

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

APPEAL NO. 9/2009

In the matter between

THE JUDICIAL SERVICE COMMISSION

1ST APPELLANT

THE SHERIFF OF SWAZILAND

2ND APPELLANT

SWAZILAND GOVERNMENT

3RD APPELLANT

ATTORNEY GENERAL

4TH APPELLANT

AND

SIPHO NYATHI

1ST RESPONDENT

NTOKOZO MABUZA

2ND RESPONDENT

MENZIE DLAMINI

3RD RESPONDENT

SANDILE DLAMINI

4TH RESPONDENT

MELUSI QWABE

5TH RESPONDENT

SAKHILE NDZIMANDZE

6TH RESPONDENT

WISEMAN DLAMINI

7TH RESPONDENT

BHEKITHEMBA DLAMINI

8TH RESPONDENT

SWANE JOSEPH DLAMINI

9TH RESPONDENT

MARTIN AKKER

10TH RESPONDENT

CORAM: J.G.FOXCROFT,

DR.S. TWUM et I.G. FARLAM JJA

HEARD: 20 MAY 2010

DELIVERED: 28 MAY 2010

Summary: Deputy Sheriffs-whether Sheriff can be interdicted from appointing further Deputy Sheriffs -whether Sheriff should be ordered to issue identity cards to deputies.

JUDGMENT

I.G. FARLAM JA

[1] This is an appeal from a judgment of Mabuza J, who granted an application brought by the ten respondents, who are all deputy sheriffs for various regions in Swaziland, against the appellants, the Judicial Service Commission (first appellant), the Sheriff of Swaziland (second appellant), the Swaziland Government (third appellant) and the Attorney-General (fourth appellant).

The order prayed for by the respondents (the applicants in the Court below) was the following:

1. dispensing with the forms of service and the time limits

provided for by the rules of High Court and permitting it to be heard as a matter of urgency,

1. interdicting and restraining the first and second appellants

from employing new deputy sheriffs;

1. directing the second appellant to renew the respondents' identity cards for the period 31 July 2009 to 31 July 2010;
1. costs of suit as against all the appellants jointly and severally, one paying the others to be absolved ; and
1. granting further and/or alternative relief.

[2] Despite the fact that she made an order granting the application, with the addition at the end of the paragraph dealing with the costs of the words 'together with the certified costs of Counsel in terms of rule 68', the learned judge also per incuriam granted the applicants' prayer for further and alternative relief.

[3] Before I proceed further it is desirable that I quote at this stage the relevant provisions of the Sheriff's Act, 17 of 1902 (which I shall call in what follows 'the Act') namely sections 3, 4 (1), 5 and 15, which read as follows:

'3. The Public Service Commission may appoint some fit and proper person to be Sheriff of Swaziland.

4 (1) Where the Public Service Commission appoints a sheriff he shall, by himself, or his deputies appointed by him and duly authorized under his hand and seal, and for whom he shall be responsible during his continuance in such office, execute all the sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the High Court, and shall make a return of the same, together with the manner of execution thereof, to such court through the registrar thereof; and the plaintiff or defendant, or their respective attorneys, may have an office copy of the process;

with the return thereto, at the cost of the party applying for the same.

5. The sheriff shall, upon the appointment of a deputy, transmit to the registrar of the High Court his name and place of abode, stating the district within which he is to act for him.

15. The Chief Justice may frame rules and regulations for the guidance of the sheriff and his deputies and such may provide for a tariff of fees to be charged by deputy sheriffs’.

[4] Attached to the founding affidavit filed on behalf of the respondents and made by the first respondent, who is a deputy sheriff for the Hhohho region, was a copy of the first respondent’s letter of appointment, dated 28 June 2005 and signed by the then Sheriff of Swaziland, Mr Shiyumhlaba Dlamini. It read as follows:

‘I am pleased to inform you that I have appointed you Deputy Sheriff for the Hhohho Region in terms of Section 4 (1) of the Sheriff’s Act of 1902 and that you shall so act in that capacity until further notice.

Your identity card shall be issued to you upon the production of a certificate of professional indemnity issued by a lawfully registered insurance company.

