IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1638/2021**

In the matter between:

SITHEMBILE THWALA	1st Applicant
SIFISO DLAMINI	2nd Applicant

and

RICHARD MSUNDUZA DUBE	1st Respondent
SIKHATSI DLAMINI	2nd Respondent
TOM MABUZA N.O	3rd Respondent
NATIONAL COMMISSIONER OF POLICE	4th Respondent
THE ATTORNEY GENERAL	5th Respondent

Neutral Citation: *Sithembile Thwala & Another v Richard Msunduza Dube & Others (1638/2021) [2023] SZHC 139 (06 June 2023)*

CORAM: **N.M. MASEKO J**

FOR THE APPLICANTS: **ATTORNEY S. JELE**

FOR 1st RESPONDENT: **ATTORNEY B. S. DLAMINI**

FOR 2nd RESPONDENT: **SIKHATSI DLAMINI IN PERSON**

DATE OF HEARING: **28/10/2021**

DATE OF DELIVERY: **05/06/2023**

Preamble: Civil law – Civil Procedure – Points *in limine* – Application proceedings in *casu* launched before this Court yet there is already a judgment issued by this Court earlier between the same parties, same cause of action and same subject matter being the ownership of the home in question. This issue was settled in the judgment of this Court which was never appealed against, never rescinded and never set aside – Therefore this Court is *functus officio* since the matter is *res judicata* and this application is dismissed.

JUDGMENT

MASEKO J

[1] On the 16th September 2021, the Applicant launched motion proceedings for an order interdicting and restraining the 2nd Respondent from preventing the Applicant from accessing the homestead at Nkoyoyo area in the District of Hhohho, also for an order interdicting and restraining the Respondent from demolishing and or construction of any permanent structure on the piece of land. It is not clear whether this prayer 4 refers to the 1st Respondent or 2nd Respondent, Prayer 5 seeks to interdict and restrain the 1st and 2nd Respondents from harassing and threatening violence against Applicant and other family members at the homestead situate at Nkoyoyo area. The Founding Affidavit of the Applicant and

Confirmatory Affidavit of 2nd Applicant are used in support of this application.

[2] On the other hand the 1st Respondent has filed an Answering Affidavit wherein he has raised the following points *in limine* namely, that:-

(i) The Applicants rely on a ruling by the Swazi National Court, but have failed to attach such ruling, nor has the Applicants filed Confirmatory Affidavits from the persons who are said to have made the decision. The entire application is founded on hearsay and stands to be dismissed on this point alone.

(ii) The 2nd Applicant has not been described in the papers nor is his citation and/or involvement justified in the papers.

(iii) The matter is *res judicature* in that the High Court had ruled that the matter was properly decided by the Umphakatsi in High Court Case No. 1619/2021, and that the Swazi National Court cannot overturn the factual findings made by the High Court; and

(iv) That the Applicant is therefore abusing the Court process...

[3] During arguments the points *in limine* and the merits were argued simultaneously, and I must state at this stage that the points *in limine* are

dispositive of the matter as argued by Counsel for the 1st Respondent and supported by the 2nd Respondent who appeared in person.

APPLICANTS' CASE

[4] At paras 11-17 of her Founding Affidavit the 1st Applicant states that around September 2019 the 1st Respondent attempted to sell the property to an unknown person, and that they challenged the purported sale but the above Honourable Court dismissed that application on the basis that there was a dispute of fact. The Applicant states further that they then pursued the matter at the Mpolonjeni Umphakatsi which however ignored the matter. The 1st Applicant states further that they have since appealed the matter to the Swazi National Court (Ndabazabantu) where it was heard by a certain Magagula gentleman on the 20/08/2021.

[5] The 1st Applicant states further that during August 2021 they went to the aforesaid homestead to prepare for their return to the homestead, and found the main house being demolished by people employed by the 2nd Respondent to do so. They were informed that the whole purpose of the demolition was to reconstruct the house. She states that through their investigations they discovered that the 1st Respondent had allowed the 2nd Respondent to take over the homestead. She states further that the Swazi National Court made a verbal ruling in their favour. A written ruling was

going to be availed to the parties in due course. She states further that the land in question was *khontaed* for by her late mother in the 1990's and she went on to construct the homestead and some flats which are rented out to clients. I must state that the **'written ruling'** of the Swazi National Court was not produced by the Applicants in these proceedings.

[6] It is common cause that the Applicants are seeking for an interdict, and therefore the 1st Applicant states that they have a clear right to live on the homestead and not be disturbed by or evicted by any person including the 1st Respondent. She states further that they will suffer irreparable harm if the 2nd Respondent is not interdicted he will continue to prevent them from having access to their homestead and also continue the demolition of their homestead. She states further that they have no alternative remedy except to approach this Court for an interdictory relief on the basis of the facts outlined above. The 2nd Applicant filed a Confirmatory Affidavit.

