Privy Council Appeal No. 158 *of* 1924.

Sobhuza II - - - - - - - - - *Appellant*

v.

Allister M. Miller and others - - - - - - *Respondents*

FROM

THE SPECIAL COURT OF SWAZILAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 15TH APRIL, 1926.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD PARMOOR.
LORD PHILLIMORE.
LORD BLANESBURGH.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Special Court of Swaziland by which a petition of the appellant has been dismissed with costs. The petition was presented against the first respondent, and the second respondents were added at the trial on the footing that they claimed to own the land in controversy and that the first respondent was acting as their manager. The substance of the petition was that certain lands, known as Farm 188, formed part of an area originally subject to a concession known as the "Unallotted Lands Concession," granted by the former King of the Swazis, Umbandine, on 26th July, 1889. Under this concession the grantees bound themselves to respect all prior rights, and, further, in no way to interfere with the rights of the native subjects of the grantor. The concession of 1889 was expressed to have been made by the King with the advice and consent of his Indunas in Council in favour of two persons, Thorburn and Watkins, of

exclusive grazing, and to have conferred agricultural and planting rights over the unoccupied land within the concession, for fifty years, with a right to renewal, at a yearly rent of £50. The King, in consideration of this, undertook to protect the concessionnaires in the exercise of their rights. The claim made in the petition was that the first respondent had trespassed on the existing rights of native occupiers and had caused them to be ejected from the land they occupied.

Evidence was taken at the trial of the petition. It was found that certain natives and their predecessors had been for a long time in occupation of portions of the land included within the concession, and that they were now being ejected from the portions of the land other than such as had been demarcated for the sole and exclusive use of the natives. The judgment of the Court set out that the original concession had been confirmed on 17th December, 1890, by the High Court of Swaziland, a Court constituted by the King of the Swazis with the assent of the British Government and the South African Republic, and having jurisdiction to inquire into the validity of concessions such as that in question. But on the 19th September, 1908, the concession was expropriated by the High Commissioner by notice to the concessionnaires under section 12 of Proclamation No. 3 (Swaziland), 1904. The judgment went on to state that by Order in Council of 2nd November, 1907, the area of the concession became Crown land, as having been expropriated, and that a portion of it was granted to the respondent company; who claimed a clear freehold title under the grant. The natives, on the other hand, claimed that their rights of use and occupation under native law had not been affected. It was contended for them that the rights they possessed before and after the granting of the concession remained intact, and had been recognised later on by section 5 of the Order in Council made on 25th June, 1903 and that these rights had not been subsequently cut down. The Court held that, at all events by the Order in Council made on 2nd November, 1907, the ownership of the land had passed to the Crown, and that the effect of this was to extinguish any rights of use and occupation that were in the natives; and that the documents and circumstances showed that it was intended to extinguish all such rights. As matter of fact, the natives were given instead sole and exclusive rights over one-third of the land included in the concession, and the concessionnaires had been given such rights over the remaining two-thirds. In the opinion of the Court below, the Order in Council of 2nd November, 1907, was validly made. Even if Swaziland was no more than a protectorate, it was one which approximated in constitutional status to a Crown Colony, and the Crown had power to make laws for the peace, order and good government of Swaziland, and of all persons therein. Any original native title had, therefore, been effectually extinguished.

The question which their Lordships have to consider is whether this conclusion was right in point of law. Into any topic

of policy they are, of course, precluded from entering. In order to come to a conclusion on the legal question it is necessary to look at the history and circumstances in which it has arisen.

Swaziland lies on the East of the Transvaal, between that country and the Coast. It was treated as an independent native state both by the South African Republic and by the British Government, notwithstanding a good deal of interference by both in its affairs, and it was recognised, and still is recognised, as a protectorate. But the South African Republic appears, from the terms of the convention made in 1894, to have become preponderant in the internal control. The relationship seems to have been recognised as being one in which Swaziland stood to the Republic as a protected dependency administered by the South African Republic. This protectorate stopped short of incorporation, but apparently it was recognised by the convention of 1894 between Great Britain and the South African Republic (Article II) as giving the latter, without incorporation, all rights of protection, legislation, jurisdiction and administration over Swaziland, and the inhabitants thereof. The natives were, however, guaranteed in their laws and customs, so far as not inconsistent with laws made pursuant to the convention, and in their grazing and agricultural rights, with the proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the convention.

