IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 40/2008

In the matter between

ZEPHANIA NTSHALINTSHALI **Appellant**

And

MINISTER OF HOME AFFAIRS **1st Respondent**

DISTRICT FARM DWELLERS TRIBUNAL MANZINI **2nd Respondent**

CENTRAL FARM DWELLERS TRIBUNAL **4th Respondent**
QUADRO TRUST **3rd Respondent**
TOMMY KIRK **5th Respondent**
ATTORNEY GENERAL **6th Respondent**

Coram: BAND A, CJ

FOXCROFT, JA

EBRAHIM, JA

For the Applicant: Advocate M. L. N. MAZIYA

For 4th and 5th Respondent: MR. L. R. MAMBA

HEARD ON: 12m NOVEMBER 2008

DELIVERED ON: 20th NOVEMBER 2008

JUDGMENT

Foxcroft JA

This is an appeal from the decision of Annandale, J in the High Court on 28 July 2008, dismissing an application brought by the appellant to review a decision of the Central Farm Dwellers Tribunal that it had no discretion "to waive the thirty (30) days as prescribed by Section 9 (3) of the Farm Dwellers Control Act of 1982".

The Court was also asked to order that the Central Tribunal, "be ordered to condone the late filing of an appeal against the decision of the Farm Dwellers Tribunal dated 20 March 2007."

The Farm Dwellers Tribunal which reached the impugned decision in this case was the Manzini Farm Dwellers Tribunal and it has been described in Minutes before us as the District Tribunal. I shall adopt that abbreviation in this judgment. The "Ruling" pronounced, according to the Minutes of the meeting on 20 March, 2007, was that the Quadro Trust should draw an agreement to be signed by Farm Owner and Farm Dweller in terms of the Farm Dwellers Control Act No. 12 of 1982 ("the Act"). Then follows a paragraph reading as

follows:

> *"Advice*
>
> *Should any party (plaintiff or defendant) be not satisfied with this ruling he/she is at liberty to appeal to the Central Tribunal at the Ministry of Natural Resources and Energy, within thirty days from today."*

What is odd about this paragraph is that the last five words "within thirty days from today" are written in an unknown hand. The rest of the paragraph is typed and there is a Ml stop after the word "Energy."

Clearly, someone wrote in longhand these final words after the typing of the Minutes. There is no way of determining whether these words were uttered at the hearing or not.

Mr. Mamba, who appeared for the fourth and fifth respondents, submitted that this was of no importance since the District Tribunal was not there to advise persons appearing before it in regard to procedure on appeal from the Tribunal.

That is so but it cannot be conclusively shown on these papers that the appellant was told about the thirty day noting period at the hearing on 20

March, 2007.

It is also so, as submitted, that the appellant had to have regard to the Act to ascertain procedural requirements. Although his attorney was not present when the "Ruling" was given, the attorney should also have consulted the Act. He would have found Section 9 (3) of the Act which provides as follows:

> *"(3) A person aggrieved by the decision of a District Tribunal may, within thirty days of such decision, appeal to the Central Tribunal and therefrom, within thirty days, to the Minister whose decision shall be final".*

Mr. Maziya, who appeared for the appellant moved an application, in terms of Rule 12 of the Appeal Court Rules, to amend his notice of appeal. Mr. Mamba voiced no objection to the desired amendment to ground 2.1 and the amendment is accordingly granted. It reads:-

> *"The learned Judge a quo erred in law and fact by interpreting Section 9 (3) of the Farm Dwellers Control Act 1982 in a rigid and literal manner.*
> *"*

There is no definition in the Act of the word "decision" and the ordinary meaning of the word in the English language is to be applied. While the word may mean many things in different situations there can be no doubt that it means a judgment of the District Tribunal in the present context.

This view is fortified by the preceding sub-section in the Act which reads as follows:

> *"9 (2) the decision of a Tribunal may be enforced as if it were a decision of a Magistrate's Court established under the Magistrate's Courts Act, No. 66 of 1938 and the rules of such Court shall apply mutatis mutandis."*

When this matter came before the Central Tribunal on 21 June 2007, Mr. Mamba appearing for Quadro Trust objected to the hearing of the appeal on the grounds that the noting of the appeal, which had been lodged on 21 May 2007, was out of time. Mr. Simelane, for the appellant, informed the Tribunal that the matter had been brought to his office on 7 May 2007 by the appellant.

