



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No: 2625/08

In the matter between:

SOLOMON MNDZEBELE

APPLICANT

and

DANIEL MNDZEBELE

RESPONDENT

Case No. 1942/2009

SOLOMON MNDZEBELE

APPLICANT

and

DANIEL MNDZEBELE
PHUMZILE MNDZEBELE (Born Gama)

1ST RESPONDENT
2ND RESPONDENT

Neutral citation:

Solomon Mndzebele v Daniel Mndzebele & Phumzile
Mndzebele (born Gama) (1942/09) [2012] SZHC126
(AUGUST 2012)

Coram:

MABUZA J

Date Heard: 23/11/09; 24/11/09; 7/3/11; 9/03/11, 17/03/11; 14/2/12;
15/2/12; 23/3/2012

Delivered: 1 AUGUST 2012

Summary: Interdict – Applicant interdicting respondent(s) from interfering with his use of family homestead – Rule nisi issued - Dispute of ownership of family homestead – Homestead situate on Swazi nation land – Applicants failure to prove ownership of homestead – Rule discharged.

Interdict – Applicant interdicting Respondent(s) from burying son at disputed family homestead – Rule nisi issued – Homestead situate on Swazi Nation land – Applicants failure to prove ownership – Interdict discharged.

[1] Initially the Applicant launched High Court case no. 2625/2008 wherein he sought and was granted the following prayers:

(a) Restraining and interdicting the Respondent or those acting on his instructions or on his behalf from interfering with and/or in anyway disturbing Applicant in his occupation and enjoyment of his homestead at Lobamba Lomdzala.

(b) Directing that the Respondent pays the costs of this action.

[2] After the demise of German Mndzebele the Applicant launched High Court case No. 1942/2009 by way of urgency in which he sought and was granted the following prayers:

- (a) Restraining and interdicting the Respondents from burying the deceased David Mndzebele at the homestead of the Applicant situate at Lobamba Lomdzala area in Manzini District.
- (b) Directing that the Respondents pay the costs of this action.

[3] The matter came before me on trial on the 23rd November 2009. Sitting with me were Assessors from the traditional Swazi courts namely Mr. Lokhensa Dlamini member of the Higher Swazi Court of Appeal and Mr. Msweli Mdluli, President, Swazi National Court, Nhlanguano; experts in Swazi Law and Custom who were kindly sourced by the Judicial Commissioner, Mr. Mavuso for which I am extremely grateful and am thankful for the Assessors' assistance. Mr. Mdluli was replaced by Mr. Abednego Vilakati member of the Swazi National Court, Lozitha.

[4] Up to and including the 17th March 2011 Mr. Lokhensa Dlamini sat with us. Regretfully when the matter resumed on the 14th February 2012 he had passed away. Our condolences go to his family, relatives and friends. We were joined by Mr. Dube, Chief of Mpolonjeni and

Swazi Court President, Mbabane who replaced Lokhensa and with whom we concluded this matter. My appreciation for his assistance is hereby expressed.

- [5] The history hereto began with the migration of some Mndzebeles from the Mankayane area to Mahlanya area where they settled permanently. These Mndzebeles sired one called Mgucuza Mndzebele who married LaMalinga. Mgucuza and LaMalinga sired two brothers; Mzube and Mangobe. Mzube was older than Mangobe. Mzube fell in love with a La Mavuso woman and impregnated her. He died before the child was born and was buried at Emfunamuzi. After his death Mangobe fell in love with the pregnant La Mavuso and married her. Her first child Mzube's son was named Paulos, was brought up and educated by Mangobe. Subsequently she gave birth to Mangobe's children namely: Reuben, Shasha (a girl), Flora, Maria, Ntombikayise, Nobuhle, Majoye and Daniel (the respondent) Paulos sired Solomon (the Applicant). In terms of Swazi custom Solomon refers to Daniel as babe lomncane (uncle) because Daniel is younger than Paulos and Reuben who are both late.

[6] The background to the application herein is that a son to the 1st Respondent (Daniel) died on the 30th May 2009. The deceased German Mndzebele is the husband of the 2nd Respondent. The deceased and the 2nd Respondent lived at Lobamba Lomdzala before his death. She continues to reside there; and the deceased is still not buried. The reason that he is still not buried is because there is a dispute between (Solomon) and Daniel as to where he should be buried. Solomon who has brought this matter to this Court states that the homestead at Lobamba Lomdzala belongs to him by virtue of lineage having belonged to Mzube his father and that Daniel should obtain permission from him in order to bury the deceased there. Daniel on the other hand denies that the home belongs to Solomon but to Mangobe Mndzebele (Mangobe) who is the late father to Daniel and therefore by ancestry to Daniel as the sole surviving son of Mangobe and that Solomon is not entitled to the interdicts that he obtained herein against him and the second Respondent.

