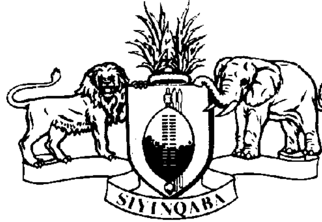

IN THE COURT OF APPEAL OF SWAZILAND

CASE NO.40_00

In the matter between:

CHIEF MTFUSO II (formerly known as NKENKE DLAMINI)	**1ST APPELLANT**
ISAAC DLAMINI	**2ND APPELLANT**
MAKININI SIKHONDZE	**3RD APPELLANT**
AND	
SWAZILAND GOVERNMENT	**RESPONDENT**

CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**BECK JA**
FOR THE APPELLANTS	**:**	**MR. DUNSEITH**
FOR THE RESPONDENT	**:**	**ADVOCATE ROBERTS**

JUDGMENT

THE COURT:-

The appellants have at all times material to this matter been living in an area of Swaziland known as ka-Mkhweli. A dispute arose in the area in about 1992 regarding the chieftainship of the community which resulted in conflict and occasional violence.

On or about the 3rd August 2000 the appellants were each served with a removal order signed by Prince Sobandla, Minister of Home Affairs, ordering them together with their dependants to leave the area of Ka-Mkhweli by 5th September 2000 and to relocate to other areas. These orders purported to be issued by the Minister of Home Affairs in terms of powers conferred on him by Section 28 of the Swazi Administration Order, 1998. ("The Administration

Order") Section 25(11) of that Order provides that a person whose removal has been ordered under Section 28(3) may, within a period of 30 days from the date the order was served on him, apply to the Ngwenyama (His Majesty King Mswati III) for the review of such an order.

On the 21st August 2000 the appellants brought an application to the High Court as a matter of urgency seeking an order declaring the removal orders to be stayed and suspended pending the final determination of an application to the Ngwenyama for review of the said orders. The appellants also sought an interdict restraining the Minister of Home Affairs and others from taking any action against them pursuant to the said removal orders, pending the final determination of the said application to the Ngwenyama.

In the founding affidavit the allegation was made that on 8th August 2000 the first appellant and his council proceeded to the Royal Kraal at Eludzidzini in order to appeal to the Ngwenyama for the review of the removal orders. The first appellant then stated that after being kept waiting for some hours they were informed that they would not be permitted to place their petition before the Ngwenyama because the matter, so they were informed, had long been concluded and they were "chased away".

It was then that the application was brought before the High Court for the relief set out above.

On 31st August 2000 the respondent's answering affidavit was filed. The Attorney General of the Kingdom was the respondent's deponent. He raised various points in limine the main one of which was that the High Court did not have jurisdiction to entertain the application. After setting out all the points in limine which he wished to argue the Attorney-General then concluded his affidavit with the following: -

> "9. Should none of the above points in limine be upheld, the respondent respectfully reserves its right to file a supplementary affidavit(s) on the merits of the matter,
>
> 10. A comprehensive affidavit cannot be filed at this time, regard had (sic) to the time constraints occasioned by the manner in which the application has been brought.
>
> 11. I do however at this stage state that I am personally in possession of the Ngwenyama's instructions in terms of Section 28(3) pertaining to this matter, and I confirm same".

Argument ensued on Friday 1st September and Monday 4th September 2000. On the latter day the learned Chief Justice had summoned to assist him in deciding the matter, two Swazi assessors who could advise him on aspects of the application which involved Swazi law and Custom. It appears to be common cause that (a) the issue of jurisdiction was fully canvassed in argument and (b) that the appellants, as it is put in the heads of argument prepared on behalf of the respondent, "were seeking an interim order, the purpose of which was to protect their rights and interests pending the final determination of their application to the Ngwenyama for review of the removal orders".

On Tuesday 5th September 2000, Sapire CJ handed down a written judgment. He analysed the contents of the removal orders which were served on the appellants and pointed out that Section 28(1) of the Administration Order ousts the court's jurisdiction to inquire into any order made under sub-section (3) i.e. an order made by His Majesty. The learned Chief Justice found that the orders "in this case were made by the Minister himself." The learned judge then went on to say: -

> "In so far as they impose conditions as to the date by which the removal should take place and the area to which they are to remove I find that it is open for this court to deal with such orders as these matters are not dealt with in the orders of the Ngwenyama." (our emphasis)

It seems clear to this court, therefore, that the Chief Justice found that the court did have jurisdiction to enquire into the removal orders issued ***in casu*** and that it is a necessary implication of what he said that the point in limine regarding the jurisdiction of the court was the subject of a final and definitive finding in favour of the appellants.

