

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 4381/07

In the matter between:

PRINCESS TSASE	1st APPLICANT
MDLETJE MJIJANE NTSHANGASE	2nd APPLICANT
SITHELA JIMSON SHABALALA	3rd APPLICANT
AND	
LINDIMPI WILSON NTSHANGASE	1st RESPONDENT
MELLINAH NTSHANGASE	2nd RESPONDENT
J U MAI MA NTSHANGASE	3rd RESPONDENT
LAZARUS JABULANI MASUKU	4th RESPONDENT
HIS ROYAL HIGHNESS PRINCE	
TFOHLONGWANE N.O.	5th RESPONDENT
HIS ROYAL HIGHNESS PRINCE	
KHUZULWANDLE N.O.	6th RESPONDENT
THE HONOURABLE JIM GAMA N.O.	7th RESPONDENT
SWAZILAND GOVERNMENT	8th RESPONDENT

CORAM:

MAMBA J

FOR APPLICANTS:

**MESSRS MAG AG U LA
&HLOPHE**

FOR RESPONDENTS:

MR M. MABILA

JUDGEMENT

15th FEBRUARY, 2008

[1] The first Applicant is Princess Tsase. Although she does not say so, I think her surname is Dlamini, as she says she is a daughter of the late King Sobhuza II.

[2] The Applicant avers that she is the widow of the late Chief Salebona Ntshangase of Mkhwakhweni area who died in 1983. She avers further that by virtue of her status as a Princess and by virtue of the rituals that were performed during her marriage to the said late Chief, she is the most senior wife of the late Chief. Her marriage was under Swazi law and custom. She also alleges that further rituals in terms of Swazi law and custom were performed on her upon the death of her husband which rituals signified and or installed her as the most senior wife to the said Chief.

[3] The first Applicant states further that by virtue of her status as senior wife aforesaid, she has been the acting Chief of the area since the death of her husband, pending the installation of her son as the substantive Chief of the area. The 3rd Applicant is her Indvuna. He was appointed by her. The second Applicant is her assistant, she says. He is the most senior male adult of the clan in terms of the governance of such clan.

[4] The second and third Respondents are the widows of the late Mzikayise Ntshangase (hereinafter referred to as Mzikayise). The first Respondent is one of the sons of Mzikayise and is the Applicant in case number 4427/05 before this court. This case was finalized by this court on the 16th August, 2007. It went on appeal and was concluded by the Supreme Court on the 15th November, 2007.

[5] In the case referred to above, the High Court ruled in favour of first Respondent herein and ordered that Mzikayise should be buried at Mkhwakweni area.

[6] On appeal, the Supreme Court up-held this decision and following that decision of the Supreme Court, the family of Mzikayise, including the first Respondent herein issued a public notice that the remains of the late Mzikayise shall be buried at Mkhwakweni on the 9th December 2007. It is this public announcement that has prompted the applicants to file this application wherein they seek, *inter alia*, for an order:

"(2) staying or suspending execution of the judgements of both the High Court and the Supreme Court of Swaziland under case numbers 4427/05 and 25/07 respectively and handed down on the 16th August and 15 November 2007, pending hearing and determination of this application by the Supreme Court.

(3) Directing that this application be referred to the Supreme court for hearing and determination of the prayers set out herein below:

(4) As concerns the Supreme Court, that: The judgment of that court dated 12th November 2007 in so far as it :-

4.1 seeks to suggest that the late Mzikayise Ntshangase was not (lawfully) evicted from Mkhwakweni area, be rescinded and substituted with an appropriate order.

Alternatively,

4.2 Concerns the burial of the late Mzikayise Ntshangase at Mkhwakhweni area, be varied so as to read that the late Mzikayise Ntshangase be buried at Mkhwakhweni area after due observance of the usual customary (Swazi protocol) by the first, second and third respondents and or any other recognized relatives of the late Mzikayise Ntshangase/' [7] This application was brought on a certificate of urgency and filed with the Registrar of this Court on the 4th December 2007 and was heard by me on the 6th December, 2007.

[8] The application was opposed by the 1st four Respondents. I ruled that because the burial was scheduled to take place on the 10th December, 2007, this was sufficient ground to render the application urgent.

