IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 893/10

In the matter between:-

MUSA DLAMINI **Applicant**

and

THE REGIONAL ADMINISTRATOR- MANZINI **1st Respondent**
THE COMMISSIONER OF TAXES **2nd Respondent**
THE ATTORNEY GENERAL **3rd Respondent**

Neutral citation: *Musa Dlamini v The Regional Administrator – Manzini* (893/10) [2012] SZHC 36 (1st March 2012)

Coram: HLOPHE J

Heard: 30th January 2012

Delivered: 1st March 2012

For the Applicant: Mr. M. Mkhwanazi

For the Respondents: Mr. M. Nxumalo

Summary: Review Proceedings- 1st Respondent "cancelling"

Applicant's appointment or status as Indvuna- Applicant complains he has not been given a hearing – Further complaining 1st Respondent acted ultra vires the powers conferred on him by the enabling legislation and Constitution.

Objection on Jurisdiction of this court raised - Section 151 (8) of the Constitution and its effect-Section 151 (8) not applicable as issue not whether applicant an Indvuna- Review about Procedural irregularities as opposed to correctness of decision.

Audi Alteram Partem principle violated- No compliance with section 33 of the Constitution-Powers of the Regional Administrator discussed- 1st Respondent has no power to terminate Applicant's status as Indvuna- 1st Respondent acted Ultra vires enabling statute- Application succeeds to the extent of the specific order granted- Costs to follow the event.

JUDGMENT

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[1] On the 24th March 2010 the Applicant claims to have received a letter from the 1st Respondent, in terms of which the latter notified the Commissioner of Taxes that the applicant had been "cancelled" as "Indvuna for Kwaluseni and Mbikwakhe areas with immediate effect." A copy of the said letter was annexed to the founding affidavit. A closer look at the document, however, revealed that same was a memorandum written by the 1st Respondent to the Commissioner of Taxes and copied to several officers who included the Attorney General, all Regional Secretaries and all Revenue Officers to mention but a few.

[2] Upon receipt of the said memorandum the Applicant who claims to be an Indvuna of Kwaluseni, Makholweni and Mbikwakhe areas,

approached this court under a certificate of urgency and claimed *inter alia* the following reliefs after the usual formal prayer in such matters:-

2.1 Reviewing and setting aside the 1st Respondent's letter dated 5th March 2010 and declaring the same to be null and void and of no force and effect *ab initio*.

2.2 Costs of the application on the scale as between attorney and own client.

[3] In his aforesaid application the applicant contends that the actions of the 1st Respondent "cancelling" his appointment as an Indvuna was unlawful in as much as the 1st Respondent had not given him a hearing before purporting to cancel his being Indvuna of the areas mentioned above. He contends further that the 1st Respondent had no power in law to act in the manner he had done and as such he had acted ultra vires his powers.

[4] On the foregoing grounds the applicant prays that the decision of the 1st Respondent as embodied in the aforesaid memorandum be reviewed and set aside including a declarator that the memorandum was of no force or effect. I must mention that owing to the nature of the relief prayed for and the jurisdictional objection raised by the Respondents, this court cannot grant the declarator sought and I did not understand the parties to contend otherwise during the argument of the matter.

[5] On the other hand, the Respondents opposed the application, through an Answering Affidavit filed by the current Manzini- Regional

Administrator Prince Masitsela, who contended that he had taken the decision to "cancel" the applicant's being Indvuna following the latter's having defied his (Regional Administrator's) call to stop allocating and selling land in the areas he claimed to be overseeing. It was disputed that the applicant had not been given a hearing as alleged or even that the 1st Respondent had acted ultra vires when he took the decision of "cancelling" applicant's being Indvuna.

[6] It was contended further that in fact the applicant was in reality not an Indvuna of the areas concerned because the areas in question were what were called Emahambate (Areas which fall under no chiefs Jurisdiction, but under the Ingwenyama's direct authority) governed through an Indvuna, Mandanda Mthethwa who was now late. It was contended that there is currently an Acting Indvuna T. V. Mthethwa, overseeing the areas on behalf of the Ingwenyama. It was contended that because Mr. T. V. Mthethwa was himself acting, he had no authority in terms of the law, to himself appoint an Indvuna in the person of the applicant.