I take this opportunity to congratulate you on your appointment and to urge you to always act within the confines of the law and the High Court Rules in the execution of your duties as Deputy Sheriff.’

The first respondent stated that the other respondents received similar notices of appointment ‘with differences in dates of appointment only’.

[5] In the answering affidavit filed on behalf of the appellants the second appellant denied that the respondents other than the first respondent had similar notices of appointment and said that they were 'put to strict proof thereof.' She continued:

'I submit that some of the [respondents] have fixed contracts of twelve months. I challenge the other 9 [respondents] to produce proof that their contracts are indefinite.' (The emphasis is mine.) This of course did not constitute a denial of the allegation made in this regard by the first respondent as Mr *Flynn*, who appeared for the appellants, conceded. Indeed he argued the case on the basis that it is to be accepted that the other respondents were appointed on the same terms and for the same period as the first respondent.

[6] The first respondent went on to say that every year the second appellant renewed the respondents' identity cards, the purpose of which being to enable the public to identify the respondents and to confirm that they are indeed deputy sheriffs. He also stated that the cards were introduced for the purposes of 'reviewing a deputy sheriff's work after a year and to enable the [sheriff] to deal with any pending complaints against that particular deputy sheriff. In the event there are complaints the [sheriff] will not renew that deputy sheriff's card until the complaints are dealt with.'

[7] He stated that the respondents' identity cards were due for renewal by the second appellant but that she had failed to do so despite 'numerous promises, and numerous visits to her office'. The second appellant admitted her failure to renew the cards but denied having promised to do so despite 'numerous promises, and numerous visits to her office.'

[8] The first respondent referred to advertisements published in the press on 22, 23, and 24 August 2009 and inserted therein by the first appellant. The advertisements read as follows:

'People interested in being appointed as Deputy Sheriffs are invited to submit their applications to the Judicial Service Commission Secretary, P.O. Box 19, Mbabane, for appointment by the Sheriff of Swaziland after due interview by the Judicial Service Commission.

Candidates should be at least 40 years old or above and should have the following qualifications and personal attributes:

- 1. Bachelor of Laws Degree (LLB) and /or*
- 2. Bachelor of Arts in Law (BA Law)*

Minimum Requirements:

- 1. Integrity, responsibility and good judgment, demonstrated by personal, work and criminal histories.*
- 2. Good conflict management skills.*
- 3. Ability to understand, interpret and apply State and local laws and departmental policies; react quickly and calmly in emergency situations and adopt an effective course of action.*
- 4. Faithful performance of their duties.*
- 5. No criminal record.*

Duration:

Appointment will be for a period of six (6) months only and shall be renewable once with the discretion of the Judicial Service Commission.

...

Closing date for application is the 1stSeptember 2009.'

[9] The first respondent averred that the first appellant had, as he put it, 'exercised functions which it is not vested with', the functions in question being within 'the exclusive purview of the second appellant' as the appointment of deputy sheriffs is vested in terms of section 4 (1) of the Act in the second appellant and the power to appoint various officers which is vested in the first appellant in terms of section 160 of the Constitution does not extend to the appointment of the Sheriff or deputy sheriffs.

[10] He went on to contend that the conduct of the first appellant in calling for interested persons to apply for appointment as deputy sheriffs was 'not only illegal but ... it has the effect of terminating our appointments as deputy sheriffs.' He contended further that the revocation of which he complained had been done in violation of the rules of natural justice, as the respondents were not given a hearing nor were they given reasons for the decision of the second appellant not to renew their identity cards.

[11] I have already summarized some of the statements appearing in the second appellant's answering affidavit. She also said: '*I submit that [respondents] are appointed for a period not exceeding one year. The identity cards are a true reflection of their contracts.*

I further submit that presently there are numerous complaints and/or allegations of misconduct against the [respondents], hence their cards and/or contracts could not be renewed.

The [respondents] were advised of the complaints against them and response was sought from them. However most of the responses provided were unsatisfactory hence I could not renew their contracts and/or cards.

I need not burden the court with each and every complaint against each and every [respondent], hence I humbly refer the court to a bundled book of complaints against the [respondents] marked "A".'

