



IN THE HIGH COURT OF SWAZILAND

Civil case No: 40/2013

In the matter between:

MUZI SHONGWE

APPLICANT

AND

ISABELLA KATAMZI

FIRST RESPONDENT

(Born Shongwe)

THE MASTER OF THE HIGH COURT

SECOND RESPONDENT

Neutral citation:

Muzi Shongwe v. Isabella Katamzi (Born Shongwe) (40/2013)
[2013] SZHC168 (2013) 8 August 2013

Coram:

M.C.B. MAPHALALA, J

Summary

Swazi Law and Custom – dispute over the ownership of Swazi Nation Land – held that the High Court has no jurisdiction to entertain such a matter – held further that such jurisdiction vests in the Chief’s Inner Council as well as Swazi Courts – application accordingly dismissed with costs.

JUDGMENT
8 AUGUST 2013

- [1] This is an urgent application brought ex-parte for a rule nisi to issue interdicting and restraining the first respondent from invading , ploughing and/or taking over fields which are owned and in the lawful possession of the applicant at a homestead called Pholela situated at Ludzeludze area in the Manzini region.
- [2] The applicant sought that the rule nisi operates with immediate effect as an interim order pending finalisation of the application. However, when the matter first appeared in Court on the 17th January 2013, this Court refused to issue the *rule nisi* and directed that the matter be heard as an ordinary application on the 9th April 2013.
- [3] The applicant contends that he is the adoptive child of Jessy Shongwe and Musa Nicholas Shongwe; and, that his adoptive parents further adopted Nomvula Shongwe as their child. Their parents did not have natural children of their own since their marriage did not bear any children. The adoptions were done in terms of Swazi law and Custom.
- [4] The applicant's adoptive father died in 1992 and his adoptive mother died in 1999. The applicant contends that her mother died leaving a will in which he was the heir. He further contends that on the death of his father, his paternal grandfather Bartholomew Bhuduya Shongwe who died in 1995 had field an

inventory in which he had listed the disputed homestead. His mother was appointed the Executive Dative in the estate of the applicant's father.

[5] The applicant contends that the disputed homestead was constructed by his father with thirty-one units which were leased to tenants. On the death of his father, his mother took over the control of the disputed homestead and further collected the rentals. He argues that in July 1994, her mother filed a Liquidation and Distribution Account of his father's estate with the second respondent; the account shows that the Pholela homestead devolves around his mother, Nomvula Shongwe and himself. The Account was advertised in the Government Gazette as well as the Times Newspaper on the 15th July 1994. The applicant argues that the advertisements occurred during the lifetime of Bartholomew Bhuduya Shongwe.

[6] The applicant further alleges that on the death of his mother, Nomvula Shongwe took control of Pholela homestead and collected rentals up to now. He contends that he has since received a report that the first respondent is ploughing fields at Pholela homestead and erecting fences around the homestead. He found the first respondent on site and she told him that the land belongs to her deceased father Bartholomew Bhuduya Shongwe, the applicant's grandfather; she is alleged to have told the applicant that she was now taking control over the land.

- [7] He contends that Nomvula Shongwe now lives in South Africa where she is married, and, that she is employed in Johannesburg; hence, it has been difficult for him to join her in the proceedings. He further contends that since his mother died thirteen years ago, he has been in control of the homestead.
- [8] The first respondent has filed an answering affidavit opposing the application. As a background to the matter, she contends that the applicant's father and herself are biological children of Bartholomew Bhuduya Shongwe, also called B.B. Shongwe; and, that her parents obtained the land through Swazi law and Custom from the Zombodze uMphakatsi in 1934. Her father built a residential house and a number of houses for renting out to tenants. She was advised by her father that her brother Musa Shongwe only built a 'Goods' Shed' which he used to show movies to the community at a fee; and, that he was instructed to collect rental on behalf of Bartholomew Shongwe until he died. Upon the death of applicant's father, Jessy Shongwe requested from B.B. Shongwe to collect the rental in order to pay debts incurred by applicant's father.
- [9] She contends that after sometime Jessie Shongwe claimed ownership of the homestead and instructed Mshayisa to collect rent on her behalf. She contends that her father was not happy with Jessy's claim, and, he lodged a complaint against her at Zombodze Royal Kraal; and that she accompanied her father to the Royal Kraal whenever the matter was deliberated.

- [10] She has raised certain Points in *Limine*. Firstly, that she pursued the matter until the Zombodze Royal Kraal made a Ruling that the land in question belongs to her father; the Royal Kraal further ruled that Mshayisa should vacate the homestead and stop collecting the rentals from tenants. She annexes a copy of a letter from the Zombodze Royal Kraal confirming this Ruling.
- [11] Secondly, she argues that this Court has no jurisdiction to entertain this matter in as much as the matter involves a ‘Swazi area’ in which Swazi law and Custom is applicable. Thirdly, that there are disputes of fact in the matter on the ownership of the Pholela homestead; she refers to a letter written by her attorney dated 7th May 2002 advising applicant’s attorney that ownership of the land is in dispute.
- [12] The first respondent further argues, in *limine*, that the matter is *lis pendis* on the basis that the applicant lodged a complaint against her at Emphelaphi Royal Kraal in January 2013 in respect of the land in question. She argues that she has approached Indvuna Morris Thwala about the matter, and, he has confirmed that he was aware that the matter was heard and finalized by the Zombodze Royal Kraal. However, he advised that the matter would be heard again on the basis of the current complaint filed by the applicant. She has annexed a copy of a letter from the Royal Kraal confirming that the matter is pending before the Chief’s Inner Council.

[13] On the merits she denies that the alleged inventory annexed herein was filed by her father; she argues that it was filed by Jessy Shongwe. She further denies that the Pholela homestead was constructed by her brother Musa Shongwe; she reiterates that the homestead was constructed by her father B.B. Shongwe. She contends that in terms of Swazi law and Custom, the land devolves upon his children and not grandchildren such as the applicant. She argues that the inclusion of the Pholela homestead in the inventory of her brother's Estate was misleading since he was not the owner of the property. She contends that she has no interest in collecting rentals but that she is utilising a portion of the land which is lying idle. She further contends that the second respondent has not approved the Liquidation and Distribution Account of the Estate of Musa Shongwe.

[14] The applicant has filed a replying affidavit stating that the first respondent is no longer part of the Shongwe family because she was married and that she cannot have land rights in terms of Swazi law and Custom. However, he does not deny that the matter was deliberated and finalized by the Zombodze Royal Kraal.

[15] Annexed to this application is an application lodged by Jessy Shongwe against Bartholomew Bhuduya Shongwe High Court Civil Trial No. 17/1993; the said application was opposed. The applicant was seeking an order interdicting and restraining the respondent from interfering with the applicant's control and

administration of the Pholela homestead. However, this application was never finalized during the lifetime of the parties. Both parties at the time claimed ownership of the land, B.B. Shongwe claiming that he obtained the land from the Zombodze Royal Kraal in 1934 in terms of Swazi law and Custom; Jessy Shongwe was claiming that the land belongs to her husband Musa Shongwe. However, Jessy did not say how her husband obtained the land.

[16] It is apparent from the evidence that the cause of action relates to a dispute over the ownership of land situated in a Swazi Area. I had occasion to deal with this issue at length in the case of *Maziya Ntombi v. Ndzimandze Thembinkosi* Civil Appeal No. 2 of 2012. Suffice to say that it is a trite principle of our law that the High Court has no jurisdiction over land disputes in a Swazi Area; such disputes are determined by the Chief's Inner Council or a Competent Authority as defined under the Swazi Administration Amendment Act No. 6 of 1979. A decision of the Chief's Inner Council or Competent Authority is appealable to the Swazi Courts as established in terms of the Swazi Courts Act No. 80 of 1950. A decision of the Swazi Courts is in turn appealable to the High Court and Supreme Court respectively.

[17] The Chief's Inner Council or the Inner Council of a Competent Authority applies Swazi law and Custom as does the Swazi Courts. Section 252 of the Constitution recognises and adopts Swazi law and Custom as part of the law of Swaziland, in addition to the Roman-Dutch Common Law; it is applied to the

extent that it is not inconsistent with a provision of the Constitution or a Statute or repugnant to natural justice or morality or the general principles of humanity.

[18] Similarly, section 139 of the Constitution recognises Swazi Courts as forming part of the judiciary. Section 139 (1) of the Constitution provides:

“139. (1) The Judiciary consists of-

(a) the Superior Court of Judicature comprising-

(i) The Supreme Court, and

(ii) The High Court;

(b) Such specialised, subordinate and Swazi Courts or tribunals

exercising a judicial function as Parliament may by law establish.”

[19] At paragraphs 19 and 20 of *Maziya Ntombi v. Ndzimandze Thembikosi* (supra),

I had this to say:

“ ‘19. Section 151 (3) of the Constitution of Swaziland provides the following:

151. (3) notwithstanding the provisions of subsection (1), the High Court –

....

(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.’

20. I wish to refer to the warning made by *Ramodibedi CJ* in the matter between the *Commissioner of Police and Attorney General v. Mkhondvo Aaron Maseko* Civil Appeal No. 3/2011 at page 2

paragraphs 1 and 2 where the learned Chief Justice said the following:

- “1. This appeal illustrates the problem of a conflict of laws in this country, a conflict which unless properly managed in a responsible manner and with due respect to both systems of our law, may soon throw our justice system into disarray. This conflict ...is between Roman Dutch Common Law on the one hand and Swazi Customary Law on the other hand.**
- 2. ...I consider that there is a fundamental need for the Courts in this country to make a proper choice of law in matters coming before them. Put differently, it is wrong, if not downright insensitive for any Court in this country to apply Roman-Dutch law in a case which cries out for Swazi Law and Custom.’ ”**

[20] Section 11 of the Swazi Courts Act No. 80 of 1950 provides the following:

- “ 11. Subject to the provisions of this Act, a Swazi Court shall administer-**
- (a) The Swazi Law and Custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;**
 - (b) The provisions of all rules or orders made by the iNgunyama or a Chief under the Swazi Administration Act No. 79 of 1950 or any law repealing or replacing the same and in force within the area of jurisdiction of the Court;**
 - (c) The provisions of any law which the Court is, by or under such law authorised to administer. ”**

[21] The first respondent contends that the matter is ‘*lis pendens*’ before the Zombodze Royal Kraal; she attaches annexure ‘BT4’, being a confirmatory

letter from the Royal Kraal dated 21st January 2013 signed by the Public Relations Officer S.D.Z. Mtsetfwa on behalf of the Chief. Similarly, the first respondent has attached annexure 'BTZ' where the Zombodze Royal Kraal confirms that the dispute was heard and determined; and, that a Ruling was made that the land belongs to B.B. Shongwe; and furthermore, that Mshayisa should vacate the Pholela homestead. It is open to the applicant to appeal the decision of the Zombodze Royal Kraal to the Swazi Courts. Whatever disputes exist in this matter, they would be resolved in the Swazi Courts.

[22] Accordingly the application is dismissed with costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant Attorney S. C. Dlamini

For First Respondent Attorney D. Jele