IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Case No. 30/2022

HELD AT MBABANE
In the matter between:

MUZIKAYISE MHLONGO — **Appellant**

And

ZAMOKUHLE MFUNDO MHLONGO — **1st Respondent**
ROYAL ESWATINI SUGAR ASSOCIATION — **2nd Respondent**
THE MASTER OF THE HIGH COURT — **3rd Respondent**
THE ATTORNEY GENERAL — **4th Respondent**

Neutral Citation: *Muzikayise Mhlongo vs Zamokuhle Mfundo Mhlongo and 3 Others* (30/2022) [2022] *SZSC* 55 (16/12/2022)

Coram: **N.J. HLOPHE JA, J.M. CURRIE JA AND A.M. LUKHELE AJA.**

Heard: 12 September, 2022.
Delivered: 16 December, 2022.

SUMMARY: *Civil law – Regional Administrator Lubombo Region replaced one holder of a sugar quota with another – interdict sought to give effect to such order and granted by court a quo without considering points in limine - new points of law raised on appeal – this court may consider or may mero motu raise such points of law provided that (a) the points are covered by the papers filed of record in application proceedings; and (b) its consideration on appeal involves no unfairness to the other parties- High Court has review and appellate jurisdiction in matters involving Swazi Law and Custom – it does not have jurisdiction to enforce decisions of traditional authorities - appeal succeeds and judgment of the court a quo set aside.*

JUDGMENT

J.M. CURRIE – JA

INTRODUCTION

[1] This appeal arises as a result of a judgment of the High Court delivered on 5th May 2022.

[2] The 1st respondent/applicant in the court *a quo* launched urgent motion proceedings in the court *a quo* seeking, *inter alia:*

(a) that the Second Respondent be restrained and/or interdicted from making payments in respect of the proceeds of Farm No. 053, situated in the Vuvulane area pending finalization of the matter and;

(b) an order declaring that Appellant be removed as the quota holder of Farm No 053 and be replaced with the name of 1st Respondent."

[3] The court *a quo* gave judgment in favour of the applicant/1st respondent including costs.

BACKGROUND

[4] This matter has a long and checkered history but the facts are essential in considering this appeal.

[5] The Mhlongo family are the owners of Farm No. 053 situated at Vuvulane in the Lubombo District. The land on which the farm is situated was originally Concession Land but with the advent of the Constitution of Eswatini Act 001 of 2005, it became Swazi Nation land. Section 211 (1) provides that all land including Concession Land shall continue to vest in the Ingwenyama in trust for the Swazi Nation. Farm 053 holds a quota allocated by the Quota Board established under Section 8 of the Sugar Act No. 4 of 1967. The family grows and harvests sugar cane on the farm which is then supplied to the 2nd respondent which pays for the sugar cane to the nominated family successor of the quota.

[6] Maria Gladys Mhlongo, the grandmother of both appellant and 1st respondent was the owner of the first sugar quota. The parties agree that there is normally a structured, systematic and organized plan on how a quota is passed down from one family beneficiary to another. When the holder of a sugar quota passes away the nominated successor takes over the farm and manages and performs all agricultural activities on the farm.

[7] *In casu* the parties do not agree that a succession plan exists with regard to Farm No. 053 as the farm is located on Swazi Nation land and it is therefore disputed as to which family member should be the holder of the right.

1ST RESPONDENT'S/APPLICANT'S CASE IN THE COURT *A QUO*

[8] First respondent/applicant in the court *a quo,* on affidavit stated that his family has at all material times been the owner of Farm 053. Maria Gladys Mhlongo ("Gladys") originally held the allocation. When she died in 1999 Mr. Wilfred Bongani Mhlongo ("Wilfred") her biological son took over and started working on the farm. Wilfred then nominated his wife, Agnes Simangele Mhlongo (born Simelane) ("Agnes") to be his successor. Three children were born of the union between Wilfred and Agnes, being the 1st respondent, Nkosingiphile Mhlongo and Nompumelelo Mhlongo. After the death of Wilfred, Agnes took over the farm and worked it in accordance with the family tradition. According to 1st respondent during her life time she nominated him as her successor by completing a Nomination Card in terms of the Vuvulane Farmers procedures. Accordingly, after her death, in July 2019 1st respondent assumed the role as the nominated successor of the farm and

started working on the farm and carrying out the agricultural activities expected of him.