[7] Paulos grew up and married Loslina and together with his wife they had several children who included Solomon. Solomon is a nephew to Daniel.

[8] When Solomon testified he stated that there was history to the effect that at some point after his marriage Paulos left the main home with his wife and established his own home at Phumuphele because he could not live with his mother and stepfather (Mangobe). After a while Paulos together with his family left Phumuphele for Barberton where he was employed as a miner. Solomon was three years old when they left for Barberton having been born at Lobamba Lomdzala. He lived in Barberton for many years (between 15 and 20 years) and when he returned to Swaziland he worked at Bulembu where he set up a home and kontaed under Chief Mnikwa Dlamini at Luhhumaneni. He was away from Lobamba Lomdzala for over forty (40) years and at Bulembu for many years. From Bulembu he returned to Lobamba Lomdzala. By then his children were fully grown up and leading their own lives away from Lobamba Lomdzala.

[9] Paulos returned to Lobamba Lomdzala three years before his death. At that time Solomon and his own family were living at Mhlumeni where Solomon was employed. When Paulos returned to Lobamba Lomdzala he abandoned his home at Bulembu.

[10] The story as to what happened subsequent to Paulos's return to Lobamba Lomdzala is taken over by Daniel. When Paulos returned to Lobamba Lomdzala the disputed home he did not have a house there but Daniel allowed him to live with him in his (Daniel's) house; the intention was to introduce Paulos to the Chief of Lobamba Lomdzala Mlomokazane Fakudze who at the time did not know Paulos; but Paulos died before this could be done. This fact was confirmed by Titane Esther Mndzebele (PW3), PW1 (Solomon) and Hlengiwe Mndzebele (PW2) who corroborated one another in stating that Daniel had no house at the disputed homestead. An inspection *in loco* disclosed that they were lying to the Court and that in fact most of the houses at the disputed home either belonged to Daniel his children and siblings or he had a hand in their construction. In fact the inspection *in loco* revealed that Paulos had no house there neither did Solomon.

[11] When Paulos returned he was given shelter in a family rondavel referred to as Mashobeni. When he died Daniel buried him at the graves where Mangobe was buried at the disputed home. Mzube who

was Paulos' father and Solomon's grandfather was buried at Emfunamuzi. Solomon was unable to tell the Court where his grandfather was buried as he did not know. He was unable to show the Court his grandfather's grave. It was Daniel who showed the Court the area and some older graves where Mzube was buried.

[12] Initially the Court was informed by Solomon that Mzube had married LaMavuso and that Mangobe married LaMavuso by "kungena". There was no evidence led to prove the marriage between Mzube and LaMavuso. On the other hand there was evidence to the effect that LaMavuso was a girlfriend when Mzube died because it was Mangobe through his children that paid lobola for LaMavuso.

[13] The house in which Solomon lives was not built by him. He has no house of his own at the disputed homestead. The Court learnt from Daniel that the said house belonged to a Portuguese national who harboured inspirations to be a son in law to the Mndzebele's but this did not happen. The said Portuguese built the house with brick and mortar up to roof level and left it unfinished. Because Solomon needed a house in which to live Daniel gave this house to Solomon

upon his return to Lobamba Lomdzala because he considered him to be family. They were on good terms then. Daniel informed Solomon that he could use the house if he finished constructing it. Daniel even provided galvanized tiles for the roof.

[14] On the other hand the deceased had lived at the disputed home since he was two years old. He owned two flats; one which he lived in with his wife LaGama and another which he rented out. The deceased was born from a girlfriend to Daniel. Daniel's mother fetched him from his mother's people when he was about two years old after paying damages for the impregnation of his mother and for him. The disputed home has been his home up to when he died. There is no evidence that any damages were paid for LaMavuso when she was impregnated by Mzube nor whether or not Paulos was purchased in the traditional sense. It would appear therefore that the deceased is better entitled legally to be at the disputed home than Solomon.

[15] If the disputed home belonged to Mzube why was he not buried there? He is buried at Phumuphele at his parental home whereas Mangobe is buried at the disputed home. If it were true that Mangobe inherited

LaMavuso when she and Mzube had already built the disputed home, then Mzube would be buried at the disputed home.

