

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2023/2007

FILE PHILDAH KHUMALO

Applicant

Vs

MASHOVANE HEZEKIAL KHUMALO

Respondent

Coram

S.B. MAPHALALA

For the Applicant

MR. T. MLANGENI

For the Respondent

MR. Z. MAGAGULA

JUDGMENT 5th
March 2009

[1] The application before court is that of a mother against her own son for an order that the latter who is cited as the Respondent herein is evicted from the home of the Applicant at Sandleni area in the Shiselweni Region.

[2] In prayer 2 thereof that the Respondent be and is hereby restrained and interdicted from coming to the home of the Applicant at Sandleni area in the Shiselweni Region.

[3] Further, in prayer 3 thereof that the Respondent be and is hereby interdicted from ploughing and/or otherwise making use of the farming fields of the Applicant at her home at Sandleni area in the Shiselweni Region.

[4] *Mr. Mlangeni* for the Applicant has given the following overview of the facts of the matter:

2. The facts are obviously not just sad but unusual as well. There appears to be no useful precedent in this jurisdiction or elsewhere to guide the court, and it is submitted that the facts offer an opportunity for creative decision - making. Even a browse through Roman law writings has not yielded anything to go by.
3. In her papers the Applicant, a 68 year old widow, describes a son who does not greet anyone in the home and who does not respond to greeting, does not get along with anyone and has, among other things, taken over the Applicant's ploughing fields against the Applicant's consent.

[5] The Applicant has filed a Founding Affidavit where this sad saga is related in detail.

[6] The Respondent opposes the application and has filed an Answering Affidavit in this respect. In the said affidavit at paragraph 10.4 he states the following:

10.4 I state that there is no reason for fear because I do not threaten any body and I do not interfere in the lives of my brothers nor of that of the Applicant since she made it clear that she did not appreciate me.

[7] Further on at paragraph 11.2 of the said affidavit the Respondent states the following:

11.2 I state that I have never threatened Applicant. I state further that for a number of years I was the only one supporting the Applicant and improving the homestead. Trouble started when my elder brother sold two of my oxen and shared the proceeds thereof with Applicant. When I demanded that my elder brother compensate me, Applicant took his side and I resolved to keep to myself and seek legal redress.

[8] Another very important point raised by the Respondent is the one found in paragraph 7.2 of his affidavit where he states that **"... this Honourable Court does not have jurisdiction to entertain this matter by virtue of the fact that the matter is already pending in a parallel forum".**

[9] I must mention that when this matter came for arguments last year the last point was argued and judgment was postponed to determine the pros and cons of those arguments.

The preliminary point of *lis pendens*

[10] The Respondent contended that the matter is *lis pendens*. The same dispute was reported by Applicant to the traditional authorities of KaGwegwe Royal Kraal against the Respondent seeking the same relief to that sought herein. The matter has not been finalized before the traditional authorities.

[11] In this regard the court was referred to *Beck's Theory and Principles of Pleadings in Civil Actions, 2nd Edition* page 134 where the following is formulated:

"This matter is *lis pendens* in that the Applicant lodged a complaint with the Chiefs Council of Esandleni and the matter is still pending".

[12] It is abundantly clear that the dispute between the parties is over Swazi nation land between people who live and are governed by Swazi law and custom. Swazi law and custom is the most suitable regime to resolve the dispute and the Chief is a better placed person to handle same in as much as the Chief is also responsible for allocating land on Swazi nation land.

[13] Section 235 (8) of the Constitution of Swaziland Act 2005 provides that:

"The powers and functions of Chiefs are in accordance with Swazi law and custom or conferred by Parliament or Ingwenyama from time to time".

[14] Sub-section (9) thereof provides the following:

"In exercise of the function and duties of his office a Chief enforces a custom, tradition, practice or usage which is just and not discriminatory".

[15] The dispute has been reported to the Chief by Applicant and she was, at least at the time of these proceedings were instituted seized with it. It appears to me that in this sense the dispute is *lis pendens*.

[16] It is my considered view that this matter can only come before this court on review or on appeal after running the full course of the hierarchy of the structures provided at Swazi law and custom. It is abundantly clear that this country has a dual legal system that of Roman-Dutch law and Swazi law and custom. These systems co-exist with each other and the Roman-Dutch system by the High Court can only exercise its powers on review or appeal of a decision in the traditional legal system. In the interest of harmony it is imperative that respect should be given where due.



S.B. MAPHALALA

PRINCIPAL JUDGE

[17] In the result, for the afore-going reasons the point of law of *lis pendens* succeeds with costs.