[9] After hearing submissions from both sides, I dismissed the application for the stay of execution of the judgements as stated in prayers 2 and 4.2 of the notice of motion. I ruled that the applicants had failed to make out a case for such orders. I indicated then that written reasons for such judgment shall be filed in due course together with my judgment regarding the rest of the prayers in the notice of motion. Below are my reasons for judgement.

[10] The following facts are either common cause or not in issue.

1. The late Mzikayise was born and bred at Mkhwakhweni area and has a home and family there. The 3rd and 4th Respondents reside thereat.
2. Mzikayise died in Swaziland about 5 years ago.
3. At the time of hearing this application his remains had been kept at a morgue, since his death.
4. Mzikayise's corpse could not be buried as his immediate family including the first three respondents herein wanted to bury it at Mkhwakhweni whereas the Respondents in case number 4427/05 above objected to this alleging that Mzikayise had, at the time of his death been lawfully evicted from Mkhwakhweni area and therefore his remains could not be buried there.
5. After hearing argument on this objection, the court held that Mzikayise's remains should be buried at Mkhakhweni. This judgement was upheld by the Supreme Court.
6. The first Applicant was not a party to the proceedings referred to in the preceding paragraph. She, however, became aware of such proceedings when this court was hearing evidence on the matter.

[11] Based on the above, the first Applicant states that as Chief of Mkhakhweni area i.e. the area where the remains of the late Mzikayise are to be buried, she ought to have been joined or cited as a party to the proceedings relating to his burial. She argues that as acting chief of the area she has a direct and substantial interest in any matter involving the burial of anyone in the area under her jurisdiction. She argues further that in terms of Swazi law and custom or practice,

"when death of a resident occurs or whenever a burial is intended to take place in the area, the close relatives of the

deceased report the death to the chief or traditional authority of the area. The report is made to the Chief through the Indvuna or directly to the chief of the area. The aim or purpose for this reporting is to secure the consent of the authorities to the burial and the convenience of the place and date and time of the burial...Accordingly the burial of a resident is not publicly announced until an understanding with the traditional authorities of the area is reached.

As may be expected, a burial on Swazi Nation area is usually that of a resident or relative of a resident. Thus in reporting the death and seeking agreement on a date of burial the Indvuna or Chief would want to know if the deceased was in fact a lawful resident of the area in the sense that the deceased lawfully resided in that area during his lifetime or that he was attached to the Chief of the area during his lifetime.

Should it turn out that the deceased was not lawfully attached to or resident in that area, the Chief may legitimately decline to have the burial take place there. It is not usual under customary practice to have persons belonging to one Chief or area buried in another chief or area...

Where a deceased person is to be buried at a place or area he did not reside in, the authorities of the area in which the deceased had resided are usually informed of the other place of burial.

It is recognized practice then that a deceased person may

not just be buried at any place at the whim of the relatives. Nor can another Chief or authority, traditional or otherwise, impose on a Chief or Swazi area the burial of a deceased person without due regard to the customary protocol. Such a situation would lead to a breakdown of law and order. This is more likely to happen if the burial has attracted a great deal of public controversy and uncharitable comments as in the present case. Only an Ingwenyama has an overriding authority to impose, where a burial can be conducted in a Swazi area, which is controlled through Swazi Law and custom."

[12] She argues that the two court decisions are not binding on her in the circumstances - as she was not a party thereto. She submits further that;

"Whatever may be the binding effect of the courts' judgements, with the customary protocol duly observed a way for a peaceful burial of the deceased at Mkhwakhweni may well be paved, but this cannot be taken for granted. Talks between the respondents and the applicants must first take place otherwise a peaceful and secure burial of the deceased at Mkhwakhweni cannot be guaranteed given that the tensions are quite high in the area."

The first Applicant concludes by saying that;

"to give effect to the orders prayed for, this Honourable court is asked to refer this matter to the Supreme Court for it to authoritatively pronounce on the prayers sought given that it was the Highest court which sanctioned the judgement herein being challenged and as such it is the only court that can authoritatively correct the position as provided for in the Constitution of the Kingdom of Swaziland."

