

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1996/2023

In the matter between:

MDLAZIMBI FARMERS ASSOCIATION

APPLICANT

And

SIVUKILE FARMERS LIMITED

FIRST RESPONDENT

ROYAL ESWATINI SUGAR

CORPORATION

SECOND RESPONDENT

Neutral citation : *Mdlazimbi Farmers Association v Sivukile Farmers
Limited & Another (1996/2023) [2023] SZHC
(17/11/2023)*

CORAM: B.S DLAMINI J

DATE HEARD: 31 October 2023

DATE DELIVERED 17 November 2023

Summary:

Application for interdict-Parties contesting rights of use of land located on Eswatini Nation Land. Court initially referring dispute to traditional authorities for determination. Ruling having been issued by relevant traditional authorities, Respondent alleging that it has rights of use and possession over land pending appeal to higher traditional authorities.

Held;

Application for interdict is based on the ruling by relevant traditional authorities. The right of appeal exercised by Respondent in terms of its appeal does not outweigh the right possessed by Applicant in terms of the ruling by traditional authorities. Orders sought by Applicant granted as prayed for.

JUDGMENT

INTRODUCTION

[1] On the 31 October 2023, having heard elaborate and extensive arguments on all issues arising in this matter, this Court granted orders 1, 2, 3, 4, 5 and 7 of Applicant's application dated 26 August 2023. First Respondent requested the Court to provide written reasons for granting the said orders. The reasons requested by First Respondent are now provided herein below.

[2] Applicant sought orders declaring that it has rights of ownership and/or use over the disputed land in question and further sought an order interdicting and preventing First Respondent from interfering and/or disturbing its lawful possession of the sugar cane fields. The Applicant also sought an order directing that the already harvested sugar cane fields (done at the instance of First Respondent) be allowed to be deposited or transported to the Second Respondent but that Second Respondent, namely Royal Eswatini Sugar Corporation, be stopped from making payment thereon to First Respondent pending finalization of the matter in Court.

- [3] The interim relief (allowing the harvested sugar to be transported to the Second Respondent but stopping payment thereon pending determination of the matter in Court), was duly granted by His Mlangeni J, who was then duty Judge, on the 28th August 2023. Given the fact that I had sometime in the year 2022, issued an order referring the dispute between the parties to the relevant traditional authorities, Mlangeni J, when granting the interim order on the 28th August 2023, referred the matter back to me for determination on the merits.
- [4] In answer to Applicant's application, the First Respondent raised a number of points *in limine* and also addressed the merits to Applicant's cause. On the date of hearing of the application, the parties agreed to address the Court on both the points *in limine* as well as the merits of the matter. It was thus agreed between the parties that the First Respondent should be the first to address the Court on the points *in limine* as well as the merits of the matter.

FIRST RESPONDENT'S SUBMISSIONS

- [5] The first point of law taken in the matter by First Respondent was that the High Court is *functus officio*. On this point *in limine*, First Respondent argued that sometime in the year 2014, the High Court of Eswatini, in relation to the same dispute between the same parties, deliberated on the conflict between the parties and concluded same by ordering that the matter be referred to the relevant traditional authorities for deliberation. In the same spirit, in the year 2022, this Court under High Court Case No: 852/2022 deliberated on the same dispute and similarly directed that the matter be referred to the relevant traditional authorities for determination. It was thus argued on behalf of First Respondent that the Court is *functus officio*, having dealt with the same dispute on two separate instances.
- [6] The second point taken on behalf of First Respondent was that the High Court lacks jurisdiction to hear and determine the dispute between the parties in that by law, the High Court is not seized with jurisdiction in those matters or disputes which involve Eswatini Law and Customs or disputes on land situate on Eswatini Nation Land.

[7] The third point *in limine* was that dispute between the parties is still pending before the King's Advisory Council (Liqoqo) following First Respondent's appeal against the decision of the Ludzidzini Council which had ruled in favour of the Applicant.

[8] First Respondent also raised a point *in limine* to the effect that the matter is not urgent as the Ludzidzini Council issued its ruling on the 23rd May 2023 and also because on the 13th June 2023, the Applicant had filed a similar application under High Court Case No: 852/2023 which was still pending in Court.

The point on urgency was however not pursued by the First Respondent. It would indeed have been pointless to pursue this point since on the 28th August 2023, Mlangeni J, had already exercised his discretion and had deemed it fit to grant an interim order on an urgent basis given the facts of the matter.

[9] First Respondent further argued that the Applicant failed to meet the requirements for the granting of an interdict and is thus not entitled to the orders sought. On this point, it was argued that the Applicant has no right of ownership or of use to the land in question. It was also

argued that the Applicant does have an alternative remedy which would be to claim for damages by way of action proceedings in the event that First Respondent's appeal was not successful before the *Liqogo*.

ANALYSIS AND FINDINGS

- [10] The Applicant's response to all the points *in limine* will be incorporated in the Court's findings in order to avoid repetition.

