IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4539/2005

In the matter between

INGCAYIZIVELE FARMERS ASSOCIATION Applicant

Vs

NTOKOZO MABUZA N.O 1st Respondent

BOY JOHN MATSEBULA 2nd Respondent

NICHOLAS MATSEBULA 3rd Respondent

KHUZWAYO DLAMINI 4th Respondent

Coram: Annandale, AC J

For the Applicant: Mr. Z. Magagula of Zonke Magagula & Company

For the Respondent: Mr. M. Mabila of RJS Perry in association with M. Mabila & N. Mchunu

JUDGMENT 2 1ST JUNE 2006

[1] The applicant herein came to Court in December 2005 to seek an *interim* order to uplift an interdict against itself, wherein it was stopped from entering, ploughing and taking over fields which are situate between Inkomanzi and Mnyokanyoka rivers. It further seeks an order that the 1st respondent return

keys of the office and main gate to it. Also, it avers that due to urgency, the Rules of Court should be dispensed with, especially insofar as it pertains to the period of notice to the other parties.

[2] Following a number of appearances in Court, the application eventually came to be argued in the middle of February 2006, with a ruling being reserved. Judgment was delayed inordinately long due to overfull court duties requiring the preparation of numerous judgments and also an appeal session in the interim. It again requires to be recorded that this Court is cruelly saddled with a workload that is impossible to dispose of within a reasonable time. The Acting Chief Justice does at least as much court work as any other Judge of the High Court, despite recent and most welcomed doubling in the size of the bench, from 3 to 6 judges. The unfortunate result is that invariably, preparation of reserved judgments take inordinately long. Despite this, new matters are required to be heard on an ongoing basis, without reprieve. The delay is regretted but was inevitable.

[3] The matter has a long history of dispute and litigation which commenced in the High Court in November 2002. Therein, the present 2nd, 3rd and 4th respondents, plus another, sought the interdict now in issue, to be ordered against the present applicant plus a chief. That application was eventually dismissed by the High Court but appealed against.

[4] On appeal, it was ordered that the following relief be granted:

> "*That a* rule nisi *do hereby issue calling upon 1st and 2nd respondents, their servants or agents to show cause why they should not be interdicted and restrained from invading, ploughing and/or taking over fields which are owned and in the lawful possession of the applicants and situate between the Inkomazi and Mnyokanyoka rivers, and stretching from the Ngonini area up to the Balegane Prison farm boundary (hereinafter referred to as the disputed area), pending the determination of an appeal filed by the applicants to His Majesty, the (sic) King*
>
> *Mswati III against the first respondent's decision to disown the applicants of the aforesaid fields.*"

The relief was further ordered to operate with immediate effect, with costs.

[5] The Court of Appeal found that the then first applicant as well as the other applicants were in undisturbed possession of the disputed land on the 20th October 2002. Further, that on that date they were deprived of their possession of the land by the land being invaded on the instructions of the then

first and second respondents. This amounted to spoliation and therefore, also justified them to obtain the interdict they sought.

[6] A further issue that was subject to appeal was a contention of *lis pendens,* which the Court found to be without merit and held:

> "*What has been referred to the King is the determination of the rights of the parties to the disputed land. What the applicants sought to protect was their undisturbed possession (which was clearly established on the papers) pending the determination of the rights of the parties by His Majesty the King.*
>
> *The applicants did not seek an order from the High Court to determine these rights.*"

(Court of Appeal judgment in Civil Appeal No. 15/2003, John Boy Matsebula and 3 others v Chief Madzanga Ndwandwe and another, at page 13).

[7] In its present application, the only applicant is the Farmers' Association, without joinder of Chief Madzanga Ndwandwe who was cited as the first respondent in the initial matter. No issue about the non-joinder of Chief Madzanga Ndwandwe was taken by the present respondents. Its founding affidavit is deposed to by Obed

Dlamini, Chairman of the applicant. The Notice of Motion refers to further affidavits by Sibusiso Malambe and Bheka Mabuza, which somehow for unexplained reason did not find its way into the papers filed of record, in the book of pleadings, though it was annexed to the original Notice.

[8] Dlamini states, on behalf of the Association, that its purpose is to assist members of the Nkambeni Community, including the 2nd, 3rd and 4th Respondents, to enter the sugar cane growing business and that the applicant was granted land for this purpose, by Chief Ndwandwe, the former 1st respondent. After commencement of the sugar cane project, he says, the respondents together with one Nxumalo, (the former 3rd applicant) reported a dispute concerning the land on which they grew sugar cane, which dispute ended up with the King, for determination. It is that dispute which resulted in the interdict, ordered by the Court of Appeal on the 14th day of November, 2005 as aforesaid, which restored possession of the disputed land to the present respondents, pending determination by His Majesty.