THE 1ST RESPONDENT'S CASE

[7] The 1st Respondent states that he was married to the 1st Applicant's mother however he did not adopt the 1st Applicant in the SiSwati traditional sense since she is not his biological daughter. He states that he is the owner of the homestead in question having *khontaed* for the piece

of land through Swazi law and custom and having paid the customary cow of kukhonta to the Mpolonjeni Umphakatsi.

[8] He states further that the High Court had ruled in this matter in Case No. 1619/2021 and that this matter is *res judicature* and therefore this Court has no jurisdiction to hear the matter. He states further that if the Swazi National Court heard and determined the matter after it had been heard and determined by the High Court, as the 1st Applicant alleges, then such ruling is contrary to the High Court's ruling and thus of no force and effect. He states that the Swazi National Court has no powers to issue or grant declaratory orders but only conciliates on disputes of land allocation. He states that the only traditional authority capable of making a determination on the rightful allocation of a piece of land on Eswatini nation land is the Mpolonjeni Umphakatsi and not the Swazi National Court.

ANALYSIS OF THE POINTS *IN LIMINE*

NO RECORD OF PROCEEDINGS OF THE SWAZI COURT AND THAT THE MATTER IS *RES JUDICATURE.*

[9] I must set the record straight from the onset that there is a big difference between Ndabazabantu the King's Liaison Officer and the Swazi Court. It

appears in *casu* that the matter was at some point heard by the Ndabazabantu of Mbabane Hhohho Region and not the Swazi Court.

[10] Ndabazabantu is housed in the Regional Administrator's office and is tasked with conciliation of disputes between or amongst emaSwati which occurred on Swazi Nation Land.

[11] On the other hand the Swazi Court is a fully fledged Court dispensing justice and is established by Section 3 (1) of the Swazi Court Act No. 80 of 1950. In terms of Section 11 of the aforesaid Act the Court is empowered to adjudicate on matters involving Swati law and custom prevailing in Eswatini. This Court has been tremendously upgraded in terms of operations and maintenance of Records of Proceedings.

NO RECORDS OF SWAZI COURT PROCEEDINGS

[12] *In casu* no such record of proceedings and or the Confirmatory Affidavits of those who adjudicated upon the matter were produced by the Applicants. Even then, it would not help because of the judgment of this Court per Her Ladyship MS Langwenya J delivered on the 30/04/2020 which to-date of the launching of these proceedings has not been appealed,

or rescinded set aside. This point *in limine* has merit and is therefore upheld.

***RES JUDICATA* AND ABUSE OF COURT PROCESS**

[13] As regards the point on *res judicature*, again as I have indicated in the preceding paragraph, the matter was dealt with by Her Ladyship MS Langwenya J under High Court Case No. 1619/2021 and she ruled in favour of Richard Msunduza Dube. This judgment has not been rescinded or overturned by the Supreme Court. In the circumstances the matter is *res judicature* and consequently this Court is now *functus officio* and therefore cannot deal with this matter.

[14] I do not accept the argument advanced on behalf of the Applicants that this matter is different from Case No. 1619/2021 *supra*. In my view the case in *casu* is exactly the same as in Case No. 1619/2021 herein referred to above. The order granted by Her Ladyship MS Langwenya J was premised on paragraph 32 and other relevant considerations. As things stand that judgment remains in force **until** rescinded, set aside or overturned by the Supreme Court on appeal. In my view the Applicants are abusing the process of the Court by re-launching these proceedings yet this Court heard and determined the matter under Case No. 1619/2021 *supra*. These points *in limine* have merit and are upheld.

[15] At pages 609 to 611, the Authors **Herbstein and Van Winsen** in their master work titled *THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA Juta 5th Edition 2012,* state as follows when dealing with the special plea of res judicature:-

> 'A defendant may plead *res judicata* as a defence to a claim that raises an issue disposed of by a judgment *in rem* and also as a defence based upon a judgment in *personam* delivered in a pre-action between the same parties, concerning the same subject matter and founded on the same cause of action.
>
> The requirements for successful reliance on the exception *rei judicatae vel litis finitae* (or *lis finite*) are:-
>
> > *"idem actor, idem reus, eadem res and eadem causa petendi.* This means that the exception can be raised by a defendant in a later suit against a plaintiff who is **'demanding the same thing on the same ground'** per Steyn CJ in **Africa Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562 (A)**; or Winsen AJA in **Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472 A-B** ----------; or which also comes to the same thing, 'on the same cause for the same thing'; whether the same issue had been adjudicated upon (see **Horowitz v Brock 1988 (2) SA 160 (A) at 179 A-H**. the fundamental question in the appeal is whether the same issue is involved in the two actions: in the two actions: in the words, in the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed in the first action?"
>
> In **Bertram v Wood 10 SC 177 at 180** it was held that:-

"The meaning of the rule is that the authority of *res judicata* induces a presumption that the judgment upon any claim submitted to a competent Court is correct, and this presumption being *juris et de jure*, excluded every proof to the contrary. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius (Dig. 50.17.57) does not permit of the same thing being demanded more than once."