Sapire CJ then went on to decide as follows (and we tabulate the learned judge's observations for the sake of convenience and clarity): -

(i) "In view of this we have come to the conclusion that the correct way of handling the matter is that the order of the Minister, (which is not the order of His Majesty) but the order of the Minister in so far as it places a date on the removal should be inquired into and the order should be in fact extended or suspended until such time as all the applicants who are affected by the order have had the opportunity of exercising their traditional right of appeal to Ngwenyama, which is specifically referred to in the statute."

(ii) "The order therefore is in these matters that the applications are themselves postponed ***sine die.*** In the interim the orders of the Minister are suspended until such time as the applicants have had an opportunity of addressing His Majesty in the traditional way."

(iii) "My assessors agree with this and agree with the order which I have made. We are especially anxious that an impression should not be gained that this court assumes jurisdiction to deal with an order made by His Majesty. What we are doing is to ensure that the terms of the statute are complied with and that the provisions of Swazi Law and Custom as generally known are applied in this case as in other cases. Accordingly there will be an order in both cases suspending the operation of the eviction orders until such time as the applicants have had an opportunity of exercising their rights according to Swazi Law of appeal to Ngwenyama."

About two weeks after the judgment was delivered i.e. on 22nd September 2000 the respondent filed what were headed "Respondent's Answering Affidavits" which included as a point in limine that the court was "not possessed of jurisdiction to adjudicate upon this matter." Included in the argument articulated in the affidavit, this after an analysis of Section 28 of the Administration Order, was the following submission: -

> "The above Honourable Court has no power whatsoever to enquire or deal with the removal orders made by the Minister of Home Affairs. The reason for this is that the orders made by the Minister of Home Affairs are orders contemplated in terms of Section 28(3) of the Swazi Administration Order of 1998. The orders of the Minister of Home (sic) were intended to be orders in terms of Section 28(3). The Minister merely gave effect to the removal orders by His Majesty the King."

In reply to this submission the appellants stated that the issue of jurisdiction was fully argued on 1st and 4th September 2000 and was finally determined by the court.

It was therefore, so it was submitted, ***res judicata.***

The answering affidavit of the respondent also dealt at length with the facts of the matter. In answer to the allegations regarding the efforts of the appellants to place their petition before the Ngwenyama and the allegation that they were "chased away from the Royal Kraal," the

Attorney General stated that he denied the allegations and submitted that they were argumentative. He did, however, annex affidavits of various deponents placing in issue facts relied on by the appellants.

The matter again came before the learned Chief Justice on 6th October and the issue relating to jurisdiction was, despite objection by the appellants, allowed to be re-argued.

On 13th October 2000 the Chief Justice delivered his second judgment. This time he found that the jurisdiction of the Court had been excluded by Section 28(1) of the Administration Order and on that basis dismissed the application with costs. It is against that order that this appeal was brought before us.

In dealing with the argument that the issue of jurisdiction was ***res judicata*** Sapire CJ said: -

> "There is a fatal flaw in applicants' argument in that the order made by the court afforded the applicants interim relief. It was not final and did not finally dispose of any issues between the parties. It was made to preserve the ***status quo*** until all the issues including that of jurisdiction could be finally decided. Any provisional finding so made can later be reversed. (emphasis added)

See **APLENI V MINISTER OF LAW & OTHERS 1989(1) SA 195 (A); ROUX D'ARCY LTD V JAMESON AND OTHERS 1995(2) SA 579 (W).**

It is true that I could, and should not have made the interim order, if the jurisdiction of the court was excluded. There is however nothing which prevents me from correcting my error."