[10] First respondent states that on 9 July 2020 the appellant, behind his back, together with members of his extended family convened a meeting before the Regional Secretary, Lubombo, without extending an invitation to him or his siblings. At this meeting, appellant was nominated as successor to the farm in place of 1st respondent. On 10 July 2020 the Regional Secretary addressed a letter to the to 2nd respondent stating that appellant was the nominated successor of the quota.

[11] Thereafter, on 28 September 2020, 3rd respondent addressed a letter to the Secretary of the Quota Board informing it that appellant had been appointed successor of Farm 053.

[12] As a result 1st respondent appealed to the Regional Administrator of Lubombo District. The matter was heard on 8 April 2021 and a decision was taken in his favour. The Regional Administrator held that the decision of the Regional Secretary dated 10 July 2020 was repealed and appellant was accordingly

removed as the purported nominated successor to the farm and replaced with 1st respondent.

[13] The 1st respondent then approached the 3rd respondent in order to rectify the situation and to assist in transferring the quota back to him. Third respondent declined to assist. There was therefore no way that he could prevent 2nd respondent from making payments in respect of the proceeds of the sugar cane to appellant as he was now the nominated quota holder. It was for this reason that he sought the interdict in the court *a quo*.

APPELLANT'S/1ST RESPONDENT'S CASE IN THE COURT *A QUO*

[14] Appellant raised two points *in limine* in the court *a quo*. The first point was the issue of urgency and the second was the issue of non-joinder of the Quota Board.

[15] Appellant contended that the Quota Board ought to have been joined in the proceedings as an interested party as in terms the Swaziland Sugar Industry

Agreement ("the Agreement") it is only the Quota Board that has the authority to issue or transfer sugar quotas.

[16] In contravention of the provisions of the Agreement the Regional Administrator and the Bandlacane, having decided who the rightful possessor of the land should be, then sought to transfer the sugar quota from the appellant to the 1st respondent by addressing a letter to the 2nd respondent requesting them to effect the change.

[17] Appellant denied that applicant/1st respondent was the rightful nominated successor of the quota on the farm.

[18] This is borne out by the fact that appellant challenged the authenticity of the appointment of 1st respondent evidenced by the Nomination Card as it did not bear an official stamp. He stated that the nomination of a successor to obtain the quota is carried out at family level and the Indlunkulu thereafter approaches the relevant structures to validate their nominated candidate.

[19] Appellant maintained that it was the Mhlongo Indlunkhulu led by Gideon Mhlongo who consulted the Vuvulane Libandla on the nomination of the quota holder and the Libandla confirmed that the nomination was done by the family Indlunkhulu.

[20] Appellant alleged further that he was nominated as the quota holder of the Farm because his father throughout the twenty years when 1st respondent's mother was in possession of the farm, and a further 13 years when his father did not benefit anything from the operations then conducted by his brother Jabulani Mhlongo.

[21] Appellant alleged further that it was the Deputy Master of the 3rd respondent who investigated the matter and eventually made a finding that Dumisani Mhlongo's family was to be awarded the quota of the late Agnes Simangele Mhlongo as she had not inherited the farm and, thus, the quota did not form part of her estate.

[22] Appellant stated that, contrary to the version of the 1st respondent, that 1st respondent was invited to a family meeting held by the Indlunkulu on 19

January 2019 but he refused to attend. Another meeting was subsequently convened at Vuvulane's V.I.F. offices with the Vuvulane Libandla where 1st respondent's family were invited to attend but refused. First respondent was also invited to attend meeting at the office of Regional Secretary on 8 April 2021 when appellant was duly appointed as the valid quota holder.

