IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 2148/2012

In the matter between

NELISIWE NDLANGAMANDLA	APPLICANT
And	
ROBERT SAMKELO HADEBE	1ST RESPONDENT
SIFISO KHUMALO	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

In re

ROBERT HADEBE	APPLICANT
And	
NELISIWE HADEBE	RESPONDENT

Neutral citation: *Nelisiwe Ndlangamandla v Robert Samkelo Hadebe (2148/12)* [2012] SZHC 57 (15 March 2013)

Coram: OTA J.

Heard **13 March 2013**

Delivered: **15 March 2013**

Summary: **Rescission of application: issues in impugned on *res-judicata* and pending before the Supreme Court: principles applicable.**

[1] This is an unending saga. A very long story and a very sorry and sad one indeed. It is the tale of a window, **Nelisiwe Ndlangamandla** (The Applicant), and the two children of a marriage she contracted pursuant to Swazi Law and Custom, with one **Mbonwa Hadebe** who died in 2010. The said **Mbonwa** was the elder brother of one **Sandile Hadebe** who has played a very significant role in the woes of the Applicant as the papers show. The sadness of the story as it is told by the papers filed of record, stems from the fact that since the demise of **Mbonwa**, the Applicant has been engaged with Sandile in a contest over ownership of her marital homestead.

[2] Suffice it to say that, it was this grouse that led one **Robert Samkelo Hadebe**, who is a grandfather to **Sandile**, to approach the High Court under a certificate of urgency, seeking the eviction of the Applicant (who was Respondent in that application), from the said marital home. The application birthed the following orders which the High Court rendered on the 23rd day of January 2013:

"2. The Respondent and all those holding or claiming title through or under her are hereby ejected from the Nyonyane property in Ezulwini in the District of Hhohho located ahead of the Islamist Worship Centre on land that is about 5000 square meters and consisting of a three (3) bedroom main house, one (1) bedroom flat, a two (2) room storage facility and nine (9) two room flats.

3. The Respondent is directed to surrender keys to all doors in the said Nkonyane homestead referred to in order 2 above, to the Applicant.

4. The Respondent is to pay the Applicant's cost of suit at the ordinary scale."

[3] The foregoing orders as can be seen, effectively evicted the Applicant herein (who was Respondent therein) and her two children from her marital homestead.

[4] It is the orders above and a dissatisfaction of same, that propelled the Applicant to initiate the present proceedings under a certificate of urgency, contending for a rescission of the said orders, and a stay of execution of same, pending the finalization of this application as well as costs, amongst others.

[5] The gravamen of the Applicants contention is that the judgment of the 23rd of January 2013 which was granted in default of her appearance, was erroneously granted, in the sense that the court per **Hlophe J**, at the time of granting the order, was not aware that the issues raised before him therein had been exhaustively entertained and determined by another court of coordinate jurisdiction, per **MCB Maphalala J**, culminating in a judgment rendered on the 28th of March 2012, in another suit styled civil case No. 2623/11, which was commenced by **Sandile.** The Applicant made these assertions in the following words as appear in paragraphs 16 and 17 of her founding affidavit:

> "16. Sandile then made application before this Honourable Court challenging *inter alia* his eviction and also alleging that he had a right to reside in the homestead and that he had been given right by his grandfather, the Respondent in these proceedings.
>
> 16.1 This Honourable Court in a 40 page judgment dismissed Sandile's application, significantly, it held that **Robert Samkelo Hadebe, Sandile's** grandfather had no title to the homestead because he had formerly relinquished same to his son my father–in-law who passed it on to my

husband who in turn passed it on to his children including me.

A copy of the judgment is annexed hereto and marked "D".

17. It is the fact of the judgment of this Honourable Court that **His Lordship Hlophe J** was not aware of when he made the order sought to be rescinded in this application"

[6] Notwithstanding 1st Respondents counsel, Mr Dlamini's contention to the contrary, I hold the view that the aforegoing assertions contemplate rescission within the context of Rule 42 (1) (a) of the Rules of this Court, which states:

> "The Court may in addition to other powers it may have, *meri motu* or upon the application of any party affected, rescind or vary (a) an order or judgment ernoneously granted in the absence of any party affected thereby".

