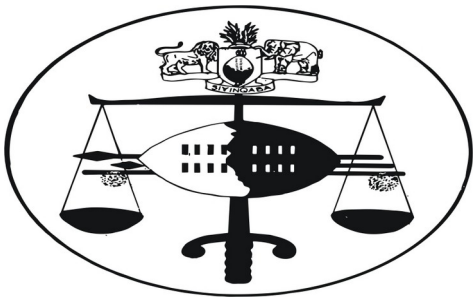

IN THE SUPREME COURT OF SWAZILAND

CIVIL APPEAL No. 03/2011

HELD AT MBABANE

In the matter between:

THE COMMISSIONER OF POLICE **FIRST APPELLANT**

THE ATTORNEY GENERAL **SECOND APPELLANT**

AND

MKHONDVO AARON MASEKO **RESPONDENT**

CORAM : RAMODIBEDI, CJ
EBRAHIM, JA
DR. S. TWUM, JA

HEARD : 17 MAY 2011

DELIVERED : 31 MAY 2011

SUMMARY

Practice and procedure – Application on notice of motion for spoliation order – Conflict of laws – Jurisdiction and the choice of law – Non-joinder – Disputes of fact – The police held not to have been in possession – Appeal upheld with costs.

JUDGMENT

RAMODIBEDI, CJ

[1] This appeal illustrates the problem of a conflict of laws in this country, a conflict which, unless properly managed in a responsible manner and with due respect to both systems of our law, may soon throw our justice system into disarray. This conflict as will be seen shortly is between Roman-Dutch common law on the one hand and Swazi customary law (Swazi law and custom) on the other hand.

[2] At the outset, I consider that there is a fundamental need for the courts in this country to make a proper choice of law in matters coming before them. Put differently, it is wrong, if not downright insensitive for

any court in this country to apply Roman-Dutch law in a case which cries out for Swazi law and custom. It is particularly more so, as in the present case, where the King and Ingwenyama's rights under Swazi law and custom are concerned. But before proceeding further, it is necessary to set out the relevant background facts.

[3] On 25 May 2009, the present respondent, as applicant, filed a notice of motion in the High Court seeking the following relief:-

> *"1. That the time limits, forms and service prescribed by the rules of this Honourable Court be dispensed with and that this matter be heard urgently.*
>
> *2. That the First Respondent be and is hereby ordered and directed to return forthwith to the Applicant and/or his Attorneys possession of thirty-two (32) herd of cattle.*
>
> *3. Alternatively, that the Deputy Sheriff for the District of Hhohho and/or any other authorized person be and is hereby authorized to seize, attach and return thirty-two (32) herd of cattle presently in the possession of the First Respondent to the Applicant wherever they may be found.*
>
> *4. That prayers 1, 2 and 3 above operate with immediate effect as an interim relief, a rule nisi to issue returnable on the 5th June 2009 calling upon the Respondents to show cause why a final order should not be granted.*
>
> *5. Directing the First Respondent to pay costs of suit at an attorney and own client scale.*
>
> *6. Granting/further and/or alternative relief."*

[4] There is nothing on the record to show what happened to the application after it was filed. However, it appears from the court *a quo*'s judgment that the application was argued before Masuku J on 1 December 2010. Judgment was promptly delivered on 17 January 2011.

[5] In his judgment the learned Judge *a quo* made the following order:-

> *"57.1 The 1st Respondent be and is hereby ordered and directed to return forthwith to the Applicant herein possession of the thirty-two herd of cattle seized from his home at Sihhoye on 25 May, 2009, together with their progeny, if any.*
>
> *57.2 The 1st Respondent be and is hereby ordered to pay costs of this application on the punitive scale of attorney and client."*

Interestingly, it will be seen from paragraph [3] above that the respondent did not claim any progeny of the cattle in question. It is an elementary principle of law that a litigant cannot also be granted that which it has not sought in the lis. See, for example, **Commissioner of Correctional Services v Ntsetselelo Hlatshwako, Civil Appeal No.67/09.**

[6] At the hearing of this appeal this Court raised the following issues which are determinative of the matter, namely, (1) jurisdiction and the choice of law (2) non-joinder, (3) whether the police were in possession of the cattle in question and (4) disputes of fact. I proceed then to determine these issues *seriatim.*

Jurisdiction and the choice of law

[7] The starting point in determining this issue is a letter, annexure "K01", dated 7 March 2009. Crucially, it is not disputed that this letter emanated from the King's Office. It reads as follows:-