It is important to note from the Minutes of the District Tribunal's hearing on 20 March 2007 that the appellant's attorney was not present. So the Ruling by the

Central Tribunal was therefore factually incorrect in stating that "Mr. Ntshalintshali was represented by the lawyer".

Mr. Simelane also informed the tribunal that the matter had first been handled by Shilubane attorneys. Mr. Simelane, quite properly, requested Minutes of the District Tribunal for the 21st and 27th February 2007, adding;

> *"Minutes were received very late, hence we could not file the appeal in time ".*

The Minutes of the meeting of 21 June, 2007 then reveal;

> *"Tribunal:- Presented minutes of the 20th, 21st and 27th February 2007 and Minister (sic) were read. "*

It seems that the word "Minister" is a typographical error and that "Minutes" was intended. The reference to 20th must refer to the meeting of 20th March, since there is no record of any meeting on the 20th of any other month.

In his founding affidavit in the High Court the present appellant confirmed that he had not known that the judgment of the District Tribunal was to be given on

"the last meeting we had with the 2nd Respondent" (the District Tribunal).

He confirmed also that he had changed attorneys "who could not get the Minutes." In paragraph 12 of his affidavit he states that the "minutes were handed to my attorney on the 18 of May 2007 and I noted an appeal on the 21st of May 2007."

There is no denial of these allegations from the District Tribunal and the Central Tribunal obviously has no independent knowledge of what occurred during the hearings of the District Tribunal.

In its Ruling of 21 June 2007 the Central Tribunal stated that:

> *"The fact that the Minutes of the Tribunal was (sic) made available on the 18th May 2007 (to) Mr. Ntshalintshali's attorney did not bar the noting of the appeal within thirty days of the judgment of the District Tribunal."*

The Central Tribunal further held that it had no discretion to;

> *"Waive the thirty days period as prescribed by Section 9 (3) of the Act, the result is that the appeal for condonation for the late filing of the appeal is refused/rejected".*

It was that refusal which led to the application for review before the High Court. In that Court, Mr. Mamba submitted that the review proceedings were not competent since the Court could not order the Central Tribunal to hear an appeal since the Farm Dwellers Control Act specifically precluded an appeal in the present circumstances.

Mr. Mamba also made the submission, which he repeated on appeal before us, that the appellant was obliged to first approach the Minister before going to the High Court.

The learned Judge a quo did not uphold this argument in his extempore judgment, finding that the appellant had effectively;

> *"No more domestic remedies left. It would be futile to approach the Minister and therefore this decision is reviewable by the High Court. "*

The learned Judge a quo then proceeded to hold, clearly reluctantly, that he could not find that the Central Tribunal had erred in holding itself bound by the prescribed time limits of Section 9 (3) of the Act. The application for review was accordingly dismissed.

Mr. Maziya, in his Heads of Arguments submitted that subsection 9 (3) of the Act is vague and ambiguous in various respects. One ground of ambiguity raised is

whether the period of thirty days provided for an appeal is calculated from the date of the actual pronouncement of the ruling by the District Tribunal, or the date on which the reasons for that "judgment" are furnished. It is common cause in this matter that the Minutes of the meetings of 21 and 27 February, and 20 March containing the written reasons for the decision of the District Tribunal were only made available to the appellant's legal representative on 18 May, 2007, and that an appeal was noted on the 21 May, 2007.

The words "may within thirty days of such decision appeal to the Central Tribunal" clearly cannot mean that the hearing of the appeal must be commenced within thirty days. Common sense, and authority in related situations, dictates that the appeal must be launched by the noting of an appeal within the prescribed period.

In interpreting the nature of the proviso, and the intention of the legislature, one must first look for any sign of a sanction if the proviso is not met. There is none. Moreover, the proviso is cast in the positive and not the negative form which is usually an indication that the proviso is not a peremptory one. Finally, the words "shall" or "must" do not appear in relation to the time limit prescribed. The words used are "may"... within thirty days … appeal, "not "shall" … within thirty days … appeal".