As we have already said, the context in which the finding regarding the issue of jurisdiction was made and the words used by the learned Chief Justice lead inescapably to the conclusion that the finding was a final one. While the order was intended to give temporary relief to the appellants in the sense that the interdict was granted and the operation of the eviction orders of the Minister of Home Affairs was suspended "until such time as the appellants have had an opportunity of exercising their rights according to Swazi Law of appeal to Ngwenyama," there was nothing temporary or provisional about the finding that the court had jurisdiction in the matter. This did not in any way depend upon the filing of further affidavits by the respondent. It was, as above stated, fully argued and therefore the learned judge is palpably wrong in suggesting that the decision regarding jurisdiction was part of an erroneous

judgement that could be corrected by him. If the respondent was dissatisfied with the decision regarding jurisdiction its remedy lay in a forum other than that presided over by the Chief Justice who was, as far as that issue was concerned, ***functus officio.*** See **BELL V BELL 1908 T.S.887.**

Mr. Roberts who ably argued the matter before us on behalf of the respondent urged us to find that the order made by Sapire CJ in his first judgment was of a provisional nature and could therefore be amended or set aside by the court which granted it. He referred us to cases such as **RAHME MARKETING AGENCIES SA(PTY) LTD VS GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL 1997(4) SA313; MV RIZCUN TRADER 2000(3) SA776©; DUNCAN N.O. VS MINISTER OF LAW AND ORDER 1985(4)SA1.**

In the last-mentioned case it was clearly stated by VAN DIJKHORST J that -

> "the general rule is that a final judgment which correctly expresses the decision of the Court cannot be altered by the same tribunal which pronounced it. Simple interlocutory orders stand on a different footing and are subject to variation. The learned Judge went on to find that an order made by him in regard to security for costs "does not bear directly upon the issue to be decided….. it cannot affect that decision. It is therefore a simple interlocutory order. It is open to reconsideration, variation or rescission on good cause shown."

The question we have to decide, therefore, is simply whether Sapire CJ's finding, in his first judgment, that the court had jurisdiction was interlocutory or not.

We can do no better in this regard than to cite the judgment of Innes CJ in **STEYTLER VS FITZGERALD 1911 AD 295** in which that great jurist said,

> "The order dismissing the plea (to jurisdiction) was one of the greatest consequence; it settled a definite portion of the dispute and had a direct bearing on the ultimate issue. It is difficult to see how such a decision could properly be called a simple interlocutory one."

It is also a well-established principle that if, on a plea to its jurisdiction, the Court finds that it has jurisdiction such finding is appealable because, of course, it is not interlocutory. See **MALHERBE VS BRITSTOWN MUNICIPALITY 1948(1) SA676(2)**

In our judgment Sapire CJ's finding that he had jurisdiction was unequivocal, final and definitive and it was therefore not open to him to reverse it even if he later thought he was wrong.

It is, therefore, the decision of this Court that the second judgment of the learned Chief Justice was bad in law and it must be set aside as a nullity.

There is a factual dispute on the papers before us regarding the question whether or not the appellants were afforded a hearing by His Majesty the King in accordance with Swazi Law and Custom or at all. That issue cannot be decided without the hearing of oral evidence. Because the learned Chief Justice purported to dispose of the matter purely on the basis of the Court having no jurisdiction to hear it, he made no reference to this factual dispute in the second judgment. Although, in theory, our judgment restores the original judgment of Sapire CJ. Mr. Dunseith who appeared for the appellant very properly and fairly conceded that it was the intention of his clients to be protected by interdict only until the determination of the application before the High Court. He also indicated that that is all that the Chief Justice could be asked to grant. With that in mind we have decided that the fairest way of resolving the present impasse is to restore the effect of the first judgment of the Chief Justice in the following terms:

> "(i) Accordingly there will be an order in both cases suspending the operation of the eviction orders pending the final determination of the applications.
>
> (ii) There will be no order of costs."

Finally, we have been advised that pursuant to the second judgment of the Chief Justice the appellants and persons in their community affected by the order of the Minister of Home Affairs have been evicted from their homes in Ka-Mkhweli. The effect of this judgment is that the ***status quo ante*** must be restored, that they must be allowed to return and that that position must be maintained until the final determination of the proceedings in the High Court.

The costs of appeal must be paid by the respondent.

<u>J. BROWDE JA</u> <u>J.H. STEYN JA</u> <u>C.E.L. BECK JA</u>

Delivered on this day of December 2000.