IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 306/2010(B)**

In the matter between:

MILDRED MAGAGULA **APPLICANT**

And

MIRRIET SIFUNDZA **1ST RESPONDENT**
ROYAL SWAZILAND SUGAR CO-OPERATION **2ND RESPONDENT**
THE MASTER OF THE HIGH COURT **3RD RESPONDENT**
THE ATTORNEY GENERAL **4TH RESPONDENT**

In re

MILDRED MAGAGULA **APPLICANT**

And

MIRRIET SIFUNDZA **1ST RESPONDENT**
ROYAL SWAZILAND SUGAR CO-OPERATION **2ND RESPONDENT**
THE MASTER OF THE HIGH COURT **3RD RESPONDENT**
THE ATTORNEY GENERAL **4TH RESPONDENT**

CORAM **OTA J.**
FOR THE APPLICANT **MR B. ZWANE**
FOR THE 1ST RESPONDENT **MR S. MASUKU**

JUDGEM ENT

OTA J.

The Applicant commenced this application by way of Notice of Motion, contending for diverse reliefs, the relevant ones are as depicted in paragraphs 2 to 7, 9 and 10 of the process as follows:-

‘‘

2. An order directing the 1st Respondent to transfer half of the

amount of the proceeds paid into her account by 2nd Respondent being the sum of E 31, 832-55 (Thirty One Thousand Eight Hundred and Thirty-Two Emalangeni, Fifty Five Cents) which is half of the sum of E 63, 665-11 (Sixty Three Thousand Six Hundred and Sixty Five Emalangeni Eleven Cents.)

3. An order directing the 1st Respondent to seize forthwith to be the sole administrator of farm SF 0057

situate at Vuvulane, since she has already administered same for the 2010-2011.

4. An order directing that the Applicant be the sole administrator of the Farm for the 2011-2012 season pending finalization of the main Application.
5. An order directing 2nd Respondent to deposit any forthcoming proceeds of the above mentioned Farm, into the respective bank account of the Applicant and 1st Respondent pending finalization of this matter and as per the Court Ruling which is in their possession.
6. An order forthwith interdicting and restraining the office of the 3rd Respondent from issuing unilateral directives pertaining to this matter in the absence of either party, as same will be against the spirit of this Honourable Court's Ruling.
7. An order directing the 2nd Respondent to provide the Applicant detailed statement of account for 2010-2011 season proceeds.
9. An order directing the Respondents to pay costs of this Application jointly and severally.

10. Granting Applicant such further and/or altenative relief.

This Application is founded on a 23 paragraph affidavit, sworn by the Applicant, **Mildred Magagula** herself, to which is exhibited annexures MM1 to MM9, respectively, as well as a confirmatory affidavit sworn by one **Themba Magagula**. It is on record that the Applicant also swore to and filed a Replying Affidavit of 21 paragraphs, to which is exhibited annexures A, B and C.

The 1st Respondent is opposed to this application. To this end, she filed an Answering Affidavit of 20 paragraphs. It is worthy of note that the 2nd, 3rd and 4th Respondents filed no processes and did not participate in these proceedings. It is also worthy of note, that when this matter came up for argument on the 17th of January 2012, **Mr Zwane**, learned counsel for the Applicant, informed the Court that Applicant

was abandoning prayers 3 and 4 respectively. This application was not opposed by **Mr S. Masuku** who appeared for the 1st Respondent. In the circumstances, prayers 3 and 4 are accordingly struck out.

Be that as it may, I think that a brief history of the journey of the parties to this Court, will help forster a better understanding of the issues thrown up.

Copious affidavits and annexures enure in these proceeding, which taken together tell a tale, which appears to be as follows:-

That the Applicant married one **Phineas Khushwa Magagula (Phineas),** in terms of civil rites and in Community of Property. Said Phineas acquired certain rights over Farm SF 005. The rights were in the name of **Phineas** who held them for the benefit of the estate. The farm was used for sugarcane farming.

It would appear that whilst the civil marriage between the Applicant and **Phineas** subsisted, that the 1st Respondent and Phineas purportedly contracted some sort of marriage.