The question which at once presents itself is, what is the meaning of a protectorate. In the general case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its government cannot hold direct communication with any other foreign power, nor a foreign power with its government. This is the substance of the definition given by Sir Henry Jenkyns at p. 165 of his book on "British Rule and Jurisdiction beyond the Seas." Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected state becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of state, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. This statute provided, upon the preamble that by treaty, capitulation, grant, usage, sufferance, and other lawful means, the Crown

has power and jurisdiction in divers countries and places outside its dominions, and that it was expedient that Acts relating to the exercise of such jurisdiction should be consolidated, that it should be lawful for the Sovereign to hold, exercise and enjoy any jurisdiction now or hereafter possessed within a foreign country in the same and as ample a manner as if the jurisdiction had been acquired by cession or conquest of territory, and that every act and thing done in pursuance of any such jurisdiction was to be as valid as if it had been done according to the local law then in force in that country. It was provided that any Order in Council made in pursuance of the Act should be laid before both Houses of Parliament within a limited time, and should have effect as if enacted in the Act. The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles. This view of it was also that taken in an important judgment of the Court of Appeal, *Rex* v. *Earl of Crewe* (1910, 2 K.B. 576). There, by an Order in Council, the High Commissioner for South Africa had been authorised to provide in the Bechuanaland Protectorate for the administration of justice and for the peace, order and good government of all persons within that protectorate and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a native tribe, was detained in custody under a proclamation purporting to have been made by the High Commissioner under the powers so conferred. He applied for a habeas corpus against the Secretary of State for the Colonies. It was held that the protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, and that the proclamation was validly made.

It was further held that the detention was lawful, inasmuch as the construction of the Act settled by practice rendered it impossible to limit its application to British subjects in the foreign country. Lord Justice Vaughan Williams considered that the proclamation under which the detention took place was valid as a law which the Act gave the Crown absolute power to make and apply, just as if the territory had been obtained by cession or conquest. He also held that the detention could be independently justified as an act of state. Lord Justice Kennedy concurred, definitely on the view that the detention could be justified as an act of state, as well as under the Foreign Jurisdiction Act. The stress in the judgment of Lord Justice Farwell, who arrived at the same conclusion as to the validity of the proclamation under which the detention was made, was laid on the construction of that Act, which he interpreted in a similarly wide sense.

In the *Southern Rhodesia Case* (1919, A.C. 211) Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially similar. He held that a manifestation by Orders in Council

of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of state. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable.

Such being the principle, it remains to ascertain whether it has been put in operation in the case under consideration. To answer this question it is first necessary to recall the true character of the native title to land throughout the Empire, including South and West Africa. With local variations, the principle is a uniform one. It was stated by this Board in the Nigerian case of *Amodu Tijani v. The Secretary for Southern Nigeria* (1921, 2 A.C. 399), and is explained in the Report made by Chief Justice Rayner on Land Tenure in West Africa, quoted in the case referred to at p. 404. The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is Sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.

Turning next to the history of what was done in Swaziland by the British Government, the material events may be stated briefly.

Swaziland was originally under the rule of native kings, and concessions conferring rights in respect of land were granted by them to persons other than natives. The land in question was granted, by the concession known as the "Unallotted Lands Concession" of 26th July, 1889, to Thorburn and Watkins, as already stated. The grant was made by King Umbandine, who reigned between 1875 and 1889. The grant, which was of farming and planting rights for fifty years, with a provision for renewal, at an annual rent of £50, bound the grantees in no way to interfere with the rights of the King's native subjects. There was conferred power to sublet or transfer.

