IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 285/2017

In the matter between

ABRAHAM MATHUNJWA **1st Applicant**

STANLEY DLAMINI **2nd Applicant**

NTOKOZO SIKHONDZE **3rd Applicant**

DICKSON KHUMALO **4th Applicant**

MBUSO KHUMALO **5th Applicant**

And

SHISELWENI REGIONAL ADMINISTRATOR **1st Respondent**

THE ATTORNEY GENERAL **2nd Respondent**

Neutral Citation: *Abraham Mathunjwa Vs Shiselweni Regional Administrator & another (285/2017) [2017] SZHC 110 (09th June 2017)*

Coram: Hlophe J.

For the Applicant: Miss C. Thwala

For the Respondents: Miss B. Shabalala

Date Heard: 28th April 2017

Date Judgement Handed Down: 09th June 2017

Summary

Application Proceedings –First Applicant allegedly an Indvuna of a certain alleged "lihambate" Area called KaLamlalati –Applicants seek an order setting aside a decision by the Shiselweni Regional Administrator allegedly stopping the applicants from holding themselves out as members of an allegedly unknown Royal Kraal referred to as Enhlulweni –Whether court has jurisdiction to hear matter in view of the Respondent's contention it does not –Whether an interested party whose decision was being challenged should not have been cited and served –Whether the decision in question can be enforced despite it being allegedly appealed against .

JUDGMENT

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[1] The Applicants instituted these proceedings under a certificate of urgency, allegedly seeking an order of court effectively reviewing and setting aside a decision made by the Regional Administrator which in effect stopped the Applicants from holding themselves out as members of an alleged Royal Kraal they referred to as Enhlulweni, allegedly situate at an area known as KaLalamlati found in the Shiselweni Region, between the Chiefdoms of Zombodze Emuva and Embilaneni.

[2] It is not in dispute that on the 20th November 2014, the applicants, particularly the First Applicant who already held himself out as an Indvuna for the area known as KaLamlati, were informed of a decision taken by the Swazi National Council, placing the area aforesaid under the authority of the Embilaneni Royal Kraal and also clarifying it was not a chiefdom of its own.

[3] It would appear that notwithstanding the said decision having been made apparently in the presence of the applicants and the First Respondent, the applicants continued to hold themselves out as members of the alleged non – existent Umphakatsi or Royal Kraal, called Enhlulweni. To that extent they had developed and acquired a certain Rubber Stamp which they used to affix on certain documents as a sign that such documents were issued or authenticated by the said 'Umphakatsi' or Royal Kraal.

[4] The Regional Administrator who it is agreed is an overseer of that particular Region on customary matters or those governed under Swazi Law and Custom, called the Applicants to his offices where he issued the order complained of. As indicated above, the order in question informed the Applicants to inter alia desist from holding themselves as members of the

Umphakatsi said to be unknown called, Enhlulweni Royal Kraal as well as using the Rubber Stamp complained of as there was allegedly no such an Umphakatsi called Enhlulweni. The order further clarified that if they continued holding themselves in the manner they had been they were committing a crime or an offence for which they would penalized. They were advised in the same order that those people who up to that date had that stamp affixed on their documents were not going to be adversely affected. It was clarified as well that the area known as KaLamlalati was according to the decision by the Ingwenyamaa as from that time to be under the Embilaneni 'Umphakatsi' or Royal Kraal and not under the Zombodze Emuva Royal Kraal, which the Applicants apparently preferred.

[5] Although there is no proof of this, the applicants claimed to have appealed the decision by the Swazi National Council Pending the outcome of the alleged appeal, they instituted the current proceedings seeking the reliefs referred to above. Worthy of note is that there is neither a Notice of Appeal nor any correspondence confirming the alleged appeal from an authoritative source.

[6] They claimed they were entitled to the order concerned because they had allegedly appealed the decision of the Swazi National Council and therefore that the position that prevailed before the order appealed against was made had to remain in place. In this sense, they contended, they should have been allowed to continue holding themselves out as ENhlulweni Royal Kraal and as reporting to the Zombodze Emuva Royal Kraal and not the Embilaneni one which they were appealing against. They also contended they should have been allowed to continue using the rubber stamp objected to by the Regional Administrator. They claimed this was in keeping with the principle that once an appeal had been noted, the implementation of the new order is suspended. It was for this reason they sought the order they did. I must say I have observed that as they apply for the status quo, that operated before the decision allegedly appealed against, the applicant has not brought any evidence indicating, that the Enhlulweni Royal Kraal was lawfully established and also that the rubber stamp concerned was issued lawfully.

[7] The Respondents on the other hand opposed the application by the applicants contending among other things that this court had no jurisdiction

to entertain this matter as it was constitutionally a matter reserved for the application of Swazi Law and Custom. It also raised an objection to the effect that the Swazi National Council as an interested party had not been served with the application to enable it place its side of the story before court.

[8] In as much as it is not in dispute that the order allegedly issued by the Swazi National Council on the 20th November 2014, was governed by Swazi Law and Custom over which this court has no jurisdiction and given the same position with regards that of the Regional Administrator which sought to enforce the one by the Swazi National Council, it becomes difficult to see how this court can be said to be having jurisdiction.

[9] It is certain that whilst acknowledging that in keeping with the constitution , matters relating to the office of the Ingwenyama are reserved for Swazi Law and Custom and this the applicants acknowledge per paragraph 8.1 and 8.2 of their Heads of argument – they still seek to have an order by that constitutional structure determined by this court which is clearly contrary to the constitution.

[10] Clearly the applicants seek to interpret the applicable Swazi Law and Custom in terms of the Roman – Dutch Common Law. I have no doubt as soon as this is done there is then bound to be a conflict of the two different law. Whereas there is a well established principle of the Common Law governing the effect of an appeal against a decision of a given authority, which is to say it suspends execution of the decision reached, or order issued, there is no material placed before this court be it legal or evidential in nature to confirm whether the same situation applies under Swazi Law and Custom.

[11] There is bound to be a problem in assuming that this principle of the Common Law is equally applicable under the Customary Law setting. Firstly, there is no proof that as a matter of fact there is an appeal pending before an appellate structure established under Swazi Law and Custom against the decision of the Swazi National Council including whether if it is being prosecuted. Even if there was an appeal, there is no proof, and indeed I was referred to now during the hearing of the matter confirming that once noted, the appeal envisaged the application of the same principles under

Customary Law as those applicable under the Common Law. The applicant has not made even a feeble attempt to address this aspect of the matter but has simply assumed that the position is the same under both legal regimes.

[12] I have no hesitation that the approach by the applicant down plays the fact that the reality of the matter is a choice of Law and that it may not necessarily follow that issues of Customary Law require the same approach as those of the Common Law. I say this bearing in mind that this country constitutionally has a dual legal system, compromising the Roman – Dutch Common Law and the Customary Law and that the principles of these laws are not necessarily the same. It may well be that in line with the requirements of justice in an appropriate matter, the appellate structures applying Swazi Law and Custom, and in contend of their process could grant a stay of proceedings pending the determination of an appeal.

[13] I say this bearing in mind that in the circumstances of this matter. The structure that has the constitutional and customary jurisdiction to appoint or disappoint traditional structures has decided the applicants were exercising authority they do not have and without challenging that matter within the

appellate levels of that structure, the applicants now seek to have this court pronounce that the activities said to be unlawful and never to have been authorized in the first place (that is the holding themselves as members of an alleged non existent 'Umphakatsi' and the use of an unauthorized rubber stamp), can be continued with pending the outcome of the appeal, whose grounds cannot even be seen by this court including this court not being able to tell whether or not there are any prospects of success in such an appeal; a question which on its own would require a higher than elementary understanding of Customary Law.

[14] I am convinced that for these reasons, this court has not been shown to be having jurisdiction to grant the relief sought in this matter. I was not given a reason why the relevant customary structures cannot regulate their processes where justice so demands. In view of the decision I have come to on this point, I find it unnecessary to determine the other issues raised.

[15] Consequently, I have come to the conclusion that the applicant's application be and is hereby dismissed with costs having to follow the event, which is that they are to be borne by the Applicants.

N. J. HLOPHE

JUDGE – HIGH COURT