Suffice it to say, that upon the death of **Phineas**, the Applicant was informed by the Management of VIF Farm, that **Phineas** has appointed the 1st Respondent as his successor and administrator of the said farm.

Aggrieved by this development and dissatisfied with the documents evidencing the alleged succession and administration of the said farm, the Applicant launched an application before the High Court per **Hlophe J,** under Case No. 306/2010, praying inter alia for the following reliefs

a) An order removing 1st Respondent as Administrator and/or beneficiary of the aforementioned Farm and appointing the Applicant as Administrator and/or Beneficiary of the said farm

Alternatively

b) An order directing the Applicant and 1st Respondent to be joint Administrators and/or Beneficiaries of the Farm.

It is on record that **Hlophe J,** handed down an interim order in Case No. 306/2010, on the 18th day of August 2010, wherein he placed the Farm in the joint control and management of the Applicant and 1st Respondent, as joint administrators and beneficiaries of the farm, pending the finalization of the main application. His Lordship further recommended that this may necessitate that the parties find a most satisfactory way of managing the farm for their joint benefit, which their attorneys will be best placed to advise. By the tenure of the Court order, the proceeds of the farm were to be distributed in equal shares between the parties.

It is common cause that in the wake of the Court order, that the parties assumed joint management of the farm, which saw the 1st Respondent and one **Themba Magagula,** a son of the Applicant, in control of the farm.

It is common cause that this arrangement was successful in the first farming season of the year 2010/2011, in which period the farm realized the sum of E 102,972-56, which was

vested in the 2nd Respondent, who distributed the balance of the amount in equal shares between the parties, after deducting the sum of E 39, 307-45 cents being its operational costs for the farm.

The problem began with the 2011/2012 farming season, by which time relations had completely broken down between the parties, rendering their joint control and management of the farm unworkable.

It is common cause that in consequence of this situation, that the management and administration of the farm reverted back to the sole control of the 1st Respondent, who was to run the Farm and account to the Applicant. It would appear that the Applicant was in tacit agreement with this arrangement, exhibiting no objections to same, until the 2nd Respondent deposited the proceeds of the 2011/2012 farming season amounting to a total of Sixty Three Thousand Five Hundred and Sixty Emalangeni E 63, 560 – 00, in the 1st

Respondents account, after deducting it's own costs of E 39,309-45.

It is common cause that the 1st Respondent then proceeded to make projections of the operational costs of the farm for 2011/2012, which amounted to E 35, 565-00, which amount the 1st Respondent deducted from the E 63,560-00 proceeds of the farm for that season, leaving a balance of E28, 134-94. The parties are ad idem that it is this balance of E 28,134-94 that the 1st Respondent seeks to distribute in equal shares between her and the Applicant in the amount of E 14, 067-47 each.

The Applicant is obviously aggrieved by this outcome thus her cries in this application, demanding the sum of E 31, 832-55 representing half of the sum of E 63, 665-11 proceeds of the farm, deposited in 1st Respondent's Account by the 2nd Respondent. The Applicant is also obviously aggrieved by the fact that about the 10th of August 2011, the 3rd Respondent by correspondence to the 2nd Respondent, endorsed the 1st Respondent as the quota holder in the

Farm. It is obvious from the record that the Applicant protested this nomination, which was subsequently reversed. The foregoing are the factors that led the parties to this Court.

Having carefully considered the totality of this application, let me say it straightaway here, before proceeding to the substance of this matter, that the theory of unclean hands which the Applicant urged against the 1st Respondent in her heads of argument as well as in oral submissions via councel, has absolutely no legs to stand upon. It cannot be controverted that the parties could not by themselves sustain the joint control of the farm as ordered by the Court, which saw the control and management, revert back solely to the 1st Respondent. This arrangement appeared to have been satisfactory to all sides as the Applicant raised no objections to same, until the issue of accounting arose. It does not therefore lie with the Applicant who gave tacit approval to this arrangement, to urge the doctime of unclean hands based on the obvious violation of the Court

order which this arrangement encouraged. Having said this, I say no more on this matter.

