

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2075/08

In the matter between:

FREEDOM NXUMALO

APPLICANT

and

**THE PRESIDENT, SWAZI
NATIONAL COURT MANZINI
ATTORNEY GENERAL
FLORAH NDZINISA
LOGOBA UMPHAKATSI**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

CORAM: Q.M. MABUZA-J

FOR THE APPLICANT: MR. B.J. SIMELANE

FOR THE RESPONDENT: MR. M. NDLOVU

RULING 3/10/08

[1] The Applicant has brought this application to review, correct and set aside a decision of the 1st Respondent dated 23/5/2008 in the matter of Florah Ndzinisa vs Logoba Royal Kraal. He prays for costs as well.

[2] He states that during July 2007 he approached Logoba Umphakatsi where he lodged a complaint that Flora Ndzinisa who is the 3rd Respondent herein and her family were interfering with

the home of his late brother Sibusiso Nxumalo. The 3rd Respondent was claiming Sibusiso Nxumalo's home to be hers in that her late husband had kontaed on the land on which this home was built.

[3] The Umphakatsi was called upon to decide who the lawful owner of the land was. After it has heard evidence it decided that the land belonged to Sibusiso Nxumalo's mother who had kontaed. This decision was reached on the 13/4/2008.

[4] The 3rd Respondent appealed against this decision to the 1st Respondent who heard the appeal on the 22/5/2008. In her appeal Flora Ndzinisa complains that during the hearing of the matter at Logoba, she was not given an opportunity to cross-examine and or challenge the evidence of Freedom Nxumalo. She also complains that she was never given a chance to present her case by leading her own witnesses who besides being present were not given a chance to be heard. She further states that by so doing the Umphakatsi acted in direct contravention of section 33 of the Constitution. The Applicants complaint is that the 1st Respondent heard the matter without calling him to be heard nor did he consider the minutes of the Logoba Umphakatsi when he knew that the Applicant had a direct and substantial interest in the matter. He further complains that he was entitled to be heard before a judgment affecting him was passed. In that regard the 1st Respondent violated principles of natural justice as enshrined under section 33 (1) of the Constitution. This is why he

wishes that the decision of the 1st Respondent be reviewed, corrected and set aside.

[5] Mr. Ndlovu who represents Flora Ndzinisa (the 3rd Respondent) has raised points of law which I shall deal with ***ad seriatim***,

Ad Locus standi:

- ***1.1 He has submitted that the Applicant has no locus standi in that he seeks to review a decision taken not against the Applicant in his personal capacity but against the Logoba Umphakatsi. That the Applicant has ex-facie his notice of application instituted same in his personal capacity and has failed to show that he has a direct and substantial interest therein.***

[6] I disagree. The decision may here been against the Logoba Umphakatsi but its execution will drastically affect the Applicant and his brother's children who have a home and business outlets on the land in dispute. In fact the 3rd Respondent had prudently copied her appeal to the Applicant recognising his interest in the matter but the 1st Respondent ignored him when it called the matter for hearing. The application does show that the Applicant has a direct and substantial interest, see paragraphs 7, 9 and 17 of the founding affidavit.

1.2. Mr. Ndlovu has submitted that the duty to institute proceedings relating to the vindication of estate assets rests on an Executor.

1.2. Mr. Ndlovu has also submitted that the Master of the High Court should have been joined as legal custodians of all deceased estates. He has also submitted that the Applicant has failed to comply with Rule 6 (23) of this court.

[7] In the normal cause of events this submission is correct. However, in this instance such estates are governed by Swazi law and custom as the merx is situate thereon. It is accepted in matters involving Swazi law and custom that a close surviving relative such as the Applicant may act as a caretaker to the estate of his deceased brother.

[8] The application before this court is for a review of the 1st Respondent's decision. It has nothing to do with the merits of the case. All this court has to decide is whether the 1st Respondent committed a procedural infraction to the detriment of the Applicant. He has. He violated the sacrosanct ***audi rule***.

[9] **The application is granted.** The decision of the 1st Respondent dated the 23/5/2008 in the matter of Flora Ndzinisa and Logoba Royal Kraal is hereby set aside. The matter is hereby referred to the 1st Respondent for re-adjudication. All interested parties are to be heard before a decision is made. I mentioned

earlier that Ms Flora Ndzinisa had copied her appeal to the Applicant. I do not know whether he received it and what he did with it. However, since the 3rd Respondent was robbed of her right to the ***audi rule*** at Logoba Umphakatsi and likewise the Applicant by the 1st Respondent, it is only fair that each party pays its own costs and it is so ordered.

Q.M. MABUZA-J