IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO; 4647/2009**

In the matter between:

BONGINKHOSI MKHABELA **1st Applicant**
BHEKANI MKHABELA **2nd Applicant**

AND

DEPUTY SHERIFF FOR SHISELWENI REGION
JOSEPH DLAMINI **1st Respondent**
THOKO MKHABELA **2nd Respondent**
THE COMMISSIONER OF POLICE **3rd Respondent**
THE ATTORNEY GENERAL **4th Respondent**

Date of hearing: 24 June, 2008
Date of judgment: 21 August, 2008

Advocate L.M. Maziya for the Applicants
Mr. Attorney M. Mabila for the 1st Respondent
Mr. Attorney S.C. Dlamini for the 2nd Respondent

JUDGMENT

MASUKU J.

[1] This is an application by the above-named Applicants for the return of 27 herd of cattle which were removed from the possession of the 2nd Applicant on 3 December, 2008. The Applicants also seek an Order interdicting the Respondents from disposing of the aforesaid cattle pending finalization of these proceedings. They also seek an Order for costs.

[2] I should mention that when the matter served before me on 8 December, 2008, a consent Order was entered and in terms of which the Respondents were ordered not to dispose of the cattle pending finalization of the matter. It was also agreed that in the interregnum, the said cattle would be kept by one Steven Mavundla of Dvokolwako area.

[3] I now deal with the facts giving rise to the present *lis.* The Applicants claim that in or around February and July 2008, he bought some cattle from different individuals. The number of cattle purchased together with the progeny ties in with neatly with the number of cattle referred to in paragraph [1], The 1st Applicant filed confirmatory affidavits deponed by the three persons from whom he states that he purchased the cattle.

[4] It is the Applicant's case that on 3 December, 2008, the 1st

Respondent, in the company of the Deputy Station Commander of Tshaneni police station and two police officers who were armed, took possession of the cattle from the 2nd Applicant. The 2nd Applicant was advised that the cattle were being attached in pursuance of an Order issued by this Court dated 11 March, 2005, under Case No. 3326/04.

[5] It is the Applicants' case that the 1st Respondent had no authority to attach the 1st Applicant's cattle as another Deputy Sheriff, one Wiseman Dlamini had attached and removed the cattle which, belonged to the Applicants' father's estate with which the Order dated 11 March, 2005 was concerned. The Applicants take issue with the 1st Respondent's right to attach the cattle in question because it is alleged that he was never appointed as Deputy Sheriff for District of Hhohho but for the Shiselweni District. The 2nd Applicant, from whose immediate possession the cattle were removed, filed a confirmatory affidavit.

[6] The 1st Respondent filed an affidavit in which he denied having executed the Order referred to above. His version, which is supported by the affidavit of Bhekithemba Dlamini, is that he did not execute the Order in question but merely

assisted the latter, Bhekithemba Dlamini, a colleague, who was the one executing the aforesaid Order. The 1st Respondent contends that as a result of the application brought against him, he was put out of pocket and prayed that the application be dismissed with costs.

[7] The 2nd Respondent also filed an opposing affidavit which raised points of law, including urgency that I ruled had been overtaken by events. I shall accordingly not burden this judgment with a consideration of those points. I presently highlight the gravamen of the 2nd Respondent's opposition to the relief sought.

[8] It is the 2nd Respondent's case that her husband, one Zachariah Mkhabela, the Applicants' father died and that the Applicants upon his death, misappropriated certain of his estate's property and appropriated to themselves some of the estate property. As a result, she moved an application before this Court for the restoration of certain property to her by the Applicants. The property to be returned, included a herd of 105 cattle and 27 goats, which I must mention were not described. This Order was granted on 11 March, 2005. Part of the Order interdicted and restrained the Applicants from dealing with or

alienating any of the estate property pending the decision of the Master of the High Court.

[9] It is the 2nd Respondent's case that on 22 March, 2006 and 6 June, 2006, respectively, this Court again issued an Order followed by another on 10 August, 2006. The Order dated 22 March, 2006 and in respect of which the Applicants, were amongst others cited as Respondents, interdicted the Applicants from disposing of the livestock belonging to the estate. The Order also required the Applicants in particular, to show cause why they should not be ordered to return estate assets, including livestock seized by them on 16 March, 2006, failing which the assistance of the police would be elicited in executing the Order. Lastly, the Applicants were also called upon to show cause why they should not be committed to prison for contempt of Court.

[10] It is contended further by the 2nd Respondent that the above Orders issued by this Court notwithstanding, the Applicants did not comply therewith, culminating in a warrant for their committal issued by this Court dated 27 November, 2006. The 2nd Respondent contends that the cattle attached and which are the subject of this

application are part of the deceased's estate. She contends further that the 1st Applicant had no source of income and could not have afforded to purchase the cattle in question, short of him having used the proceeds of the cattle appropriated from the estate. In short, the 2nd Applicant takes the view that the cattle in question were properly attached in execution of the Order dated 11 March, 2005.

