the present 1<sup>st</sup> respondent ("Busisiwe") was authorised to deal with the cattle of the joint estate. This order is not sought to be changed. It is the former order, which prevents the present applicant ("Absalom") from disposing of or slaughtering the same cattle, which he seeks to have amended to require both the husband and wife to jointly cause transfer or disposal of their cattle.

[6] The second and third respondents filed no papers herein.

[7] Due to the outcome of the present application it is not necessary to deal with the details of the papers that were filed, nor with the well argued merits thereof, nor with the further legal points and reply to

[8] The 1<sup>st</sup> respondent's attorney raised the determining point, namely that the applicant's aim is misdirected in that it is sighted on the wrong order of the 14<sup>th</sup> June 2002, not the later order of the 25<sup>th</sup> February in the following year.

[9] This is a fatal blow to the application. Whether or not the first order is capable of being varied for the reasons advanced and the manner in which it is sought to be done, with the opposition thereto, falls by the wayside. In the event that the application is granted, it would result in contradictory orders in the same issue, albeit under different case numbers. The parties and the cattle remain the same.

[10] In the order of 2003 it is the exclusive domain of Busisiwe to deal with the cattle which are registered jointly in the names of both Busisiwe and Absalom Makhanya at the Nyoninga Dipping Tank. Should it now be ordered that the order of 2002 be amended as sought, it would result in the one order requiring both parties to sign a transfer certificate while the further and remaining order provides to the contrary, that only Busisiwe (and not Absalom as well) may do so. There is no application to set aside the order of 2003 in case number 375/03 in the event that this application succeeds.

[11] At the hearing of argument, the applicant's attorney did not replicate to the argument that the wrong order is sought to be amended. The only conclusion I can draw from this is that he either tacitly or by necessary implication conceded the point. If there are two contradictory orders of court, the one

requiring both parties to sign transfer of cattle and the other requiring only one party to sign, it would result in confusion, error and conflict. No court would willingly and knowingly cause such a state of affairs to follow an application like the one at hand.

[12] Should the result of a dismissal of the present application follow in a fresh application aimed at a variation of the order dated the 25<sup>th</sup> February 2003, it will then have to be dealt with on its own merits. It might well be avoided if an acceptable arrangement could be reached between the parties wherein assets of the joint estate are properly and equitably protected - whether it be in the form of a curatorship pending the finalisation of divorce proceedings or otherwise as they may be advised.

[13] In the event and because of the reason that contradictory orders of court cannot be countenanced, especially so where the same cattle of the same joint matrimonial estate would be the object of both such orders, the application stands to be dismissed on this crucial point alone, without regard to the remainder of the issues raised by both parties.

[14] Wherefore the application is ordered to be dismissed, with costs.

ANNANDALE, ACJ