

**THE HIGH COURT OF SWAZILAND**

**LESLIE JACOBS**

Applicant

**And**

**MSUNDUZA MSIBI AND NINE OTHERS**

Respondents

Civil Case No. 2859/2005

Coram: S.B. MAPHALALA-J

For the Applicant: MR. D. MADAU

For the Respondents: IN ABSENTIA

**JUDGMENT**

(16<sup>th</sup> March 2006)

[1] Before court is an application on notice in the long form directing and ordering the Respondents to comply by their resolution of the 26<sup>th</sup> June 2004, granting permission to the Applicant to build a filing station and shopping complex along the Manzini/Mbabane Highway.

[2] When the matter was called for argument there was appearance for the Applicant and no appearance for the Respondents. In view of this state of affairs I allowed *Mr. Madau* to argue the matter on the merits, (see *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of*

*South Africa, Juta* at page 661 and the cases cited thereat. It appears also from the papers filed of record that Counsel for the Respondent S.V. Mdladla withdrew as attorneys of record in a notice to the Registrar received on 15<sup>th</sup> September 2005.

[2] On the 10<sup>th</sup> March 2003, I again heard the matter on the issue of the court's jurisdiction where again Respondents were not represented. I only heard submissions from *Mr. Madau* for the Applicant.

[3] Applicant filed an application requesting the Respondents to comply with their undertaking that Applicant may put up a filing station and shopping complex at Elangeni and which is under their jurisdiction. The Applicant is an adult Swazi businessman of Mbabane. All Respondents are members of Elangeni Royal Kraal Committee.

[4] The Respondents have filed affidavits in opposition thereto and thus joining issue with the Applicant.

[5] This dispute arose this way: Sometime around the 26<sup>th</sup> June 2004, the Applicant through his "*lincusa*" (emissary) namely, one Nhlanhla Magongo approached the *libandla* (committee of Elangeni Royal Kraal) wherein he requested for permission and/or authority to build a filing station and a shopping complex. The *libandla* comprising the Respondents granted him permission to build a filing station and a shopping complex at Elangeni community which falls under the Elangeni Royal Kraal. A letter being annexure "A" from the *libandla* dated 26<sup>th</sup> June 2004, states that Applicant "**Mr. Leslie G. Jacobs has been granted permission to build a filing station and a shopping complex at the Elangeni community, along Manzini -Mbabane Highway**". The letter then lists all the members of the *libandla* and is signed by the Headman who is the 1<sup>st</sup> Respondent in this matter. Subsequent to that on the 10<sup>th</sup> August 2004, a meeting was held between the *libandla* and members of the Swaziland Commercial Amadoda wherein the question of his authority and/or permission to build a filing station and a shopping complex within the area was discussed at length. The minutes of that meeting being annexure "B" attest to this fact.

[6] Having been assured by the *libandla* that he had been granted permission to proceed with his

project he had since sold his other business concerns with the hope that this project will take off soon but that has not been the case, as he continues to lose a lot of money due to the fact that for some reasons unbeknown to him the Respondents are now not proceeding with the necessary action of formally handing over the land to him at Elangeni. The Respondents have not been forthcoming with the reason thereof. He has been in constant discussions and negotiations with oil companies who are to supply him with the necessary oil products to facilitate the running of a Filing Station and as time is running out and he stands to lose the franchise which will be detrimental to him.

[7] Applicant avers that he has tried on a number of occasions to get some clarification from the Headman and the Secretary to the *libandla* as to what might be the delay about but to no avail, {per annexure "C" being a letter written to the Headman and Secretary to the *libandla* dated 1<sup>st</sup> September 2004).

[8] The matter has been taken to the high echelons of the Swazi law and custom structures including the Governor of Ludzidzini, Jim Gama who heard his pleas with Princess Mnengwase and Prince Masitsela in attendance. They advised Applicant that the Elangeni Royal Kraal Committee should allow Applicant to proceed with the project or pay him all expenses.

[9] On or about May 2005, Prince Gcokoma who was then the Regional Secretary of the Hhohho Region met the Applicant with the *libandla* where the Chairman requested for reasons as to why Applicant was now prevented from proceeding with the development of his intended business and **"there was no clear explanation. The libandla then made a special request for patience.** (As per the affidavit of Elliot Moses Blessing Mkhathshwa who is the Assistant Regional Officer who also attended the said meeting).

[10] The defence proffered by the Respondent is found in the opposing affidavit of the 1<sup>st</sup> Respondent who is the Headman of the *libandla* where he answered the Applicant *in limine* and on the merits. *In limine* he avers that this court has no jurisdiction to hear this matter, as this matter involves traditional issues which can only be dealt with by Swazi law and custom. In any event, the Applicant has

appealed to high authorities at Ludzidzini and his appeal was dismissed. The present application is therefore an abuse of the court process. On the merits the essence of the defence is as follows at paragraph 5 thereof:

"It is correct that the libandla had tentatively agreed the Applicant (sic) to build on the land, however, it was subject to him following certain conditions and the libandla being satisfied that the land had no problems and offered the approach (sic) of the Commercial Amadoda. The Applicant failed to adhere to the other formalities. However, he could not settle on the land as it had issues and in any event, he had proven himself to be unworthy. The senior authorities he appealed to advise him of this at Ludzidzini".

[11] Having considered the affidavit evidence and the arguments advanced on behalf of the Applicant it is my considered view that the Respondents point in *limine* is correct that this court has no jurisdiction in this matter. It appears to me and this seems to be common cause in the documentary evidence before me that the relationship between the Applicant and Respondents is founded on the principles of Swazi law and custom and there is no doubt about this fact. Therefore if one party to the relationship were to renege from his obligations does this court have power to assist the other party? It appears to me that this court does not have the power to enter the fray as it were. It would appear to me further that Applicant's remedies lie within the Swazi law and custom framework. I say so because were the court to grant the order sought it would be difficult, if not impossible to enforce such an order. This will be clearly against the principle of law that courts do not issue orders in vain.

[12] In the result, for the afore-going reasons the point of law in *limine* is upheld and I make no order as to costs.

**S.B. MAPHALALA**

**JUDGE**