[11] In their heads of argument, the parties raised certain points of law which could be dispositive of the case, at least *pro ha vice.* For her part, the 2nd Respondent argued that the Applicants ought not to be heard for the reason that they stand in contempt of Orders of Court and secondly that this matter was brought on application although there were apparent disputes of fact which were bound to loom large, rendering the application eminently unsuitable for motion proceedings.

[12] The Applicants, on the other hand, contended that the Order issued on 11 March, 2005 had become superannuated by the time of its execution on 3 December, 2008 and that there was no application to have it revived prior to its execution as required by the

Rules of Court. It was therefore argued that the Deputy Sheriff was not entitled in the circumstances, to execute the said Order.

[13] It would appear to me proper to commence the discussion of the legal issues with the 2nd Respondent's contention that the Applicants be non-suited for the reason that they remain in contempt of Orders of this Court and have soiled hands which fact precludes them from approaching the pure fountains of justice. I mention *en passant* though that in my view, there was no need to cite the 2nd Applicant as a party. The fact that the cattle forming the subject matter of this application were in his possession at the time of attachment does not *per se* serve catapult him into a position of having any personal interest in the matter or in any order that the Court may be minded to issue. His involvement being confined to filing an affidavit setting out the circumstances in which the cattle were seized would have sufficed.

Doctrine of Clean Hands.

[14] The leading authority for the above doctrine, is to be

found in the high watermark case of *Hadkinson v Hadkinson* [1952] 2 all ER 57 at 574-5, where Lord Denning said:-

> "It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which the court will only take when the contempt itself impedes the course of justice and there are no other effective means of securing a compliance. Applying this principle, I am of the opinion that the fact that a party to a cause has disobeyed an order of court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues it impedes the course of justice in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the court may, it its, discretion, refuse to hear him until the impediment is removed or good cause is shown why it should not be removed."

This statement has been cited with approval in a number of cases by this Court, most notably in the *Attorney-General v Ray Gwebu and Lucky Nhlanhla Bhembe* Case No.3699/02 and *Charles Thwala v Inspector S.W. Methula, The Station Commander* of Lobamba Police Station, *Attorney-General and Kenneth Ngcamphalala in re First National Bank of Swaziland v Kenneth Ngcamphalala and Glory Thembi Ngcamphalala.*

[15] The 2nd Respondent's position is that the Court should

refuse to hear the Applicants because they stand in contempt of an Order of this Court and that it would be wrong for this Court to turn the other cheek as it were and give the Applicants audience, when by their actions, they are setting the law in defiance. The main question, in my view, is whether the Applicants stand in contempt of an Order of this Court and more importantly, whether their disobedience impedes the course of justice by rendering it difficult for this Court to ascertain the truth or to enforce its own orders. It will be seen from the *Hadkin* case *(supra)* that in deciding whether or not to hear a party, the Court exercises a discretion. In exercising its discretion, the Court must, as in all other cases, do so judicially and judiciously.

[16] In the Founding Affidavit at paragraph 11.2 the 1st Applicant contends that the Order issued on 11 March, 2005 was executed in or about December, 2006 by Deputy Sheriff Wiseman Dlamini. He depones further that the said Dlamini took all the cattle that belonged to his father's estate. The 2nd Respondent did not directly or comprehensively deal with this paragraph, particularly the allegation that Wiseman Dlamini attached the cattle.

[17] That is not, however the end of the matter because after the execution alleged by the 1st Applicant there were further orders issued by the Court, which it would appear the Applicants did not comply with, culminating in the warrant for their arrest being issued. This is an issue that it not properly canvassed in the papers.

[18] Whatever the merits or demerits of the allegations of contempt of Court may be, I am of the view that this is case in which the Court's discretion should be exercised against refusing to hear the Applicants. I say so for the reason that the Order that was executed, as I will endeavour to show below, amounted to nothing else but a travesty of justice as the execution of the Order was itself contrary to the terms of the Order allegedly executed. Public interest would not, in my view, look kindly at allowing such a situation to prevail as a result of the Applicants being denied the right to be heard. I state that the 2nd Respondent, if she is correct in her allegations about the contempt, is perfectly at large to institute appropriate proceedings to have the Applicants brought to the proper table to eat their just desert. In any event,

another question arises, in light of what appears to be common cause fact that the Applicants were committed for the contempt whether it would not amount to double jeopardy for them to be refused to be heard for sins ostensibly purged by the committal. I leave this question open.

