IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 237/17

MANGEDLA MDLULI **APPLICANT**

And

SIBHEBHU MDLULI **DEFENDANT**

Neutral citation: *Mangedla Mdluli vs Sibhebhu Mdluli &11 others (237/2017) SZHC [2017] 93 (17/05/2017)*

Coram: **S. A. NKOSI J.**

Heard: 20, 28 April 2017

Delivered: 17 May 2017

HEADNOTE

Application for Interdict - is the High Court the Court of first instance given the application of Section 7 and Section 11 of the Swazi Court Act 80/1950. The High Courts' jurisdiction is that as envisaged by Section 151 (3) (b) of the Constitution as read with Section 11 of the Swazi Court Act 80/1950 – it can only review or exercise appellate jurisdiction and is therefore not a court of first instance in matters requiring the administration of Swazi Law and Custom.

[1] This is a matter which was launched by the Applicant by way of motion dated the 17th February 2017 in which motion Applicant seeks the following orders: as against the 12 Respondents:

1. ***That dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.***
2. ***Condoning Applicants' non-compliance with the rules of Court.***
3. ***The First to Tenth Respondents and/or any person acting under their direction or instructions be hereby interdicted from convening and/or participating in a meeting scheduled to be held at the Vusweni South Umphakatsi (Maseyisini) on Sunday, 19th February 2017.***
4. ***The First to Tenth Respondents and /or any person acting under their direction or instruction be hereby***

interdicted from convening and/or participating in any meeting at the Vusweni South Umphakatsi (Maseyisini) and surrounding area which has not been authorized by the traditional structures of the Vusweni South Umphakatsi (Maseyisini) being "babe lomkhulu" and/or indvuna and/or through any other person duly acting on their behalf.

5. ***That the Eleventh Respondents be hereby ordered to do all that is necessary to keep the peace and ensure the immediate enforcement of the orders 3 and 4 as prayed for above.***
6. ***That Prayers 1, 2, 3, 4 and 5 operate with immediate and interim effect.***
7. ***That a Rule Nisi do hereby issue calling upon the Respondents to show cause on a date to be determined by the above Honourable Court why Prayers 1, 2, 3, 4 and 5 should not be made final.***
8. ***Cost of suit in the event of opposition thereto.***

[2] The matter was brought before this Court on the 17th February 2017 on an ex-parte basis. The Court, on that date, granted prayers 1 to 6. I can well resonate with the learned Judge on that occasion given that the matter did seem urgent and that there was the probability (on the papers) of a communal conflict developing as a result of the events described by the Applicant.

[3] Notwithstanding, after the Respondents were served with the motion, they employed the services of an Attorney and they filed their opposing papers on the 15th March 2017. By that time the order sought in terms of prayer 3 had become

academic and the operative prayers were and are 4 and 5 of the motion in terms of this ruling. The 1st to 10th Respondents having filed their opposing papers the matter appeared on the contested motion Court roll a number of times between the 3rd March 2017 and the 20th April 2017 when it was briefly argued before me. Each party having filed comprehensive heads of argument, it was thus left to the Court to come to a determination.

[4] The first material and important point of departure between the parties is the question of jurisdiction. The Respondents raised the issue of jurisdiction as a point ***in limine*** which simply translates as that this Court does not possess the necessary jurisdiction to hear this matter as the Court of first instance. Counsel for the Respondents argues that, in terms of Section 151 (3) and (8) of the constitution, this Court has no original jurisdiction but has review and appellate jurisdiction in a matter such as ***in casu***. The argument continues, that, in fact, this is a matter that is governed by Swazi Law and Custom and is thus the ambit of "traditional structures" which I take to mean the so called Swazi Courts and includes, in the hierarchical order of things, the all-important **"libandla leNdlovukati"** which is based at Ludzidzini.

[5] This is an important question which impacts directly on the jurisprudence of this Court with respect to interpreting the relevant clauses of the constitution and if necessary, the case law governing these issues. The obvious starting point must, of course, be the constitution which is the fundamental and primary source of our law. ***Counsel for the Respondents argues that in terms of section 151*** (3) and (8) this Court should not at this stage entertain the matter. The relevant sections read as follows:

> ***S. 151 (3) Notwithstanding the provisions of subsection (1), the High Court–***

(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;

(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.

151 (8) Notwithstanding subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of iNgwenyama; the office of iNdlovukazi (the Queen Mother); the authorisation of a person to perform the functions of Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the Libutfo (regimental) system, which matters shall continue to be governed by Swazi law and Custom..

[6] In terms of subsection (3) (b) ***prima facie*** the High Court has only ***"review"*** ,or ***"appellate"*** powers and cannot exercise original jurisdiction. However the qualification, is that this applies only to matters ***"in which a Swazi Court … has jurisdiction under any law for the time being in force"***

[7] Well, for our purposes, we are all aware that the Swazi Courts are governed by the Swazi Courts Acts No. 80 of 1950 which legislation is very much in force and currently governs these Courts. With regards to the civil jurisdiction of these Courts Section 7 of Act No. 80 of 1950 reads as follows:

"7) (1) Every Swazi Court shall exercise civil jurisdiction, to the extent set out in its warrant and subject to the provisions of this Act, over causes and matters in which all the parties are members of the Swazi nation and the defendant is ordinarily resident, or the cause of action shall have arisen, within the area of jurisdiction of the court.

(2) Notwithstanding anything contained in this or any other Act such jurisdiction shall be deemed to extend to the hearing and determination of suits for the recovery of civil debts due to the Government under the provisions of any law, where such jurisdiction has been expressly conferred upon Swazi Court under section 11."

[8] There is no doubt that this is a civil matter and thus ought to be governed by Section 7. On a proper construction, the wording in Section 7 seems to suggest that cases of the nature of this case are to be heard and determined by the Swazi Courts. The wording of Section 11 completes the picture as it confers the appropriate power to be exercised by the Swazi Courts. It reads as follows:

S. 11 "subject to the provisions of this Act a Swazi shall administer –

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.

(a) the provisions of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79/50 or any law repealing or replacing the same, and in force within the area of jurisdiction of the Court;

(b) the provisions of any which the Court is by or under such law authorized to administer. (Amended L.34/1996.)"

[9] The wording in the preamble and sub-section (a) clears one of any doubt as to the correct manner in which to deal with this matter. It is the Swazi Court as the Court of 1st instance which endowed with the jurisdictional power to hear this matter. This Court can only came in at later stage. Further scrutiny of the Act

compliments and cement the dictates of section 151 (3) (b) of the constitution. Section 33 of Act 80 of 1950 clearly stipulates the stages through which a matter may be brought before the High Court on appeal. Also the only manner under which the High Court may hear and determine a matter such as this one directly from an ordinary Swazi Court, would be on review in terms of Section 151 (3) (b) of the constitution.

[10] Having carefully looked at the governing law and the merits of the motion, it becomes apparent that, in fact; there Applicant has not approached the right medium, ie, the Swazi Court, but has rather jumped the gun and approached this Court as a Court of first instance.

[11] As a precursor it would really be helpful if the provisions of the constitution would be elaborated upon by the executive initially and the legislature subsequently to give meaning to Sections 82 and 83 of the constitution. It seems to me that certain of these disputes should by law fall squarely onto the shoulders of the Regional Administrator for that Region, in conjunction with the Ludzidzini Libandla, particularly as loyalties within the Swazi Courts' structure at first instance may interfere with the necessary ambits of justice ie, impartiality, openness and fairness.

[12] Notwithstanding, under the circumstances I dismiss the application with costs.

S.A NKOSI J

JUDGE OF THE HIGH COURT

The Applicant : MR TENGBEH

For the Respondents : MR SITHOLE