[13] The applicant's position on the above was further clarified in argument by Counsel who stated that, the first applicant has, in principle, no objection to the burial of the remains of Mzikayise at Mkhwakhweni, provided, however, that the respondents report the death of Mzikayise to the 1st applicant and consult with the first applicant on the actual burial and the logistics thereto, so as to ensure that law and order prevails in the area during and after such burial.

[14] The first applicant submits that this application must be referred to the Supreme Court so that she may furnish that court with the evidence (she has) that Mzikayise was lawfully evicted and or removed from eMkhwakhweni by her father in 1982 who was, in terms of his office and under Swazi law and custom entitled to do so. She also lists the offences allegedly committed by Mzikayise which led to his eviction from eMkhwakhweni area.

[15] I should also mention that the applicants are also represented herein by Magagula Hlophe Attorneys. The Respondents' attorneys objected to this insofar as pertaining to the first Applicant.

[16] Respondents argued that as acting Chief the first Applicant can only be represented in legal proceedings by the office of the Attorney General as per section 77(3)(c) of the Constitution which provides that; "The Attorney General shall ...

(c) represent Chiefs in their official capacity in legal proceedings."

[17] These provisions of the Constitution do not make it obligatory that a Chief may only be represented by the Attorney General in legal proceedings. The Attorney General has an obligation or duty to represent a Chief in legal proceedings. A Chief has a right to call upon the office of the Attorney General to

represent him or her in legal proceedings. A Chief may for whatever reason elect not to exercise this right and instruct Counsel of his or her own choice. A Chief, like every one else, has a fundamental right to instruct Counsel of his choice to represent him in legal proceedings. There is therefore no merit in this objection. Though not represented by the Attorney General, the first applicant is properly before court in these proceedings.

[18] I shall assume, for purposes of this application that the first Applicant is indeed the acting Chief of the eMkhwakhweni area and that she derives such authority by virtue of birth and status in her marriage to the late Chief Salebona. For the avoidance of any doubt, I am not saying this is factually or legally true.

[19] I shall assume further, without deciding the issue, that as a matter of course under Swazi law and Custom, a death in an area under a Chief must be reported to the Chief having jurisdiction over that area. I shall further assume that an intended burial likewise must be reported to the Chief or that the Chief must be consulted on such an issue before hand. I am unable to assume though, that the first applicant as acting chief of eMkhwakhweni area, is genuinely trying to enforce this rule of Swazi customary law.

[20] It is not without significance that the first applicant states that inspite of Mzikayise having being evicted from eMkhwakhweni, he returned to the area in about 1994 and re-established or re-settled himself and his family there, without her permission as chief of the area. He, however, lived there together with his family without any hurt or hindrance. Five years after his death, his family is still there and is mourning his death and painfully awaiting his burial as per Swazi custom.

[21] In terms of Swazi law and custom, the pre and post-burial mourning period for a deceased adult person is six months generally, for all the relatives of the deceased and two years for widows of the deceased. During this period the immediate family members of the deceased are very much restricted on their movements and on what they can and can not do. For the family of the deceased herein that period of six months has become nearly five years. This application seeks to prolong this yet further. This is done in the pursuit of or adherence to custom or tradition.

[22] From their own showing, the applicants were aware of the court proceedings pertaining to the place of burial of the deceased. The first applicant says she has evidence or material that all along she knew was relevant to the said proceedings. She was fully aware of the nature of the proceedings that were underway. She was alive to the allegations that were being made such that she approached the respondents' attorneys in those proceedings concerning this, but was not given the chance to lead this evidence before the court. She was fully aware then, that the outcome of the proceedings would, either directly or indirectly, affect her in the manner she now complains about.

[23] She did not move an application to be joined as a party to those proceedings. When this court ruled that Mzikayise should be buried at eMkhwakhweni/ the story received, as was always the case with the proceedings, generous media coverage throughout the country. Still she did not approach this court. And again, when the matter went on appeal, she reserved her rights. She has decided to exercise her rights now. It is at the eleventh hour.

[24] In dismissing the application, I inter alia, referred to section

233 (9) of our Constitution which provides that :

"(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.

[25] Under the common law, the court has jurisdiction to control and or regulate its own orders or judgements. This power extends to judgements and orders of lower courts or tribunals. This power would generally be exercised upon the application of a party affected by the operation of the court order. This control includes the suspension of such orders pending the occurrence of certain specified eventualities. In the Republic of South Africa this common law jurisdiction of the court has been made a rule of court. It is rule 45A and was introduced as such in 1991. We do not have a similar rule and therefore rely on the common law.

[26] In deciding on whether or not to exercise its discretion and suspend or stay the execution or operation or effect of its judgement the court would be influenced by a number of factors such as the irreparable harm or potential harm and or prejudice that would be suffered by the applicant if the application is refused and the irreparable harm or potential harm or prejudice to be suffered by the respondent if the stay is granted. The reasons or grounds for the application will also be a major consideration in the equation. I refer this regard to the case of *NXUMALO JOSEPH v SWAZILAND BUILDING SOCIETY AND OTHERS* 1987-1995 (1) SLR 122 @ 125-126, *SWAZI MTN LTD v MVTEL COMMUNICATIONS (PTY) LTD & ANOTHER*, Civil case number 7/06 (unreported) a decision of this court delivered on the 08th March 2006 and the authorities therein cited.

[27] The applicants concede that they have been aware of the non burial of Mzikayise all along. They are also aware of the

public notice pertaining to his burial. In spite of these two facts, applicants insist on the formal notification demanded by custom. These are the traditional protocols that have to be observed, they proclaim. The words of Oscar O'Flahertie Wills Wilde that

"Education is an admirable thing, but it is well to remember from time to time that nothing that is worth knowing can be taught"

are apposite here.

[28] No one can teach you that to keep or prevent a corpse from being buried, for five years, in circumstances such as in the present case, is wicked and evil. To know and or understand this, you need to have a heart, soul and conscience. In short, "buntnfu" - the very essence of being human.

[29] Whilst the custom sought to be enforced by the applicants herein may in general terms be seen as good and laudatory, it is not appropriate in this case, taking into account, the publicity that has always surrounded the death of Mzikayise and the inordinate delay that has accompanied his burial. To insist on the formalistic customary reporting or even consultation in the face of all this, is unreasonable and unjust. It is a blind and inappropriate use of custom. It fails to meet the test laid down in section 233 (9) of the Constitution. The custom may be just. It is its implementation in circumstances such as the present, that is unjust and patently unreasonable.

[30] The applicants also aver that "a peaceful and secure burial of the deceased ... cannot be guaranteed given that the tensions are quite high in the area." This alleged volatile situation, it is argued, is worsened by the fact that some residents of the area claim that the deceased was the Chief of the area.

[31] The applicants have, however, not stated how the suspension of the burial of the remains of the deceased would quell or stop these claims. Such claims, no doubt, existed whilst Mzikayise was still alive. Such claims exist now and there is no suggestion that they will not exist beyond his grave; or indeed if he is buried in another place other than eMkhwakhweni.

[32] There is nothing, beyond the unmotivated or unsubstantiated allegation by the applicants that the forthcoming burial if not stayed would lead to a breach of the peace in the area, and that the law enforcement agents in the country would fail to prevent or contain such breach of law and order.

[33] The first applicant states further that it is necessary "to comply with the necessary customary protocol to ensure that after the funeral the area still remains stable and governable by the competent traditional authorities [and] ...that it becomes clear to all and sundry that he was never a Chief" of eMkhwakhweni. She continues and states that; "...at the heart of this burial dispute is a simmering chieftaincy dispute which I submit ought to be cleared at this stage through the relevant respondents being made to follow the customary protocol as concerns burials. ...the respondents seek to use the burial of the deceased in the area as a basis of launching a bitter chieftaincy dispute or legitimizing their chieftaincy claim which can only yield instability. ...it is for this reason that I pray it to be spelt out clearly that the respondents concerned follow the customary protocol failing which such burial be prevented from happening to avoid the potential dispute becoming a reality"

[34] I have referred to the above quoted passages because they capture, in my view, the reason why the applicants want the respondents to observe the said customary protocol of reporting

the death and burial of the deceased to the first applicant. The reason is this: It is a show of force, power or authority. It is an act of bravado. This reasoning fortifies my conclusion above that the applicants' security fears are non-existent. They are contrived by them. It is a ruse, a stratagem to divert the court from the real issues.

[35] If this court grants the first applicant her wish and stays the burial of the deceased pending the reporting, the respondents would be compelled to make the report to her and thereby acknowledge her to the whole world ("all and sundry") that she is the supreme authority in the area and that the deceased was never ever a Chief of eMkhwakhweni.

[36] Applicants' case to the respondents is simply this: acknowledge the first applicant as your chief and then and only then can you bury the deceased at eMkhwakhweni.

[37] I do not think the first applicant is entitled to use the machinery of this court in this way to fight her chieftaincy dispute. Neither the judgement of this court by Mabuza J, nor that of the Supreme Court refer to the deceased as a Chief of eMkhwakhweni. Mabuza J merely held that the deceased should be buried at eMkhwakhweni where his forebears are also buried.

[38] Significantly and perhaps ultimately fatal to the applicants' cause, is the fact that there is no allegation contained in their affidavits that they can not fight their chieftaincy dispute or that they would be prejudiced in their case once the deceased has been buried as ordered by the court. Again, I refer to the factors to be considered in such cases referred to in the authorities cited above in this judgement.

[39] I find no reason why this judgement should be watered down or qualified or varied in the manner sought by the applicants or at all.

[40] In its judgment the Supreme Court concluded that : "There can be no doubt in my mind, in the circumstances fully rrrghltghted above, that the public interest cries out for finality to this saga and that the deceased should now be allowed to rest in peace besides his ancestors at Mkhwakhweni Area where he was born and bred. It is repugnant to public morality that he should have been used as a pawn by the two warring factions."

I respectfully share these views.

[41] The applicants have failed to make out a case for the stay of the burial of the deceased.

[42] I now examine whether or not I should refer the matter to the Supreme Court. This referral would, it is argued by the applicants, enable the first applicant to persuade that court to come to the conclusion that Mzikayise was lawfully evicted from eMkhwakhweni by King Sobhuza II and that *ipso facto*, his remains ought not to be buried there.

[43] When the court sought authority empowering it to order such a referral, both Mr Magagula and Mr Hlophe for the applicants were unable to point to any such authority save that they were both adamant that these powers are inherent in the inherent original jurisdiction possessed by this court. Counsel seemed a bit taken aback, even agitated that such an elementary question was asked by the court. Both attorneys argued that the applicants can not approach the Supreme Court directly as that court deals only with matters which have gone through this court. This argument is, in my view, not very helpful. This court is not a mere conduit

to facilitate the passage of cases to the Supreme Court. It has to deliberate and finalise cases and leave it to the litigants, if not satisfied with the result, to appeal or apply for leave to appeal to the Supreme Court.

[44] It is true that a litigant may not by-pass this court and directly approach the Supreme Court. The general rule is that all cases must find their way to that court by way of appeal from this court. Such appeal may either be as of right or with leave of this court, following a decision in which the issues between the parties have been finally disposed of. This, one would have thought, was common cause. I refer to section 14 of the Court of Appeal Act No. 74 of 1954. Section 147 of the Constitution deals with appeals from this court to the Court of Appeal only and is of no assistance to the applicants. See also the decision of this court in the case of *THEMBA MSIBI v TIMES OF SWAZILAND AND TWO OTHERS* CIVIL CASE NO. 66/06 (delivered on the 1st February 2007).

[45] Section 17 of the Court of Appeal Act makes provision for the referral of a stated case by this court on any question of law which may arise during a trial and on which judgement has been reserved or given subject to the opinion of the Supreme Court. In casu, the applicants are of course not seeking leave to appeal but have merely applied that I refer their case to the Supreme Court so that they could, in that court, "set the record straight" that Mzikayise had been lawfully evicted from eMkhwakhweni by the first applicant's father.

[46] I have been unable to find any provision in the rules and practice of this court or the Supreme Court that empowers me to grant such an order. If the applicants have, in the circumstances

of this case, a right to be before the Supreme Court in order for them to "set the record straight", as they argue, then I think, they must approach that court. They do not have to obtain an order of this court to do so.

[47] For the above reasons, the application can not succeed. It is dismissed with costs.

MAMBA J