> *"The King's Office*
> *P.O. Box 1*
> *Kwaluseni*
> *Kingdom of Swaziland*
>
> *Chief Madzanga Ndwandwe*
> *Bulandzeni*
>
> *Dear Sir,*
>
> *I have been commanded by His Majesty King Mswati III to inform you that you hand over all his cattle that are at Bulandzeni some of which are with Mkhondvo Maseko and Aaron Zulu. The cattle will be fetched by Libandla letinkhomo, which is led by Macaleni Dlamini and Samson Nkwanyana together with Royal Swaziland Police members.*
>
> *The cattle will be taken to Khubutha Tibiyo. The said cattle were removed from kaGeorge Farm by Maseko, Zulu and others.*

Thanking you in advance.

Yours faithfully

(signed)

Bhekie R. Dlamini

Chief Office."

[8] It is apparent from its contents that annexure "K01" was a "command" by His Majesty King Mswati III. This is undisputed. In such a situation, therefore, the question becomes, which is the proper forum to adjudicate in the dispute? Is it the Roman-Dutch common law courts or is it the Swazi National Courts? The answer to these questions must no doubt depend on a proper choice of law between the two legal systems, something that the court *a quo* inexplicably failed to do.

[9] In determining a proper choice of law s252 of the Constitution as the supreme law is decisive. It provides as follows:-

> *"252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the*

principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.

(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.

(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may –

(a) provide for the proof and pleading of the rule of custom for any purpose;

(b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and

(c) provide for the resolution of conflicts of customs or conflicts of personal laws."

[10] It is plain from s252 (2) of the Constitution that the principles of Swazi law and custom are "recognised and adopted and shall be applied and enforced as part of the law of Swaziland." No court in this country can

simply ignore this constitutional provision as was apparently done in the present case.

[11] Similarly, the courts in this country are obliged to observe s4 of the Constitution on the Monarchy, with particular reference to His Majesty the King and Ingwenyama. Insofar as this case is concerned, subsection 4 thereof bears reference. It provides as follows:-

> *"(4) The King and iNgwenyama has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights, prerogatives and obligations in terms and in the spirit of this Constitution."*

[12] The rights and prerogatives of the King and Ingwenyama referred to in subsection 4 of the Constitution undoubtedly include, in my view, the right to property as well as protection of that property under Swazi law and custom. It is by design then that Roman-Dutch law is not mentioned in the subsection. On the contrary, it must be stressed that the Constitution is informed by very strong traditional values.

[13] It follows from the foregoing considerations that a proper interpretation of subsection 4 of the Constitution can only mean that where the rights of the King and Ingwenyama are concerned in a matter such as this, involving as it does the rights to cattle allegedly stolen by one of his subjects, the proper choice of law to invoke is Swazi law and custom. It is not Roman-Dutch concept of "spoliation" as the Judge *a quo* erroneously held in my view.

[14] **Mr. Khumalo** for the appellants also relied on s151 (8) of the Constitution for the proposition that the High Court had no jurisdiction in the matter. This is so, as he submitted, because the "command" for the seizure of the cattle emanated from the King's Office which is a traditional structure. Only traditional structures are entitled to deal with the matter, so he argued. Section 151(8) provides as follows:-

> *"Notwithstanding subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of iNgwenyama; the office of iNdlovukazi (the Queen Mother); the authorisation of a person to perform the functions of Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the*

procedure of the Council; and the Libutfo (regiment) system, which matters shall continue to be governed by Swazi law and Custom..”

[15] **Mr. Nzima** for the respondent on the other hand submitted that the High Court has unlimited jurisdiction. He relied on s151 (1) of the Constitution which provides in relevant parts as follows:-

“151. (1) The High Court has –

(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution.”

[16] As can plainly be seen from s151 of the Constitution, the “unlimited original jurisdiction” of the High Court does not extend to matters relating to the office of the Ingwenyama and other matters spelt out in subsection 151(8). The latter subsection specifically excludes the High Court’s jurisdiction in such matters in clear and unambiguous terms. It must be stressed, however, that the question whether or not a matter falls under subsection 151(1) or 151(8) is obviously a matter of evidence to be judged on the facts of each case. *In casu*, Macaleni made the following uncontroverted averment in paragraph 7 of his supporting affidavit:-

"7.