[23] Once appellant was duly appointed as the holder of the quota he obtained a loan from the fiancial institution in eSwatini, FINCORP, in order to finance the farming operations. The loan was secured by a cession over the sugar cane proceeds from 2nd respondent. Accordingly 1st respondent authorized the 2nd respondent to pay certain proceeds of the sugar cane to FINCORP in settlement of the loan.

[24] It is quite clear from affidavits filed in the proceedings in the court *a quo* that it was disputed as to who the rightful successor to the quota holder should be and that both parties sought the intervention of the Regional Administrator.

FINDINGS OF THE COURT *A QUO*

[25] The court *a quo* did not deal with the points *in limine* but it appears that these points were dealt together with the merits although it is not apparent from the judgment that due consideration was given to the point of non-joinder of the Quota Board.

[26] Although the application before the court was for an interdict and not for a review of the decision of the Regional Administrator the court made the following comments:

(a) That there were disputes of fact on the papers but that the overriding factor that emanated from the affidavits filed of record was the Regional Administrator's Office Lubombo region was the appropriate authority to deal with such issues;

(b) That the Regional Administrator Lubombo Region is the head of the region and all the chiefs in the different chiefdoms situated in the Lubombo region are under the authority of the Regional Administrator.

His duties include dealing with disputes over land situated on Swazi Nation land;

(c) That the court *a quo* was satisfied that the Regional Administrator conducted the appeal or review in conformity with the rules of natural justice expected by administrative authorities when performing such functions and thus, the court came to the conclusion that it could not question the decision of the Regional Administrator Lubombo Region dated 9 June 2021;

(d) That it was satisfied that there was no evidence that the Regional Administrator had committed any gross irregularity or illegality in the performance of his duties when adjudicating the matter. Further that it cannot be said that the Regional Administrator was irrational and arbitrary in the decision he took.

[27] It is evident from the above that the court *a quo* misdirected itself in expressing any views or making any findings on the decision of the Regional Administrator.

[28] The appellant/1st respondent in the court *a quo* has noted an appeal against the judgment as follows:

> *"1. The Court a quo erred in law and in fact by holding that the Applicant a quo has a clear to the sugar quota which right was granted to the Applicant a quo by the Regional Administrator in view of the following:*
>
> *1.1 A quota is issued to and/or transferred from one person to another by the Quota Board in terms of section 13 read with section 18 of the Swaziland Sugar Industry Agreement issued in terms of Sugar Act No. 4 of 1967 (the Sugar Act). The decision to issue a Quota does not rest with the Regional Administrator. The Regional Administrator does not have the jurisdiction to issue a*

quota. There is as such no right to a sugar quota that may be granted by the Regional Administrator; and

1.2 *A decision of the Quota Board is only reviewable by the High Court in terms of section 8 (2) of the Sugar Act and not the Regional Administrator. The Quota Board transferred the sugar quota from Agnes Simangele Mhlongo to the Appellant on the 7th October 2020. The Regional Administrator did not, as such, have jurisdiction to review and set aside the decision of the Quota Board to transfer the quota from Agnes Simangele Mhlongo to the Appellant on the 9th June 2021.*

2. *The Court a quo erred by holding that the Regional Administrator was exercising his lawful duties as head of the region when he issued the decision of the 9th June 2021 in that;*

2.1 *The Regional Administrator's authority emanates from the Regional Council Order of 1978 (the Order). In terms of the Order the Regional Administrator does not have authority to determine the transfer and/or allocation of sugar quotas;*

3. *The Court a quo erred in law in entertaining and/or disposing of the application a quo in view of the following;*

3.1 *Assuming that this is a matter that properly fell within the jurisdiction of the Regional Administrator, then and in that event the Court a quo did not have original jurisdiction to entertain the application a quo, but only had review and appellant jurisdiction in terms of section 151 3 (b) of the Constitution of Eswatini Act No. 001 of 2005.*

4. ***The Court a quo erred in fact and in law in holding that it was not necessary to join the Quota Board in the proceedings. The Quota Board was a necessary party in the proceedings since it was its decision that was reviewed by the Regional Administrator and by extension the Court a quo. The Quota Board is further the rightful statutory body to issue sugar quotas.***

ARGUMENT ON BEHALF OF THE APPELLANT ON APPEAL

[29] Appellant contends that the pivotal question is whether the court *a quo* had jurisdiction to hear and dispose of the application as it did in view of the fact that the court does not have originial jurisdiction but has review and appellate jurisdiction in matters in which a Swazi Court has jurisdiction.

