



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO. 1124/2020

In the matter between:

ANDREAS DINGANE MAKHATHU

Applicant

And

INDVUNA GANGILE HLATSHWAKO

1st Respondent

KANDINDA ROYAL KRAAL

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

NATIONAL COMMISSIONER OF POLICE

4th Respondent

Neutral Citation: *Andreas Dingane Makhathu v Indvuna Gangile
Hlatshwako & 3 Others (1124/2020) [2020] SZHC 134
(17 July 2020)*

CORAM:

N.M. MASEKO J

FOR THE APPLICANTS:

M.V. DLAMINI

FOR THE RESPONDENTS:

Z. NSIMBINI

DATE HEARD:

24TH JUNE 2020

DATE OF DELIVERY OF EX TEMPORE:

26TH JUNE 2020

DATE OF DELIVERY OF FULL JUDGMENT:

17TH JULY 2020

Preamble

Civil law – Civil Procedure – Application for interdict – Whether Applicant has satisfied the pre-requisites for the grant of an interdict – Whether the First and Second Respondents would suffer any prejudice if the deceased is buried in the family graveyard next to her husband – Whether such burial will hinder community development projects – Held that the Applicants have satisfied the pre-requisites for the grant of an interdict, and same is granted and further that the 1st and 2nd Respondents would suffer no prejudice if the deceased is buried in the family graveyard owing to the fact that there are already nineteen (19) grounds in the family graveyard and that currently there is no community development project that would be affected by such burial of the deceased next to her husband.

JUDGMENT

[1] On the 19th June 2020, the Applicants launched Motion Proceedings on a certificate of urgency, seeking the following relief:

1. Dispensing with the normal rules of Court relating to the manner of service, time limits and hearing the matter as one of urgency.
2. Condoning Applicant's non-compliance with the Rules of this Honourable Court.

3. That the 4th Respondent be ordered to assist in the execution of this order.
4. Costs of suit in the event of opposition.
5. Granting further and/or alternative relief.

[2] The Affidavits of the Applicants and Confirmatory Affidavit of Mbulawa Simon Dlamini are attached to the Notice of Motion in support of these proceedings.

[3] The 1st Respondent is cited in his nominee officio position as the Indvuna of the 2nd Respondent – the kaNdinda Royal Kraal.

[4] The 3rd Respondent is cited in his capacity as the legal advisor and representative of the Government of the Kingdom of Eswatini and all Royal Kraals (imiphakatsi) in the country.

[5] The 4th Respondent is cited in his capacity as the principal law enforcement officer in the Kingdom of Eswatini.

- [6] The 1st Applicant states that he is the eldest son of the deceased Elizabeth Makhathu (born Dlamini) who passed away on the 14th June 2020 together with his late father Kelios Makhathu. 1st Applicant testifies that he was born in 1940, the same year his parents got married.
- [7] The family is settled at kaNdinda area under the Chiefdom of the 2nd Respondent.
- [8] 1st Applicant states that the Makhathu family have a family graveyard, which is about ten (10) metres away from the houses where the family reside. This is not uncommon in SiSwati culture and custom to bury their family members at the edge of the yard (etaleni)
- [9] I must commend Counsel M.V. Dlamini and the Applicants for having attached two coloured photographs which are marked together as Annexure AM1, as these photographs clearly show where the family bury their members. Currently the family graveyard has nineteen (19) graves and is located within the yard of the Makhathu homestead.

- [10] The Makhathu graveyard has its own history just like any other family graveyard in the Kingdom of Eswatini. According to the Applicants' testimony, their father Kelios passed on in the year 1999 and he was buried in the family graveyard next to his own parents (i.e. grandparents of Applicants). The Applicants state further that during the burial of their father in 1999, the deceased (who obviously was alive then) reserved a space next to her husband's grave and instructed the Applicants together with other family members that she wished to be buried next to her husband.
- [11] The Applicants testify further that after the death and burial of their father in 1999, other family members also met their untimely death and were buried in the family graveyard but distant from their father's grave in order to maintain the reserved space for the burial of the deceased when she passes on.
- [12] It is the custom in Eswatini that when a family member passes on, such death is reported to the Umphakatsi (Royal Kraal) of the deceased family. In *casu* the death of the deceased was duly reported to the 1st and 2nd Respondents respectively. The reporting is done for purposes of obtaining consent and permission to bury the said deceased person.

[13] In *casu*, the Applicants testify that they reported the death of the deceased on the 16th June 2020 to the 1st and 2nd Respondents respectively. This was done as per the custom and also to obtain permission to bury the deceased in the family graveyard next to her husband on the space that she had reserved for this unfortunate eventuality.

[14] It appears from the testimony of both the Applicants and the 1st Respondent that the Applicants request was turned down because a community gravesite was now in place owing to national developments, for example, the proposed construction of a railway line from the Republic of South Africa to Mozambique via Eswatini.

[15] At paragraph 6.3 of his Answering Affidavit, the 1st Respondent testifies as follows:

“The directive was a condition put by potential investors and for the future development of the community and some of these projects, for example, the railway line that will pass kaNdinda from South Africa to Mozambique, have begun resulting to the relocation of about 5 homesteads and the relocation of about 20 graves to the community graveyard.”

At paragraphs 13.5-13.6 of his Answering Affidavit, the 1st Respondent further testify that –

“13.5. The directive to bury in the community graveyard was an agreement made between the Land Management Board and the Umphakatsi solely for the development of the community. Pursuant to the agreement we have a number of ongoing projects including the construction of a railway which has resulted to the relocation of about 5 homesteads and 20 of their graveyards.

13.6. We cannot rule out the possibility that the homestead of the deceased can also be earmarked for the development of future projects. (My emphasis)

[16] The 1st Applicant confirms that around the year 2015, the 2nd Respondent established a community graveyard where all members of the community who had passed on were now going to be buried. The reason behind this decision was that in the event development came to the community, there would be no graves scattered all over the place to be a hindrance to that development.

[17] The Applicants lost two of their brothers, respectively, in 2017 and 2018. In order to demonstrate their loyalty and respect to the 2nd Respondent's instructions and directions to bury members of the Chieftdom in the community graveyard, the Applicants family indeed buried the two brothers in the community graveyard without a problem.

[18] At paragraph 10.2, the 1st Applicant states as follows:

“10.2.I humbly submit that in adherence to the 2nd Respondent’s directives as a family we lost two brothers in the year 2017 and 2018, whom we buried at the community graveside respectively. It is only our beloved matriarch Minah Elizabeth Makhathu whom we wish to bury in the family graveside as per her wishes and in respecting the dictates of Swazi Law and Custom. It is also custom that a person is buried with her beloved ones (kubakubo).”

[19] The Applicants further state that they have been duly advised by their attorney that in order for them to obtain the interdict they seek from this Court, they are under a legal duty to prove firstly a clear right, secondly, an injury committed or apprehension of irreparable harm and thirdly, that there is no other adequate remedy in due course.

[20] 1st Applicant states that as a family they derive the clear right to bury deceased next to her husband because of her matriarch status to the family, and that there is space reserved for her next to her deceased husband’s grave. He testifies further that the balance of convenience favours them as a family because of the space that was long reserved for the burial of their mother amongst nineteen (19) graves, and that the 1st and 2nd Respondents respectively have no prejudice to suffer if she is buried next to her husband amongst the nineteen graves of the family.

Instead it is the family that would suffer great prejudice if she is not buried next to her husband as per her wishes or declaration, so testifies the Applicant. There is no doubt that the Applicants have suffered an injury as a result of the untimely death of their mother and further that there is no other adequate remedy in due course other than to approach this Court for the relief they seek because of the 1st Respondent's refusal to have the deceased buried in her designated space within the family graveyard.

- [21] The first Respondent on the other hand testifies in his opposition to the Applicant's prayers, that the Applicants have not satisfied the requirements for the grant of an interdict. He testifies that the deceased's burial at Applicant's home will cause disharmony and inconsistencies in the administration of the community and promote discriminatory tendencies that can lead to disloyalty and ungovernability of the community.

ANALYSIS OF THE EVIDENCE

- [22] The evidence adduced before Court by the Applicants is more credible than the evidence adduced by the 1st Respondent.

- [23] There is no doubt in my mind that every Liswati is aware that a lawful and moral declaration that is made by a person during his/her lifetime on how his/her body is to be disposed of, when he/she is deceased, is to be respected and honoured by all means. This is because this is a long standing custom and practice of the citizens of this Kingdom of Eswatini.
- [24] The deceased in *casu* reserved space next to the grave of her husband so that she could be buried there after her demise. Indeed she is now deceased and her children want to fulfil or comply with that declaration. This declaration is part and parcel of the custom which the Chief enforces as the footstool of the Ingwenyama in trust of the nation in terms of Section 233 (9) of the Constitution of the Kingdom of Eswatini Act No. 001/2005
- [25] The dominant factor for consideration here is whether there is prejudice to be suffered by the 1st and 2nd Respondents respectively, if the deceased is buried next to her husband owing to the allegations by the 1st Respondent that if the deceased is buried next to her husband in the family graveyard, the community will revolt and be disloyal to the extent of being ungovernable.

[26] I cannot believe for once, that emaSwati would revolt against the Makhathus who wish to follow a custom that every Swati family follows. I say this because there is no tangible evidence from the 1st Respondent that the Makhathu family has in the past defied the Chief's instruction to relocate their family homestead or even the family graveyard (nineteen (19) graves) to give way for community development. Further the 1st Respondent has not adduced any evidence indicating the existence of the alleged revolt by members of the kaNdinda community.

[27] The 1st Respondent himself has instead fortified the Applicants' prayers by stating that already about five (5) homesteads and twenty (20) graves have been relocated because of the South African-Mozambique via Eswatini Railway project, and the Makhathu family is not affected. It would be a different scenario if the Makhathus resisted to be resettled to give way to development and now they want to bury their mother in the family graveyard.

[28] As things stand the Makhathus form part of the families in the community whose homesteads have not been affected by the community development in particular the cross-border railway project. It would therefore cause no prejudice whatsoever to the 1st Respondent for this

Court to allow the Makhathus to bury their beloved mother in the space which she reserved next to her husband.

[29] Further, the Makhathu family has demonstrated their loyalty and respect to the authority of the Chief because in 2017 and 2018 respectively, they buried two of their family members in the community graveyard in compliance with the directive of the Chief.

[30] It is very important to consider the Applicants' request to bury the deceased next to her husband's grave in the context of fulfilling the wishes of the deceased, and whether such request causes any prejudice whatsoever to the 1st Respondent. It is my considered view that no prejudice would be suffered by the 1st Respondent if the deceased's wishes are honoured.

[31] The Applicants are supported by the fact that, there are already nineteen (19) graves within the family yard and the burial of the deceased there would only make a small fraction in terms addition to the number of graves already there, however and most importantly, such burial would fulfil the moral and customary declaration of the deceased, which has been practised for generations and generations of citizenry.

[32] As I have observed above, there is therefore no prejudice that would be suffered by the 1st and 2nd Respondents if the deceased is buried next to her husband, as per the practice and custom of the Swati nation.

[33] Another factor that I have seriously considered is the manner in which the 1st Respondent is described in the Answering Affidavit. He commences his Affidavit as follows:

"I the undersigned

MVELI PHILIP HLATSWAYO

do hereby make oath and say

1.

I am the Indvuna of the Second Respondent Andreas Dingane Makhathu. The facts that I depose to in this affidavit unless the context indicates otherwise, within my personal knowledge and are true." (My emphasis)

[34] It is common cause that the Second Respondent is the kaNdinda Royal Kraal and not the Andreas Dingane Makhathu. Further there is nowhere in the affidavit where the 1st Respondent makes averments that he is acting within the course and scope of being the said Indvuna of kaNdinda and duly authorised by the Chief. The way his affidavit has

been framed gives the impression that he is acting in a personal capacity and this is irregular and should not be repeated and is certainly not acceptable.

- [35] There is also no confirmatory affidavit filed by the Chief himself despite the 2nd Respondent being correctly cited by the Applicants in the pleadings. The manner in which the 1st Respondent's Affidavit commences as demonstrated above together with the lack of the necessary averments asserting his authority to depose to the Answering Affidavit, and coupled with the failure to, at least, file a Confirmatory Affidavit of the Chief, introduces a serious disconnect between the 1st Respondent and the 2nd Respondent. There is nowhere in his Answering Affidavit where he states that he is acting under the authority of the Chief and or the 2nd Respondent. The 1st Respondent cannot and should not litigate as if the Chief and or the 2nd Respondent are not there. As he has filed the Answering Affidavit, at least the Chief should have filed a Confirmatory Affidavit to confirm the 1st Respondent's opposition. It must always be remembered that it is the Chief who is the footstool of the Ingwenyama and his/her constitutional authority must never be downplayed in proceedings before this Court, or any other Court for that matter.

[36] In any Court Proceedings, it must be stated clearly by that Indvuna that he/she is acting within the course and scope of his/her duties as such, and duly authorised by the Chief or Acting Chief as the case may be. To omit such an important declaration in the proceedings creates an unfortunate impression that the Indvuna is acting on his personal capacity, which should not be the case as he/she cannot do that. Unfortunately this is the position in casu where he has stated that –

“I am the Indvuna of the Second Respondent Andreas Dingane Makhathu.”

It is obvious that this was an error, however, this is the kind of an error that should have been corrected by those who prepared the affidavit, infact it's the kind of an error that should never happen in litigation because it simply affects the *locus standi* of the person deposing to that affidavit. There was no application for condonation from the 1st Respondent for this error let alone to apply for leave to file a Supplementary Affidavit to correct this error.

[37] In the Applicant's papers, the Indvuna Gangile Hlatshwako N.O. is cited as such, but in the Answering Affidavit he is said to be MVELI PHILIP HLATSHWAYO. It was incumbent upon the 1st Respondent to shed further light as to whether Gangile is his official title or other name in addition to Mveli Philip, so that at least the Court does not have doubt

that it is dealing with one and the same person, bearing in mind that, there is no confirmatory affidavit from the Chief whom he is supposed to be acting on his behalf in these proceedings.

[38] It is therefore my considered view that at all material times a deponent must be properly and sufficiently described in an affidavit, and where such deponent act in his/her official or representative capacity, that must also be sufficiently stated together with the source of the authority which that deponent is exercising. It is also procedural and very pertinent that a Confirmatory Affidavit be filed to enable the Court to realize the *locus standi* of the said deponent. In casu, it is unacceptable and irregular for the 1st Respondent to completely exclude the Chief in these proceedings such conduct is counter-productive to him and completely diminishes the value of his opposition. The impression given is that he is parading his personal position as opposed to the official chieftaincy position. This cannot be allowed as it amounts to undermining the very same powers of the Chief which this Court should always guard against.

[39] In Order to demonstrate the importance of a full description of a nominee officio deponent, this is how it was dealt with in the case of **INDVUNA WILSON MAVIMBELA N.O. v PETROS DVUBA AND 5 OTHERS CIVIL**

CASE NO. 2131/12, where His Lordship, MCB Maphalala J (as he then was) stated as follows at paragraph 13 of his judgment and I quote:

“13. The Applicant further contends that he is duly entitled to bring the application as the Chief’s headman; and that he is in charge of the day to day running of the area with the Chief’s Inner Council on behalf of the Governor of Ezulwini Umphakatsi ----”

[40] This is the certainty that this Court needs when dealing with an Indvuna who fully describes his powers and the role which he plays and even the source of his powers and duties. In *casu* it is not the case, and I will reiterate that the manner in which the 1st Respondent holds himself out as Indvuna in these proceedings is not only insufficient and irregular, but is in fact questionable.

