



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No.550/2012

In the matter between

MARIAH DUDUZILE DLAMINI

APPLICANT

and

AUGUSTINE DIVORCE DLAMINI

1ST RESPONDENT

POLYCARP DLAMINI (Chief Mshoshi)

2ND RESPONDENT

SAMSON DLAMINI

3RD RESPONDENT

Neutral citation:

Mariah Duduzile Dlamini v Augustine Divorce Dlamini and 2 others (550/2012) [2012 SZHC] 66 (12th April, 2012)

Coram:

OTA J.

Heard:

29th March, 2012

Delivered:

11th April, 2012

Summary:

Application to interdict the decision of the Umphakatsi to evict Applicant from her marital homestead. Applicant failed to file an appeal or review application against said decision. Held: In the circumstances, the interdict sought is a final interdict to defeat or extinguish the decision of the Umphakatsi. No jurisdiction in the High Court to grant such an order. Applicant has an alternative remedy by way of an appeal or review application against the said decision of the Umphakatsi, to the appellate traditional adjudicatory authorities. Application dismissed. No order as to costs.

OTA J.

[1] By Notice of Motion dated the 16th day of March 2012, the Applicant prayed the court for the following reliefs:-

1. Dispensing with the normal forms, service and time limits as provided for by the rules of this Honourable court and having this matter heard as one of urgency.
2. Interdicting and restraining Respondents and those acting under their instruction from evicting Applicant from her home at Moneni area.
3. Costs against Respondents jointly and severally, one paying the other to be absolved.
4. Any further and or alternative relief.

[2] This application is premised on a 26 paragraph affidavit sworn to by the Applicant herself, to which is exhibited annexure A. It is on record that the Applicant also filed a replying affidavit, to which is attached annexure B.

[3] The 1st Respondent is opposed to this application. To this end, he filed a notice to raise points of law which reads as follows:-

“

1. *In terms of section 77 (3) (c) of The Constitution of the Kingdom of Swaziland, the Attorney General represents Chiefs in their official capacity in legal proceedings and as such, there is the non joinder of The Attorney General and this renders the application defective.*
2. *The above Honourable court has no jurisdiction to hear, entertain, and determine this matter because it falls exclusively within the ambits of Swazi Law and Custom in as much as the decision complained of was taken by Umphakatsi.*
 - 2.1 *In terms of Section 233 of The Constitution of the Kingdom of Swaziland, the chiefs powers and functions are in accordance with Swazi Law and Custom. So the above Honourable court has no jurisdiction in such matters.*
3. *From the Applicant's papers there is no indication that she has appealed against the decision of the Umphakatsi which will be basis for her to get the restraint order. In the premises the Applicant's application does not meet the requirement of an order for interdict.*
4. *There is a serious dispute of fact in this matter which cannot be determined by the papers filed herein.*
 - 4.1 *The Applicant knew about this at the time of institution of the application and as such the Applicant's application stands to be dismissed on this point.*
5. *The Applicant is bringing this application with dirty hands in that she is cohabitation (sic) with another man in the marital homestead and the name of the person is Ngabisa Masilela. The Applicant started cohabiting even way before the divorce order was granted.”*

[4] The record reveals that the 1st Respondent also filed an answering affidavit of 12 paragraphs, sworn to by the 1st Respondent himself, on the merits of this application. Attached to this affidavit are annexures AF1 and AF2 respectively.

[5] Now, it is apposite for me at this juncture, before dealing with the points taken *in limine*, to first demonstrate the facts of this case from the perspective of the respective parties, as is apparent from the affidavits filed of record.

[6] It is Applicants case that she and the 1st Respondent were married in community of property on the 2nd April 1976 and a divorce was granted during the month of February 2012. That during the subsistence of the marriage, in 1984, the 1st Respondent *khontaed* for a place in Moneni area, for them to build their marital home. The Applicant alleged, that without the aid of the 1st Respondent, she built the homestead at Moneni. That she was then gainfully employed as a teacher at Boyane, and the 1st Respondents contribution was not forthcoming, as he was busy with extra marital affairs which had surfaced as far back as 1979. Applicant further alleged, that she

single handedly connected electricity and telephone as well as procured a water tank at the homestead, with no assistance from the 1st Respondent. That all the 1st Respondent has in the home amounts to a few furniture items some of which were left by his Uncle. That on the 10th of March 2012, the Applicant was summoned by the Inner Council at Moneni, where she was ordered to vacate the said home within three months because she was now divorced. Applicant alleged, that there was no hearing before the eviction order was issued and that she was not given any opportunity to state her case. It is further the Applicants case, that following the eviction order, and on the 15th of March 2012, she received a letter annexure A, from the 2nd Respondent, advising her, that he had heard 1st Respondent's appeal to the effect that three months are too long for her to vacate the premises, therefore, Applicant should vacate the premises by Monday 19th March 2012.

