

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 2265/2023

In the matter between:

SWAZI PHARM WHOLESALE (PTY) LIMITED

1st Applicant

KAREEM ASHRAFF

2nd Applicant

DAVID MELVIN

3rd Applicant

And

ATTORNEY GENERAL OF ESWATINI

1st Respondent

THE RIGHT HONOURABLE PRIME

MINISTER OF THE KINGDOM OF ESWATINI

2nd Respondent

MINISTER FOR FINANCE

3rd Respondent

MINISTER FOR HEALTH

4th Respondent

AUDITOR GENERAL

5th Respondent

FUNDUZI FORENSIC SERVICES (PTY) LIMITED

6th Respondent

Neutral citation: *Swazi Pharm Wholesale (Pty) Limited & Two Others v Attorney General of Eswatini & Five Others (2265/2023) [2024] SZHC 85 (17 April 2024)*

CORAM : T. DLAMINI J
Heard : 3 November 2023
Ex tempore issued: 15 April 2024
Delivered : 17 April 2024

[1] *Civil procedure – Application for a mandamus interdict*

Summary: *The ministry of health under the Government of the Kingdom of Eswatini faced a serious shortage of drugs and medicines at public health facilities to a point that some people died and the public health system almost entirely collapsed – The Auditor General for the Kingdom of Eswatini commissioned a forensic investigation styled ‘A Forensic Audit into Acquisition and Distribution of Medicines to Public Health Facilities in Eswatini’ – Funduzi Forensic Services Proprietary Limited was awarded the tender to carry out the forensic audit – Of major concern was the expenditure on drugs and medicines versus the availability of the drugs and medicines at the public health facilities – The ministry spent more than a billion emalangeni each year on the acquisition of the drugs that are then supplied to the public health hospitals and clinics – While a report of the audit investigation was being awaited, and at a stage of, in my opinion and understanding, being shared with the relevant government ministries and authorities as per the dictates of the Constitution, the applicants instituted these proceedings seeking an order directing the first to fifth respondents to produce the report for it to be copied by them – In the alternative, they sought an order directing the first to fifth respondents to produce a redacted copy of the report with exclusions of sections of the report that are subject to legal privilege and the severed portion to be made available to the applicants – The application was opposed and points ‘in limine’ were raised by the respondents before answering the merits of the case.*

Held: *That by agreement of the parties, the application has become academic as the sought report is now a public document and is accessible to any member of the public – Application is removed from the roll pending authentication of the Report by the Attorney General – Each party is ordered to bear its own costs.*

JUDGMENT

T. Dlamini J

[1] The applicants filed an application under a certificate of urgency against the respondents seeking, *inter alia*, the following orders:

- (i) That the first to fifth respondents be ordered and directed to produce for purposes of copying a report styled "*Forensic Investigation Report into Allegations of Irregularities Relating to Procurement, Acquisition and Distribution of Medicines to Public Health Facilities in Eswatini*" that was carried out by the sixth respondent at the instance of the fifth respondent;
- (ii) Alternatively, that the first to fifth respondents be ordered and directed to produce for purposes of copying a redacted copy of the report styled *Forensic Investigation Report into Allegations of Irregularities Relating to Procurement, Acquisition and Distribution of Medicines to Public Health Facilities in Eswatini*" that was carried out by the sixth respondent at the instance of the fifth respondent with exclusions of sections of the report that are subject to legal privilege and the severed portion be made available to the applicants; and
- (iii) Ordering the respondents to pay the costs of this application in the event of opposition.

[2] The first applicant is Swazi Pharm Wholesale (Pty) Limited, a company registered and incorporated in accordance with the company laws of the Kingdom of Eswatini and has its principal place of business in Matsapha. It is engaged in the business of selling and distributing pharmaceutical products to both the private sector and the ministry of health of the Kingdom of Eswatini. The second applicant is Kareem Ashraff, an adult businessman who is also the Honourable Consular General for the Republic of Indonesia in the Kingdom of Eswatini. He is a director of the first applicant and deposed to the founding affidavit. The third applicant is David Melvin, an adult businessman of Mbabane and is a former director of the first applicant.

