IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 3967/05

In the matter between

GONGO MOTSA & 62 OTHERS	Applicants
and	
VUSI DLAMINI	1st Respondent
NTUTHUKO DLAMINI	2nd Respondent
THE REGIONAL ADMINISTRATOR	
OF THE MANZINI DISTRICT	3rd Respondent

Coram

J.P. Annandale, AC J

For the Applicants	Mr. M.R. Masango of Sibusiso
	B. Shongwe & Associates

For 1st and 2nd Respondents Mr. P.R. Dunseith of Dunseith Attorneys

For 3rd Respondent No appearance

JUDGMENT

15 December, 2005

[1] The applicants came to court on an urgent basis to seek various interim and final orders for relief, all of which emanate from a dispute about a chieftaincy issue in the Mhlabubovu area. The dispute has already been reported through the traditional authorities and is said to await final adjudication by the Ngwenyama. No interim relief has yet been granted in this matter.

[2] In their notice of application the following relief is sought :-

"1. That the above Honourable Court dispense with the normal and usual requirements of the rules of this Honourable Court relating to service of process and notices and that the matter be heard as a matter of urgency.

2. Directing that the respondents and their supporters and all people acting on their instructions to be restrained and interdicted from invading or taking or taking up or using land at Mhlabubouu area that has been in the possession of the applicants (i.e. the fields) until a final decision or ruling on the dispute on whose Chieftaincy the land under dispute at Mhlabubouu

belongs to is made by His Majesty the King Mswati M.

3. Directing that the respondents and their supporters and people acting on their instructions be restrained and interdicted from conducting themselves violently, harassing and threatening injury to the persons and property of the applicants.

4. Directing that the respondents and their supporters and all people acting on their instructions to be interdicted and restrained from interfering with the running of the affairs of the applicants at Mhlabubovu Area.

5. Directing that the respondents and their supporters and all people acting on their instructions to be interdicted and restrained from sabotaging the interests whatsoever of the applicants at Mhlabubovu area (i.e. ploughing of the fields) until a final decision or ruling on the dispute is made by His Majesty the King Mswati ZZ7 who is the only person with authority to make final decision or ruling in matters of this nature.

6. Directing that the Sheriff or his lawful Deputy to effect the order and seek assistance from members of the Royal Swaziland Police should it be necessary in carrying out his aforesaid duties.

7. Further directing that the members of the Royal Swaziland Police to take such action as necessary to ensure that peace prevails and that the interests of applicants at Mhlabubovu are carried out and protected.

8. Directing that all structures that were put up at Mhlabubovu as a result of the invasion be removed or destroyed in such a manner that the status quo remain as it was before the invasion took place.

9. Directing that the costs of this application be borne by the respondents."

[3] A week after the application was filed, and after the second respondent instructed his attorney to oppose the matter, the applicants withdrew their "action" (sic) against him. The third respondent has not filed any papers in the matter and is deemed by the court to abide by the outcome.

[4] Very briefly, as it does not require in-depth assessment in order to determine the outcome of this application, the short facts of the matter are that the applicants and the first two respondents, plus their supporters, reside on Swazi National land in the Mhlabubovu and ka-LaMgabhi areas, divided by the Luphulanga river. The dispute centres around the issue of which of two groups of people are entitled to the use of which part of the land. Generally, the one group is said to bear allegiance to Chief Lembelele II and the others are under Chief Ndzimanye II.

[5] The first applicant states the manner in which a match was put into the gunpowder:

"(on)... the 19th October 2005 the 1st and 2nd respondents and their supporters invaded our land/ area in that they crossed over the boundary line from their land onto our land with a clear intention of usurping and grabbing or taking away of our land "femphasis added). The application was filed on the 1st November 2005.

[6] The first applicant goes on to state how "their" land was occupied, how the police did not render assistance and how barbed wire fences and structures were erected by the invaders,

further that "they" are threatened with violence when trying to reclaim "their" land. He says that they used their land for residential and agricultural purposes since 1947 and states how it was allocated to them by the Ngwenyama, seemingly in settlement of an earlier dispute between two clans.

