IN THE HIGH COURT OF SWAZILAND

Civ. T.171/92

In the mater of

JOSEPH DLAMINI — Applicant

and

THE PRESIDENT OF THE NATIONAL COURT — Respondent

CORAM : Hull, C.J.
FOR APPLICANT : Mr. Ntiwane
FOR RESPONDENT : Unopposed

J U D G M E N T

28/08/92

Hull, C.J.

This is an application to review a judicial decision given by the Swazi National Court at Manzini on 29th September in the year 1985 in Case No.A10/85.

That case related to a dispute about cattle between Zallinah Dlamini and one Gedion Dlamini. In its decision, the National Court ordered that 15 head of cattle belonging to Gedion Dlamini should be seized and handed over to Zallinah Dlamini.

The present applicant Joseph Dlamini was not a party to that dispute. It had nothing to do with him. I have read the record of evidence carefully and he is nowhere mentioned in it.

His complaint is that the Messengers of the National Court then, according to his founding affidavit, went and took 12 head of cattle in the possession of one Sikhotsa Dlamini and delivered them to Zallinah Dlamini, purportedly in pursuance of the Court's order. But he says that those 12 cattle, now being kept on her behalf by her brother Joyina Dlamini, in fact belong to him.

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He seeks first an order setting aside the decision of the National Court and, secondly, an order that the Deputy Sheriff for the District of Shiselweni recover the cattle, as well as such other relief as the High Court may think fit.

The notice of motion for review was filed on the 17th February 1992. In his affidavit, Joseph Dlamini addressed the delay, explaining that his attorneys could not obtain the record earlier and had been able to do so only after commencing an action against the President of the National Court at Manzini under Case No.220/90.

A record of the proceedings in question is now before the High Court. Moreover, proceedings were earlier brought in this Court in Case No.220/90 to obtain the production of a court record. The application in those other proceedings was, however, brought by Sikhotsa Dlamini. It referred to the case in the National Court as being No.A285/85, but it appears otherwise to have related to the same matter. The respondents on 26th March, 1990, in those earlier proceedings (i.e. the clerk to the National Court of Manzini and the Swazi National Court of Appeal) withdrew their opposition on 28th March 1990.

From the record before me, it appears that on 27th November 1985 a warrant of attachment was issued in case No. A 10/85 authorising the Messengers of the National Court to take twelve head of cattle from the property of Sikhotsa Dlamini and Joseph Dlamini.

It also appears from the record that Sikhotsa Dlamini had given evidence in the hearing in the National Court and that he there acknowledged that he had taken cattle, the subject of the dispute between Zallinah Dlamini and Gedion Dlamini, from Zallinah's property. It seems that it was for this reason that the National Court caused the warrant of attachment to issue, at least as far as he was concerned on

27th November 1985. The Court's decision after the hearing refers to a claim for cattle taken by the defendant's late father .... "assisted by his elder brother Sikhotsa Dlamini, unlawfully".

The record does not disclose any reason why the warrant of attachment should have issued against Joseph Dlamini.

The matter eventually came before the Judicial Commissioner. It is not clear how this came about. The original dispute was of a civil nature. There is nothing in the record to indicate that the High Court ever referred it to the Judicial Commissioner under the proviso to section 33 (4) of the Swazi Courts Act 1950.

On 28th January 1991, the Judicial Commissioner wrote a letter to the President of the National Court at Manzini. He expressed the views, first, that before the National Court caused a warrant to be issued against Sikhotsa Dlamini, it ought to have joined him as a second defendant (and no doubt, as the Judicial Commissioner would have had it in mind, to allow him a full opportunity to answer the allegations so far as they may have affected him adversely) and, secondly, that in the meantime the cattle taken from Sikhotsa Dlamini should be returned to him.

The views of the Judicial Commissioner were evidently not carried into effect, for if they had been acted upon, it would seem unlikely that Joseph Dlamini would now be pursuing his claim here in this court in proceedings that relate back, eventually, to Zallinah Dlamini. It may therefore be (though I can only speculate on this) that in fact everyone involved took the view that the Judicial Commissioner was not seised of jurisdiction.

This is a matter that involves differences between members of the Swazi Nation, which fell in the first instance to be determined in the National Court according to Swazi law and

custom. The High Court has jurisdiction under section 33 of the Act to entertain an appeal of the High Swazi Court of Appeal or (where the High Court has first referred an appeal to the Judicial Commissioner), an appeal from the Commissioner's decision. The High Court also has jurisdiction to review a decision of a National Court or of the Higher Swazi Court of Appeal.

The High Court will only intervene, however, in accordance with given principles of law and of justice. Ordinarily disputes of this nature are propeprly and, in my view, best left to be resolved in the National Courts, according to the Swazi law and custom, provided that the decision does not infringe section 11 (a) of the Act.

The present motion for review, brought by Joseph Dlamini, relates to a matter that is now very old. An application for review is a remedy that must be sought promptly.

His explanation for the delay is, in itself, not adequate. Under rule 53(1) of the High Court Rule, a person seeking review of the proceedings of an inferior court is required to serve the notice of motion on the presiding officer of the lower court, calling on him to despatch to the Registrar of the High Court within 14 days the record of the proceedings to be reviewed. An applicant who complies with this rule thereby protects himself against a complaint of delay on his own part if the record is not furnished; and if it is not provided by the lower court on compliance with the rule he can come to this court for redress in that respect.

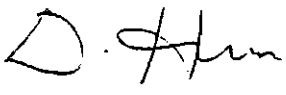
In the present instance, these courses of action were not followed by Joseph Dlamini.

Had he taken them, a question may have arisen as to whether he had standing to apply for the review of a decision in a dispute in which he was not a party. It may have been

argued that as a third party, his remedy was to commence his own proceedings in the National Court, or in the High Court, to vindicate his own rights in a matter in which they were (on his allegations) being interfered with, in circumstances which he had never been given an opportunity to be heard. My own view is that such an objection would have been unduly technical. The record of the lower court did refer to him by name, if only in respect of execution of its judgment. If his objection had been brought timeously, this court would have considered the matter in its substance and would, if necessary, have given appropriate directions to allow him to present his case to it.

The long delay is, however, in my view fatal. It is the responsibility of the lower courts to comply with the requirements of rule 53, but, it is in the first instance the responsibility of an aggrieved person to institute action under that rule within a reasonable time. In this case that was not done. It is a principle of justice that there should be finality in legal proceedings and there are obvious dangers in re-opening this very old dispute in the way in which the applicant requests.

Accordingly I refuse the application.



David Hull
CHIEF JUSTICE