[7] Commenting on Rule 42 (1) (a) of the Rules of the Supreme Court of South Africa, which is in *pari materia* with our own Rule 42 (1) (a), in the case of **President of The Republic of South Africa V Ersenberg and Associated**

2005 (1) SA 247 at 264 H-J, Erasmus J, regurgitated the words of **Nepgen J,** in the case of **Stander and Another V ABSA Bank 1997 (4) SA 873 (E) at 882 E-F**, as follows:-

> "It seems to me that the very reference to 'the absence of any party affected' is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the court in order to have such order or judgment rescinded, or varied, on the basis of facts, of which the court would initially have been unaware, which would justify this being done---"

[8] Adumberating further on the scope of the applicability of Rule 42 (1) (a) in the case of **Bakoven V G. J Holmes (Pty) Ltd 1992 (2) SA 466 at 471 E-G, Erasmus J** declared as follows:-

> " Rule 42 (1) (a) it seems to me is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is erroneously granted when the court commits an error in the sense of a 'mistake in a matter of law appearing on the proceedings

> of a court of record.' It follows that a Court deciding whether a judgment was erroneously granted is like a court of appeal, confined to the record of proceedings. In contradisticion to reliefs in terms of Rule 31 (2) (b) or under the Common Law, the applicant need not show 'good cause' in the sense of an explanation for his default and a *bona fide* defence---. Once the applicant can point to an error in the proceedings, he is without further ado entitled to a rescission."

[9] Then there is the pronouncement of the court, on this self same issue, in the case of **Nyingwa V Moolman N.O 1993 (2) SA 508 (TK GD) per White J,** as follows:

> " It therefore seems that a judgment has been erroneously granted, if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge if he had been aware of it, not to grant the judgment"

[10] It is worthy of note that the continued re-statement of the principles ante in the courts of the Kingdom have rendered them sacroscant. The cases are legion. They include but are not limited to the following: **Savannah N. Maziya**

Sandanezwe V GDI Concepts and Project Management and Savings Bank and 2 Others Civil Case No. 257/2009, Sarah Masina V Thabsile Lukhele and Another Civil Case No. 2019/2008.

[11] It is by reason of the totality of the foregoing, that I cannot accept Mr Dlamini's contention that this application does not fall within the purview of Rule 42 (1) (a) because there was nothing irregular *ex facie* the proceedings before **Hlophe J.** He contended that there was nothing incorrect or irregular in the facts and circumstances placed before **Hlophe J**, to invoke Rule 42 (1) (a).

[12] I hold the firm view that to adopted the restricted approach advanced by **Mr Dlamini** would certainly kill the objects of Rule 42 (1) (a). I am more inclined to agree with the authorities paraded above that once there existed at the time of granting the order or judgment a fact of which the court was unaware which would have precluded the granting of the judgment, the case shall fall within the contemplation of Rule 42 (1) (a).

[13] The reference in **Bakoven (supra)** to the court being "confined to the record of proceedings" cannot be construed in the narrow sense which **Mr Dlamini** seeks to ascribe to it. To my mind, and as is abundantly demonstrated in that decision, what this expression simply means is that all the court looks for is an error in the proceedings that birthed the order sought to be rescinded, in contradistinction to the position of Rule 31 (2) (b) where the court goes outside the proceedings to consider extraneous issues like; reasonable explanation for default and bonafide defence.

[14] Having stated as above, let us now test the alleged error urged by the Applicant against the rigours of Rule 42 (1) (a), to ascertain its efficacy and substantiality.

[15] A proper consideration of this issue will entail a chronicle of the events that brought the parties thus far.

[16] What appears to be the facts of this case is that the 1st Respondent **Robert Hadebe**, was the initial owner of the homestead in issue. He khontaed at the Ezulwini Chiefdom in the late 1970's. He later left the area and relocated to KaLanga Chiefdom where he has remained resident ever

since after bidding farewell to the Ezulwini tradition authorities. Following his relocation, he stopped or discontinued all obligations to the Ezulwini Chiefdom e.g. payment of homage and loyalty, as is required under Swazi Law and Custom.

[17] It is common cause evidence that prior to his relocation to the KaLanga Chiefdom, the 1st Respondent introduced his eldest son **Sifiso Hadebe** to the Ezulwini Umphakatsi.