COURT BEING FUNCTUS OFFICIO

- [11] This point *in limine* is misdirected. This is a fresh application in which Applicant seeks the Court's intervention in the enforcement of its rights arising from two lawful rulings of the relevant traditional structures. The first ruling was issued by the Esicelwini Royal Kraal on the 7th July 2016. The ruling specifically directed that members of the Applicant are rightful owners of the land in question. It is not clear who then took the matter to the Ludzidzini Council, but on the 23rd May 2023, the Ludzidzini Council ruled as follows;

"SIJUBO

Lelibandla leNgwenyama liyavumelana nesijubo senkantolo samhlaka o7 November 2014 kanye nesijubo sababe sikhulu Mlungeli Mahlalela samhlaka o7 July 2016. Lesijubo sababe Sikhulu Mlungeli Mahlalela samhlaka 07 July 2016 sicacisa kahle kutsi Sivukile Farmers Limited akabuyisele umhlaba kubanikati nelibandla Le Nkhonsi lisho njalo.”

[12] In essence, the Ludzidzini Council ruled that First Respondent should vacate the land in question and hand it over to Applicant. It is these rulings that Applicant is seeking to enforce. Applicant’s right to approach the High Court is based on these rulings. The Applicant is not saying the High Court must determine the rights of the parties afresh but is only seeking to enforce a right that has already been determined by lawful structures recognized in the Constitution of the Kingdom of Eswatini.

[13] In the Supreme Court Case of **Rogers Boyana Du-Pont v Robert Fana Nkambule and 2 Others (07/2015) 2015 SZSC 20 (4th November 2015)**, the Court had this to say on the principle of *functus officio*;

“[16] The *functus officio* principle is however subject to various exceptions which are to the effect that in certain instances the Court may correct, alter or supplement its order provided the application seeking that is made within a reasonable time. This will happen where;

- “1. The principal judgment or order is in respect of accessory or consequential matters; for example costs that a court inadvertently failed to grant.
2. The meaning of the judgment or order on a proper interpretation remains obscure or ambiguous provided the alteration does not alter the sense and substance of the judgment or order.
3. There is a clerical or arithmetical error in the judgement and the idea is to give effect to its true meaning.
4. Counsel in the matter has argued the merits but not the costs and the court, in its judgment also makes an order relating to costs.”

[14] The point *in limine* relating to the Court being *functus officio*, is in any event raised out of context. Several questions must be asked, namely; in which matter is it alleged that the Court is *functus officio*? What was the precise relief sought in the other matter or matters? In order to rely on this point, the First Respondent should have annexed the pleadings of the other matters so that the Court can make a

comparison. But even if First Respondent had attached the pleadings setting out the relief sought in the other matters, as long as it (First Respondent) is refusing to comply with the decisions of the traditional authorities, the dispute remains unresolved and Applicant is entitled to approach this Court to seek compliance with the rulings of the traditional authorities.

LACK OF JURISDICTION

[15] This point is linked to the other points already discussed above and the points which are still to be discussed herein below. The High Court does have jurisdiction to enforce rights which have already been determined by other lawful forums. Section 152 of the Constitution of the Kingdom of Eswatini, dealing with the review and supervisory powers of the High Court provides;

“152. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers.”

[16] In the '*Oxford Dictionary*' the word 'supervise' is defined to mean;
"observe and direct the execution of (a task, project or activity)".

[17] The power to observe and oversee that proceedings and rulings of subordinate courts, tribunals and lower adjudicating authorities are well conducted and properly executed is expressly given to the High Court by Section 152 of the Constitution.

[18] Even if my interpretation of Section 152 of the Constitution may not be correct, in the High Court Case of **Gugu Motsa v Bongani Austin Dlamini & 2 Others (1536/2020) [2020] SZHC 202 (5 October 2020)**, the Court (dealing with a dispute over land situate on Swazi Nation Land), per Langwenya J, stated that;

"[15] In my view, there is neither rhyme nor reason why an applicant who can prove that she was lawfully allocated the land in question in line with the dictates of the appropriate law, should not be able to interdict any unlawful invasion of her right over the property she has possessory rights over. The present matter however, is not one where the clear

right over the land has been established in light of the disputes raised.

[16] An interdict is a discretionary remedy. The discretion must be exercised judiciously. The Court always has discretion to refuse to grant an interdict even though all the requisites for an interdict are present. This will be so if, for instance, the effect of the interdict which is being sought by the applicant is, indirectly to pronounce on who, between the applicant and the first respondent, has the possessory rights of the land situate on Swazi nation land- an issue that is outside the powers of this Court.”

[19] The High Court in the *Gugu Motsa case* (supra) has therefore made it clear that it does have jurisdiction to enforce orders issued by relevant traditional structures. It follows that the point of law raised on behalf of First Respondent in which it is alleged that the High Court lacks jurisdiction in these type of matters should fail:

LIS PENDENS

[20] The First Respondent has also raised the point that the matter before Court is also pending before the King's Advisory Council known as Liqoqo. According to First Respondent;

“The matter in question is pending before another traditional authority and thus the above Honourable Court cannot hear the same matter pending before another forum.”

