THE HIGH COURT OF SWAZILAND

GOBA NDLANDLA

1st Applicant

MATUTUTU DLAMINI

2nd Applicant

And

CHIEF NGALONKHULU MABUZA

1st Respondent

FANUKWENTE MAPHOSA

2nd Respondent

Civil Case No. 545/2003

Coram **S.B.** MAPHALALA r-**J**

For the Applicants For MR. M. DLAMINI MR. S.

the Respondents MDLADLA

JUDGEMENT

(20/08/2004)

1. **The relief sought.**

Serving before court is an application under a certificate of urgency for an order ***inter alia*** directing the 1st and 2nd Respondents to stop inciting and encouraging their subjects to disturb peace at Elundzindzaneni area in the district of Manzini. A further order interdicting the Respondents and/or their subjects from forcefully occupying and/or building structures at Elundzindzaneni are which area is under the late Chief Ngwaze Dlamini, pending the determination of an appeal made by the Applicants on behalf of the Lundzindzaneni Royal Kraal to His Majesty King Mswati III.

2. **Preliminary issues.**

The matter first appeared before Masuku J on the 21st March 2003, where the learned Judge issued an interim order in terms of prayers 1, 2, 3 (a), (b) and 4 of the notice of motion returnable on the 27th March 2003. The court further directed as to how and wh:".i the affidavits were to be filed.

The parties have filed the requisite affidavits in this matter. The interim order has been extended many times until the matter finally came before me on the 18th July 2003 for arguments. I heard submissions by ***Mr. Dlamini*** for the Applicant who did not complete them on that day applied for a postponement to enable the Applicants to seek the services of Counsel to argue the matter. Thereafter Advocate Maziya was instructed to represent the Applicants and it became necessary that he appraise himself with the points already argued by the instructing attorney ***Mr. Dlamini.*** Thereafter the matter has been postponed a number of times at the instance of the Applicant. In each case the Applicants were ordered to pay wasted costs. I must say that the attitude of the Applicant in having this matter finalized leaves a lot to be desired.

It appears to me that the Applicants were only content to have an interim order in their favour and were not at all concerned with the interests of the other side. As a result of this lacklustre approach by the Applicants I directed that they be put to terms in that the matter was to proceed on the 4lh June 2004 with or without them. On the return date there was no appearance for the Applicant despite being notified of the said date.

I then directed that the matter proceeds in their absence and I allowed ***Mr. Mdladla*** to address me in reply to what ***Mr. Dlamini*** had submitted at the commencement of arguments on the 18th July 2003.

3. <u>The facts of the matter.</u>

This is a chieftaincy dispute between Chief Ngalonkhulu Mabuza who is cited as the 1st Respondent and the 2nd Applicant who also claim to be the rightful Chief of the area. The dispute is between the Lundzindzaneni area and the Mafutseni Royal Kraal. The dispute relates to the question whether the Lundzindzaneni area falls under the Mafutseni Royal Kraal or it is independent, and as such, a separate chiefdom under the late Chief Ngwaze. The 2nd Applicant was appointed by the Lundzindzaneni Royal Kraal to be an heir to the late Ngwaze Dlamini.

At some point the Indvuna Mpica Mtsetfwa intervened in the dispute and it was then referred by the King to the Swaziland National Council (hereinafter referred to as the "SNC"), where the Chairman of the SNC advised the Mafutseni residents to keep the peace whilst the matter was still pending before them. The SNC then resolved the matter in favour of the Respondents. The Applicants then appealed to the King in terms of Swazi Law and Custom.

It is alleged by the Applicants that as a result of the conflict there is a real likehood of violence between the parties. In paragraph 6.2 the Applicants aver that the Respondents and their subjects have threatened war against the Applicants and their followers. According to the Applicants these threats can never be taken lightly as there are instances where people have died in other areas because of chieftaincy and boundary disputes. The Applicants contended that they are entitled to enjoy peace and further to have their matter properly adjudicated by all traditional structures.

The Respondents' version in summary form is that the Applicants do not want tc abide by the decision which was made by the SNC. They allege that it is the Applicants who are responsible for all the conflicts which have taken place in the area. The 2nd Applicant is not a Chief and the 1st Applicant is not an Induna. The present application is a clear abuse of the court process, more particularly as the

Applicants have failed to show any good faith by disclosing all the material facts to thercourt.

