

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

HELD IN MBABANE

CASE NO. 1860/21

In the matter between:

SIGONYELA MAMBA

APPLICANT

And

SICELO MAHLALELA

FIRST RESPONDENT

MUKILE SIKHONDZE

SECOND RESPONDENT

Neutral Citation: *Sigonyela Mamba vs Sicelo Mahlalela And Another*
[1860/21] [2021] SZHC 221(23 November 2021)

Coram: LANGWENYA J

Heard: 1 November 2021; 11 November 2021, 23 November 2021.

Delivered: 23 November 2021

Summary: *Civil law-Civil Procedure-application-dispute of fact arising-where disputes of fact that are irresolvable on the papers, the court has a discretion either to refuse the application or to refer the matter for oral evidence on the disputed issues.*

Civil law and Procedure-application for an interdict to stop construction on disputed land esicintsini-possessory rights in disputed-two traditional structure claim to have jurisdiction over disputed land-matter for traditional authorities to resolve.

Interdict-effect thereof on fact in present matter-if effect to grant interdict is to give possessory rights to applicant when clear right has not been established court at large to refuse to grant order-application dismissed with costs.

JUDGMENT

Introduction

- [1] The applicant instituted this proceeding under a certificate of urgency seeking *inter alia*, an order of this court interdicting and or restraining the respondents from carrying out construction works on the disputed land situate at iNhlalabantfu, eTimphisini until the dispute is determined by eBuhleni royal kraal. Applicant contends that the land in question belongs to him.
- [2] The matter is opposed.

The Parties

- [3] The applicant describes himself as an adult male liSwati and a son of Moses Mamba and Mzuzephi Mamba born and bred at iNhlalabantfu, eTimphisini in the Hhohho region.
- [4] The first respondent is an adult liSwati male of iNhlalabantfu, eTimphisini, Mashobeni in the Hhohho region.

- [5] The second respondent is described by the applicant as a widower of Mvembili in the Hhohho region. It is unclear to me why being a widower is more prominent than the age, gender and nationality of the second respondent. Also, it would appear from the papers that the second respondent is not male but female. Why she is referred to as a widower and not a widow is also unclear to me. The second respondent describes herself as an adult female liSwati of iNhlalabantfu, eTimphisini, Mashobeni in the Hhohho district¹. She is a biological daughter of Mshiva Sikhondze. The second respondent alleges that the disputed land belongs to her father Mshiva Sikhondze²; that after her father's demise she was left in possession of the now disputed land.

Brief Background

- [6] It is common cause that the disputants do not see eye to eye concerning land situate at iNhlalabantfu in the Hhohho region. The applicant and second respondent each claim possessory rights over the land in question. The applicant avers that the land in question was initially under the jurisdiction of the late chief Gija Dlamini and that after the demise of chief Gija Dlamini, the land was put under the administration of eBuhleni Royal kraal. This is sharply disputed by the respondents who argue that the land in question is and has always been under the jurisdiction of chief Matsafeni Shongwe of Mashobeni Royal kraal.
- [7] Applicant states that as a resident of iNhlalabantfu-born and bred there-he inherited the land from his forbears and for a long time lived in harmony

¹ See Confirmatory affidavit on page 24 of the Book of Pleadings.

² The version of the second respondent is affirmed by the communication from Mashobeni royal kraal reflected as annexure 'SM1' at page 22-23 of the Book of Pleadings.

with the Mahlalelas' and other families who were all apportioned land in iNhlalabantfu that was clearly demarcated. Applicant avers that he was taken aback therefore when on this day he saw certain workers mounting a fence which encroached on his land. Applicant states that he approached the said workers to enquire and was informed that they were acting on instructions of the respondents. He alleges that he requested the workers to stop what they were doing as the land belonged to him to no avail.

[8] Applicant states that he then reported the matter to eBuhleni Royal kraal which summoned all disputants to have the matter adjudicated upon. On the day of the hearing, only the applicant attended and the respondents were no show. Applicant was informed by the council of eBuhleni Royal kraal that summons would be re-issued and a new date set for the deliberation of the matter.

[9] While waiting to be called before eBuhleni Royal kraal Council for the determination of the land dispute, applicant states that he saw construction of a house on the disputed land carrying on at breakneck speed. He again confronted the construction workers with the intention of advising them to stop the construction works as the matter was pending before eBuhleni Royal kraal for determination. It is applicant's case that he was informed by the construction workers that they were acting on the instructions of the respondents and they did not cease the construction works.