[9] His affidavit then relates the events after the appeal judgment, namely that on the 28th November 2005, the Deputy Sheriff (first respondent) served a copy of judgment on the

Fields Supervisor of the applicant, but not an official Order of Court issued by the Registrar, to evict the association from the fields. Two days later, the Deputy Sheriff, two police officers and "more than fifty people including the 4th respondent", would then have evicted the applicant's employees from the fields, then locked the access gates to the fields as well as applicant's offices and left with the keys.

[10] He then refers to the seemingly non-existent affidavit of one Sibusiso Malambe, to support his version of these events. I revert to this omission below.

[11] Dlamini plays his trump card in paragraph 15 of the founding affidavit, which reads that:

> "*On Monday the 7th day of November 2005, the King through the Secretary to (sic) the Swazi National Council, Mr. Bheka Mabuza, delivered his ruling on the dispute and the ruling was to the effect that applicant should continue using the land; respondents should approach Chief Madzanga for allocation of alternative land; if there was a shortage of land in the area the Chief should approach the King for relief.*"

[12] He then refers to a second seemingly non-existing affidavit, this time of one Bheka

Mabuza, to confirm the contents of his statement about the King's ruling. As is the position with the affidavit of Sibusiso Malambe, referred to above, it appears that the applicant's attorney haphazardly prepared the Book of Pleadings. Neither of these two affidavits found their way into the record, though both were attached to the original papers. Such slapdash or slipshod attention to a client's case is not to be expected of any diligent litigating attorney.

[13] In any event, Mabuza does confirm the King's ruling, in his capacity of Secretary of the Swazi National Council, to the following effect: "*Ingcayizivele should continue using the land allocated to them by the chief for the purpose of growing sugar cane, that the respondents should approach Chief Madzanga for the allocation of alternative land, and lastly that if the Chief has run short of land, he should approach the King for appropriate relief*" These words are almost *verbatim* as those used by Dlamini.

[14] It is this ruling, referred to by the applicant, which he holds out to render the present Court of Appeal ruling to be "academic", also that the first respondent ought not have enforced it as "*...she was not so authorised by a warrant duly signed*".

[15] In his affidavit, which suffered the same fate of being omitted by applicant's attorney from the record, Sibusiso Malambe, supervisor of the fields, confirm Dlamini's version of events concerning their eviction, especially that they were not shown a lawful Court Order by the Deputy Sheriff, who was accompanied by police, and that they were only told that they are evicted on authority of an Appeal Court judgment.

[16] He then continues to detail the woes of the applicant, caused by their eviction, their financial losses, potential crop loss, etcetera, to motivate their need to return to the cultivated land forthwith. He also states why he believes that the matter should be heard on a basis of urgency, namely that the applicant would suffer "... *gross and irreparable harm in that it will fall behind in the repayment of the debt and may never recover as the entire crop for this season may be destroyed*". He adds that the applicant did not unduly delay coming to Court as their erstwhile attorney "*...was always to be busy (sic) and when we finally met him he referred us to our present attorney ... because he was too busy*". This is said to have followed its eviction and a referral by the chief to the Attorney General, who advised them to approach their attorney.

[17] The short story of the applicant's case, in seeking setting aside the *interim* interdict against it, is thus that His Majesty has, since date of the Order, decided and determined the matter in its favour, which interdict was only to remain in effect pending the determination of the rights of the parties by His Majesty the King.

[18] In spite of the clear *prima facie* case of the applicant, none of the respondents chose to file any opposing affidavits. I revert to this below, and the reason why they did not do so. If they were to challenge the correctness of the King's ruling as conveyed by the applicant, it seemingly would have been easy to do so. If they were to challenge the applicant's version of eviction without a Court Order being produced, again it would seemingly be easy to do so. If they were to challenge any aspect of the applicant's statement of facts, deposed to by Obed Dlamini and confirmed in material respects by Mabuza and Malambe, they again seemingly could have done so. They are in occupancy of the land on strength of a judgment in their favour, following what was essentially spoliation against them by the present applicant, and knowing full well that the ruling of the Appeal Court is an interdict . *.pending the determination of an appeal filed by the applicants (the present 2nd, 3rd and 4th*

respondents and another) to His Majesty, the (sic) King Mswati HI against the first respondent (Chief Madzanga Ndwandwe) decision to disown the applicants of the aforesaid fields". Thus, the interdict served to prevent the present applicant from interfering with the present respondents in their activities on the land, *pending* the outcome of the appeal to the King.