[41] The following facts emerge from this case scenario:-

- (i) Currently, the Applicants’ homestead has not been earmarked for any community development project.
- (ii) Consequently, the burial of the deceased next to her husband will be to fulfil her declaration and the SiSwati custom of burying each spouse next to the other.

- (iii) The family has nineteen graves already and the burial of the deceased will be the 20th burial. She will be buried in the space which she reserved next to her husband.
- (iv) The deceased's declaration and wishes of her place of burial are lawful, moral and in accordance with SiSwati customs.
- (v) In the event of community development extending to the Makhathu homestead, the family home and the graveyard will be relocated as per the Chief's directives just like the other families who have been relocated.
- (vi) The Makhathu family have demonstrated loyalty and obedience to the Chief's authority by burying their two brothers in 2017 and 2018 respectively in the community graveyard.

[42] As I have observed earlier, I am of the considered view that there is no prejudice to be suffered by the 1st Respondent if the deceased is buried in the space which she reserved next to her beloved husband when she passes on, as she has done. This is because the Makhathu family are obedient and loyal citizens to their Chief who have complied with the directive to bury their deceased in the community graveyard. The request to bury the deceased in the reserved space next to her husband is in my view an exceptional request, reasonable and in the

circumstances of this case fully justified, regard being had that each case is to be decided on its own merits.

[43] The merits in this case are such that, there is a clear factual demonstration that no prejudice is to be suffered by the Umphakatsi by having the deceased buried in the family graveyard next to her husband. This is not the case where the Chief has ordered the exhumation and relocation of the Applicant's graveyard and the Applicants are resisting that instruction.

THE INTERDICT

[44] On a proper consideration of the facts as outlined above, I consider that the Applicants have satisfied all the prerequisites for this Court to grant the interdict. In the case of **THOKOZILE DLAMINI v CHIEF MKHUMBI DLAMINI & ANOTHER Civil Appeal Case No.2/2010 citation: [2010] SZSC 3** Ramodibedi CJ (as he then was) stated as follows at paragraph 11 of the judgment, and I quote:-

"Now, following the celebrated case of SETLOGELO v SETLOGELO 1914 AD 221 at 227, it is well established that the pre-requisites for an interdict are a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by another ordinary remedy. See also V.I.F LIMITED v VUVULANE

**IRRIGATION FARMERS ASSOCIATION (PUBLIC) COMPANY AND
ANOTHER Civil Appeal Case No. 3/2000.**

[45] The interdict sought by the Applicants is not in any way a sign of disrespect to the Chief and Royal Kraal of kaNdinda and should also not be perceived by the 1st Respondent as sowing seeds of division amongst members of the community in general. All what is required is a reasonable and justifiable narrowing down of the SiSwati customary practice and tradition, that a wife is buried next to her husband.

[46] Further, at community level there currently is no prejudice to the community projects because the major project of the railway line does not affect the Makhathu homestead. In any event the Makhathu family like all the community members, would surely give way to community development, as and when it comes, and have their homestead and graveyard relocated, but as things stand currently they have discharged the prerequisites for the grant of an interdict, in that:-

- (i) The deceased is their mother who declared during her lifetime where she wanted to be buried per the custom, tradition and practices of eMaswati hence they have established a clear right to bury her next to her husband's grave.

- (ii) The Applicants have suffered an injury because of the death of the deceased and they have no other alternative remedy than to approach this Court more particularly because there is a reserved space for her burial, and further there is no community development that prevents them from burying the deceased in these circumstances of the case, regard being had that in 2017 and 2018 they buried their family members in the community graveyard which is a sign of loyalty and obedience to the Chief, 1st Respondent and the 2nd Respondent.

[48] Consequently I hereby grant an order in terms of prayers 1, 2, 3 and 4 of the Notice of Motion dated the 19th June 2020.

So ordered.


NM MASEKO
JUDGE