



**IN THE HIGH COURT OF SWAZILAND**

Civil case No: 5/2013

In the matter between:

**SIPHO SAMUEL HLOPHE**

**APPLICANT**

**AND**

**AFRICAN METHODIST**

**RESPONDENT**

Neutral citation: *Sipho Samuel Hlophe v African Methodist Episcopal Church (5/2013) [2013] SZHC31 (2013)*

**Coram:** **M.C.B. MAPHALALA, J**

For applicant Attorney Sipho Gumedze

For Respondent Attorney Sanele Mavimbela

**Summary**

Civil Procedure – dispute over Swazi Nation Land- Sections 211, 233 and 252 of the Constitution discussed in relation to the ownership of Swazi nation land and the role played by chiefs thereto – the issue relating to the dual legal system as well as the problem of the conflict of laws discussed – court held that matters relating to Swazi law and custom should be determined by chiefs and Swazi Courts before review and appeal to the High Court and Supreme Court – application dismissed.

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**JUDGMENT**  
**28 FEBRUARY 2013**

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- [1] An urgent application was instituted seeking an interdict restraining the respondent, its agents, members or assignees from destroying crops to be planted by the applicant at his homestead at Sidvwatjana area; he further sought an interdict restraining the respondent from removing or tempering with the fence demarcating the boundary of the applicant's land and the respondent's land. The applicant further sought an order for costs of suit.
- [2] The applicant resides at Sidvwatjana area under the chieftaincy of Zombodze area in the Manzini region. He argued that his uncle, Reverend Paul Khoza as well as his father were amongst the founders of the church; and, that his father as a member of the respondent used to cultivate fields below the church building in order to provide food for the pastors who stayed at his home before their residence was built within the church premises. Upon the death of his father, he took over the cultivation of these fields and delivered maize to the pastors.
- [3] He argued that after twenty years of continuous cultivation, the respondent then demanded the return of the fields, and, that he refused because he believed that the fields had evolved to the benefit of his family. The respondent then lodged a complaint with the Sidvwatjana Traditional Authorities who ruled in favour of the respondent. He appealed to the Inner Council at Zombodze Umphakatsi, which also ruled in favour of the respondent.

- [4] The respondent conceded that the land below the church belongs to the respondent; however, the basis for his refusal to hand over the fields was that his family had invested a lot of energy and resources to make the land arable, and, that they needed compensation.
- [5] The applicant further argued that the respondent lodged legal proceedings before this court under civil case No. 2387/2011 for eviction; and that the respondent included land which had not been part of the deliberations before the Traditional Authorities. The additional land is adjacent to the land belonging to the respondent and it has a house which was built by Reverend Khoza; and, there are fields next to the house which were cultivated by Reverend Khoza for his own use. The respondent subsequently withdrew the legal proceedings after he had filed opposing papers.
- [6] He argued that Khoza's land though situated close to the church is separate from the church's land; and, that the land belonging to the church has a house for worship, a pastor's house and fields below the building which he cultivated. He further argued that Khoza was given the land by the Zombodze Umphakatsi. He also argued that before Rev. Khoza died, he introduced him to the Zombodze Umphakatsi as the person who should take over the homestead since Rev. Khoza had no children of his own.

- [7] He argued that after the withdrawal of the proceedings, his attorneys advised him to utilize the disputed land previously owned by Rev. Khoza; and, that he planted maize and sweet potatoes. On the 27<sup>th</sup> December 2012 the respondent ploughed over the crops and destroyed them; an elder of the respondent Samuel Ndlangamandla was seen directing the tractor driver. Previously and prior to the destruction of the crops, Ndlangamandla and other members of the respondent had been seen removing a fence that demarcated the respondent's land from his land.
- [8] He argued that he wants to plant sweet potatoes on the land and that he needs an interdict to restrain the respondent from destroying his crops; and, that they have demonstrated the capacity to resort to self-help.
- [9] The applicant further argued that he was entitled to the interdict in respect of the land previously owned by Rev. Khoza, and, that he has a *prima facie* right to the land since he was given by its owner who also introduced him to the traditional authorities; he argued that Reverend Khoza khontaed for the land and paid a beast and that he could not be deprived of the land without due process of the law. He further argued that there is an apprehension of irreparable harm since the respondent had previously destroyed his crops, and they have shown a propensity to resort to self-help.

- [10] He also argued that the balance of convenience favours him in the circumstances because the land was lawfully given to him and he has been cultivating it since the death of Rev. Khoza. He also argued that he has no other adequate remedy and that an action for damages will not be adequate since he needs the land, to grow food and feed his family.
- [11] The application is opposed by the respondent. In *limine* it argued that the matter is not urgent since the applicant became aware of the damage to his crops on the 27<sup>th</sup> December 2012 but only instituted this application on the 21<sup>st</sup> January 2013. The applicant has failed to explain why it took him three weeks to institute the proceedings if it was urgent.
- [12] The respondent further argued that the applicant's founding affidavit is riddled with hearsay evidence; however, it didn't deal with this point of law either in the Answering Affidavit or in its heads of argument during the hearing. It further argued that the applicant has failed to meet the requirements for an interim interdict. However, it did not substantiate this point.
- [13] On the merits it was argued that the applicant's father cultivated land within the church parameters or compound designated as the church land by Umphakatsi; and, that such cultivation was for the benefit of the church.

[14] The respondent further argued that on the death of applicant's father his mother Barbara Hlophe (nee Khoza) continued cultivating the land for the benefit of the church with the assistance of her younger son Sibani Hlophe until her death; and, that the applicant never assisted her mother in this regard. It was only after the death of his mother that the applicant started cultivating the land for his own benefit, and, further claiming ownership of the land which resulted in a dispute between him and the church.

[15] The respondent confirmed that the Sidvwatjana Local Council ruled in its favour, and its witnesses included applicant's sister Beauty Hlophe and his uncle Sikhwishi Hlophe. The respondent further confirmed that the appeal by the applicant to the Zombodze umphakatsi was dismissed. No appeal or review was lodged by the applicant to the Swazi Courts; however, he moved an application before the Manzini Magistrates Court under case No. 861/08 in respect of the same matter, and, it was dismissed with costs on a punitive scale after oral evidence was led and submissions made.

[16] The respondent argued that Rev. Khoza was allocated his own land at Boyane Area by the umphakatsi and that the land in dispute belongs to the church, and, that Rev. Khoza had been allowed by the church to build his house on the land so that he could be closer to the church since he had retired. It was explained that Rev. Khoza could no longer occupy the pastor's house because he had retired and the pastors' house was occupied by a new pastor. The respondent

denied that the church had given Rev. Khoza land for cultivation, and it argued that all the land in dispute between the parties belong to the church.

[17] The respondent denied that the applicant was introduced to the Umphakatsi by Rev. Khoza as the person who was to take over the land on his demise; and, that this would not have been possible since the land belongs to the church.

[18] The deponent to the respondent's opposing affidavit argued that it was hearsay that a neighbour saw him directing a tractor driver which was ploughing over his crops, and, he called for the striking out of the allegation in the absence of a confirmatory affidavit by the neighbour; he further denied removing a fence which constitute a boundary between the applicant's land and the respondent's land.

[19] The respondent argued that the applicant has failed to establish a clear right and/or a *prima facie* right over the land in question, and, that he stands to suffer no prejudice or irreparable harm as alleged. The respondent argued that the applicant's family has enough land lying idle which he could utilize. It was further argued that applicant has a host of alternative remedies including laying a criminal charge or claiming damages.

[20] A brother to the applicant's father Joshua Hlophe has filed a confirmatory affidavit in which he states that the land in dispute belongs to the church, and

that Rev. Khoza could not lawfully give the land to the applicant. He further confirmed that the applicant's father, the late Bhekindlela Hlophe, was a founding member of the church and that he was responsible for cultivating the land for the benefit of the church. He contended that upon his demise his wife cultivated the land with the assistance of her younger son. He stated that the applicant took over the cultivation of the land on the demise of his mother; however, that this was shortlived since he cultivated the land for his own benefit, and a dispute with the church subsequently arose. He denied that Rev. Khoza was related to the applicant or that he khontaed for the land; he emphasised that Rev. Khoza was only allowed by the church to build a house on the land since he was retired and old. He argued that he was one of the witnesses of the church both before Sidvwatjana Council as well as the Zombodze Umphakatsi and that the church won on both forums.

[21] The applicant's sister Barbara Hlophe filed an affidavit in which she confirmed as true the allegations made by Samuel Ndlamandla and Joshua Hlophe. She was one of the witnesses of the church when the matter was heard before the Sidvwatjana Council as well as the Zombodze Umphakatsi.

[22] The acting Chief of Zombodze Umphakatsi, Timothy Velabo Mtsetfwa deposed to an affidavit confirming that on the 15<sup>th</sup> November 2006, the Inner Council and himself deliberated on the land dispute between the parties, and that their Ruling was that the land belongs to the church; they further ruled that



Rev. Khoza was only given permission by the church to build his house on its land due to old age so that he could be closer to the church. He submitted that the church had khontaed for the land in the normal customary manner; and, that Rev. Khoza had khontaed and was allocated land at Boyane area which he never utilised.

[23] In his replying affidavit the applicant stated that the land in which Rev. Khoza's house was built was not part of the deliberations at Zombodze Umphakatsi; and certain members of the Inner Council of Zombodze Umphakatsi filed confirmatory affidavits in this regard. They argued that the decision was only taken in respect of the fields cultivated by the applicant below the church and not the land where Rev. Khoza's house was built. However, a closer look at Annexure "D", the affidavit of the Acting Governor, the Confirmatory affidavits of Joshua Hlophe, Beauty Hlophe and the Opposing affidavit of Samuel Ndlangamandla, it is evident that the Traditional Forums deliberated on the entire land dispute between the parties including the piece of land where Rev. Khoza had built his house. The applicant in his replying affidavit never disputed the allegations by the respondent that Rev. Khoza was only allocated land at Boyane area which he never utilized; it was also not disputed that Rev. Khoza was permitted by the church to build a house closer to the church after his retirement due to old age. There is no evidence before this court that Rev. Khoza khontaed for the land where his house was built in addition to the land at Boyane area.

[24] I am cognisant of the fact that the land in dispute is situated on Swazi nation land under the administration of chiefs. Section 211 of the Constitution expressly provides that all land including any existing concessions in Swaziland save privately held title – deed land vests in the iNqwenyama in trust for the Swazi nation. Section 233 of the Constitution provides for the office of chiefs; and, in discharging their functions, the chiefs enforce a custom, tradition practice or usage which is just and not discriminatory. It is also clear from section 233 (1) and (2) that every Umphakatsi is headed by a chief who is appointed by iNqwenyama; and, that every chief exercises his functions in accordance with Swazi law and custom.

[25] In the case of *Michael Mvungama Mahlalela v. Mirriam Tjengisile Dlamini* case No. 17/2013 (HC) (unreported)) I had occasion to state the following at paragraph 21 of the judgment:

**“21. This country has a dual legal system which does not only co-exist but is complementary. The Roman – Dutch Law is the general law of the land and it is applied by the courts of general jurisdiction including the Magistrate’s Courts, the High Court, the Supreme Court as well as specialised courts such as the Industrial Court and the Industrial Court of Appeal. The Swazi courts were established in terms of the Swazi courts Act No. 80 of 1950, and consist of Swazi Courts of first instance, the Swazi Courts of Appeal, the Higher Swazi Court of Appeal and the Judicial Commissioner; and, these courts apply Swazi law and custom. Matters emanating from chiefdoms are appealable to the Swazi Courts from where they are reviewable by the High Courts and**

**Supreme Court. Disputes over the ownership of Swazi Nation land are matters within the jurisdiction of chiefs.”**

[26] Section 252 of the Constitution provides the following:

**“252. (1) Subject to the provisions of the Constitution or any other written law, the principles and rules that formed, immediately before the 6<sup>th</sup> September 1968 (independence day), the principles and rules of the Roman-Dutch Common Law as applicable to Swaziland since 22<sup>nd</sup> 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 is, inconsistent with a provision of this Constitution or a statute or repugnant to natural justice or morality or general principles of humanity.”**

[27] In the case of *Sandile Hadebe v. Sifiso Khumalo NO and Three Others* Civil case No. 2623/2011 at paragraph ss 55, I explained the powers of chiefs as follows at para 55 and 58:

**“55.... In addition, in terms of Swazi Law and Custom the chief acting on the advice of his Inner Council has power to allocate land by means of “kukhonta custom” to Swazis from other chiefdoms who wish to reside in his area; similarly, the Chief’s Inner Council also sits as a court to determine minor disputes between members of the chiefdom. A person affected by the decision of the Inner Council has a right of appeal to the chief who can either confirm or reverse the decision of the Inner Council....**

**(58) Generally decisions of the Chief’s Inner Council are appealable to the Swazi Court...”**

[28] In the case of *Phildah Khumalo v. Mashovane Khumalo* civil case No. 2023/2007 at paragraphs 12, 13, 14 and 16 *His Lordship Justice Stanley Maphalala* stated the following:

**“12. It is abundantly clear that the dispute between the parties is over Swazi Nation land between people who live and governed by Swazi law and custom. Swazi law and custom is the most suitable regime to resolve the dispute and the chief is a better placed person to handle same in as much as the chief is also responsible for allocating land on Swazi nation land....**

**(16) It is my considered view that this matter can only come before this court on review or on appeal after running the full course of the hierarchy of the structures provided at Swazi Law and Custom. It is abundantly clear that this country has a dual legal system that of Roman Dutch Law and Swazi Law and Custom. These systems co-exist with each other and the Roman-Dutch system by the High Court can only exercise its powers on review or appeal of a**

**decision in the tradition legal system. In the interest of harmony it is imperative that respect should be given where it is due.”**

[29] It was the recognition of the legal dualism in this country and the need for a proper choice of law in dealing with the conflict of laws that *His Lordship Chief Justice Ramodibedi* in the case of the Commissioner of Police and the *Attorney General v. Mkhondvo Aaron Masuku* civil Appeal No.3/2011 had this to say:

- “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 (i.e. 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 the country to apply Roman Dutch Law in a case which cries out for Swazi law and custom.”**

[30] It is apparent from the evidence that this matter was heard before the Sidvwatjana Council as well as the Zombodze Umphakatsi. If the applicant is not satisfied with the decision of the Umphakatsi, he is at liberty to take up the matter with the Swazi Courts; it is only after exhausting the hierarchy of the

Swazi court that he could take up the matter on review or appeal to the High Court and Supreme Court.

[31] Accordingly the application is dismissed with costs on the ordinary scale.

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**M.C.B. MAPHALALA**

**JUDGE OF THE HIGH COURT**