IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1773/14

In the matter between

MBOMBO DLAMINI Applicant

Vs

CHIEF HYND DLAMINI Respondent

Neutral Citation: *Mbombo Dlamini Vs Chief Hynd Dlamini (1773/14) [2015] SZHC108 (30th April 2015)*

Coram: Hlophe J.

For Applicant: Mr. L. Maziya

For Respondent: Mr. V. Kunene

Date Heard: 01 April 2015

Date Delivered: 30 April 2015

Summary

Application proceedings – Applicant and respondent involved in a chieftaincy dispute – Sometime in 2011 there issued a Directive placing Gebeni area under Ndlinilembi Chiefdom – Applicant who claims to be acting Chief of Gebeni, notes a traditional appeal to the Ingwenyama – Dispute of fact on what the outcome of the said appeal was – Applicant contends it was decided in their favour – Respondent contends it is still pending except that Applicant's sympathizers have asked for the directive to be suspended which the Liqoqo claimed it had no power to grant – Dispute of fact on what the Applicant's sympathizers communicated to Liqoqo - Effect of dispute of fact in law – Not necessary in the circumstances of the matter to decide the dispute of fact – Because of the decision reached by this court on the matter, not necessary to decide the other legal points raised which include the constitutional question on jurisdiction – Application dismissed with costs.

JUDGMENT

[1] It is common cause that the Applicant who claims to be an acting Chief of an area called Gabeni in the Manzini District, is embroiled in what I will loosely term a chieftaincy dispute with the Respondent, who it is common cause is a Chief of an area called Ndlinilembi which is also situate in the Manzini District. The areas in question appear to be, at least from the papers, adjacent to each other.

[2] It would appear that although there was a dispute over this, the Gebeni area regarded itself as a Chiefdom of its own, separate and distinct from Ndlinilembi Chiefdom until sometime in 2011, when the parties are common cause there was issued a Directive to the effect that, Gebeni was not a separate and distinct Chiefdom, but was under Ndlinilembi known as Sigodzi (sub-area) in Siswati. There is a minor dispute on where the Directive in question emanated from, with the applicants saying it emanated from the Liqoqo, which is a constitutionally established committee, whose main function is described in the constitution as that of an advisor to His

Majesty The King on matters referred to it by him yet the Respondent contends that the said Directive emanated from His Majesty The King.

[3] The Directive was itself annexed to the papers as annexure "G2" and is herein produced verbatim for purposes hereof. It suffices that same is contained in a letter head from the King's Office and reads as follows":-

> *"Re: Dispute Between Prince Hynd Dlamini/Prince Mahlobo and Prince Mbombo*
>
> 1. *On the 7th June 2011, the Ingwenyama in Libandla, the Kings Advisory Council (Liqoqo), heard the dispute between Prince Hynd, chief of Endlinilembi Royal Residence and prince Mahlobo and Prince Mbombo of KuHlushwana Royal residence, Lavumisa Area, Shiselweni region, in the presence of both parties and made the following decision:*
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> 2. *That Endlinilembi area, was allocated (Liphakelo) to Inkhosikati LaMatsebula and currently Prince Hynd is the Chief of the area.*
>
> 3. *That Prince Mbombo and Prince Mahlobo belong to Inkhosikati LaNtshalintshali who was allocated at KuHlushwana, Lavumisa area, Shiselweni region and therefore they do not have a right to allocate land and call*

meetings at Endlinilembi area and that they can only exercise such rights at KuHlushwana Royal residence, Lavumisa area.

(Signed)

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Prince Logcogco
Liqoqo Chairman"

[4] It is common cause that the effect of the said Directive was that Gebeni was not a Chiefdom of its own but was part of Ndlinilembi Chiefdom whose Chief was Hynd Dlamini. The Directive was further understood to mean that the Applicant and his brother prince Mahlobo had no power to allocate land at Gebeni area and that they could only exercise such power at Hlushwana area in the Shiselweni District, where their mother (Inkhosikati) was allocated land.

[5] Given that the Directive on its face asserts to have been issued by the Ingwenyama in Libandla (Ingwenyama in Council) as well as the fact that from what is pleaded in the Applicants own papers, the Directive was complied with and acted upon in as much as it was allowed to take effect

despite that it was appealed against to the Ingwenyama through what has been referred to as the culture or practice of ‘Kwembula Ingubo’, which is a traditional appeal, I will treat the minor dispute on where the directive emanated from referred to above to be of no consequence and I will accept that a directive regarded as appropriate and having the necessary force, was issued and was binding upon the parties and that it was to remain effective until reversed on appeal by the appropriate authority.