4. The arguments.

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On behalf of the Applicant a four- pronged argument is advanced; firstly, that in terms of the Swazi National Council Standing Committee Decree No. 1 of 1999, the function of the SNC is only to advise the King; and not to act an authoritative and decisive body. Secondly, that the Respondent have not complied with Section 8 (2) of the High Court Act No. 2000 of 1954. The Respondent failed to file a transcript of the purported King's blessing of the SNC ruling, notwithstanding reference thereto. Thirdly, that the signatory to annexure "A" lacks the powers to pronounce decisions issued by the King and as such the Chairman usurped the function of the Attorney General as provided by Section 11 (1) of the Interpretation Act. Therefore annexure "A" is not an exception to the hearsay rule and for this reason inadmissible.

The fourth leg of the Applicants' argument is that if the matter is urgent and the interdict sought is temporary in nature, proceedings may be commenced by way of motion even though a dispute of fact is foreseeable. For this proposition the court was referred to the textbook by ***Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, (4th ED)*** at page ***1080*** and the authorities cited thereat. Further, it was contended under this head that the Applicants have met all the requirements for a grant of an interim interdict.

Mr. Mdladla for the Respondents advanced arguments ***au contraire.*** The argument is threefold. The first point is that the Applicants in ***casu*** have not proved the third requirement for an interim interdict ***viz*** the absence of similar protection by any other ordinary or suitable legal remedy. For this proposition the court was referred to the textbook by ***John Mayer, Interdicts and Related Orders*** at page ***59*** and the case of ***John Boy Matsebula and three others vs Chief Madzanga Ndwandwe, Civil Case No. 3294/2004 (unreported).*** In the latter case the court relied on what was held in ***Ferreira vs Levin NO. and others 1995 (2) S.A. 813 (W)*** where Streicher J stated the following:

"It has up to now, been accepted that in order to establish a *prima facie* right entitling an Applicant to an interim interdict, an Applicant has to make out a case Jhat he is entitled to final relief. If on the facts alleged by the Applicant and the undisputed facts alleged by the Respondent a court would not be able to grant final relief the Applicant has not established a *prima facie* right and is not entitled to interim protection" ("my emphasis).

The court held as follows at ***page 6*** in the case of ***John Boy Matsebula (supra):***

> "It is clear from the facts that it is His Majesty the King who has the power to grant a final relief in this matter. It has not been shown in the instant case that His Majesty the King cannot grant interim relief *pendente lite.* Further, it would appear to me that *Mr. Mazibuko* is correct in his submissions that by operation of the doctrine of submission the Applicants' cause has to be determined by His Majesty the King as Applicants have submitted themselves to his jurisdiction. All matters incidental to the main issue before His Majesty the King therefore ought to be directed to His Majesty the King.

The second point advanced is that the Applicant should especially in the case of an ***ex parte*** application place all relevant facts before the court. A ***fortiori*** no incorrect information may be furnished. Even if this is done carefully and not recklessly or deliberately. The court was referred to the case of ***Hall and another vs Heyns and others 1997(1) S.A. 38*** in support of this argument.

The third argument is that the Applicants have not made sufficient delegations in the affidavits or the pleadings arising from the particular facts which meet the requisites for interdictory relief.

5. The court's analysis and the conclusions thereon.

Presently therefore, there are five issues for determination by the court, ***viz*** i) the issue of the authority of the SNC whether its powers are confined only to advise the King; not to act as an authoritative and decisive body; ii) non-compliance with Section 8 (2) of the High Court Act, No. 20 of 1954 and the failure to file a transcript of the purported King's blessing of the SNC ruling; iii) the issue around annexure "A" and iv) whether the Applicant has satisfied the requirements of an interim interdict and v) the issue of non-disclosure of material fact is ***ex parte*** applications.

The issues under i), ii) and iv can be decided together as in my view-r they are nothing more than technical arguments which do not go to the root of the matter. Starting with the issue of the powers of the SNC, in my view this issue is irrelevant for purposes of the determination of an interim interdict. The issue can only be relevant in my opinion when the matter is heard by His Majesty, The King on the merits of the appeal.

On the issue of Section 8 (2) of the High Court Act, I am unable to find any relevancy of this Section to the issue at hand. The Section reads ***in extenso*** as follows:

> **1) Save as otherwise provided in this Act, the pleadings and the proceedings of the High Court shall be carried on and sentences, decree, judgements and other orders thereof pronounced and declared in open court and not otherwise.**
>
> **Provided that at any time during a trial the Judge may order that the court be cleared or that any person of class of person leave the court.**
>
> **2) The pleadings and proceedings of the court shall be in the English Language" (my emphasis).**

The argument by the Applicant is that annexure "A" to the **1st** Respondent's opposing affidavit should be found inadmissible under the said Section as it is written in the Siswati language. This being a letter written by the Chairman of the SNC and which reflects the decision of the SNC. I do not think the Section applies ***in casu*** as the Section only deals with proceedings before the High Court and prescribe that they should be in the English language. The fact of annexure "A" is that there was a decision made by the SNC and this is common cause between the parties. Whether it is written in the Siswati language or any language for that matter, is neither here nor there. This objection, in my view, is highly technical and does not advance the Applicant's case in any way. Also in this vein I hold that the issue of the transcript and that the order was not communicated by the Attorney General in terms of the Interpretation Act, does not take this matter any further, either way.

