IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE CASE NO. 2108/2020

In the matter between

TIMELENI BOMAKE WOMEN ASSOCIATION 1st Applicant

And

INZWABUHLUNGU AID FUND 1st Respondent

INDVUNA TFUNTINI UMPHAKATSI
GEDION GUMEDZE N. O. 2nd Respondent

CHIEF NDLALUHLAZA NDWANDWE
TFUNTINI UMPHAKATSI 3rd Respondent

THE PRINCIPAL SECRETARY MINISTRY OF
AGRICULTURE AND COOPERATIVES 4th Respondent

ATTORNEY GENERAL 5th Respondent

Neutral Citation: *Timeleni Bomake Women Association v Inzwabuhlungu Aid Fund and 4 Others (2108/2020) [2020] SZHC 277 (07 December 2020)*

Coram : MAMBA J.

Heard : 02 DECEMBER 2020

Delivered : 07 DECEMBER 2020

[1] Immediately after submissions on 02 December 2020, I issued an order dismissing the application with costs. I indicated then that the written reasons for judgment will follow in due course. These then are those reasons.

[2] This matter was filed on an urgent basis, accompanied by the requisite certificate of urgency and was set down to be heard on 03 November, 2020. In the application, the applicant prays for the following order, *inter alia;*

> '2. Granting an order with interim and immediate effect, directing that the 1st respondent and or any such other person acting at her instruction and or employ as the case may be to be hereby interdicted forthwith from doing any constructions or such other activity on the piece of land in issue herein pending finalization of the dispute which has now been reported to the 3rd respondent as Chief where the said land is situated at Nkambeni/Mandishini main bus station in the Hhohho District.
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> 3. Granting an order with interim and immediate effect that the 1st respondent be hereby interdicted from continuing with any constructions on the said land referred to above while this matter is pending before any traditional structure as the case may be.

4. Granting an order reviewing and setting aside the decision of 2nd respondent in his council that granted a piece of land to 1st respondent at Nkambeni/Mandishini which land was earlier allocated to 1st applicant without giving a hearing to the applicant on the basis of same derogating the principle of audi alteram partem rule.

5. Granting an order for costs against the 1st and 2nd respondents at attorney and own client scale for being vexatious with the applicant's family each party paying and absol ving the other.'

[3] These prayers are by no means a model of clarity and brevity. They are *inter alia,* argumentative and convoluted.

[4] The applicant is described as 'an association of rural women of Nkambeni that undertakes development projects mainly with the Ministry of Agriculture through its rural development programmes around the country. It was founded in the late 1980s and was allocated land by the Ministry of Agriculture which land is situated at Nkambeni/Mandishini main bus station. --- The land in issue was clearly demarcated during the rural resettlement programme of the government and there are maps in the custody of the 4th respondent, which is the Ministry of Agriculture.

[5] The 1st respondent '--- is an organisation incorporated in terms of the company laws of Eswatini [and its] further details and purpose is unknown to the applicant.' The 3rd respondent is the Chief of Tfuntini Umphakatsi, where the land in question is situated and the 2nd respondent is his Indvuna or headman in that area. The land in dispute is part of the Eswatini Nation land under the jurisdiction or immediate authority of the 3rd respondent.

[6] The applicant avers that the land in question was allocated to it 'in the late 1980s' by the 4th respondent. Subsequent to such allocation, the applicant approached the 3rd respondent, office and formalised the said land allocation to it by paying the applicable or relevant customary dues for such allocation. This was on 18 June 2018.

[7] The applicant alleges that in or about July this year, its piece of land was invaded by the 2nd respondent and his council, who then unlawfully allocated a portion thereof to the 1st respondent. The applicant avers further that the 2nd respondent in so acting did not consult or seek the approval of the applicant. Following this allocation to the 1st respondent, the applicant lodged or filed a complaint or protest with the erstwhile Indvuna of the area Mr. Mahhuda Mdluli. Mr. Mdluli 'deployed his entire libandla (council) to look into the matter and again the same

libandla that had allocated this land to 1st respondent maintained its stance ---.' The matter was then reported to the senior Indvuna, [2nd respondent] who issued an order directing that the construction by 1st respondent be stayed pending finalisation of the matter at Umphakatsi.

[8] The matter was, according to the applicant, duly heard and the issues ventilated at the Umphakatsi. Such hearing included an inspection in loco of the land in question. The applicant states further that on 10 October 2020, the 2nd respondent in council '--- just pronounced that he was making a ruling that the 1st respondent be allocated the said land without hearing any representations from the (applicant).' It is this decision that has led to or culminated in this urgent application.

[9] The applicant avers that the decision of 10 October 2020 by the 2nd respondent is bad in law inasmuch as it was made without the applicant being afforded the opportunity to be heard thereof. Applicant states further that it has filed or lodged an appeal against this decision with the 3rd respondent. This appeal and the review before this Court are both based on the sole ground that the applicant was not afforded the opportunity to be heard by the 2nd respondent before he made the ruling or decision on 10 October, 2020. This is, so the argument goes, in violation of the principles of natural justice that a decision that adversely affects an

individual in his personal and proprietary rights may not be made against him without first affording that individual the chance to be heard thereon before the decision is made or taken.

[10] It is common cause that the 1st respondent has started building a house, or concrete structure on the land allocated to it by the 2nd respondent. It is this building or construction, amongst other things, that the applicant seeks to interdict or restrain, pending this review and the appeal before the 3rd respondent. No date has yet been set for the hearing of the appeal.

