



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 (DLAMINI)

2nd Respondent

ALPHEOUS DLAMINI

3rd Respondent

STEPHEN DLAMINI

4th Respondent

MBANGO MAVIMBELA

5th Respondent

Neutral citation: *Elcan Dlamini v Dan Dlamini and others (4209/09) [2012] SZHC*
69(13th April 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: 13th April 2012

For the Plaintiff: Mr. M. Mabila

For the Defendants: Mr. S. Khumalo

Summary

Application proceedings – Matter involving deep issues of Swazi Law and Custom – Court to sit with assessors – Sibling brothers having a dispute over family fields initially belonging to their father – Fields initially ploughed by the younger of the two with their mother – At the death of

the mother, the elder son taking over fields and distributing them without authority – Who is entitled to plough such fields according to Swazi Law and Custom – Who is an Inkhosana (heir) including when does he assume power – What does his power entail – Family council should resolve dispute and appoint the heir by a given date – Owing to the fact that the ploughing season is still far from commencing, court reserves its order on how the fields are to be ploughed going forward – Determination of costs reserved until the date which the matter is postponed.

JUDGMENT

[1] The Applicant instituted these proceedings on Notice of Motion seeking *inter alia* and primarily an order of this court interdicting the 1st Respondent and those acting at his behest from ploughing the Applicants Family fields at KaDinga area in the Shiselweni region. There were also other orders sought which included one interdicting all the Respondents from interfering in matters of Applicant's family at KaDinga as well as another one directing the 5th Respondent to avail Applicant the minutes of a certain Family Council meeting allegedly held on a certain date. There was sought as well an order declaring a certain decision allegedly reached on a certain date a nullity on the basis of its having been issued allegedly without the Applicant having been heard together with a costs order against the Respondents jointly and several.

[2] The common course facts in the matter are that the Applicant and 1st Respondent are biological brothers born of the same father and mother with the 1st Respondent being the eldest son and child to their parents

who is followed by the Applicant in terms of their birth order. There are several other siblings comprising three girls and three other boys whose names are Lucky, Mgcini and Sibusiso Dlamini. Sibusiso is the youngest among the boys.

[3] Whilst several prayers were made on the notice of motion, it is a fact that only two issues were pursued during the hearing of the matter being the interdict against the 1st Respondent from ploughing the family fields and the prayer of costs. Otherwise all the other prayers seemed to have fallen by the wayside as no evidence in proof of them was led nor was there an order sought with respect thereto. It is for this reason this court shall treat such prayers as having been abandoned or as being no longer pursued and concentrate on the two mentioned above.

[4] The fields forming the subject matter of these proceedings are situated on Swazi Nation Land and are part of the land allocated to the protagonist's late father, John Dlamini, who died in 1971. It is apparent the said land is governed by or in terms of Swazi law and Custom, like all land allocated through the customary land allocation – kukhonta. It was for this observation that the matter ended up being heard by this court sitting with assessors knowledgeable on Swazi Law and Custom who were provided by the Judicial Commissioner. It was agreed at its commencement that this court refer the matter to oral evidence so that the central issues could be determined.

[5] The fact of the matter is that following the death of the late John Dlamini, the Applicant assisted his mother on the ploughing and planting of the fields with result that the produce would be more than

sufficient for family consumption whilst the surplus would be sold to either Swaziland Milling or the National Maize Corporation in Matsapha. This sale of maize ended up being the main way to sustain applicant's family.

[6] In 1990, the 1st Respondent established his own home which he refers to as a house. There is a dispute on how this came to be. Whilst one side claims that it was a decision by the 1st Respondent's mother following the said Respondent's failure to contribute or assist in any way in the running of the family, the 1st Respondent contends that it was a voluntary decision by him when he felt the need to establish what he called his own house, following the digging of the soil around his kitchen by the Applicant.

