



IN THE HIGH COURT OF SWAZILAND

Civil case No: 2131/12

In the matter between:

INDVUNA WILSON MAVIMBELA NO

APPLICANT

AND

PETROS DVUBA

FIRST RESPONDENT

LUKE MOTSA

SECOND RESPONDENT

WILLIAM DLAMINI

THIRD RESPONDENT

JABULANI DVUBA

FOURTH RESPONDENT

MJAHEZITHENI DVUBA

FIFTH RESPONDENT

BONIFACE DLAMINI

SIXTH RESPONDENT

Neutral citation:

Indvuna Wilson Mavimbela v. Petros Dvuba & 5 Others
(2131/12) [2013] SZHC173 (9 August 2013)

Coram:

M.C.B. MAPHALALA, J

Summary

Swazi Law and Custom – dispute over boundaries between Ezulwini chiefdom and Mpolonjeni chiefdom – held that boundary disputes between Chiefs over a Swazi Area are determined by iNgcwenyama In-Council – held further that the requisites for an interim interdict have been established – application granted with costs.

JUDGMENT
9 AUGUST 2013

- [1] This is an urgent application for an order interdicting and restraining the respondents or anyone acting under their authority from posing as rightful authorities of Ehini, also referred to as Engcobingeni. The applicant further sought an order interdicting and restraining the respondents or anyone acting under their authority from allocating land to new settlers at Ehini. Similarly, the applicant sought an order interdicting and restraining the respondents or anyone acting under their authority from calling community meetings at Ehini.
- [2] When the matter was first heard in Court, the applicant sought a *rule nisi* to issue to operate with immediate effect as an interim relief in respect of the orders sought pending finalisation of the application. However, this Court was reluctant to issue a *rule nisi*; hence, the respondents made an undertaking that they would not allocate land to new settlers at Ehini pending finalisation of the application.
- [3] The applicant contends that he is the Chief's headman of Ezulwini uMphakatsi (i.e. Chief's Kraal) which controls areas such as Ezulwini, eBuka, Mantabeni, eMvutjini and Ehini. It is common cause that the Ezulwini uMphakatsi is under the jurisdiction of Lidvuna Sifiso Mashampu Khumalo. The applicant contends that the first respondent resides at Mpolonjeni area in Mbabane and that he is the person allocating land and calling community meetings at Ehini area, and, further posing as the rightful authority of the area. The applicant

alleges that the other respondents are residents of Ehini area under Ezulwini uMphakatsi, and, that they are acting in cohort with the first respondent.

- [4] The applicant further contends that Ezulwini uMphakatsi is the King's Residence headed by Lidvuna (i.e. Governor), and, that it was not an ordinary uMphakatsi administered by a Chief. He contends that this matter relates to a dispute over the jurisdiction of Ehini area which falls under Mvutjini, one of the areas controlled by Ezulwini uMphakatsi. He contends that sometime back, the Governor of Ezulwini Umphakatsi allocated land at Ehini to the forefathers of the applicant, the Dvuba clan who were originally from Mpolonjeni area in Siteki; the Dvuba clan, are the herders of cattle belonging to Ingwenyama.
- [5] The applicant alleges that at one stage Mboziswa Dvuba, now deceased, started assuming the role of Chief in the area and began allocating land and performing other duties of a Chief. The Governor of Ezulwini Umphakatsi, Mafelenkhosini Khumalo, now deceased, took the matter with the Hhohho Regional Administrator as well as the King's Liaison Officer for the Hhohho Region. A meeting was subsequently held where the late Mboziswa Dvuba conceded that he was not a Chief of Ehini area or any area; he apologised for his actions

[6] The applicant alleges that at one stage the first respondent was summoned to Ludzidzini Royal Residence by the late Governor of Ezulwini uMphakatsi Mafelenkhosini Khumalo and Chief Zembe Dvuba, the leader of the Dvuba clan at Mpolonjeni area in Mbabane and Mpolonjeni area in Siteki. The first respondent was advised to desist from posing as a Chief of Ehini area. The other respondents claim that they constitute the Chief's Inner Council under the first respondent.

[7] The applicant further contends that the respondents have now established an illegal uMphakatsi or Chief's kraal in the disputed area and named it Ehini Royal Kraal; and, that the first respondent together with the other respondents are allocating land to new settlers, holding community meetings and performing all functions of a chief. He contends that part of the affected land was lawfully allocated by the Ezulwini uMphakatsi to the Swaziland Electricity Company to settle people who were affected by the construction of Mnyamatsini Power Station and Lumphohlo dam at Ehini.

[8] The application is opposed by the respondents; and, the first respondent has deposed to an answering affidavit in which he states that he is the Chief of Mpolonjeni area in Mbabane. In *limine* he contends that the matter is fraught with a litany of disputes of fact, and, that it cannot be resolved on affidavit; however, he does not state the nature of the disputes of fact save to state that they are apparent from the answering affidavit. Furthermore, he argues in

limine, that the applicant has failed to establish a clear right to the order sought since his claim over Ehini area is being challenged. He further argues that the Governor of Ezulwini uMphakatsi is in a similar position since he would not have a clear right to claim jurisdiction over the disputed area.

- [9] The first respondent contends that the applicant has an alternative remedy of instituting these proceedings before the Traditional Structures with jurisdiction. He further argues that the applicant has no direct and substantial interest in the matter and that he should have joined the Governor of Ezulwini uMphakatsi. He also contends that the jurisdiction of this Court is excluded by the Constitution since the effect of the application is to remove the first respondent as the rightful Chief of Ehini Royal Kraal.
- [10] On the merits the first respondent contends that Mvutjini area does not fall under the jurisdiction of Ezulwini uMphakatsi but under the Mpolonjeni Royal Kraal which is under his jurisdiction. He argues that the Dvuba clan was allocated the land by King Mbandzeni and they established their Royal Kraal at Ehini area. He denies that the land was allocated to the Dvuba Clan by the Governor of Ezulwini uMphakatsi. He further contends that the Dvuba clan was assigned by King Mbandzeni to herd his cattle under the supervision of Jabulani Dvuba. He denies that the Dvuba clan at Mvutjini area pay allegiance to the Ezulwini uMphakatsi as alleged but at Ehini Royal Kraal.

[11] The first respondent denies that the Hhohho Regional Administrator and the King's Liaison Officer for the Hhohho Region made a Ruling that the disputed area falls under Ezulwini uMphakatsi or that Mboziswa Dvuba apologised for extending his jurisdiction to the disputed area. The first respondent contends that the Ruling was that Mboziswa Dvuba should not extend his control beyond Mvutjini area and that Ezulwini uMphakatsi should not extend its control beyond Ezulwini area pending further deliberations on the boundary dispute between the two traditional authorities. He contends that Ezulwini uMphakatsi is defying the said Order and encroaching on land under his jurisdiction. He further contends that it is within his rights to allocate land to new settlers because the land falls under his jurisdiction.

[12] In his replying affidavit the applicant denies that the first respondent is a Chief of Mpolonjeni Area or at all and puts him to the proof thereof. He further contends that he is merely seeking an interim order interdicting the respondents from allocating land at Ehini Area pending resolution of the dispute before the Traditional Structures. He contends that it is settled law that temporary interdicts are always claimed by way of application proceedings despite the existence of disputes of fact.

[13] The applicant further contends that he is duly entitled to bring the application as the Chief's headman; and, that he is in charge of the day to day running of the area with the Chief's Inner Council on behalf of the Governor of Ezulwini

Umphakatsi. He contends that the Governor is always busy with Traditional assignments. He further contends that he does not need not to establish a clear right but a *prima facie* right suffices even if it is open to doubt.

[14] He denies that the application seeks to remove the first respondent as Chief of the disputed area. He argues that the application relates to a boundary dispute between the two traditional authorities. He avers that the appointment and removal of chiefs is a preserve of iNgunyama, and, that the jurisdiction of this Court is excluded. He concedes that the Traditional Structures have jurisdiction to determine the boundary dispute between the parties.

[15] The application seeks an interim order restraining the respondents from allocating land to new settlers at Ehini Area pending the determination by Traditional Structures of the boundary dispute between the two chiefdoms. For this reason, this matter does not fall within the ambit of section 151 of the Constitution in so far as it does not relate to the appointment, revocation or suspension of a Chief, which matters are governed by Swazi law and Custom; however, it is trite that disputes over Swazi Nation land falls to be determined in terms of Swazi law and Custom by Traditional Structures.

[16] It is trite law that a final interdict requires a clear right and an interim interdict requires a 'prima facie right'. The phrase '*prima facie* right' is defined as a right which though *prima facie* established is open to some doubt. In addition

an interim interdict requires a well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing his right; that a balance of convenience favours the granting of interim relief; and, that the applicant has no other satisfactory remedy.

See *Mahlobo Edmund Dlamini and Siphon Samson Tsabedze v. Chief Hayindi Dlamini* High Court Civil Case No. 4633/10; *Setlogelo v. Setlogelo* 1914 AD 221 at 227; *Ericksen Motors (Welkom) Ltd v. Protea Motors Warrenton & Another* 1973 (3) SA 685 (AD) at 691.

[17] The respondents do not dispute that they are currently allocating new settlements on the disputed area. Furthermore, they do not deny that the land is in dispute with the Ezulwini Umphakatsi, and, that such a dispute has been ongoing for a long time. If the interim order is refused, the respondents will continue settling new homesteads on the disputed land; and, the applicant will have no relief if the Traditional Structures subsequently rule in his favour. It is apparent from the papers before Court that the respondents do not dispute the allegations by the applicant that certain homesteads were moved from the disputed land to give way to the construction of the Luphohlo dam project.

[18] In the *Mahlobo* case (supra) at para 23, I had occasion to say the following:

“23. It is trite law that an interim interdict should be granted as long as there are prospects of success in the claim for final relief and the

other three essentials are established. In deciding whether to grant an interim interdict when a prima facie right and reasonable apprehension of irreparable injury have been established, the Court will take into account the balance of convenience or fairness between the parties. The Court weighs up the likely prejudice to the Applicant if the interim interdict is refused and the refusal is later shown to have been wrong against the likely prejudice to the respondent. If the interim interdict is granted and this is later shown to have been wrong. Similarly, the Court must also have regard to applicant's prospects of ultimate success. The stronger the applicant's prospects of success, the less the need for the balance of convenience to favour the applicant."

[19] The first respondent argues, in *limine*, that the application is fraught with disputes of fact which cannot be resolved on affidavit. Again in the Mahlobo case (*supra*), I had this to say:

"25. It is settled law that temporary interdicts are always claimed by way of application proceedings and will be granted despite the existence of a dispute of fact provided that the applicant has established the other requirements and that the balance of convenience is in the applicant's favour. It is only when a final interdict is sought that the application cannot be granted in the face of real, genuine, material or *bona fide* disputes of fact."

[20] The cause of action in this matter relates to a boundary dispute between two chiefdoms. Section 213 of the Constitution provides that all land including existing concessions, save privately held title-deed land vests in iNgwenyama in trust for the Swazi Nation. Save for existing concessions, the land entrusted

to iNqwenyama is referred to as a ‘Swazi area’; and, it is this land which is administered by the chiefs on behalf of iNqwenyama.

[21] In *Sandile Hadebe v. Sifiso Khumalo NO and three Others* High Court Civil case No. 2623/2011 at para. 70, I had occasion to state the following:

“70. The definition section of the Swazi Administration Amendment Act No. 6 of 1979 defines a “Swazi area” as any area of land so defined in the definition of Swazi areas Act No. 41 of 1916 or any other area of land held by iNqwenyama in trust for the Swazi Nation. Section 2 of the Definition of Swazi Areas Act No. 41 of 1916 defines a Swazi Area as one which has been set aside for the sole and exclusive use and occupation of the Swazi Nation.”

