



**IN THE HIGH COURT OF SWAZILAND**

Civil case No: 17/2013

In the matter between:

**MICHAEL MVUNGAMA MAHLALELA**

**APPLICANT**

**AND**

**MIRRIAM TJENGISILE DLAMINI  
ABEL MAFIKA DLAMINI  
BEAUTY GIZANE MAHLALELA  
(NEE MATSE)**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT**

Neutral citation: *Michael Mvungama Mahlalela v. Mirriam Tjengisile Dlamini & 2 Others (17/2013) [2013] SZHC40 (2013)*

**Coram:**

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

For applicant

Attorney N. Ndlangamandla

For Respondents

Attorney I. Du Pont

**Summary**

Swazi law and Custom – dispute over ownership of land situated on a Swazi area – held that the proper forum was the Chief’s Court whose decisions are appealable to the Swazi Courts established in terms of the Swazi Courts Act of 1980 – decisions of the Swazi Courts are subject to review and appeal to the High Court and Supreme Court.

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**JUDGMENT  
6<sup>th</sup> MARCH 2013**

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- [1] An urgent application was lodged in which a Rule Nisi, was sought calling upon the respondents to show cause why they should not be interdicted from constructing a house on the applicant's land at Mhlaleni area. The applicant alleged that in 1990 the third respondent, his mother, and himself were allocated a piece of land at Mhlaleni area through the "kukhonta system". The third respondent subdivided the piece of land and allocated a portion thereof to him to build his homestead and another portion to the first respondent to construct a house. He constructed a block of apartments leaving a vacant portion of land for use at a later stage.
- [2] However, on the 24<sup>th</sup> December 2012, he discovered that a foundation had been dug on his vacant piece of land in front of his block of apartments by the first and second respondents who are married to each other; they intended to construct a house.
- [3] The application is opposed by the respondents. The third respondent deposed to the answering affidavit; she gave a brief background of the matter to the effect that she was married to Albert Mahlalela, and, they lived at Siteki. However, they subsequently separated in the late 1960s; the first respondent was the only child born of the marriage.
- [4] The third respondent explained that the applicant is a son to her husband from a relationship with her sister; they were not married, and, the applicant grew up

at her parental home. In 1987 she returned home after retiring from her place of work at Dyson and Lincoln in Siteki; she started working there in 1972. However, her father advised her not to build her house at her parental homestead but to seek her own piece of land from the Logoba Traditional Authorities; this was to avoid possible disputes in the event of his demise. She was accordingly allocated land through the “khonta system” and her emissary was John Thwala who was accompanied by Mabonjwana Nkambule (born shongwe) who are both late.

[5] Thereafter, she asked the first respondent, who is her daughter, to construct her a stick and mud house. After sometime she was approached by the applicant who asked for land to construct five flats in order to generate extra income; in return he undertook to construct for her a three-roomed brick house with water and electricity. However, he failed to honour his undertaking.

[6] After building the five flats, the applicant disappeared; the first respondent built her a two bed-roomed flat in 1985 which she leased to tenants. She denied that the applicant had any role in her acquisition of the land.

[7] The third respondent further raised three points in *limine*. Firstly, non-joinder of the Logoba Traditional Authorities; she argued that they should have been joined on the basis that the land in question is under their jurisdiction. Secondly, *lis pendens*; she argued that this matter is pending before the Logoba

King's Council where she lodged a complaint against the applicant for claiming ownership of her land. Thirdly, she argued that the applicant had failed to satisfy the requirements for an interim interdict; in particular, to demonstrate the irreparable harm he stands to suffer or to show a *prima facie* right to the piece of land or even the absence of alternative remedy.

[8] On the merits she argued that this court has no jurisdiction to entertain this matter on the basis that it deals with Swazi Nation land. She argued that the appropriate forum would be the Traditional Authorities applying Swazi law and Custom.

[9] She contended that the applicant had a homestead at Mpolonjeni where he resides. She denied that the house being built belongs to the first respondent and her husband but to her. She conceded allowing the applicant to build the apartments on her land but she denied that the applicant owns a vacant piece of land in front of his apartments as alleged. She further denied that she had to consult the applicant for consent before building the new house in front of applicant's apartment. She disclosed that the first respondent and her husband were merely assisting her with the construction of her house. She also denied that the applicant had attempted to resolve the matter amicably at a family level.

[10] The first respondent has deposed to a confirmatory affidavit and argued that, she was able to construct a two-roomed house for the third respondent, with the help of the second respondent; she disclosed that the said house is being leased to tenants. She further disclosed that she also constructed a stick and mud house for her mother's occupation when she retired; and, that she was currently constructing a bigger house for her mother so that she could also accommodate a relative to assist her since she is elderly and lives alone. She confirmed that she is building this bigger house in front of applicant's apartments and has since dug a foundation for this purpose. She further disclosed that the second respondent is financing the construction on her behalf; and, that he doesn't want to be drawn into family disputes. She alleged that the applicant did not engage her and the second respondent before lodging this application. She further alleged that the applicant came and verbally abused her which prompted the third respondent to report the matter to the Logoba Royal Kraal; and the matter is still pending. The second respondent also deposed to a confirmatory affidavit in support of the first respondent.

[11] The applicant filed a replying affidavit alleging that they both went to Chief Mahhawulane with the third respondent to ask for a land; and, that she had introduced him as her son. He denied that he approached the third respondent for the piece of land to construct flats to generate extra income; and that it was the third respondent who was under pressure to have the land developed in fear that her brother might take the land from her since it was not developed. He

denied any undertaking to construct a three-roomed brick house for the third respondent. He alleged that the two-roomed house built by the first respondent was intended for her own use and her husband to lease out to tenants; he denied that the house was built for the third respondent.

[12] He argued that there was no need to join the Traditional Authorities since they had no interest in the matter partly because the Umphakatsi was not involved when the third respondent allocated a portion of the land to him and partly because he lawfully khontaed at the Umphakatsi with the third respondent.

[13] He denied knowledge of the fact that the third respondent has lodged a complaint against him at the Chief's Royal Kraal. He argued that he has not been formally informed of the matter. He denied that he has failed to satisfy the requirements for the interdict, and argued that he has made specific averments in the Founding Affidavit that he stands to suffer if the interim interdict is not granted, and that he has a *prima facie* right to the piece of land and the absence of an alternative relief.

[14] He denied verbally abusing the first respondent and argued that he asked her politely why she was constructing a house on his portion of land. He insisted that the two-roomed house where the third respondent resides was built by the second respondent for the first respondent to generate income since she was not employed at the time; he argued that the house was built on the land allocated

to the first respondent. He further denied that the stick and mud house was built by the third respondent but by the first respondent.

[15] It is apparent from the evidence adduced as well as the submissions made by counsel that the dispute between the parties relates to the ownership of land where the applicant has built his apartments; this is the same piece of land where a foundation has been built. The applicant claims that he khontaed at the uMphakatsi together with the third respondent; and, that the third respondent subsequently subdivided the land between himself, the first respondent as well as the third respondent. He argued that the respondents have now dug a foundation on the portion of land allocated to him; hence, he seeks an interdict restraining the respondents from constructing a house on his land.

[16] It is not in dispute that the land is situated on Swazi nation land under the jurisdiction of the Logoba Traditional Authorities; they administer the chiefdom on behalf of the Ingwenyama. Section 211 of the Constitution provides the following:

**“211. (1) From the date of commencement of this Constitution, all land (including any existing concessions) in Swaziland save private held title –deed land, shall continue to vest in iNgcweme in trust for the Swazi Nation as it vested on the 12<sup>th</sup> April 1973.”**

[17] Section 233 of the Constitution provides the following:

**“233. (3) The general rule is that every uMphakatsi (Chief’s residence) is**

**headed by a chief who is appointed by iNqwenyama after the chief has been selected by the Lusendvo (Family Council) and shall vacate office in like manner.**

**(4) The position of a chief as a local head of one or more areas is usually hereditary and is regulated by Swazi law and Custom.**

....

**(8) The powers and functions of chiefs are in accordance with Swazi law and custom or conferred by parliament or iNqwenyama from time to time.**

**(9) In the exercise of the functions and duties of his office, a chief enforces a custom, tradition, practice or usage which is just and not discriminatory.”**

[18] This country has a dual legal system which 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 Magistrates' Courts, the High Court, the Supreme Court as well as the specialized courts such as the Industrial Court as well as 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 and appealable by the High Court and Supreme Court. Disputes over the ownership of Swazi Nation land are matters within the jurisdiction of chiefs and Swazi Courts.



[19] Section 151 (3) of the Constitution of Swaziland provides the following:

**“151. (3) Notwithstanding the provisions of subsection (1), the High Court –**

**....**

**(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.”**

[20] The duality of our legal system is reflected in section 252 of the Constitution which 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> of September 1968 (independence Day), the principles and rules of the Roman-Dutch Common Law and 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 customs) 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.”**

[21] In the case of *Sandile Hadebe v. Sifiso Khumalo NO and three Others* Civil Case No. 2623/2011 (HC), I had occasion to deal with a similar matter involving a dispute over the ownership of land situated in a Swazi area. At paragraph 55 of the judgment, I had this to say:

**“55. Section 6 of the Swazi Administration Act No. 79 of 1950 provides that the duties of every chief is to maintain order and good government over Swazis residing in the area over which his authority extends in accordance with the Act, in addition to powers vested in him by any other law or by Swazi law and Custom which is not inconsistent with any other law. In addition, in terms of Swazi law and Customs, 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 chiefdoms. 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 decisions of the Inner Council.**

**56. In deciding disputes brought before them, the Chief’s Inner Council applies Swazi law and Custom....**

**58. Generally, decisions of the Chief’s Inner Council are appealable to the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950; the Act empowers iNgwenyama to establish these courts, and, they exercise jurisdiction over members of the Swazi nation. Swazi courts exercise both civil and criminal jurisdiction as reflected in sections 7 and 8 of the Act. The parties in the civil**

**matter must ordinarily be resident or the cause of action shall have arisen within the area of jurisdiction of the court...**

**62. Section 31 of the Act provides for the review powers of the Higher Swazi Court of Appeal over Swazi Courts below them; however, the parties must be heard before a decision is made.**

**63. Section 33 deals with the appeals structure and provides that decisions of the Swazi courts are appealable to the Swazi Courts of Appeal and from there to the Higher Swazi Court of Appeal. A person aggrieved by a decision of this court in a criminal matter may appeal to the Judicial Commissioner; and, in a civil matter, he may appeal to the High Court. Where a person is aggrieved by the decision of a Judicial Commissioner in a criminal matter he may appeal to the High Court. Decisions of the High Court are appealable in both criminal and civil proceedings to the Supreme Court in terms of the Court of Appeal Act No. 74 of 1954 as well as sections 146 and 147 of the Constitution.**

**64. The Constitution not only recognises Swazi Courts but it confirms that they are part of the Judiciary. Sections 138 and 139 provide the following:**

**138. Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution.**

**139. (1) The Judiciary consists of:**

**(a) the Superior Courts of Judicature comprising –**

**(i) the Supreme Court, and**

**(ii) the High Court**

**(b) Such specialised subordinate and Swazi Courts or tribunals exercising a judicial function as Parliament may by law establish.’ ”**

[22] Section 11 of the Swazi Courts Act provides the following:

**“11. Subject of 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 any law which the court is by or under such law authorised to administer**

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

[23] The Principal Judge of this Court his *Lordship Justice Stanley Maphalala* in the case of *Phildah Khumalo v. Mashovane Hezekiel Khumalo* Civil Case No. 2023/2007 succeeded in dealing with dispute relating to land in a Swazi area. at paragraphs 12, 13, 14 and 16 he stated the following:

**“12. It is abundantly clear that the dispute between the parties is over Swazi nation land between people who live and are governed by Swazi law and custom. Swazi law and custom in the most suitable regime to resolve the dispute and the**

**chief if 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 an appeal after running the full course of the hierarchy of the structure provided at Swazi Law and Custom. It abundantly clear that this country has a dual legal system that of Roman – Dutch law an 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 traditional legal system. In the interest of harmony it is imperative that respect should be given where it is due.**

[24] Section 7 (1) of the Swazi Courts Act confers civil jurisdiction on Swazi Courts, and it provides the following:

**“7. (1) Every Swazi Court shall exercise civil jurisdiction, to the extent set out in the warrant and subject to the provisions of this Act, over causes and matters in which all the parties are members of the Swazi Nation and the defendant is ordinarily resident, or the cause of action shall have arisen, within the area of jurisdiction of the court.”**

[25] Section 9 of the Swazi Courts Act outlines the cases in which the Swazi Courts have no jurisdiction, and it provides as follows:

**“9. Subject to any express provision conferring jurisdiction, no**

Swazi Court shall have jurisdiction to try-

- (a) cases in which a person is charged with an offence in consequence of which death is alleged to have occurred, or which is punishable under any law with death or imprisonment for life;
- (b) cases in connection with marriage other than a marriage contracted under or in accordance with Swazi Law and Custom, except where and in so far as the case concerns the payment or return or disposal of dowry;
- (c) cases relating to witchcraft, except with the approval of the Judicial commissioner.”

[26] *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 at paragraphs 1 and 2 dealt with the question of a choice of law and jurisdiction in this country; and, he stated the following:

- “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 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.”**

[27] In the case of *Maziya Ntombi v. Ndzimandze Thembinkosi* Appeal case No. 2/2012, I had occasion to deal with another matter dealing with a dispute over Swazi Nation land. I quoted with approval the case of *Bangindawo and Others v. Head of the Nyanda Regional Authority and Another; Nhlanhlalala v. Head of the Western Tembuland Regional Authority and Others* 1998 (3) BCLR 314 TK at 326 where *Madlanga J* said the following:

**“... the judicial, executive and law-making powers in modern African customary law continue to vest in the Chiefs and so-called Paramount Chiefs (the correct appellation being kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western Legal Systems, or not believing in African Customary Law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It continues to thrive and is believed in and accepted by the vast majority of those subject to Kings and Chiefs and who continue to adhere to African Customary Law.”**

[26] Having said this, it becomes unnecessary to deal with the issue of non-joinder, *lis pendens* or the Interdict. Suffice to say that this is a matter suitably

qualified to be dealt with by the Logoba Traditional Authorities, if afterwards either party is not satisfied with the outcome, he could appeal to the Swazi Courts. After exhausting that forum, either party would be at liberty to appeal or review the decision to the High Court and the Supreme Court respectively.

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

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