



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No. 15/2015

In the matter between:

**TISUKA TAKANGWANE**

**APPELLANT**

**AND**

**MUNICIPAL COUNCIL OF MANZINI**

**1<sup>ST</sup> RESPONDENT**

**AMOS DLAMINI**

**2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**Neutral Citation:** *Tisuka Takangwane V. Municipal Council of Manzini and Others (15/2015) [2015] SZSC 22 (29 July 2015)*

**Coram:** M.C.B. MAPHALALA ACJ, DR B.J. ODOKI JA, Q.M.  
MABUZA AJA

**Heard on:** 3 JULY 2015

**Delivered on:** 29 JULY 2015

## Summary

*Civil Procedure – Application for rescission of judgment entered in default of appearance – Principles guiding rescission in Magistrates’ Courts – Application for rescission refused by Magistrate – Appeal to the High Court which allowed appeal and granted rescission on ground of non-service of the process – High Court finding that Appellant was liable to pay rates under the Rating Act for property registered in the name of the Ingwenyama – Whether property exempt from payment of rates under Sections 10 and 11 of the Constitution and Sections 2 and 7 of the Rating Act – Whether Appellant as agent of the Ingwenyama is liable to be sued for payment of rates – Held that High Court erred in finding that the property of the Ingwenyama was not exempt from payment of rates which constituted a bona fide defence on the merits – Appeal allowed.*

## JUDGMENT

**DR. B. J. ODOKI, J.A.**

[1] This is an appeal against part of the judgment of the High Court (Ota J) whereby the Court *a quo* granted the Appellant leave to defend the main action at the Manzini Magistrates Court. The appeal is particularly against the holding of the Court *a quo* that certain property registered in the name of His Majesty the Ingwenyama was ratable within the meaning of the Rating Act, and that the Appellant as an agent was liable for payment of rates owing to the principal. The immunity from legal action granted to the Ingwenyama under the Constitution and the exemption granted under the Rating Act was pleaded as a defence.

[2] The background to this appeal is that on 26<sup>th</sup> November 2012, the 1<sup>st</sup> Respondent instituted proceedings against the Appellant for recovery of the sum of E571,174.90, being arrears of rates in respect of certain portion of Farm 189, situated in the District of Manzini, together with interest, collection charges, plus costs. The property in question is owned by His Majesty, the Ingwenyama.

[3] The Appellant was served with the originating proceedings but there was no appearance made for the Appellant. On 5<sup>th</sup> December 2012, the Principal Magistrate entered a judgment in default of appearance against the Appellant in terms of the order prayed for

[4] On 19<sup>th</sup> December 2012, the 1<sup>st</sup> Respondent filed an urgent application for rescission of the order before the Magistrate on the following grounds:

*“(1) That Tisuka Takangwane is not the registered owner of the said property and thus no duty to pay rates for that property.*

*(2) That the said property is owned by His Majesty the King and Ingwenyama and registered in the name of the Ingwenyama.*

*(3) That the process was issued against the wrong party, thus a mis-joinder or non-joinder as Tisuka Takangwane and the office of the King and Ingwenyama are two entirely distinct legal persona.*

- (4) *That the process was issued against a non-entity labeled “Tisuka Houses” as there is no such and that the proper name is Tisuka Takangwane.*
- (5) *That the order was granted on a day which the Applicant was not aware, and that was on 5 December 2012.*
- (6) *That the supplementary affidavit filed by the 1<sup>st</sup> Respondent prior to the decision of 5 December 2012 was not served on the Applicant.”*

[5] On 28<sup>th</sup> October 2013, the Magistrate dismissed the application for rescission on the ground that it failed to meet the requirements of such application under Section 21(2) of the Magistrates Act and the Common Law.

[6] The Appellant filed an appeal in the High Court against the decision of the Magistrate. The High Court held that although the property in question was owned by His Majesty the Ingwenyama, it was not exempt from payment of rates because it was held for private pecuniary profit. The Court *a quo* also held that the Magistrate Court erred in refusing to rescind the default judgment as it was established that the Appellant had not been served with the notice before the default judgment was granted. The Court *a quo* granted the Appellant leave to defend the proceedings.