[12] She also stated that she had been advised, presumably after the application was launched, by the fourth appellant, the Attorney-General, that 'the appointment of deputy sheriffs is my sole prerogative hence the interviews called by the JSC shall be abandoned and fresh interviews shall be called by myself.' She denied that 'calling for applications and/or appointing more deputy sheriffs have the effect of terminating the [respondents'] appointments' and said she had been advised that she had the power to appoint as many deputy sheriffs as necessary. Dealing further with the complaints, she said that the respondents had been advised that there were complaints against them and that they had failed to provide satisfactory responses to the allegations made.

[13] In the replying affidavit made on behalf of the respondents by the first respondent the point is made that the book of complaints does not contain any complaints against the second and fifth respondent and that many of the files relating to individual respondent contain letters which cannot be described as complaints. Those that can be described as complaints have, so he said, been answered. Some indeed relate to the period before June 2008, after which identity cards were issued because (so he contended) the answers given were satisfactory. He pointed out further that none of the respondents against whom complaints were made was informed by the second appellant that his response was unsatisfactory.

[14] In her judgment granting the application the judge held that what she called the 'open ended' contracts appointing the respondents as deputy sheriffs were illegal in terms of the Act and

said that it was clear on the basis of the wording of section 4 (1) and section 5 that any appointment of a deputy sheriff had to be permanent and that any variation by the second appellant would be illegal. She pointed out that the identity cards are not provided for in the Act. 'They do not have a statutory basis', she said, 'but merely serve to identify the Deputy Sheriffs when carrying out their work. Whether the second [appellant] renews them or not is immaterial. The affected Deputy [Sheriffs] can still carry out their work unhindered by not having them. Having them is a salutary practice but the [respondents] cannot in my view be held to ransom by the withholding of their identity cards. The cards should not even be such an issue that they ground a cause of action.'

[15] Turning to the book of complaints, she found that the statements made in the replying affidavit regarding the complaints, which I have summarized above, were correct.

[16] She held that in directing the second appellant to renew the identity cards she was ordering the second appellant to perform a function which 'is necessary in the execution of the duties of a Deputy Sheriff.'

[17] Dealing with the respondents' complaint that they had not been given a proper hearing by the second appellant before the decision not to renew their cards was taken, she found that the second appellant had violated the respondents' rights under sections 21 and 33 of the Constitution.

[18] After saying why she thought that the Act was outdated and should be replaced, she concluded her judgment by saying that she had already expressed her views concerning the identity cards as a non-issue but, she said, ' since the matter is at the core of the [respondents'] concern I find for the respondents.'

[19] There are two main issues which arise for decision in this case: first, whether the court *a quo* had the power to interdict the second appellant from exercising her statutory power under section 4 (1) of the Act to appoint deputy sheriffs; and secondly, whether the respondents showed on the papers that the second appellant was obliged to renew their identity cards.

[20] On the first issue Mr *Maziya*, who appeared on behalf of the respondents, correctly conceded that a Court has no power to prevent the second appellant from appointing deputy sheriffs. He contended however that, seen in context, that is not what the court *a quo* did. What it did, he submitted was to interdict the second appellant, *acting together with the first appellant* (which it was common cause had no power to appoint deputy sheriffs), from appointing deputy sheriffs. The order made, he submitted, did not prevent the second appellant, acting on her own, from appointing a deputy sheriff.

[21] The legal position regarding the interpretation of judgments and orders was set out by Trollip JA in his judgment in **Firestone South Africa (Pty) Ltd v Gentiruco AG** 1977 (4) SA 298 (A) at 304 D - H as follows:

‘The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. See **Garlick v Smartt and Another**, 1928 A.D. 82 at p. 87; **West Rand Estates Ltd, v New Zealand Insurance Co. Ltd.**, 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no

extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it (cf. **Postmasburg Motors (Edms.) Bpk. V Peens en Andere**, 1970 (2) S.A. 35 (N.C.) at p. 39 F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court’s granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See **Garlick’s case, supra**, 1928 A.D. at p. 87, read with **Delmas Milling Co. Ltd. V Du Plessis**, 1955 (3) S.A. 447 (A.D.) at pp. 454 F – 455 A; **Thomson v. Belco (Pvt.) Ltd. and Another**, 1960 (3) S.A 809 (D).’

