



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 824/13

In the matter between

DONALD MANDLAKAYISE NDLOVU
LUCKY NDLOVU
MAKHOSAZANA DLAMINI (Nee Ndlovu)
ZANELE ZWANE (nee Ndlovu)
NYAMALELE DLAMINI (nee Ndlovu)
THANDIWE MAVUSO (nee Ndlovu)
And
ELGIN MAGUDUZA MAKHUBU
LINCOLN MOTSA
NATIONAL COMMISSIONER OF POLICE
THE ATTORNEY GENERAL

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant
5th Applicant
6th Applicant

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

IN RE:

ELGIN MAGUDUZA MAKHUBU
And
DONALD MANDLAKAYISE NDLOVU
LUCKY NDLOVU
MRS MAKHOSAZANA DLAMINI (Nee Ndlovu)
MRS ZANELE ZWANE (nee Ndlovu)
MRS NYAMALELE DLAMINI (nee Ndlovu)
MARGARET NDLOVU
NATIONAL COMMISSIONER OF POLICE
THE ATTORNEY GENERAL

Applicant

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent

Neutral citation: *Donald Mandlakayise Ndlovu & Others v Elgin Maguduza Makhubu & Others In Re Elgin Maguduza Makhubu & Others v Donald Mandlakayise Ndlovu & Others (824/13) [2016] SZHC 59 (22 March 2016)*

Coram: **MAMBA J**

Heard: **12 & 26 February, 2016**

Granted: 22 March, 2016

- [1] Civil Law and Procedure – Court issuing interdict pending determination of resolution of dispute in terms of dispute resolution mechanism in terms of Swazi Law and custom. Dispute resolved in favour of applicants. Respondents not satisfied with ruling and file appeal against such decision.
- [2] Civil Law and Procedure – Application to discharge interim interdict on the ground that Respondents have failed to file an appeal against the decision of the traditional authority. Where there is clear evidence that respondents have challenged or appealed the said decision, application for the discharge of the interim order, dismissed with costs.
- [3] Civil Law – interdict pending finalization of appeal. Appeal not heard and finalized. Respondents not responsible for the delay in hearing and finalization of Appeal. Appeal frustrated by forces beyond the control of the respondents. Application to discharge interim injunction dismissed with costs.

- [1] On 31 May 2013 this Court issued a rule nisi

‘interdicting and restraining [applicants] and any other person acting on their instructions, or behest from closing down, blocking entry into and in any way whatsoever interfering with the normal business operations of Luyengo bus terminal within the Mazini Region [and] also directing the Malkerns Police Station to assist and ensure a proper execution of this order and to keep the place at the aforesaid shop. [Further it was ordered that] an order for costs be issued against the [applicants] at attorney and own client scale,

the one paying the other to be absolved in the event of unsuccessful opposition.’

[2] After all the parties had filed their papers in the application, the above rule nisi was confirmed and made final. The finality of the order was, however, granted in order to preserve the status quo then prevailing on the ground pending the determination of ownership of the land where the shop is situate. The dispute was pending before the Luyengo Royal Kraal. In reaching this conclusion, this court per MCB Maphalala J stated as follows:-

‘[14] It is apparent from the evidence that the application is intended to preserve the status quo ante pending the final determination of the dispute by the Traditional Structures in terms of Swazi law and custom. By so doing this court has not usurped the powers of the Traditional Structures. This court has jurisdiction to entertain an interim interdict which is intended to preserve the status quo ante pending the determination of a dispute before Traditional Structures in accordance with Swazi law and custom. It is not in dispute that the matter of ownership of the land upon which the business is situated is pending before the Luyengo Royal Kraal.

...

[19] It is trite that the High Court has jurisdiction to determine an application for an interdict to preserve the status quo pending the determination of a dispute over the ownership of land under the jurisdiction of a chief in terms of Swazi law and custom. The applicant has established the prerequisites of an interim interdict, and, he is entitled to the relief sought.'

This order was made on 22 September 2014.

[3] By notice dated 13 October 2015, the applicants filed the present Notice of Motion wherein, *inter alia* they pray for an order

- '1. Discharging the interim interdict that was issued by this court on 22 September 2014 forthwith.
2. Authorising applicant to execute the decision of the ELuyengweni Royal Kraal declaring applicants as the lawful possessor or occupier of the Land in question situate at Luyengo bus station.'

This application is founded or based on the allegations that:

'...the presiding judge, in his wisdom, found it proper to stay the execution of the ruling pending the final determination of the appeal before traditional authorities in accordance with Swazi law

and custom ... before a higher Swazi traditional institution with power to determine appeals and or reviews of the decision of the Royal Kraal. ... Since then (22 September 2014), the first respondent has done absolutely nothing either in prosecuting any appeal against the ruling and nor taken any step in pursuit of any review rights he may have over the decision of the Luyengweni Royal Kraal.’

[4] In opposition, the first two respondents deny that they have not prosecuted the matter before the relevant traditional authorities. They aver that they have prosecuted the matter and it is still pending determination before the relevant traditional authorities. In particular, they state that

’14.2 The dispute is already pending before traditional authorities and the court cannot usurp the powers of such authorities before the dispute is finally pronounced on by the relevant traditional structures. The Luyengweni Royal Kraal was requested to submit the record of [proceedings to] the Regional Administrator.

14.3 The Honourable Court could not have referred the matter to the Luyengweni Umphakatsi as the Chief had already distanced himself from the unlawful ruling by his Headman

and thus the matter had to be taken up on appeal to the Ludzidzini Inner Council through the offices of the Regional Administrator.

...

16.1 I reiterate that after the Luyengweni Royal Kraal refused to avail minutes of the hearing in 2013, I was instructed by the Makhubu clan to report the matter to the Regional Administrator for referral to the Ludzidzini Inner Council.

...

16.2 To the best of my recollection, the dispute was reported to the Regional Administrator in November 2014’

Later the respondents aver that

‘The Royal Kraal is frustrating the process by failure to submit the record of proceedings to the Regional Administrator.’

[5] After hearing submissions from both sides on 12 February, 2016, I issued an order returnable on 26 February, 2016 whereby the respondents were ordered to file proof of their appeal or review. I made this order because there was no proof of such appeal or at least some intimation or statement of any sort on the issue by either the Regional Administrator or the Ludzidzini Inner Council or such like body confirming or denying the

allegations made by the Respondents that they had indeed prosecuted their appeal or review.

- [6] On 24 February 2014, the respondents filed some correspondence from the office of the Manzini Regional Administrator dated 18 February 2016. This letter was issued and signed by the Regional Secretary. It reads in part: ‘...the Makhubu family visited the Regional Administrator’s office during the month of April 2013 to seek advice in connection with their dispute over their store....

This matter was referred to their chiefdom in particular Chief Prince Lembelele for appeal since it had a ruling from their Bandlancane’

- [7] Counsel for the respondents submitted before me that this was clear and unequivocal proof that the respondents have filed an appeal or at least have taken steps to reverse or challenge the said ruling. Counsel for the applicants has submitted that this letter is no proof or confirmation of such appeal or review.

- [8] Whilst it is true that the Regional Secretary states that the respondents approached his office for mere ‘advice’, he plainly states that the matter was referred ‘for appeal’ before the relevant Chief. I do accept that this is contrary to the clear assertion by the respondents that the matter was

subsequently referred to the Ludzidzini Inner Council and is pending thereat. What is, however, clear from the respondents' assertion or evidence, is that the matter was taken up with the Regional Administrator's office after the decision of the Luyengweni Royal Kraal Bandlancane. The office of the Regional Administrator viewed and treated it as an appeal and referred it to the Chief; being the next hierarchy in the dispute resolution or determination under the traditional machinery. That, to my mind, is prosecuting or challenging the decision of the Bandlancane. Whether that challenge or appeal is before the Chief or the Ludzidzini Inner Council, is in my view, of very little consequence.

- [9] This court is also mindful of the fact or assertion by the respondents that the chief has distanced himself from the matter and thus their referral of the matter to the Ludzidzini Inner Council. When the respondents state that the Chief has distanced himself from hearing their appeal, I understand them to be confirming that the Regional Administrator's office did refer their appeal to the Chief but the Chief declined to hear it for the reasons stated or given by him. Whether he was correct in doing so, is again of no moment in this regard.

[10] Lastly, the respondents aver that their appeal is being frustrated by the Luyengweni Royal Kraal which is failing ‘to submit the record of the proceedings to the Regional Administrator.’

[11] From the above stated facts, it is plain to me that the respondents have filed an appeal or review with the relevant traditional structures. They have prosecuted it. The process is, however, being frustrated by the relevant Royal Kraal. They are not to blame for the lack of final determination of their challenge or appeal. For these reasons, the applicants have failed to show or prove that the respondents have failed to comply with the order of this Court issued on 22 September 2014. Consequently, this application must fail and it is hereby dismissed with costs.

MAMBA J

For the Applicants:

Mr. Z. Dlamini

For the Respondents:

Mr. S. Mngomezulu