[7] The Appellant has appealed to this Court on the following grounds:

- “(a) *The Court a quo erred in fact and in law in holding that the Appellant, in the circumstances of this specific matter and regard being had to the pleadings filed before Court, could be sued for rates outstanding for property owned by His Majesty the Ingwenyama.*
  
- (b) *The Court a quo erred in fact and in law in holding by extension, that the immunity bestowed upon the Ingwenyama, in terms of Section 11 of the Constitution, constituted “an absence” as per provisions of Section 2 of the Rating Act, in as much as the 1<sup>st</sup> Respondent had not pleaded in any of its papers before Court that the Ingwenyama was at any given moment “absent”.*
  
- (c) *Or and in the alternative to (b) above, the Court a quo erred in fact and in law in failing to find that an immunity attendant to the principal would also be attendant to the agent for an agent can have no better rights and duties above his principal.*
  
- (d) *The Court a quo further erred in fact and in law in holding that the specific property was ratable in as much as the 1<sup>st</sup> Respondent had not pleaded that any rent and **specifically other than nominal rent**, was paid to the owner of lessee.*
  
- (e) *The Court a quo erred in fact and in law in finding that the specific property was ratable in as much as the 1<sup>st</sup> Respondent had not pleaded in any of its papers, or placed supporting financial documents of the same, that the object of the specific property was for the **pecuniary profit of any person.**”*

[8] Before dealing with the merits of the appeal, it is necessary to dispose of the preliminary point raised by Counsel of the 1<sup>st</sup> Respondent that this appeal is incompetent since the Appellant got a decision in its favour in the Court **a quo**. The 1<sup>st</sup> Respondent argued that the Appellant could not appeal against certain findings or reasoning which were not pertinent to the resolution of the appeal. It was the 1<sup>st</sup> Respondent's contention that an appeal lies only against the executive part of the Court Order and not against the reasons for judgment: Counsel relied on the case of **Administration Cape and Another Vs. Ntshwagila and Others 1990(1) SA 705 and 716**. Finally, the 1<sup>st</sup> Respondent submitted that since the appeal does not seek to alter the judgment of the High Court, it is frivolous and vexatious and has no prospects of success.

[9] It is common ground that the Appellant's application for rescission was successful in the Court **a quo** which granted the Appellant leave to defend the action on the ground that the Appellant had not been duly served. However, the Court **a quo** went ahead and decided that the Appellant was liable to pay rates as an agent of the principal, His Majesty the Ingwenyama, whom the Court deemed to be an absent owner since he could not be sued. The Court **a quo** based its decision on the provisions of Section 11 of the Constitution Act 2005 and Sections 2 and 7 of the Rating Act.

[10] The finding that the Appellant was liable to pay rates was not a decision in favour of the Appellant who was aggrieved by it, and hence it filed this appeal against part of the decision of the Court *a quo*.

[11] However, I wish to observe that it was not necessary for the Court *a quo* to make a definite decision on the Appellant's defence that it was not liable to pay rates, but it was sufficient for the Court to find that the Appellant had an arguable defence on the merits, as the decision of the High Court was likely to influence the Magistrates Court when determining the matter. It is, therefore, necessary for this Court to consider whether the High Court was correct in coming to the conclusion it did in view of the importance of the issue.

[12] The substantial issue for consideration is whether the property owned by His Majesty the King and Ingwenyama is subject to payment of rates. In the present case, it is common ground that the property in question is owned by His Majesty the King in trust for the Swazi Nation.

[13] The Appellant argued the first three grounds of appeal together. It was submitted that since the property in question was owned by His Majesty the King and registered in the King's name, it was wrong to sue the Appellant as the two were entirely different persons. The Appellant also contended that although the Appellant was an agent who collects rentals on behalf of the King, the Appellant did not own the property or the rentals collected. It was submitted that the Appellant could only be sued on the doctrine of "*undisclosed principal*" which

did not apply in this case where the principal was disclosed. The Appellant submitted further that it could not be sued because its principal had not given it authority to be sued on its behalf, as an agent can have no better rights and duties above the principal.

[14] The Appellant further argued that the Court *a quo* erred in law in finding that despite the provisions of Section 11 of the Constitution of Swaziland and Practice Direction No. 4 of 2011 issued by the Chief Justice, His Majesty the King as the registered owner of the property in question could be sued through the Appellant as his rent collecting agent, for rates owed in respect of the King's property. The Appellant referred to the contents of the Chief Justice's circular and the provisions of Section 11 of the Constitution.

[15] Finally, the Appellant submitted that the Court *a quo* erred in holding that the Appellant could be sued as an agent because the owner of the property in question was absent. The Appellant contended that nowhere in the pleadings was it pleaded that the King was at any given moment absent, and therefore this conclusion was not supported by facts. It was argued that the provisions of Section 11 of the Constitution could not be relied on to support that conclusion.