[3] The first to fifth respondents are senior officials of the Government of the Kingdom of Eswatini. These are the Attorney General; The Honourable Prime

Minister; the Minister for Finance; the Minister for Health; and the Auditor General. They are the first, up to the fifth respondents, and are cited in that chronological order.

- [4] The sixth respondent is Funduzi Forensic Services (Pty) Limited, a company incorporated in accordance with the company laws of the Kingdom of Eswatini. The sixth respondent provides forensic services, and was awarded a tender for the forensic audit investigation into irregularities in the acquisition and distribution of medicines to public health facilities under the ministry of health. The forensic audit investigation was undertaken under the mandate of the auditor general.
- [5] The purpose for seeking to be furnished with copies of the forensic investigation report is stated in paragraph 15.3 of the founding affidavit where it is deposed that it is “... *to institute proceedings for the review and/or setting aside the forensic report issued by Funduzi Forensic Services (Pty) Limited (“Funduzi”).*”
- [6] The second applicant allege in the founding affidavit that there were reports to the effect that the government, through the Auditor General; and the ministers for health and finance; appointed a forensic investigation team into allegations of irregularities relating to the procurement, acquisition and distribution of medicines to public health facilities in the country (Eswatini). There were also reports that the forensic investigation team was interviewing role players, including employees of the ministry of health, and suppliers as well.

- [7] The second applicant also alleged that there were media reports that two employees of the ministry of health launched urgent court proceedings seeking, amongst other prayers, an interdict against the investigators on allegations of impropriety on the part of the investigators. A draft report of the forensic investigation was shared with one of the ministry of health employees by one of the investigators and was attached to the court papers. It was further alleged that the report mentioned the first applicant as one of the entities involved in some form of wrong doing pertaining to the supply of pharmaceutical products and services.
- [8] The second applicant contends in the founding affidavit that premised on this information, he expected the investigators to summon him as a director of the first applicant, in order to provide explanations and /or rebuttals of the assertions made.
- [9] The second applicant alleged in the founding papers that on 17 July 2023 at about 20:48 hours he was visited at his homestead by the auditor general who informed him that the forensic audit investigation had been completed and produced to him its report and permitted him to take photographs of extracts of the report. It was in his discussion with the auditor general that he learnt that the first applicant was implicated in grave wrong doing. The adverse findings were startling and highly contentious, contended the second applicant.
- [10] The allegations made in the paragraph above are denied by the auditor general concerning the purpose for his visit to the second applicant's homestead. He stated that he was invited to the homestead by the second applicant and he

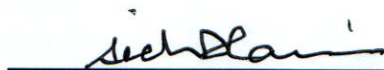
honoured the invitation because he respected his position as Honorary Consul General. He also stated that it was a casual visit that included a witness, one Mr. John Bukutu. He further stated that he honoured the invitation because he met other diplomats, Consular and Country representatives with similar invitations as an ascertaining exercise to know about the seriousness of the audit forensic investigation and the picture that the health crisis is painting to the outside community. He stated further, that he informed the second applicant that the investigation was not complete but was in progress. He denies that he had extracts of the report, and that he ever showed to him any.

- [11] The second applicant contends that the findings were causing serious reputational damage to the applicants, and that the investigators reached unfounded and completely incorrect conclusions. As a result, the second applicant submitted that the conclusions have been made without the applicants being accorded a right to be heard. It is for this reason, according to the second applicant, that it became imperative to take steps to have the report impugned as a first step towards vindicating the rights of the applicants.
- [12] The second applicant alleged that he was informed that his request for the report would be considered after the report had been tabled and adopted by Cabinet. Extracts of the report were however leaked to the local media and a media frenzy continued that was accompanied by comments from certain government officials that included the minister and principal secretary for the health ministry. Given that the term of office for Cabinet had been extended to 27 September 2023, the second applicant contended that the matter had to be heard on an urgent basis as it was the last day for Cabinet to be in office yet it was to consider and decide on his request for the report.

