

THE HIGH COURT OF SWAZILAND

LINDIMPI WILSON NTSHANGASE

1st Applicant

MELLINAH NTSHANGASE (born NKWANYANA)

2nd Applicant

J U VIAI VIA NTSHANGASE

3rd Applicant

LAZARUS JABULANI MASUKU

4th Applicant

And

HIS ROYAL HIGHNESS PRINCE TFOHLONGWANE N.O

1st Respondent

HIS ROYAL HIGHNESS PRINCE KHUZULWANDLE N.O.

2nd Respondent

THE HONOURABLE JIM GAMA N.O.

3rd Respondent Civil

Case No. 4427/2005

Coram:

S.B. MAPHALALA - J

For the Applicants:

MR. M. MABILA

For the Respondents:

MR. J. MAGAGULA

**(Principal Crown Counsel in the
Attorney General's Chambers).**

RULING

ON POINT OF LAW *IN LIMINE*

(1st December 2006)

[1] This matter has been allocated before me for three days from 17th October 2006 to 19th October 2006 to hear *viva voce* evidence as directed by Mabuza J on the 10th February 2006. When the matter was called Counsel for the Respondents advanced a point *in limine* from the bar. This point is that this application is improperly before court in that by Applicant's own admission this matter is still pending before His Majesty the King for a ruling and this court is therefore not in a position to grant the order sought in the Notice of Motion in the circumstances.

[2] After hearing arguments for and against on this point I reserved my ruling until the 19th October 2006. Unfortunately in view of ill-health I could not deliver judgment as promised and thus the present judgment at this stage.

[3] **Mr. Magagula** in support of the Respondents' position has filed Heads of Argument which relates in detail the sequence of events from the time the deceased died to the involvement of the three committees assigned by His Majesty the King to resolve the matter up to now when these committees are still awaiting to report back to His Majesty as the final arbiter in the matter.

[4] **Mr. Mabila** on the other hand opposes the point of law *in limine* on two grounds. The first ground raised in opposition is that the learned Judge Mabuza had ordered that this matter proceeds on *viva voce* evidence and the point *in limine* is therefore precluded. The second point against the point *in limine* is that the relief sought is merely a declaratory order seeking no relief on anyone. In this regard **Mr. Mabila** cited the legal authority in *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa. 4th Edition* at page 1055 where the judgment of Stevn CJ in *Ex parte Nell 1963 (1) S.A. 754 (A)* at 75H -760B is cited to the legal proposition that an existing dispute was not a prerequisite for the making of a declaratory order.

[5] I shall proceed therefore to address the point of law *in limine* in the same sequence of arguments adopted by **Mr. Magagula** in opposition.

[6] The first question to consider is whether the Applicant is precluded in raising this point *in limine* by the order of the court dated the 10th February 2006. After considering all the arguments for and against I cannot say that the Applicant is precluded in advancing this point at this stage of the proceedings.

[7] I now proceed on the second aspect of the Respondent's argument that the relief sought is merely a declaratory order seeking no relief on anyone. I must mention that in argument before me **Mr. Mabila** for the Respondents also relied on the *dictum* in the Court of Appeal case of **John Boy Matsebula and three others vs Chief Madzanga Ndwandwe and another - Case No. 15/2003**, where the Appellate Court held *inter alia* that what had been referred to His Majesty the King was the determination of the rights of the parties to the disputed land. What the Applicants in that case sought to protect was their undisturbed possession pending the determination of the rights of the parties by His Majesty the King. The Applicants did not seek an order from the High Court to determine those rights.

[8] From the review of the legal authorities cited in argument notably the case of **Nunn Publishing (Pty) Ltd vs Zimbabwe Broadcasting Corporation 1995 (4) S.A. 675 (25)** to the legal proposition that the availability of another remedy does not render the grant of a declaratory order incompetent. From this legal proposition it would appear to me that it logically follows that even if the matter is pending before His Majesty this court has a discretion to grant the declarator *in casu*.

[10] On the facts of the present case I would not exercise my discretion in favour of granting the declarator and would allow the dictates of customary law to take effect. I say so because as I have stated in paragraph [3] of this judgment that there are three committees which have been appointed by His Majesty, the King to advise him on how to proceed with the burial of the deceased.

[11] In the result, for the afore-going reasons the point of law *in limine* is upheld. Costs reserved for the time being.

S.B. MAPHALALA

JUDGE