[18] After the 1st Respondent departed from the homestead, **Sifiso** took occupation of the homestead and built nine two-roomed flats, two bedroom flats and the main house. **Sifiso** and his wife **Esther Hadebe** lived in the homestead until he died in 2003. During their life time they produced three children of their union, namely, **Mbonwa, Sandile** and **Dudu Hadebe.**

[19] After Sifiso died in 2003, **Mbonwa** his eldest son, took over the responsibilities of the homestead. **Mbonwa** eventually married **Nelisiwe Ndlangamandla**, the Applicant, with whom he lived together with the two children of their union in the main house built by **Sifiso** during his life time.

[20] After **Mbonwa** died in 2010, the Applicant took over the responsibilities of the homestead This was the Genesis of the Applicants woes. I say this because the evidence shows, that it was after this, that wranglings between Applicant and Sandile over ownership of the homestead began. A venture which eventually led to the eviction of the Applicant and her two children from the homestead. After their eviction **Sandile** took over the homestead.

[21] The Applicant was not to be intimidated or deterred by these activities of **Sandile** because after her eviction, she took steps in the right direction by reporting same to the Ezulwini Umphakatsi and several other higher Traditional Structures, which unanimously ordered **Sandile** not to evict the Applicant and her children from the homestead.

[22] The record demonstrates that **Sandile** remained recalcitrant and refused to comply with the decisions of the several traditional structures.

[23] This state of affairs appears to be what eventually led to his eviction from the Ezulwini Chiefdom by the Umphakatsi by way of sanctions.

[24] It was against a background of this eviction that **Sandile** as Applicant, moved an application under a certificate of urgency against, **Sifiso Khumalo N.O.** 1st Respondent, as Chief of the Ezulwini Chiefdom, **Albert Vilakati and Oupa Lapidos** 2nd and 3rd Respondents respectively, who are members of the Ezulwini Inner Council and 4th Respondent **James Dlamini,** who is the chairman of the Chiefs Inner Council of Ezulwini Royal Kraal, contesting his eviction.

[25] In a comprehensive judgment rendered on the 28th of March 2012, the High Court per **MCB Maphalala J,** after making copious findings of fact, some of which I will allude to later in the course of this judgment, dismissed Sandile's application in the following terms:-

> "(a) The application is dismissed with costs on the ordinary scale.
>
> (b) The decision of the first respondent evicting the applicant from Ezulwini Chiefdom is confirmed.

(c) The decision of first respondent evicting the Applicant from the home of **Mbonwa Hadebe** in Ezulwini Chiefdom is confirmed.

(d) The Applicant is hereby interdicted and restrained from evicting **Nelisiwe Ndlangamandla** and her children from their homestead at Ezulwini area.

(e) The Applicant is hereby interdicted and restrained from staying or setting foot at the homestead of **Mbonwa Hadebe** or communicating with **Nelisiwe Ndlangamandla** and her children"

[26] Aggrieved by the decision ante, **Sandile** launched an appeal against same under Appeal Case No. 25/2012, premised upon 15 grounds of appeal detailed therein as follows:-

"1. The court a quo erred in deciding questions involving Swazi Law and Custom *mero motu* without expert evidence being led on this specialized field. The court a quo more particularly erred in:

1.1 Finding that the Appellant's grandfather, Robert Hadebe, had no authority over the Ezulwini homestead at the centre of the dispute.

1.2 Finding that the Appellant's grandfather, Robert Hadebe had relinquished his right and title to the contested Ezulwini homestead by leaving to reside in another chiefdom.

1.3 Finding that the Appellant's brother was the automatic heir to the Appellant's deceased father.

1.4 Not finding that there was no question of succession or inheritance in respect of the Appellant's grandfather in his lifetime.

2. The court a quo erred in not at least granting the Appellant interim relief pending determination of the dispute between the parties in the traditional structures under Swazi Law and Custom.

3. The court a quo erred in finding that the Appellant had no clear right to reside in a homestead built by his biological parents and where he had lived virtually his whole life.

4. The court a quo erred in not finding that Section 252 (3) of the Constitution of the Kingdom of Swaziland (the Constitution) was applicable in the eviction of the Applicant in that:

4.1 This eviction was inconsistent with the provisions of the constitution;

4.2 The eviction was repugnant to natural justice and morality as well as the general principles of humanity

5. The court a quo erred in finding that the 1st Respondent acted intra vires Section 233 of the Constitution inasmuch as the eviction of the Applicant did not constitute the enforcement of a lawful custom, tradition, practice or usage.