It is now that the King has apparently decided the matter, as aforesaid, that the applicant wants to have the interdict removed. It is on the merits of the applicant's case that the respondents seemingly decided to file no papers at all, save to take preliminary legal points. This could be construed as an effort to have the *status quo* continued with. Obviously, their present occupation of the land following eviction of the Farmers Association is to their own benefit and they are in no hurry to vacate the land and see the applicant association return to it to save the sugar crop as best as it can do. It is therefore no wonder that they plead a lack of urgency. They also seek leave to file opposing affidavits should their points of law not be upheld, saying that it was not wilfully omitted to be done but necessitated by short service. On the other hand, to be fair to the respondents, proper regard must also be given to their circumstances, especially to the time that they had to file their opposing affidavits, due to the ultra short period of time afforded them by the applicant in its Notice.

According to the papers filed of record, the Notice of Motion (to have the interdict set aside) informed the respondents that the application would be made on Thursday the 15th December 2005 at 09h30. In the Notice, they were further informed that notice to oppose was to be filed on Wednesday the 14th December at lOhOO, with answering affidavits by 17h00 the same day, preceding the date of application.

[21] Attorney Sdumo Mdladla filed an affidavit to the effect that he served the papers on the 2nd and 3rd respondents "*...by leaving a copy with Mrs. Matsebula who is the mother to (sic) the 1st (sic) and 2nd respondents*". Also, that he served the 4th respondent by leaving a copy with his wife. The 1st respondent has not been served. Strictly speaking, the affidavit of service cannot be accepted as being *prima facie* correct, since by name of respondent, service was effected on the 2nd, 3rd and 4th respondent, not the 1st, while by numerical citation, the 1st, 2nd and 4th respondents were served, not the third. Furthermore, the affidavit of service does not state whether the mother and wife were at the address stated in the Notice, i.e. at Nkambeni area, or not. As practical example of what the consequences of such a deficiency could be, my own mother lives in Somerset West, Cape Town. To effect service on her would require major efforts by her to make me aware of papers served on her. Nevertheless, although

the opposing papers do not mention any specifics, I take the supposition, for present purposes, that "the respondents", with exception of the first respondent, were made aware of the proceedings in that an attorney filed opposing papers on "their" behalf. When the matter came before me some months later, despite the initial few hours given to react, Mr. Mabila put up an appearance on behalf of "the respondents", to argue the points in their notice. Service was effected on the 12th December, at an unknown time, at best one day and a few hours before Notice to Oppose had to be filed. The attorneys of the respondents managed to file such notice on the 14th December and also on the same day, the aforesaid Notice to raise legal points, also seeking leave to file papers on the merits if their preliminary attack fails to carry the day.

The timing of the application coincided with the end of the last session of the High Court in the year 2005 just prior to entering a recess until middle January the following year. Under such circumstances, with many legal practitioners also closing office in tandem with the recess, the respondents' attorneys did as well as they could by filing their papers on very short notice and at the same time, to include the papers of the initial application as background to the matter.

It is under such particular circumstances that it

becomes all the more difficult to close the door on them and refuse to hear them on the merits, in the event that they do not succeed on legal points *in limine.*

[24] The legal points that the present respondents raise *in limine* are set out in the Notice of the 14th December 2005, a day before the hearing date stipulated on the applicant's notice and a day after the papers were served.

[25] In their hurriedly filed Notice, the respondents raised various points of law, which were fully argued at the hearing of the matter. In order not to labour this judgment more than what is necessary, and as the Notice sets out the issues crisply and concisely, it is incorporated herein virtually *in toto.*

> "*1) The urgency is self-created in that the applicant became aware of the Judgment on appeal on the 14th November 2005 (which is a full month back) as it was represented by Messrs Masina Mazibuko and Company when same was delivered and they did not take any action only to give respondents less than 48 hours notice to oppose the present application.*
>
> *2) The applicant cannot complain about a crop which may be destroyed if this*

matter is not dealt with as one of urgency as they ploughed the crop knowing very well that the matter was pending in Court and ought to have foreseen that a judgment against them may be granted - the alleged harm and/or loss (which will be argued is not irreparable) is a direct creation of the applicant and they cannot then now complain about it.