[16] The inspection *in loco* also revealed that Daniel had built a big modern house and the rest of the yard was littered with houses wherein his children lived and the children of his siblings. Other than the house given to Solomon, there were no houses belonging to Paulos' children, Solomon's siblings. It is clear to the Court that the disputed home is where Daniel is a permanent residence.

[17] Solomon, PW2 and PW3 contend that Daniel has a home at Edwaleni where he kontaed and that he could bury the deceased at this home. The Court conducted an inspection *in loco* at that home and found that the premises were not fully developed as the disputed home. When Daniel gave evidence he stated that he had obtained the land strictly to farm cattle. Indeed the Court found this to be so. It is not fully developed nor modern like the disputed home even though he has two ramshackle houses for two of his younger wives. He is a polygamist and self-declared lover of the opposite sex. The area slopes, has no yard and is surrounded with grass and brush. It would be totally

unsuitable to conduct a funeral. Whereas the disputed home is very suitable for that purpose.

[18] Evidence was led by Solomon corroborated by PW2 and PW3 that Daniel had buried some of his children at Edwaleni and he could equally bury the deceased there. When he gave evidence Daniel explained that the children he buried there were his daughters who had married Mozambicans but when their marriages failed they returned home with their children. Such daughters according to Swazi law and custom were not buried at the main homestead. The graves both big and small that Daniel pointed out to the Court during the inspection *in loco* belonged to his daughters and their children.

[19] When Solomon led evidence he indicated that his grievance lay in the fact that Daniel never reported to him that the deceased had died nor did he seek permission to bury the deceased at the disputed home. Solomon told the Court that the disputed home belonged to him as he had inherited it from Paulos who in turn had inherited it from Mzube. PW2 and PW3 corroborated Solomon's grievance and the claim to the disputed home.

[20] Daniel's response was that he could not seek permission from Solomon as the disputed home had devolved to him after the death of his parents and elder brothers. In fact he was senior to Solomon because he was Solomon's uncle (younger father) and according to Swazi law and custom it was Solomon who was supposed to defer to him. His duty was to inform the Chief and senior members of the family that his son had died and this he had done. Furthermore, there was no need to report a death that everyone in the homestead knew about. The deceased and Solomon lived in close proximity of several metres from each other so there was no way Solomon would not have known of the deceased's death.

[21] Solomon testified that before launching the proceedings before this Court, he went to the Chief's inner council to report that Daniel was disputing Solomon's ownership of the main homestead. This was during 2000. Solomon's father had died by then. The headman was Magingdane Dlamini (DW1). The inner council deliberated upon the matter and ruled that the matter should first be deliberated upon by the Mndzebele clan. The clan deliberated on the matter but Solomon was

not happy with the decision. He returned to the Chief's inner council which heard the complainant. The inner council ruled that the disputed home belonged to Mangobe, Daniel's father. An appeal by Solomon directly to the Chief was not successful and Solomon lodged the complaint with the King's council at Ludzidzini but was dissatisfied with how the Governor of Ludzidzini Jim Gama received the complaint. He proceeded to Lozitha where he was entertained by the Swazi National Council. The latter deliberated over the matter and referred it to a joint session of the King's Councils at Ludzidzini.

[22] At Ludzidzini Chief Dambuza chaired the meeting. Chief Dambuza ruled that the parties should return to the Chief's inner council at Lobamba Lomdzala who were directed to point out to the complainant what belonged to him. Indeed he was shown the fields and land that belonged to Paulos and where Paulos lived and cultivated land after he left the disputed homestead. These belong to Solomon but he not only wants these he also wants the disputed home. He was shown land at Phumuphele where Paulos had built a home before migrating to South Africa. Solomon did not want this land because it had been

struck by lightning during 1952 which struck the house and many cattle. This caused Paulos to abandon it and migrate to South Africa.

[23] When PW2 was asked as to which cattle were used to pay the bridal price for LaMavuso, she responded that it was the bridal price for Shasha. Shasha is Daniel's sister from Mangobe and LaMavuso. She was asked why were cattle paid as bridal price for Paulos's female children (Solomon's siblings) not used if Mzube had married LaMavuso. She was unable to respond. PW3 confirmed during cross-examination that when Mangobe died LaMavuso wore mourning gowns for him. There was no evidence that LaMavuso wore any mourning gowns for Mzube after he died; if she had done so, she would not have been able to wear them for Mangobe as according to Swazi Law and Custom a woman may not wear them twice. It is trite that mourning gowns cannot be worn twice. Had she worn them for Mzube she would not have been allowed to wear them for Mangobe. And if she had worn them for Mzube this would have been an indication that she was married to him.