[30] Appellant raised three new questions of law for the first time on appeal and contended that these issues are capable of resolution on the facts pleaded in the court *a quo* without the need for additional evidence. There would be no prejudice to the 1st respondent as the issues were covered by the pleadings and therefore the 1st respondent could equally argue the points raised without the

need to adduce further evidence. He relied on the case of **Sarrahwitz v Maritz N.O. and Another [2015] ZACC 14, paragraph 14** where the Constitutional Court of South Africa held that in matters of this nature a court should be guided by three conditions:

"the point sought to be raised must be a point of law; it must be covered by the pleadings; and there should be no prejudice to the other party... ".

THE ISSUE OF JURISDICTION

[31] Appellant's counsel on behalf of the appellant contended that issues pertaining to Swazi Law and Custom fall within the jurisdiction of the Swazi Courts in terms of the Swazi Courts Act No. 80 of 1950. Decisions as to the right to possess or occupy Swazi Nation Land are determined according to Swazi Law and Custom. The land on which Farm 053 is situated was originally Concession Land until the advent of the Constitution of Eswatini Act No. 001 of 2005. Section 211 (1) of the Constitution provides that all land including Concession Land shall vest in the Ingwenyama in trust for the Swazi Nation. It follows therefore that this is a matter which falls exclusively within the preserve of the Swazi Courts and the court *a quo* had no jurisdiction to entertain the matter.

[32] The court *a quo* acknowledged that Regional Administrator is the head of the region and all the chiefs of the different chiefdoms fall under the Regional Administrator and that they are the appropriate authority to deal with disputes over land situated on Nation Land.

[33] The 1st respondent approached the court *a quo* seeking an order for the enforcement of a decision of the Regional Administrator and the Bandlacane. The court did not have jurisdiction to entertain the matter on review or appeal as it was neither a review nor appeal. Instead of refusing to entertain the matter it issued the orders sought by the 1st respondent on the basis that its hands were tied and it could do nothing other than confirm the decision of the Regional Administrator and the Bandlacane. By doing so it closed the door to the appellant to appeal the decision through the traditional authorities.

THE LACK OF AUTHORITY OF THE REGIONAL ADMINISTRATOR AND THE BANDLACANE TO REVIEW A DECISION OF THE QUOTA BOARD

[34] At the meeting in June 2021 the Regional Administrator and the Bandlacane decided who the rightful possessor of the land should be,

as they were entitled to do. Thereafter, the acted *ultra vires* in seeking to transfer the sugar quota from appellant to 1st respondent as they did in their letter to the 2nd respondent dated 7 June 2021 where the Regional Administrator stated: *"It was resolved that quotta [sic] should be removed from Muzikayise to Zamokuhle Mhlongo who was nominated by the deceased Agnes Mhlongo."*

THE FAILURE TO JOIN THE QUOTA BOARD

[35] The appellant contends that the court *a quo* dismissed the point of non joinder of the Quota Board without addressing the point of law at all.

[36] Sections 13,15 and 18 of the Swaziland Sugar Industry Agreement ("the Sugar Agreement") provide that it is the Quota Board as established in terms of the Sugar Act 1967 that has the authority to issue or transfer sugar quotas. In view of the above provisions the Regional Administrator and the Bandlane have no authority to issue or transfer sugar quotas.

