



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Case No: 02/12

In the matter between:

**MAZIYA NTOMBI**

**APPELLANT**

**AND**

**NDZIMANDZE THEMBINKOSI**

**RESPONDENT**

Neutral citation: *Maziya Ntombi vs Ndzimandze Thembinkosi (02/12) [2012]*  
*SZSC 23 (31 May 2012)*

**CORAM:**

**A.M. EBRAHIM JA,  
S.A. MOORE JA,  
M.C.B. MAPHALALA JA**

Heard : 18<sup>th</sup> May 2012  
Delivered : 31<sup>st</sup> May 2012

**Summary**

Civil Appeal – appeal against Final Interdict – requirements thereof - appeal dismissed.

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**JUDGMENT**

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**M.C.B. MAPHALALA J.A.**

- [1] The respondent instituted proceedings in the court *a quo* for an order interdicting and restraining the appellant and one Mr. Mnisi or anyone acting under their instructions from setting their foot on the land situated at Kwaluseni next to Dinner Times Shopping Complex in Matsapha or effecting any development on the land in the form of a building or structure; he further sought an order directing the police to assist in effecting the Order. He also sought an order for costs. This application was opposed by the appellant who filed opposing papers; Mr. Mnisi who was the second respondent in the court *a quo* did not oppose the application.
- [2] The court *a quo* gave judgment in favour of the respondent including costs of suit. The appellant filed a Notice of Appeal. His grounds of appeal could be summarised as follows: First, that the court *a quo* erred in law and in fact in holding that the respondent had satisfied the requirements of a final interdicts. Secondly, that the court *a quo* erred in law and in fact when holding that the dispute had been adjudicated upon by the Chief's Inner Council as well as Ndabazabantu or that they were competent and had jurisdiction to deal with the dispute in terms of section 252 (2) of the Constitution; thirdly, that the court *a quo* erred in failing to apply the provisions of section 139 of the Constitution; and lastly, that the court *a quo* erred by failing to call upon evidence in proof of the death of Phineas Maziya, the husband of the appellant.
- [3] In his Founding Affidavit the respondent told the court *a quo* that the land in dispute belongs to him, and, that it was allocated to him by his parents. He further told the court that in 2008 the husband of the appellant Phineas Maziya lent and advanced E8 000.000 (eight thousand

emalangeni) to him at his special instance and request; and that the said Phineas Maziya subsequently lodged a complainant to the chief's Inner Council that he was now failing to repay the loan.

- [4] The respondent alleged that he subsequently paid the debt of E8 000.00 (eight thousand emalangeni) and interest of E7 000.00 (seven thousand emalangeni) to the appellant in the presence of the Chief's Inner Council and his wife in October 2008. He annexed a letter from the Kwaluseni Royal Kraal confirming the payment.
- [5] Subsequently, the appellant claimed that the respondent had pledged the land as security for the debt owed to her husband who was now deceased. The respondent alleged that the appellant proceeded to allocate the land to Mr. Mnisi who intended to build a church.
- [6] The respondent alleged that he reported the matter to the King's Liaison Officer or Ndabazabantu. He annexed a letter written by the King's Liaison officer confirming the payment.
- [7] The respondent argued in the court *a quo* that he was entitled to the interdict sought. He further alleged that the appellant and Mr. Mnisi had forcefully occupied his land without his consent or that of the Traditional Authorities as custodian of Swazi Nation Land. He argued that the appellant and the said Mr. Mnisi were acting in competent of the orders of the chief's Kraal and King's Liaison Officer. The appellant filed an opposing Affidavit in the court *a quo* stating that her husband had lent and advanced a total of E10 000.00 (ten thousand emalangeni) to the respondent. She denied that her husband lodged a complaint to the Chief's Inner Council against the respondent as alleged. She further denied that the respondent repaid the loan or any amount at all.

- [8] She further alleged that the respondent had pledged his land as security for the loan, and that when he failed to repay the loan, he surrendered the land to her husband. She also alleged that the respondent accompanied her husband to the Chief's Residence to pay E2 000.00 (two thousand emalangi) as a Khonta fee for the land; she annexed a receipt with a stamp from the Chief's Residence.
- [9] The respondent's sister deposed to an affidavit in support of the appellant. She alleged that the respondent failed to produce a receipt before the King's Liaison Officer as well as the Chief's Inner Council in proof of payment of the loan. She further stated that the respondent accompanied Phineas Maziya to the Chief's Residence to pay the Khonta fee of E2 000.00 (two thousand emalangi).
- [10] The respondent filed a replying affidavit in which he denied allocating his land to appellant's husband. He further argued that land under a chief cannot be used as security. He also argued that the receipt of E2 000.00 (two thousand emalangi) reflects that it was paid for a fine and not for the allocation of land; to that extent, he denied accompanying the appellant's husband to the Chief's Inner Council as alleged.
- [11] The court *a quo* was correct in holding that the question of the ownership of the land in dispute was deliberated upon and settled by the Chief's Inner Council as well as the King's Liaison Officer known as Ndabazabantu. The court *a quo* was also correct in holding as it did that the question of ownership of the land was *res judicata* as between the parties and that it could only be re-opened as between them by way of appeal or review lodged before a competent appellate or reviewing Traditional Structure.

[12] The evidence clearly shows that the land dispute was deliberated before the King's Liaison Officer as well as the Chief's Inner Council. This was not denied by the appellant in the court *a quo*. Similarly, the appellant did not challenge the jurisdiction of the Chief's Inner Council as well as the King's Liaison Officer to deliberate and settle the land dispute.

[13] One of the grounds of appeal by the appellant is that the court *a quo* erred in failing to call upon evidence in proof of the death of her husband. This ground of appeal is misconceived on the basis that it is the appellant who states in paragraph 10 of the Opposing Affidavit the following:

“...The land is no longer being held as security. My husband khontaed and the land now belongs to me since my husband is deceased...”

[14] Similarly, the ground of appeal relating to the failure of the court *a quo* to apply the provisions of section 139 of the Constitution is misconceived because that was not an issue before the court *a quo*.

[15] The court *a quo* was correct in holding that the parties reside in a “Swazi Area”. 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 area of land held by Ingwenyama in trust for the Swazi Nation. Section 2 of the definition section 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.

- [16] A Swazi Area is governed by a competent authority, and the Swazi Administration Amendment Act No. 6 of 1979 defines a competent authority as a person appointed by Ingwenyama in Libandla for the purpose of administration in a Swazi Area and includes a chief or any person holding such office.
- [17] The court *a quo* correctly found that the land dispute properly falls within the Customary Adjudicatory Structures established in the areas where the parties reside; and, that these structures have the competence to adjudicate upon and settle disputes arising within that area in terms of Swazi Law and Custom.
- [18] It is common cause that the parties reside at Kwaluseni Area in Matsapha, and that they are under the jurisdiction of Kwaluseni Royal Kraal which is under the Manzini region; hence, they are subject to the jurisdiction of the King's Liaison officer or Ndabazabantu attached to the Regional Administration in Manzini.
- [19] The court *a quo* was correct in holding that Traditional Structures in Swaziland apply Swazi Law and Custom; and, that such law is recognised by section 252 of the Constitution which provides as follows:

“252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed immediately before the 6<sup>th</sup> September 1968 (Independence Day), the principles and rules of the Roman-Dutch Common Law as applicable to Swaziland since 22<sup>nd</sup> 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.

(2) Subject to the provisions of this Constitution, the principles of 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 matter in which or the purpose of which customs may be recognised, applied or enforced; and
- (c) provide for the resolution of conflicts of customs or conflicts of personal law.”

[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.”

[21] The Constitution draws a sharp distinction between the Modern System of Government which is characterised by the King as Head of State, the Executive, Parliament and the Courts of General Jurisdiction. The Constitution further recognises a Traditional System of Government characterised by Ingwenyama as Head of State as well as the Swazi Traditional Institutions of Indlovukazi, Ligunga (Princes of the Realm), Ligoqo, Sibaya, Tikhulu (Chiefs), uMntfwanenkhosi Lomkhulu (Senior Prince) and Tindvuna (Royal Governors). Section 227 of the Constitution provides that the Swazi Traditional Government is administered according to Swazi Law and Custom and the Traditional Institutions that are pillars of the Monarchy. The Traditional Institutions are guaranteed and protected by the Constitution.

[22] Section 233 provides that Chiefs are the footstool of Ingwenyama and that Ingwenyama rules through the Chiefs, and, that he may appoint any person to be Chief over any area, and that the general rule is that every Umphakatsi (Chief’s Residence) is headed by a chief. This section further provides that the powers and functions of Chiefs are in accordance with Swazi Law and Custom or conferred by Parliament or Ingwenyama from time to time. In the exercise of his functions and duties of his office a chief enforces a custom, tradition, practice or usage which is just and not discriminatory.

[22.1] The importance of the institution of chiefs in the Swazi Traditional System of government cannot be overemphasised since they are the footstool of Ingwenyama and pillars of the Monarchy. Any weakness in the powers of chiefs has a negative impact not only on the



office and powers of Ingwenyama but on the institution of the Monarchy in its entirety.

[23] 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 areas 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 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 Swazi citizens from other chiefdoms; similarly, the Chief’s Inner Council also sits as a court to determine minor disputes between members of the chiefdom.

[24] A person affected by the decision of the Inner Council has a right of appeal to the chief who can either confirm 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 section 7 and 8 of the Act; the matters over which they have jurisdiction are provided.

- See *Sandile Hadebe v. Sifiso Khumalo and three others* High Court Civil Trial No. 2623/2011 pages 24-27

[25] Both the Chief’s Inner Council and Swazi Courts apply Swazi Law and Custom. Section 11 of the Swazi Courts Act 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 Ngwenyama 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.”

[26] The Judicial Commissioner has power to review criminal proceedings of Swazi Courts, Swazi Courts of Appeal as well as the Higher Swazi Court of Appeal in accordance with Section 30 of the Act.

[27] The Higher Swazi Court of Appeal and the Swazi Courts of Appeal may review civil proceedings of courts below them at the instance of an aggrieved person in accordance with section 31 of the Act.

[28] Decisions of Swazi Courts are appealable to the Swazi Courts of Appeal and their decisions are appealable to the Higher Swazi Court of Appeal; the latter’s decisions in Criminal matters are appealable to the Judicial Commissioner and then to the High Court. Decisions of the Higher Swazi Court of Appeal in civil proceedings are appealable to the High Court. See sections 33 of the Swazi Courts Act No. 80 of 1950. Decisions of the High Court in both civil and criminal proceedings are appealable to the Supreme Court in terms of the Court of Appeal Act No. 74 of 1954 as well as sections 146 and 147 of the Constitution.

[29] The Constitution gives the High Court unlimited original jurisdiction in civil and criminal matters as well as appellate and review jurisdiction over Subordinate Courts and Swazi Courts. However, the High Court

has no original but review and appellate jurisdiction in matters in which a Swazi court has jurisdiction in terms of section 151 (3) (b) of the Constitution.

[30] The Constitution provides that Justice shall be administered in the name of the Crown by the Judiciary; and that the judiciary consists of the Superior Courts of Judicature comprising the Supreme Court and the High Court and such other specialized subordinate and Swazi courts or tribunals exercising a judicial function as parliament may by law establish: see sections 138 and 139 of the Constitution.

[31] It is appropriate at this stage to cite with approval the decision of *Madlanga J* in the case of *Bangindawo and Others v. Head of the Nyanda Regional Authority and another; Hlanhlalala v. Head of the Western Tembuland Regional Authority and Others* 1998 (3) BCLR 314 (TK) at 326 where the learned judge stated the following:

“...the judicial, executive and law-making powers in modern African Customary law continue to vest in the Chiefs and so-called Paramount Chiefs (the correct appellation being Kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western Legal systems, or not believing in African Customary Law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It continues to thrive and is believed in and accepted by the vast majority of those subject to Kings and Chiefs and who continue to adhere to African Customary Law.”

[32] At paragraph 67 in the case of *Sandile Hadebe v. Sifiso Khumalo* and three others (supra) *His Lordship Justice M.C.B. Maphalala* stated the following:

“What *His Lordship Madlanga J* said in the above case is true not only for Swaziland but for many African Countries which still adhere to African Customary Law; hence, the warning by *Ramodibedi CJ* in the *Mkhondvo Aaron Maseko* case (supra) with regard to the dual legal system in this country and the need to make a proper choice of law applicable to a particular case between Roman Dutch Common Law and Swazi Law and Custom cannot be overemphasized.”

[33] Decisions of the Chief’s Inner Councils are legally enforceable equally as those of the Swazi Courts established under the Swazi Courts Act No. 80 of 1950. Swazi Law and Custom has long recognised the judicial function of Chiefs and their Inner Council in disputes between their subjects which are not justiciable in courts of General Jurisdiction applying Roman-Dutch Common Law.

[34] However, the King’s Liaison Officer or Ndabazabantu is a recognised functionary established in terms of Swazi Law and Custom; he is appointed by Ingwenyama and is answerable to the Regional Administrator. He doesn’t exercise judicial power. His function is that of a mediator or peacemaker between rival parties. His decisions have no force of law and their legitimacy and compliance depends on the willingness of the parties to abide by them. In deciding a dispute, he applies Swazi Law and Custom.

[35] The Constitution provides that all land including any existing concessions in Swaziland shall continue to vest in Ingwenyama in trust for the Swazi Nation save for privately held title-deed land; and, that citizens without regard to gender shall have equal access to land for normal domestic purposes. It further provides that a person shall not be deprived of land without due process of law and where a person is so deprived, he will be entitled to prompt and adequate compensation for

any improvement on that land or loss consequent upon that deprivation unless otherwise provided by law. See section 211 of the Constitution.

[36] It is apparent that section 211 of the Constitution refers to “Swazi Areas” which are administered by Chiefs or other competent person such as “Emadvuna” duly appointed by Ingwenyama. Citizens are allocated the land for normal domestic purposes including building homes and subsistence farming. The land is allocated by the Competent Authority, and it cannot be sold, leased or used as security for a debt because ownership of the land vests in Ingwenyama in trust for the Swazi Nation.

[37] However, whenever a person allocated land in a “Swazi Area” decides to relocate permanently either to another Swazi Area or title-deed land or to another country, he is at liberty to surrender the land back to the Competent Authority; he cannot transfer it to another person or his relatives.

[38] In the present case, the appellant alleged that the land in dispute was used as security for a loan by the respondent for monies borrowed from her late husband. This allegation is denied by the respondent; even if it was not, such a contract would be illegal and unenforceable at law.

[39] As stated in the preceding paragraphs, the court *a quo* was correct in holding that the question of ownership of the land was settled by the Traditional Structures as reflected in annexures TD1 and TD2, namely, the documents from the King’s Liaison Officer as well as Kwaluseni Royal Kraal; both documents substantiate respondent’s contention that he paid back the money owed to the deceased before the Inner Council. It is open to the appellant to appeal to the Swazi Courts.

[40] The court *a quo* made a correct finding that the receipt of E2 000.00 (two thousand emalangen) annexed by the appellant is not evidence of the “kuKhonta” fee as alleged by the appellant, but, that it was paid to Kwaluseni Royal Kraal as a fine.

[41] From the foregoing, it is clear that the court *a quo* was correct in finding that the respondent was entitled to a final interdict against the appellant. The leading case in this regard is the case of *Setlogelo v. Setlogelo* 1914 AD 221 at 227 where *Innes JA* stated the following:

“The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.”

[42] The respondent established on a balance of probabilities that he has a clear right to the land. The repayment of the loan discharged the land as security. The evidence showed that the respondent was in control of the land, whether he owned it as part of his inheritance or as a family land does not detract from the fact that he had a clear right over the land.

[43] I agree with the court *a quo* that the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear right to the subject-matter of the dispute.

[44] The evidence before court indicates that the respondent has suffered prejudice in that the appellant has allocated the land to Mr. Mnisi, the second respondent in the court *a quo* for use as a church; this effectively deprives the respondent and his family the use and enjoyment of the land; the appellant has admitted allocating the land to Mr. Mnisi. A further prejudice is the possibility of Mr. Mnisi erecting structures on

the land. These are intrusions into the respondent's rights of ownership of the land.

[46] Accordingly the appeal is dismissed with costs on the ordinary scale.

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M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I agree:

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A.M. EBRAHIM  
JUSTICE OF APPEAL

I agree:

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S.A. MOORE  
JUSTICE OF APPEAL

For Applicant  
For Respondent

Attorney S.C. Simelane  
Attorney S.P. Mamba

**DELIVERED IN OPEN COURT ON 31<sup>st</sup> MAY 2012.**