



IN THE HIGH COURT OF SWAZILAND

Civil case No: 4048/2010

In the matter between:

THE MASUNDVWINI ROYAL COUNCIL

APPLICANT

AND

TIMOTHY KHUMALO

FIRST RESPONDENT

NELI MHLONGO

SECOND RESPONDENT

JOMO SHONGWE

THIRD RESPONDENT

ZULU (NAME UNKNOWN

FOURTH RESPONDENT

GABI SIMELANE

FIFTH RESPONDENT

LUCAS (SURNAME UNKNOWN)

SIXTH RESPONDENT

BENJAMIN ZONDO

SEVENTH RESPONDENT

VARIOUS RESIDENTS WHO HAVE

CONTINUED WITH ILLEGAL CONSTRUCTION

AT FARM NO. 126

EIGHTH RESPONDENT

COMMISSIONER OF POLICE

NINTH RESPONDENT

Neutral citation:

*The Masundvwinini Royal Council v. Timothy Khumalo And
Eight Others (4048/2010) [2013] SZHC121 (19 June 2014)*

Coram:

M.C.B. MAPHALALA, J

Summary

Civil contempt of Court – requirements thereof considered – held that an order was issued by this court interdicting and restraining the first to the seventh respondents from erecting any structures at KaShali without the authority and consent of the applicant – held further that the said respondents were served with the Order and/or had personal knowledge of the Order – held further that the respondents acted wilfully and *mala fide* and that the *rule nisi* is confirmed with costs at attorney and own client scale – held further that the execution of the judgment is to be suspended for a period of six months to enable the respondents to purge their contempt by legitimising their residence at KaShali with the applicant.

JUDGMENT 19 JUNE 2014

[1] The applicant sought a *rule nisi* calling upon the first to the seventh respondents or any other person acting on the authority of the respondents or anyone else other than the lawful authority of kaShali area to show cause to this Honourable Court why an order should not be made in the following terms:

1.1 Committing the first to the seventh respondents to gaol for a period of thirty (30) days for contempt of court for defying the judgment of this Honourable court under case No. 4048/2010 delivered on the 18th March 2011.

1.2 Demolishing all the illegal structures that were constructed illegally or without the authority of the applicant which is the lawful authority at KaShali after the judgment under civil case No. 4048/10 delivered on the 18th march 2011.

1.3 Deleting the respondents from the list of residents to be taken to His Majesty iNkwenyama for purposes of “kuyokwembula ingubo” in accordance with the judgment under civil case No. 4048/10 delivered on the 18 March 2011 interdicting and restraining them from constructing buildings at kaShali without the authority of the applicant.

1.4 Directing the eighth respondent to ensure and assist in compliance with the order.

1.5 Directing the first to the seventh respondents to pay costs of suit at attorney and own client scale.

[2] This application was brought on a certificate of urgency; however, it was served upon the first to the seventh respondents together with the court order of the 18th March 2011. On the 24th April 2013 the rule nisi as sought herein was issued as an interim order returnable on the 7th June 2013. The first, third, fourth and sixth respondents entered an appearance to oppose the application; however, only the third respondent filed an opposing affidavit.

[3] This application is a sequel to the civil case of *Nomsa Phindile Dlamini & 288 Others v. Phophonyane Maziya & Others* Civil Case No. 4048/2010. In that case the applicants sought an order interdicting and restraining the respondents from evicting and demolishing their homesteads at kaShali area on the basis that they were lawfully allocated the land by Prince Matatazela Dlamini, the Chief of Nhlambeni area in terms of the kukhonta custom. However, the court

found that kaShali area was a Farm registered under the iNgwenyama, and, that it did not fall under the Nhlambeni Chiefdom.

The judgment was delivered on the 18th March 2011 as follows:

COURT ORDER

....

Having heard counsel for the applicants and the respondents, it is hereby ordered that:

- 1. The land at KaShali was not assigned by Ingwenyama to the Chief of Nhlambeni in terms of Section 233 (2) of the Constitution of Swaziland Act No. 001/2005.**
- 2. The land at KaShali in so far as it is registered as Farm No. 126 in the name of Ingwenyama as Successor in-title is not part of Nhlambeni Chiefdom but it is land vested in Ingwenyama in trust for the Swazi Nation in accordance with Section 211 (1) of the 2005 Constitution.**
- 3. The Chief of Nhlambeni and his Libandla have no jurisdiction over and lack authority to exercise administrative functions over KaShali Area, and to that end they are interdicted and restrained from interfering with the administration of the Area**
- 4. The allocation of portions of land at KaShali by the Chief of Nhlambeni and his Libandla is unlawful and of no force and**

effect, and to that end, they are interdicted and restrained from further allocating portions of land.

- 5. The construction of buildings at KaShali by anyone without the authority of the Masundvini Council is hereby interdicted and restrained.**
- 6. The applicants are directed to appeal to iNgwenyama in terms of Swazi Law and Custom through the Masundvini Council in order to legitimise their permanent residence at kaShali.**
- 7. The Second Respondent and/or his agents are hereby interdicted and restrained from assisting the first respondent in carrying out the demolishing of the homesteads and eviction of the applicants.**
- 8. No order as to costs.**

[4] The court in the previous case found that the land at kaShali is registered as Farm 126 in the name of iNgwenyama and is held in-trust for the Swazi Nation. The court further found that the land had been allocated to the applicants by the Nhlambeni Umphakatsi on the basis that the land fell under their jurisdiction; and, it is against this background that the court interdicted and restrained the respondents from evicting and/or demolishing the homesteads of the applicants. The court considered that the applicants honestly believed that kaShali fell under the jurisdiction of Nhlambeni, Chiefdom, and that they had lawfully khontaed for the land allocated in terms of Swazi law and Custom. It is for this reason that the court had further directed the

applicants to appeal to iNgwenyama in terms of Swazi Law and Custom in order to legitimise their permanent residence at kaShali.

[5] It is common cause that subsequent to the judgment aforesaid, several meetings were held at kaShali by the applicants in an effort to explain and address the implications of the judgment. However, the present application shows that the illegal constructions have continued unabated at kaShali in contempt of the judgment of this court delivered on the 18th March 2011.

[6] In addition to the meetings called by applicant to address the illegal construction, the police at the instance of the applicant have consistently warned people engaged in the illegal construction to comply with the court order but to no avail. It is common cause that on the 4th October 2012, pursuant to the court order aforesaid, the acting Governor of Ludzidzini Mr. T.V. Mthethwa convened a meeting at Masundvwini where the residents of kaShali were reminded to comply with the Court Order. However, the respondents have continued to defy this Order. The meeting of the 4th October 2012 was widely publicised in the electronic media as well as in newspapers circulating within the country. It is apparent from the evidence that the respondents are now a law unto themselves with a total disregard of the law of the land.

[7] The third respondent who has filed an answering affidavit contends that the land upon which he has built his homestead was allocated to his family by the

Nhlambeni Umphakatsi. However, it is apparent from the replying affidavit filed of record that the third respondent was a party to the previous case of *Nomsa Dlamini and Others v. Phophonyane Maziya & Others* (supra), that he was also interdicted and restrained from constructing illegal structures at kaShali without the consent of the Masundvwini Council; he has continued to defy the Court Order and erected illegal structures at kaShali.

[8] The third respondent further contends that this court does not have jurisdiction over this matter on the basis that it involves Swazi law and Custom. On the contrary, this is incorrect. The cause of action herein involves the continued defiance of an order of this court delivered on the 18th March 2011; hence, this point of law has no substance and it is bound to fail. Similarly, the point of law relating to dispute of facts is bound to fail on the basis that the third respondent was a party to the previous proceedings whose order this court is urged to enforce. In addition, the point of law that the third respondent was not aware of the order of the 18 March 2011 is misconceived on the basis that the third respondent was part of the previous proceedings and was also served with the court order; hence, this point of law is dismissed.

[9] It is trite law that civil contempt of court is established if it is shown that an order was granted against the respondent; that the respondent was either served with the order personally or that the order had come to the respondent's personal notice; and, that the respondent has disobeyed the order. The failure

to comply with the order must not only be wilful but it should also be *mala fide* or reckless.

See: Herbstein and Van Winsen, “The Civil Practice of the High Court of South Africa” pp 1103 -1104

Jayiya v. MEC For Welfare, Eastern Cape 2004 (2) SA 611 (SCA) at 621

Fakie (Fakir NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 333

[10] Accordingly, it is hereby ordered:

1. The *rule nisi* is hereby confirmed, and, to that extent the application is granted as follows:
 - (a) The respondents are hereby committed to gaol for a period of thirty (30) days for contempt of court for defying the judgment of this Honourable Court under case No. 4048/2010 issued on the 18th March 2011.
 - (b) All the illegal structures at KaShali constructed without the authority of the applicant as the lawful authority and in contravention of the judgment under civil case No. 4040/2010 issued on the 18th March 2011 should be demolished.
 - (c) The first to the seventh respondents are deleted from the list of residents to be taken to His Majesty the iNgwenyama for purposes of

“kuyokwembula ingubo” in accordance with the judgment under civil case No. 4048/2010.

(d) The eighth respondent is directed to ensure compliance with this order.

(e) The first to the seventh respondents are directed to pay costs of suit at a scale of attorney and own client.

2. It is hereby ordered and directed that the execution of this judgment is hereby suspended for a period of six months to enable the first to the seventh respondents to purge their contempt by legitimising their residence at kaShali with the applicant.

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

For Applicant

Senior Crown Counsel
Vusi Kunene

For First and Sixth Respondent
For Third Respondent

Attorney Lloyd Mzizi
Attorney Justice Mzizi