There is no enquiry whether the judgment is right or wrong, but simply whether there is a judgment. A default judgment granted in error and which should have been set aside or rescinded, stands and constitutes *res judicata.*

In **Bafokeng Tribe v Impala Platinum Ltd 1999 (3) SA 517 (B)** Friedman JP following **Kommissaris Van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (SCA)** concluded as follows:

"From the aforegoing analysis I find that the essentials of the exception *res judicata* are threefold; namely that the previous judgment was given in an action or application by a competent Court (1) between the same parties, (2) based on the same cause of action *(ex eadem petendi causa)* (3) with respect to the same subject matter, or thing *(de eadem re).* Requirements (2) and (3) are not immutable requirements of *res judicata.* The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However, where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely in order to ensure overall fairness (2) or (3) above may be relaxed. A Court must have regard to the object of the exception *res judicata* that it was introduced with the endeavor of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious

effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties. The doctrine of issue estoppel has the following requirements: (a) where a Court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, (b) if the same issue is again involved, and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on a dissimilar cause of action. Issue estoppel is a rule of *res judicata* but is distinguished from the Roman-Dutch law exception is that is issue estoppel the requirement that the same subject-matter or thing must be claimed in the subsequent action is not required."'

[16] It is trite law that the doctrine of *res judicata* has a long history as an implement of justice. Its main objective is to protect litigants and the Courts from the never ending cycle of litigation. Its strict terms and essential requirements are applied when a later dispute involves the same party, seeking the same cause of action. This is the position in *casu*. The judgment of Justice Langwenya settled the matter in so far as the ownership of the homestead is concerned. These proceedings in *casu* seems to seek to re-open that issue of ownership again, and I cannot allow that, regard being had that this matter is between the same parties and based on the cause of action and the subject matter is also the same.

[17] All of these circumstances revolve around the ownership of the home which this Court per Langwenya J had already pronounced that it belongs to the 1st Respondent. Her Ladyship based her judgment on the minutes from the Mpolonjeni Royal Kraal (see page 63 of the Book of Pleadings paras 32-33 of her Ladyship's judgment). The Mpolonjeni Royal Kraal is the ultimate traditional authority of Mpolonjeni area situate in Mbabane under the Chiefdom of Chief Zembe Petros Dvuba.

[18] Section 233 of the Constitution of the Kingdom of Eswatini Act No. 001/2005 provides as follows:-

> '(1) Chiefs are the footstool of iNgwenyama and iNgwenyama rules through chiefs.'
>
> (2) The iNgwenyama may appoint any person to be the chief over any area.
>
> (3) The general rule is that every Umphakatsi (chief's residence) is headed by a chief who is appointed by iNgwenyama after the chief has been selected by the *lusendvo* (family council) and shall vacate office in the like manner.
>
> (4) The position of a chief as a local head of one or more arrears is usually hereditary and is regulated by Swazi law and custom.
>
> (5) Unless the situation otherwise requires, a chief shall assume office at the age of eighteen or so soon thereafter as the period of mourning comes to an end.
>
> (6) A chief, as a symbol of unity and a father of the community, does not take part in partisan politics.

(7) A chief may be appointed to any public office for which the chief may be otherwise qualified.

(8) The powers and functions of chiefs are in accordance with Swazi law and custom or conferred by Parliament or iNgwenyama from time to time.

(9) In the exercise of the functions and duties of his office a chief enforces a customary, tradition, practice of usage which is just and not discriminatory.

[19] *In casu* Her Ladyship MS Langwenya J found that the 1st Respondent was lawfully allocated the land where the homestead was built after complying with the customary processes and procedures of *kukhonta* under Swazi law and custom and was duly allocated the piece of land by Mpolonjeni Royal Kraal under Chief Petros Zembe Dvuba, Indvuna Tom Mabuza and the Chief's Council. It is for that reason why I say the Mpolonjeni Royal Kraal is the ultimate authority over the Mpolonjeni Chiefdom, and as long as their actions are lawful and in conformity with Section 233 (8) and (9) of the Constitution respectively as referred to above, this Court does not have jurisdiction to interfere with the allocation of the piece of land to the 1st Respondent by Chief Petros Zembe Dvuba of the Mpolonjeni Umphakatsi.

[20] It is therefore my considered view in the circumstances of this case that the points *in limine* raised by the 1st Respondent and supported by the 2nd Respondent have merit, and accordingly I hand down the following order:-

1. The points *in limine* are upheld.

2. Consequently, the application is dismissed.

3. Each party is to pay its own costs.

N.M. MASEKO
JUDGE