



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.: 74/2022

In the matter between:

ZUBA NGIHLALE INVESTMENTS (PTY) LTD

1st Applicant

SAM MBHEKWA DLAMINI

2nd Applicant

And

ZODWA MTSHALI (Nee Dlamini)

1st Respondent

MOSE NKHOSI

2nd Respondent

MAGWEGWE NKHOSI

3rd Respondent

THE NATIONAL COMMISSIONER OF POLICE

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

Neutral Citation: *Zuba Ngihlale Investments (Pty) Ltd and Another vs Zodwa Mtshali (Nee Dlamini) and 4 Others (74/2022) [2023] SZSC 02 (26/01/2023)*

Coram: **M.J. MANZINI AJA.**

Date Heard: 16th January, 2023.

Date Delivered: 26th January, 2023.

SUMMARY: *Civil law – Application for leave to execute High Court Order pending determination of appeal – Whether Supreme Court is vested with jurisdiction to hear and determine application – Requirements for granting leave to execute – Whether Applicants discharged the onus cast on them.*

Held: The Supreme Court is vested with concurrent jurisdiction based on Section 146 (3) of the Constitution.

Held: Applicants failed to discharge onus of proving any irreparable harm if leave to execute is refused – Application dismissed with costs on the ordinary scale.

JUDGMENT

M.J. MANZINI, AJA:

[1] Serving before me is an application for leave to execute an Order issued by the High Court on the 14th October, 2022. The application was brought on a certificate of urgency.

- [2] The 1st Applicant is a sugar cane growing company; and the 2nd Applicant is a director of the said company.
- [3] The 1st, 2nd, and 3rd Respondents are siblings of the 2nd Applicant.
- [4] At the heart of the dispute is a tract of land which it is alleged that at one point or another belonged to the late Mabhebha Logo Dlamini, who was the common parent (father) of the main protagonists in this matter. Both Applicants and Respondents lay claim to the land, hence my reference to it as the disputed land. The land is situated at Maphobeni, and falls under the jurisdiction of traditional authorities, and, as such, it is classified as Swazi Nation Land. The right to the use and enjoyment of Swazi Nation Land is governed by customary law (Eswatini Law and Custom).
- [5] In the Court *a quo* the Applicants obtained an Order in terms of which “*the Respondents and others who will act on their behest, are hereby interdicted and restrained from disrupting and interfering with the work at Applicant’s*”

sugar cane fields at Maphobeni in any manner whatsoever.” As is plainly clear, this was a final interdict.

[6] The Applicants approached the Court *a quo* for an interdict on the basis that 1st Applicant had been allocated the tract of land in dispute after having paid the relevant “*khonta*” fee to the traditional authorities under whose jurisdiction it falls, that is, Engevini Royal Kraal. Applicants alleged that they had begun their farming operations preparing to plant sugar cane, when Respondents attacked and threatened those assigned to prepare for the planting. 1st Applicant claimed that it had a clear right to work on the disputed land. 1st Applicant further claimed that it had obtained a loan from the Industrial Development Company of Eswatini to fund the project, and stood to suffer “*a great deal of injury*” through the unlawful conduct of the Respondents.

[7] The application for the interdict was opposed, and Respondents filed affidavits disputing 1st Applicant’s title to the land. As a preliminary issue Respondents contended that the dispute over the land was *lis pendens*, as the Engevini Royal Kraal was seized with the matter (the dispute over the land).

Respondents further contended that Applicants had failed to satisfy the requirements of a final interdict, particularly a clear right to the land. Respondents detailed the basis on which they contested 1st Applicant's title to the land, and contended that it belongs to their late father and therefore, to the family as a whole. They alleged that 2nd Applicant, through his company, had no right to appropriate to himself the land and use it for his exclusive benefit.

[8] On the 14th October, 2022 His Lordship Magagula J. heard the application and issued an *ex tempore* Order granting the final interdict. As at the time the matter came before me, no reasons had been furnished by the Learned Judge for granting the final interdict.

[9] A few days later, Respondents noted an Appeal against the Order. The Order is being assailed on a number of grounds, and the Appeal is yet to be heard by this Court.

[10] Almost two months after the Appeal was noted, Applicants approached this Court seeking leave to execute the abovementioned Order. In a nutshell Applicants seek leave of this Court to continue with the sugar cane planting operations without any disruptions or interference by Respondents, notwithstanding the Appeal.

[11] In the current proceedings Respondents raised a preliminary objection, contending that this Court lacks jurisdiction. Respondents contended that the application ought to have been instituted before the High Court, being the Court which issued the Order against which the Appeal lies. It was submitted that this was an entrenched common law rule and there was no basis to depart from it.

[12] Applicants, on the other hand, contended that this Court was vested with jurisdiction, citing the Constitution of the Kingdom of Eswatini. Applicants further contended that the principal reason for approaching this Court was that the High Court was *functus officio*, having heard the application before it and thereafter making a final Order, albeit without giving any reasons.