Now, it is convenient for me to first settle the question of the interdicts which the Applicant seeks against the 2nd and 3rd Respondents, vide prayers 5, 6 and 7 of the notice of motion. Suffice it to say that having read the papers, I am satisfied that the Applicant is entitled to the interdicts sought, when one considers the parameters for the grant of such an order as set out in the celebrated case of **Setlogelo V Setlogelo 1914 AD 221 at 227,** which are in sum, a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy or irreparable harm.

It cannot be gainsaid, that the Applicant acquired a clear right to the interdicts, via the interim order of 18th August 2010, which vested in her the status of a joint administrator and beneficiary of the said Farm with 1st Respondent. As the Court said in the case of **Minister of Law and Order V**

Committee of the Church Summit 1994 (3) SA 89 at 98:-

> *‘‘ whether the Applicant has a right is a matter of substantive law. The onus is on the Applicant applying for a final interdict to establish on a balance of probabilities the facts and evidence which he has, a clear and definitive right in terms of substantive law. The right which the Applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common law or statutory law’’*

See also **Swaziland Electricity Company V John Young and another, Case No. 2382/11**

It is beyond dispute therefore, that the Court order of the 18th of August 2011, conferred a clear right on the Applicant.

Similarly, I am firmly convinced that on the papers, the Applicant has demonstrated a reasonable apprehension of injury to her right in the Farm by the 2nd and 3rd Respondents, to entitle her to the interdicts sought.

In the case of **Minister of Law and Order V Committee of the Church Summit (supra) Friedman AJP,** declared as follows at **98:-**

> *'' The phraseology ''injury'' means a breach or infraction of the right which has been shown or demonstrated and the prejudice that has resulted therefrom. It has also been held that prejudice is not equivalent to damages. It will suffice to establish potential prejudice''.*

In casu, there is evidence to show that the 2nd Respondent not only paid the proceeds of the farming season of 2011 to 2012, solely into the 1st Respondents account, but that it also failed to account to the Applicant of the proceeds of 2011 to 2012. The Applicant complains that these activities of the 2nd Respondent are in violation of the Court order and an infringment of her right of joint administrator and beneficiary of the farm, and is thus prejudicial to her. I agree with her especially in view of the circumstances birthed by the activities of the 2nd Respondent resulting in the action instant.

Similarly, the record shows that the 3rd Respondent on the 10th of August 2011, by a letter to the 2nd Respondent

endorsed the 1st Respondent as quota-holder of the said farm, clearly in contravention of the Court order, which vested joint control in Applicant and 1st Respondent. Even though this nomination was subsequently reversed in the face of protestations by the Applicant, I agree completely with the Applicant that this activity of the 3rd Respondent in flagrant violation of the Court order has caused her reasonable apprehension of potential injury to her rights in the farm. This state of affairs, I hold, entitles her to the interdict sought .

Finally I see no other remedy available to the Applicant other than that available in a Court of law.

Let me now look at prayer 2 of the application wherein the Applicant urges the Court to order the 1st Respondent to pay half of the proceeds of the 2011/2012 season, an amount of E 31, 832-55, into her account.

In answer to the Applicants allegations in this regard, the 1st Respondent in paragraphs 13 and 14 of her answering

affidavit, admitted that after deducting the sum of E39, 309,45 to cover its own costs, that the 2nd Respondent paid a total of E 63,665-11 into her own account. The 1st Respondent by her own showing, then deducted what she calls the ensuing operational costs for 2011/2012, an amount of E35, 565-00 as depicted in annexure NM 7, leaving the balance of E 28, 134-94, which she posited is the amount to be shared between her and the Applicant in equal shares, in compliance with the Court order.

There is no doubt that the 1st Respondent made the alleged projections for the said ensuing operational costs for 2011/2012, on her own without the consent or impute of the Applicant. This fact is not disputed. I hold the firm view, that even though the parties are ad idem, that the control and management of the Farm reverted back to the sole control of the 1st Respondent in the wake of the break down of the joint administration of the farm by the parties, this state of affairs did not however give the 1st Respondent the rights to act unilaterally without the consent or approval of

the applicant. I say this because when two people are put in joint control or are joint trustees of an estate, no one of the two can act without the consent or approval of the other. It was thus imperative that the two parties consorted and agreed upon the said operational costs and the resultant amount to be deducted.

