

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No. 817/2021

**NTFOMBIYENKHOSI ROSEMARY HLATSHW
AYO**

Applicant

And

**TFOBHI RITA NXUMALO [Nee HLATSHW
AYO) ALFRED HLATSHWAYO**

1st Respondents

INDVUNA MPHATHAKAHLE J. DLAMINI

2nd Respondent

N.O NATIONAL COMMISSIONER OF POLICE

3rd Respondent

THE ATTORNEY GENERAL N.O

4th Respondent

5th Respondent

Neutral citation

***Ntfombiyenkhoosi Rosemary Hlatshtwayo v Tfbobhi Rita
Nxumalo Nee Hlatshwayo and Four Others (817/2021)
[2022] SZHC 105 (21" May, 2022)***

Coram

M. Dlamini J

Heard

. 16th April, 2022

Delivered

27th May, 2022

Jurisdiction -

Orders issued by Swazi courts or traditional structures;

... the Swazi or traditional courts are established in terms of the constitution. They derive their powers and authority from the constitution. Their decisions, pronouncements, orders and judgments therefore have the full force of the law. In brief, they do not need another court to give effect to their decisions. Once they have pronounced upon an order, that order has the full force for purposes of execution as it carries the full blunt of the law. [17]

Citation of 4th respondent or his subordinate in order to execute court orders:

There is therefore no justiciable ground for litigants in civil matters to seek orders against the 4th respondents or his subordinates in order to execute or assist the sheriff to execute orders either from the Swazi law and customs courts or common law courts. [19]

Summary: The applicant seeks to register orders issued by a traditional structure against the respondent for purposes of execution. The 1st and 2nd respondents' contention is that this court has no jurisdiction.

Genesis

[1] On the 2nd November 2019, the Zombodze Royal Kraal having deliberated on a Swazi Nation land dispute between the applicant and the 1st and 2nd respondents, found against the 1st and 2nd respondents. An appeal was lodged by the respondents before the King's Liaison officer who dismissed it. Several attempts were made to compel the 1st

and 2nd respondents to comply with the order to no avail. The 4th

respondent's assistance was sought. The 4th respondent insisted on an order by this court.

The Parties' Contentions

[2] The applicant approached this court for relief. She prayed as follows:

"J. That the decision issued by the Umphakatsi of the Zombodze Royal Kraal dated 2 November 2019 be and is hereby made an Order of this Court.

2. The 1st and 2nd Respondents and all those holding through or under them be and are hereby ejected from the Applicant's matrimonial home situate at Ngonini, Mfabantfu Area,

3. The 4th Respondent be and is hereby directed to assist the Deputy Sheriff in giving effect to Order 2 above.

4. Costs of suit in the event the Application is opposed".

[3] The respondent is strenuously opposed to the application on one main ground, viz.,

"3.

I am advised and verily accept that the Honourable Court lack the jurisdiction to hear and determine this matter on account of the fact that this is a dispute that arises on property situate in Swazi Nation Land [SNL]. It is trite in our law that the High Court has no inherent jurisdiction to hear and determine disputes that are governed by Swazi law and custom as a court of

*first instance save for review or appeal in terms of s151 (3)(b) of the Constitution, 205 as read together with 9 of the Swazi Court Act, 1950."*¹

- [4] Although there were other points of law raised on behalf of respondents, such were not argued on the hearing date.

Issue

- [5] The issue is crisp: Does this court have jurisdiction to make an order of a traditional court an order of this court? Put from respondents' perspective: Do orders issued by traditional authorities need this court's pronouncement to make them executable?

Submissions

- [6] The respondents submitted that in terms of the constitution, there are two legal regimes operating in this Kingdom. There is the Roman Dutch-law commonly referred to as the common law and the Swazi law and custom. Each regime has its own systems of execution. To come to this court and seek an order to endorse the order of the traditional structures would effectively mean that the orders of traditional structures have no effect in nature. This is not the correct position. Orders of traditional structures carry the same force and effect as orders by common law courts. Further, section 151 of the Constitution provides for an appeal or review and not for such procedure as sought by applicant herein.

¹ Page 23-24 para 3 of the book

[7] The applicant on the other hand submitted that there was nothing amiss by this court endorsing the orders by the traditional structures.

Dlamini

J. decided on this point and it was well settled in our law. **Dlamini J** held that this court has jurisdiction to order an enforcement of orders at the instance of traditional structures.

Ad judgment

[8] The applicant referred to the case of **Priscilla Dlamini v Hunter Shongwe and 4 Others (1591/2013) SZHC 150 (2018) (10 July 2018)** in support of her contention that this court has jurisdiction to order execution in terms of orders of traditional structures. At paragraph 23 (d) the learned Judge stated:

"Based on analysis of the pleadings and submissions, the issues for determination are the following:

(d) *Whether the decision of the Umphakatsi can be registered as an order of this court.²*

[9] The honourable Justice proceeded to canvass the question as follows:

"It was also submitted on behalf of the 1st respondent that there are no rules of this court that make provision for the registration of orders of Umphakatsi to be orders of this court.

*In answering the above submission the applicant's attorney referred this court to two judgments, viz; **Maria Duduzi/e Dlamini v***

² Paragraph 59 supra

Augusti11e Divorce Dلامي11i a11d 2 Others (550/2012) /2012] SZHC 66 (12th April 2012) a11d Ndzimab11dze Tllembinkosi v Maziya Ntombi and A11otlier (394/2010) /2011] SZHC 129 (19 June 2011) where the court held as follows:

"Swazi Customary Law (Swazi Law and custom) is recognized, adopted, applied and enforced as part of the Kingdom of Swaziland pursuant to section 252 (20, (3) and (4) of the Constitution of the Kingdom of Swaziland Act No. 001, 2005. (see paragraphs 14 and 27 respectively)".³

[61] *In the case of Ndzima11dze Thembi11kosi (supra), Ota J enforced an order of the Kwaluseni Umphakatsi and in so doing stated what is quoted below:*

"[42]...it is obvious to me that the Applicant has exhausted his right of redress before these traditional structures. 1 see 110 other option ope11 to ltim, i11 tlte face of tlte flagra11t disobedie11ce and disreqai-d of the verdicts of tltose traditional structures, displaved hv tlte P¹ Respo11de11t, a11d I must sav witlt impu11ity and opprobrium, tha11 to approaclt this court for redress by way of an interdict to e11force tlte orders of tlte traditional structures..."⁴

[IO] He then concluded:

"[62] Likewise, the enforcement of the decision of the Ezulwini umphakatsi has failed. Even the Royal Eswatini Police have not been of

³ See paras 59 and 60 of Priscilla Dlamini's case supra

⁴ Page 21 paragraph 60 and 61 of the judgment

*assistance as they demanded to be first fiirished with an order of this court"*⁵.

[11] The respondents referred to two judgments in support of its ground that this court lacks the necessary jurisdiction. The first case was as per my brother **Mamba J.**⁶

[12] The learned Justice held:

"From the above facts, it is plain to me that this is a matter that has to be heard by the relevant traditional authority or structures. That authority is the Masundvwini Royal Residence. In fact the decision has been taken and this court is being asked to order compliance therewith. This court, in my judgment, cannot and must not be used as a forum to rubbers/amp judgments of other appropriate and legitimate fora or structures. To my mind, structures under Swazi Law and Custom have their own mechanisms or methods of execution or enforcement of their own judgments and orders. A duplication in the enforcement of such orders is not desirable or advisable at all. It is quite unnecessary in fact and this court must, as a general rule always decline to meddle or inte1fere in such matters.
"7

[13] The second judgment was as per **Dr. B. J. Odoki JA in Masundvwini Royal Kraal v Evangelical Church (By Christ Ambassadors) and**

⁵ Page 21 paragraph 62 of the judgment

⁶ Mciniseli Cindzi and Another v The Ministry of Housing in Urban Development and 9 Others (925/2016) [2017]

SZHC 227 (30th October, 2017)

⁷ See page 12 of NS

Another (19/2017) (2018] SZHC 10 (4th May 2018). At paragraph 38, his Lordship espoused:

"[38] Even if the matter was to have been finalized by the traditional authorities, it is my view that it would not have been necessary or proper to bring an Application before the High Court to enforce the decision of the traditional authorities. It is trite law that the High Court has no original jurisdiction in matters in which a Swazi Court has jurisdiction. Section 151 (3) (b) of the Constitution provides:

"(3) notwithstanding the provisions of subsection (1) the High Court

a.

b. Has no original but review and appellate jurisdiction in matters in which a Swazi Court or Court Marital has jurisdiction under any law for the time being in force."

[14] He eloquently proceeded:

"[39] Swazi Courts are established under the Swazi Courts Act, No. 50 of 1950 which provides for their constitution, recognition, functions and jurisdiction. The matters adjudicated upon by the Swazi Courts are set out in terms of Section 115 (6) of the Constitution, and include the designation, recognition and removal powers of Chiefs or other traditional authority and Swazi Nation Land.

[40] *It is well- settled that under the Constitution there are two separate and distinct systems of laws and customs called Swazi Law and*

*Custom and the super-imposed general law referred to as the Roman Dutch Common Law. Therefore, wherever the question of appropriate forum arises for determination, a proper choice must be made between the Roman Dutch Common Law Courts and the Swazi Courts. **See Commissioner of Police vs Mkhonta Aaron Maseko** [2011] SZSC 15.*

[41] *In **Phildah Khumalo vs Mashovane Hezekiel Khumalo**, Civil case No. 2023/2007 cited with approval by MCB Maphalala, as he then was, in **Michael Mvungama Mah/ale/a and Others** [2013] SZHC 40, Maphalala PJ, as he then was, stated,*

"[12] It is abundantly clear that the dispute between the parties is over Swazi Nation Land between the people who live and are governed by Swazi Law and Custom. Swazi Law and Custom is the most suitable regime to resolve the dispute and the Chief is a better placed person to handle, same in as much as the Chief is also responsible for allocating land on Swazi NationLand.

[16] It is my considered view that this matter can only come before this court on review or on an appeal after running the full course of the hierarchy clear that this country has a dual legal system, that of Roman-Dutch Law and Swazi Law and Custom. These systems co exist with each other and the Roman Dutch system by the High Court can only exercise its powers on review or appeal of a decision in the traditional legal system.

/11 tte interest ofltarmonv, it is imperative titat respect should be given where it is due. "

[42] In *Maziva Ntombi vs Ndzimandze Thembinkosi* [2012] SZSC 23, MCB Maphalala JA as he then was, stated:

"Decisions df the Chiefs Inner Councils are legally . enforceable equally as those of the Swazi Courts established under the Swazi Courts Act No. 80 0(1950.

Swazi Law and Custom has long recognized the iudicial function of Chiefs and their Inner Council in disputes between their subiects which are not iusticiable in Courts of general iurisdiction applying Roman Dutch Common Law. "

[43] In *Beautv Jumaima Tlwmo vs Ke1111etl, Harold Vilakati and Another* (1159/2006) [2012] SZHC 125 (14 June 2012), **Sprey J.** observed,

"[19]A person affected by the decision of the Inner Council has a right of appeal to the Chief who can either corifirm or reverse its decision. Thereafter, decisions of the Chief's Inner Council are appealable to the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. The Act confers both civil and criminal jurisdiction upon Swazi Courts in accordance with Sections 7 and 8 of the Act thereof".

[15] He then concluded:

"[44] It is therefore abundantly clear that the appropriate forum for determination of the current matter which is based on allocation and utilization of Swazi Nation Land was the traditional authorities applying Swazi Law and Custom and, not the general Roman Dutch Common Law Courts, including the High Court. It is also trite law that the traditional authorities including Swazi Courts have appellate structures for resolving complaints on appeal against lower authorities.

Thirdly, it is also well established that traditional authorities or Swazi Courts have mechanisms for enforcing their decisions. It is therefore not necessary or proper to approach the High Court for orders to enforce decisions of the traditional authorities.

[45] It is common cause that the High Court has review and appellate jurisdiction in matters in which Swazi Court have jurisdiction. Therefore the Appellant should have exercised its right to apply for review or appeal to the High Court, if it had exhausted all the appellate process before the traditional authorities. "

[16] It is clear that the two decisions namely by **Mamba J** and **Odoki JA**, which were passed in 2016 and 2017 respectively, supercede **T. Dlamini J** decision of 2013 which was based on the High Comi decisions of 2010 and 2012. Further, section 252 of our Constitution partly reads:

"(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 law and custom) are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland."

[17] From the above, it is clear that the Swazi or traditional courts are established in terms of the Constitution. They derive their powers and authority from the Constitution. Their decisions, pronouncements, orders and judgments therefore have the full force of the law. In brief, they do not need another court to give effect to their decisions. Once they have pronounced upon an order, that order has full force for purposes of execution as it carries the full blunt of the law. It is for this reason that scholars have described the Kingdom as a dual jurisdiction in that Swazi law and custom applies on the one hand with the Swazi or traditiortal structures having jurisdiction on such matters. On the other hand, common law (Roman-Dutch) applies with the common law courts regulating its application. The submission on behalf of the applicant that the two legal systems exist side by side is partially correct

m so far as execution of the orders of the respective comis are conce111ed. However, by reason that a litigant who is dissatisfied with the decision of the Swazi courts may appeal or apply for a review before the common law comis in terms of section 151 of the Constitution, then the statement that the two legal systems exist independent of each other is unsuited.

[18] What remains for Swazi law and custom's comi or structure to do upon issuing an order is to identify personnel to carry out or execute their orders. Fees for such personnel and costs of execution are to be paid by the successful litigant who shall be reimbursed from the costs order against the unsuccessful litigant.

[19] It follows therefore that the advice, if any, by the 4th respondent that the applicant should first obtain an order for execution from this court for it to execute the order of the traditional structure herein was misplaced. However, there is one point which needs clarity emanating from the 4th respondent's advice, ill as it may. 4th respondent's mandate, duties and functions are outlined mainly in the enabling Act (Police Act) and other legislative enactments. Fees and costs for execution of their duties and functions are borne by the Crown as sourced from the public fund. Their main mandate is on criminal as opposed to matters of civil jurisdiction. The paiiies in the case at hand together with the orders are civil in nature. In civil matters, common law provides that the litigants themselves must bear the costs of litigation. These costs include the fees and costs for execution of the orders granted. The law provides

further that in civil matters, the sheriffs and their deputies are mandated, amongst others, to execute such court orders at the expense of the litigants. Now, the question is, why should the 4th respondent be ordered to execute a civil judgment at the cost of the public fund? Or to put it directly, at the costs of the Government's purse or again, at the costs of the common public or tax payer as it were? An observed tendency is that litigants, in order to avoid execution costs, tend to join the 4th respondent for purposes of execution. They disregard that their conduct digs deeper into the tax payer's pocket and that police are already overstretched in their mandate. They cite the 4th respondent for execution of civil orders under the guise that the police have a duty to prevent anarchy or crime in the event there is resistance during the execution of the said order. However, sheriffs and their deputies ought not to be just men or women of feeble stature. They ought to be well trained and fully equipped for their offices. This is so that when they meet resistance in the discharge of their duties, they can lawfully deal with it. There is therefore no justiciable ground for litigants in civil matters to seek orders against the 4th respondents or his subordinates in order to execute or assist the sheriff to execute orders either from the Swazi law and customs courts or common law courts. Prayer 3 must fall for these reasons therefore.

Costs

[20) Pursuant to the nature of the prayer herein, I am not inclined to grant litigation costs against the unsuccessful party. This is more so because

this court has in a number of instances granted the prayer sought by applicant.

Conclusion

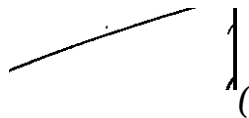
[21] On the above, the matter remains to be referred back to the traditional structure of Zombodze Royal Kraal for it to give direction in terms of para. 18 above.

[22] **Orders**

22.1 The matter is struck of the roll;

22.2 The matter is referred to the Zombodze Royal Kraal for it to act in terms of paragraph 18 of the judgment herein.

22.3 Each patty to bear its own costs.



M. DLAMINIJ

For the Applicant

For the Respondents

B. Nkonyane of Magagula & Hlophe Attorneys

T. R. Maseko of T.R. Maseko Attorneys