[13] It is trite law that in this jurisdiction the noting of an appeal operates as an automatic stay of execution. In a unanimous judgment this Court held in **Good Shepherd Mission Hospital vs Sibongile Bhembe (56/2020) [2020] SZSC 32 (22/10/2020)** that:

“A litigant who properly files an appeal against a final Judgment or Order of the High Court should legitimately expect an automatic stay of the execution of that Judgment or Order pending the appeal. To hold otherwise would be to subvert the age old principle that an appeal automatically stays execution of judgment pending final determination of the appeal, unless leave to execute the judgment has first been obtained.”

[14] This begs the question – which Court has jurisdiction to hear and determine an application for leave to execute a High Court Judgment or Order? The general view seems to be that it is the High Court, being the Court which would have issued the Judgment or Order. This proposition is based on a long line of South African Court Judgments which have been applied in our jurisdiction.

[15] Examples of High Court Judgments dealing squarely with applications for leave to execute are Long Distance Swaziland v. Swazi Paper Mills Case No. 84/2009; Thoko Regina Mamba, Israel Wendy Dlamini v. Phumzile Simelane (Nee Dlamini) Paulos Dlamini, Crucifix Funeral Home (Pty) Ltd, National Commissioner of Police, Attorney General (1257/15) [2015] SZHC 186 (30 October, 2015); Kenneth Ngcamphalala vs Nedbank (Swaziland) Ltd (1269/2004) [2013] SZHC 166 (8th August, 2013); Jaha Malaza v. Margaret Londumo Malaza NO (952/2013) [2014] SZHC 216 (22nd September, 2014); TQM Investments (Pty) Ltd v. Lucky's Ark Motor Spares (Pty) Ltd SZHC 82 (1510/2019) [2019] (30/04/2020); Busisiwe Nandi Fuphe and Another v. Dr. Butare Rukundo and Another (953/2017) [2020] SZHC 19 (14th February, 2020).

[16] Clearly, the preponderance of authority stemming from the High Court is that that Court is vested with jurisdiction to hear and determine applications for leave to execute its own judgments. Applicant's argument, therefore, that the High Court becomes *functus officio vis-à-vis* an application for leave to execute a Judgment or Order issued by it, is not supported by any authority and stands to be rejected. In any event, the relief sought in an

application for leave to execute is typically not the correction, alteration or supplementation of the Judgment or Order, but to execute or implement it. The *functus officio* rule is aimed at preventing a judicial officer from re-considering a Judgment or Order duly made, unless the matter falls within the recognized exceptions. The doctrine finds no application in these proceedings.

[17] As is apparent, the Judgments cited in the preceding paragraphs stem from the High Court, but none of them deal specifically with the question whether that Court enjoys exclusive jurisdiction, or has concurrent jurisdiction with the Supreme Court to hear and determine applications for leave to execute Judgments or Orders issued by the High Court. Counsel for the Applicant was unable to direct this Court to any Judgment (of this Court) which confirms that it enjoys concurrent jurisdiction with the High Court. The Rules of this Court do not confer jurisdiction to hear and determine applications for leave to execute Judgments or Orders of the High Court.

[18] In terms of the common law it is only the Court which granted the Order or Judgment appealed against which is vested with jurisdiction to grant an

application for leave to allow its Order or Judgment to be carried into effect pending final determination of the appeal. See in this regard: **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A); Hermansburg Mission v Sugar Industry Central Board and Others 1981 (4) SA 717 (D & CLD).**

[19] The legal position in South Africa, is now governed by Section 18 (1) of the Superior Courts Act, which came into effect on the 23rd August, 2013 by virtue of **GN R36 of 2013**. In terms of the above section it is only the Court which granted the Order or Judgment which is vested with jurisdiction. Judgments coming post the amendment are of limited assistance.

[20] However, Section 146 (3) of the Constitution of the Kingdom of Eswatini, 2005 seems to provide a solution to Applicants. It provides that:

“Subject to the provisions of subsection (2), the Supreme Court has for all purposes of and incidental to the hearing and determination of any appeal in its jurisdiction the power, authority and jurisdiction

vested in the Court from which the appeal is brought.” (Own underling)

[21] On my reading, the above section is wide enough to confer jurisdiction on the Supreme Court to hear and determine applications for leave to execute Judgments or Orders of the High Court, such applications being incidental to the hearing and determination of any appeal in its jurisdiction. There is no suggestion that the Appeal noted by the Respondents is invalid or a nullity, it having been filed within the time period prescribed by the Rules of this Court. I therefore conclude that on the basis of Section 146 (3) of the Constitution, the Supreme Court enjoys concurrent jurisdiction with the High Court to hear and determine applications for leave to execute Judgments or Orders of that Court.

[22] Having concluded that the Supreme Court is vested with concurrent jurisdiction with respect to applications for leave to execute Judgments or Orders of the High Court, I now turn to deal with the merits of the application.

[23] The factors which a Court seized with an application for leave to execute must consider were aptly articulated in **South Cape Corporation (Pty) Ltd b Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 545 C -G:**

“The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby’s Cash Store (Pty) Ltd v Estate Marks and Another, supra at p.127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. Fisser v Thornton 1929 AD 17 at p.19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

- (2) *the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;*
- (3) *the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and*
- (4) *where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or inconvenience, as the case may be.”*

[24] As is apparent from the authorities referred to above, this Court, as would the High Court, has a wide discretion to grant or refuse leave to execute the Order issued by the Court *a quo*.