[37] The Quota Board issued is decision to grant a sugar quota to the appellant on 7 October 2020. The Regional Administrator and the Bandlacane sought to reverse the decision on 9 June 2021 whilst not having the authority to do so. A party aggrieved by a decision of the Quota Board may take the matter on review to the High Court relying on Section 8 (2) of the Sugar Act which provides:

> *"The High Court may review a proceeding of the board on the petition of any person of any person aggrieved thereby if it appears to the Court that-*
>
> *a) In the proceedings in question the board –*
>
> *i) exceeded its powers; or*
>
> *ii) failed to take into consideration matters relevant to the issues before it or otherwise failed to perform a duty; or*
>
> *iii) exercised its powers in an arbitrary, mala fide or grossly unreasonable manner; or*
>
> *iv) a point of law arose which the Court should determine."*

[38] Finally, 1st respondent submitted that apart from the new points of law raised the grounds of appeal are meritorious and the appeal should be dismissed with costs.

ARGUMENT OF 1ST RESPONDENT ON APPEAL

[39] 1st respondent contends that the questions of law now raised for the first time on appeal stand to be dismissed as they were not raised in the court *a quo*. He states that the legal issues raised by the appellant do not meet the three requirements stipulated in the case of **Sarrahwitz** and are not contained in the pleadings and that it would be prejudicial for the appellant if this Court were to determine same. He relied on the case of **The Chairman of the Liquor Licensing Board v Joshua B.Mkhonta, Supreme Court of Eswatini Case No. 1/2013** where the Court held:

> *"The Appellant made two main submissions; one procedural, the other touching and concerning the High Court's jurisdiction to entertain the Respondent's Notice of Motion. In respect of the procedure used by the Respondent to invoke the High Court's jurisdiction, the Appellant submitted that the application ought to have been by petition not Notice of Motion. It must be pointed straight away that this objection was not*

raised in the Court a quo. It is inappropriate for this Court to consider it now....'(sic)."

[40] With regard to the issue of jurisdiction, the 1st respondent maintains that the court *a quo* did have jurisdiction to grant an interdict and the 1st respondent was enititled to such interdict and had met the requirements for the grant of such an interdict. He maintains that, in a plethora of judgments the court *a quo* has granted interdicts such as the one serving before this Court.

[41] He relied in particular on the case of **Ndzimandze Thembinkosi v Maziya Ntombi, High Court Case No. 394/2000** where the court held:

> *"I have no wish to engage in any long drawn out analysis of this issue in the face of the facts stated, which demonstrate beyond dispute litigation before the Inner Council of the Royal Kraal of Kwaluseni, as well as the Ndabazabantu of Manzini. The record demonstrates that this matter has been extensively deliberated upon and settled by these traditional adjudicatory structures, culminating in the interdicts as contained in TD 1 and TD 2, which I have hereinbefore*

reproduced in extensor. ***It is obvious to me that the Applicant has exhausted his right of redress before these traditional structures. I see no other option open to him, in the face of the flagrant disobedience and disregard of the verdicts of those traditional structures, displayed by the 1st Respondent and I must say with impunity and approbrium, than to approach this Court for redress by way of an interdict to enforce the orders of the traditional structures, and none is in these proceedings.*** "

[42] 1st respondent submits that he had exhausted his right of redress before the traditional authorities and had no alternative remedy available other than to approach the court *a quo.* The nature of his claim was one that could not be enforced by the Regional Administrator or any other adjudicatory authority but was one that could be enforced by the High Court.

[43] With regard to the issue of whether or that Regional Administrator and Bandlacane lacked jurisdiction to decide to whom a sugar quota may be issued he contends that the argument of the appellant is incorrect. These traditional authorities only play an advisory role in that they advise the Quota Board of

the rightful successor of the sugar quota and the Board then confirms the allocation based on their advice. They do not purport to issue nor transfer sugar quotas.

[44] The 1st respondent contends that appellant was invited to the family meetings held at "*Indlunkhulu*" where it was to be debated and decided who the rightful holder should be but he failed or refused to attend such meetings. However, when he wished to be appointed quota holder in July 2020 he approached the very same authority to have himself appointed. He cannot therefore approbate and reprobate. If he believed that it was only the Quota Board who could decide the issue he should not have approached the Regional Administrator himself.