In other words, this is patently a directory rather than a peremptory requirement.

The locus classicus in South Africa in this regard is **SUTTER V. SCHEEPERS 1932 AD 165** at **173 - 174** where a number of rules of interpretation were laid down. As Holmes, JA said in a later decision of the Court in **COMMERCIAL**

UNION ASSURANCE COMPANY V CLARKE, 1972 (3) SA 508 (AD),

> *"The basic test, in deciding as to the imperative nature of a provision, is whether the Legislature expressly or impliedly visits noncompliance with nullity ".*

There is no such indication that the legislature wished to treat an appeal out of time as a nullity, yet that is how the Central Tribunal seems to have viewed the situation.

There are many cases in South Africa and elsewhere where the failure to comply with directory provisions has been condoned depending upon the circumstances.

In addition, as Didcott, J pointed out in **ZUNGU V. KWA-ZULU GOVERNMENT, 1980 (1) SA 231 at 235.**

> *"It is recognized nowadays, in any event that substantial compliance with a statutory command will suffice, even when it is peremptory ".*

There is a further important consideration. As the learned Judge a quo rightly pointed out, Section 33 (2) of the Constitution of the Kingdom of Swaziland provides that:

> *"A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority. "*

Parliament could, in my view, not have intended when enacting the Farm Dwellers Control Act, No. 12 of 1982 that a person in the position of the appellant in this case would forfeit his right of appeal. The Act is for the protection of farm dwellers

who are entitled in terms of the Constitution to written reasons for the decision of a District Tribunal or any other administrative authority. Moreover, as Mr. Maziya correctly emphasized, Tribunals of this kind are dealing with the fundamental rights of citizens.

In this case the District Tribunal was obliged to provide written reasons for its decision; in order for any meaningful decision whether to appeal or not to be taken, the person aggrieved by the decision ought to have been provided expeditiously with the written reasons. Any appeal tribunal or Court dealing subsequently with the matter could not have dealt properly with it without having these written reasons before it.

On the facts, the appellant was not represented by a lawyer on the day when the oral pronouncement of the ruling took place. There is no evidence that the ruling was given in a language which he could understand. On the face of it, and according to the Minutes before us, the ruling was read out in English and there is no indication that he understood English sufficiently well to fully understand the ruling.

It seems that Parliament did intend the thirty day period in Section 9 (3) to commence on the day of the decision (Ruling) given by the Tribunal, but also that written reasons would be provided expeditiously. After all, the written reasons would normally be the oral reasons in typed form. The Minutes in this case are both the record of the hearing and the reasons for judgment.

In my view, the Central Tribunal erred in holding that it had no discretion to

"waive" the thirty day period prescribed by Section 9 (3) of the Act. It is a quasi-judicial body exercising quasi-judicial functions and ought to have condoned the filing of the notice of appeal after the lapse of the thirty day period. Once the written reasons were provided to the appellant he noted an appeal three days later. In my view he could not have made a proper decision whether to appeal or not before he was provided with the written reasons for judgment. His actions amounted to substantial compliance with the section and should have been condoned. Thereafter, the appeal to the Central Tribunal should have been heard.

If follows that the learned Judge a quo erred in not holding that the steps taken by the appellant to launch the appeal to the Central Tribunal required condonation by the Central Tribunal.

It is ordered as follows:

(a) The appeal succeeds with costs;

(b) The matter is remitted to the Central Farm Dwellers Tribunal;

(c) The decision of the Central Farm Dwellers Tribunal that it had no discretion to waive the thirty day period prescribed by Section 9 (3) of the Farm Dwellers Control Act, of 1982 is set aside ;

(d) The Central Farm Dwellers Tribunal is ordered to condone the late filing of an appeal against the decision of the District Tribunal dated 20 March 2007, and ordered to hear and determine that appeal, after having regard to the provisions of Section 6 of the Farm Dwellers Control Act No. 12 of 1982, and in particular hearing whatever evidence is necessary to arrive at a just determination after a thorough investigation.

J.G. FOXCROFT
JUDGE OF APPEAL

I agree

R. A. BANDA
CHIEF JUSTICE

I agree

A.M. EBRAHIM
JUDGE OF APPEAL