[7] Applicant contended that these decisions not only violate the principles of natural justice, but that the Respondents lack the power or authority to evict her from the home which she personally built. That the fact that she is now divorced is a private matter and the community has no business in evicting

her from her home. Applicant alleged that it was the 1st Respondent who deserted her and established his home at Ludzeludze with a younger woman. That she fears that without an interdict, the Respondents will evict her from her home, since they have the authority and man power to forcibly do so. That if this happens, her son and grand children will suffer irreparable harm. She prayed the court to intervene in the circumstances.

[8] In her replying affidavit, the Applicant basically reiterated the facts in her founding affidavit, save for the status of the 2nd Respondent cited in these proceedings, as Chief Mshoshi.

[9] For his own part, the 1st Respondent, whilst not denying that he was married to the Applicant in community of property, and that the house in issue was built during the subsistence of the marriage, however contended, that he built the said house without any assistance from the Applicant, because at the time he was gainfully employed by the Government as a member of the Correctional institution, wherein he retired as a superintendent. The 1st Respondent alleged that the Applicant was given a hearing by the Umphakatsi prior to its verdict and that the bone of contention before that

forum was Applicants cohabitation with one Ngabisa Masilela at the marital home, as evidenced by annexures AF1 and AF2 respectively, communications in respect of this fact. That notwithstanding the communications in AF1 and AF2 respectively, the Applicant continued with the cohabitation, leading to the proceedings before the Inner Council, which resulted in the verdict evicting the Applicant from the said homestead within 3 months. Therefore, the Applicant was not ordered to vacate the homestead simply because she is divorced, but because of the alleged act of immorality with said Ngabisa Masilela, which immorality occurred after the divorce, and whilst the parties waited for the determination of the question of their homestead pursuant to the dictates of Swazi Law and Custom.

[10] The 1st Respondent admitted lodging an appeal before the 2nd Respondent, but stated that he did not appear before the 2nd Respondent who took a decision based on the minutes of bondcacane. 1st Respondent further contended, that he neither left the Applicant for a young woman nor does he have a home at Ludzeludze. 1st Respondent contended, that the Applicant filed for divorce because he found her performing traditional rituals (*kuchela*) at the marital home without his knowledge or consent.

[11] Now, one of the points taken in *limine* by the 1st Respondent is the jurisdiction of this court to entertain and determine this Application, since the matter falls exclusively within Swazi Law and Custom, as the decision complained of emanated from the Umphakatsi. The 1st Respondent also complained that the Applicant has not appealed against the decision of the Umphakatsi, which appeal would give her the latitude to obtain the order sought. Mr Magongo for the 1st Respondent thus contended, that in the circumstances of the absence of an appeal, that to grant the interdict sought by the Applicant, would amount to granting a perpetual interdict against the orders of the Umphakatsi, which is clearly unconstitutional.

[12] In response to this point of law, the Applicant contended, that this court has the jurisdiction to grant the interdict sought. That as a matter of law, an interdict is not dependant on the noting of an appeal and that she has met all the requirements for the interdict as prayed for.

[13] Now, it is common cause that the order of eviction which the Applicant seeks to interdict, is that of the Umphakatsi or the Moneni Royal Kraal. This case therefore brings to the fore the problem of the conflict between

the Roman Dutch Common Law and Swazi Customary Law (Swazi Law and Custom), which plagues the legal system of the Kingdom. This conflict of laws is a reality in the Kingdom, as was recognized by the Supreme Court in its recent decision in the case of the **Commissioner of Police and another v Mkhondvo Aaron Maseko, Civil Appeal No. 03/2011.**

[14] Now, Swazi Customary Law (Swazi Law and Custom), is recognized, adopted, applied and enforced as part of the law of The Kingdom of Swaziland, pursuant to section 252 (2), (3) and (4) of the Constitution of the Kingdom of Swaziland Act No. 001, 2005, in the following terms:-

“252 (2) subject to the provisions of this Constitution the principles of Swazi customary law (Swazi Law and Custom) are hereby recognised and adopted and shall be applied and enforced as part of the Law of Swaziland.

