

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 78/2008

In the matter between:

MAKHAYA GWEBU

APPLICANT

VERSUS

CHIEF NTSETSELELO MAZIYA

RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: MR. S. BHEMBE

FOR RESPONDENT: MR. S. MALINDISA

JUDGEMENT 29th April, 2008

[1] This is an application filed by the Applicant against his Chief, the Respondent herein. This judgement applies *mutatis mutandis* to case number 77/08 wherein the present Respondent is Respondent and the Applicant is Ntombikayise Gamedze.

[2] The essential features or elements of this application that are not disputed are the following :

1. Musa Gwebu is the biological son of the applicant and is 33 years old. He is married and has his own homestead; separate from that of the Applicant. He has four children.
2. In 2006, Musa was charged with the crime of stock theft and was released on bail by the Siteki Magistrate's Court. (It is safe to assume that the trial is yet to be finalized).
3. The Applicant was summoned to the Respondent's Urnphakatsi by the local Libandla and there advised that the Libandla had determined that the Applicant would have to pay a herd of twelve cattle for the stock theft committed by his son, Musa.
4. When Applicant protested against the decision the Respondent told him that he was vicariously liable for the sins of his offsprings, including Musa.
5. Musa was never tried by the Libandla, and though he had been summoned to attend the meeting at the Urnphakatsi together with the Applicant, he did not attend.
6. The decision by the Libandla to order the applicant to pay for the cattle allegedly stolen by Musa was taken before the Applicant could be heard on it and he was called to the meeting only to be informed of the decision that had already been taken against him and in the absence of Musa.
7. The Applicant refuted that he was liable for the sins of his son and did not consent to the decision taken against him and in his absence and before he could be heard on the issue.
8. On the 4th October, 2007, the Respondent, who was under police escort came to the Applicant's place and took away two of the Applicant's cattle that were in his possession. These are the cattle which are the subject of dispute in this application.
9. The Respondent did not have any court order authorizing

her to remove the said cattle.

10. The Respondent avers that the Applicant is, "in terms of Swazi [law] & custom for as long as the Applicant is alive, in all matters relating to his son at urnphakatsi, [liable to] take full responsibility" thereof- and the decision by the Libandla was sufficient authority for her to take the said cattle away.

[3] These then are the brief facts of the case upon which I have to make a decision.

[4] With due respect to the Chief and her legal advisors in the form of the office of the Attorney General, her contention that the Applicant is vicariously liable for the unlawful acts of his 33-year-old emancipated son is incorrect. It is a gross misrepresentation of the concept and application of the notion of vicarious liability as it obtains under Swazi law and custom. It is so ridiculous that I need no authority at all to dismiss it.

[5] In terms of Swazi Customary law, where a parent is said to be vicariously liable for the wrongful or unlawful acts of his child it is said that "*umntfwana ushayele uyise tinyoni*"-literally meaning, the child has killed or captured birds for his father". Under both Swazi law and custom and old Roman Law, this has reference only to an unemancipated person.

[6] In casu, Musa is an emancipated and independent, married adult and is not under the tutelage of the Applicant. The Applicant can not under the circumstances of this case have the sins of his son visited upon him.

[7] The central issue though in this Application is whether or not the decision of the Libandla was sufficient authority to cloth the Respondent with the legal power to act as she did in dispossessing the Applicant of his cattle. The Respondent has

not said in her papers before me what authority this Libandla had to sit in judgement over the issue. To my knowledge, a Libandla is nothing more than a gathering of individuals, chaired by one of their members, to deliberate on issues of common concern to them. It is not a court or a body that makes legally binding decisions. Its decisions, no doubt carry with them a moral sanction or obligation, which do not necessarily have the force of law.

[8] The court accepts that a Chief as such, may in appropriate circumstances constitute a court in terms of Swazi law and custom, this would invariably depend on the facts as pleaded in each case. After all "the powers and functions of Chiefs are in accordance with Swazi law and custom or conferred by Parliament or INgwenyama from time to time/" (per article 233(8) of the Constitution.) Therefore, if in terms of Swazi law and custom a Chief as such chief has the power and jurisdiction to constitute a court or other adjudicating authority which makes decisions which are legally binding on those it governs, the pleadings must allege and establish this. It cannot be assumed. See ENOCH GWEBU v CHIEF NTUNJA MNGOMEZULU, civil trial 305/89 (judgement delivered on the 27th September, 1989) at page 2 where HANNAH CJ (as he then was) stated that:

"It would appear from the evidence that the Chief's court is commonly accepted as having the authority and jurisdiction to deal with civil disputes and minor criminal matters and to impose penalties, but the fact that such courts exist and operate does not mean that they are clothed with proper authority. This court is entitled to know under what authority they exist and if no authority is shown this court can only conclude that non exist.

A Swazi court can undoubtedly exist by virtue of a warrant under the hand of the INgwenyama (see section 3 of the Swazi Courts Act, 80/1950) and as a Swazi court is not defined it could include a Chief's

court but this particular Chief's court has no such warrant Where else is one to look? Mr Lukhele has suggested that authority may be found in this Swazi Administration Act of 1950 but I have looked at the provisions of that Act for such authority in vain. That Act imposes duties and confers powers on the Chiefs to maintain order and good governance in their respective areas but no where does it confer a power to hold court."

[9] From the above it is plain to me that the Respondent has failed to show any legal justification or authority authorizing her to dispossess the Applicant of his cattle in the manner set out herein. She is guilty of spoliation. The application succeeds with costs.

[10] One notes that many tenets or precepts of Swazi Customary law are appropriate even under our new Constitutional dispensation. The rules of natural justice for example, are an integral part of procedural justice under Swazi customary law. What is required of us - all of us -who are governed by these rules, is to interpret and give effect to them in their proper context and under the Constitution which is the supreme law of the land. If any rule of Swazi Customary law, properly interpreted and applied, is not consonant with the Constitution, it must give way- be struck down as invalid. Chiefs, "Emabandla" and all those entrusted with the onerous yet honourable task of interpreting and enforcing the law have as their primary duty to ensure that everything that is done is done in accordance with the Constitution.

MAMBA J