



IN THE HIGH COURT OF SWAZILAND

Civil case No: 135/2013

In the matter between:

ISAAC SIGULULWANE ZWANE

APPLICANT

AND

MAQALENI DLAMINI

FIRST RESPONDENT

THE COMMISSIONER OF POLICE

SECOND RESPONDENT

ATTORNEY GENERAL

THIRD RESPONDENT

Neutral citation:

Isaac Sigululwane Zwane v. Maqaleni Dlamini And Two Others (135/2013) [2013] SZHC153 (2013) 8 August 2013

Coram:

M.C.B. MAPHALALA, J

Summary

Conflict of Laws – application brought on Notice of Motion for a spoliation order to recover possession of disputed cattle – the jurisdiction of the High Court as well as disputes of fact raised by respondents in *limine* – cause of action relates to cattle allegedly owned by iNgwenyama and King of Swaziland – held that the matter is one of a conflict of laws arising from the dual system of government obtaining in this country between the Traditional System of Government applying Swazi Law and Custom and the Western system of government applying Roman-Dutch Common Law – held further that the matter in so far as it involves the iNgwenyama should be determined in terms of Swazi law and Custom – consequently that this Court has no jurisdiction to hear and determine this matter – application dismissed with costs.

**JUDGMENT
8 AUGUST 2013**

[1] This is an urgent application brought *ex parte* seeking the issue of a rule nisi operating with immediate and interim effect directing the respondents to show cause why the possession of the cattle should not be restored to the applicant, and, to further disclose where the cattle are currently being kept. The applicant further seeks an alternative order that the Deputy Sheriff for the Lubombo region should be ordered, directed and authorised to take possession of the cattle from whomsoever is in possession thereof and restore possession to the applicant. He also seeks an order for costs at Attorney and Client scale.

[2] The applicant alleges that on the 31st January 2013 at about 0730 hours, the first respondent accompanied by a contingency of seven police officers, two soldiers, members of kaNgcamphalala Umphakatsi led by the Chief's headman Lofana Vilakati, a community police officer, seven members of the Shabangu and Sikhosana families residing at kaNgcamphalala area, took twenty four herd of cattle which were in the possession of his daughter Celiwe Zwane and drove them away; he further alleges that one of the cattle belongs to Mkelele Mamba, and the rest belongs to him.

[3] The applicant also contends that on the 28th June 2012, he had obtained a Court order directing Boniface Bofile Sikhosana to pay him a sum of E15 000.00 (fifteen thousand emalangen) as well as costs of suit in respect of a damages claim for defamation. The Deputy Sheriff for the Lubombo region subsequently attached fourteen head of cattle belonging to Boniface Bofile Sikhosana in order to satisfy the

Writ of Execution. The execution of the writ was done with the assistance of police officers.

[4] It is common cause that the first respondent is a royal emissary responsible for overseeing cattle belonging to iNgwenyama. The applicant alleges that the cattle were taken on the pretext that he had sold twenty-five herd of cattle belonging to iNgwenyama, and, that he had previously took three heard of cattle belonging to iNgwenyama. The applicant argues that the first respondent had no Court order authorising the taking of the cattle.

[5] The applicant further contends that the provisions of section 19 of the Constitution confers the right to own property and further protects the individual from unlawful deprivation of his property. He further invokes spoliation as a remedy, and argues that at the time when the cattle were taken, he was in peaceful and undisturbed possession; and, that the taking was unlawful in the absence of a Court order.

[6] When the matter came to Court on the 4th February 2013, the Court was not satisfied that the matter should proceed *ex parte*; and, it directed that the application should be served upon the respondents. Accordingly, the interim order was not granted as prayed for. Meanwhile the attorney for the respondents made an undertaking not to dispose the cattle pending finalization of the proceedings. The basis of the urgency as well as the *ex parte* proceedings was the alleged fear by the

applicant that the cattle would be disposed by the respondents before the matter is finalised.

[7] The application is opposed by the respondents; the first respondent has filed an answering affidavit in which he states that he is the Overseer of all cattle belonging to the iNgwenyama. He concedes that he is the leader of the delegation that was commanded by iNgwenyama to seize the cattle from the applicant; and, consequently, that he has authority to depose to the answering affidavit.

