



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 524/2018

In the matter between

**CHIEF MALIWA MAZIYA N.O
MORRISON MBULI N.O**

1st Applicant
2nd Applicant

And

**JACKSON SHONGWE
VUSI MAZIYA
JEKE TSABEDZE
BAFANA MAZIYA
ARAS MAZIYA
PHAMBANISA MAZIYA
MPHOLI NDZIMANDZE
DUMA MNGOMETULU
JOHANE MAZIYA
MADODA MAZIYA
THE NATIONAL COMMISSIONER OF POLICE**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent

Neutral Citation: *CHIEF MALIWA MAZIYA N.O and Another v JACKSON SHONGWE and 10 Others (524/2018) [2020] SZHC 258 (25 November 2020)*

Coram : MAMBA J.

Heard : 07 OCTOBER 2020

Delivered : 25 NOVEMBER 2020

- [1] *Civil law- jurisdiction of High Court to issue interim injunction on matters pending before traditional adjudicative bodies. – Court has inherent jurisdiction to do so per section 151(1)(a) of Constitution.*
- [2] *Civil law- contempt of Court – allegation that applicant has approached the Court with dirty hands for being in wilful defiance of a Court order. For such objection to succeed, objector must establish, inter alia, that Court order was duly brought to the knowledge and attention of applicant. That applicant was represented by counsel when relevant order was issued not enough or sufficient to impute knowledge on applicant.*

JUDGMENT

- [1] This application emanates from or is a consequence of what is essentially a chieftaincy dispute in Maphungwane area in the Lubombo District of Eswatini.
- [2] The 1st applicant is by virtue of having been appointed by the Ingwenyama, the Chief of Maphungwane area. His appointment aforesaid is contained in an instrument dated and or executed by the Ingwenyama on the 4th day of November 2010. The authenticity of this instrument has not been questioned or queried in these proceedings. So it stands to reason that the 1st applicant is the rightful Chief of the area in question. The 2nd applicant is his Indvuna.

[3] The first to tenth respondents, it is common cause, recognise the second respondent as the Chief of Maphungwane. In furtherance of their claim, on 18 September 2017, they attempted to build and establish an Umphakatsi or Chief's home or household for him in the same area. This attempt was aborted by an order of this Court. These facts are common cause inasmuch as they have been averred by the applicants but not denied or disputed by the relevant respondents.

[4] In his founding affidavit the 1st applicant states that the 1st to 10th respondents 'are running a parallel administration in Maphungwane in that they have illegally established a council that is conducting itself as the legitimate council in the area by allocating land to people without consultation with myself as the Chief of the area. ---.

[And] –are also calling meetings and engaging the community in meetings and other projects without involving myself as the legal authority in the area.

It has now become impossible to administer the area because the community is defying my administration's authority . ---

Community members who are called to appear before my Inner Council to answer to charges laid against them refuse to come to the lawful Umphakatsi claiming that their matters are being dealt with by the other council. Those who have been found guilty by my council are encouraged to defy the sanction meted on them.

On seeing that the respondents were interfering with my administration of the area I then reported the conduct of the respondents to the traditional authorities and I am on my way to report same at the Ludzidzini Council.’

[5] This affidavit by the 1st applicant was executed or sworn to on the 4th day of April 2018. In an affidavit sworn to by Indvuna Lusendvo Fakudze in his capacity as the Chairman of the Ludzidzini Royal Council, on 14 November, 2018, the deponent specifically confirmed that the matter was reported to the said council by the 1st Applicant and is pending thereat.

[6] Following the above complaint by the 1st applicant, he has approached this Court for, *inter alia*, the following prayers:

- ‘1.1 Restraining and interdicting the Respondents or anyone acting under their authority from interfering with the applicant’s administration of Maphungwane Chiefdom.
- 1.2 Restraining and interdicting the respondents or anyone acting under their authority from calling and holding any meetings at Maphungwane Chiefdom without the authority of Chief Maliwa Maziya.
- 1.3 Restraining and interdicting the respondents or anyone acting under their authority from allocating land for building or burial at Maphungwane Chiefdom without the authority of the applicant.
- 1.4 Restraining and interdicting the respondents or anyone acting under their authority from intimidating and threatening the lawful administration of Maphungwane Chiefdom with violence.
- 1.5 Restraining the interdicting the respondents from running their illegal parallel administration at Maphungwane Chiefdom.
- 1.6 Ordering and authorizing the 11th respondent or any member of the Royal Swaziland Police to ensure that the Order is

effectively executed and also assist in the service of the said order and Application;

2. Costs of the application in the event the application is opposed.’

[7] It is clear from the above prayers that the prayers sought by the applicants are in the nature of a final injunction or interdict. However, in the founding affidavit by the Chief, the point is there made abundantly clear that what is being sought or prayed for is a interim interdict and not a final one. For instance, in paragraph 16.14 the Chief states that

‘It is my further desire that the respondents be interdicted and restrained from interfering with my roles and responsibilities pending the determination of the matter by the Ludzidzini Council.

[And at 20.1 he states that] the balance of convenience favours the grant of an interim order pending the determination of the matter by the Ludzidzini Council. The respondents will not suffer any prejudice if they are restrained and interdicted from interfering with my administration of the chiefdom and further stopped from threatening my officials with violence.’