[7] My comment in this regard is that this court has no jurisdiction on deciding who is or is not an Indvuna of what area as these matters have structures governing them, who are best placed to decide who is or is not an Indvuna of a given area. I will approach the matter from an assumption that applicant was an Indvuna prior to the memorandum that claimed to be "cancelling his being an Indvuna of the concerned areas because that is what the memorandum suggests on the face of it.

[8] Arguing why the applicant was entitled to the reliefs sought, it was contended the power exercised by the 1st Respondent in purporting to

cancel the Applicant's being an alleged Indvuna for the areas concerned was and administrative action. In exercise of such administrative action, it was contended that he 1st Respondent had not upheld or observed the requirements of Article 33 of the Constitution of Swaziland which enjoined an Administrative Authority to hear and treat justly and fairly according to law any person appearing before such authority. It was alleged this had not been observed because the Applicant had never been given a hearing. In fact during argument, Mr. Mkhwanazi argued that although there were minutes annexed to show that the discussion of the matter about the alleged sale of land as well as the use of a personal stamp by the applicant as opposed to that of the King's Counsel, such however did not amount to the hearing contemplated in terms of the Constitution as the applicant had not been informed of the exact complaint nor of its effect in the event he was found guilty of committing certain wrongs.

[9] The actions of the 1st Respondent it was argued did not only violate article 33 of the Constitution of Swaziland but also the rule in the case of ***Administrator Transvaal vs Tranb 1989 (4) SA 731 (A)***, which is to the effect that where an administrative decision will have the effect of prejudicing a person in his rights, such a person has a right, or is entitled, to be heard before such a decision is taken against him, even if the legislation be silent about a hearing.

[10] As concerns the ground of the 1st Respondent having acted outside the enabling Act or statute, it was contended that whereas the position and functions of the Regional Administrator were established by both section 83 of the Constitution as read with section 8 of the Regional

Council's order of 1978, it was not given power to appoint or dismiss Tindvuna. By purporting to terminate or "cancel" the applicant's being an Indvuna, it was contended the 1st Respondent was acting outside his functions as given him in terms of the said Legislation.

[11] Besides contending that the applicant was heard before the decision complained of was taken, as well as that the 1st Respondent had the Power to act in the manner he did, which he said stemed from his being an overseer in the Manzini Region, the 1st Respondent also contended through counsel that this court has no jurisdiction to hear and determine the current matter because it falls within the office of the Ingwenyama which according to clause 151 (8) of the Constitution, this court has no jurisdiction to deal with.

[12] I do not believe that the question of the termination or "cancelling" of the Applicant's being an Indvuna can be said to be falling under the Ingwenyama's office. The question is simply whether the 1st Respondent does have the power to terminate the status of a person he himself refers to as an Indvuna hitherto his memorandum under consideration. It seems to me that a question that would fall under the Ingwenyama's office would be whether the applicant is or is not an Indvuna. I have no hesitation that question would be outside the jurisdiction of this court.

[13] Article 151(98) of the Constitution provides as follows:-

> *"notwithstanding subsection (1) the High court has no original or appellate jurisdiction in matters relating to the office of Ingwenyama, the office of Indlovukazi (the Queen mother); the authorization of a person to perform*

the functions of Regent in terms of section 8; the appointment, revocation and suspension of a chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the Procedure of the Council; and the Libutfo system, which matters shall continue to be governed by Swazi law and custom".

[14] What is certain is that I am not being asked to determine whether or not the applicant is the proper Indvuna for the areas referred to, which it is common course are areas known as **Emahambate**. Instead I am being asked to determine whether the termination of applicant's status as an Indvuna of the said areas was done procedurally including if the 1st Respondent who purported to terminate the applicant's said status had the power in law to do so. I have already made my position known on what I would say if I was to determine whether or not he was an Indvuna as clearly that question would be left to the appropriate structures to decide.