[22] At para 54 and 55 of the *Sandile Hadebe* case (supra), I had this to say:

“54 Section 233 of the Constitution provides that Chiefs are the footstool of iNqwenyama and that he rules through Chiefs; they are appointed by iNqwenyama to administer specific and particular areas. Every Chief has an administrative centre called Umphakatsi or Chief’s residence. In the exercise of his powers, functions and duties of his office, a Chief enforces a custom, tradition, practice or usage which is just and not discriminatory....

55. Section 6 of the Swazi Administration Act No. 79 of 1950 provides that the duties of every Chief is to maintain order and good government over Swazis residing in the area over which his authority extends in accordance with the Act, in addition to powers vested in him by any other law or by Swazi law and Custom which is not inconsistent with any other law. In addition, in terms of Swazi law and Custom, the Chief acting on the advice

of his Inner Council has power to allocate land by means of “kukhonta Custom” to Swazis from other chiefdoms who wish to reside in his area.”

See also the case of *Nomsa Phindile Dlamini and 288 Others v. Phophonyane Maziya and three Others* High Court Civil Case No. 4048/2010; *Ngangenyoni Dlamini and Another v. Themba Dlamini and Seven Others* High Court Civil Case No. 2121/2009 (B).

22.1 The *Sandile Hadebe* case (supra) was confirmed on appeal by the Supreme Court in *Sandile Hadebe v. Sifiso Khumalo NO and three Others* Civil Appeal case No. 25/2012.

[23] Boundary disputes between Chiefs are determined by iNgwenyama in Libandla (i.e. In Council). This is the same Council which advises the iNgwenyama on the appointment of Chiefs. When a Chief is appointed the area of jurisdiction is expressly mentioned in the Notice of Appointment. When a dispute arises in respect of the boundaries, it is the iNgwenyama in-Council who determines the dispute.

[24] Sections 3 and 4 of the The Swazi Administration Act No. 79 of 1950 provides the following:

“3. The iNgwenyama and his Libandla shall exercise the powers conferred

upon them under this Act according to Swazi Law and Custom and the area of their authority shall extend over the whole of Swaziland.

4. (1) The iNgwenyama in Libandla may by order appoint any person to be a Chief for any specified area or areas in Swaziland.”

[25] Boundary disputes between Chiefs are reported to the Ludzidzini Committee which advises the iNdlovukazi and is chaired by the Governor of Ludzidzini Royal Residence; this Royal Residence is the home to iNdlovukazi as well as the administrative capital of the Swazi Traditional Government. An appeal from this Committee lies to iNgwenyama at the Lozitha Royal Residence; the iNgwenyama in determining the dispute is advised by Liqoqo which is the King’s Advisory Council in accordance with section 231 of the Constitution.

[26] Sections 13 and 231 provide the following:

“13. (1) There shall be the King’s Advisory Council composed and constituted as Liqoqo under section 231.

(2) The function of the Council shall be to advise the King and iNgwenyama as provided for under Section 231.

....

231. (1) The Liqoqo is an advisory council whose members are appointed by iNgwenyama from the membership of bantfwabenkhosi (emalangen), tikhulu (chiefs) and persons who have distinguished themselves in the service of the Nation.

(2) Where necessary the members of liqoqo may be appointed by the iNdlovukazi as Queen Regent.

(3) Liqoqo traditionally advises iNgwenyama on disputes in connection with the selection of tikhulu (chiefs), boundaries of chiefdoms and any other matter iNgwenyama may assign for their advice in confidence.”

[27] I am satisfied that the applicant has satisfied the requirements of an interim interdict. Accordingly, the following order is made:

1. Pending the finalization of the land dispute between the parties over Ehini/Engcobingeni area by the iNgwenyama:
 - (a) The respondents or anyone acting under their authority are hereby interdicted and restrained from posing as rightful authorities of Ehini/Engcobingeni area.
 - (b) The respondents or anyone acting under their authority are hereby interdicted and restrained from allocating land to new settlers at Ehini/Engcobingeni area.
 - (c) The respondents or anyone acting under their authority are hereby interdicted and restrained from calling meetings of the community of Ehini/Engcobingeni area.
2. The respondents are directed to pay costs of suit.

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

For Applicant T.L. Dlamini (Attorney General's Chambers)
For Respondent Attorney M. Mkhwanazi