[7] The first applicant sets out a long standing dispute, from pre-1947, between the clashing clans and a succession of chiefs, with boundary lines apparently coming into effect early last century demarcating different chiefdoms. Subsequently and more recently various transgressions and invasions are alleged. It is said that King Mswati III is now seized with the ongoing dispute, for a final decision in terms of Swazi law and custom, following various unsuccessful attempts to settle scores.

[8] Various other statements are made to allege clear rights, apprehension of injury, the absence of other remedies, urgency and no substantial redress in due course, as are applicable to interdicts.

[9] The application is "supported" by an affidavit of the Chief of Luyengweni area, Peter Dlamini, who is not one of the initial 63 applicants, which by the time that he deposed to his affidavit on the same day as the first applicant, had dwindled to 26, without any explanation therefor.
He states that the dispute was reported to him and that in turn he caused the dispute to be reported to the King, for final determination.

[10] In his answering affidavit the first respondent raises valid preliminary legal points, to which I revert below, and he further deals with the allegations contained in the founding affidavit.

[11] That a factual dispute is at hand is evidently clear by a denial that Mhlabubovu is at Luyengweni, a material aspect of the applicant's claim, but rather that it falls under the KaLaMgabhi Chieftaincy. The map annexed by the applicants, to indicate the areas they refer to, is also disputed, as is the chieftaincy of Chief Lembelele II over Mhlabubovu. A different version of the antecedent history leading to the claim is also brought into the fore. The claim of the Motsa clan, which is a material aspect of the application, is strenuously disputed, in some detail. He states how an authorised Chief-in-Council meeting dealt with the issue and determined it, whereafter the first applicant and his followers are painted with a very different brush as that with which they projected themselves.

[12] Many further details are stated, which jointly gives a picture of a longstanding and ongoing dispute over the land claimed by different groups of people, over many decades, and which is certainly not a matter that can be dealt with by way of application proceedings. Notably, the applicants do not come to court on a mandament van spolie.

[13] Though the applicants seemingly seek an order to restrain the first respondent from resorting to various wrongful actions, it is disguised as a subterfuge for a declaratory order to determine a boundary dispute of different chieftainships. Furthermore, there is not a remote possibility that the applicants did not actually forsee a serious contentious factual dispute, which is sought to be resolved on affidavit, by way of application proceedings.

[14] In order to determine the outcome of the application it is not necessary to decide whether the High Court has jurisdiction to deal with the issue or whether it is ousted by the new Constitution, diverting jurisdiction to the Swazi (National) courts, since it derives from a chieftaincy dispute and the determination of the traditional boundaries of the disputed areas.

[15] The first issue to determine is who the applicants are. The application is not brought as a class action. The application is brought by the deponent of the founding affidavit, Gongo Motsa, "and 62 others". As stated afore, it was thereafter suddenly changed to Motsa "and 25 others", without any explanation as to why the majority of initial "applicants" jumped ship even before it set sail.

[16] The novel manner in which the initial "62 others" were incorporated as "applicants" is set out in the first paragraph of the founding affidavit which reads that:-

"I am an adult male Swazi Citizen of Mhlabubovu area, Luyengweni, Manzini district. I am the applicant herein together with 62 others a list with the names of the other applicants is annexed herein as annexure 'LM1'" (my underlining).

[17] The first applicant does not even attempt to show how the "62 others" are interested in the application or the outcome thereof, nor does he aver that he has any authority to drag them into litigation which could, and does, have an adverse costs implication.

[18] Annexure "LM1", which is a photocopied manuscript list of names, the first few being Motsa, many with the Dlamini names and various other Swazi names, could be any list of names for any purpose - a raffle, a list of donors, or whatever. On the right handside of the names, headed "signature" a few signatures are appended, or what seems to be fingerprints, maybe thumbprints. There is absolute no indication whatsoever what the purpose of the listed names is or why some have signed or printed some finger, of whoever, or more especially so, what their interest in the matter could be. It is pathetic that an instructed attorney could deem it sufficient to probably charge legal fees to 62 people in order to represent their case in the manner it was brought to court and this is reflected in the costs order hereunder. Not a single person out of the "other" 62 applicants have filed any affidavit of any sort, nor are any one of them stated to have authorised the first applicant to litigate on their behalf, putting them at risk to bear the costs of a misconceived application in the High Court. Also, the second respondent has been caused the misfortune of being cited herein, with no reason, whereafter the application was unexplainedly abandoned against him.