[8] Whilst I agree with the respondents' objection that the prayers sought are not in sync or consonant with the statements in the founding affidavit referred to above, I do not think that the applicants should be unsuited because of this. To do so would be taking a rather formalistic or technical approach to the issue, which is impermissible and does not lend itself to a proper, fair and just administration of justice. There is certainly no prejudice that would be suffered by the respondents in having the matter heard and treated as an application for an interim injunction rather than a final one. This would be in line with what the applicants have unequivocally stated in the founding affidavit. Besides, being an interim injunction, the respondents though they may be restrained, such restraint is not final and definitive in its nature. Therefore, I dismiss this point or objection by the 1st to 10th respondents in this regard. This is an application for an interim injunction not a final one – notwithstanding the prayers in the Notice of Motion being framed or couched otherwise.

[9] It is plain to me and this is too plain to argue, that as the duly appointed Chief of Maphungwane, the 1st applicant has the locus

standi and the right to protect his powers qua Chief from being unjustly eroded or interfered with by the relevant respondents, who are for all intents and purposes usurpers of his powers or pretenders. He thus has established a prima facie right and that this right is being violated or unlawfully interfered with by the said respondents. Furthermore, the Chief has demonstrated that the 'parallel administration' being run or conducted by these respondents is causing disharmony, strife and lawlessness in Maphungwane. Some people openly defy instructions and or orders from the lawful administration and are being 'encouraged' to do so by the said respondents. (Vide para 15.11 of the founding affidavit). Again, this has not been denied or disputed by the relevant respondents and therefore, for purposes of this application, these averments constitute the truth.

[10] The respondents also objected, stating that the application had been prematurely set-down: with them not being afforded sufficient time to respond to it. This objection was, however, later abandoned or not persisted in by them. Therefore nothing further needs be said thereon.

[11] By Notice filed and served on 02 March 2020, the 1st to 10th respondents raised yet another point of law in which they stated that:

‘The applicants are not entitled to be heard on the merits of their application as they are coming to this Honourable Court with dirty hands inasmuch as they have todate failed, refused and or neglected to comply with the judgment of Maphalala PJ.

--- issued under Civil Case No.730/2015 on the 23rd February, 2016 and confirmed on appeal by the Supreme Court under Civil Appeal Case No. 15/2016 on the 30th June 2016.’

[12] It is common cause that the 2nd applicant appeared as the 5th respondent in the above proceedings and also filed as confirmatory affidavit in his capacity as the Indvuna of the relevant Umphakatsi. The Chief was not cited as a party in those proceedings, which were essentially spoliation proceedings. The second applicant and his co-litigants were ordered to restore certain construction materials that they had unlawfully removed from the then applicants. They have, todate not complied with the said Court order. This has not been

denied or disputed by the applicants and therefore it is, for purposes of these proceedings accepted as truthful.

[13] Whilst it is to be accepted that there is in existence the two Court orders aforesaid against the applicants – in particular the second applicant - there is no allegation that any of the said Court orders was ever duly served on the second applicant. That he was duly represented by counsel in those proceedings does not in my humble view constitute the necessary service of the Court order on him. For him to be held to be in defiance or contempt of a Court order, service of the Court order in question must have been served and fully explained to him. There is no such evidence or allegation in this case. Counsel for the respondent argued or submitted that the mere fact that the second applicant was duly represented in those proceedings, was sufficient evidential material to conclude that the Court orders were brought to his knowledge and attention. I cannot agree. Service of Court orders are and can only be legitimately or lawfully served by duly appointed officers or sheriffs. There is no evidence or suggestion that the said counsel was appointed to serve the Court order on the second applicant, or that he ever brought

those Court orders to his knowledge and attention. That being the case, I cannot, in law, hold that the second applicant is in wilful defiance or contempt of the relevant Court orders and consequently he has come before this Court with dirty hands. *Vide Rex v Lucky Matsenjwa (174/2017) [2017] SZHC 07 (04 February 2020) at para 37, Fakie N.O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA), Pheko and Others v Ekurhuleni Metropolitan Municipality (No.2) [2015] ZACC 10 and Martins v Regadas 2001 (2) BLR 371 (HC).* This point stands to be dismissed and is hereby so dismissed.

[14] I have already stated above that this is a chieftaincy dispute. It is pending before the rightful traditional authorities in the form of the Ludzidzini Royal Council. For this reason, this Court has jurisdiction to issue the interim injunction which shall be operative pending finalisation of the dispute before the said council. Indeed, there has been no suggestion that this Court lacks such power or jurisdiction. Consequently, an order is granted as stated in paragraph 16 hereinunder.

[15] Because of the nature of the dispute herein as stated in the preceding paragraph, I do not think that an order for costs would be appropriate

against the respondents despite them having lost in this application.
Each part is ordered to bear its own costs of the application.

[16] For the avoidance of doubt, the following order is made; namely:

16.1 Pending finalisation of the dispute reported to the Ludzidzini Royal Council by the 1st applicant against the first to tenth respondents, the said respondents or any one acting under their authority are hereby

16.1.1 Restrained and interdicted from interfering with the applicant's administration of Maphungwane Chiefdom.

16.1.2 Restrained and interdicted from calling and holding any meeting at Maphungwane Chiefdom without the authority of the 1st applicant.

16.1.3 Restrained and interdicted from allocating land for building or burial at Maphungwane Chiefdom without the authority of the applicant.

16.1.4 Restrained and interdicted from intimidating and threatening the lawful administration of Maphungwane Chiefdom with violence.

16.1.5 Restrained and interdicted from running their illegal parallel administration at Maphungwane Chiefdom.

16.2 The 11th respondent or any member of the Royal Swaziland Police is ordered and authorised to ensure that this order is executed and also to assist in the service of same.

16.3 Each party is ordered to bear its own costs of suit.



MAMBA J

FOR THE APPLICANTS: MR. N. MASHININI

**FOR THE 1ST TO 10TH
RESPONDENTS:**

**ADV. L.M. MAZIYA (Instructed by
Malinga & Malinga INC.)**