

IN THE COURT OF APPEAL OF SWAZILAND

Civil Appeal Case No.6/02

In the matter between:

MINISTER FOR HOME AFFAIRS 1st Respondent

COMMISSIONER OF POLICE 2nd Respondent

REGIONAL SECRETARY - LUBOMBO 3rd Appellant

ATTORNEY GENERAL 4th Appellant

VS

CHIEF MLIBA FAKUDZE 1st Respondent

MADELI FAKUDZE 2nd Respondent

MAHAWUKELA FAKUDZE 3rd Respondent

MAKHUPHUKA THWALA 4th Respondent

CORAM : BROWDE J.A.

STEYN J.A.

ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The respondents, who were all resident in the Macetjeni area, were on or about 3rd August 2000 handed copies of removal orders ordering them and their dependents to leave the Macetjeni area and to move to the Esihlutsi area on or before 5th September 2000. The respondents and their families have lived in the Macetjeni area for generations and have built their homes there. Their children attend the local school. They refer in their application to the trauma and anguish of being evicted from the place that has always been regarded by them as home.

2

The respondents, as a matter of urgency, launched applications to the High Court in which they sought orders setting aside the removal orders, or in the alternative orders staying the execution of the removal orders pending their audience with the King (the Ingwenyama).

The applications were heard by a Full Bench of the High Court which granted the applications and set aside the removal orders. It is against the order made by that Court that the appellants have lodged their appeal.

The removal orders were purportedly granted in terms of the Swazi Administration Order No.6 of

1998. Subsection 28 (1) of the said Order reads as follows:

28 (1) Provided that such orders do not conflict with any law, the Ngwenyama may issue orders to be obeyed by Swazis within Swaziland:

(1) prohibiting, restricting or regulating the migration of Swazis from or to any particular area or areas under his jurisdiction; Subsections 28 (3), (4), (10) and (11) of the said Order provide.

28 (3) The Ngwenyama may at any time instruct the Minister for Home Affairs in writing to make an order containing such conditions as the Ngwenyama may consider appropriate for the removal of any person or any of his dependents living with him from one Swazi area to another Swazi area.

(4) Any order made under subsection (3) shall be served on the person concerned by a messenger of the Minister for Home Affairs by exhibiting the original order to the person concerned and leaving a copy thereof with him or at his place of residence and by depositing another copy at the nearest Royal Swaziland Police Station.

(10) A Court shall not have jurisdiction to inquire into any order made under subsection (3) nor shall any Court issue an interdict or otherwise order the stay of such an order as a result of an appeal against conviction under subsection (5).

3

(11) A person whose removal has been ordered under subsection (3) or who has, in terms of subsection (6) been removed may, within a period of not more than thirty days from the date when the order was served upon him or such removal effected, apply to Ngwenyama (embule ingubo eNkhosini) for the review of such an order or removal.

Purporting to act in terms of the aforementioned subsection 28 (3) the following "Removal order" was signed by Mswati III, the Ingwenyama of Swaziland:

REMOVAL ORDER

Swazi Administration Order, 1998 (Act No.6 of 1998) THE INSTRUCTIONS FOR THE REMOVAL OF CERTAIN PERSONS AND THEIR DEPENDANTS BY THE MINISTER FOR HOME AFFAIRS (Under section 28 (3)).

In exercise of the powers conferred upon me by section 28 (3) of the Swazi Administration Order 1998, I, MSWATI III, NGWENYAMA OF SWAZILAND, instructs the Minister of Home Affairs to make an order removing the following persons and their dependants

1. Mliba Fakudze
2. Madeli Fakudze
3. Mahawukela Fakudze
4. Makhuphula Tfwala

Of Macetjeni area in the Lubombo Region under Chief Prince Maguga From Macetjeni area to an area (sic repetition) be located by the Minister of home affairs THUS DONE UNDER MY HAND

AT LOZITHA THIS 12th DAY OF JULY 2000 MSWATI III.

4

INGWENYAMA OF SWAZILAND

The actual removal orders, copies of which were served upon the respondents, are signed by the Minister of Home Affairs. They are all similarly worded and I set out in full the removal order issued in respect of the First Respondent.

REMOVAL ORDER OF MLIBA FAKUDZE PURSUANT to the Removal Order issued in terms of Section 28 of the Swazi Administration Order, 1998, and signed by MSWATI III, NGWENYAMA OF SWAZILAND dated 12th July 2000 which authorises me to make and sign Removal Orders for MLIBA FAKUDZE and his dependants, I PRINCE SOBANDLA now hereby order the said MLIBA FAKUDZE and his dependants to leave Macetjeni area in the Lubombo Region under Chief Prince Maguga to Esihlutse under Chief Bhejisa on or before 5th September, 2000.

PRNCE SOBANDLA MINISTER FOR HOME AFFAIRS

In their applications the respondents allege that the removal orders are for several reasons invalid. Some of the reasons alleged by them are the following:

(1) That the Swazi Administration Order in terms of which the removal orders were issued is invalid as it has never come into operation as law.

(2) In the alternative, if the Order is valid, section 28 thereof is void for vagueness.

(3) That the services of the removal orders upon the respondents were in any case not carried out in terms of Order No 6 of 1998 in that the original orders were not exhibited to them, the written instructions from the Ingwenyama to the Minister authorising him to issue the removal orders were not shown to them, the contents of the removal orders were not explained to them, and copies

of the removal orders were not deposited at the nearest Royal Swaziland Police Station,

5

The Full Bench of the High Court, in setting aside the removal orders, held that the Swazi Administration Order No.6 of 1998 was and is invalid and that the removal orders issued in terms thereof were accordingly also invalid and of no force or effect. The Court a quo held further that even if the said Order was not invalid, the procedure set out in the Order for the issuing of removal orders was not followed and that for this reason also the removal orders could not stand.

Mr Maziya, who appeared for the respondents, submitted that the Court a quo correctly held that the Swazi Administration Order No.6 of 1998 never came into operation as law and is therefore invalid. He bases his argument on the fact that the Legislative Procedure Decree No.1 of 1998, which makes provision for the adoption of laws referred to as Orders in Council, provides that the Decree "shall apply and operate pending the establishment or constitution of a new Parliament." The new Parliament, he submits, was established on or before 12th November 1998 and the Swazi Administration Order, which is an Order-in-Council, was assented to only on 13th November 1998 at a time when the Legislative Procedure Decree was no longer operative. For this reason, he submits, the Swazi Administration Order never came into force and the King accordingly did not have the power or authority to issue the removal orders in respect of the

respondents. We find it unnecessary to decide this point. For the purposes of this judgment we will assume that the Swazi Administration Order was valid and operative at the time when the removal orders were issued.

What is however common cause on the papers is that the procedure and requirements set out in the Swazi Administration Order were not complied with. Subsection 28 (4) of the Order provides that such orders must be served "by exhibiting the original order to the person concerned and leaving a copy thereof with him" and "by depositing another copy at the nearest Royal Swaziland Police Station". The respondents allege in their applications that these requirements were not complied with, and these allegations by the respondents are not denied by the appellants.

A further point concerns the delegation of his discretion by the King to the Minister for Home Affairs. Subsection 28 (3) of the Order authorises the King to instruct the Minister to make an order "containing such conditions as the Ngwenyama may consider appropriate" for the removal of persons from one area to another area. The Removal Order

6

signed by the King instructs the Minister to make an order removing the respondents to an area to be located by the Minister. This means that the King has sought to delegate to the Minister the discretion which has to be exercised by the King himself.

In his book on Administration Law Baxter states the following at page 439.

"Powers which involve little or no discretion - so called "purely mechanical" powers - are usually delegable.....On the other hand, where the power has a significant discretionary component, requiring skilled and careful decision -making and possibly even decisions of policy, it is unlikely that it is delegable. "

Cases referred to by the author include the cases of Shidiack vs Union Government 1912 A.D. 642 and United Dairies Co-operative Ltd vs Searle and Another 1974 (4) S.A. 117 (E).

The removal of people from the area where they have lived most of their lives is a matter of considerable importance to the people concerned and to the country. Of equal importance is the area to which such people are to be relocated. Their relocation can bring about fundamental changes to their life-styles, the schooling of their children, their access to job opportunities and generally speaking to the quality of their lives. Such a fundamental invasion of their human rights certainly has "significant discretionary components" (see Baxter op cit). It is therefore clear that the discretion given to the King in such matters is not a discretion which he can delegate to one of his Ministers. For this reason alone the judgment given by the Court a quo must be upheld.

The respondents allege further that subsection 28 (1) of the Order has not been complied with. This subsection provides that a person whose removal has been ordered may within a period of 30 days from the date upon which the order is served upon him apply to the King for the review of such order. The respondents allege that all efforts by them to have the orders reviewed have been frustrated by government officials. On the papers before us this appears to be the case, but it is not necessary that we pronounce a final decision thereon.

7

The last point to be dealt with is the argument by the appellants that the courts lack jurisdiction to enquire into orders made under subsection 28 (3). Subsection 28 (10) reads as follows:

"28 (10) A Court shall not have jurisdiction to inquire into any order made under subsection (3) nor shall any Court issue an interdict or otherwise order the stay of such an order as a result of an appeal against conviction under subsection (5)."

In the case of Hurley and Another vs. Minister of Law and Order and Another 1985 (4) S.A. 709 (D) it was held that an ouster of jurisdiction clause applies only when action has been taken in terms of the section in question. If the terms of the section have not been complied with the ouster clause does not apply. See also the case of South West African Peoples Democratic United Front en'n Ander vs. Administrates - Generaal, Suid -Wes Afrika en Andere 1983 (1) S.A. 411 (A). The Hurley judgment was upheld by the South African appellate Division. See Minister of Law and Order and Others vs. Hurley and Another 1986 (3) S.A. 568 (AD).

From what is stated above it is clear that the Court was entitled to enquire into the question whether the terms of section 28 of the order had been complied with. This clearly was not the case, and the Court a quo was therefore correct in coming to the conclusion that the removal orders should be set aside as being of no force or effect.

In the result the appeal is dismissed, with costs.

N.W. ZIETSMAN J.A.

I agree

J. BROWDE J.A.

I agree

J.H. STEYN J.A.

Delivered on this 10th day of June 2002