



## THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4539/05

In the matter between

INGCAYIZIVELE FARMERS ASSOCIATION Applicant

VS

NTOKOZO MABUZA

1<sup>st</sup>

Respondent

BOY JOHN MATSEBULA

2<sup>nd</sup>

Respondent

NICHOLUS MATSEBULA

3<sup>rd</sup>

Respondent

KHUZWAYO DLAMINI

4<sup>th</sup> Respondent

Coram

R.A. Banda, CJ

For the Applicant

Mduduzi Mabila

For the Respondent

Zonke Magagula

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JUDGMENT

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December 2008

- [1] The applicant is Ingcayizivele Farmers Association Limited, a legal entity duly incorporated in accordance with the law of this Kingdom.
- [2] The applicant was incorporated in the year of 1993 for the purpose of assisting the people of Nkambeni area to enter into the sugar cane growing business. It will be important to give some background information regarding the manner in which the Association came into being.
- [3] In early 1980 there was a programme of resettlement in Nkambeni Area. The evidence is that the resettlement programme demarcated areas into those reserved for homesteads, areas for fields and areas for grazing. There was some contradiction in the evidence on the nature of the demarcation. Some witnesses said the demarcation only dealt with land for homesteads and that it did not affect land for fields and yet other witnesses stated that the resettlement affected all lands for homesteads, fields and for grazing. It was, however, common cause that a resettlement programme had been undertaken in Nkambeni area in the early 80s.
- [4] It would appear that in early 90s the people of Nkambeni area were engaged in some agricultural activity and were mainly involved in the growing of maize and beans. This activity was not very productive

because there was insufficient supply of water because the community did not have the right to draw water from the river. The people then decided that they should bring all their fields which they had used for growing maize and beans under commercial production. They accordingly decided to approach Chief Madzanga for his permission. The evidence of Mr. Joseph Masuku was that the chief asked the executive committee for an explanation why they wanted to turn their fields into commercial activity. The chief wanted, particularly, to know which part of the land they wanted and whether the whole community wanted their land converted to commercial use.

- [5] It was only after the chief was assured that the project had the support of the whole community did the chief finally approve the project. It was only after this approval that the Association was formed and registered. It was the whole community of Nkambeni which approached the chief for the land as it was not being used for anything. There can be no doubt, therefore, that initially at least there was community support for the project and it is the evidence of Mathabela and Masuku that there was no disagreement about the decision to form the Association. It is

significant to note that all respondents except John Boy Matsebula were members of the Association.

- [6] It was agreed that membership to the Association would be determined on the basis of homesteads. Each homestead would be represented by one member of the family. At the time when the Association was formed the second respondent was not resident in Nkambeni area and he had no house there and in terms of the agreement it was Nicholas, his young brother, who represented his family in the Association. When John Boy Matsebula came home he objected to Nicholas being a member of the Association contending that he, as the elder brother and heir to the estate of his father, was the proper person to be a member of the Association. The chief advised him to discuss with his family and agree on which of the two brothers should be the family representative on this Association. That was the genesis of the dispute in this matter.
- [7] The dispute was taken to traditional structures for resolution. Meetings were convened by the Regional Administrator at Pigg's Peak, at the chief's kraal, another meeting was held at a school until ultimately the dispute was referred to the Swazi National Council.

The issue before this court is to determine what was the decision of His Majesty the King as it was communicated through the Council. Both Counsel have agreed that this is the issue which this court must resolve.

- [8] There was another issue which was raised on the question of acquisition of land under Swazi Law and Custom. This issue can be quickly disposed of as it is one on which both parties agree. Land is acquired through the Khonta system under which an application is made to the chief's council who in turn report to the chief. The latter will then instruct his council to investigate the applicant and to investigate if there is land available. Once these preliminary investigations are complete the matter is reported to the chief who then directs the council to allocate the land to the applicant showing him where he can build a house, where he is going to have fields and where he is going to graze his animals. The applicant will then meet the chief to thank him and something will normally be given to the chief as a mark of appreciation. Any vacant land reverts to the chief's kraal who has the power to allocate the vacant land to any person.

[9] Mr. Magagula for the applicant has contended that the applicant has discharged the onus to prove its claim. He referred to the evidence of Mathabela, Thomas Gumedze and Joseph Masuku. He submitted that all witnesses stated that His Majesty's ruling was delivered at Nkhanini on 7<sup>th</sup> November 2005. He submitted that the ruling was delivered by Mr. Bheka Mabuza who is the Secretary of the Swazi National Council Advisory Board. He contended that according to the evidence called by the applicant the ruling of His Majesty the King was to the effect that the applicant should continue to use the land given to them by Chief Madzanga and that the respondents should approach His Majesty the King for another piece of land. He contended that this ruling came after the Liqoqo had heard representations from both sides of the dispute.

[10] Mr. Mabila for the respondents has submitted that the evidence had shown that Chief Madzanga and the applicant had deprived the respondents of their fields and had given them to the applicant for commercial use without the consent of the respondents. Mr. Mabila has contended that His Majesty the King's ruling was to the effect that land should be given to the respondents and if no land was available the Chief should approach His

Majesty the King for an alternative land to be given to the applicant. Mr. Mabila has submitted that this court should not depart from the direction which Mabuza J made in her judgment earlier in this case. The order which was made by Mabuza J is in the following terms:-

*“In the event I order as follows:-*

1. *That Chief Madzanga be joined herein.*
2. *That the applicant file its replying affidavit within the time stipulated in the rules, and thereafter the matter may be set down before any judge and evidence be led with regard to the issue successfully complained of.*

*Costs to be costs in the cause.”*

I am satisfied that what this court has been requested to determine is precisely what Mabuza J wanted this court to do. Evidence has been led with regard to the issues on which there has been complaints. Indeed Mr. Mabila has agreed that the issue before this court is to determine what was the ruling which His Majesty the King gave through the Swazi National Council Advisory Board.

[11] It is pertinent to consider briefly the evidence of witnesses who were called to testify in the case.

[12] The evidence of Mr. David Mbulalame Mathabela is that he was a member of the applicant Association which he joined in 1993. He was the secretary to the late Chief Madzanga and he was responsible for taking minutes and writing letters and testimonials on behalf of the chief. He said that John Boy Matsebula had not been a member of the Association but that the other three respondents had been members.

[13] He stated that he was aware of the dispute in this case and that membership of the applicant was through heads of each family. He recalled that all the respondents except John Boy were residents in Nkambeni Area. He stated that John Boy had now constructed a house at Nkambeni Area and that the chief had decided that only heads of families could be members of the Association. The witness stated that John Boy did not like this and he contended that by accepting his younger brother, Nicholas as member the Association was imposing Nicholas as head of their family. The witness remembered that the dispute was taken to the High Court, then to the Regional



Administrator at Pigg's Peak and that the matter was taken to King's Council. He said that no decision was taken at the Regional Administrator's Office. The witness stated that the dispute had now taken a different turn - the issue was no longer that the respondents had been denied membership of the Association but rather that their fields had been taken away from them. The witness stated that it was this dispute which was taken to the King's Council.

[14] Mr. Mathabela said that he was present when the King's Council made the decision on the dispute and that the ruling was given at Nkhanini at Lobamba. He said the 4<sup>th</sup> respondent was present when the decision was given and that the witness himself, Joseph Masuku, Obed Dlamini and Nxumalo were also present. The witness recalled that the decision was delivered on 7<sup>th</sup> November 2005. The witness stated that before the decision was delivered Mr. Bheka Mabuza first enquired if the chief's entourage was present. The witness stated the King's ruling as delivered by Mr. Mabuza was as follows:-

“These individuals who are complaining should not disturb the operations or work which the Association has started doing at Nkambeni

area”.

The witness further stated that the ruling went on to state as follows:-

*“ That if these individuals are prepared to work the chief should find alternative place for them and that if the chief did not have land for the complaining individuals he should come to us for land for these individuals.”*

The witness stated that after the ruling was given there was no further complaints and that there was no one who sought any clarification of the ruling.

[15] The evidence of Mr. Joseph Masuku is to the same effect as the evidence of Mr. Mathabela. Mr. Masuku stated that he was the secretary of the applicant Association which was registered in 1993. He recalled that Mr. Bomba was the Chairman, Vice Secretary was Nxumalo and Joseph Dlamini was the Treasurer. The Association started to grow sugar cane in 2003 and prior to that they had been growing maize and beans. This venture was not productive and they stopped it because of the inadequate supply of water as they did not have the right to draw water from the river. He confirmed the evidence of Mr. Mathabela about the

community approaching the chief on changing the land from communal farming to commercial farming. The witness referred to the meetings at the Regional Administrator's office to discuss the dispute that had arisen. He also stated that other bodies had been involved to try and resolve the dispute including the High Court and the Swazi National Council. The witness remembered meeting Prince Gcokoma concerning this dispute before court and that he met the Prince at the chief's kraal at Buhlebuyeza. The Prince was the DC for the Hhohho District. That meeting did not give any ruling and the meeting was rescheduled.

[16] The witness remembered attending the meeting of the National Council where the respondents were present together with Chief Madzanga. He said that the respondents had complained that they had been deprived of their fields. The witness stated that the decision was that it was premature to take the matter to the National Council at that stage because the matter had to be referred to the Regional Administrator before it could go to the National Council. The matter was later referred to Mr. Sibandze the Regional Administrator. The witness stated that it was at this

meeting where the chieftaincy of Chief Madzanga was challenged by one Dick Nxumalo who claimed that Chief Madzanga was not the chief of the area where the dispute had arisen. The witness stated that the respondents associated themselves with Nxumalo's claim. Mr. Sibandze, according to the witness, stated that the issue would be referred to the National Council. The witness stated that while the matter was pending before the National Council the respondent went to the High Court where they sought an order restraining the applicant from doing any further developments on the land.

[17] The witness stated that the final ruling by the National Council was delivered on 7<sup>th</sup> November 2005 at Nkhanini offices. The witness stated that the ruling was made through its Secretary Mr. Bheka Mabuza. The witness was present when the ruling was delivered and that it was in the following terms:-

*“ Chief Madzanga and the applicant should not be disturbed on the operations that are already under way but if the respondents are looking for their own place on which to work on , the chief should look for alternative place if there is and if he does not have that alternative piece of land he should come back to His Majesty the King who will provide land to the*

*respondents.”*

The witness said that no one complained after the ruling was delivered. He said it was only Khuzwayo Dlamini the 4<sup>th</sup> respondent who was present when the ruling was given.

[18] Mr. Thomas Gumedze’s evidence is more or less the same as the two witnesses and it is not necessary to repeat it in this judgment.

[19] The respondents called three witnesses. The first witness was Mr. Gideon Dlamini. This witness stated that he was familiar with the dispute before this court. He stated that the chief deprived them of their fields without their consent; that the resettlement came first before they were deprived of their fields; that the chief deprived them of their land and that it is the applicant who is enjoying the use of the land.

[20] The second witness for the respondent was Mr. John Boy Matsebula. He said he resides at plot no. 2901 at Mbangweni and that he has a residence at Nkambeni. He stated that he has a homestead there although he grew up at Makalani at his mother’s parental home.

He inherited his father's fields and stayed in his father's house until he built his own home. He further stated that he is employed at the Ministry of Works in the design section of the department of Roads. He was aware of the resettlement programme which took place in 1983. He said that the resettlement programme only affected the homesteads and that it did not affect the fields. He said that an attempt had been made to settle the dispute of land but it failed because the land belonged to what he called the Makalani. The evidence of this witness was that the dispute arose because the subjects of Nkambeni, who did not own any plots, were in the forefront with regard to the allocation of plots and that subjects who did not have plots were given the respondents' lands and that those are the people who called themselves as the applicant Association. He said that the land dispute had been to many traditional structures and that Prince Gcokoma had ruled in the respondents favour. He also stated that the Regional Administrator had ruled in their favour. He said that the decision was to the effect that the respondents should continue to till the land. This witness also stated that the Swazi National Council declined to give a ruling because it said that it did not have authority over Benguni clan's land. According to

this witness it was His Majesty the King himself who delivered the verdict. The witness further stated that the ruling was delivered toward the beginning of 2007.

[21] The third witness for the respondent was Nxumalo. This witness stated that the Benguni Clan are the owners of land at Nkambeni. The witness stated that he was not present when the King's ruling was given. It is interesting to note that contrary to what DW1 and DW2 said this witness stated that the resettlement programme affected all the fields - for homesteads, fields and grazing and that all had to be allocated and that Princes were not allowed to be part of the resettlement and yet DW1 stated Prince Mshelevu was involved in the resettlement programme.

[22] The issue in this case as I have already indicated earlier in this judgment is what was the ruling of His Majesty the King on the dispute of the land between the applicant and the respondents. I have carefully considered all the evidence that was given by both parties in this case. I found the evidence called on behalf of the applicant cogent and consistent. All the witnesses called for the applicant attended most of the meetings which were convened at different traditional

structures which were called to resolve the dispute. They all stated that no decision was given at these earlier meetings and that the final ruling was only given at Nkhanini offices and that ruling was delivered on 7<sup>th</sup> November 2005. The evidence of the witness called for the respondents was most unsatisfactory and contradictory. They gave different versions of the nature of the dispute.

[23] The issue started as a dispute about membership on the Applicant Association; it then turned out to be a dispute between Chief Madzanga and the respondents and finally that the dispute was about the deprivation of their fields. None of the witnesses called by respondents attended the meeting of the National Council where the ruling was given. Indeed DW1 actually accused Mr. Bheka Mabuza of fabricating or distorting the King's ruling. He said that he had himself seen the ruling in a document and that the ruling which Mr. Mabuza delivered was not the same as the one he had seen because it was not signed by all the members of the Council and that the ruling which was given was signed only by one member. This is the first time the allegation was made and it had not been put to the applicants witness. The respondents were



obliged to put this issue to the applicant so that its witnesses could have an opportunity to comment on it.

[24] It was clear to me that the respondents' witnesses told different stories which did not address the main issue which I have to determine. And any evidence they gave directed to the issue was contradictory and unsatisfactory. They told different stories as the basis of the dispute.

[25] I am satisfied and find that the main dispute in this case was not the alleged deprivation of the respondents fields. It was quite clear to me from the evidence that the community as a whole at Nkambeni area agreed, after due consultation with the chief, that their communal fields should be converted to commercial farming. The evidence shows that there was no disagreement on this matter. The main dispute in this case only arose when John Boy Matsebula expressed dissatisfaction when he found that he could not be a member of the Association after his younger brother Nicholas had already been elected a member. He felt that as the elder of the two and heir to his father's estate he should have been a member of the Association. And it was only after he was refused

membership that the misunderstanding started. The issue of land deprivation was only a red-herring. This explains the different versions of the nature of the dispute given by the respondents' witnesses. I find it difficult to imagine why a person who claims that his fields had been unlawfully taken away from him would want to be a member of the very organisation which had unlawfully deprived him of his fields.

[26] Mr. Mabila has submitted that this court should not consider the contents of the affidavit which was part of papers which were before Mabuza J. That affidavit is part of the Book of Pleadings to which both Mr. Mabila and Mr. Magagula have referred. There is no other book of pleadings for this court and in this case. I was not able to follow the reasons Mr. Mabila advanced why this court should have no sight of a document which is part of the pleadings before it. The judgment which I have been asked to consider was given after the judge had presumably also considered the affidavit. According to Mr. Mabuza's affidavit His His Majesty's ruling is as follows:-

*"Ingcayizivele should continue using the land allocated to them by the Chief for the purpose of growing sugar cane, that the respondents should*

*approach Chief Madzanga for the allocation of alternative land and lastly that if the chief has run short of land he should approach the King for appropriate relief”*

All the witnesses both for the applicant and the respondents referred to what they believed was the King’s ruling as delivered by Mr. Mabuza. Mr. Mabila did not give any reason why this court should not look at that affidavit which is part of the pleadings of this case. However if there is any rule which makes this affidavit inadmissible and none was given, I would still rely on the evidence of the applicant’s witnesses whom I have found to be credible witnesses and I accept their evidence. Their version of the King’s ruling on the matter is supported by what Mr. Mabuza said as Secretary to the National Council.

[27] I am satisfied and find that the applicant has discharged its onus and has proved on a balance of probabilities the decision which His Majesty the King delivered on this dispute through the National Council. I find that the King’s ruling was to the effect that the applicant should continue with operations at Nkambeni area and that the respondents should stop disturbing those operations and that if the respondents require land they should approach the chief and if the latter had no alternative land he should approach His Majesty

the King who would provide land.

[28] This application will therefore succeed with costs.

R.A. BANDA  
CHIEF JUSTICE