

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 117/06**

**In the matter between:**

**MAPHOKELA SHABALALA**

**APPLICANT**

**VS**

**NELSON MABUZA**

**RESPONDENT**

**CORAM: MAMBA AJ**

**FOR APPLICANT: MR THULANI DLAMINI**

**FOR RESPONDENT: MR MANDLA Z. MKHWANAZI**

**JUDGEMENT 14<sup>th</sup> February, 2006**

[1] On the 19<sup>th</sup> January, 2006 the applicant filed with the Registrar this application which was accompanied by a certificate of urgency. The application came before me on the next day.

[2] Having heard Counsel for the applicant I granted the following interim orders:

(a) That the application was urgent

(b) That the respondent or any other person acting under him was, pending finalisation of this application interdicted and or restrained from burying and or conducting the funeral or burial of Mrs Gastinah Mabuza at Dwalile area without the consent and or permission of the applicant.

(c) That a rule nisi do issue calling upon the respondent to show cause, if any, on the 27<sup>th</sup> day of January, 2006 why:

- (i) order (b) herein should not be made final and
- (ii) he should not be ordered to pay the costs of this application.

[3] The basis upon which the aforesaid orders were issued were that the applicant is the Chief of Dwalile area and that he was appointed as Chief by the Ngwenyama of the Kingdom of Swaziland in terms of Swazi law and custom. In support of these averments he filed annexure A1. Annexure A1, is an uncertified photostat copy of a letter of appointment said to have been executed by the Ngwenyama on the 11<sup>th</sup> November, 2004. According to this instrument, the Ingwenyama, is said to have, acting in terms of section 7 of the Swazi Administration Order of 1998 appointed 12 other persons besides the applicant to be Chiefs of certain specified and or named areas within Swaziland. I shall return to this instrument presently.

[4] The applicant stated further in his founding affidavit that as Chief of the area any death in the area had to be reported to him and permission to conduct any burial and funeral in the area had to be sought and obtained from him personally or from the local Royal household of which he is the head,

prior to such funeral or burial. In the absence of such consent and or permission, so he says, no funeral or burial may ever take place in his area. These, he says, are the dictates of Swazi law and custom.

[5] It is further stated by the Applicant that Gastinah Mabuza, the wife of the respondent has died and the respondent intends to bury her at Dwalile area where she lived and died. Applicant states that the death of Gastinah (hereinafter referred to as the deceased) has not been reported to him or his Royal household and therefore the burial and funeral due to be conducted by the respondent and to take place on the 22<sup>nd</sup> December, 2005 is unlawful and must be stopped by this court.

[6] There is further allegation by the applicant that the respondent has always refused to acknowledge the applicant as Chief and or Chief of Dwalile area. The applicant states that he determined or decreed that all Swazis living in Dwalile who claimed to be under the Chieftom of Velezizweni area and who refused to acknowledge him as their chief would not be allowed by him to be buried or bury their deceased family members at Dwalile.

[7] In opposing this application the respondent has amongst other things stated that he is the Indvuna of Dwalile and that Dwalile is under the Chieftom of Velezizweni and its Chief is Ndwandwe II. The applicant is unknown to him and respondent does not recognise him as his Chief. It is further averred by the respondent ""that all my ancestors and some of my children were buried at Dwalile area. My family cemetery is at Dwalile. When burring (sic) all my relatives at Dwalile, I have not sought the consent and permission of the applicant or his alleged Indlunkulu". Respondent continues "that I was born and raised at Dwalile area. I need no permission from the applicant to bury my wife at Dwalile. I do not have to report the death of my wife to the applicant but to my chief at Velezizweni area :.. Even if I recognised the applicant as my Chief, I would not seek his permission to bury my wife but would only inform him that my wife has passed away."

[8] It was common course between Counsel that the Swazi Administration Order of 1998 was declared invalid by this court in the case of **Chief Mliba Fakudze and 3 others vs Minister for Home Affairs and 3 others** in 2002.

[9] Faced with this hurdle, in an attempt to cure the defects in Annuxure A1, the applicant filed the affidavit of the Attorney General who, without stating any background information in the matter, boldly stated that the applicant was appointed as chief of Dwalile area by the Ingwenyama in November 2004 and that the Ingwenyama "has an inherent right [power] in terms of Swazi law and custom quite separate and distinct from the provisions of either the Swazi Administration order of 1950 or 1998 to appoint chiefs in the Kingdom of Swaziland. ...He infact did appoint Maphokela Shabalala Chief of Dwalile". With due respect to the Honourable Attorney General, not only is this statement by him bold but also bald with regards to the issue of Swazi law and custom, the powers of the Ingwenyama and what the Ngwenyama actually did. Proof of Swazi Customary law and the powers of the Ingwenyama thereunder must pass the rigors of proof of foreign law. If the Ingwenyama did infact appoint the applicant, the Attorney General must state how that is within his

knowledge. He may not decree it to be a fact - without motivation. I am not unmindful of the fact that the Attorney General **qua** Attorney General is the principal legal advisor to the King. That the Ingwenyama executed Annexure A1 citing a law that did not exist, says something about the quality of the legal advice he received then. In fairness to the incumbent Attorney General, he was not the Attorney General in November 2004.

[10] For purposes of this application, it is not necessary for me to decide the issue of who is the Chief of Dwalile area.

[11] I shall assume, without deciding the issue, that the applicant

(a) is Chief of Dwalile Area,

(b) that as Chief of the area, he has the power to regulate and monitor the use of all the land over which he is chief, including agricultural use, the erection of homesteads and burial sites or cemeteries.

(c) That Swazi law and custom dictates that a death in his area must be reported to him and permission for burial be sought or obtained from him, prior to such burial,

(d) That the respondent did not report the death of the deceased to the applicant.

(e) That the respondent did not seek and or obtain permission to bury the deceased at Dwalile from the applicant and that because of this failure,

(f) The applicant had the power in terms of Swazi customary law to prevent the burial of the deceased.

[12] It is, perhaps fair to mention here that Counsel for the applicant argued that applicant's complaint was only that the death of the deceased had not been formally reported to him or his Indlunkulu and not that permission had not been sought and obtained from him (for the burial or funeral).

[13] Chiefs, their powers, roles and or functions are an integral part of Swazi Society. Section 233 of the Constitution provides that;

"(1) Chiefs are the footstool of Ingwenyama and Ingwenyama rules through the chiefs....

(9) In the exercise of the functions and duties of his office a chief enforces a custom, tradition, practice or usage **which is just** and not discriminatory "(the emphasis is mine).

[14] I invited both counsel to address me on the above provisions of the constitution, especially subsection (9).

[15] A death, funeral and or burial of a deceased person is a very solemn, sensitive, sorrowful and sacred event. It commands and demands respect from both friend and foe alike. The corpse of a human being may never be used as a tool by anyone to settle petty social scores or differences.

[16] In casu, one should note that the right to be buried at Dwalile area is a right that accrues to the deceased. It is not a right that accrues to the respondent, her husband. It is the respondent and not the deceased who refused to accept the applicant as his Chief. That the respondent refused to accept or recognise the applicant as his chief may not be used as a reason or ground to deny the deceased a

burial at Dwalile. Whilst in an appropriate case a wife may be expected, even after death, to bear the sins and or iniquities of her husband, I am unable to hold that this is such a case. He and he alone is guilty of insubordination.

[17] Moreover, assuming it is a rule of Swazi customary law that the failure by the respondent to report the death of the deceased to the applicant entitled the latter to stop and or prevent the burial of the deceased, this, in my humble view is too harsh a sanction or penalty that I find it totally disproportionate to the conduct complained of. It is unjust. It offends against the provisions of subsection 9 of section 233 of the constitution. The applicant was therefore not entitled to enforce such a rule of custom or tradition.

[18] For the foregoing reasons, the rule nisi issued by this court on the 20<sup>th</sup> January, 2006 is hereby discharged.

[19] The respondent is not blameless herein. For his transgressions, I shall disallow 50% of his costs.

**MAMBA, AJ**