[21] The matter which is said to be pending before the King's Advisory Council is an appeal against the ruling of the Ludzidzini Council. This Court repeatedly enquired from First Respondent's counsel on whether appealing in the context of customary law has the effect of staying execution of the ruling. The Court enquired from First Respondent's counsel on who has a better right of occupation of the land following a determination of the dispute by the relevant *Umphakatsi* and a confirmation of such ruling by the Ludzidzini Council. First Respondent's counsel insisted that their noting of the appeal means all the previous decisions by the relevant traditional authorities have been stayed and therefore that First Respondent has a better right to remain in occupation pending determination of the appeal.

[22] Even without legal authorities, the reasoning by First Respondent's counsel appears to be blatantly flawed and contrary to logic. Fortunately, the Court was able to obtain guidance from a decision of the High Court in **Shongwe v Sithole and Another (604/2018)** [2018] SZHC 154 (11 July 2018) in which the Court held that;

“[25] It is the applicant's contention that he is entitled to the order prayed for because he has allegedly appealed the decision of the Lozitha Royal Kraal and that the status quo ante that prevailed prior to the decision allegedly appealed against was made has to remain in place. The reasoning seems to be this position is in keeping with the principle that once an appeal has been noted, the implementation of the new order is suspended. The view taken by the applicant in this regard is to interpret the applicable customary law through the lens of the Roman Dutch common law. This cannot be correct. It has been held by the High Court in various decisions that the High Court does not have jurisdiction to interfere in a matter that is the preserve of the customary law of EmaSwati.

[26] If the common law principle of suspending the execution of the decision reached or order issued is super-imposed in cases where only customary law is applicable, there is likely to be an undesirable tension between the application of Roman-Dutch common law and the customary law in this regard. It is not a given that matters of customary law necessarily require the application of common law principles as the two systems of laws are not necessarily the same in their complexion and application. It may well be that in line with the requirements of justice in appropriate matters the traditional structures exercising appellate jurisdiction and applying customary law may well grant a stay of proceedings pending the determination of the alleged appeal. The applicant did not advance reasons why the Zombodze Royal Kraal cannot regulate its processes where justice so demands.

[27] In the present matter, there is no material-either evidential or legal- confirming the applicability or otherwise of

suspension of the execution of a decision or order granted by the Lozitha Royal Kraal once an appeal is noted. The applicant did not address the court on this issue.”

- [23] From the decision of the High Court, it is clear that the noting of an appeal in the customary law context does not stay execution. This point of law therefore ought to fail.

FAILURE TO MEET REQUIREMENTS OF INTERDICT

- [24] This point has already been dealt with above. Applicant's right to the orders sought emanate from the decisions of the traditional authorities. The right to possess and use the land in question was determined by the Esicelwini Royal Kraal and confirmed by the Ludzidzini Council. Armed with these rulings, the Applicant approached this Court in order to enforce its rights over the land in question. The right possessed by the Applicant is a clear right which is directly sourced from the rulings by traditional authorities. The First Respondent's continuous refusal to vacate the land in question means there is an ongoing injury being suffered by the Applicant. The Court has already highlighted above that it is the only institution which is given power

by the Constitution of Eswatini to supervise the proper conduct of lower tribunals and to ensure that execution of their orders is done in accordance with law.

[25] The point raised on behalf of First Respondent relating to failure by Applicant to meet the requirements of a final interdict is rejected.

[26] Another contentious issue arising in the matter relates to the interim order granted by the Court on the 28th August 2023, which was subsequently confirmed on the 31 October 2023.


[27] First Respondent's occupation of the land in question was illegal as from the 7th July 2016 when the *Umphakatsi* issued its ruling and expressly informed First Respondent to vacate the land in question and hand it over to Applicant. Whatever was being done on the land in question by First Respondent subsequent to that ruling was illegal and of no force and effect. Surely in law one cannot benefit or enjoy the fruits of an illegal enterprise, unless so justified in a proper and legal manner. The holding of the money by the Second Respondent avails to First Respondent the opportunity to state reasons in Court why it

ought to be paid the money in question. The same principle applies to the Applicant.

[28] It is important to note that the Court did not direct that the money held by Second Respondent in consideration of the produce from the land must be handed over to Applicant. The Court only directed that such monies be kept by the company so that whoever lays a claim to same will be required to justify the legal basis for claiming such monies. This, in the Court's view was a fair order to both parties.

[29] In conclusion, the Court confirms the orders issued on the 31st October 2023 as follows;

(a) An order is granted in terms of prayers 1, 2, 3, 4, 5 and 7 of the Applicant's application dated 26th August 2023.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant: Attorney Mr. S.V Mdladla
(S.V Mdladla & Associates)

For 1st Respondent: Attorney Mr. T. Simelane
(Simelane Shongwe Attorneys)