All the cattle that are kept at George Farm are owned by the Ingwenyama and as such I am advised and verily believe that this court has no jurisdiction to hear this matter by virtue of the fact that this is a matter relating to the office of Ingwenyama (yindzaba letsintsa Ingwenyama)."

In paragraph 16 of his replying affidavit the respondent merely contended himself with the following averments:-

"16.

AD PARAGRAPH 7

I wish to state that I have no dealings whatsoever with the cattle that are kept at George Farm. I am only interested in the cattle that were removed from my kraal by members of the Royal Swaziland Police Force. This Honourable Court has jurisdiction to deal with the present matter that relates to my herd of cattle. None of the herd of cattle that were removed from me by the police belong to the Ingwenyama and none of them had the Ingwenyama's brand mark."

It must, therefore, be accepted as factually correct, as an uncontested fact, that this is a matter which relates to a dispute involving the Ingwenyama's property. Accordingly, I accept that in terms of s151(8) of the Constitution the High Court had no jurisdiction to hear the matter. The court *a quo* apparently thought that s140 (2) gave him jurisdiction in the matter. I do not

agree. It seems to me that the court tried too hard to find jurisdiction where there was none. This section reads as follows:

> *"140. (2) In the exercise of the judicial power under this Constitution or any other law, the superior courts may, in relation to any matter within their jurisdiction, issue such orders or directions as may be necessary to ensure the enforcement of any judgment, decree or order of those courts."*

[17] As I have said before, and as I repeat now for emphasis, this case cried out for the invocation of Swazi law and custom. It is common cause that the court *a quo* did not apply this legal system. The court was, in my view, in error in doing so.

The words "within their jurisdiction" are decisive. They are intended to ensure that the superior courts, including the High Court, do not exceed their jurisdictions laid down in s151 of the Constitution. Unlike s151 of the Constitution, s140 (2) does not confer any jurisdiction on the High Court.

[18] It is not in dispute that the Swazi National Courts are best suited to deal with matters involving Swazi law and custom. These courts were established in terms of the Swazi Courts Act 80/1950 ("the Act"). Section 7 (1) of the Act confers civil jurisdiction on the courts in these terms:-

> *"7. (1) Every Swazi Court shall exercise civil jurisdiction, to the extent set out in its warrant and subject to the provisions of this Act, over causes and matters in which all the parties are members of the Swazi nation and the defendant is ordinarily resident, or the cause of action shall have arisen, within the area of jurisdiction of the Court."*

[19] In terms of s9 of the Act the only cases which are excluded from the Swazi courts are the following:-

> *"(a) cases in which a person is charged with an offence in consequence of which death is alleged to have occurred, or which is punishable under any law with death or imprisonment for life;*
>
> *(b) cases in connection with marriage other than a marriage contracted under or in accordance with Swazi law and custom, except where and in so far as the case concerns the payment or return or disposal of dowry;*
>
> *(c) cases relating to witchcraft, except with the approval of the Judicial Commissioner."*

As can be seen, the present matter is not one of the cases excluded from the Swazi Court's jurisdiction.

[20] The Swazi courts are obliged to administer Swazi law and custom. In this regard s11 of the Act reads as follows:-

> *"11. Subject to the provisions of this Act a Swazi Court shall administer –*
>
> *(a) the Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;*
>
> *(b) the provisions of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79/50 or any law repealing or replacing the same, and in force within the area of jurisdiction of the Court;*
>
> *(c) the provisions of any law which the Court is by or under such law authorised to administer. (Amended L.34/1966.)"*

[21] In his book entitled, **Application of Customary Law in Southern Africa at page 97, T.W. Bennett** correctly, in my view, makes the point that Swazi courts have been "specially retained as part of the court system to preserve the distinctively African mode of dispute settlement."

