IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4209/09

In the matter between:-

ELCAN DLAMINI **Applicant**

and

DAN DLAMINI **1st Respondent**

FILISIYA SALELWAKO (NEE DLAMINI) **2nd Respondent**

ALPHEOUS DLAMINI **3rd Respondent**

STEPHEN DLAMINI **4th Respondent**

MBANGO MAVIMBELA **5th Respondent**

Neutral citation: *Elcan Dlamini v Dan Dlamini and 4 others (4209/09) [2012] SZHC 153(16th July 2012)*

Coram: HLOPHE J.

Dates Heard: 19/01/12, 05/03/12, 06/03/12
19/03/12, 20/03/12, 21/03/12 and 23/03/12

Delivered: 16th July 2012

For the Plaintiff: Mr. L. Malinga

For the Defendants: Mr. Z. Magagula

JUDGMENT

[1] On the 13th April 2012, I handed down a Judgment in terms of which I made the following orders:-

(1) The eldest Family Council member (who I am told is Alpheous Dlamini) be and is hereby directed to convene Family Council meetings as may be necessary to resolve the issue between the parties either through appointing the heir or through giving direction on how the parties are to go forward.

(2) The said meetings should be opened to the Applicant's siblings as the Council shall find appropriate taking into account the rules of natural justice.

(3) The order of this court as to what happens to the fields is reserved to give the Family Council an opportunity to resolve the matter through their structures.

(4) The Family Council is directed to have finalized the matter by the 18th June 2012 on which date their decision has to be placed before this court by either of the parties.

(5) Should the matter not be resolved by that day, this court shall decide on the next level as the situation shall demand.

(6) This question of costs is also reserved for now until the 18th June 2012, which is the date to which the matter is postponed.

[2] These orders were a sequel to an application instituted in court by the current Applicant who sought among other reliefs an order of this court interdicting and/ or restraining the First Respondent or his agents from ploughing the Applicant's family fields at KaDinga area in the Shiselweni District.

[3] The application itself was a result of a family dispute in terms of which the First and Second Applicants, who are siblings born of the same father and mother, quarreled over certain fields initially owned by their parents during their lifetime. Whilst the Applicant claimed to be in charge of the fields by virtue of the fact that he had always ploughed those fields together with their mother, who was the last of their parents to die, and after she had allocated the First Respondent his own fields and land for his own homestead, the latter claimed to have allocated and or redistributed the fields to all their male siblings claiming to have been so entitled by virtue of his being the eldest son.

[4] It having been ascertained that the matter was to be resolved by Swazi Law and Custom Principles and it having been established, that the allocation or distribution of family assets such as land after the death of the parents under this law cannot be done on the basis of one's order of birth but on the basis of one being an heir or Inkhosana, and having noted that the matter was a family dispute whose resolution in the most constructive of ways was to be in the interests of all the parties, this court had decided that such a measure be given an opportunity, hence the order issued and quoted verbatim above.

[5] Orders 1 and 2 mentioned above were therefore aimed at achieving this goal. I had however clarified that otherwise a

decision on the issue of the allocation of the fields was being reserved whilst the Family Council was being given a chance to resolve the matter amicably. This I did to ensure that an order that had an out–out winner and loser was the last resort, in view of the relationship of the parties.

[6] On the return date I had fixed, namely the 18th June 2012, it was brought to my attention that a meeting had been held as envisaged in order 1 referred to above. There were however produced different minutes set by each one of the sides. Each side had taken its own minutes and it appears there was no one specifically appointed or authorized to do so. Naturally the minutes of these parties were not in agreement. It became clear that as there was no officially appointed person to record the minutes including there having been no attempt to proof read and sign the said minutes jointly, there remained a dispute on what transpired.

[7] It for this reason became clear to me that the matter had not been resolved and that the chance given to the parties to resolve same in what I would describe the most constructive of ways had not yielded fruits. At least from both versions of the minutes it became clear that the chairman of the Family Council alleged that the court order concerned had directed that they appoint the First Respondent as an heir and nothing else. Certainly that is not the order I had made and surely his said assertion was either or misunderstanding of the order or a downright deliberate act of refusal to resolve the matter in a constructive manner as suggested by this court.

[8] I have had to consider whether it was advisable for me to refer the matter to oral evidence so as to determine what the true position was in view of the disputes contained in the minutes but I have

cautioned myself against doing so as I am of the view I would be digressing from the real issue. I being clear that my measure at having the parties resolve the matter amicably was not effective, I had to resort to the law on the reliefs sought.

[9] I consequently can neither confirm nor dispute whether the First Respondent is now a lawfully appointed heir. This issue I have to leave in the hands of the parties themselves to deal with in terms of the options available to them as their legal representatives shall advise.

[10] Given that in my previous judgment I had clarified that the remaining question was about the property of the allocation of the fields, I now have to decide the matter once and for all on this question –that is to say whether same was proper or not.

[11] In my Judgment handed down on the 13th April 2012, I had already found that the purported allocation of the fields by the First Respondent was an exercise in futility as he had no authority to do what he purported to do in purporting to allocate the fields. This is so because it was only the Family Council as a whole that would decide on the issue of the fields or the heir would have to decide it. In this matter it is common course that the First Respondent had no authority to allocate or apportion or distribute the fields when he purported to do so as he had not been appointed an heir.

[12] This being the case I reiterate that his purported distribution or allocation or apportionment of the fields was unlawful and cannot stand which means that his order purporting to do so should be set aside or declared a nullity. This means that until the time the matter is resolved between the parties, the position as was at the

time of the death, of the mother of the Applicant and 1st Respondent, should prevail as concerns the ploughing of the fields.

[13] For the removal of any doubt I make the following order:-

(1) The decision of the 1st Respondent purporting to allocate or distribute or apportion the fields among his siblings and himself be and is hereby set aside.

(2) The position as regards the utilization of the fields be and is hereby ordered to revert to what it was at the time of the demise of the mother of both Applicant and the First Respondent.

(3) The First Defendant is to bear the costs of these proceedings.

Delivered in open Court on this the …… day of July 2012.

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N. J. HLOPHE
JUDGE