[16] On the other hand, the Respondent argued that Section 2 of the Rating Act defines the word "**owner**" to include agent where such owner is absent. It was therefore, the Respondent's submission that the Appellant as an agent could be sued for rates in place of his principal, the King.



[17] Referring to the provisions of Section 7 of the Rating Act which exempts certain properties of the Ingwenyama for payment of rates, the Respondent contended that the Appellant had not demonstrated that the exemption was available. The Respondent submitted that as some profits in form of rental collected was derived from the property, the property was not exempt under Section 7(3) (a) and (b) of the Rating Act. Furthermore, the Respondent maintained that the Appellant had failed to annex application under Section 9(3) of the Rating Act, for the property to be declared exempt from payment of rates.

[18] The Attorney General who was joined to the case as a friend of the Court particularly because the appeal called in question the provisions of the Rating Act 1995 and the Constitution Act 2005, made it clear that the Attorney General would not side with any of the parties.

[19] The Attorney General submitted that there was no conflict between Section 11 of the Constitution and the Rating Act 1995. Section 11 provides for the immunity of the King and Ingwenyama from legal suit while the relevant Sections of the Rating Act deal with exemption from paying of rates and prescribes the conditions for exemption. The Attorney General submitted that this was not an application where the King could be sued because the Ingwenyama cannot be sued.

[20] The Attorney General pointed out that Section 10 of the Constitution was more relevant than Section 11 in this matter. It was submitted that in terms of Section 10 of the Constitution, the King and Ingwenyama was immune from paying rates on all property owned by him in any private capacity. The Attorney General further submitted that the property in question is registered in the name of Ingwenyama in trust for the Swazi Nation and may be said to fall outside Section 10 of the Constitution.

[21] It was the contention of the Attorney General that this matter falls for determination in terms of the Rating Act. The Attorney General submitted that it was, however, wrong for the Court *a quo* to hold that the object was owned for private pecuniary profit as it is registered in trust for the Swazi Nation, and therefore cannot be said to be private.

[22] The Attorney General agreed that an agent can be sued where the owner was absent, but maintained that the Court *a quo* erred in deciding the matter on the basis of absence of owner as regards Section 2 of the Rating Act and Section 11 of the Constitution.

[23] In conclusion, the Attorney General made the following submissions in his Heads of Arguments:

- “24. *It should at this stage be emphasized that all properties owned by Ingwenyama in his private capacity shall be exempt from payment of rates (Section 10 of the Constitution)*
25. *It is, therefore, suffices to say that the Rating Act 1995 should be amended to expressly incorporate the above.*
26. *In summary, the King and Ingwenyama cannot be taxed for income accruing and property accrued in his private capacity. The view of the Attorney General is that it is important for the Court to ascertain the nature of ownership of the property. It must also be established if there is any rent paid other than nominal rent on the property which is registered in trust for the Swazi Nation in view of Section 7(3)(b) of the Rating Act.*
27. *The Attorney General, therefore, requests that the Court makes an appropriate finding therein.”*

[24] In the Court *a quo*, it was common ground that the Appellant was an agent of the Ingwenyama, the title deed holder, for collection of rentals on his behalf, among other duties. The Court *a quo* held that since the Ingwenyama enjoyed immunity from the suit, under Section 11 of the Constitution, he could be said to be an absent owner in terms of Section 2 of the Rating Act, thereby making the agent liable to pay rates on his behalf. The Court *a quo* stated:

*“For the purpose of payment of rates, the whole notion of definition of the owner including the Agent is so that in the absence of the owner for any reason, the Agent can be sued. It follows that action for the collection of tenement rates can lie against the Agent of the owner managing the property on behalf of the owner. The general principal that an Agent need not be sued where the principal is disclosed cannot apply by virtue of Section 2 of the Rating Act which defines “owner” as including the Agent of the owner. This is more so in the peculiar circumstances of this case, for the farther reason that by virtue of Section 11 of the Constitution Act, His Majesty the King and Ingwenyama, who is the owner is not suiable.”*

[25] It is common ground that under the Rating Act, the liability to pay rates rests on the owner. It is also not in dispute that the word “**owner**” is defined under Section 2 of the Rating Act to include “**the person in whom the legal title to such property is vested**”, and where such owner is absent, his agent. However, the mere fact that His Majesty the Ingwenyama was immune from legal action, did not mean that he was absent within the meaning of Section 2(a) of the Rating Act. There was no evidence that His Majesty was absent from the Kingdom.