[15] In the contrary this court cannot be said to be having no power to determine whether or not the 1st Respondent followed the enabling the law when terminating applicant's aforesaid status. It is not disputed that the law establishing the office of Regional Administrator, also spells outs its functions. It was not disputed that the powers exercised by the Regional Administrator are those of an Administrative Authority. All such powers are therefore susceptible to section 33 of the Constitution in my view.

[16] It shall be noted that the 1st Respondent has not raised a defence that he exercised the powers in any other capacity than the one legislated as quoted above. He also did not say he was carrying out instructions from the Ingwenyama which would have brought the matter within the rubric of those matter that fall within the office of the Ingwenyama as provided by section 151 (8) of the Constitution.

[17] It is for the foregoing reasons that I have come to the conclusion that this court does have the jurisdiction to hear the matter, which means that I should dismiss the point raised on this court having no jurisdiction.

[18] Owing to the fact that no other points other than the merits of the matter were argued I must now deal with the merits of the matter where I am required to decide whether or not the 1st Respondent complied with section 33 of the Constitution as well as whether the 1st Respondent had the power to do what he did, that is to say did he act outside (ultra vires) his powers.

[19] It seemed common course during the argument of the matter, that the applicant was entitled to a hearing before the decision to terminate his status as an Indvuna was taken. In fact the 1st Respondent contends that the hearing did take place and was confirmed by the minutes annexed to the Answering Affidavit which bear the dates of the meetings held for that purpose, as the 21st April 204 and the 11th August 2005. The letter terminating the applicant's status is dated the 5th March 2010, which is about six and five years respectively from the date of the minutes. My reading of the minutes do not indicate that the Applicant was ever asked

to clarify or show cause why his status as an Indvuna should not be terminated or cancelled. Consequently, if the Respondents believed the applicant was being given a hearing through the said meetings, then that hearing did not match up to the standard contemplated by Article 33 of the Constitution of Swaziland.

[20] Furthermore there is no doubt that even if there was no stipulation anywhere that the Applicant be given a hearing, he however deserved one in line with Audi Alteram Partem principle as clarified in the ***Administrator Transvaal vs Tranb Supra at 748 G-H*** case where the following was stated:-

> "*The maxim (Audi Alteram Pertem) expresses a principle of natural Justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in the liberty or property or existing rights, the latter has a right to be heard before the decision is taken…".*

[21] I have therefore come to the conclusion that the applicant was not given a hearing before the decision complained of was taken which means that the *Audi Altram Partem* rule was not observed when it should have.

[22] The next question to consider is whether or not the 1st Respondent had the power to terminate the Applicant's status as an Indvuna. This court has to be understood that it is by no means decreeing that the Applicant is indeed or was ever properly appointed, an Indvuna in the areas concerned. It is a matter that remains for the appropriate Authorities who can lawfully appoint or terminate tindvuna's appointments to deal

therewith in terms of the laws of the country governing such appointments. It is common course that prior to the memorandum allegedly terminating his status as an Indvuna of certain areas he exercised powers as such. Ours is therefore to consider that alleged status of his was terminated by someone with proper power to do so.

[23] I agree that the position of the 1st Respondent is established by law which also spells out its functions. It is indisputable that among the functions spelt out there is none in terms of which the 1st Respondent is given the power to appoint or terminate the appointment of an Indvuna. If there is no such law then there is only one conclusion to be reached which is that by purporting to terminate an Indvuna status the 1st Respondent exercised powers he did not have, and therefore acted ultra vires his powers.

[24] It is therefore my considered view that the 1st Respondent could only exercise powers he has. It would perhaps be a different position if the Applicant had been appointed by the 1st Respondent given the maxim that power to appoint implies power to dismiss. Consequently the purported termination of the Applicant's status as an Indvuna is unlawful and should be set aside.

[25] Having come to the conclusion I have, I now make the following orders:-

25.1 The decision of the 1st Respondent as embodied in the memorandum dated the 5th March 2010 purporting to

"Cancel" the applicant as Indvuna for Kwaluseni and Mbikwakhe areas be and is hereby set aside.

25.2 The 1st Respondent be and is hereby ordered to pay the costs of these proceedings at the ordinary scale.

Delivered in open Court on this the 1st day of March 2012.

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N. J. HLOPHE

JUDGE