[19] For all further practical purposes, it is only the first applicant who is before court and whose evidence can be considered. As said, he does not purport to bring a class action as he might have been able to do under the 2005 Constitution, Section 35(1), and he does not remotely allege an infringement of any Constitutional rights that he or his co-applicants could have suffered. As submitted by Mr. Dunseith, he or they are equally not entitled under either the common law, or even the existing Rules, to bring the matter as they seem to attempt, as a class action. See Maluleke v M.E.C., Health and Welfare 1999(4) SA 367 and Contralesa v Minister for Local government, E.C. 1996(2) SA 898. None of the 62 other "applicants" aver any direct and

substantial interest in the matter, or any other interest, nor even a financial interest, which would not suffice. None of the "62 others" allege any wrong suffered or apprehended. None state that they join cause with the first applicant, none authorise him to litigate on their behalf.

[20] The immediate problem that follows is what interest the first applicant himself has in the relief he seeks. He does not allege any wrong to himself, nor to his property, perpetrated by anybody. Collectively and generally, he avers that "our" land and "our" interests are adversely affected but not that he himself has been threatened by anybody or that any property to which he has a claimed right or which he was in undisturbed possession of, has come under any attack.

[21] Whether he has a clear or a prima facie alleged right that is or is about to be violated by the first respondent, due to which he could be entitled to an interdict by the court, is not specifically averred by the first applicant, as is required of him if he is to have any measure of success.

[22] Moreover, the material and substantial disputes of fact are abundantly clear from his own papers, amplified and extended by the answering affidavits. The underlying dispute is the chieftaincy issue. Each of the parties have a diametrically opposed view of this and each has the anteceding history, from almost a century ago, as a different case. Likewise with who invades whose land. Each point the finger at the other as the invading offending party, each with their respective followers and each with their own version of who the properly appointed chief may be. Each has a totally different concept of the demarcated or designated boundaries of the different chieftainships. Each has a different version of the resolution of their dispute by the Ngwenyama.

[23] With absolute clarity, the factual disputes between the two opposing factions are as muddled and unsettled as can be. To even consider an attempt to resolve it on the papers before court, on application procedure, is neigh impossible. As held in Roomhire v Jeppe Street Mansions, 1949(3) SA 1155(T), this procedure is wholly unsuitable. Further, even if it was brought by action, on the applicants' own version, the whole issue is yet to be determined by the Ngwenyama, who is by far in the better position to deal with the dispute as to who is the chief of which area and where the boundaries of each area have traditionally been determined, also to determine who may utilise which piece of land allocated by which chief. These matters involve the application of traditional Swazi Law and Custom for which specialised customary tribunals and procedures have existed for many generations. National land, administered by appointed chiefs on behalf of the King or Ngwenyama who is the custodian-in-trust on behalf of the nation, has its own sets of rules and norms which differ from the legal traditions followed and applied by the High Court. It is for this reason that the 2005 Constitution explicitly requires such matters to be dealt with by the traditional authorities.

The inherent jurisdiction of the High Court is not undermined by this. Specialised structures to deal with special issues, such as chieftainships and allocation or designation of national land requires knowledge and understanding that does not form part of the formalised legal structures such as the High Court. This is reflected unambiguously in the Constitution as well as other relevant legislation. Nor is it deemed to be appropriate to resolve such issues in the forum of the High court of Swaziland.

[25] Despite the outcome of the application, due to the assertions herein, the police are hereby ordered to come to the assistance and protection of any person who is threatened by any other person or persons, during the ongoing dispute herein, in order to maintain the peace and protection of persons, as are the dictates of the sworn duty of the Royal Swaziland Police Force.

[26] For the reasons stated above, the application stands to be dismissed, and it is so ordered. Costs follow the event, which includes the costs of the second respondent in so far as he had to instruct his attorney. Furthermore, it is ordered that in the event that the 62 "other applicants" do not jointly and severally contribute to the taxed costs of the application, one to pay the other absolved, together with the first applicant, within 21 calender days after being served with a taxed costs order, that the attorney acting for the 63 applicants be ordered to bear the costs de bonis propriis.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE