IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 774/18

In the matter between:

SIPHO COMFORT NGWENYA	**Applicant**
AND	
THE COMMISSIONER OF POLICE	**1st Respondent**
ABSALOM MSONGELWA MASEKO	**2nd Respondent**
ATTORNEY GENERAL	**3rd Respondent**
ANDERSON NGWENYA	**4th Respondent**

Neutral citation: *Sipho Comfort Ngwenya and The Commissioner of Police and 3 Others* [774/18] *[2018] SZHC 141 (5th July, 2018)*

Coram: FAKUDZE, J

Heard: 12th June, 2018

Delivered: 5th July, 2018

Summary: *Civil Procedure – Applicant seeking interpretation of Section 37 of Swazi Courts Act 1950 in so far as it relates to the powers of the Chief's Inner Council to execute its orders – Applicant removed from house on Swazi Nation land on the orders of the Inner Council – alleges that removed from house on non existent High Court Judgement – Same executed by National Commissioner of Police officers – Applicant spoliation – National Commissioner's officers explain that they were executing orders of the Inner Council – Court concludes that traditional structures or authorities have their own mechanisms of enforcing their decisions – it is therefore not necessary to approach the High Court for Orders to enforce decisions of the traditional structures or authorities, including the Inner Council – Matter dismissed – each party to bear its own costs.*

JUDGMENT

BACKGROUND

[1] The Applicant filed an Application under a certificate of urgency directing the First and Second Respondents to restore the Applicant into peaceful and undisturbed possession of his homestead at Mgomfelweni from which he was forcefully removed on the 16th May, 2018.

[2] The Applicant alleges that he was removed pursuant to a judgment of this Honourable Court of the 10th April, 2018 whereas the First and Second Respondents submitted that the removal of the Applicant was in accordance with the Ruling of the Mgomfelweni Inner Council under Chief Mphaphela Mabuza.

The Parties' Contention

The Applicant

[3] The Applicant states that spoliation is a common law relief which is meant for the protection of possession. The Applicant's burden is to prove, on a balance of probability, firstly, that he was in peaceful and undisturbed possession of the homestead. Secondly, that such possession was despoiled without his consent and/or due process.

[4] The Applicant further contends that from the papers filed of record between the parties, it is apparent that neither Applicant's possession of the homestead, nor his ejectment from same is contested. Two issues are therefore ripe for determination in this Application before court. The first one pertains to the legal authority of First and Second Respondents to execute the Ruling of the Inner Council. The second one is the question as to whether or not the Ruling of the Inner Council was still in force and effect (valid) when it was purportedly executed by First and Second Respondents on the 16th May, 2018.

[5] On the issue of the legal authority of First and Second Respondents to execute the Ruling, the Applicant submits that if there is no voluntary compliance with the Inner Council's Ruling of the 18th July, 2017, then there ought to have been issued a further judicial process in the form of a writ of execution. Section 37 of the Swazi Courts Act, 1950 clarifies the issue of the execution of Orders of Swazi Courts when it states that:-

> *"37 A Swazi Court shall carry into execution any decree or order of the High Court or of a Magistrate's Court or of any other Swazi Court directed to the Court, and shall execute all warrants and serve all process issued by any such courts and*

directed to the court for execution or service, and shall generally give such assistance to the said court as may be required."

[6] Further, Section 18 of the Swazi Courts Act, 1950 demonstrates that there is a Public Official designated by law to execute judgments, orders, rulings and decrees of our courts. This Public Officer is designated as a Swazi Court Messenger. It is therefore clear that the concept of execution is not an unknown one under our Customary law. This procedure should equally apply to give effect to a judgment and/or order of the Court including the Chief's court.

[7] On the issue of the nullity of actions of the 16th May, 2018, the Applicant alleges that in the papers filed of record by the Respondents, no instrument authorising the execution (as distinct from the judgment and/or ruling of the Inner Council) of the Inner Council's Ruling of the 18th July, 2017. This is so notwithstanding the fact that our Customary law makes it clear that there exists such judicial process. The Applicant therefore submits that in the absence of a lawful court process authorising the execution of the Inner

Council's Ruling of the 18th July, 2017, then Respondents' action of the 16th May, 2018 was a nullity and therefore void *ab initio.*

[8] The absence of a judicial official during the execution of the judgment issued by the Inner Council violates the principle of separation of powers as enshrined and contemplated in the Constitution. The presence of Second Respondent on the 16th May, 2018 should not and cannot be taken to amount to issuance of an extra judicial process of an instrument of execution. Since the actions of First and Second Respondents lacked due compliance with the Customary law principles referred to above, the eviction cannot be allowed to stand.

[9] The Applicant finally raises the issue that at the time the eviction took place, there was a pending appeal that had been lodged with the Senior Princes of Mgomfelweni. The advice on the lodgement was given by the Manzini Regional Administrator. Section 33 of the Swazi Courts Act, 1950 guarantees the right to an appeal in civil matters. After the Applicant was dissatisfied with the ruling of the Inner Council of the 18th July, 2017, he promptly indicated his intention to take same on appeal. The Applicant

states that the common law principle which stipulates that the lodgement of an appeal automatically suspends the operation and execution of a judgment or Order should apply in this case.

The Respondents

[10] The Respondents submit that the Applicant claims that during his ejectment from the homestead, the Mahlangatsha Police Post Commander brandished the judgment under **Civil Case No. 1649/2017** and claimed that it said that the Applicant should vacate the homestead. The Respondents deny that the Applicant was ejected from the homestead based on the judgment of the above Honourable Court under **Civil Case No. 1649/2017**. The Respondents have stated in their respective Answering Affidavits that the ejectment of the Applicant was based on the decision of the Mgomfelweni Royal Kraal of the 10th July 2017 which is annexed "A" of the Applicant's Founding Affidavit. The Post Commander merely explained that the order of the above Honourable Court stated that the Mgomfelweni Traditional Court or Authority must enforce or execute its own judgments or Orders as it is a Competent Court or Authority.

[11] The Respondents further contend that for an Applicant to succeed in spoliation proceedings, he has to prove that he was in possession of the thing despoiled from him and that he was unlawfully ousted from such position. In this case the Applicant has failed to prove that he was deprived of his possession of the said homestead unlawfully or without a court order because it is clear from the judgment of the Mgomfelweni Royal Kraal of 10th July, 2017 that the Applicant was ordered to vacate the homestead. This is a lawful order from a lawful and competent authority.

[12] The Respondents allege that the Applicant was aware of this lawful order when he instituted the proceedings before court and even annexed it to the Founding Affidavit. The Applicant never stated in the Founding Affidavit that he complied with the Order or that he was challenging it by way of review or appeal. He only stated this in his Replying Affidavit much against the principle that an Applicant must disclose all the material facts that are necessary for the determination of the issue in Applicant's favour in the Founding Affidavit. The Applicant should not seek to make out its case in the Replying Affidavit by including facts that should have been in the Founding Affidavit in order to set out a cause of action.

[13] On the issue of the appeal to Senior Princes, the Respondents state that the Applicant never mentioned in the Founding Affidavit that he has appealed the ruling of the Mgomfelweni Royal Kraal. He only states this for the first time in the Replying Affidavit. He states that he had erroneously lodged the appeal before the Regional Administrator for Manzini. There is no evidence of the said lodgement of the appeal neither is there a Confirmatory Affidavit from the Regional Administrator. There is therefore no proof of any appeal of the decision of the Mgomfelweni Royal Kraal of the 10th July, 2017.

[14] Even if there was the purported appeal to the Regional Administrator, the Respondents argue that Mgomfelweni is under the Shiselweni Region. An appeal should have been launched with the Shiselweni Regional Administrator. The other issue pertains to the fact that officers of the First Respondent cannot get involved in the enforcement of civil judgments of common law and customary courts. He states that customary law courts have their own officers who are appointed to execute judgments of these courts. Ironically, the Applicant does not tell this court the authority of his legal position he so holds. He does not tell the court who these officers from the customary courts are.

[15] The Respondents finally submit that the Second Respondent did not personally execute the decision of the Inner Council. The Second Respondent as Indvuna of Mgomfelweni sought the assistance of the First Respondent's Officers to effect the decision of the Inner Council through the office of the Third Respondent. There is no law or customary prohibition that the Applicant has alleged that precludes the Second Respondent from being there personally when a judgment of the Inner Council is being effected.