[22] It must be remembered, too, that there are traditional structures designed specifically to deal with settlement of disputes such as we have here. In this regard I accept as correct the following statement by Professor Kerr: **Customary Law of Immovable Property and Succession (3rd Ed) Grocott and Sherry at 25**:-

> *"In old customary law 'the tribe is a community or collection of natives forming a political and social organisation under the government, control and leadership of a chief who is the centre of the national or tribal life'. The chief exercised the functions of a king, chief justice, chief executive. In his council he exercised the sovereign right of making laws, while in his person he acted as chief justice adjudicating cases in his tribal court and as chief executive sometimes even carried out the sentence himself. Thus the Rev HH Dugmore said:*
>
> > *'The laws originate in the decisions of the chief and his council; but the same council forms the great law court of the tribe, in which the chief sits as judge, and afterwards enforces the execution of his own sentences or perhaps inflicts the awarded punishment with his own hand.'"*

[23] Commenting on the above statement Madlanga J expressed himself in the following terms in **Bangindawo and Others v Head of the Nyanda Regional Authority and Another; Hlantlalala v Head of the Western Tembuland Regional Authority and Others 1998 (3) BCLR 314 (TK)** at 326:-

> *"Although Professor Kerr refers to the position in 'old customary law', the judicial, executive and law-making powers in modern African customary law continue to vest in the chiefs and so-called paramount chiefs (the correct appellation being kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western legal systems, or not exposed to or sufficiently exposed to African customary law, or not believing in African customary law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It continues to thrive and is believed in and accepted by the vast majority of those subject to kings and chiefs and who continue to adhere to African customary law."*

[24] It follows from these considerations that in assuming jurisdiction on the basis of Roman-Dutch common law as he did, the learned Judge *a quo* misdirected himself. Similarly, he made a wrong choice of the applicable law in the circumstances.

Non-joinder

[25] It is not disputed that in terms of the letter, annexure "K01", referred to in paragraph [7] above His Majesty the King "commanded" one Macaleni Dlamini ("Macaleni") to fetch the cattle in question from the respondent and so it happened. Indeed, Macaleni deposed to a supporting affidavit in which he confirmed in paragraph 2 thereof that he was the one who led a

team called Libandla Letinkhomo TeNkhosi when the cattle were collected. He categorically stated that the police "were merely there to maintain peace and order and did not take part in the seizure..." In answer to paragraph 2 of Macaleni's supporting affidavit the respondent merely contended himself with the following averment in paragraph 11 of his replying affidavit:-

> *"I may as well state that the said Macaleni Dlamini is not known to me and as such his identity cannot be denied or admitted."*

[26] In paragraph 4 of his supporting affidavit Macaleni was emphatic that the cattle were seized by him. He averred as follows:-

> *"The cattle that form the subject matter of this application were seized by me acting in concert with other members as Libandla Letinkhomo TeNkhosi. The said cattle were taken to a Tibiyo TakaNgwane Farm at Khubuta in the Shiselweni Region."*

I pause there to note that Macaleni's version is undoubtedly correct, having regard to the letter, annexure "K01", which clearly designated him the leader of the team which was sent to seize the cattle

from the respondents. In any event Macaleni is supported in this version by Zangciki Gumedze ("Gumedze") who deposed to a confirmatory affidavit and said the following in paragraph 2.1 thereof:-

> *"2.1 I was present when Macaleni and his Libandla went to fetch the herd of cattle in question at Applicant's homestead. Macaleni and his Libandla arrived at my homestead in the early hours Monday the 25th May 2009 and from there we proceeded to the Applicant's homestead. At Applicant's homestead Macaleni introduced the delegation as well as their mission at Applicant's homestead. From there they proceeded to the kraal and opened Applicant's kraal and loaded the cattle in question in two trucks."*

[27] It is of crucial importance to note that in his replying affidavit the respondent did not address Gumedze's affidavit at all. It must therefore be accepted as correct that the cattle were seized by Macaleni, a version which was confirmed by Inspector Sibusiso Dlamini in his answering affidavit.

[28] Notwithstanding the fact that the cattle were fetched by Macaleni, it is common cause that he was not joined as a party in the proceedings. This, despite the fact that he clearly had a direct and substantial interest in the matter by virtue of the authority entrusted in him

by the letter, annexure “K01”. Indeed, his averment in paragraph 2 of his supporting affidavit to the effect that he is the “overseer of all the Ingwenyama’s cattle all over Swaziland” has not been controverted. It must, therefore, be accepted as correct.