[45] With regard to the issue of non-joinder of the Quota Board, 1st respondent contends that this point is without merit. He submits that the Quota Board's role is to abide by the decision of the Court and enforce any such order made by the Court.

[46] First respondent contends that it is factually incorrect for the appellant to state that the Regional Administrator sought to reverse the decision of the Quota Board dated 7 October 2020 when he wrote the letter of 9 June 2021. The letter of 9 June 2021 was reviewing and setting aside the letter written by the Regional Secretary on 10 July 2020. Thus the decision of the Quota Board was never reviewed by the Regional Administrator. The Quota Board's role is to abide the decision taken by the relevant authorities as to the rightful successor to the sugar quota.

APPLICABLE LEGAL PRINCIPLES AND FINDINGS OF THIS COURT

[47] The manner in which the court *a quo* dealt with the points raised *in limine* requires some comment. The appellant raised the point *in limine* that the Quota Board ought to have been joined as an interested party. It is evident from the judgment of the court *a quo* that it did not consider this issue at all or hear argument on the point and it merely dismissed the point. In my view the court erred in this regard because if the Quota Board had been joined the outcome may have been different. The Quota Board may well have shed some light on how it deals with an allocation when there is a dispute as to who the successor of a quota holder should be. As the farm was allegedly first

managed by 1st respondent and thereafter the appellant it may have stated which was the more competent of the two to carry out the agricultural activities. On the other hand it may have stated that it follows the advice of the Regonal Administrator if the land which holds the quota is situated on Swazi Nation land. – See the decision in **Amalgamated Enginerring Union vs Minister of Labour 1949 (3) SA 637** with regard to Joinder of an interested party where it was held as follows:

> *"....if a party has a direct and substantial interest in any order the court may make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings...."*

[48] With regard to the Quota Board the appellant has raised the issue whether the Regional Administrator and the Bandlacane possess the authority to usurp a decision of the Quota Board. In my view he cannot do so as Section 18 (2) of the Sugar Agreement provides as follows:

> *"(2) No alteration in terms of such allocation, either as regards the Grower, the land in respect of which the quota applies or the mill to*

which the Grower is attached in schedule "A" shall be made without written consent of the Quota Board."

[49] It follows therefore that the Regional Administrator and the Bandlacane had no authority to order the transfer of the sugar quota from the appellant to the 1st respondent. Their conduct was thus *ultra vires* when they purported to usurp the authority of the Quota Board.

[50] The second issue which this Court has to to consider is whether the appellant is entitled to raise new issues for the first time on appeal, in particular as these points may be depositive of the matter

[51] Rule **33** of the Rules of this Court provides as follows:

> *"33. (1) No party to an appeal shall have the right to adduce new evidence in support of his original case; but for the furtherance of justice, the Court of Appeal may where it thinks fit allow or require new evidence to be adduced.*

(2) A party may, by leave of the Court of Appeal, allege any facts essential to the issue that have come to his knowledge after the decision from which the appeal is brought and adduce evidence in support of such allegations.

(3) Even where the notice of appeal seeks to have part only of the judgment reversed or varied, the Court of Appeal may draw any inference of fact, give any judgment, and make any order which ought to have been made and may make such further or other order as the case may require, and such powers may be exercised in favour of all or any of the respondents or parties whether or not they have appealed from or complained of the decision under appeal.

(4) The Court of Appeal may make such order as to the whole or any part of the costs of the appeal as may be just."

[52] The new points of law were raised for the first time in the heads of argument, supported by submissions based on relevant authorities. In terms of Rule 33 an appellant is confined to the Notice of Appeal and may only go beyond the ambit thereof with the leave of the court. Respondent took issue with raising

of new points on appeal and both parties addressed full argument thereon as if there had been an application for such leave.

[53] The consideration thereof by the court in the absence of a formal application for leave should not be regarded as setting a precedent for non-compliance with the rule; *in casu* the issue of jurisdiction was not addressed in the notice of appeal and had the appellant not sought to introduce it on appeal this Court would *mero motu* have raised the issue due to the particular nature and import of questions of jurisdiction.