[7] The 1st Respondent's said home is established within the family compound as depicted by the perimeter fence. In fact the 1st Respondent's home or house occupies a square area estimated at 125 x 125 metres and occupies the North Eastern corner of the family compound. The distance between the nearest house either in the main homestead or in the 1st Respondent home is about 100 metres.

[8] It is common course that when he established his home or house, the 1st Respondent was also allocated some three fields at the lowest end of the family fields which he ploughed until the time of his mother's death in 2001.

[9] Otherwise the family fields as a whole, excluding those referred to in the foregoing paragraph, comprise those referred to as Nhlanguano's fields,

which I was told are nine in number; the family fields which are seven in number comprising the six below the kraal and the one facing Mdikhoni Ngwenya's home as well as those which are allocated a distance of about two or so kilometres from the home which 1st Respondent claimed to have allocated the Applicant, and are eleven in number.

[10] In 2002, the mother of both the Applicant and the 1st Respondent died. It is common course that the 1st Respondent suggested to the Applicant and his other siblings in 2003 that the fields be appropriated or distributed between his male siblings. The family counsel (lusendvo) is said to have met as a result of this suggestion, but did not approve of the distribution or appropriation of the fields. Instead it is common course, that the Family Council directed that the fields be not allocated or appropriated or distributed as suggested at that stage but directed that their utilization should continue as was during the time of their mothers' lifetime. This meant that the Applicant had to continue ploughing and planting all the fields referred to as the family fields which at the time excluded only those initially allocated 1st Respondent by their mother. It is further common course that as the Applicant continued ploughing the fields, the 1st Respondent and his other brother, Lucky Dlamini, were directed to contribute financially to the ploughing of the fields by Applicant so that the family produces sufficient maize. The Family Council directed further that they would come back at a later stage to appoint an heir in terms of Swazi Law and Custom, who I guess would be the person to decide on the way forward concerning the fields.

[11] This decision of the Family Counsel was not respected or complied with because in or around 2004, the Applicant stopped ploughing the fields

and took all the farming implements with which he went to Manzini. He says he did so because the 1st Respondent had, whilst discussing with his mother's sister, threatened to overturn the fields after the ploughing and planting by the Applicant. The 1st Respondent disputes or denies saying this, but one of the Applicant's sisters Cebisile Dlamini maintains he said it because she confronted him with same and he (1st Respondent) had not denied it.

[12] It is not important in my view to decide whether or not the 1st Respondent had made the alleged threat. It suffices to say that the Applicant had stopped ploughing the fields in the years mentioned (2004 or 2005) for a period of two years.

[13] It is common course again that after the second year of the fields having lied fallow, the 1st Respondent ploughed them for one season until 2007 when, during a ceremony known as an imvimba ceremony to 1st Respondent's daughter, he claims to have called all his siblings, both male and female to discuss the issue of distributing the fields. Although the other siblings deny attendance of such a meeting, they are not emphatic in that regard and it became clear to me that they were not realistically denying such a meeting but disputed or denied mainly the authority of the 1st Respondent to distribute the fields he had purported to distribute at the said meeting. He claims to have allocated two of the three fields initially allocated him by their mother to the last but one brother of his called Mgcini. The next two he claims to have allocated to his youngest brother Sibusiso Sibonelo Dlamini. The next six fields from those of Sibusiso Dlamini to the kraal he allocated to himself together with the seventh one facing Mdikhoni Ngwenya's house.

- [14] Lucky Dlamini was allocated the nine fields which are referred to as Nhlangano fields. The eleven fields which are furthest from the homestead and about 2-3 kilometers on the Southern part of the main homestead are said to have been allocated to the Applicant.
- [15] The 1st Respondent contends that he had directed that the female members of the family or his female siblings would have to decide who they align themselves with among the brothers allocated land and could assist in the weeding and the carrying out of other duties in the fields.
- [16] It is common course that none of the 1st Respondent's siblings agreed with him as concerns the allocation, or distribution of the fields. The 1st Respondent is the only one who observed his distribution or who acted in terms of it. Otherwise all the others did not associate themselves with the distribution. In fact all his siblings except for Lucky Dlamini and Zandile Dlamini who were not called as witnesses, supported the Applicant and urged for the relief sought by the Applicant which was mainly that the distribution be set aside and that the fields be reverted to the position they were in, in 2003 when the Family Council directed as stated above.
- [17] It is a fact that the directive of the Family Council as recorded above was not complied with by either side- the Applicant when he stopped ploughing on the allegations of threats by the 1st Respondent, without taking the matter back to the Family Council for direction in this regard. The 1st Respondent did not comply with the directive when he started allocating the fields in the manner he did in 2007, without having

resorted or taken the matter back to the Council for it to redirect or revisit its earlier decision. First Respondent admitted in court that he is not above the Family Council whose decision binds him.

[18] It is common course that the 1st Respondent was the eldest brother to all his siblings. Whilst he initially contended that it was this birth right of his which entitled him to become an heir, this has not been found to be the position under Swazi Law and Custom which it was agreed was the applicable on the dispute concerned. This court had sought the assistance of the assessors it sat with throughout the matter for them to assist it determine who, the heir (Inkhosana) was in terms of Swazi Law and Custom among the siblings, when does one assume power as an Inkhosana (heir) including what his duties are.

[19] I was advised by the assessors I presided with over the matter that in a monogamous family, the eldest son to the married couple qualifies and often is appointed the heir (Inkhosana). It is however not automatic as one has to be appointed. It was advised it may well be very difficult to appoint the younger one in his stead, but that he needs to be appointed to assume the powers of an Inkhosana.

[20] Once appointed I am further advised the heir (Inkhosana) takes the position of his late father and he stands in such a position to all his other siblings. It is only then that he would have the power to distribute or allocate the fields. If he ploughs all the fields, the produce has to be used to feed any of his siblings who is in a desperate position. It is for this reason all his siblings should one way or the other participate in the ploughing, planting and weeding of such fields.

[21] In the matter at hand it was agreed that although he was the eldest son qualifying to be appointed an heir, (Inkhosana) the 1st Respondent had not yet been so appointed. If he had not then been so appointed the question becomes was he entitled to apportion or allocate or distribute the fields in the manner he did. The answer in my view is simply that he is not so entitled. He himself did not claim to be except that he said he became entitled to do so because the fields were now lying fallow and Family Council was now not deciding on the next step. He said he had taken it upon himself to distribute the fields in the hope the hunger that had set in was going to be overcome as the members would be able to produce food with whoever they would have aligned themselves with. He felt he had the authority to distribute the fields because he was the eldest but was very clear he was not an heir as that was to be appointed by the Family Council.

[22] Whatever the motives of his purported distribution it is certain that the reasons he put forth as entitling him to distribute the fields are not good enough. The Family Council had specifically directed that the situation as had prevailed under their mother had to be maintained until such time they had appointed an heir or Inkhosana, which they undertook to do at the right time whatever that meant.

[23] In my view it was incumbent upon the 1st Respondent to report whatever developments he was observing which he considered to be threatening or to be against, the decision of the Family Council. It certainly was not open to him to act in the manner he did and I have no hesitation that his actions have only worsened the situation as opposed to resolving it.

[24] It could be that the Family Council took a long time to resolve the matter but again it did not authorize him doing what he did as it was unlawful. If the Family Council was itself failing in its duties, I am advised that should have been reported to the next level which is the Umphakatsi. The assessors inform me the latter structure has the power to order or direct the Family Council on what to do.

[25] For the foregoing reasons I am convinced that the decision of the Applicant to distribute the fields cannot stand. This however does not bring the matter to an end as it is true there is a problem that exists between the parties that needs to be resolved by the Family Council. Consequently in an endeavour to bring about finality in the matter whilst peace and order prevails I will make the following order, which has been agreed to by the assessors:-

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

Delivered in open Court on this the day of April 2012.

N. J. HLOPHE

JUDGE