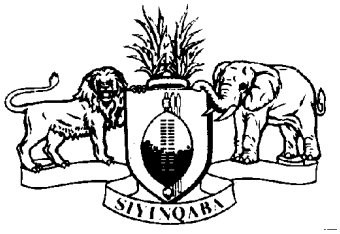

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.8/2002

In the matter between:

MADELI FAKUDZE		**RESPONDENT**
VS		
THE COMMISSIONER OF POLICE		**1ST APPELLANT**
ATTORNEY GENERAL		**2ND APPELLANT**
ABRAHAM DLADLA		**3RD APPELLANT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**ZEITSMAN JA**

JUDGMENT

Steyn JA:

The judges of the Court of Appeal trust that the judgments delivered in the two appeals before us at this session of the Court of Appeal, being the case cited above and Case No.6 of 2000, will bring to an end a most regrettable episode in the constitutional development of this country. This Court has gained the clear impression that the executive has taken every conceivable step, both legitimate and illegitimate, to delay and ultimately attempt to thwart the orders issued by the courts arising out of the unlawful ejectment of the parties involved.

As long ago as the 3rd August 2000 a removal order pertaining to Chief Mliba Fakudze, (2) the Respondent in this appeal, Madeli Fakudze,

(3) Mahawukela Fakudze and (4) Makhuphuka Thwala was served on them. They succeeded in obtaining an injunction from the High Court preventing them from being ejected. This injunction was subsequently erroneously withdrawn by the High Court. This withdrawal was challenged before us and this Court set aside the withdrawal of the injunction. Our order in Case No.40/2000 dated December 2000 reads as follows:

> "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 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."

This Court however went on to say:-

> "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. <u>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</u>." (emphasis added)

On the 8th June 2001 the Government once again appealed against an order granting the same relief to the original four respondents of which the respondent is one. The appellants abandoned the appeal during the course of the session and this Court granted those respondents – including Madeli Fakudze (the present respondent) the following relief, namely.

"<u>The respondents may now return to their homes at Macetjeni area in the Lubombo Region."</u> An appropriate costs order was also granted.

It is clear that the respondent is one of the persons who was wrongfully evicted by the security forces on the 13th of October 2000 from the regions identified in the above orders.

Acting on the strength of this Court's Order of the 8th of June 2001 and the judgment and orders of December 2000, the respondent went back to his home at Macetjeni on Wednesday the 17th of October 2001.

The evidence of the respondent as to what happened on their arrival can best be conveyed by recording the evidence in the ***court a quo*** verbatim. The respondent tells his story as follows:-

> "No sooner had we arrived than we were confronted by a group of police officers who wanted to know why we had come back without first apologising to Prince Maguga who is claiming to be the rightful Chief of the Macetjeni and kaMkhweli areas. I showed them the court order of the Appeal Court which makes no reference to our apologising to Prince Maguga as a condition for our return.
>
> They then left saying they were going back to their camp which is hardly 500 metres from Prince Maguga's residence but more than 2 kilometres from Chief Mliba's residence. They did however point out that they were yet to consult their superiors.
>
> Just when we were still preparing to spend the first night at home with my wife and children, the police officers confronted us again at +-8pm. They were led by the Station Commander at Siphofaneni Police Station, a certain Sergeant Mthethwa.
>
> They told us in no uncertain terms that they had been given an order by the Commissioner of Police to tell us to leave our home immediately. I again showed them the court order and asked them to produce any document cancelling the said court order. They said they were acting on a verbal order that they had been given by the Commissioner.
>
> I was with my younger brothers Zeblon and Solomon Fakudze in the house. They also asked the police officers why they have persistently refused to allow all the evictees (including my elder brother Chief Mliba Fakudze) to return to their homes following the Order made by the Appeal Court on two separate occasions.
>
> Their answer was that they would rather respect their Commissioner than court orders. They threatened to use force to kick us out of my home if we did not leave immediately.
>
> I pleaded with them to at least allow us to spend the night then we would leave for Siteki in the morning since there were no buses destined for Siteki at that time of the night. They flatly refused saying the order they got from the Commissioner was that we should not spend even the night there.
>
> We had no option but to pack our belongings and walked out. We spent the night with a relative about a kilometre away.