The Applicable law

[16] In the Supreme Court case of **Masundvwini Royal Kraal V Evangelical Church (By Christ Ambassadors) and Another, Civil Appeal Case No. 19/2017** the court observed as follows in paragraph 38:-

> *"[38] Even if the matter was to have been finalised by the traditional authorities, it is my view that it would not have been necessary or proper to bring an Application before the High Court to enforce the decision of the traditional authorities. It is trite law that the High Court has no original jurisdiction in matters in which a Swazi Court has jurisdiction."*

[17] The Supreme Court continued to observe at paragraphs 44 and 45 as follows:-

"[44] and [45] It is therefore abundantly clear that the appropriate forum for determination of the current matter which is based on allocation and utilisation of Swazi Nation Land was the traditional authorities applying Swazi Law and Custom and, not the general Roman Dutch Law Courts including the High Court. It is also trite law that the traditional authorities including Swazi Courts have appellate structures for resolving complaints on appeal against lower authorities. It is also well established that traditional authorities or Swazi Courts have mechanisms for enforcing their decisions. It is therefore not necessary to approach the High Court for orders to enforce decisions of the traditional authority."

[18] In **Maziya Ntombi V Ndzimandze Thembinkosi (2012) SZSC 23**, His Lordship Maphalala M.C.B. J, as He then was stated:

"Decisions of the Chief's Inner Council are legally enforceable equally as those of the Swazi Courts established under the Swazi Courts Act, No. 80 of 1950. Swazi Law and Custom has long recognised the judicial function of Chiefs and their Inner Council

in disputes between their subjects which are not justiciable in courts of general jurisdiction applying Roman Dutch Common Law."

Court's Analysis and Conclusion

[19] The Applicant seems to contend that from the papers filed of record between the parties, it is apparent that the issue for determination is the legal authority of First and Second Respondents to execute the ruling of the Inner Council. The other issue pertains to the validity of the Ruling of the Inner Council when it was executed by the Frist and Second Respondents on the 16th May, 2018. On the first issue the Applicant contends that following the Ruling, there should have been a further judicial process in the form of a writ of execution as contemplated by Section 37 of the Swazi Courts' Act, 1950.

[20] The Respondents' response to this argument is that the High Court judgment was to the effect that the Mgomfelweni Royal Kraal must execute its own judgment. It need not approach the High Court for such execution. The Respondents further contend that the Applicant has not established any authority to support its contention. This court is inclined to agree with the

Respondents that the mechanism for the enforcement of the judgment of the Inner Council has not been prescribed anywhere. In **Maziya Ntombi V Ndzimandze Thembinkosi** (Supra) all that the court said is that decisions of the Chief's Inner Council are legally enforceable equally as those of the Swazi Courts. This means that these decisions have a force of law. This line of reasoning tallies with the argument that a party need not approach the High Court to seek enforcement of a decision of the Chief's Inner Council. Section 37 of the Swazi Courts'Act, 1950 does not help the Applicant. All that Section says is that a decision directed to the Swazi Court by the High Court, Magistrate's Court or any other Swazi Court must be carried into execution by the Swazi Court. The Swazi Courts Act, 1950 defines what the Swazi Court is and this definition does not include the Chief's Inner Council. Stretching the process of execution beyond what is contemplated by Section 37 of the Swazi Courts Act would lead to abourdity.

[21] The Applicant further alleges that the Respondents' action of the 16th May, 2018 was a nullity because there was no instrument authorising the execution. This is so notwithstanding the fact that our customary law makes it clear that there exists such process. Similarly, the absence of a judicial official during the execution of the judgment issued by the Inner Council

violates the principle of separation of powers as enshrined and contemplated in the Constitution. The presence of the Second Respondent on the 16th May, 2018 should not be taken to amount to the issuance of an extra judicial process of an instrument of execution.

[22] The court's view on the point raised by the Applicant is that the papers filed of record reflects that it is being raised by the Plaintiff for the first time in the Replying Affidavit. The same applies to the issue of the purported pending appeal before the Senior Princes of Mgomfelweni. In the Founding Affidavit, all that the Applicant was contesting was the manner in which the eviction was carried out. He wanted to be restored to his possession of the homestead by way of spoliation. It is trite that an Applicant must disclose all the material facts that are necessary for the determination of the issues raised by the Applicant. It must not seek to make its case in the Replying Affidavit. See **Herbstein and Van Winsen**, **The Civil Practice of the High Courts of South Africa 5th Edition at pages 439 to 440**. I therefore dismiss Applicant's point in this regard.

[23] On the issue of spoliation, I am convinced that there is no basis for the Applicant's claim that he was unlawfully removed from his property. The Respondents have abundantly demonstrated that they were carrying out an order issued by the rightful authority.

[24] In light of all that has been said above, the Applicant's application is dismissed with costs at an ordinary scale.

FAKUDZE J.

JUDGE OF THE HIGH COURT

Applicant: M. Thwala

1st to 3rd Respondents: Attorney General Office

4th Respondent: S. Bhembe