IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1322/13

In the matter between

MPHICA MTSETFWA	**1ST APPLICANT**
MKHIZA ZULU	**2ND APPLICANT**

And

BHEJANE MANYATSI	**1ST RESPONDENT**
MYALWA ALSON TSELA N.O	**2ND RESPONDENT**
MNANTWA MORRIS ZWANE N.O	**3RD RESPONDENT**
THE COMMISSIONER OF POLICE	**4TH RESPONDENT**

In Re:

BHEJANE MANYATSI	**1ST APPLICANT**
MYALWA ALSON TSELA N.O.	**2ND APPLICANT**
MNANTWA MORRIS ZWANE NO.	**3RD APPLICANT**

And

MPHICA MTSETFWA	**1ST RESPONDENT**

MKHIZA ZULU **2ND RESPONDENT**

Neutral Citation: ***Mphica Mtsetfwa and Another vs Bhejane Manyatsi and Three Others (1322/13)31* October 2013 [SZHC] 243**

Coram: **OTA J.**

Heard: **15 October 2013**

Delivered: **31 October 2013**

Summary: **Civil procedure: rescission application: principle thereof.**

JUDGMENT

OTA J.

[1] This application originates from a long standing dispute between the parties *in casu*, as to which side of the contest is the lawful authority of the Sigcineni Chiefdom. It appears that the duly appointed Chief of the Chiefdom was one Chief Madubula Manyatsi; who was appointed by King Sobhuza 11 on or about 1932. The Applicants in the main application contend that upon the death of Chief Madubula and around July 1999, the

Family Council of eSigcineni Chiefdom appointed the 2nd and 3rd Applicants as the headman and chairman respectively of the Inner Council of the Chiefdom, pending the appointment of a new Chief by His Majesty the King and iNgwenyama. Meanwhile, the Family Council at all material times was still engaged in the process of nominating a chief designate to be presented to the iNgwenyama for royal blessings. Whilst this process was on-going, and on or about 2005, the 1st Respondent in the main application convened a community meeting at Sigcineni Chief Kraal, wherein he advised the community that he had since been appointed by their Majesties to assume the position of Chief of eSigcineni area. The 1st Respondent during the meeting, appointed one Shimela Manyatsi a resident of the area to be his headman and thus dismissed the 2nd and 3rd Applicants from their positions as headman and chairman respectively of the Inner Council, so the Applicants further contended.

[2] It was further alleged by the Applicants that in the wake of these activities, the Respondents started allocating land to new settlers in the area and calling meetings and being suspicious of same, the Applicants sought to approach the iNgwenyama on the issue through the chairman of the Ludzidzini Royal Committee. This led to a meeting convened by the Ludzidzini Royal

Committee, which was attended by the Sigcineni Family Council including the Applicants and Respondents, wherein the Respondents and all those who were acting at their behest were duly warned to desist from conducting themselves as authorities of the said Chiefdom without lawful appointment as such by the iNgwenyama. The Committee further ruled that the status quo in as far as the administration of the area was concerned, should remain with the 2nd and 3rd Applicants as chairman and headman respectively of the Inner Council of the said Chiefdom.

[3] The Applicants alleged that the Respondents failed to heed the decision of the Ludzidzini Royal Committee but persisted in allocating land to new settlers in the area and calling meetings.

[4] Suffice it to say that the matter was subsequently reported to Her Majesty the Ndlovukazi but yielded no results. The matter was further reported to the Liqoqo Committee who advised the parties to approach his Majesty the King and iNgwenyama on the issue.

[5] The Applicants contend, that they consequently presented a cow to the iNgwenyama through their Lincusa one pastor Muzi Mhlanga and are still

waiting for audience with the iNgwenyama on a date yet to be determined. However, despite the matter pending before the iNgwenyama the Respondents are continuing with the illegal allocation of land to new settlers and are also preventing the 2nd and 3rd Applicants from calling community meetings, so argued the Applicants. Furthermore, just recently on or about the 20th August 2013, the 2nd Respondent who was acting under the authority and instructions of the 1st Respondent caused to be constructed a road for and on behalf of their new settlers in the area. The said road is being constructed on an area which is reserved for community developments. Attempts by community members to stop construction of the road proved abortive and led to a near violent encounter between the community members of eSigcineni and the factions in support of the Respondents. The community members are now up in arms against the Respondents as a result of their actions and this may result in total chaos and bloodshed in the area, further contended the Applicants.

[6] It is against the backdrop of the aforegoing allegations of fact and on the 28th of August 2013, that the Applicants approached the High Court under a certificate of urgency contending for the following reliefs:-

"(1) Dispensing with the normal and usual time limits, forms, procedures and manner of service of application proceedings and enrolling and hearing this matter as one of urgency.

(2) Condoning the Applicants for any non-compliance with the Rules of this Honourable Court.

(3) That a *rule nisi* do hereby be issued operating with interim and immediate effect calling upon the Respondents to show cause on a date to be determined by this Honourable Court why the following orders should not be made final:-

3.1 That pending determination and finalization of the dispute regarding the rightful administrative authority over Sigcineni area by the iNgwenyama in-council.

3.1.1 The Respondents or anyone acting under their authority are hereby interdicted and restrained from posing as rightful authorities of eSigcineni area in the Manzini District.

3.1.2 The Respondents or anyone acting under their authority are hereby interdicted and restrained from allocating land to new settlers at eSigcineni area in the Manzini District.

3.1.3 The Respondents or anyone acting under their authority are hereby interdicted and restrained from calling and convening community meetings at eSigcineni area in the Manzini District.

3.1.4 The Respondents or anyone acting under their authority are hereby interdicted and restrained from interfering with the 2nd and 3rd Applicants in the execution of their functions as headman and chairman of the inner council respectively of Sigcineni Chiefs Kraal.

(4) Directing the Respondents to pay the costs of suit.

(5) Further and /or alternative relief."

[7] The Respondents filed a notice to oppose on the 29th of August 2013. Thereafter, the matter served before my learned brother Mamba J on the 30th of August 2013, who entered the following consent order pending the finalization of the application:-

"1. An interim order is granted in the following terms returnable on the 13 September 2013.

1.1 That the applicants and the respondents or anyone acting under their authority are restrained from posing themselves as authorities of Sigcineni pending finalization of this matter.

1.2 That the applicants and respondents or anyone acting under their authority are hereby interdicted and restrained from allocating land to new settlers pending finalization of this matter.

1.3 The applicants and respondents or anyone acting under their authority are hereby interdicted and restrained from calling and convening community meetings at Sigcineni pending finalization of this matter."

[8] It appears that when the application served before Court on the 13th of September 2013, per **Dlamini J**, neither the Respondents nor their legal representatives appeared. The Respondents had also failed to file any affidavit in opposition of the application. This resulted in a default judgment against the Respondents in the following terms:-

"1. That pending determination and finalization of the dispute regarding the rightful administrative authority over Sigcineni Area by the iNgwenyama in-council:-

1.1 The respondents or anyone acting under their authority are hereby interdicted and restrained from posing as rightful authorities of eSigcineni Area in the Manzini district.

1.2 The Respondents or anyone acting under their authority are hereby interdicted and restrained from allocating land to new settlers at eSigcineni Area in the Manzini District.

1.3 The Respondents or anyone acting under their authority are hereby interdicted and restrained from calling and convening community meetings at eSigcineni Area in the Manzini District.

1.4 The Respondents or anyone acting under their authority are hereby interdicted and restrained from interfering with the 2nd and 3rd Applicants in the execution of their functions as headman and chairman of inner council respectively of Sigcineni Chiefs Kraal.

2. Directing the Respondents to pay costs of suit."

[9] The present application which was commenced by the Respondents as Applicants under a certificate of urgency and which is dated 20th of September 2013, is against the aforegoing order of **Dlamini J.** It prays the Court for the following reliefs:-

"(a) Dispensing with the terms and time limits prescribed by the rules of this Honourable Court and hearing this application as a matter of urgency.

(b) Setting aside and rescinding the judgment granted in favour of respondents under Case No. 1322/13 on the 13th September by this honourable Court.

(c) Staying the proposed meeting of the 21st September 2013 and any other, pending finalization of this application.

(d) That the Commissioner of Police ensures compliance with the order of Court.

(e) **That a rule nisi do hereby issue operating with interim and immediate effect and returnable on the date to be determined by this Honourable Court in terms of prayers b and c.**

(f) **No order as to costs.**

(g) **Further or alternative reliefs."**

[10] It is convenient for me to refer to the Applicants in the above application as Respondents / Applicants and to the Respondents as Applicants / Respondents. The application is founded on the affidavit of Nhlanhla Dlamini learned Crown Counsel who appeared for the Respondents / Applicants. The Respondents / Applicants also filed a replying affidavit. The Applicants / Respondents who are opposed to the aforegoing application, urged an opposing affidavit wherein they raised the following points *in limine*:-

1. The Respondents / Applicants attorney has no right to appear for them in terms of section 77(3) of the Constitution Act 2005.

2. The Respondents / Applicants application is defective for non-compliance with Rule 6 (25) in that they failed to state in their papers

the reason why they claim that they cannot be afforded substantial redress at a hearing in due course.

[11] Now section 77 (3) of the Constitution upon which the Applicants / Respondents rely for the first point *in limine* provides as follows:-

> **"The Attorney-General shall**
>
> **(a) be the principal legal adviser to the Government;**
> **(b) be ex-officio member of the cabinet, and**
> **(c) represent Chiefs in their official capacity in legal proceedings."**

[12] Mr Manyatsi who appeared for the Applicants / Respondents submitted, that reference to Chiefs in section 77 (3) (c) above does not include reference to Indvunas, which appellation Respondents / Applicants claim as their own and which in any case, is fiercely contested *in casu.*

[13] I am unable to subscribe to the proposition that Section 77 (3) (c) must be read restrictively to refer to Chiefs only and not to Indvunas. I say this because, it is common cause that Indvunas as secretaries to the Chiefs exercise the powers of Chiefs. They must therefore in my view, be accorded the same courtesy as Chiefs via section 77 (3) (c). The 1st Respondent /

1st Applicant is described in the papers as the Indvuna of Lobamba responsible for Royal household and the 2nd Respondent / 2nd Applicant is described as Indvuna of Sigcineni. This is all that is required for their representation by the Attorney General for the purposes of this application. Whether or not they are properly or lawfully appointed as such Indvunas is a matter that tends to the merits of this case, which it is clearly undesirable for the Court to pronounce upon at this stage of the proceedings. In the circumstances, I will dismiss this point *in limine.*

[14] Similarly, the second point *in limine* must fail. I say this because the established facts are that the impugned judgment was entered on or about the 13th of September 2013. Thereafter, the Applicants / Respondents by announcement over the radio on 19th of September 2013, sought to convene a meeting on 21st of September 2013. Respondents / Applicants contend that this was the first time they became aware that default judgment had been entered against them, which elicited the present urgent application. In these circumstances, especially in view of the absence of any return of service of the assailed order on the Respondents / Applicants, or their legal representatives there is in my view, much force in Mr Dlamini's contention that the matter is urgent.

[15] Furthermore, Mr Manyatsi's proposition that the Respondents / Applicants failed to demonstrate facts which show why they say they cannot be granted adequate redress if the matter were to take its normal course, is clearly an argument for another day. This is because this issue is sufficiently addressed by paragraph 21 of the founding affidavit, wherein Mr Dlamini alleged, that if the matter were to take its normal course the Respondents / Applicants will suffer prejudice by reason of the fact that the matter is pending before traditional structures and a dangerous situation will occur and bloodshed will spread as there are two rival factions in the chiefdom. It is interesting to note that the likelihood of confrontation between the parties and their factions leadings to bloodshed, is one of the grounds upon which the Applicants / Respondents premised the urgency they proposed in the main application. It does not thus lie in their mouth to contend to the contrary now.

[16] Similarly, the contention that Mr Dlamini lacks the competence to depose to the founding affidavit and make the aforegoing allegations is not tenable. This is because, right from the outset of the founding affidavit Mr Dlamini had in para (2) thereof, averred as follows:-

> **"I have been designated by the Attorney General to conduct the opposition and or defence of the above application proceedings in the matter hence I am ex-officio duly authorized to attest to this affidavit."**

[17] Even though in para 7.2 of the answering affidavit the Applicants / Respondents call upon Mr Dlamini to exhibit the power of attorney and / or special instruction or document from the Attorney-General authorizing him to conduct the opposition and defend the application, I am of the firm view that the absence of the said authorization at this stage should not defeat the whole application. This is on the strength of the celebrated case of **Shell Oil Swaziland Ltd vs Motor World t/a Sir Motors Civil Appeal No. 23/2006 at page 23 and Swaziland National Sports Council vs Minister of Sports, Culture and Youth Affairs and Others Civil Case No. 1455/13.**

[18] Mr Dlamini must thus be given the opportunity to ratify the issue of his authorization retrospectively. The points *in limine* are hereby accordingly dismissed.

[19] Now on the merits, it is common cause that the rescission application is in terms of the common law. I must also observe here that both attorneys tendered arguments pursuant to Rule 42 (1) (a) of the High Court Rules. It is

convenient for me to first consider this application on the Common Law ground.

[20] Under the common law, the Applicant for rescission of judgment bears the duty to demonstrate the following:-

(1) Reasonable explanation for his default.

(2) *Bona fide* defence. See **Johannes Manguluza Tsabedze vs Swaziland Development and Savings bank and 2 others Case No. 257/2009. Sarah Masina vs Thabsile Lukhele and Others Case No. 2019/2008.**

[21] Reasonable explanation for default

What the law requires the Applicant to demonstrate under this head is that he was not in willful default in attending Court. Speaking about this issue in **The Superior Court Practice Juta 1995 at B1 – 202**, the learned editor **Erasmus,** said the following:-

> **"Before a person can be said to be in willful default, the following elements must be shown:-**
>
> **(a) Knowledge that the action is being brought against him.**

> **(b) A deliberate refraining from entering appearance, though free to do so; and**
>
> **(c) A certain mental attitude towards the consequences of the default.”**

[22] A re-statement of the aforegoing principles by Courts in this Kingdom has rendered them sacrosanct. The cases are legion. They include but are not limited to **Savannah N. Maziya Sandanezwe vs GD1 Concepts and Project Management (Pty) (Ltd) Civil Case No 905/ 2009, Sarah Masina vs Thabsile Lukhele and Others (Supra).**

[23] The question here is, whether the Respondents / Applicants were in willful default in view of the fact that they failed to enter an appearance when the matter was heard on the 13th of September 2013 and they also failed to file opposing papers.

[24] The grounds upon which the Respondents / Applicants contend that they were not in willful default are that learned Crown Counsel Mr Dlamini was bereaved having lost his sister and thus could not attend Court. Mr Dlamini alleged in the founding affidavit that he communicated the fact of his bereavement to Mr Manyatsi telephonically and expected that his learned friend would accord him the sympathy and courtesy of not proceeding with

the matter in his absence in these circumstances. In any case, further contended Mr Dlamini, after the interim order granted by **Mamba J**, both himself and Mr Manyatsi approached one of the Assistant Registrars of this Court to have the matter set down on the contested roll of the 13th of September 2013. Mr Dlamini contended that they could not be availed of that date because the roll was already full, a fact which he says was subsequently communicated to him by Mr Manyatsi. In the light of the totality of the aforegoing circumstances, he could not have envisaged that the matter would proceed on the 13th of September 2013, irrespective of the fact that **Mamba J** had duly postponed the matter to that date.

[25] In the answering affidavit, Mr Manyatsi categorically denies that Mr Dlamini ever informed him telephonically about his bereavement; he denies that he ever went with Mr Dlamini to an Assistant Registrar to have this matter set down on the contested roll of 13th September 2013, and he also denies ever informing Mr Dlamini that the matter could not be set down on the 13th of September 2013 because the roll for that day was full.

[26] The allegations of Mr Dlamini *in casu* raise serious questions about Mr Manyatsi's professional conduct in this matter. I have no wish to dabble

into this issue, as these allegations are fiercely contested and cannot thus be resolved on the strength of the papers serving before Court. Suffice it to say that it is not disputed by the Applicants / Respondents, that Mr Dlamini was bereaved at the material time in question. This, it must be appreciated, is usually a very unsettling occurrence and in my view defeats any suggestion of willful default on his part. The cases of **Reuben Benard Rautenbach v Rose Rautenbach Civil Case No. 4379/05 and Siphamandla Ginindza v Mangaliso Clinton Msibi SZSC 38 (31 May 2013),** urged by Mr Manyatsi in support of this proposition find no application *in casu.* I say this because the antecedents of those cases are clearly different from the facts of this case.

[27] 2. *Bona fide* defence

Speaking about this requirement **Erasmus (Supra) at page B1 – 203-4** declared as follows:-

> **"The requirement that the applicant to rescission must show the existence of a substantial defence does not mean that he must show a probability of success, it suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence must be set-forth with sufficient detail to**

enable the Court to conclude that the application is not made for the purpose of harassing the respondent ---"

[28] In honour of the aforegoing dictate of the law, the Respondents / Applicants urged para 20 of the founding affidavit, wherein it is contended as follows:-

"I submit that the applicants have a *bona fide* defence in the matter:-

(i) This Court does not have the jurisdiction to deal with a matter of such nature in terms of the constitution of Swaziland specifically section 151 (1) as they are governed by the Swazi Law and Custom. The respondents in their papers have also stated that the matter is pending before the traditional structures.

(ii) This honourable Court has stated in a number of its decisions that it would be loathe determining or even granting an interdict in a matter that can be dissolved (sic) in terms of Swazi Law and Custom or other competent structures as opposed to the above honourable Court.

(iii) From the papers of the respondent, it is clear that there are disputes of facts which can not be solved on application.

(iv) Respondents have failed to satisfy the requirements for an interdict prima facie right or clear right. The respondents in their papers allege that the matter is pending before traditional structures.

(v) The urgency is self created as the Umphakatsi was long established in 1990 by their Majesties.

(vi) Matters which involve their Majesties are not determined at this honourable Court.

(vii) I had liased with the Indvuna of Ludzidzini in regard to the dispute and he advised that the matter was long resolved by their Majesties and said that Sigcineni was given to Inkhosikati nabo Betfusile."

[29] I am firmly convinced that the aforegoing allegations of fact raise issues fit for trial, which if established would entitle the Respondents / Applicants to succeed in their defence.

[30] The aforegoing conclusion it seems to me, renders any further consideration of this application pursuant to Rule 42 (1) (a) of this Court's Rules *otiose.*

[31] On the whole, this application has merits. It succeeds.

[31] ORDER

I order as follows:-

1. That the judgment granted by this Court on the 13th of September 2013 in Case No. 1322/13 be and is hereby rescinded and set aside.

2. That the interim order granted by **Mamba J** on 30th of August 2013 in Case No 1322/13 be and is hereby resuscitated pending finalization of this matter.

3. That the Registrar of the High Court be and is hereby ordered to treat this matter with dispatch.

4. No order as to costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE...............................DAY OF 2013

OTA J.

JUDGE OF THE HIGH COURT

For the Respondents / Applicants: Mr. N. Dlamini

For the Applicants / Respondents: Mr. L. Manyatsi