- [13] The second applicant further alleged that in his personal capacity, and as an Honorary Consular General, the reports that he is involved in acts of maleficence do not augur well for his status and reputation. His profile as a diplomat has been severely damaged by the unsavoury conclusions that emanate from the report. His good standing as a businessman has suffered serious reputational damage, and there is need for these adverse findings to be expunged as early as possible before more damage is meted out.
- [14] The second applicant alleged further, that he was informed by the auditor general that the report implicated two ministry of health officials that had taken the government to court. He was shown and he took a picture of one of the exhibits that related to Sincedile Dlamini, attached and marked 'KA 3'. This exhibit is an incontact message from First National Bank directed to the email address '*SNCEDILE@GMAIL.COM*'. In terms of this exhibit, an amount of **E36, 290.00** was paid by Swazipharm on Tuesday, 14 December 2021 at 19:36 hours. The second applicant contends that the investigators did not seek to identify the account holder. This is therefore one of the many conclusions brought about that they want to address in the review proceedings that they want to launch.
- [15] It was the second applicant's contention that section 33 of the Constitution was violated by the manner that the forensic audit investigation was carried out because the applicants were denied the constitutional right to be treated justly and fairly as conclusions were made about them but without according them the opportunity to rebut these conclusions.

- [16] While the court had commenced preparing its judgment, a message from the applicants' attorney was received informing the court that the *Forensic Audit Investigation Report* (the *Report*) that they wanted to have access to has been tabled in Parliament and is now a public document that is available to any member of the public. The order of the court compelling the respondents to make it available is therefore no longer necessary. The court then summoned the parties to appear on the next court date of 15 April 2024.
- [17] The court was informed by Mr. D.Z. Jele who represents the applicants that his clients are now in possession of the *Report* that they wanted to be furnished by the first to fifth respondents. He reiterated that they want to subject the *Report* to review by the court. He submitted that an order of the court compelling these respondents to make the *Report* available to the applicants is no longer necessary, and has become academic as they are now in possession of the *Report*. He informed the court that they have sent the *Report* to the office of the Attorney General for authentication before they can use it. A proposal was made by Mr. Jele that the matter be removed from the roll of the court.
- [18] Mr. V. Manana who appeared for the first to fifth respondents agreed to the proposal for the removal of the matter from the roll. Mr. K.Q. Magagula who appeared for the sixth respondent submitted that he pointed out during arguments that any order issued would be academic as the applicants stated that they wanted to hold the previous Cabinet responsible for the *Report*. It was his submission then, that it was the last day of office for the Cabinet. He now argued that the matter is ending in accordance with the point of law he raised when addressing the issue of urgency.

- [19] Concerning the submission by Mr. Magagula about the point of law he raised, the court rules that the reason why an order of the court is now deemed academic is for a different reason and not the one that Mr. Magagula contemplated and made submissions on. His submission was that the term of office for Cabinet came to an end on 27 September 2023, and that was when the applicants instituted the proceedings. As a result, the order would be academic because the Cabinet had formally vacated office, he argued.
- [20] The order or judgment is now deemed academic because the applicants are already in possession of the *Report* that they sought to be given access to.
- [21] For the foregoing, the matter is removed from the roll but may be reinstated if there are issues concerning the authentication of the *Report* by the Attorney General. Each party is ordered to bear its own costs.



T. DLAMINI
JUDGE

For applicants:	Mr. Z.D. Jeje
For 1 st – 5 th Respondents:	Mr. V. Manana
For 6 th Respondent:	Mr. K.Q. Magagula