6. The court a quo erred in not applying Section 211 of the Constitution which affords citizens equal access to land for normal domestic purposes including building homes and subsistence farming.

7. The court a quo erred in determining the matter outside the context of the court's unlimited original jurisdiction given that the eviction of the Appellant was patently unlawful and enforced with immediate effort.

8. The court a quo erred in finding that the Appellant had an effective remedy of appealing to His Majesty the King through the King's Advisory Council, Liqoqo,

inasmuch as the King was in seclusion at the material time just as the said Advisory Council was not accessible as a result of the sacred national ceremony, Incwala.

9. The court a quo erred in finding that the Appellant's eviction followed due process of the law inasmuch as this is not supported by the objective facts.

10. The court a quo erred in finding that the Appellant had evicted his sister in law, **Nelisiwe Ndlangamandla**, from the Ezulwini homestead that is the centre of the dispute between the parties.

11. The court a quo erred in accepting the disputed evidence of the Respondents about the developments regarding the alleged eviction of **Nelisiwe Ndlangamandla** at the Ezulwini homestead at the centre of the dispute. The court a quo particularly erred in not finding that there was a dispute of fact in this regard which could not be determined otherwise than by referral of the issue to oral evidence.

12. The court a quo erred in not limiting its decision to the determination of the application before it and,

proceeding to determine issues not serving before the court a quo, The court a quo particularly erred in:

12.1 Confirming the decision to evict the Appellant from the Ezulwini chiefdom,

12.2 Interdicting and restraining the Appellant from evicting **Nelisiwe Ndlangamandla** and her children from their homestead at Ezulwini area;

12.3 Interdicting and restraining the Appellant from setting foot at the homestead of **Mbonwa Hadebe** or communicating with **Nelisiwe Ndlangamandla** and her children.

13. The court a quo erred by failing to distinguish between allegation, fact and suspicion.

14. The court a quo erred in dismissing the Appellant's application with costs.

15. The court a quo erred in not granting the relief sought by the Appellant in the proceedings in the court a quo."

[27] It appears that it was during the pendence of Appeal Case No. 15/2012, that the 1st Respondent who is **Sandile's** grandfather launched the urgent application which elicited the orders of **Hlophe J,** sought to be rescinded.

[28] Now, my understanding of the Applicant's posture, is that the question of the ownership of the homestead is *res-judicata* the decision of **MCB Maphalala J,** and is also an issue raised in Civil Appeal No. 25/2010, therefore divesting **Hlophe J** of the jurisdiction to reopen and determine same.

[29] The doctrine of *res judicata* is underpinned by the principle that it is in the interest of public policy that there be an end to litigation. Therefore, parties having canvassed an issue before a court of competent jurisdiction, resulting in a valid and subsisting judgment, are precluded by law from re-opening and re-canvassing that issue under any guise, except on appeal or review. These are the requisites of a successful plea of *res-judicata*, as authoritatively stated by **Herbstein and Van Winsen in the Civil Practice of the Supreme Court of South Africa (4th ed) pages 249-250** as follows:-

> " The requisites of a plea of *lis pen*dens are the same with regard to the person, cause of action and subject matter as

> those of a plea of *res judicata*, which in turn, are that the two actions must have been between the same parties or their successors-in-title concerning the same subject matter and founded upon the same cause of complaint. For a plea of *res judicata* to succeed, however, it is not necessary that the 'cause of action' in the narrow sense in which the term is sometimes used as a term of pleading should be the same in the latter case as in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be *res-judicata* in any subsequent action between the same parties in respect of the same subject matter (emphasis mine)."

[30] What can be distilled from the aforegoing exposition of **Herbstein *et al*** is that a sustainable plea of *res-judicata* is achieved on the following grounds:-

1. There was a prior final judgment between the same parties.
2. In respect of the same subject matter.

3. On the same grounds

See Prince Mhlaba Dlamini v Msimisi Dlamini Civil Case No. 660/12

[31] There is no doubt that the two suits i.e before **Hlophe J and MCB Maphalala J,** concerned the same subject matter i.e. the homestead in Ezulwini. That is common cause in these proceedings.

[32] **Mr Dlamini** however, strenuously contended, that the rescission sought is defeated on ground [1] above. This, he says is because a mere cusory look at the parties in the decision by **MCB Maphalala J,** which I have already demonstrated was a suit filed by **Sandile** against the Inner Council of the Ezulwini Umphakatsi, will show that they were different from the parties in the proceedings before **Hlophe J. Mr Dlamini's** take is that since the 1st Respondent who was the Applicant before **Hlophe J**, and whom we have established is **Sandiles** grandfather, did not feature in the suit before **MCB Maphalala J,** which was launched by **Sandile** he is not bound by that decision.

[33] I beg with respect to disagree with this proposition. To hold such a myopic view of the requisites of the defence of *re-judicata* will defeat the sound object of that doctrine. That is why **Herbstein *et al*** extends the meaning of the parties to a suit to include their *‘‘successors-in-title”* . This expression in my view should not be restricted to its literal interpretation but must be read, and as rightly contended by **Mr Magagula** on behalf of the Applicant, to include all parties interested in the subject matter of the earlier action whose rights were expressly or impliedly determined in the earlier decision and who may wish to re-open issues already determined by a court. The 1st Respondent *in casu*, fits like a hand in gloves into this category.

[34] I must also say, contrary to **Mr Dlamini's** contention, that the issue determined in the two decisions are the same, that is the ownership of the homestead.

[35] Even though the claim for ownership of the homestead, does not appear *ex-facie* the reliefs claimed in the two application, it however underpinned the reliefs sought. That is why ***Herbstein et al*** prescribes that it is not necessary that the cause of action in the narrow sense in which it is sometimes

used as a term of pleading should be the same in the latter case as in the earlier case:

> "If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination though not declared on the face of the recorded descision, is deemed to constitute an integral part of it, and will be *res-judicata* in any subsequent action between the same parties in respect of the same subject matter"
> **See Prince Mahlaba Dlamini V Msimisi Dlamini (supra)**

[36] Therefore, even though the claim before **Hlophe J** was for eviction of the Applicant (as Respondent therein) from the suitland, the 1st Respondent premised his justification for the said eviction on his alleged ownership of the homestead in proof of which he brandished annexure A, which was urged in the proceedings, and which is an instrument allegedly produced by the Swazi National Court and duly signed by the **Libandla** endorsing said ownership.

[37] I say alleged because the question of the authenticity of annexure A is fiercely contested in these proceeding, and I

cannot therefore reach a concluded opinion on the matter. I however do not wish to bother myself with this because in my view, it does not in anyway derogate from the plea of *res judicata* raised *in casu*, contrary to Mr Dlamini's contention. It is for this self same reason, that I refused to countenance the point taken *in limine* by **Mr Dlamini**, on the propriety of the supplementary affidavit filed by the Applicant after filing her replying affidavit. The facts contained in the supplementary affidavit relate to annexure A, which to my mind, does not detract from the plea of *res-judicata* raised, as I have already stated.

[38] Now, the question of the 1st Respondent's ownership of the suitland which was raised before **Hlophe J**, was already decided by **MCB Maphalala J** prior to the alleged decision of the Swazi National Court and the impugned decision of **Hlophe J. MCB Maphalala J** in the process of arriving at his final orders, made findings in relation to the ownership of the homestead in the following language:-

> "[39] It is apparent from the evidence that **Robert Hadebe** khontaed at Ezulwini Chiefdom in the late 1970's, however, he left the area and relocated to Kalanga Chiefdom where he has been living

ever since. There is no evidence that he pays homage and loyalty to the Ezulwini Chiefdom ever since he left the area, such as attending meetings called by the Ezulwini Traditional Authority or attending 'Ummemo' or 'kuhlehla' at the Ezulwini Umphakatsi as required of every resident of a Chiefdom in accordance with Swazi Law and Custom.

[40] The evidence shows that before he relocated, he introduced his eldest son **Sifiso Hadebe** to the Ezulwini Umphakatsi as the person who was to take over the responsibilities of the homestead. He informed the traditional authorities that he was now relocating to KaLanga Chiefom, he bade farewell, 'wavalelisa' to the traditional authorities and this explains why he ceased to reside in the area.

[41] It is not in dispute that **Sifiso Hadebe** took occupation of the homestead and built nine two-roomed flats, two bedroom flats and the main house, his father **Robert Hadebe** had only built a one two-roomed flat. It is further not in dispute that **Sifiso Hadebe** lived in the homestead with his wife **Esther Hadebe** and their children until he died.

[42] **Sifiso Hadebe** and his wife had three children **Mbonwa**, the Applicant as well as **Dudu Hadebe,** they lived in the main-house. He died in about 2003 and **Mbonwa Hadebe** being the eldest son took over responsibility of the homestead, in terms of Swazi Law and Custom, the eldest son automatically takes over control of the homestead on the death of the head of the family, and, this doesn't require the consent of the family council.

[43] **Mbonwa Hadebe** married **Nelisiwe Ndlangamandla** and two children were born of the marriage, he lived with his wife and children in the main house, and the Applicant lived in the small house built by his grandfather. Swazi Law and Custom dictates that younger sons who have come of age should move out of their parental homes to build their own homesteads either within their Chiefdoms or to "khonta" in other Chiefdoms, the eldest son remains in the parental homestead and becomes the head of the family.

[44] When the Applicant came of age, he did not move out of the homestead to build his own home contrary to the dictates of Swazi Law and Custom. When **Mbonwa Hadebe** died, the responsibilities

of the homestead fell on his wife; and, it is clear from the evidence adduced that the Applicant unlawfully evicted **Mbonwa Hadebe's** wife and children and forcefully took over the control of the homestead.

[80] As discussed in the preceding paragraphs, the Applicant has failed to establish a clear right over the homestead. On the death of Mbonwa, the homestead accrued to his wife and children. Since the Applicant is younger to **Mbonwa Hadebe**, he should move out of the homestead and establish his own homestead because he has come of age.

[82] Another important issue requiring the courts attention relates to the ownership of land in Swaziland, and in particular land administered by Chiefs in a 'Swazi Area'. Section 211 of the Constitution vests all land in Swaziland including Concessions in iNgwenyama save for privately owned land. Citizens of Swaziland have equal access to land for normal domestic purposes including building homes and subsistence farming. Land in 'Swazi Area, are allocated by the Chief or 'Lidvuna' on the advise of their Inner Councils

[83] Where a person decides to leave the Cheifdom either to reside in another Chiefdom or to reside in a Title-deed land, he surrenders the land to the Chief or 'Lidvuna' and it vests in the custody of the Chief who can either utilize it or allocate it to another person".

[39] It is indisputably apparent from the totality of the foregoing, that **MCB Maphalala J** decided the question of ownership of the homestead as against **Sandile** and 1st Respondent and made the finding that at the death of **Mbonwa Hadebe** the homestead accrued to his wife, the Applicant *in casu*.

[40] It was precisely as a result of these findings made with respect to the ownership of the homestead, that **Sandile** raised the following issues in grounds 1 to 1.4 of Appeal Case No. 25/2012, which bear repetition at this juncture:-

" ----The court a quo more particulary erred in

1.1 Finding that the Appellant's grandfather, **Robert Hadebe**, had no authority over the Ezulwini Homestead at the centre of the dispute.

1.2 Finding that the Appellant's grandfather **Robert Hadebe** had relinquished his right and title to the contested Ezulwini homestead by leaving to reside in another Chiefdom .

1.3 Finding that the Appellant's brother was the automatic heir to the Appellant's deceased father.

1.4 Not finding that there was no question of succession or inheritance in respect of the Appellant's grandfather in his lifetime"

[41] **MCB Maphalala J,** having made a final pronouncement on the ownership of the homestead, which had been duly appealed against by **Sandile**, it was no longer competent to any of the parties to seek to reopen this issue either before **Hlophe J** or the Swazi National Court nor did the two courts have the jurisdiction to entertain and determine same in the circumstances. This is because the said decision of **MCB Maphalala J** is valid, definitive and subsisting until it is set aside by a competent appellate or reviewing court. The mere fact that the said decision is perceived to be wrong by **Sandile** and 1st Respondent, which perception is echoed by **Mr Dlamini** in these proceedings, does not detract from the potency of such a decision.

As I stated in my decision in the case of **Clement Nhleko V MH Mdluli 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 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 latter, whether it is a superior court in the judicial hierarchy, presumes the order as made or the judgment as given by the former, to be manifestly invalid without a

> pronouncement to that effect by an appellate or reviewing court"

See the case of **Mariah Duduzile Dlamini Augustine Divorce Dlamini And Others Civil Case No. 550/2012.**

[42] **Hlophe J** was neither seating on appeal or on review over the decision of **MCB Maphalala J** nor did he have the competence to do so. This is because it is the established position of our law that appeals lie from the High Court to the Supreme Court and that the High Court has review and supervisory jurisdiction over inferior courts and adjudicatory authorities.

[43] Similarly, the Swazi National Court, an inferior adjudicatory authority, has no review power over the valid and subsisting decision of the High Court.

[44] In any event, the mere fact that the issue of the ownership of the homestead was alive before the Supreme Court, derogated the rights of any other court, superior or inferior, from inquiring into same.

[45] It follows therefore from the above that the impugned orders granted by **Hlophe J** are *res-judicata* the decision of **MCB Maphalala J,** which is pending in an appeal before the supreme court.

[46] This is the error in the proceedings which if **Hlophe J** was aware of would have precluded him from granting the assailed orders.

[47] This state of affairs to my mind entitles the Applicant to the rescission sought pursuant to Rule 42 (1) (a).

[48] I hold the view that this application will also succeed under the common law which demands that the Applicant must demonstrate (1) a reasonable explanation for her default and (2) a *bona fide* defence.

[49] The Applicant has successfully raised the plea of *res-judicata* as I have already abundantly determined. This is a veritable basis for the final termination of any proceedings *in limine* or at any stage. It therefore constitutes a *bona fide* defence to the proceedings before **Hlophe J.**

[50] Similarly, I am convinced that the Applicant has demonstrated that she was not in willful default in attending court. I say this because it is the judicial concensus that what the court has to ascertain in establishing reasonable explanation for default, is, whether or not the Applicant in a rescission application was in willful default in attending court.

[51] **As Erasmus** stated in **The Superior Court Practice (Juta) 1995 at B1-202**

> " 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"

[52] The foregoing principles were replicated by **Mosenke J in the case of Harris V ABSA Bank Ltd t/a Volkskas, 2006 (4) SA 527 (1) para 8** as follows:-

" Before an Applicant in a rescission of judgment application can be said to be in willful default he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an Applicant must deliberately, being free to do so, fail or omit, to take the step which would avoid the default and must appreciate the legal consequences of his or her action"

[53] *In casu*, this is not the case. The record demonstrates that upon being served with the proceedings before **Hlophe J,** the Applicant instructed Attorneys from **NDZ Ngcamphalala Attorneys** on or about 14th January 2013 and they duly filed a notice of intention to oppose the application. By instructing attorneys to defend the action, the Applicant took the steps that she was required to take to avoid the default. The failure by her attorneys to carry out their functions leading to the default can hardly be attributed to the Applicant since there is no evidence to show that the Applicant was partly to blame for the default.

[54] As stated by the court in the case of **Webster And Another V Santam Insurance Co. Ltd 1977 [2] SA 874,** which was cited with approval by **Dlamini J** in the case of **Bhokile**

Elliot Shiba v Swaziland Development & Savings Bank and Another Civil Case No. 1716/2006:-

> " a lay client like the Appellants is ordinarily entitled to regard an attorney duly admitted to the practice of Law, as a skilled professional practitioner. Ordinarily, he places considerable reliance upon the competence, skill and knowledge of an Attorney and he trusts that he will fulfill his professional responsibility. It is of cause not unknown for an Attorney or his firm to be negligent in carrying out professional duties, but that is not usual and *a fortiori* to lay client, it would be most unusual and unexpected occurrence. To hold without qualification that a client is bound by the negligence of his legal adviser, is in my respectful view wrong---. It may well be that to attribute to a client the negligence of an Attorney would be justifiable in cases where he (the client) is partly to blame through his sappiness or otherwise for his Attorneys dilatoriness"

[55] I therefore hold the Applicant not to be in willful default in attending Court. In the light of the totality of the foregoing, this application has merits. It succeeds. I hereby order as follows:

1) That the Rule Nisi issued calling upon the 1st Respondent to show cause why the order granted by this Honourable Court on the 23rd of January 2013 should not be rescinded and/or set aside, is confirmed.

2) Costs against the 1st Respondent.

For the Applicant: Z. Magagula

For the Respondent: S. Dlamini

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

OTA J

JUDGE OF THE HIGH COURT