The following day we boarded public transport back to Makhewu which is more than ten kilometres from Siteki Town."

The respondents therefore found it necessary once again to approach the High Court for relief and on the 9th of November 2001 the Court issued the following order:

"It is hereby ordered that:

(a) **The 1st respondent and or any of its security forces are hereby interdicted and restrained from preventing applicant from returning to and residing at his home Macetjeni area in the Lubombo region pending the finalization of Case No.2823/2000.**

(b) The respondents are ordered to pay costs of this application on the Attorney and own client scale including costs of counsel calculated on the same scale."

The order was duly served on the Attorney-General and on the Commissioner of Police who is the first respondent in this appeal.

Once again it is best to allow the voice of the respondent to speak as to what occurred next-

"Pursuant to this Court Order, (i.e. the order of the 9th November) I proceeded to my home at Macetjeni on the 9th December 2001 (a Sunday). I was in the company of my younger brother, Zeblon Fakudze.

As we were still clearing the yard a police officer who introduced himself as Sergeant Simelane came and enquired why we were within the premises as I have been evicted from the area last year. I showed him the court order and he read it. He then asked me why I had not come back earlier since the court order was dated the 13th November 2001. I told him that I had been in hospital all along and had just been discharged. He then told us to stop clearing the yard until he had informed his superiors. We complied. He then left.

After about thirty (30) minutes he came back and said his superiors were coming to speak to us and asked us to go to the security camp in the area to meet them. We refused and said we

would rather come out of the premises and sit next to the perimeter fence pending the arrival of his superiors.

After about an hour a large group of police officers came. They were led by the 3rd respondent who did the talking all the time. The 3rd respondent told me in no uncertain terms that he did not want to see me within the premises of my home since I was evicted from the area last year. I showed him the court order but he refused even to look at it. I then told him that the court order said I should not be prevented from returning to and residing at my home pending the finalization of the main application (i.e. case no.2823/2000). He told me that I should take the court order and give it to one who evicted me from the area.

I then asked him to show me any document authorising him to prevent me from returning to my home. He failed. I further asked him why he was doing this since the police were served with the court order. He told me that whoever received the court order merely signed because he was receiving it not that he was bound by its contents. He then told me that he was not going to argue with me any further and that I should leave the place immediately failing which he would use violence. I then told my brother that we better leave the area. We left.

I then boarded public transport and went back to Makhewu area, past Siteki where I am presently residing with a relative."

On the 13th December 2001 the respondent therefore brought an application before the High Court in which he sought the following relief:

"Committing the 3rd respondent (presently the 3rd respondent) to prison for seven days for contempt of the court order issued by this Honourable Court on the 9th November 2001.

Directing the 1st respondent to ensure that the applicant is not again prevented from returning and residing

at his home at Macetjeni area in the Lubombo District pending the finalisation of Case No.2823/2000.

Directing the respondents to pay costs jointly and severally the one paying the other to be absolved on the Attorney and own client scale including counsel's fees calculated on the same scale."

This application was opposed. It was heard by Matsebula J and in a judgment dated the 14th of March 2002 he granted the application as prayed. He did however, quite correctly suspend the committal of the 3rd respondent to prison "**on condition that the respondents, that is the first and third respondents, obey the court order issued by this Court and do not stop the applicant from returning to his homestead**." (emphasis added)

It is against this order that the three appellants have appealed to this court.

Whilst in its opposing affidavits the appellants have challenged some of the detailed allegations concerning the manner in which they treated the respondent, they have not contested the fact that they have prevented the respondent from returning to his homestead and that they have done so deliberately and with a full appreciation of the nature and consequences of their conduct.

As the learned trial Judge pointed out in his judgment all they say is to the effect that "the respondent and his Chief were evicted from the Macetjeni area, (and that) the contents of the court order is of no moment (to them, the police)." It is clear that the third respondent (Dladla) relied on instructions received from the Commissioner of Police and acted as he did because he "had no mandate to deviate from it."