5.1 *The applicant cannot come to complain about the "negligence" and/or "inefficiency" of its attorneys as it is bound by their actions.*

5.2 *There is no allegation* (in the founding affidavit) *that the applicant cannot be afforded redress at a hearing in due course neither are such reasons alleged as per the mandatory dictates of Rule 6(25)(b).*

5.3 *The applicant has failed to satisfy the requirements of an interim interdict:*

5.4 *It has not alleged (and/or shown) a* prima facie *right in the* res.

5.5 *It has not alleged (and/or shown) that the balance of convenience favours it.*

5.6 *It has failed to allege (and/or show) why a claim for damages would be of no assistance yet the value of the crop is clearly and easily*

quantifiable.

6) The application is ill-conceived in that at paragraph 15 of the founding affidavit the applicant alleges that through the Swazi National Council the King ruled on the dispute directing that applicant use the land and respondents approach Chief Madzanga for allocation of alternative land.

It is submitted that (as per annexure "JM1" hereto) the matter referred to the King for adjudication was determination of ownership (in terms of Swazi Law and Custom) of the land in question not who should use the same hence the present application is ill-conceived. "

[26] Despite the background of the matter as adumbrated above in this judgment, the legal points enumerated in the respondent's notice cannot therefore be ignored or casually glossed over.

[27] The applicant did in fact delay its application for longer than it purports to explain in its papers. It is partially to be blamed for dilatory conduct, a passing away of time which it now seeks to impose on the respondents, to act in utmost haste by meeting a cause that is, and has been for considerable time, a huge bone of contention.

[28] To now come back to Court, after having despoiled the present respondents of their *prima facie* right to cultivate and possess the contentious fields, it has a sudden and pronounced "knee-jerk" reaction, wanting the interdict to be set aside all of a sudden, apparently somewhat belatedly.

[29] Any litigant is bound by the Rules of Court. Should circumstances so dictate, for instance when the stipulated *dies* will unduly delay its cause, such as when urgency is of the essence, it may deviate from the periods of time set out in the rules, but only where urgency is justifiable and sufficiently explained and detailed in the founding affidavit.

[30] On the applicant's own version, which is the only version before Court, the Appeal Court Judgment was handed down on the 14th November 2005. Again, the Book of Pleadings go without the last few pages of the Judgment, on which the date thereof is recorded, although the full judgment was located elsewhere, with the date thereof recorded as being the 14th day of November 2005.

[31] Then, on the 28th and 30th November 2005, it was fully well made known to the applicant what the effect of the judgment meant to it. Yet, it is only on the 14th December that it filed the present application, to set aside the effect of the judgment against it, with the foundation for it being the King's Order on Appeal to His Majesty, the Ngwenyama.

[32] Furthermore - the applicant states that the King's Order on which it relies, was delivered on the 7th day of November 2005. Although the Appeal Judgment does not mention the date on which it was heard, its judgment was handed down seven days thereafter. If urgency was of such importance to the applicant, which I certainly for present purposes do not find in the adverse, it reasonably could have been expected to have come to court one full calendar month earlier than what it in fact did.

[33] It is in light of these facts that it could not reasonably be expected of the respondents to be kept in the dark, so to speak, for one month and only then be called upon to state their case in the utmost haste, were they to avoid the consequence of the relief sought against them.

[34] Again, I emphasise that this does not mean that the applicant does not have a justifiable justified cause, or that the respondents do not have a leg to stand upon.

[35] *Prima facie,* it does seem that the King has spoken, with "a mouth that does not lie". It is still premature to decide whether the contentions of the respondents will carry the day. They submit that the Ngwenyama was to decide on who should use or utilise the land, not the determination of ownership of the land.

[36] Such a point is arguable and may well be given a meaning contrary to the literal words, as used in the anteceding application and ruling of the Court of Appeal, *vis-a-vis* the eventual ruling by the King, as cited in the application.

[37] It is for these reasons, despite the court's initial *prima facie* view taken of the matter, that judgment had to be reserved, and which, belatedly and unfortunately for the applicant, result in the delayed outcome hereof.

[38] It is ordered that the matter is to follow its ordinary course, as the first prayer, to dispense with the rules relating to service and to hear the application as a matter of urgency, cannot be countenanced.

[39] Further, the respondents are to file their answering affidavits, should they chose to do so, within the ordinary limitations as set out in the Rules, following which it may be replied to, if so chosen. Thereafter, the matter may be set down for hearing by any Judge on the first available date that can be allocated.

Costs hereof are ordered to be costs in the cause.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE