IN THE HIGH COURT OF SWAZILAND
Held at Mbabane

Case No. 1776/2010

In the matter between:-

FLORENCE NTSHALINTSHALI	APPLICANT
And	
CENTRAL FARM DWELLERS TRIBUNAL	1ST RESPONDENT
QUADRO TRUST	2nd RESPONDENT
THOMAS KIRK	3rd RESPONDENT
ATTORNEY GENERAL	4th RESPONDENT
QUORAM	HLOPHE J
FOR THE APPLICANT	MR. S. GUMEDZE
FOR THE 1ST AND 2nd RESPONDENTS	MR. L. R. MAMBA

JUDGMENT

HLOPHE J

[1] The Applicant instituted these proceedings seeking an order of this Court in the following terms:-

1.1. That the decision of the Central Farm Dweller^ Tribunal of the 7th October 2009, be reviewed corrected and set aside.

1.2. That the Respondents pay the costs of this application.

1.3. Granting the Applicant any further and or alternative relief as this Honourable Court deems fit.

[2] The application was triggered by the decision of the Tribunal established in terms of the Farm Dwellers Act of 1982, otherwise known as the Central Farm Dwellers Tribunal which is an appellate body established in terms of the aforesaid Act, so as to deal, among other issues, with appeals from the District Farm Dwellers Tribunal. It is not in dispute that the two tribunals deal with all and any disputes that may arise between a Farm Dweller and the owner of a farm. The Legislature saw it appropriate to oust the Jurisdiction of the formal Courts, including this Court, from dealing with such disputes. It is however, common course that this Court does have review jurisdiction on the decisions of the Tribunals aforesaid which is what this matter is about.

[3] The background to this application is that on the 23rd October 2009, the 1st Respondent, delivered its decision on a dispute initially brought before the District Farm Dwellers Tribunal by the 2nd and 3rd Respondents, who sought an order evicting the Applicant from a certain farm fully described in the said decision, situate at a place called Ekufinyeni in the Malkerns area, Manzini District.

[4] The decision of the District Tribunal was taken on appeal to the Central Farm Dwellers Tribunal who could not entertain it at first allegedly because it had been noted out of time, a decision confirmed by this Court on review, but finally reversed by the Supreme Court on Appeal on the 20th November 2008, which directed how the matter was to be dealt with by the Central Farm Dwellers Tribunal to which it was referred. This review application is a sequel to the decision eventually reached by the Central Farm Dwellers Tribunal after the referral of the matter to it by the Supreme Court as indicated above.

[5] It is said that after submissions made by the parties concerned or their legal Representatives, the Central Farm Dwellers Tribunal delivered its decision in terms of which it stated as follows :-

> "*(a) The Tribunal finds that the land in dispute is a farm and the Appellant cannot succeed in her application to resist eviction.*
>
> *In the event, the Respondent intends to evict the Appellant from the farm, such eviction must be subject to the provisions of Section 10 (2) of the Farm Dwellers Act No. 12 of 1982 which outlaws the eviction of a farm dweller by the farm Owner between the months of 1st September of the current year and the 31st May of the following year. This restriction is to allow the Farm Dweller to plough its crops and harvest same before leaving the farm in question.*"

[6] The Applicant understood the order in question to be empowering or authorizing the 1st and 2nd Respondents to evict her and those holding under her as long as the eviction period was allowable in terms of Section 10 (2) of the Farm Dwellers Act 12 of 1982. It is my observation that the Respondents did not indicate a different understanding of the order concerned and the matter has been dealt with on the understanding that the decision of the Tribunal had such an effect - that is authorization of the 2nd and 3rd Respondents to evict Applicant and her family members from the farm.

[7] Although this does not form one of the issues before me, it is important for me to mention that it is not clear how the decision to evict the Applicant from the farm was arrived when considering that the decision of the District Tribunal was that the Parties go and conclude an agreement as contemplated in terms of the Act. I say this because the Appeal was not quite on this finding but rather on the challenge whether that land was a farm or not. This I mention in passing.

[8] The verbatim order of the Supreme Court under case No. 40/2008 which reverted the matter to the 1st Respondent read as follows in orders (c) and (d) which are the relevant ones for my purposes in this matter.

> *"(c) The decision of the Central Farm Dwellers Tribunal that it had no discretion to waive the thirty days period prescribed by Section 9 (3) of the Farm Dwellers Control Act, of 1982 is set aside;*
>
> *(d) The Central Farm Dwellers Tribunal is ordered to condone the late filing of an appeal against the decision of the District Tribunal dated 20 March 2007, and ordered to hear and determine that appeal, after having regard to the provisions of Section 6 of the Farm Dwellers Control Act No. 12 of 1982, and in particular hearing whatever evidence is necessary to arrive at a just determination after a thorough investigation.*"

[9] From the above Orders, it is clear that when reverting the matter to the Central Farm Dwellers Tribunal, the Court expected the matter to be dealt with justly or at least expected the First Respondent to come up with what it termed a just determination of the matter to the extent of hearing "whatever evidence is necessary .... after a thorough investigation."

> This in my view, suggests that the matter was to be dealt with not just as an appeal but that every issue found to be pertinent was to be considered.

[10] It becomes inescapable in my view for one to answer the question whether or not the decision arrived at by the Central Farm Dwellers Tribunal resulting in the current proceedings can be said to be the just determination envisaged by the Supreme Court. I am alive that this question should be answered within the

context of a review and hope it will be answered in the course of this judgment.

[11] In her papers, the Applicant contends that the decision of the 1st Respondent is reviewable because the latter failed to decide the question whether, she had acquired the land on which her homestead was situated through the principle of acquisitive prescription. She goes on to say that the 1st Respondent should in fact not have ignored the said principle once raised (it is at least common course that same was raised during submissions and in fact the 1st Respondent's decision also addressed its requirements specifically); but it should have suspended its decision and *melo rruitu* referred the matter to this Court. This argument is further developed in the papers and in the Applicants submission, to contend that it was irregular for the 1st Respondent to pronounce on the question of the Applicant's eviction from the farm without the determination of the said question at least by the appropriate forum. This I shall deal with later on in this judgment.

[12] The Applicant's argument in support of its application was also premised on the contention that the 1st Respondent did not have the requisite jurisdiction or the powers to determine the matter, such powers vesting in the Land Management Board in terms of Section 212 (4) of the Constitution of Swaziland. The said Section reads as follows :-

> "*The Board is responsible for the overall management, and for the regulation of any right or interest in land whether urban or rural or vesting in the Ingwenyama in trust for the Swazi Nation.*"

[13] The Respondents' argument went on to contend that the position of the law is now settled that lack of jurisdiction by a Court is a ground for review. In this regard I was referred to **African Reality Trust Ltd v Johannesburg Municipality 1906 TS 908 at 913** where the Court stated the following:-

> "*If a body or an individual exceeds its powers the Court will exercise a restraining influence.*"

[14] In his Heads of Argument, and during his argument in Court, Mr. Gumedze introduced a new aspect to the ground of lack of jurisdiction by the Central Farm Dwellers Tribunal. This new aspect was to the effect that the 1st Respondent decided the question on whether the land in question was a farm or not. He says this question was answered in the positive by the 1st Respondent who found that it was a farm and because of this finding it then concluded that she could not avoid being evicted. Applicant contends that the 1st Respondent had no power to determine whether the land in question was a farm or not as such a question could only be determined by this Court. For this determination, it was contended by Mr. Gumedze that the 1st Respondent had committed an irregularity reviewable in law.

[15] Unlike the foregoing two other grounds of the review which I shall answer later on in the course of this Judgment, I am convinced that this particular one does call for determination at this stage particularly in view of its being disputed or challenged by the Respondents.

[16] The Applicant's first hurdle with this ground is that it is not the case that the Respondents were made aware of by means of the papers. This is to say it was not pleaded. In fact same arose for the first time in the Applicants Heads of Argument only to be reiterated during argument. This means that same is not the case the Respondents were called upon to meet and it was therefore new matter. The position is settled that a party's case stands or falls as pleaded in his founding papers. The thrust of this principle is obviously to avoid having a party taken by surprise but to enable him prepare fully for the case disclosed.

[17] The other hurdle in the Applicant's way is that I do not agree that the 1st Respondent is the one which determined whether the land in question was a farm or Swazi Nation land or a concession as alleged. In my view what the 1st Respondent did in effect was to ascertain if indeed the land in question was a farm as contended by the Respondents. Whether or not a piece of land is a farm is a question of fact. A farm has a title deed, which, the legal position is trite, is proof of ownership. I do not think therefore that a mere ascertainment of this fact by the 1st

Respondent can be said to amount to an irregularity as it had no change on the factual position prior to the decision. It seems to me that one can be said to have found in the manner contemplated in the Applicant's argument if by his decision he creates a new position which did not factually exist prior. This is the only time in my view that the 1st Respondent can be said to have had no jurisdiction to entertain the matter and not where the 1st Respondent merely reiterated the fact as supported by a title deed. See in this regard **LTC Harms, Amler's Precedents of Pleadings Sixth Edition, 2003 at page 270 as well as Gemeenskapsontwikkelings raad vs Williams 1977 (2) SA 692 (W).**

[18] I have no doubt that before it can entertain a dispute between an alleged Farm Owner and Farm Dweller, it is incumbent on the Tribunal to satisfy itself that the land in question is a farm. It is not in dispute in the present matter that the 2nd Respondent does have a title deed for the land in question and that the parameters of such a farm were attested to by the Surveyor General or officers under him.

[19] I therefore fail to see the irregularity complained of in this regard and this ground I cannot uphold.

[20] As concerns the other grounds - that is, that the 1st Respondent should not have directed that the Applicant could be

evicted anytime by the 1st Respondent as long as it observed the provisions of Section 10 (2) of the Farm Dwellers Act and that it had no jurisdiction because the dispute was properly one for determination by the Land Management Board, the 1st Respondent contended in the manner set out herein below.

[21] In so far as the Applicant contended that the 1st Respondent should not have directed that the Applicant could be evicted but instead should have referred the matter *melo mutu* to this Court for determination of the question of the acquisitive prescription of the land in question by the Applicant, the 2nd and 3rd Respondents contended that the 1st Respondent has no function to refer matters to the above Honourable Court on behalf of litigants.

[22] It was argued further that the 1st Respondent committed no irregularity to warrant a review of its decision by this Court. It was argued that it is not every irregularity in law that would ground a review as it is only that which is a cause of injustice.

[23] It is my understanding that these legal principles cannot be faulted for it is not in doubt that the enabling Act, says nothing about the powers of the Tribunal to refer a matter to a Court of Law *melo mutu.* It is further correct that for the irregularity to result in a review of the body's previous order, such an irregularity should result in an injustice. Being that as it may however, could the 1st Respondent lawfully authorize an eviction

of the Applicant from the farm where she claims to be lawfully entitled to remain before she could exhaust her remedies. I say this bearing in mind the effect an eviction would have on the Applicant's claim, which would no doubt be rendered academic by the eviction.

[24] The question for determination on this ground is in my view, whether or not it was irregular for the 1st Respondent to direct that 2nd and 3rd Respondents could evict the Applicant subject to Section 10 (2) of the Act when there was a claim by the Applicant that had not been determined as relates to its alleged acquisition of the land concerned through the principle of acquisitive prescription.

[25] It seems to me that it was irregular for the 1st Respondent to so direct, ignoring the Applicant's claim which had not been determined. The decision of the 1st Respondent should have taken this argument into account. It must be understood that I do not fault the 1st Respondent in so far as it found that the land was a farm but only in so far as it directed and or authorized the 2nd and 3rd Respondents to evict the Applicant prior to exhaustion of this other remedy, she claimed to be having. I am influenced in the view that I have taken of the matter by the terms of the Supreme Court Order which directed that it had to be determined justly after thorough investigation. It does not seem to me that to authorize an eviction of the Applicant before a determination of

the acquisitive prescription claim made by the Applicant would accord with anyone's sense of Justice, particularly when considering the effect such eviction would have on such a claim.

[26] I am therefore of the considered view that the decision of the 1st Respondent cannot stand in its current form and therefore needs to be set aside and substituted with a proper one.

[27] I am alive to the fact that this Court cannot ordinarily substitute its decision for that of the body whose decision is reviewed and set aside but is required to refer the matter back to the said body. However, it is a fact that there are those instances where the reviewing Court can substitute its decision for that of such a body as in the following instances.

(a) Where the result will be a foregone conclusion and a reference back will only be a waste of time. See **Traube v Administrator Transvaal and Others 1989 (2) SA 396 (T) at 408 A-E.**

(b) Where a reference back would be an exercise in futility. See in this regard **Yates v University of Bophuthatswana and Others 1994 (3) SA 815 (B) at 849 D - G, or**

(c) Where there are cogent reasons why the Court should exercise its discretion in favour of the Applicant and

substitute its decision for that of the Respondent. **See Inkosinathi Property Developers (Pty) Ltd and Another v Minister of Local Government and Land Tenure 1991 (4) SA 639 (TK) at 645 F - G.**

[28] In view of my decision to set aside that of the 1st Respondent in so far as it concerns the authorization of the 2nd and 3rd Respondents to evict the Applicant before its claim on the acquisitive prescription of the land in question can be determined (which has a potentiality of irreparable loss), I am of the view that this is one matter where this Court would have to substitute its decision for that of the 1st Respondent to take care of the Applicant's claim and allow the latter an exhaustion of her remedies. I am of the firm view that I am justified by the instances referred to above on when the Court would substitute its decision for that of the 1st Respondent. I believe the result would be a foregone conclusion as that body should reach the same decision as I make or worse still it could be an exercise in futility should it be found that the 1st Respondent has no power to impose a condition on Applicant vis-a-vis when it should institute proceedings to prosecute its claim, as I intend to make herein. I will therefore have to set a period within which such proceedings have to be instituted failing which the 1st Respondent would be entitled to evict the Applicant.

[29] Having come to the conclusion I have, it seems to me that there is no longer a need for me to determine the other ground of review raised, which was that the 1st Respondent had no jurisdiction to determine the dispute because that was a matter for determination by the Land Management Board in terms of Section 212 (4) of the Constitution of Swaziland. I refrain from doing so because the matter has already been decided and secondly and primarily, because such is a constitutional question, of which the position is trite need not be determined if the matter can be determined on other grounds. See in this regard **Daniel Dinabantu Khumalo v The Swaziland Government Appeal Case No. 31/2010.**

[30] Consequently I make the following order.

30.1. The decision of the 1st Respondent, in so far as it authorizes or sanctions the eviction of the Applicant prior to determining whether the principle of acquisitive prescription avails him, be and is hereby set aside.

30.2. The decision that the 1st Respondent is the owner of the land in question (subject to the determination of the Applicant's claim for acquisitive prescription] stands.

30.3. The Applicant is directed to institute proceedings to the appropriate Court for the determination of his claim of acquisitive prescription within a period of 30 days from the

date of delivery of this judgment, failing which the 1st Respondent shall be entitled to evict the Applicant from the said Farm in line with provisions of Section 10 (2) of the Farm Dwellers Act 1982.

30.4 Given the circumstances of this matter it will be fair that each party bears its own costs.

Delivered in open Court on this the 12th day of August 2011.

N. J. Hlophe
JUDGE