[22] I cannot agree that the interpretation which Mr. *Maziya* seeks to put upon the order is correct. It is not in accordance with the language used nor is the point he made dealt with in the reasons appearing in the judgment of the court *a quo*. There was in any event no need to make an order (save possibly as to costs) involving the first appellant in the appointment process because it had been indicated that it had, on advice from the fourth appellant, withdrawn therefrom. It is also of interest to note that the respondents’ attorney, in an answering affidavit he filed in an application (which was subsequently granted) for condonation of the appellants’ failure to file their heads of argument timeously, stated that the second appellant had ‘in the face of a court order expressly prohibiting her from doing so’ continued [obviously on

her own] to appoint deputy sheriffs. This indicated that the respondent's own attorney did not interpret the order as Mr *Maziya* says it should be interpreted.

[23] I am accordingly satisfied that the submission advanced in this regard by Mr *Maziya* must fail. It follows that the Judge erred in granting an order in terms of prayer 2 of the respondents' notice of motion.

[24] I turn now to deal with the order granting prayer 3 of the notice of motion. In my opinion it is clear from the first respondent's letter of appointment that it contained a term to the effect that he would have an identity card issued to him upon the production of a certificate of professional identity issued by a lawfully, registered insurance company. The respondents do not allege that they are in possession of such certificates. Yet in terms of the order granted the second appellant is simply directed to renew the respondents' cards for the period 3 July 2009 to 31 July 2010. This order is not subject to the production of indemnity certificates. In my opinion when the respondents were appointed as deputy sheriffs there was an undertaking given by the sheriff who appointed them (either the second appellant or her predecessor by whose undertaking she is bound) to issue identity cards upon production of the relevant certificates. The judge had no power to amend the undertaking given to each respondent by deleting the reference to the certificate.

[25] In the interests of clarifying the position I wish to make certain comments on this part of the case. I do not agree with the assertion made by the respondents that the conduct of the first appellant in placing the advertisement referred to had the effect of terminating their appointments as deputy sheriffs. Apart from the fact that the first appellant had no power to do so, the

advertisement did not purport to do so. It spoke of new deputy sheriffs being appointed by the second appellant. As Mr *Maziya* conceded she has the power to appoint additional deputies for the various regions and the making of such appointments does not terminate the appointments of previously appointed deputies.

[26] I do not agree with the judge's finding that the respondents have permanent appointments. That finding is not supported by the wording of sections 4 (1) and 5 of the Act. In my view it is competent for the sheriff to appoint a deputy, as was done in the case of the respondents, 'until further notice'. Such notice has not been given to any of the respondents. (In what circumstances such notice can be given, whether a deputy sheriff is entitled before notice is given to a hearing as to whether it should be given and what period of notice would be appropriate are not matters which arise for decision in this case and I express no opinion upon them.) What is clear is that for as long as a person remains a deputy sheriff he or she is entitled, as I have said, to have an identity card issued to him or her, provided the necessary certificate of professional indemnity is produced.

[27] For the reasons I have given, in the absence of averments that the respondents were able to produce such certificates, it was not competent for the judge to order the second appellant to issue identity cards to them.

[28] In the circumstances the appeal must succeed with costs and the order granted by the court *a quo* replaced with an order dismissing the application with costs.

The following order is made:

1. The appeal succeeds with costs including the certified costs

of Counsel as provided for in Rule 68 (2) of the High Court
Rules.

1. The order made in the court below is set aside and
replaced with the following order:

'The application is dismissed with costs including the certified costs
of Counsel as provided for in Rule 68 (2) of the High Court Rules.'

I.G. FARLAM

JUSTICE OF APPEAL

I agree _____

J.G. FOXCROFT

JUSTICE OF APPEAL

I agree _____

DR. S.TWUM

JUSTICE OF APPEAL

For: Appellants P.E. Flynn

For: Respondents M.L. M. Maziya