

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

Civil Case No. 2714/2007

In the matter between

**CHIEF MPHAPHELI MFUNDVO MABUZA** 1<sup>st</sup> Applicant

**INDVUNA ABSALOM MSONGELWA MASEKO** 2<sup>nd</sup> Applicant

**KHUZWAKO MABUZA** 3<sup>rd</sup> Applicant

And

**GELEMU MABUZA** 1<sup>st</sup> Respondent

**THOBELA MABUZA** 2<sup>nd</sup> Respondent

**SIBONGANGAYE MABUZA** 3<sup>rd</sup> Respondent

**MPINI MABUZA** 4<sup>th</sup> Respondent

**LOKHANDANE DLADLA** 5<sup>th</sup> Respondent

Coram

For the Applicants

For the Respondents

S.B. MAPHALALA - J

MR. S. KHUMALO

MR. B. MAGAGULA

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**JUDGMENT**

11<sup>th</sup> April 2008

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[1] The Applicant who is a Chief of Emgomfelweni area in the Manzini region has filed this application in the long form for an order interdicting and restraining the Respondents or their agents from interfering or otherwise disturbing the community meeting called by him as Chief of the area and/or calling their own meeting without the lawful authority of the Chief and directing the Respondents to pay costs of this application on the attorney and client scale.

[2] The Founding affidavit of the Applicant is filed thereto where the history of the dispute is outlined. In the said affidavit annexure “B1” is attached being an appointment of the Chief by His Majesty, the Ingwenyama of Swaziland in terms of Section 7 of the Swazi Administration Order No. 6 of 1998. In the said instrument the Applicant was appointed Chief together with another Chief Madvodza Vusi Dlamini of Emaqdvulwini in the Manzini district. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicant have filed confirmatory affidavits to the founding affidavit of the 1<sup>st</sup> Applicant.

[3] The Respondents have filed a Notice of Intention to Oppose followed by an Answering affidavit of the 1<sup>st</sup> Respondent. In the said affidavit three points *in limine* are raised as well as the merits of the case. I must mention that the examination of the points *in limine* is the subject-matter of this judgment.

[4] The points *in limine* are the following:

- 3.1 The above Honourable Court does not have jurisdiction to hear this matter as it pertains a chieftancy dispute. Section 41 of the Swazi Administration Order, 1998 states that no court shall have jurisdiction to hear and determine any course or matter affecting chieftainship. For the purposes of the Act a course or matter affecting chieftainship means any cause, matter, question or dispute relating to any of the following:
  - (a) The appointment of nay person as chief or the claim of any person to be appointed as chief; or
  - (b) Appointment or revocation of appointment of a person to be chief;

There is a dispute between two factions of the community pertaining to whether the 1<sup>st</sup> Applicant was properly appointed as chief of Mgomfelweni area. In order for this court to be able to grant the relief sought it would have to inevitably ascertain who is the rightful chief which then makes this matter to fall out of the matter that can be decided by the court in terms of Section 41 of the Swazi Administration Order.

- 3.2 The Applicants have failed to set out in their affidavit all the factual circumstances which meet essential requirements for granting of a final interdict.
- 3.3. This matter is prematurely before court because there is an appeal regarding the appointment of the 1<sup>st</sup> Applicant which is pending before the libandla at Ludzidzini.

[5] The arguments relating to the above were commenced by Counsel before this court, where they both filed very comprehensive Heads of Arguments. I must state that I am grateful to both Counsel for the manner they have handled the matter.

[6] At the commencement of arguments Counsel for the Respondent moved an application to strike out a paragraph in the Applicant's replying affidavit on the ground that the averment that is made therein constitutes a new matter where Respondents cannot challenge that averment.

[7] Having considered the arguments of the parties in this regard I am inclined to rule in favour of the Respondent that the application to strike out the said paragraph succeeds.

[8] Reverting to the points of law *in limine* starting with the first point raised that this court does not have jurisdiction to hear this matter as it pertains to a chieftaincy dispute. Section 41 of the Swazi Administration Order, 1998 states that no court shall have jurisdiction to hear and determine any course or matter affecting chieftainship. For purposes of the Act a

course or matter affecting chieftainship means any cause, matter, question or dispute relating to any of the following:

- a) The appointment of any person as chief or claim of any person to be appointed as Chief, or
- b) Appointment or revocation of appointment of a person to be chief.

[9] On the other hand the Applicant contends in this regard that this is not an application for determination of appointment of a person as chief nor is it an application for revocation of appointment of a person to be chief. This is an application for an interdict prohibiting the Respondents from calling community meetings without the authority of the chief and/or disrupting community meetings that are sanctioned by the Chief. The question of appointment or revocation of appointment of the Chief is not an enquiry before this court.

[10] After considering the arguments of the parties in this regard I have come to the considered view that this point is misplaced in that it is not correct that in order to grant the relief sought the court has to ascertain who is the rightful chief since there is no doubt that the 1<sup>st</sup> Applicant is the rightful chief of Emgomfelweni and therefore entitled to protection by the courts if his rights are being infringed. Unless otherwise stated by the appointing authority, the 1<sup>st</sup> Applicant is the rightful chief of Emgomfelweni. Section 41 of the Swazi Administration Order 1998 and Section 151 (8) of the Constitution does not apply in the present case. For these reasons the point of law *in limine* ought to be dismissed forthwith.

[11] The second point *in limine* is that the Applicants have failed to set out in their affidavit all the factual circumstances which meet essential requirements for granting of a final interdict. The Applicant's founding affidavit falls short of the factual allegations that must be demonstrated for one to qualify for an order of interdict. The fact that the Applicant's appointment has always been contested and before he approached the court he has always been contested. Clearly it does not entitle him to an order of interdict because there is a dispute to his appointment as chief, a right which he wishes this court to enforce.

[11] The Applicants have advanced *au contraire* arguments to the above arguments of the Respondent stating that 1<sup>st</sup> Applicant has a clear right to the relief sought by virtue of being a Chief of the area. The convening of meetings for members of the community on Swazi nation land is the exclusive right of the chief derived from Swazi law and custom to prevent anyone from holding a community meeting without his authority and/or from disturbing a meeting called by him or his (chiefs) agent. The court was referred to a number of legal authorities in support thereto including *C.B. Prest SC, The Law and Practice of Interdicts* at page 62 and the South African decision in *Erasmus vs Afrikander Proprietary Mines Limited 1976 (1) S.A. 950 (W)* at page 965.

[13] On the facts of the matter it would appear to me that the Applicants have proved all the requirements of a permanent interdict. The only criticism being that the interdict sought before the court has been overtaken

by events in that the date for the meeting sought to be stopped has long come and gone. Even when the matter was heard in December the said date has passed. For this reason I find that the point of law *in limine* by the Respondents ought to succeed.

[14] In the result, for the afore-going reasons the application is dismissed with costs.

**S.B. MAPHALALA**

**JUDGE**