



IN THE HIGH COURT OF SWAZILAND

Case No: 756/2012

In the matter between:

MKHULU KHANYILE

APPLICANT

AND

ALLISON NSINGWANE

FIRST RESPONDENT

RANDY NSINGWANE

SECOND RESPONDENT

MANDLA NSINGWANE

THIRD RESPONDENT

Neutral citation:

Mkhulu Khanyile v. Allison Nsingwane and Two Others
(756/2012) [2014] SZHC67 (3 April 2014)

Coram:

M.C.B. MAPHALALA, J

Summary

Civil Procedure – Swazi Law and Custom – held that the High Court no original jurisdiction over matters dealing with Swazi Law and Custom in terms of section 151 (3) of the Constitution – held further that the High Court has review and appellate jurisdiction in matters of Swazi Law and Custom – application dismissed with costs.

JUDGMENT
3 APRIL 2014

- [1] An urgent application was lodged for an order interdicting and restraining the respondents and/or their agents from erecting any structure, fencing the portion of land in dispute allegedly belonging to applicant's family as if it belonged to them; they further sought an order committing the respondents to Sidvashini Remand Centre for thirty days in the event that they breached the order for an interdict. They also sought an order for costs of suit. A *rule nisi* was subsequently issued in respect of the interdict.
- [2] The applicant resides at Ndlalambi chiefdom in the Hhohho region. He contends that in September 2011, the respondents came to his area and fenced a piece of land belonging to his family without their consent. After reporting the matter to the Umphakatsi, the fence was subsequently removed in March 2012 at the instance of his chief and placed at the Umphakatsi. The applicant further states that on the 18th April 2012, the respondents again started clearing the land for purposes of construction.
- [3] The applicant alleges that the respondents are from Mhlangatane chiefdom and not Ndlalambi. The application is supported by the Ndlalambi Umphakatsi. Mathoma Dlamini, a senior member of the Inner Council of Ludzibini Royal Kraal under Prince Magudvulela Dlamini, has deposed to a confirmatory affidavit on behalf of the Chief's Inner Council. He contends

that the land in dispute falls under their jurisdiction. He argued that the conduct of the respondents were both unlawful and contemptuous of the authority of the Traditional Authority of Ndlalambi area. The respondents deny that they are residents of Mhlangatane but Ndlalambi; they only concede that their grandmother LaMakhabane was originally from Mhlangatane but eventually khontaed at Ndlalambi area.

- [4] The respondents contend that this Court has no jurisdiction to hear and determine this matter; however, they do not state the basis for their contention. The respondents allege that the land was allocated to them by the Mkhuzweni Royal Kraal on the 17th May 2011 for business purposes. They annex a letter written by the Secretary of the Chief's Inner Council of Mkhuzweni Royal Kraal to the Swazi Commercial Amadoda seeking that the respondents be allocated land for business purposes at Mkhuzweni. They further attach a consent letter from the Swazi Commercial Amadoda signed by the Chief of Mkhuzweni as well as the Regional Administrator for the Hhohho region. To that extent the respondents argued that Prince Magudvulela Dlamini has no authority over the land in dispute and that the land falls under the jurisdiction of the Ndlalambi Chiefdom which inturn falls under Mkhuzweni Chiefdom. They contend that Prince Magudvulela has subjects residing at Ndlalambi. They argued that Ndlalambi was under

the late Chief Gija, and, that the Indvuna of the area, Mangomeni Ndzimandze, is the acting Chief.

[5] In as much as they deny having consultations with Prince Magudvulela on the land in dispute, they concede that Prince Magudvulela's Inner Council led by Matfomo Dlamini confronted them about the land, and, they directed them to the Umphakatsi of Mkhuzweni. It is interesting to note that the respondents whilst conceding that Ludzibini area is under the chieftaincy of Prince Magudvulela, they argued that Ludzibini is not an Umphakatsi but falls under Ndlalambi Umphakatsi which inturn falls under the jurisdiction of Mkhuzweni Umphakatsi.

[6] Lozimpisi Dlamini, the acting Chief of Mkhuzweni area since 2002 after the death of Prince Majahane Dlamini, has filed a confirmatory affidavit stating that the land in dispute was allocated by the Chief's Inner Council to the second and third respondents. He further stated that the applicant has no right to the land in dispute. He denies knowledge of Matfomo Dlamini of Ludzibini but stated that Ludzibini accounts to Mkhuzweni Royal Kraal, and that it has no jurisdiction over Ndlalambi area.