[19] It would be perfectly in order to quote the full terms of the Order dated 11 March, 2005. It reads as follows:-

"1. The 1st, 2nd and 3rd Respondents are restrained and interdicted from dealing with and or alienating property belonging to the deceased Zachariah Mkhabela of Mabiya in the Hhohho District pending the decision of the Master of High Court.

2. The 1st, 2nd and 3rd Respondents are to restore to the possession of the Applicant the following:-

2.1 A white Toyota van registered SD 866 LN
2.2 A Massey Ferguson Tractor
2.3 A grocery shop
2.4 A water pump
2.5 A herd of 105 cattle
2.6 A herd of 87 goats

3. Costs of suit."

[19] It is noteworthy that prayer 2 required the Respondents therein, who include the Appellants herein, to "restore possession of (sic) the Applicant..." Included in the items to be

restored were the cattle under 2.5 i.e. 105 cattle. The import of the Order was that is was the Respondents therein, in terms of the Order, who were ordered by the Court to surrender the items therein referred to the 1st Respondent, who was the Applicant. Failure on the part of the Respondents to comply therewith would have entitled the Applicant, in terms of the law, to move proceedings for contempt of Court subject to all the requirements carefully set out in *Craw &> Another v Jarvis* 1982-86 (1) SLR 218 being fully satisfied.

[20] It is clear from the depositions of the Applicants that when the Order was executed, it was spelt out in clear terms by the executing officers that the Order being executed was that dated 11 March, 2005. The Respondents also concede in their papers that the cattle attached and removed from the Applicants' possession were so attached and removed in pursuance of the said Order. It will be clear from reading the terms of the Order that it did not, even given a wide and benerdent the interpretation in any way authorize any attachment of any goods.

[21] In any event, it is noteworthy that the cattle referred to were not described in the Order of Court. I say so because if

the said Order did authorize the attachment of the cattle, the identity thereof would have had to be spelt out in clear terms so that it would be clear to the Deputy Sheriff executing the same which cattle to attach. The alternative would have been for the 2nd Respondent to institute an action and possibly obtain a monetary judgment which could enable the Deputy Sheriff to attach any property attachable in terms of the Rules of Court and which could include other property and cattle belonging to the Applicants, even with no connection to the deceased's state. This, sadly, was not the case.

[22] It is therefore clear on all accounts that the attachment effected on 3 December, 2008, was unlawful and contrary to the terms of the Order avowed to be executed. Such a situation cannot, in the interest of the public and the general interests of the administration of justice be allowed to prevail. The situation is exacerbated by the fact that two Deputy Sheriffs and a *posse comitatus* of police officers failed to read, properly understand and appreciate and therefore property execute the terms of the Order dated 11 March, 2005.

[23] I must mention that executing Court Orders is serious business for it has the propensity to interfere with people's

possession of their property. For that reason, scrupulous care and sedulous attention must be given to the letter of Order of Court concerned so that violence to the terms thereof is not heralded. As a result of failing to understand the Court Order in the instant case, the 1st Applicant's property was irregularly attached a situation which cannot be countenanced. It's for that reason that I come to the view that to exercise this Court's discretion against hearing the Applicants would be incorrect and unconscionable and would tend to legitimate what is clearly unlawful.

[24] In the premises, I find it unnecessary to decide the issue of superannuation of judgments and orders raised by the Applicants' attorneys. I decline to deal with that issue for the reason that it is abundantly obvious that the attachment and removal of the Applicant's cattle was unlawful and clearly unauthorized. To deal with that issue would in my view result in superfluity.

[25] For the foregoing reasons, I am of the view that the application should succeed with costs. The 1st Respondent, on his version, made common cause with his colleague the substantive Deputy Sheriff in the execution of the Order and

in effect opposed the application. I find it appropriate to mulct him with costs together with his co-Respondents. I note in particular that it was only in the heads of argument that costs on the punitive scale were applied for. I shall not, at this late stage, give in to such entrities, which the Respondents were not afforded an opportunity to deal with and possibly controvert in their papers.

[26] On account of the foregoing, I hereby grant the following Order: -

[26.1] The 27 herd of cattle attached from the 2nd Respondent on 3 December, 2008 be and are hereby ordered to be restored to the Applicants' possession forthwith.

[26.2] The 1st and 2nd Respondents be and are hereby ordered to pay the costs of this application, which include the costs of Counsel as certified in terms of Rule 68 (2) of this Court's Rules, as amended.

[26.3] Such costs are to be levied at the scale between party and party and are to be paid jointly and severally by the 1st and 2nd Respondents, the one paying the other to

be absolved.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 21st DAY OF AUGUST, 2009.

T.S. MASUKU

JUDGE

Messrs. Masina Mazibuko for the Applicants
Messrs. Mabila Attorneys for the 1st Respondent
Messrs. S.C. Dlamini for the 2nd Respondent.