[24] A common factor from PW1, PW2 and PW3 was that they all had no strong objection to the deceased being buried at the main homestead. They wanted Daniel to formally request Solomon for permission to do so and by so doing to acknowledge that Solomon owned the main homestead but Daniel refused to do so. After PW3 had testified the Applicant closed its case.

[25] The defence led two witnesses namely Magingindane Jacob Dlamini (DW1) and Daniel (DW2). DW1 testified that he was an Indvuna (Headman) of the Chief's inner Council at Lobamba Lomdzala. He stated that the death of the deceased was reported to the Umphakatsi and the latter had no objection to him being buried at the disputed homestead. He informed the Court that the Chief's inner council at sometime adjudicated upon the dispute about the ownership of the homestead which is at Lobamba Lomdzala. The finding of the inner council was that the matter should be referred back to the Mndzebele family and the family should give Solomon Paulos's lands which he acquired after leaving the disputed homestead. DW1 stated that Solomon was shown his father's lands in the presence of another

Libandla from the King's Council, the Swazi National Council (SNC) who were accompanied by two men from the Chief's inner council.

[26] He stated that he had known since childhood that the disputed homestead was built by Mangobe. He also knew that when Paulos got married he left Mangobe's home and built his own home. DW1 stated that the deceased paid tax through the Chief of Lobamba Lomdzala and it was inconceivable for him to be buried anywhere else but in the area under his Chief.

[27] The salient features of the evidence of DW1 is that the disputed homestead belonged to Mangobe, Daniel's father; that Paulos had built his own home after he had got married; and that Solomon was shown and given his father's lands.

[28] Daniel disclosed during cross-examination that the deceased had two wives whom he had married at the main homestead in Lobamba Lomdzala. He lived with them there but that one wife had left leaving the second respondent. Daniel used to have seven wives, five died and two young ones remain. It is those two who live at Dwaleni. His

wives are buried at the main homestead. His children from the deceased wives live at the main homestead.

[29] He confirmed that the children who are buried at Dwaleni are his daughter's children sired by foreign men and could not be buried at the Mndzebele graveyard(s) as they were not Mndzebeles. He further stated that his unmarried daughters, the mother's of the aforesaid children were buried at Dwaleni near their children. Had they married they and their children would have been buried at their in-laws homesteads. He stated that the deceased was a Mndzebele and had to be buried at the main homestead and that the chief had acquiesced to this. The family had been using the family graveyard since 1946 and save for informing the Chief's Council, no permission was ever required.

[30] After the evidence from both sides had been heard, the court conducted an inspection *in loco* at the homestead at Lobamba Lomdzala at Mahlanya area on the 14th February 2012 and at the home of the 1st Respondent at Dwaleni on the 23rd March 2012.

[31] The inspection in loco conducted at the main homestead revealed 10 houses of various sizes and mostly constructed with brick and mortar and roofed with tiles and galvanized zinc. The biggest and most impressive house belonged to the 1st Respondent (Daniel). The deceased and his wife occupied a two roomed modern house. They also owned an old dilapidated house which they rented out. Among the mealie fields were two separate areas with graves. Both LaMalinga and Mangobe were buried at the main homestead and not Mzube.

[32] After leaving the homestead the court went to an area behind the Mahlanya market called Phumuphele. The area had mealie fields and used to be the home of Paulos Mndzebele after he moved out of the main homestead. When the Court inspected it, there was no longer any house and the Applicant was using it for ploughing purposes. From there the Court proceeded to another area called Ntabamhloshana which also belonged to the Applicant. From there the Court proceeded to another area belonging to the Mndzebele clan, Emfunamuzi a portion of which was used as a graveyard. It is here that Solomon's grandfather Mzube is buried.

[33] The inspection in loco conducted at the homestead at Lobamba Lomdzala left no doubt in the Court's mind that the said homestead belongs to Daniel and not to Solomon. Solomon was given a house at the homestead by Daniel out of the kindness of his heart.

I am also satisfied that Solomon was shown his father's land at Phumuphele and Ntabamhloshana and should construct his own home there. There is therefore no need for Daniel to request Solomon's permission or Hlengiwe's to bury his son at the disputed homestead.

[34] I find therefore that the Applicant has failed to show that he has a clear right to the home at Lobamba Lomdzala and that the Respondent's have interfered with his rights to use and enjoy the said homestead.

[35] In the event I order that:

- (a) The *rule nisi* and or interim orders granted in both the above cases are hereby discharged with costs.

- (b) The Respondents are hereby ordered to bury the deceased at the family homestead at Lobamba Lomdzala.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. Z. Magagula

For the Respondents : Mr. J. Mavuso