[7] Similarly, Khabukhabu Dlamini has deposed to a confirmatory affidavit, and, he described himself as an adult male of Nhlalabantfu area under Mkhuzweni chiefdom. He contends that he is the chairman of Imisumpe of Nhlalabantfu. The “imisumpe” refers to people who are appointed by the chief and their function is to ascertain that land under a chief is properly utilized with people settled on the non-arable land and that arable land is reserved for farming. Generally, they advise the Chief on the rezoning of land for cattle grazing, farming and business establishments.

[8] In his confirmatory affidavit, Khabukhabu Dlamini confirmed that the second and third respondents were allocated the land in dispute to conduct business by the Umphakatsi of Mkhuzweni Royal Kraal. He contends that Dumsani Dlamini is Indvuna of Ludzibini which is under the jurisdiction of Mkhuzweni Umphakatsi. He further contends that Prince Magudvulela is the Chief of Ntfonjeni area and that he has no jurisdiction over Ndlalambi area. Similarly, Elias Lofana Matfunjwa of Mkhuzweni area has deposed to a confirmatory affidavit stating that he is Umsumpe (i.e. singular word for imisumpe) of Ndlalambi area, and, that he accompanied the second and third respondents to Mkhuzweni Umphakatsi seeking land to establish a business. He further confirmed that the Umphakatsi allocated the land in

dispute to the second and third respondents. He denies that the applicant has any right to the land in dispute.

- [9] It is apparent from the evidence that this matter involves a dispute over land situated in a Swazi area. This matter falls exclusively within the preserve of Swazi Law and custom; hence, this Court has no jurisdiction to entertain the matter. This is a matter to be determined by the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. This Court can only hear and determine this matter on review or appeal from the Swazi Courts. Where the dispute is between two residents of the Chiefdom, the matter is determined by the Umphakatsi and the decision is subject to review or appeal to this Court. Where however, the dispute involves parties from two or more chiefdoms, the matter is determined by the Swazi Courts as the Court of first instance. Where the parties involved in the land dispute are Chiefs, the matter is dealt with by the Ludzidzini Committee as a boundary dispute between the chiefdoms; a report is subsequently made for the advice of the Ingwenyama who makes a final decision.

See the cases of *Muzi Shongwe v. Isabella Katamzi and the Master of the High Court* Civil case No. 40/2013; *Michel Mungama Mahlalela v. Mirriam Tjengisile Dlamini and Two Others* High Court cases No.

17/2013; *Sandile Hadebe v. Sifiso Khumalo NO and three Others* High Court Civil Case No. 2623/2011; *Maziya Ntombi v. Ndzimandze Thembinkosi* Appeal Case No. 2/2012; *Commissioner of Police and Attorney General v. Mkhondvo Aaron Masuku* Civil Appeal No. 3/2011.

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

“11. Subject to the provisions this Act, a Swazi Court shall administer

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- (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 iNqwenyama 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.”**

[11] The Supreme Court in the case of *Maziya Ntombi v. Ndzimandze Thembinkosi* (supra), emphasized that it is a trite principle of our law that the High Court has no jurisdiction over land disputes in a Swazi area. When giving judgment, I emphasised that 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. Such a decision is appealable to the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. A decision of the Chief's Inner Council and that of the Competent Authority are both reviewable and appealable to the High Court in terms of the Swazi Court Act as well as the Constitution.

[12] Section 151 (3) of the Constitution 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.”

[13] The Constitution further recognises and adopts Swazi Law and Custom as part of the law of Swaziland in addition to the Roman – Dutch Common law. Section 252 of the Constitution provides the following:

“252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced

as the Common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.

(2) Subject to the provisions of this Constitution, the principles of Swazi Customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.

(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may -

(a) provide for the proof and pleading of the rule of custom for any purpose;

(b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and

(c) provide for the resolution of conflicts of customs or conflicts of personal laws.”

[14] Having come to this conclusion, it is open to the applicant to approach the Chief’s Inner Council of Ndlalambi where all the parties are resident; and, if he is not successful, he is at liberty to approach the main Umphakatsi at Mkhuzweni Royal Kraal for a remedy. Whatever decision is made, it will be appealable to the Swazi Courts established in terms of Swazi Courts Act

No. 80 of 1950. As stated in the preceding paragraphs, a decision of the Swazi Courts is both reviewable and appealable to the High Court.

[15] Accordingly the following orders are made:

- (a) The *rule nisi* is hereby discharged.
- (b) The application is dismissed with costs on the ordinary scale.

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

For Applicant
For Respondents

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Attorney Ben Simelane