[29] Regrettably, the court *a quo* dealt with the issue of non-joinder in an unsatisfactory manner in its judgment. The court initially appeared to hold the view that Macaleni was a necessary party. It felt, however, that even though he was “aware of the proceedings” he did not seek to intervene. In any event, so the court opined, a dismissal of proceedings for non-joinder would appear to be “harsh in the extreme”. The court expressed itself in the following terms in paragraph [12] of its judgment:-

> *“[12] I am inclined to the view that the Court should ordinarily not dismiss the proceedings in the event it finds that a necessary party has not been joined. What the Court ought to do in my opinion, unless it is properly satisfied that the said party has waived its right to be joined, is to stay the proceedings or order that the said party be joined and that the notice of the proceedings is properly brought to the attention of such a party. In that event, the Court would not proceed with the matter but would postpone or stay the same and make an appropriate order as to the costs which have been occasioned by the postponement or stay, necessitated by the non-joinder.”*

[30] There can be no doubt in my mid that by holding a dogmatic view that any proceedings may not be dismissed for non-joinder the court *a quo* misdirected itself. The correct position is that each case is judged on its own peculiar circumstances. There are several cases where courts have correctly dismissed proceedings on non-joinder alone. If a party is non-suited by reason of non-joinder, the obvious result is dismissal of the case on that ground alone. See, for example, a long line of decisions in this regard in the Lesotho Court of Appeal such as **Masopha v Mota 1985-1989 LAC 58; Matime And Others v Moruthoane And Another 1985-1989 LAC 198; Basutoland Congress Party And Others v Director of Elections And Others 1995-1999 LAC 587; Lesotho National Olympic Committee And Others v Morolong 2000-2004 (LAC 2000-2004) 449. Theko And Others v Morojele And Others 2000-2004 LAC 302.**

[31] As was stated in **Matime's** case (supra) "non-joinder is a matter that no court, even at the latest stage in proceedings can overlook, because the Court of Appeal cannot allow orders to stand against persons who may

be interested, but who had no opportunity to state their case." It is for that reason that the Court may raise the issue of non-joinder *mero motu* in order to do justice. See **Sabelo Mduduzi Masuku N.O. v Meridien Recoveries (Pty) Ltd, Appeal Case No. 24/00.**

[32] In the case of **Basutoland Congress Party And Others (supra)** the Lesotho Court of Appeal made the following apposite remarks at p599G-H:-

> *"In the first place appellants were not the only parties involved in the election. It is inconceivable that a court could have considered postponing the election without at least involving the other parties in these proceedings and giving them an opportunity to be heard. The appellants should therefore have been non-suited on this ground alone."*

[33] It is important to note that in paragraphs 3 and 6 of his supporting affidavit Macaleni specifically raised the issue of non-joinder in the following terms:-

> *"5.*
>
> *I am advised and verily believe that the order that the Applicant is seeking cannot be granted without prejudicially affecting me or Tibiyo TakaNgwane. I am further advised that the Applicant ought to have cited and joined me in this application.*
>
> *6.*

> *What is more, the Applicant is aware that the cattle in question were seized by me. The Applicant informed a reporter of the Time of Swaziland of this fact. I attach a copy of the Applicant's interview with the reporter which was published in the Times of Swaziland dated 1st June 2009. See annexure K05."*

Part of the statement relied upon in the article referred to in annexure "K05" reads as follows:-

> *"When the Times team visited Maseko he confirmed that Macaleni and company took all his cattle and left the kraal literally dry."*

The article also quoted the respondent as having said the following:-

> *"When they came here on Monday Macaleni produced a letter purportedly from the King's Office giving instruction that he should take the cattle with him but what surprised me the most was that this letter was signed 'Khula Mlisa' yet I don't suppose that the king signs this way," a distraught Maseko said."*

[34] Yet, as will be remembered from paragraph [24] above, the respondent subsequently claimed that he did not know Mcaleni. In his replying affidavit he made bare denials of the statement contained in paragraphs 5 and 6 of Macaleni's supporting affidavit. Similarly, he made a bare denial of the statement attributed to him in the

preceding paragraph. But he never disavowed this statement in the newspaper itself. More importantly, he never sought to join Macaleni even after receiving the latter's affidavit owning up to the seizure of the cattle in question.

[35] It follows from these considerations, in my view, that the respondent should have been non-suited simply by reason of his failure to join Macaleni.

Whether the police were in possession of the cattle in question

[36] The issue of possession of the cattle is closely linked to that of non-joinder as fully set out above. Once again, the starting point is the letter, annexure "K01", in terms of which His Majesty, The King "commanded" Macaleni to go and fetch the cattle from the respondent. Armed with that letter, Macaleni duly obliged and seized the cattle. It is not disputed that he took them back to kaGeorge Farm at Khubuta where they had allegedly been stolen from.