This is more so as it is evident that 2nd Respondent funds the operation of the farm, as clearly demonstrated by the fact that it deducted the sum of E 39,309-45 from the proceeds of both the 2010-2011 and 2011 to 2012, seasons respectively to cover its operational costs. There was thus need if any further expenses was incurred or to be incurred for this to be deliberated and agreed upon by the parties. More so because no such ensuing operational costs were incurred in the 2010/2011 farming season. Where the 1st Respondent embarked upon unilateral actions, either by way of projections of the operational costs or out right financial impute in the farm without the consent or approval of the Applicant, she did so at her own peril**. Mr Masuku's** contention that the order sought would be impracticable

because the E 35,565-00 has already been utilized must collapse, in so far as the money was utilized without the consent or impute of the Applicant.

Mr Zwane has urged that the E 31, 832-55 be paid to the Applicant, and undertook that the Applicant will tender half of any costs incurred for operating the farm, after such has been deliberated upon and approved by the parties. I think that this will be the proper course to adopt in the circumstances, and in compliance with the Court order.

In conclusion, may I remind all concerned, that the Court order of the 18th of August 2010, is definitive, valid and subsisting, and must be presumed to be right until it is set aside by an appellate or reviewing court. The law is that in so far as the judgment is not appealed against, it is unquestionably valid and subsisting. This is so no matter how perverse it may be perceived. It is binding on all and must be obeyed. The mere fact that the Applicant and 1st Respondent on their own allowed the farm to revert back to

the sole control of the 1st Respondent, does not in the slightest degree detract from the validity or potency of the order. See **Clement Nhleko V MH Mdluli & Company and Sandile Dlamini Case No. 1393/09, Sibongiseni Fundzile Xaba V Lindiwe Bridget Dlamini No and others, Case No. 1080/2009.**

In the face of the unworkability of the joint control of the farm by the parties themselves, for reasons not detailed in the papers before Court, perhaps the parties should avail themselves of the wise counsel of **Hlophe J,** in the order of the 18th August 2010, to the effect that the joint control of the farm may necessitate that the parties find a most satisfactory way of managing the farm for their joint benefit, which their attorneys will be best placed to advise.

Mr Masuku in apparent recognition of the problems evident in the joint control of the Farm by the parties themselves, in paragraph 4 of the 1st Respondents heads of argument, urged that the Court directs that the parties consider hiring a

manager for the farm in the interim. This may well be the way forward, which in my view is best suited for the parties to decide, in consulation with their attorney.

In the light of the totality of the foregoing, I find that this application has merits. It succeeds. In the circumstances, I make the following orders.

1) That the 1st Respondent be and is hereby ordered to transfer half of the amount of the proceeds paid into her account by 2nd Respondent, being the sum of E 31, 832-55 to the Applicant.

2) That the parties be and are hereby ordered to deliberate and agree on the cost projections for operating the farm in the 2011/2012 season.

3) That the Applicant hereby undertakes to tender half of the projected operational costs if any for the

2011/2012 season to the Applicant, after same has been deliberated upon and approved by the parties.

4) That the 2nd Respondent be and is hereby ordered to deposit any forthcoming proceeds of the afore mentioned farm, into the respective bank accounts of the Applicant and 1st Respondent in equal shares, pending finalization of this matter and as per the Court order.

5) That the 3rd Respondent be and is hereby interdicted and restrained from issuing unilateral directives pertaining to this matter in the absence of either party, as same will be against the spirit of this court's order.

6) That the 2nd Respondent be and is hereby ordered to provide the Applicant with detailed statement of account for 2010-2011 season proceeds.

7) That the 1st Respondents be and is hereby ordered to pay the costs of this application on the ordinary scale.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE ……. DAY OF……2012

E. OTA

JUDGE OF THE HIGH COURT