(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is inconsistent with a provision of the Constitution or a statute or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may

(a) provide for the proof and pleading of the rule of custom for any purpose.

(b) regulate the manner in which or the purpose for which custom may be recognised applied or enforced and

(c) provide for the resolution of conflicts of customs or conflicts of personal law”

[15] Now, it cannot be gainsaid that Swazi Law and Custom is not only enforced via the Swazi National Courts established pursuant to Section 7 of the Swazi Courts Act 80/1950, but is also enforced by traditional structures, through chiefs heading the different communities, which chiefs are described in Section 233 (1) of the Constitution as:-

“the footstool of iNqwenyama and iNqwenyama rules through the Chiefs”

[16] Further, Section 233 (9) of the Constitution gives the following mandate to the Chiefs:-

“ 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”.

[17] It is thus beyond controversy that these traditional structures like the Moneni Royal Kraal in casu, which are headed by Chiefs, have the Constitutional mandate to enforce Swazi Law and custom, just like the Swazi National Courts.

[18] This position of our law was recognised by the Supreme Court in the case of the **Commissioner of Police and another V Mkhondvo Aaron Maseko (supra)**, at **paragraph 22**, with reference to the statement of **Professor Kerr**, in the work titled:- **Customary Law of Immovable Property and Succession (3rd ed) Grocott and Sherry at 25**, where the following is depicted:-

“In old customary law “the tribe is a community or collection of natives forming a political and social organisation under the government, control and leadership of a chief who is the centre of the national or tribal life”

*The chief exercised the functions of a king, chief justice, chief executive. In his council, he exercised the sovereign right of making laws, while in his person, he acted as Chief Justice adjudicating cases in his tribal court and as chief executive sometimes even carried out the sentence himself. Thus the **Rev H H Digmore** said:-*

“The laws originate in the dedisions of the chief and his Council, but the same council forms the great law court of the tribe in which the chief sits as judge, and afterwards enforces the execution of his own sentences or perhaps inflicts the awarded punishment with his own hand”

[19] The Supreme Court in **paragraph 23 of The Commissioner of Police (supra)**, followed the foregoing statement, with the pronouncement of **Madlanga J**, in the case of **Bangindawo and others V Head of the Nyanda Regional Authority and Another; Hlantlalala V Head of the Western Tembuland Regional Authority and others 1998 (3) BCLR 314 (TK) at 326:-**

“Although Professor Kerr refers to the position in “old customary law, the `judicial, executive and law making powers in modern African customary law continue to vest in the Chiefs and so called paramount chiefs (the correct appellation being Kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western legal systems, or not exposed to, or sufficiently exposed to African customary law, or not believing in African customary law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It continues to thrive and is believed in and accepted by the vast majority of those subject to Kings and Chiefs and who continue to adhere to African Customary Law”.

[20] It appears to me therefore from the totality of the foregoing, that these traditional structures are competent adjudicatory authorities and their decisions are binding on all.

[21] In casu, it is common course that the Applicant and 1st Respondent *Khontaed* on Swazi Nation Land in the Moneni area and built their marital homestead thereon. It was based on this fact that 1st Respondent referred the dispute that arose over the homestead to the Moneni Royal Kraal.

[22] Now, the Applicant who is aggrieved by the orders of the Moneni Royal Kraal has approached this court for redress. By the tenure of her application, the Applicant seeks a perpetual or final interdict against the eviction order of the Moneni Royal Kraal. I say this because, it is common course, that the Applicant failed to file an appeal or application for review against said order. Therefore, the interdict sought is not interim in nature, since it is not premised on the finalization of an appeal or review application. This is the reason why I agree with Mr Magongo, that this is an insuperable obstacle in the way of this application. I say this because the presence of an appeal or review application would have empowered this court to invoke its inherit

jurisdiction pursuant to Section 151 (1) (a) of the Constitution to entertain an application for an interim interdict, pending the finalization of the appeal or review proceedings. However, this is not the position here. What the Applicant is asking the court to do, by the way and manner she has approached the court, is to defeat or extinguish permanently, the said eviction order of the Moneni Royal Kraal, by granting a final interdict. I find that this court has no jurisdiction to do such a thing. This is because the said decision of the Moneni Royal Kraal is valid, definitive and subsisting until it is set aside by an appellate or reviewing court.

[23] As I said in my decision in the case of **Clement Nhleko V MH Mdluli's Company and another, Case No. 1393/09, pages 11,12 and 13**

“By the nature of the application the Applicant enjoins the Court to adjudicate upon matters already decided by the Magistrates Court and in respect of which a definitive judgment subsists. I see no rule of practice or procedure which gives me the latitude to proceed as the Applicant urges and none is urged by the Applicant. This Court lacks the jurisdiction to embark on the adventure it is entreated to embark on, in the way and manner it has been approached. I say so because the summary judgment given by the Magistrates Court is valid and subsisting and must be presumed to be right until it is set aside by an appellate or reviewing

court. So long as the judgment is not appealed against, it is unquestionably valid and subsisting. This is so no matter how perverse it may be perceived. It is binding and must be obeyed by all including this Court. This is because a Court is powerless to assume that a subsisting order or judgment of another Court can be ignored because the former, whether it is a superior Court in the Judicial hierarchy presumes the order as made or the judgment as given by the latter to be manifestly invalid without a pronouncement to that effect by an appellate or reviewing Court”

See Sibongiseni Fundzile Xaba v Lindiwe Bridget Dlamini N.0. and others Civil Case Numbers 1080/2009 and 844/2010.

[24] The verdict of the Moneni Royal Kraal has not been appealed against, reviewed, varied or rescinded. It is undoubtedly subsisting and binding upon the parties thereto. This court cannot just interfere and extinguish the said verdict by way of a perpetual interdict, on the proposition of the Applicant that she built the marital homestead, or that she was not given a hearing by the Moneni Royal Kraal or that the Respondents lack the jurisdiction to issue the eviction order or that the 2nd Respondent lacked the jurisdiction to hear the Appeal. The proper course to my mind, would have been for the Applicant to seek redress by way of an appeal or review to the Nkanini offices to the Judicial Commissioner and further to the Ludzidzini

Royal Committee, which are the proper appellant or reviewing structures vested with the powers to set aside vary or review the said verdict of the Moneni Royal Kraal.

[25] As the case lies, in the absence of an appeal or application for review or rescission against the said decision of the Moneni Royal Kraal, it will be unlawful, clearly, for this Court to order the interdict sought by Applicant.

[26] Furthermore, assuming without conceding, that this Court had the requisite jurisdiction to entertain this application, I am firmly convinced that it will still fail. I say this because the papers exude serious disputes of the material facts of this case, which deprive the application of the clear right requisite for such an interdictory relief. **See Setlogelo V Setlogelo 1914 AD 221 at 227. Ndzimandze Thembinkosi V Maziya Ntombi and, another Civil Case No. 394/10. Setlogo (supra)**, expounds the principle, that for an Applicant for an interdict to be successful, he must demonstrate the following:-

- (1) a clear right to the subject matter of the interdict.
- (2) Injury actually committed or reasonably apprehended.
- (3) No alternative remedy or irreparable harm.

[27] The main and paramount disputes tend to the ownership of the homestead and which law should govern it pursuant to the divorce. Whilst Applicant contends that she owns the property because she built it, and that in any case, by the civil rites marriage contracted by the parties, both should hold the property in equal shares, the 1st Respondent contended replicando, that he owns the property by virtue of the fact that he built it. It is also 1st Respondent's position that after the divorce, the question of the property was left to be determined under Swazi law and custom, pursuant to Sections 24 and 25 of the family Act 47/1964. These disputes which cannot be resolved on the papers serving before court, deprive the Applicant of the clear right to the interdict sought.

[28] Furthermore, it appears to me that the Applicant has also failed the test of an alternative remedy to the interdict sought. This is because she clearly has an alternative remedy by way of an appeal or review application, to the

appropriate appellate traditional structures, the Nkanini offices of the Judicial Commissioner and Ludzidzini Royal Committee. These avenues in my view, must be exhausted before the Applicant approaches the High Court for redress.

In the light of the totality of the foregoing, this application fails and is dismissed accordingly.

I make no order as to costs.

For the Plaintiff:

Mr. B. J. Simelane

For the Respondent:

Mr. Magongo

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE DAY OF2012

OTA J.

JUDGE OF THE HIGH COURT

