



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4124/2007

JABULANI MANGETSE ZWANE

AND 19 OTHERS

Applicants

And

FULEKO MASUKU AND 3 OTHERS

Respondents

Coram

S.B. MAPHALALA - J

For the Applicant

MR. V. DLAMINI

For the Respondent

MR. S. MALINDZISA

JUDGMENT
19th February 2009

[1] On the 23rd November 2007, the Applicants who are all residents of Ematseni area under Chief Gaulela Dlamini, in the District of Manzini filed an urgent application before this court for an order on the following terms:

1. That this Honourable Court dispenses with the normal requirements relating to time limits, manner of service of process, form and procedure in applications and deal with this matter as one of urgency in terms of Rule 6 (25) (a) and (b) of the High Court Rules.
2. That this Honourable Court condones Applicants' non-compliance with the Rules of court.
 3. That a rule *nisi* be issued, calling upon the Respondents to show cause on a date to be determined by this Honourable Court why the prayers set out below should not be confirmed and made final.
 - 3.1 That the Respondents be interdicted and restrained from summoning the Applicants to perform duties at Chief Nhloko Zwane's **Umphakatsi** or for any activity pending finalization of this application.
 - 3.2 That the Respondent be interdicted and restrained from summoning the Applicants to perform duties or for any other cultural activity or for anything associated with Chief Nhloko Zwane's **Umphakatsi**, pending finalization of the determination of the boundaries between the Elundzi and Emlindazwe Umphakatsi by the Eludzidzini committee and/or the **Ingwenyama**.
 4. That prayer 3.1 operates with immediate and interim effect.
 5. That this Honourable Court grants the Applicants costs in the event the application is unsuccessfully opposed.
 6. That this Honourable Court grants any further and/or alternative relief which it may deem fit and just in the circumstances.

[2] The said application is founded on the affidavit of the 1st Applicant Jabulani Mangetse Zwane who is the Induna of Ematseni area under Chief Gaulela Dlamini of the Elundzi Umphakatsi in the District of Manzini. The 1st Applicant relates herein all the material facts in support of the Applicants' case. The other Applicants have filed supporting affidavits to that of the 1st Applicant. A further supporting affidavit of one Dingiswayo Kenneth Magagula who is the Senior Indvuna of the Elundzi Chiefdom is filed.

[3] The Respondents oppose the granting of this order and has filed a Notice to rise points of law as follows:

1. The matter is not urgent because the matter was reported and is still pending at Eludzidzini.
2. Full legal argument will be advanced at the hearing of this matter.

Requirements of an interim interdicts

In particular that there is no alternative remedy

Jurisdiction

In terms of Section 151 and 152 of the National Constitution the High Court does not have jurisdiction.

[4] The above points are further supplemented at paragraph 5 of the Answering Affidavit of the 1st Respondent Fuleko Masuku as follows:

- 5.1 The matter is not urgent.
- 5.2 Applicants lack sufficient facts to enable the court to grant an interim relief.
- 5.3 *Lis pendens* in that the same dispute involving similar parties is being handled by a special committee at Eludzidzini.
- 5.4 Applicants do not have the requisite *locus standi in judicio* to institute these proceedings.
- 5.5 Applicants do have an alternative relief under the Swazi Administration Act of 1950.
- 5.6 Jurisdiction of the High Court has been prematurely invoked (see the Constitution Section 151 (3) (b)).

[5] In arguments before me, Counsel for the respondent

abandoned points 5.1, 5.2 and 5.4 and proceed with the following in arguments:

- i) *Lis pendens* in that the same dispute involving similar parties is being handled by a special committee at Ludzidzini
- ii) Applicants do have an alternative relief under the Swazi Administration Act of 1950.
- iii) Jurisdiction of the High Court has been prematurely invoked (see the Constitution Section 151 (3) (b)).

[6] It is the above three points of law that vexes the court presently. I shall proceed to address them *ad seriatim* hereunder as follows:

Lis pendens

[7] The Respondents contend that this matter is being handled by the Ludzidzini Council and for reasons known to Applicants they initiated these proceedings without giving

the committee presently handling the matter an opportunity to interrogate Applicants concerns and fears. In this regard the court was referred to the High Court case of *Sanele Cele and Others vs University* by Masuku] at page 19.