In September, 1890, Ungwane, the then King of the Swazis, set up by organic proclamation a Chief Court composed of three judicial members approved by the British High Commissioner and the President of the South African Republic, such Court to have full jurisdiction over all persons in Swaziland of European extraction, and over all questions, matters and things in which such persons were concerned. The Court was to undertake judicial inquiry into the validity of disputed concessions. In 1890 it confirmed the concession in question. By deed of cession the grantees transferred the area comprised

in it, including the territory in dispute, but excepting certain distinct areas which had previously been transferred to others, to the second respondents. Ungwane was succeeded by his son, Sobhuza, the appellant, who is the present king or paramount chief.

When the Boer war broke out in 1899 Swaziland had for some years come to be under the protectorate of the South African Republic. This was the result of the convention of 1894 between the Republic and the British Government. After the conquest and annexation of that Republic, by Order in Council of 25th June, 1903, the Crown, on the recital that by the conquest and annexation all rights and powers of the South African Republic had passed to the British Sovereign, ordered that the Governor administering the Transvaal might exercise all powers and jurisdictions of the Crown and take all such measures and do all such things as were lawful and in the interest of His Majesty's service, as he might think, subject to instructions, expedient. The Governor was expressly empowered by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of Swaziland, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. He was, in issuing such proclamations, to respect any native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection were regulated, except so far as the same might be incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. Such proclamations were to be published and might be disallowed or modified by the Sovereign.

By Order in Council of 1st December, 1906, the powers given to the Governor administering the Transvaal were transferred to the High Commissioner for South Africa.

By a subsequent Order in Council of 2nd November, 1907, on the recital that it was intended that portions of certain lands in Swaziland the subject of concessions or grants made by paramount chiefs and confirmed by the Chief Court under the organic proclamation of 1890, should be set apart and demarcated for the exclusive use and occupation of natives, and that the remaining portions should be granted or leased to European persons claiming rights under such concessions or should be held by the High Commissioner for South Africa, His Majesty, by virtue of the powers vested in His Majesty under the Foreign Jurisdiction Act or otherwise, ordered that all rights in any land in the said territory not being land set apart and demarcated by the authority of the High Commissioner for the sole and exclusive occupation of the natives, and proclaimed as Crown lands, and also in any land within the territory lawfully transferred to or expropriated by the High Commissioner in exercise of the powers vested in him by proclamation or otherwise for the peace, order, and good government of the territory, should vest in and be exercised by the

High Commissioner, who might make grants or leases of such lands.

By proclamation of the High Commissioner made on 16th March, 1917, certain areas were proclaimed as Crown lands, and among these areas was a portion of the lands included in the Unallotted Lands Concession of 1889. This had been in 1908 expropriated by notice given by the High Commissioner under the powers vested in the Governor of the Transvaal by the Order in Council of 25th June, 1903, the exercise of which he had provided for by Swaziland Proclamation No. 3 of 1904. Under a Crown grant of 16th March, 1917, the High Commissioner granted to the second respondents a part of the land subject to the concession and now in dispute, as compensation for lands which they had relinquished in his favour. By proclamation promulgated on the same date the High Commissioner had proclaimed to be Crown land the portion of the unallotted land included in the original Unallotted Lands Concession, and this portion included the land granted as compensation to the second respondents and now in dispute.

The principles of constitutional law laid down in the earlier part of their Lordships' judgment render it in their opinion impossible to maintain the argument submitted for the appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and those which it acquired by the conquest of the South African Republic. The limitation in the convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. But if this be true it makes an end of the appellant's case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had therefore full power to make the Crown Grant of 16th March, 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an Act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the question involved is concerned with constitutional issues and is of far-reaching public interest, they will advise, following precedents in other cases, that there should be no costs of the appeal.

In the Privy Council.

SOBHUZA II

v.

ALLISTER M. MILLER AND OTHERS.

DELIVERED BY VISCOUNT HALDANE.

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