The fact of the matter is that a decision was made by the SNC and as a result thereof the Respondents appealed to His Majesty, The King. This fact is common cause.

I rrow turn to the issue of non-disclosure of a material fact. The allegations which give rise to this aspect of the matter is found in paragraph **14** of the **1st** Respondent's answering affidavit and reads ***in extenso*** as follows:

> **AD Paragraph 4.6**
>
> I am not aware of the contents stated herein. Save to bring it to the court's attention that in fact on the 13th of March 2003, the Applicants and ourselves were at the Lozitha Royal Kraal wherein there was the Deputy Commissioner and the Station Commander of the Manzini Region. The Swazi National Council once again issued a directive and advised the Regional Administrator Prince Gabheni that in fact this matter had been dealt with and that the matter had been resolved by the Swazi National Council which had been instructed by the King. The Applicants were advised in no uncertain terms that they fall under the Chiefdom of the 1st Respondent. The Applicants are well aware of this as they were present. It defies logic why they have not disclosed this to the Honourable Court and can only be viewed as a deliberate non-disclosure to the Honourable Court and as such the application should be dismissed.

The Applicants have not answered the above-cited paragraph in their replying affidavit and therefore the Respondents' version remains uncontroverted.

In ***ex parte*** applications, it is trite law that the Applicant has an obligation to the court to disclose fully the true circumstances and facts pertaining to the application, (see ***De Jager vs Heibrow and others 1947 (2) S.A. 419 (W); Cometal Nometal vs Corlana Enterprises 1981 (2) S.A. 412*** and ***Herbstein et al The Civil Practice of the Supreme Court of South Africa (4th ED)*** at ***367*** and the cases cited thereat). However, on the facts of this case I cannot find that the principles in the above-cited cases apply because ***ex facie*** the court record it cannot be said that the matter came before the court on an ***ex parte*** basis. The court records in the first entry by Masuku J that when the interim order was issued both parties were represented by their respective attorneys. The learned Judge granted an order in terms of prayers 1, 2, 3 (a), (b) and 4 returnable on the 28lh March 2003. The Respondents were further ordered to file their opposing papers by close of business on the 25lh March 2003, and the Applicants to file their replies by noon of the 27lh March 2003.

Strictly speaking therefore, the ***uberima fides*** rule does not apply on the facts of -the present case though I may venture to say ***en passant*** that-Applicant in any application is obliged to exercise good faith ***(bona fides)*** as opposed to utmost good faith ***(uberima fides).***

I now turn to the most important question of whether the Applicant has satisfied the requirements of an interim interdict. The Respondents hold the view that the Applicants have not shown (c) ***viz*** the absence of similar protection by any other ordinary or suitable legal remedy.

The trite principle in this regard is that in an application for interdictory relief the Applicant must make delegations in the affidavits or the pleadings arising from the particular facts which meet these requisites. In the present case it would appear to me that the ***dicta*** in the case of ***John Boy Matsebula (op cit)*** applies with equal force. It is clear from the facts that it is His Majesty, The King who has the power to grant a final relief in this matter. It has not been shown in the instant case that the King cannot grant interim relief ***pendente lite.*** In fact in this regard there is evidence on affidavit that the traditional authorities intervened between the parties to maintain peace between the parties before the General Elections in 2003.

It would appear to me that on the basis of the above reasons the interim order granted by the court ought to be discharged. However, not only has the court an overriding discretion whether to grant or refuse an interdict but also has the power to regulate the future proceedings of any application before it (see ***C.B. Brest, Interlocutory Interdicts (1993)*** at page ***85*** and the cases cited thereat). In the present case it is common cause that the situation at Elundzindzaneni area is volatile as a consequence of the feud between the parties which might easily lead to bloodshed. It is my considered view therefore that this court is obliged by the dictates of justice to put in place some mechanism to ensure that peace is maintained in that troubled area.

The following order is accordingly recorded:

1. The interim order issued by the court on 23rd March 2003, is discharged and that the Applicants and the 1st and 2nd Respondents are however directed to stop inciting and encouraging their subjects to disturb the peace at Elundzindzaneni area, pending the determination of an appeal made by the Applicants on behalf of the Lundzindzaneni Royal Kraal to His Majesty, King Mswati III;

2. The Applicant to pay wasted costs.

S.B. MAPHALALA

JUDGE