[26] Section 11 of the Constitution provides for the legal immunity of the King as follows:

*“The King and Ingwenyama shall be immune from:*

- (a) A suit or a legal process in any cause in respect of all things done by him or omitted to be done by him, and*
- (b) Being summoned to appeal as a witness in any civil or criminal proceedings.”*

Similarly, Section 228 (2) of the Constitution provides,

*“The Ingwenyama enjoys the same legal protection and immunity from legal suit or process as the King.”*

[27] The above provisions make it absolutely clear that the King and Ingwenyama enjoys sovereign immunity from suit or any legal process. However, the Attorney General submitted that Section 11 of the Constitution was not relevant to this case because there is no involvement of the King and Ingwenyama in this matter as there are no things done or omitted to be done by him to warrant invoking the Section.

[28] It was the contention of the Attorney General that it is Section 10 of the Constitution which is relevant to this case. Section 10 of the Constitution provides:

*“The King and Ingwenyama shall be immune from taxation in respect of his civil list, all income accruing to him and all property owned by him in a private capacity.”*

[29] It is clear from the provisions of Section 10 of the Constitution that the King and Ingwenyama is immune from paying rates on all property owned by him in any private capacity. The question is whether the property in question which is registered in the name of Ingwenyama in trust for the Swazi Nation can be said to fall outside the provisions of Section 10 of the Constitution.

[30] There was no sufficient evidence to establish whether the property in question fell outside the protection given to the Ingwenyama by Section 10 of the Constitution. The property was registered in the name of the Ingwenyama in trust for the Swazi Nation. What are the legal implications of this in terms of the immunity accorded to the Ingwenyama? Can it be said that the property in question was public and not private property? Is such a distinction recognized in the Constitution when the property is owned by the Ingwenyama? In my view, it is doubtful whether such a distinction exists in respect of the property registered in the name of the King and Ingwenyama. It appears to me that such property could be exempt from taxation or payment of rates.

[31] It was submitted that the property in question falls to be determined in accordance with the Rating Act. The Court *a quo* observed that certain properties registered in the name of His Majesty the King and Ingwenyama are exempt from the payment of rates. However, the Court held that the property in issue did not fall

within the purview of this exemption because rent is collected from the property and that the object of the property is for private pecuniary interest.

[32] Section 7(2) and (3) of the Rating Act, provides as follows:

*“(2) In addition to the properties referred to in subsection (1), the following properties shall also be exempt from the payment of rates:*

*(a) Properties registered in the name of the Ingwenyama and the Ndlovukazi;*

*(b) Properties registered in the name of the Ingwenyama in trust for the Swazi Nation. Provided they are not used for any purpose mentioned in subsection 3(a), (b) and (c); and*

*(c) Properties owned by foreign governments and used for diplomatic purposes.*

*(3) No exemption from rates shall be granted in respect of any immovable property by virtue of subsection (1)*

*(a) if the use of such property has as one of its objects the private pecuniary profit of any person whether as a shareholder or otherwise;*

(b) *if any rent, other than nominal rent is paid to the owner, lessee, or occupier of any property; or*

(c) *where such property is used for the residential accommodation of members of staff or staff of any institution therein.”*

[33] There was no pleading or evidence to support the view that the property in question had, as one of the objects, the private pecuniary profit of any person, but on the contrary, it was held in trust for the Swazi Nation. Secondly, there was evidence to establish that the rent collected was not nominal, but commercial rent. Without such pleading or evidence, it could not be held that the property in question was not exempt from payment of rates.

[34] I hold, therefore, that the Court *a quo* erred in holding that the Appellant was liable to pay rates, as the Appellant had an arguable bona fide defence on the merits of the case which had prospects of success.

[35] I wish to observe, however, that Section 7 of the Rating Act needs to be amended to bring it in line with Sections 10 and 11 of the Constitution which provide for the immunity of the King and Ingwenyama. In the meantime, the Act should be interpreted and applied in such a manner as to bring it in line with the Constitution of Swaziland.



[36] In the result, I allow this appeal. The decision of the Court *a quo* that the Appellant is liable to pay rates is set aside. The other orders of the Court *a quo* are confirmed. Each party will bear its own costs.

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**DR. B. J. ODOKI**  
**JUSTICE OF APPEAL**

**I Agree**

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**M. C. B. MAPHALALA**  
**ACTING CHIEF JUSTICE**

**I Agree**

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**Q. M. MABUZA**  
**ACTING JUSTICE OF APPEAL**

**For Appellants: Mr. T. M. Ndlovu**

**For 1<sup>st</sup> Respondent: Mr. M Mabila**

**For 2<sup>nd</sup> Respondent: Unrepresented**

**For 3<sup>rd</sup> Respondent: Mr. S. Khumalo**