The only other contention upon which the appellants rely are averments concerning national security.

The first respondent says the following in this regard:

"I wish to state that I have information about this matter the effect of which is that national security is greatly threatened if I can

divulge it to this Honourable Court. We do have a very plausible explanation why we do not allow applicant, and other evictees, to return to Macetjeni and kaMkhweli areas where they are resident before they were evicted. I would like to state such reasons before this court but because any attempt to do so will jeopardize national security I feel, strongly, that such information should not be divulged to the public.

I am fully aware of the court orders that this court has issued time and again ordering that the evictees be returned or be allowed back to their original places of residence. The reason why I am not enforcing them is also based on the security of the nation which I am in possession of verified information, that it is threatened should I enforce the same.

I am in no way wilfully refusing to obey the court orders but I submit that in as much as I have an obligation to comply with the orders of this Honourable Court I have another competing, but paramount, duty to ensure that national security is not threatened and that any thing which so threatens national security must be brought under our full control and that national security considerations override all other interests whether they rise out of a court order or not and they are all subject to the dictates of national security. I do not intend not complying with the court order indefinitely but as soon as the threat is over applicant will be re-instated back to his original home. It is also unfortunate that my non-compliance with the court order ***prima facie*** amounts to contempt of court but I wish to state that I have a valid reason for my conduct and I cannot disclose it in this affidavit because the same is a public document which any member of the public can have access to."

In a short affidavit the Commanding Officer of the Umbutfo Swaziland Defence Force says the following:

"I am an adult Swazi male employed by the Government of Swaziland as an Army Commander of the Umbutfo Swaziland Defence Force and I have my head office situated at Bethany Army Headquarters. My primary duty is to defend the country against any external and internal military invasion and to assist in the keeping of peace in the country whenever there is a breach of peace. I am perfectly aware of this matter and I have deployed some soldiers to keep the peace in the Macetjeni and kaMkhweli areas to work jointly with police officers working for the first respondent herein and thus I am entitled to depose to an affidavit ***ex officio***.

The facts herein stated are within my personal knowledge and are derived from reliable sources within the reach of my office and `documentation in our possession and are true and correct.

I have read the answering affidavit of the third respondent and the supporting affidavit of the Commissioner of Police and I confirm them in all respect and in so far as they talk about the existence of a threat to national security. I hereby state that it was the presence of such a threat that made me to deploy my troops in the Macetjeni area thus there is a security problem which we are still monitoring, which has also made it difficult for us to allow the applicant back to his original area of residence. I will withdraw my troops in the area as soon as the security problem has been overcome."

The learned judge in his judgment says the following concerning the last gasp attempt to raise national security as a barrier to the enforcement of the court order. The relevant portion of his judgment reads as follows:

"This Court rejects the question raised, i.e. security by the third respondent. This rejection is based on the following grounds:-

(a) Reference was made to case no.2823/00 which at the time when this application was made the case was pending at the High Court;

(b) Reference was also made to the decision by the Court of Appeal case no.2823/00. At some stage during the hearing of

> the case an officer from the Attorney-General went into the witness stand and stated in no uncertain terms that they were quite happy to have all the evictees back to Macetjeni as long as they will respect and apologize to the Chief of Macetjeni, Prince Maguga. There is no question of security at all and I reject this latest innovation of some security being the reason why the court order was not complied with."

In addition to the considerations raised by the High Court Judge, I would mention the following further considerations regarding the invocation of national security as a reason for not complying with the court order.

The case involving the present respondent as well as a number of other cases have been before the courts in this Kingdom for some 2 years now. I find it remarkable that such an important issue should only surface now, when the threat of imprisonment is for the first time employed as a method to enforce compliance with the court order.

