



**IN THE HIGH COURT
OF SWAZILAND**

JUDGMENT

Civil Case No. 1649/2017

In the matter between

ANDERSON NGWENYA

APPLICANT

And

**SIPHO COMFORT NGWENYA
NATIONAL COMMISSIONER OF POLICE
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Neutral citation: *Anderson Ngwenya vs Sipho Comfort Ngwenya & 2 Others* (1649/2017) [2018] SZHC 84 (10 April 2018)

Coram: **MAMBA J**

Heard: **06 April 2018**

Delivered: **10 April 2018**

[1] *Civil Procedure – Dispute over ownership of homestead situate on Swazi Nation Land. Relevant traditional authority (Umphakatsi) ruling that homestead belongs to the Applicant. Traditional authority ruling that First Respondent must vacate homestead.*

[2] *Civil Law & Procedure – Execution and enforcement of judgments and orders. Applicant applying for an order to have a writ to execute an order already issued by a traditional authority (chief). Court refusing application holding that traditional court or authority has its own means or mechanisms of executing and enforcing its own orders or judgments.*

[1] The Applicant is a Swazi male adult person of Mgomfelweni area in the Shiselweni region. He has a home there, he says. Similarly, the First Respondent is a Swazi male adult of Mgomfelweni and has his own homestead in the same area. Both disputants or litigants are under the same chief.

[2] The Applicant states that he was arrested and detained for a criminal offence on 16 July 2005 and was subsequently convicted and jailed for a period of five years. This all occurred or happened in Swaziland. Upon his incarceration, he left his wife and children at his home. The home is situate on Swazi nation land and the land in question was allocated to him by the chief of the area.

[3] The Applicant states further and this is common cause, that after finishing serving his sentence aforesaid, he returned to his home and found that all his family members; i.e. wife and children had left the homestead and the First Respondent was now residing thereat. The Applicant avers that the First Respondent told him that he now owned the homestead; after having purchased it from the family of one Gasolo Nkambule who had bought it

from the Applicant's family whilst the Applicant was in prison. I observe here that the First Respondent states that he had been advised that Gasolo Nkambule had purchased the homestead from the Applicant who had since relocated to neighbouring South Africa. This is of course denied by the Applicant. This factual dispute, if indeed it be such, is, however, irrelevant for purposes of this Application. In any event what Gasolo's family told the First Respondent has not been confirmed by such family and is therefore hearsay and clearly inadmissible to prove the contents or veracity thereof.

- [4] The Applicant states that the First Respondent informed him that he had purchased the homestead for a sum of E25, 000-00 from Khonjwa Nkambule. The Applicant states further that he did not and could not have sold his homestead because it is situated on Swazi nation land. He says, and this again is common cause, land or fixed property on Swazi nation land may not be sold. The owner thereof has no power to alienate or dispose of it. His ownership thereof is, though having most of the essential elements and or rights of an owner in terms of Roman-Dutch Common Law, in reality nothing more than a lifelong usufruct; which is itself subject to one paying allegiance to the Chief who has jurisdiction over that piece of land.

[5] After failing to convince the First Respondent to vacate the said homestead, the Applicant reported the matter to the local Royal Kraal or Umphakatsi. He states further that:

‘12.

After deliberating on the matter in July and October 2016 and on various other dates the inner council (bandlancane) Mgomfelweni Royal Kraal issued a decision on the 10th July 2017 that the First Respondent vacate the homestead belonging to me by the end of July 2017 as I will re-occupy my homestead by the 1st August 2017. A copy of the decision of the Mgomfelweni Royal Kraal of the 10th July 2017 is hereto attached marked ‘A’.

13.

On the 1st August 2017 I went to my homestead as per the order of the Mgomfelweni Royal Kraal but found the 1st Respondent still occupying my homestead. I then sought the assistance of the Mankayane Police who advised me to obtain an order of the above Honourable Court for them to assist me’.

The Honourable Court referred to in this case is this court and not the chief’s court or libandla traditional authority. The decision of the libandla (annexure A) is in SiSwati and has not been translated into the English language, which is the official language of this court. In future,

Counsel would do well to follow the dictates of rule 60 of the rules of this court.

[6] It is based on the said advise of the police – not counsel herein – that the Applicant has lodged this application wherein he seeks inter alia the following prayers:

- ‘1. That the 1st Respondent vacate the homestead of the Applicant situate at Mgomfelweni area, Mahlangatja in the Shiselweni District which is under the authority of Mgomfelweni Royal Kraal and Chief Mphaphela.
2. That the members of the Royal Swaziland Police Service of Mankayane Police Station are to assist the Applicant in effecting the eviction of the 1st Respondent from Applicant’s homestead’.

[7] The application (by the Applicant) is, on the factual side, supported by the affidavit of Khuzwayo Mabuza who says that he is ‘--- the prince and elder of Mgomfelweni Royal Kraal and as such know all the decisions taken by the inner council (bandlancane) of Mgomfelweni Royal Kraal’. Mr. Mabuza further states that indeed a decision was taken by the Royal household or traditional authority of Mgomfelweni that the 1st

Respondent must vacate the homestead in question and surrender it to the Applicant, 'who is the rightful owner of the homestead ---'

- [8] Tholiwe Nkambule has filed a confirmatory affidavit in support of the case or allegations by the first Respondent. She states that she is the Secretary at the Royal Kraal concerned and the widow of the late Gasolo Nkambule who died in 2003. She states that the homestead was actually sold by the Applicant to Gasolo in 1998. The Nkambule family subsequently sold it to the 1st Respondent in 2005, after the death of Gasolo. Again, Tholiwe states that during a meeting at the Royal Kraal in September 2017, the Applicant admitted selling the homestead to Gasolo. She states further that, on the orders of the Manzini Regional Administrator, on 20 September 2017, the matter was referred back to the senior princes of Mgomfelweni and is pending there to date.
- [9] There are clearly sharp factual disputes between the parties in this case. Notwithstanding the fact that, it is common cause that the alleged sale of the homestead would, in terms of Swazi law and custom be a nullity, the alleged involvement of the Manzini Regional Administrator is denied by the Applicant. There is no confirmation from the Administrator's office of such involvement. There is further no plausible explanation from the 1st Respondent how the said administrator would have adjudicated upon

an issue that falls outside his region or jurisdiction. But apart from these disputes, the Applicant, on his own showing, already has a judgment in his favour by the traditional authority that has jurisdiction over the homestead in question. That is the Mgomfelweni Royal Kraal. The Applicant has only approached this court to obtain an order or writ to enforce or execute the judgment of that traditional authority that issued the order. Crucially and fatally though neither the Applicant nor the responsible traditional authority state that there are no mechanisms, means or mode of executing the relevant order. To my mind there are such means of enforcement or execution.

[10] In *Mciniseli Cindzi and Another v The Ministry of Housing and Urban Development & 9 Others* (925/2016) [2017] SZHC 227 (30 October 2017) this court stated as follows:

‘[8] It is common cause further that the dispute over the homestead in question was also taken before the Masundvwini Royal Residence by some of the disputants herein. The said Royal Residence is the traditional authority which has control over the area where the disputed structures are situated. It is the authority that has the necessary power or jurisdiction to allocate land to an individual in that area. In turn, the person to whom the land has been allocated, pays

allegiance or homage (*Kuhlehla*) to that Royal or traditional authority.

[9] In a long line of cases before our Supreme Court and this Court, the courts have consistently held that these courts have no jurisdiction over matters pertaining to the rights of persons over Swazi Nation Land. Such jurisdiction rests with the applicable local or traditional authority. In this case, that authority is the Masundvwini Royal Residence. (See the case of *Phildah Khumalo v Mashovane Khumalo*, *Civil Case 2023/2007*, which was cited with approval by Mlangeni J in Case 1523/2015 above).

[10] The Masundvwini Royal Kraal as per annexure C (at page 36 of The Book of Pleadings) at one stage dealt with the matter; in one form or another. In the said deliberations, the Chairman of The Inner Council, which is the supreme authority therein, issued a written acknowledgement or certification that David and Bongani Cindzi (2nd Applicant) were known in the area and ‘recommended that’ they be given the necessary assistance. This letter or certification is dated 04 February 2016.

[11] As appears from prayer 3 quoted above, the applicants want this court to order or direct the First Respondent to pay to them the compensation due to them as ordered by the Masundvwini Royal Kraal. Although the word “advice” rather than order is used in that prayer, I think the tenor or import thereof is very clear and it is this: “Masundvwini Royal Residence has ordered that we be paid compensation. This court must endorse that order and accordingly compel the First Respondent to comply therewith.”

[12] From the above facts, it is plain to me that this is a matter that has to be heard by the relevant traditional authority or structures. That authority is the Masundvwini Royal Residence. In fact the decision has been taken and this court is being asked to order compliance therewith. This court, in my judgment, cannot and must not be used as a forum to rubberstamp judgments of other appropriate and legitimate fora or structures. To my mind, structures under Swazi Law and Custom have their own mechanisms or methods of execution or enforcement of their own judgments and orders. A duplication in the enforcement of such orders is not

desirable or advisable at all. It is quite unnecessary in fact and this court must, as a general rule always decline to meddle or interfere in such matters.’

These remarks are opposite in this application and I hereby repeat them.


[11] Counsel for the Applicant submitted that *Cindzi’s (supra)* case was wrongly decided and I should not follow it. In support of this contention I was referred to the judgment of this court in *Maseko v Dlamini & Others (1568/2013) [2014] SZHC 125 (19 June 2014) para 19* where Hlophe J stated:

‘Other than a bare assertion that this Court has no such jurisdiction, I have not been referred to any facts establishing such lack of jurisdiction or supporting such a contention, nor have I been referred to any law in the regard. There is no law that says disputes arising out of Swazi Nation land have to be dealt with only in terms of Swazi Law and Custom’. (The underlining has been added by me).

[12] I have not being given the full judgment in the *Maseko* case (supra). However, it is clear to me from the underlined sentence that the Learned Judge was referring to the lack of jurisdiction in the adjudication of ‘disputes arising out Swazi Nation Land’. That is not the issue in the

instant case. The crisp issue for decision in these proceedings as already stated above, is the right or appropriateness of this Court having to rubber stamp or endorse, for purposes of execution or enforcement, an order already issued by another competent court or authority. That other court or authority must enforce or execute and regulate its own judgments or orders. That is the ratio decided in *Cindzi (supra)*. I have not been persuaded that I was wrong in that judgment. Therefore I cannot recant my views expressed therein.

[13] For the foregoing reasons, the application was, immediately after submissions, refused.



MAMBA J

FOR THE APPLICANT:

MR. S. BHEMBE

FOR THE 1ST RESPONDENT:

MR. M. THWALA