[8] The first respondent has raised two Points of Law. Firstly, that this Court has no jurisdiction to hear and determine the matter on the ground that it relates to the office of the iNgwenyama. He refers the Court to section 4 of the Constitution which gives the King and iNgwenyama such rights and prerogatives including the right to own property as envisaged by section 19 of the Constitution. He further refers the Court to annexure 'KI', being a directive from the King's office. I will deal with this point later in this judgment.

[9] The second point of law relates to disputes of fact. The first respondent alleges that the applicant was not in peaceful and undisturbed possession of the cattle since he was in the habit of stealing cattle from the iNgwenyama. I should point out at the onset that the requirement of 'peaceful and undisturbed possession' is an essential requirement of spoliation proceedings; hence, it is a legal question and cannot

constitute a dispute of fact as alleged by the first respondent. This point of law accordingly fails.

[10] On the merits the first respondent contends that his committee and himself were commanded by the iNgwenyama to seize the cattle from the applicant. The herdmen looking after the king's cattle at Luvatsi Estate had earlier reported to him of the theft of the King's cattle, and, that there was a reasonable suspicion that the applicant was responsible. The first respondent in turn reported the incident to the local Umphakatsi at kaNgcamphalala area; the applicant was summoned to the Chief's Kraal, but he refused to attend. Some of the cattle found at the applicant's homestead bore a special brand belonging to the Ingwenyama.

[11] Lofana Vilakati, the Chief's headsman of kaNgcamphalala Area deposed to a confirmatory affidavit and stated the following: Firstly, that the herdmen from the iNgwenyama's farm reported to the Chief's Kraal that the King's cattle were being stolen at Luvatsi Farm, which is owned by the King. The herdmen further reported that the applicant was responsible for taking the King's cattle. According to the Chief's headman, the applicant was called several times to the Chief's Kraal to give his side of the story but he had refused to attend the meeting. Secondly, that the applicant was slaughtering and selling the meat to individuals including butcheries. Their investigations revealed that the hides of the slaughtered cattle bore a brand of the iNgwenyama. At one instance he was found skinning a black bull and a red cow both belonging to the iNgwenyama. In another instance he tried to register three of

the cattle with the King's brand at the local dipping tank but this was refused. Thirdly, that he was summoned to the King's Office with the Chief's Inner Council where they were commanded to seize the King's cattle from the applicant on the 31st January 2013 at the dipping tank.

[12] Annexure 'KI' is written on the Letterheads of the King's office by the Chief Executive Officer in the King's office Bhekie Dlamini; the command is directed to the Attorney General and provides the following:

“....

During the year 2003, His Majesty King Mswati III in Libandla commissioned that any person who is in one way or the other found to have stolen His Majesty's cattle will not be prosecuted in the Court but will be hauled before Libandla or a chief of that area. If that individual is found guilty, he will be fined two cows in addition to the one cow he is found to have stolen.

No court has jurisdiction over theft of His Majesty's cattle. That was an Order. Kindly advise on actioning this order in line with the Constitution of Swaziland.”

[13] In his replying affidavit the applicant reiterates that this Court has jurisdiction to entertain this matter on the ground that it does not relate to the office of iNgwenyama and in particular the succession to that office. In addition the applicant denies that annexure 'KI' is a directive from the king's office but that it is merely a letter seeking advice from the Attorney General on the Constitutionality of the decision taken by iNgwenyama-In- Council.

[14] The applicant further denies not only that he refused to attend summons from the Chief's kraal but he further denies that he was found in possession of cattle with iNgwenyama's brand or that he slaughtered cattle belonging to iNgwenyama. The applicant reiterates that he is entitled to a spoliation order on the basis that the cattle were seized from him without a Court Order. Furthermore, he argues that during the seizure, he was in peaceful and undisturbed possession of the cattle. However, this is denied by the respondents who contend that this is not a matter of spoliation but one of a conflict of laws between the Roman-Dutch Common law on the one hand and Swazi law and Custom on the other hand; it is against this background that the respondents argue that this Court does not have jurisdiction to entertain this matter.

[15] During the hearing, the points of law were argued simultaneously with the merits. In his replying affidavit the applicant concedes and does not dispute the fact that annexure 'KI' is a decision taken by iNgwenyama-In-Council; hence, his contention that annexure 'KI' was intended to seek the advice of the Attorney General on the Constitutionality of the said decision is mischievous and misconceived. It is apparent from a reading of annexure 'KI' that it is a directive from iNgwenyama-In-Council. It is further apparent that in the said directive, the iNgwenyama had ousted the jurisdiction of the Courts in favour of His Advisory Council.

[16] The King and iNgwenyama is the head of State with executive powers. Section 4 of the Constitution provides the following:

“4. (1) Without prejudice to the provisions of section 228, King and iNgwenyama of Swaziland is a hereditary Head of State and shall have such official name as shall be designed on the occasion of his accession to the Throne.

(2) The King and iNgwenyama is a symbol of unity and the eternity of the Swazi Nation.

(3)

(4) The King and iNgwenyama has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and Custom, and shall exercise those rights, prerogatives and obligations in terms and in the spirit of this Constitution.

....

(12) The King and iNgwenyama shall upon his installation as King and iNgwenyama take and subscribe an oath for the due execution of his office in accordance with Swazi law and Custom.”

[17] Section 64 (1) provides that the executive authority of Swaziland vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution. It is apparent from the provisions of the Constitution dealing with the Monarchy as well as the Traditional Institutions that Swaziland has a dual system of government which further signifies the dual role of the Monarchy. The first system of government relates to the powers of the King when he discharges his functions with the Western-type government, namely, the three arms of government which are the Executive, the Legislature and the Judiciary in chapters VI, VII and VIII of the

Constitution. This system of government applies the Roman-Dutch Common Law; when discharging these functions, he is the King.

[18] The second system of government relates to the Swazi Traditional government which is administered according to Swazi law and Custom. When discharging these functions, he is referred to as iNgwenyama. Sections 227 and 228 of the Constitution provide the following:

“227. (1) The Swazi traditional government is administered according to Swazi Law and Custom and the traditional institutions that are pillars of the Monarchy as set out in subsection (2).

(2) The following Swazi traditional institutions are hereby guaranteed and protected-

(a) iNgwenyama

(b) iNdlovukazi

(c) Ligunqa (Princes of the Realm)

(d) Likoqo

(e) Sibaya

(f) Tikhulu (Chiefs)

(g) Umntfwanenkhosi Lomkhulu (Senior Prince)

(h) Tindvuna (Royal Governors)

228. (1) iNgwenyama is the traditional head of the Swazi State and is chosen by virtue of the rank and character of his mother in accordance with Swazi law and Custom.

(2) iNgwenyama enjoys the same legal protection and immunity from legal suit or process as the King.

(3) Subject to an elaborate system of advisory councils, the functions of iNgwenyama under this chapter shall be regulated by Swazi law and Custom.”

[19] The definition section of the Swazi Courts Act No. 60 of 1950 states that the iNgwenyama means the iNgwenyama acting after such consultation with his Libandla as required by Swazi law and Custom. When iNgwenyama exercises his powers under the Traditional System of government, he acts after consultation with an elaborate system of advisory councils including Liqoqo; when discharging his powers under the modern government, he acts after consultation with the Cabinet or Executive Arm of government as well as the King’s Advisory Council. See sections 13, 65, 230 and 231 of the Constitution.

[20] It is imperative to mention that the “immunity” protection afforded to iNgwenyama in the exercise of his powers under the Traditional System of government is equally available when he exercises his powers in relation to the

Modern System of government as King. Sections 10 and 11 of the Constitution provide the following:

- “10. The King and iNgwenyama shall be immune from taxation in respect of his Civil List, all income accruing to him and all property owned by him in any private capacity.**
- 11. The King and iNgwenyama shall be immune from-**
- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and**
 - (b) being summoned to appear as a witness in any civil or criminal proceeding.”**

[21] In the exercise of his powers as iNgwenyama, he may issue orders to be obeyed by Swazis within Swaziland. The Swazi Administration Act No. 79 of 1950 provides the following:

“3. The iNgwenyama and his Libandla shall exercise the powers conferred upon them under this Act according to Swazi law and Custom and the area of their authority shall extend over the whole of Swaziland.

....

10. (1) Provided that such orders do not conflict with any law, the Ngwenyama in Libandla may issue orders to be obeyed by Swazis within Swaziland...

....

16. (1) Provided that they do not conflict with any other law the iNgwenyama

in-Libandla, and a Chief in libandla, with the approval of the iNngwenyama in Libandla, may make rules to be obeyed by Swazis providing for the peace, good order and welfare of Swazis, including rules regarding the public services provided by the iNngwenyama in any capacity, and also any matter in respect of which an order under section 10 could have been issued....

- 17. (1) Every order issued under section 10 or 11, other than an order issued to an individual, and all rules made under section 16 shall be known in such manner as is customary amongst Swazis and thereupon the order or rule shall be in force and shall be biding upon and obeyed by all Swazis by whom the order or rule, as the case may be, is to be obeyed or observed.”**

[22] The jurisdiction of this Court does not extend to matters relating to the office of iNngwenyama because such issues fall to be determined in terms of Swazi law and Custom. Section 151 of the Constitution provides the following:

“151. (1) The High Court has-

- (a) unlimited jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution;**
- (b) such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland;**
- (c) such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and**
- (d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.**

....

- (8) Notwithstanding subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of iNgwenyama; the office of iNdllovukazi (the Queen Mother); the authorisation of a person to perform the functions of Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the Libutfo (regimental) system, which matters shall continue to be governed by Swazi law and Custom.”**

[23] This country has a dual legal system which is specifically entrenched in section 246 of the Constitution. Section 252 of the Constitution provides for the dual legal system in respect of the Roman-Dutch Common Law as well as Swazi law and Custom, and, it provides the following:

“252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September 1968 (Independence Day), the principles and rules of the Roman-Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the Common Law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a Statute.

(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 this 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 laws.”**

[24] It is against this background that it would be over-simplistic to view the matter before this Court as one of spoliation proceedings. This matter involves a conflict of laws; and, a proper choice of law, applicable in the circumstances of this case, has to be determined. Having come to the conclusion that matters involving the iNgwenyama are excluded from Common Law Courts, it becomes apparent that such matters can only be determined in terms of the principles of Swazi law and Custom.

[25] *Ramodibedi CJ* in the case of the *Commissioner of Police and the Attorney General v. Mkhondvo Maseko* Civil Appeal No. 03/2011 warned our Courts of the

danger of failing to appreciate the problem of a conflict of laws. This case is similar to the present case on the basis that they both involve the theft of cattle belonging to iNgwenyama and a subsequent order issued by iNgwenyama to repossess the cattle. His Lordship had this to say at para 1 and 2:

“[1] This appeal illustrates the problem of a conflict of laws in this country, a conflict which, unless properly managed in a responsible manner and with due respect to both systems of our law, may soon throw our justice system into disarray. This conflict as will be seen shortly is between Roman-Dutch Common law on the one hand and Swazi Customary Law (Swazi law and Custom) on the other hand.

[2] At the outset, I consider that there is a fundamental need for the Courts in this country to make a proper choice of law in matters coming before them. Put differently, it is wrong, if not downright insensitive for any Court in this country to apply Roman-Dutch law in a case which cries out for Swazi law and Custom. It is particularly more so, as in the present case, where the King and iNgwenyama’s rights under Swazi law and Custom are concerned.”

[26] The dual legal system in this country necessitates that the Roman-Dutch Common Law be applied in the Common Law Courts; and, that Swazi Law and Custom be applied in the Swazi Courts established in terms of the Swazi Courts Act, No. 80 of 1950. This Act provides, inter alia:

“3. (1) By warrant under his hand the iNqwenyama may recognise or establish within Swaziland Swazi Courts which shall exercise jurisdiction over members of the Swazi nation within such limits, as may be defined by such warrant.

(2) The iNqwenyama may suspend, cancel or vary any warrant recognising or establishing a Swazi Court, or defining the jurisdiction of any such Court or the limits within which such jurisdiction may be exercised.

4. (1) A Swazi Court shall be constituted in accordance with the Swazi Law and Custom of Swaziland:

Provided that the iNqwenyama may prescribe the constitution of any Swazi Court, or the order of precedence among members thereof, or the powers and duties of persons acting as assessors to such Courts.”

[27] The Swazi Courts exercise both Civil and Criminal jurisdiction to the extent set out in their warrants. See sections 7 and 8 of the Act. Section 11 of the Act provides for the law to be applied and states the following:

“11. Subject to the provisions of this Act, a Swazi Court shall administer-

(a) The Swazi Law and Custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;

(b) The provisions of all rules or orders made by the iNqwenyama or a Chief under the Swazi Administration Act No. 79/1950 or any law

repealing or replacing the same, and in force within the area of jurisdiction of the Court;

(c) The provisions of any law which the Court is by or under such law authorised to administer.”

[28] The Swazi Courts Act has set out the appellate structure of the Courts in sections 32 and 33 which provide the following:

“31. (1) The Higher Swazi Court of Appeal and a Swazi Court of Appeal may, on the application of the Court immediately below or of any person concerned or of its own motion for reasons which it shall record in writing-

(a) revise any civil proceedings of the Court and make such order therein as the Swazi Court or Swazi Court of Appeal or the Higher Swazi Court of Appeal could itself have made:

Provided that such reviewing Court shall not make any order in a civil proceeding, to the prejudice of any party in such proceeding, without first giving such party an opportunity to be heard;

(b) order any case to be retried before any Swazi Court of competent jurisdiction.

(2) The powers conferred upon the Higher Swazi Court of Appeal and Swazi Courts of Appeal under this section shall not be exercised after the expiration of six months from the termination of the proceedings in the Court concerned.

32. The iNqwenyama may, by warrant under his hand, recognise any Swazi Court or establish such Swazi Courts of Appeal as he shall think fit, or a Higher Court of Appeal from any specified Swazi Court in Swaziland in respect of any of the cases arising therein.
33. (1) A person aggrieved by an order or decision of a Swazi Court of first instance may within thirty days from the date of such orders or decision appeal therefrom to a Swazi Court of Appeal.
- (2) A person aggrieved by an order or decision of a Swazi Court of Appeal may within thirty days from the date of such order or decision appeal therefrom to the Higher Court of Appeal.
- (3) A person aggrieved by an order or decision of a Higher Swazi Court of Appeal in a criminal proceeding may within thirty days from the date of such order or decision appeal therefrom to the Judicial Commissioner.
- (4) A person aggrieved by an order or decision of a Higher Swazi Court of Appeal in a civil matter may within thirty days from the date of such order or decision appeal therefrom to the High Court.
- Provided that if in the opinion of a Judge of the High Court the written record of the cases is inadequate for the purpose of the hearing of the Appeal in the High Court, he may order the Appeal to be heard in the first instance by the Judicial Commissioner.
- (5) A person aggrieved by an order or decision of the Judicial Commissioner under sub-sections (3) and (4) of this section may within thirty days from the date of such order or decision appeal therefrom to the High Court.
- (6) An appeal to the High Court under sub-sections (4) and (5) shall be only in cases where the amount of the judgment exceeds two hundred

emalangeni or where sentence of imprisonment for a period exceeding three months or of corporal punishment exceeding eight strokes has been imposed:

Provided that notwithstanding anything in this Act, a Judge of the High Court sitting in chambers may on the application of any Court or person concerned grant special leave to appeal against an order or decision made or given by any Swazi Court or by the Judicial Commissioner.”

[29] Similarly, section 30 of the Act provides for the Revisory powers of the Swazi Courts. Section 30 provides the following:

“30. (1) The judicial Commissioner and every District Officer in his capacity as a holder of a Subordinate Court, shall at all times have access to the records of all Swazi Courts within his jurisdiction, other than the Higher Swazi Court of Appeal, and on the application of the Swazi Court or of any person concerned or on his own motion may, after consultation with the Court concerned, for reasons which he shall record in writing-

(a) revise any criminal proceeding of the Swazi Court, other than the Higher Swazi Court of Appeal, and make such order or pass sentence therein as the Swazi Court could itself have made or passed:

provided that should the Judicial Commissioner or District Officer be of the opinion that an acquittal should be altered to a conviction or any sentence of fine or imprisonment or other sentence in a criminal proceeding should be increased, he shall cause the case to be retried by the Court to which an appeal would ordinarily lie under section 33;

(b) order any criminal case to be retried before any other Swazi Court of competent jurisdiction;

(c) transfer any criminal matter either before trial or at any stage of the proceedings, whether before or after sentence passed, to a Magistrate’s Court of the First Class having jurisdiction.

(2) Notwithstanding anything contained in subsection (1), the Judicial Commissioner shall exercise over the proceedings of the Higher Swazi Court of Appeal the power mutatis mutandis prescribed in sub-section (1).

(3) The powers conferred upon the Judicial Commissioner and District Officers by sub-sections (1) and (2) shall not be exercised after expiration of six months from the termination of the proceedings in the Court concerned.”

[30] Accordingly, the application is dismissed with costs.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant Senior Crown Counsel V. Kunene

For Respondent Attorney Xolani Mthethwa