Secondly, as can be seen from the averments made by the two deponents cited above, they fail to disclose any information to the ***court a quo*** on which a reasonable apprehension could be based that a threat to national security may in fact exist, or may arise, if the court order is implemented. In the absence of a factual foundation being laid, in view of the findings of the ***court a quo***, and in view of the fact that it is raised for the first time after a lapse of nearly two years, satisfies me that the ***court a quo*** was correct in rejecting this defence.

I am therefore satisfied that all the necessary requirements for holding the appellants in contempt of the court order ***in casu*** were present. There can be no doubt that they were all three fully advised as to the nature of the court orders. First and third respondents refused to carry them out. Their conduct was in wilful defiance of a court order the import of which they fully understood.

The court elected to commit only the third respondent to jail. The first respondent was equally contemptuous of the court order, particularly

as his unmeritorious defence of national security was quite rightly rejected by the ***court a quo***. After all it was he who gave the instruction to the third respondent not to comply with its terms. Should sanity not prevail and further executive interference with the due process of law take place, any person acting in defiance of the High Court's order may be well-advised to consider the wise injunctions of Matsebula J that:

> "The court order is therefore valid and enforceable and anyone wilfully refusing or failing to comply with an order of this Court exposes himself to (the) imposition of a penalty…… to compel performance in compliance with the order of court.
>
> He also points to the fact that if the authorities are not seen to comply with the court order, that would be "a recipe for anarchy."

I can only record my full support for his approach and the sentiments he expressed.

On behalf of the Attorney-General a novel proposition was advanced as a final line of defence. Counsel was bold enough to suggest that because contempt of court was also a criminal offence it could only he enforced via the criminal justice process. A complaint should be submitted and lodged with the police, the Attorney-General and the Director of Public Prosecutions - where appropriate – and they would have to initiate conventional criminal proceedings. This was he said the law of Swaziland and the trial Judge had been wrong to rely on South African authorities in this regard. He could however not point to a single judgment or Swazi academic commentator that had espoused this view. Indeed there are numerous cases reported in the Swaziland reports where the very opposite process to that contended for was followed. See in this regard **CRAW AND ANOTHER V JARVIS 1982-87 (1) SLR 218** and **ICS GROUP V MICHEL JEAN RESTAURANTS LTD 1982-86 SLR 474.**

In so far as defamation in ***facie Curiae*** is concerned, see **R V MKHULUNYELWA DLAMINI 1970-1976 SLR 179.**

Counsel for the Crown sought to find support for the fact that contempt of court is a criminal offence in the decision in **S V BEYERS**

1968(3) SA 70. There is no question that this is so and that it can be indicted accordingly. However, in the very judgment relied on, at page 81 A-C, the learned Chief Justice makes it clear that normally in cases of civil contempt it is left to the aggrieved party in the civil proceeding to seek the relief. This must obviously be so because he wishes to coerce his adversary to comply with the court order and secure the relief claimed. See in this regard also **CAPE TIMES LTD V UNION TRADE DIRECTORIES (PTY) LTD AND OTHERS 1956 (1) SA 105(N)** and for Roman Dutch authorities **VOET 47:10:15; VAN LEEUWEN ROMEINS HOLLANDS RECHT 4-37-1** and **van Zyl: Civil Practice** page 317 and 319.

I also refer to the judgment delivered by this court at this session by Zietsman JA in **ELIAS VONKO NDZINISA V THE COMMISSIONER OF TAXES AND OTHERS COURT OF APPEAL NO.15/2001** and the cases cited therein.

Counsel for the Crown was also heard to argue, although unpersuasively, that a servant of the Crown could not be subject to the order ***in casu*** because of provisions of the Government Liabilities Act No.2 of 1967. This would indeed be an astonishing meaning to attach to legislation dealing exclusively with claims sounding in money i.e. ***ad pecuniam solvendam*** and not those "***ad factum praestandum."*** The legislation has no application to the orders granted in this case.

It follows that for the reasons set out above the appeal is dismissed with costs on the scale as between attorney and client inclusive of counsel's fees.

J.H. STEYN JA

I AGREE J. BROWDE JA

I AGREE N.W. ZIETSMAN JA

Delivered in open court on this ..... June 2002.