[37] As indicated earlier, the appellants' version was that the police had nothing to do with the actual seizure of the cattle. Their presence was merely "to maintain peace and order" when the cattle were removed.

[38] As proof beyond reasonable doubt that the cattle in question were not in the police possession but were in Macaleni's possession at kaGeorge Farm at Khubuta, the Deputy Sheriff deposed to an affidavit in which he stated that on 27 May 2009 he proceeded to Khubuta where he found the cattle. His attempt to remove the cattle failed, clearly because Macaleni who had possession was not mentioned in the court order which the Deputy Sheriff was armed with. It is trite that the court will not issue an order which will be a *brutum fulmen* because some person who will have to cooperate in its execution will not be bound by it. This is such a case. See, for example, **Sabelo Mduduzi Masuku N.O. case (supra)**; **Raik v Raik 1993 (2) SA 617 (W)**.

Disputes of fact

[39] I consider that, at best for the respondent, there were disputes of fact which made it impossible to resolve the matter on paper. As can be seen from the above rèsume of facts there was a dispute of fact on whether it was Macaleni who seized the cattle in question, a point which was conceded by the court *a quo* in these terms in paragraph [20] of its judgment, "This therefore raises a dispute of fact which cannot, for obvious reasons, be decided on the papers..." Similarly, there was a dispute of fact on whether the police were in possession of the cattle or whether they were in Macaleni's possession. And so, too, there was a dispute of fact as to whether the respondent had been despoiled of the cattle at all. The appellants' version showed that the respondent was not in peaceful and undisturbed possession of the cattle. On the contrary, he was "in the habit of stealing the Ingwenyama's cattle at George Farm." The Pigg's Peak police had "on numerous occasions recovered some of the cattle." In fact in paragraph 17 of his answering affidavit Inspector Sibusiso Dlamini made the following damaging allegations against the respondent which were met by no more than a bare denial:-

> *"17.1 The Applicant has on numerous occasions been called by Libandla Lelakhetfwa Tikhulu takaHhohho*

(council appointed by chief from the Hhohho Region) to discuss the issue of the theft of the Ingwenyama's cattle at George Farm and the Applicant has flatly refused to adhere to the subpoenas calling him to appear before this committee.

17.2 Applicant's late Chief Mdzanga Ndwandwe was also unsuccessful in calling the Applicant to appear before the Inner Council of Bulandzeni for a hearing on the alleged theft of the Ingwenyama's cattle kept at George Farm."

[40] It follows in my view that these disputes of fact should have been decided in favour of the appellants on the authority of **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) 1984 (3) SA 623 (A)**.

[41] In the result it follows from all of the foregoing considerations that the respondent's application in the court *a quo* should have been dismissed with costs.

[42] Before closing this judgment it is a matter of regret that I have to comment on the court *a quo*'s intemperate language used with reference to His Majesty The King. In paragraph [42] of its judgment the court said the following:-

> *"[42] It would indeed be surprising if His Majesty would have directed as alleged that the applicant's cattle should be seized at all and as it was, under the barrel of the gun without any due process of the law. I say so considering His Majesty's public remarks, of which this Court can take judicial notice, such as during the recent opening of the Hluti Magistrate's Court and the police station on or about 28 September, 2010, where he stated unequivocally in the presence of inter alia: the Judiciary, Executive, Parliamentarians and the police that the Swazi people must avoid taking the law into their own hands. The actions of the police and Macaleni in this context, are in direct contradiction to His Majesty's directive to the people of Swaziland and it would be hard to imagine let alone accept and thus incomprehensible that <u>His Majesty could conceivably speak with a forked tongue</u>, saying one thing to his people and then authorising his officers to do the opposite. I reject this notion as totally inaccurate and wrong, and which cannot be properly apportioned to the venerated office of His Majesty."* (Emphasis added.)

The use of the words "forked tongue" with reference to His Majesty The King is unfortunate. It is inappropriate language which does not belong to the King's own loyal subjects. Such language must be deprecated in the strongest possible terms. To say that I was horrified by the use of this language is probably an understatement.

[43] The result is that the appeal is upheld with costs. The order of the court *a quo* is set aside and replaced with the following order.

"The application is dismissed with costs."

_____

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree

_____

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree

_____

DR. SETH TWUM

JUSTICE OF APPEAL

For Appellants : Mr. S. Khumalo
(with him Mr. B. Tsabedze)

For Respondent : Mr. O. Nzima