[11] This application is opposed by the respondents. The 1st respondent has raised a few preliminary points of law in objection. I, however, do not, without disrespect to counsel for the 1st respondent, find it necessary to burden this judgment by dealing with these points of law. One such point of objection is that this Court has no jurisdiction to hear this application inasmuch as the 3rd respondent has the sole prerogative or constitutional right to allocate Eswatini nation land under his jurisdiction or chiefdom and '--- this Court lacks the requisite jurisdiction to hear and determine this matter until and unless the customary adjudication structures have been exhausted.' This assertion is premised or predicated upon the allegation that it was the 3rd respondent and not the 2nd respondent that allocated the land in question to the 1st respondent.

[12] The other point raised by the 1st respondent is that the appeal to the 3rd respondent is mistaken inasmuch as the decision appealed against was actually made by the 3rd respondent.

[13] It is common cause that there is a dispute of fact regarding the actual borders of the land utilised by the applicant and that which has been allocated to the 1st respondent. These two pieces of land are adjacent to one another and at some point have a common boundary. The 1st respondent states that the land allocated to it is different from that which was allocated to the applicant. Further, it is averred by the 1st respondent that the applicant was duly heard before the decision to allocate the land to the 1st respondent was made. This included the inspection in loco which was aimed at identifying the actual boundaries of the two pieces of land. These are real and material disputes of fact and cannot be resolved in this application proceedings.

[14] Again, without stating that there was due hearing before the decision challenged or impugned herein, one must observe that traditional hearings or dispute resolution fora do not function as a Court of law. This is common cause. Such fora, are on matters of procedure, very informal and less than technical in nature. They are masters of their own house on

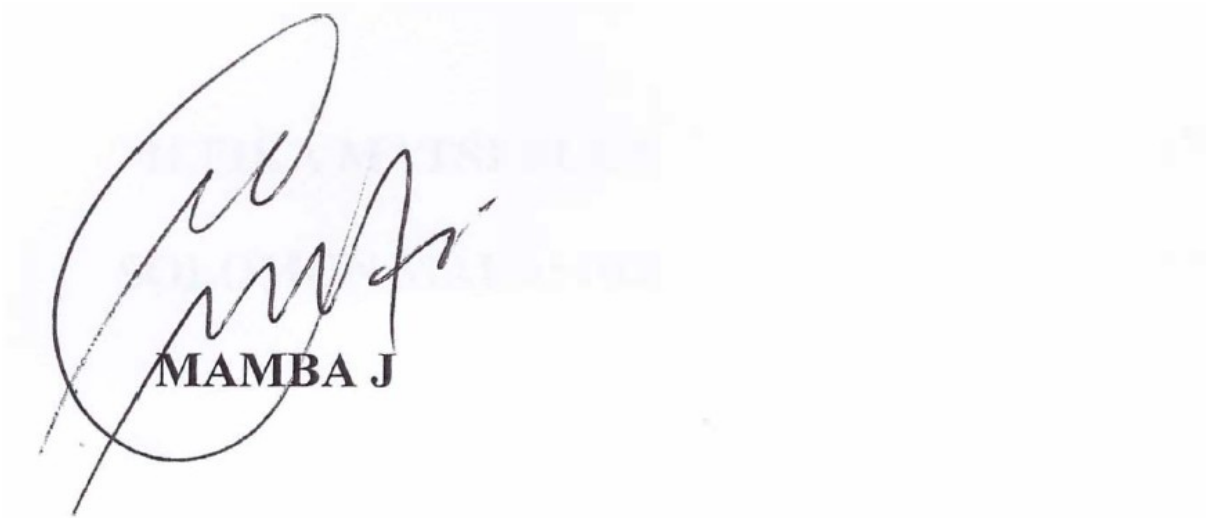
such issues. I emphasise though, just for the avoidance of doubt, that this does not mean that they are at large to violate the basic rules of fairness and justice. Far from it.

[15] But there is a more fundamental flaw in the applicant's papers, and it is this. The applicant has filed or lodged an appeal with the 3rd respondent against the relevant decision. This appeal is pending. The 3rd respondent has jurisdiction to hear that appeal. He is thus a competent authority in terms of the applicable law and principles. The appeal is grounded on the same ground as this review application. This therefore means that there are two challenges against the relevant decision. One challenge is termed or called an appeal and the other is termed a review. The appeal was filed before the review.

[16] Without second guessing the decision of the 3rd respondent, the possibility or even probability posed by these two challenges is that there could be two differing and diametrically opposed outcomes on the same issue between the same parties and on the same grounds or challenge by two competent authorities. This is totally undesirable and has to be avoided at all costs. Counsel for the applicant realised this situation when this was brought to his attention by the Court during submissions. He, however, had no real answer to the problem. He contented himself by

submitting that the appeal would not be heard until March 2021, at the earliest. That is, however, not an answer to the problem. The applicant is, in law, not entitled to have two parallel proceedings on one and the same issue before two different and separate fora. The appeal was filed first and is pending. It should and must have preference in this challenge. The applicant is not at liberty, to file its challenge before two competent fora. By filing the appeal, it has made its election and must be held to it. It has made its bed and must now lie on it. Apart from this two pronged attack by the applicant, the applicant has not exhausted its remedies under the Siswati traditional fora, where the matter originates. It must exhaust such remedies.

[17] For the above reasons, the application was dismissed with costs.



FOR THE APPLICANT: **MR. M. N. DLAMINI**

FOR THE 1ST RESPONDENTS: **MR. S. DLAMINI**
FOR THE 2ND TO 5TH RESPONDENTS: **MR. MASHININI**