[54] A party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided that they arise from the facts alleged and provided further that the Court is satisfied that such procedure will not result in prejudice or unfairness to the other side. *In casu* the Court was satisfied that the facts were sufficiently pleaded in the papers filed of record to enable to parties to make submissions on the new points of law without the need for further evidence.

[55] In the matter of **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 324-325**; the Court held that a court of appeal may consider a point of law that is raised for the first time on appeal, or *mero motu* raise such point, if:

(a) the point is covered by the pleadings in action proceedings, or by the papers filed of record in application proceedings (i.e. affidavits, annexures, notices and other pertinent documents); and

(b) its consideration on appeal involves no unfairness to the other parties;

(c) the point is covered by the pleadings in action proceedings, or by the papers filed of record in application proceedings (i.e. affidavits, annexures, notices and other pertinent documents); and

(d) its consideration on appeal involves no unfairness to the other parties.

This case has been referred to with approval in e.g. **The Prime Minister of Swaziland and Others v Christopher Vilakati (...30/12) [2013] SZSC 34 (31 May 2013). The Attorney General & Another v Masotsha Peter Dlamini (...27/13) 2013 [SZSC] 44 (30 July 2013)** at Paragraph [55].

[56] The crisp issue is whether the court *a quo* had jurisdiction to entertain and dispose of the application for an interdict. It is clear that this matter involves a dispute over the allocation of a sugar quota granted to Farm 053 siutated on Swazi Nation land. Therefore the matter falls exclusively to be dealt with according to Swazi Law and Custom.

[57] Section 11 of the Swazi Courts Act No. 80 of 1950 which provides 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 Ingwenyama or a chief under Swazi Administration Act No. 79 of 1950 or any law repealing or replacing the same and in force within the area of jurisdiction of the Court;

b) The provisions of any law which the Court is, by or under such law authorized to administer."

[58] In **Mkhulu Khanyile v Allison Nsingwane and Two Others (756/2012) [2014] SZHC 67**, the learned M.C.B. Maphalala, as he then was held as follows;

"It is apparent from the evidence that this matter involves a dispute over land situated in a Swazi area. This matter falls exclusively within the preserve of Swazi Law and Custom; hence, this Court has no jurisdiction to entertain the matter. This is a matter to be determined

by the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. This Court can only hear and determine this matter on review or appeal from the Swazi Courts."

[59] The 1st respondent, being disatisfied with the decision of the Regonal Administrator, could have been taken the matter on review to the High Court in terms of Section 151 (3) of the **Constitution of Eswatini Act No.001 of 2005** which provides as follows:

*"151 (3) Notwithstanding the provisions of subsection (1), the High Court – (b) has no **original** but **review** and **appellate jurisdiction** in matters in which a Swazi Court or Court Marshall has jurisdiction under any law for the time being in force."*

[60] In **Mciniseli Cindzi and Another v The Ministry of Housing and Urban Development and 9 others (925/2016) [2017] SZHC 227** his Lordship Justice Mamba held as follows;

"From the above facts, it is plain to me that this is a matter that has to be heard by the relevant traditional authority or structure. That

authority is the Masundvwini Royal Residence. In fact a decision has been taken and this Court is being asked to order compliance therewith. This Court, in my judgment, cannot and must not be used as a forum to rubberstamp judgments of other appropriate and legitimate structures. To my mind, structures under Swazi Law and Custom have their own mechanisms or methods of execution or enforcement of their own judgments or orders. A duplication in the enforcement of such orders is not desirable at all. It is quite unnecessary in fact and this Court must as a general rule always decline to meddle or interfere in such matters." (my underlining)

[61] In a judgment of this Court in the matter of **Masundvwini Royal Kraal vs. Evangelical Church (By Christ Ambassadors) and Another (19/2017) [2018] SZSC 10 (4th May 2018)** Odoki J. stated:

"[38] Even if the matter was to have been finalized by the traditional authorities, it is my view that it would not have been necessary or proper to bring an Application before the High Court to enforce the decision of the traditional authorities. It is trite law that the High Court has no original

jurisdiction in matters in which a Swazi Court has jurisdiction. Section 151 (3) (b) of the Constitution provides:

> *"(3) Notwithstanding the provisions of subsection (1) the High Court*
>
> *(a) . . . . . .*
>
> *(b) has no original but review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force."*

[62] In the matter of **Ntfombiyenkhosi Rosemary Hlatshwayo v Tfobhi Rita Nxumalo Nee Hlatshwayo & Four Others (817/2021) [2022] SZHC 105 (27th May 2022)** it was stated:

> *".....it is clear that the Swazi or traditional courts are established in terms of the Constitution. They derive their powers and authority from the Constitution. Their decisions, pronoucements, orders and judgments therefore have the full force of the law. In brief, they do not need another court to give effect to their decisions."*

See also the decisions of **Justice Langwenya in Sigonyela Mamba v Sicelo Mahlalela and Ano (1860) [2021] SZHC 221** and **Justice M. Dlamini in Ntfombiyenkhosi Rosemary Hlatshwayo v Tfobhi Rita Nxumalo Nee Hlatshwayo and Four Others (817/2021) [2022] SZHC 105** and the decisions cited therein

[63] It follows therefore that a matter which falls within the jurisdiction of a Swazi Court may only be brought to the High Court on review or appeal. *In casu* the 1st respondent sought an interdict in the court *a quo* in order to enforce the ruling of the Reginal Administrator and did not take the matter on appeal or review to the court *a quo*. The court came to the conclusion that the verdict of the Regional Administrator could not be overturned by the court *a quo* and therefore the applicant was entitled to the interdict sought.

[64] Whilst the court *a quo* has jurisdiction to grant an interdict in certain matters involving Swazi Law and Custom it does not have jurisdiction it make an order enforcing the the decision of the Regional Administrator which has the effect of ousting the jurisdiction of the traditional authorities. In my view the court *a quo* misdirected itself in entertaining the matter and ought to have

dismissed the application and/or referred the matter back to the appropriate traditional authority to determine who the lawful successor of the sugar quota should be in respect of Farm 053.

[65] It is evident from the obiter comments of the Learned Judge in the court *a quo* that he was of the view that the matter should be dealt with according to Swazi Law and Custom. He stated;

> *"[34] The Regional Administrator Lubombo Region is the Head of the Region and all the Chiefs of the different Chiefdoms situate in the Lubombo Region are under the Regional Administrator, and that included dealing with any matters that may arise in particular disputes over land situate on Eswatini Nation Land."*

[66] Furthermore both parties, at different times sought the intervention of the Regional Administrator and were clearly of the view that the Regional Administrator was the appropriate authority to determine the matter.

[67] Whilst in my considered view the court *a quo* misdirected itself in granting an interdict to enforce the decision of the Regional Administrator, it is imperative that the lawful successor to the sugar quota holder of Farm 053 be appointed and this needs to be determined according to Swazi Law and Custom.

[68] In view of the findings of this court it would be equitable that each party bears its own costs.

[69] Accordingly the following Order is made:

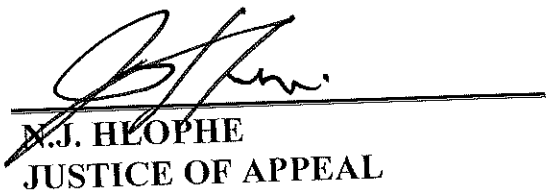
1. The appeal is upheld.

2. The matter is referred back to the parties to be dealt with by the appropriate traditional structures to determine who the lawful successor of the sugar quota holder in respect of Farm 053 should be.

3. No order as to costs.

J. M. CURRIE
JUSTICE OF APPEAL

I agree



N.J. HLOPHE
JUSTICE OF APPEAL

I agree

A.M. LUKHELE
ACTING JUSTICE OF APPEAL

For the Appellant: MR. M. M. TSAMBOKHULU OF MASEKO TSAMBOKHULU ATTORNEYS

For the 1st Respondent: MR. C. BHEMBE OF BHEMBE & NYONI ATTORNEYS