[25] In *casu*, Applicant’s main argument is that they have the right to the use and enjoyment of the land, and have been granted a loan which is running

interest, and should the farming project be halted pending the appeal, they would have lost the opportunity to plant this year's crop of sugar cane. They also allege that should the farming operations be halted pending appeal, the project will be destroyed and the financiers will take over the project if it fails. They further claim that repayment of "*the loan is not cancellable, whether applicants prevail on appeal or not, the land is already encumbered by the loan.*" Applicants further contend that no prejudice would be suffered by Respondents if leave to execute were to be granted and the appeal upheld in that they would find the farming project intact. In effect, Respondents would benefit from continuation of the project, so the argument went.

[26] On the other hand, Respondents contended that Applicant's alleged prejudice is "*self-created*" by failing to embrace the decision of the Engevini Royal Kraal over the disputed land. They further allege that the decision of the Engevini Royal Kraal is clear regarding the ownership of the disputed land, that is to say, it belongs to their late father. They highlighted that the decision emphasizes that all children of the deceased should benefit from the use of the land. Respondents attached a letter from the Engevini Royal Kraal dated 29th October, 2022 which confirmed its decision regarding the dispute. They further allege that subsequent to the decision of

the Engevini Royal Kraal, Applicants were invited to a meeting in order to discuss the ruling with the aim of finding a lasting solution to the matter. Applicants are alleged to have ignored the ruling and the invitation to a meeting, which was a clear indication that “*they want to continue to use our late father’s land for their exclusive benefit.*”

[27] Pertinently, Applicants, in their Replying Affidavit have not disputed that the Engevini Royal Kraal has issued a ruling in respect of the disputed land. They have simply contented themselves with asserting that the letter was issued in their absence and without their knowledge. They have not stated if the decision is being challenged in any form. They have also not denied the invitation to a meeting with Respondents in order to discuss the ruling and find a way forward.

[28] Having considered all the surrounding circumstances I am inclined to refuse to grant leave to execute the High Court Order. In exercising my discretion I have considered the following factors:

28.1 The Engevini Royal Kraal, under whose authority the disputed land falls under Eswatini Law and Custom, has decisively stated that the land belonged to the late Mabhebha Dlamini and that all his children must benefit from its utilization.

28.2 Respondents have not challenged, nor alleged that they intend to challenge, the decision of the Engevini Royal Kraal. Respondents have simply contented themselves with disputing the letter from the Royal Kraal because “*it was issued in my absence and without my knowledge.*” The presence and/or knowledge of the Applicants does not detract from the authority of the Engevini Royal Kraal over the land in dispute. Thus, to grant leave to execute the Order would be tantamount to defeating or undermining the decision of the traditional authority under whose jurisdiction the land falls.

28.3 Applicants cannot properly claim that they stand to suffer prejudice or irreparable harm in that they have not established a right, or even a *prima facie* right, to conduct their sugar cane farming project. The decision of the Engevini Royal Kraal takes away any legitimacy to the

Applicant's claim to the land. Therefore, if leave to execute is not granted, Applicants do not stand to suffer irreparable harm. Applicants have ignored the decision of the Engevini Royal Kraal at their own peril.

28.4 If leave to execute is granted, Respondents will be deprived the benefit of utilizing of the land which the Engevini Royal Kraal has determined should be utilized for the benefit of all the children of the late Mabhebha Dlamini. Respondents will have no say on how the land is utilized or participate in any profits from the farming operation, pending final determination of the appeal.

28.5 The reasons for granting a final interdict in favour of Applicants have not been furnished by the Learned Judge *a quo*, and as such the probabilities of success on appeal cannot properly be ascertained. Be that as it may, there is nothing contained in the grounds of appeal which suggests that the appeal is frivolous or vexatious or has not been noted with the *bona fide* intention of seeking to reverse the High Court Order. And neither have Applicants alleged or demonstrated

that it is so. I may mention, in passing, that it is difficult to fathom how the Learned Judge *a quo* could have granted a final interdict, without first having heard oral evidence, regarding the clear dispute(s) as to the right to use and enjoyment of the disputed land, which is under the jurisdiction of traditional authorities.

28.6 As earlier indicated I am of the view that since Applicants have failed to establish their right (or *prima facie* right) to the use and enjoyment of the disputed land, it cannot be said that they will suffer irreparable harm if leave to execute is refused. Therefore, the issue of balance of convenience does not arise.

[29] Accordingly, the application must fail.

[30] **ORDER**

1. The application for leave to execute the High Court Order issued on the 14th October, 2022 is dismissed.

2. The Applicants are to pay costs on the ordinary scale.

M.J. MANZINI
ACTING JUSTICE OF APPEAL

For the Applicants: MS. L. SIMELANE (KHUMALO NGCAMPHALALA
ATTORNEYS)

For the 1st, 2nd, and 3rd Respondents: MR. B. XABA (XABA ATTORNEYS)