[6] The effect of the said directive as can be easily deciphered from the cases of both parties was therefore that there is no chiefdom known as Gebeni Chiefdom, and that the area of Gebeni was merely under Ndlinilembi Chiefdom as a part thereof. It is not in dispute that the said Directive became operative and was in that sense accepted and became effective while it was appealed against by the Applicants to the Ingwenyama in keeping with Swazi Law and Custom. I say the Directive in question became effective and was accepted because it comes from the Applicant himself that the Directive was applicable and effective until the 30th October 2014 and 8th December 2014, when according to him the Ingwenyama allegedly made two respective commands to the Liqoqo, with the first one allegedly directing it to restore all the rights, privileges and services initially enjoyed

by the people of Gebeni prior to the 2011Directive referred to above back to them and later on in December 2014, ordering Liqoqo to refrain from discussing or dealing with the Gebeni and Ndlinilembi issue which had to be left to the Ingwenyama to personally handle. According to the Applicant the effect of these commands was to suspend or stop the operation of the 2011 Directive referred to above. Given that the Respondent was allegedly refusing to heed the said commands it became necessary for the Applicant to institute these proceedings seeking inter alia an interim order interdicting and restraining the respondent from settling people or allocating people land under the Gebeni Chiefdom pending finalization of the matter by Liqoqo as directed by the Ingwenyama.

[7] While admitting that there was issued a Directive sometime in 2011, authoritatively placing Gebeni area under Ndlinilembi Chiefdom, the respondent denies that the said directive came from the Ingwenyama. The Respondent avers the said Directive came from the Liqoqo and had nothing to do, with the King and the Ingwenyama. Again, whereas he admits that significant events occurred on the 30th October and 8th December 2014, the Respondent denies that those were commands respectively ordering that the position as prevailed prior to the Directive that issued in 2011 placing

Gebeni area under Ndlinilembi Chiefdom, be restored to Gebeni and that on the 8th December 2014 there issued a directive stopping Liqoqo from dealing with the issue of the two areas. According to the Respondents on both the 30th October 2014 and 8th December 2014, certain Princes Phuzugazi, Hlangabeza and Indvuna Themba Ginindza, among others came to the Liqoqo and requested that it suspends the operations of the directive placing Gebeni area under Ndlinilembi Chiefdom pending the outcome of their appeal (Kwembula Ingubo) to the Ingwenyama. Respondent further denied that there was also an order to restore to the people of Gebeni all the rights, privileges and services enjoyed by them prior to the placing of their area under Ndlinilembi Chiefdom in 2011.

[8] The Respondent claims to have been informed by some members of Liqoqo whose affidavit he annexes to his papers, that the Princes referred to above had gone to the Liqoqo to plead with it to suspend the operation of the 2011directive pending the outcome of the appeal to the Ingwenyama. The Liqoqo had, in response to their request allegedly advised the said Princes, that it had no power to suspend the operation of an order by the Ingwenyama. The Respondent further denies the contention that the Regional Administrator for the Manzini District, had been directed to restore

all rights, privileges and services enjoyed by the Gebeni people prior to the 2011 Directive referred to above. It was contended by the Respondent that whereas the Regional Administrator was asked by the Princes referred to above, to restore rights and privileges and the services aforesaid, he had refused to do so, claiming he had no power to do that and that such could only be directed by the Ingwenyama.

[9] The effect of this is clearly that whereas there is common cause that an authoritative directive was issued in 2011 placing Gebeni under Ndlinilembi Chiefdom, with the result that Gebeni lost certain rights privileges and services, the same cannot be said on the alleged subsequent commands allegedly restoring all the lost rights, privileges and services to Gebeni including banning the Liqoqo from further dealing with the Gebeni and Ndlinilembi matters again. Firstly the Respondent denies and disputes that there ever issued directives restoring the rights, privileges and services initially enjoyed by the Gebeni people to it. Secondly there is a dispute on what transpired when the Princes in question visited the Liqoqo. Whereas the Applicant avers they came to deliver a command for the restoration of rights, privileges and services to the Gebeni people, the Respondent avers that the said Princes came there to plead with the Liqoqo to suspend the

operations of the Directive placing Gebeni under Ndlinilembi. Ofcourse the Respondent as confirmed by the members of Liqoqo present there, claims that they refused the request contending they had no power to suspend a Directive by the Ingwenyama and that he was the only one who could do so.

[10] This means that there is a dispute of fact on what happened on the 30th October 2014 and 8th December 2014 before the Liqoqo. This dispute appears to be very material to me with the result therefore that the matter cannot be resolved on the papers as they stand. The law is very clear on what happens in such situations. As these are application proceedings, this court can choose to either dismiss the application, refer it to trial or refer it to oral evidence on a specific issue. **Herbestein and Van Winsen** in their book, **The Civil practice of The Supreme Court of South Africa, 4th Edition; Juta and Company at page 383**, put the position in the following words:-

> *"It has already been shown that where, at the hearing of application proceedings, a dispute of fact arises on the affidavits filed and cannot be decided without the hearing of oral evidence, the court has a discretion as to the future course of the proceedings, and may (i) dismiss the*

> *application with costs; or (ii) order that oral evidence be heard in terms of the rules of court; or (iii) order the parties to go to trial".*

See also ***Room Hire Co. (PTY) LTD v Jeppe Street Mausins (PTY) LTD 1949 (3) SA 1155 (T) at 1162; Pressma Services (PTY) LTD v Schuttler & Another 1990 (2) SA 411 at 419 C - I***

[11] The question becomes, is this the kind of dispute I need to concern myself with and resolve in the circumstances of this matter? I do not think so. Sight should not be lost of the fact that these are matters with a forum of their own in terms of Swazi law and Custom and that forum has not been shown to have failed to resolve it. It is true that all that was being sought from this court was an interim order preventing the respondent from exercising his Chieftaincy power over Gebeni area pending the finalization of the appeal process pending before the Ingwenyama. It was argued that because of this fact, the Applicant could not obtain a similar order anywhere hence the application before this court. I do not agree with this assertion. If it is true that the Ingwenyama had ordered that the status quo as prevailed before the 2011 directive be restored it would be clear that the respondent is

defying such an order by acting in the contrary. I have no doubt it is a matter the Ingwenyama would ably deal with. It would not be appropriate for this court to impose its own decision in a matter like the present and in the face of these disputes.

[12] I am therefore convinced that in view of the disputes referred to above, this is not a matter for this court to attempt to resolve, but one that ought to be resolved by the appropriate structures which leaves this court with the option to dismiss the matter. It would have been different if there was no dispute on what happened on the 30th October and 8th December 2014, as this court would be called upon to enforce a position that is certain.

[13] It is true that several other points of law were argued before this court including that of the propriety of this court to hear and decide this matter (Jurisdiction) as well as that of the alleged non-joinder of Liqoqo or the King's Advisory Council and the alleged failure to satisfy the requirements of an interdict. With regards the decision I have already come to on account of the material disputes of fact and how I have had to exercise the discretion

I have in that regard, I do not think it is necessary for me to decide the said points of law.

[14] The contention that this court had no jurisdiction is based on the provisions of Section 151 (2) and 151 (8) of the Constitution of Swaziland. It is a long settled principle of our law that a constitutional question need not be decided in a matter capable of a decision on other legal points. In ***Daniel Didabantu Khumalo and the Attorney General, Civil Appeal Case No. 31/2010 (Unreported)*** the Supreme Court stated this position in the following words at paragraph 3 of the unreported judgment:-

> *"It is strictly not necessary for this court to reach a concluded view on whether or not the learned judge a quo was correct in relying on the lack of jurisdiction in terms of Section 151 (8) of the Constitution. It shall suffice merely to stress a fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis. See, for example* ***Jerry Nhlapho and 24 Others vs Lucky Howe N. O.*** *(in his capacity as Liquidator of VIF Limited in Liquidation)****, Civil Appeal Case No. 37/07****"*.

[15] It is for this reason I am of the view that since this matter has already been decided on the question of the existence of material disputes of fact which necessitate that it be dismissed as it can be dealt with by another forum, it is not necessary for this court to decide the said constitutional question.

[16] The same thing applies to the other points referred to above whose decision by this court will only be academic in view of the conclusion I have reached.

[17] Consequently, I am of the firm view that Applicant's application cannot succeed and I in that respect make the following order:-

1. The Applicant's application be and is hereby dismissed with costs.

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N. J. HLOPHE

JUDGE – HIGH COURT