[8] The Respondents further contend in this regard that this application be dismissed or referred pending the exhaustion of local remedies in that, Applicants be ordered to appeal to the main committee at Ludzidzini since their matter is being handled by a select committee.

[9] Further that this application must fail because their hands are not clean. Applicants are causing all sorts of problems at Emlindazwe **Umphakatsi** in that though knowingly that they are residents of that **Umphakatsi** they continue to defy summons from the Umphakatsi authorities.

[10] Counsel for the Respondent further outlined a

description of the land in issue. That Ematseni is a piece of land which forms part of the Emlindazwe **Umphakatsi**. Applicants are just a few homesteads on this land. This piece of land has more than 60 homesteads. A majority of these people are loyal to the Emlindazwe **Umphakatsi** as it has been the case during the lifetime of the late Chief Nhloko Zwane. Summons shall always be issued to residents of the **Umphakatsi** based at Ematseni because they are the majority and as usual they respond. The defectors have never been compelled to attend to activities at Emlindazwe **Umphakatsi** and therefore there has never been a threat on their rights.

[11] The Respondents contend that it appears that what made Applicants to launch this application is nothing more than their failure to lure all the people of Ematseni to change their allegiance to the Elundzi **Umphakatsi**. This is what can easily be detected.

[12] The Respondents furthermore contend that in terms of the Swazi Administration Act 79 of 1950 Section 2, a Chief is defined as any person appointed under Section 3, or any person for the time being holding the office of chief. Respondents submit that they are within their authority to summon subjects of the late Chief Nhloko Zwane to **Umphakatsi**. Under the same Section 2 “**libandla**” is defined to mean the Ngwenyama or Chief Advisors and representatives.

[13] I shall consider the Respondents point *in limine ad seriatim* starting with the issue of urgency and say that firstly, I wish to apologise profusely for the delay in handing down judgment in this matter due to other matters which clamoured for my attention late last year. I shall therefore consider the application in the long form.

[14] On the second and fourth points *in limine* being that Applicant lacks sufficient facts to enable the court to grant an interim relief and fourthly that Applicant do not have the requisite *locus standi in judicio* to institute such proceedings I find on the facts of the matter that the Respondents cannot succeed on these points. On the point of *locus standi* I find that the Applicants have *locus standi* to bring this application because their personal rights are being violated. A personal right is a legal right and a legal right enjoys protection of our law. (see *Durban City Council vs Association of Building Societies 1942 AD 27 at 33*).

[15] On the first point about the interim interdicts I have come to the considered view that the requirements of an interim interdicts have been proved in accordance with what is provided in the South African landmark case of *Setlogelo vs Setlongelo 1914 AD 221 at 227*. Furthermore, I have come to the view that the local case of *V.I.F Limited, in Re:*

V.I.F Limited vs Moses Mathunjwa and Others, Civil Case No. 1270/2000 is apposite on the facts of the present case.

[16] The only point that remains for determination is that of *lis pendens*. Applicants in their Founding Affidavits pointed out that the matter was sometime in the year 2003 reported to Eludzidzini and is still pending finalization.

[17] It is also clear on the facts that to facilitate the finalization of this dispute a committee was set-up to deal with the Emlindazwe and Elundzi land dispute.

[18] On these facts it would appear to me that the matter is *lis pendens* in that it is a matter of the same parties and with a similar prayer before the traditional authorities. It is my considered view that this court ought to allow these authorities to determine the disputes. The dispute between the parties is essentially a matter governed by Swazi law and

custom and those traditional authorities are better placed to deliberate on it. I would only point out to these traditional structures that as time is of the essence it should be dealt with as a matter of urgency.

[17] In the result, for the afore-going reasons the point of law on *lis pendens* succeeds and therefore the application is dismissed. I further rule that each party pays his or her own costs.

S.B. MAPHALALA
PRINCIPAL JUDGE