[10] Applicant's matter was subsequently heard and deliberated upon by eBuhleni Royal kraal in the absence of the respondents. The applicant was present when the matter was deliberated upon. Ebuhleni Royal kraal Council determined that the land belongs to the applicant; it further ordered that the

respondents, with all their belongings must vacate the land in question. The traditional structure at eBuhleni stated further that the respondents should also come to eBuhleni Royal kraal's *libandla*. The decision of the *libandla* is written in SiSwati and has not been translated into the English language which is the official language of this court. Counsel would do well to follow the strictures of rule 60 of the rules of this court³.

Factors Disputed

- [11] Applicant states that when the decision of eBuhleni Royal kraal's *libandla* was communicated to the respondents, they agreed to stop the construction works and to present themselves before eBuhleni Royal kraal to state their case. This is disputed by the respondents who state that they were never summoned by eBuhleni Royal kraal and therefore they are unaware of any dispute pending before it concerning the land in question. On the papers before me, there is no confirmatory affidavit stating who served the respondents nor is there evidence of when they were served. Put differently, there is no return of service in this regard.
- [12] The respondents state that they are subjects of chief Matsafeni Shongwe of eMashobeni Royal kraal and that the land that is the subject of the dispute is under the jurisdiction of eMashobeni Royal kraal.
- [13] As can be seen from the papers, the disputants are also in disagreement about which traditional authority has jurisdiction over the disputed land in question. Both eBuhleni and eMashobeni Royal kraals feature prominently in the proceeding as each ostensibly claims authority through their

³This court has on previous occasions admonished counsel to follow the rules of the court in interpreting documents from traditional structures in conformity with rule 60 of the rules of the High Court. See *Anderson Ngwenya vs Sipho Comfort Ngwenya* (1649/2017) [2018] SZHC 84 (10 April 2018).

pronouncements on the matter⁴. eMashobeni Royal kraal states that the land in dispute belongs to the second respondent and that the first respondent assisted the second respondent to build the house which has now been completed. The Royal kraal at eBuhleni states that the land belongs to the applicant. This is a dispute of fact which cannot be resolved on the papers before court. Not that this court has jurisdiction to make that determination as that is now the exclusive preserve of traditional structures.

Respondent's Case eBuhleni Royal kraal Council *functus officio*

[14] The respondents contend that there is no pending dispute before eBuhleni Royal kraal as it appears the matter was determined already in their absence. It is the argument of the respondents that consequently, eBuhleni Royal kraal is now *functus officio* and can no longer deal with the matter. If eBuhleni Royal kraal is *functus officio*, respondents argue there is therefore no pending matter regarding the disputed land before them. For this reason, the prayer for an interdict pending determination of the matter regarding the disputed land is therefore incompetent-so the argument goes.

[15] In my view, the decision of *libandla* of eBuhleni Royal kraal is unambiguous. The order is specific that the disputed land belongs to the applicant. It is specific also that the respondents must take all their personal effects and vacate the land in question. The decision is specific also that the respondents must appear before eBuhleni Royal kraal's *libandla*. It is unclear though why the respondents would be expected to appear before the said *libandla* after it heard and determined the matter in the absence of the respondents. It was submitted on behalf of the applicant that the decision of

⁴ See annexure on page 9 of the Book of Pleadings and annexure 'SM1' on page 22-23 of the Book of Pleadings.

eBuhleni Royal kraal's *libandla* is interim in nature as respondents were called upon to approach eBuhleni Royal kraal's *libandla*. There is no confirmatory evidence from any of the members of eBuhleni Royal kraal's *libandla* buttressing same. It is effectively the word of the applicant giving an added meaning to the decision. The following is stated in the Council's decision bearing date stamp of 5 October 2021:

Ruling Concerning Mamba Sigonyela, Mukile and Sicelo Matter

Following the hearing and deliberation of the above matter, we found that the land referred to herein by Sigonyela Mamba belongs to him. We issued a decision that Sicelo and Mukile must vacate the land belonging to Mamba; they must also remove all their belongings from the said land. We also said they should come to the Council at eBuhleni Royal kraal.

Secretary of the Council

Mduduzi Mamba

Signed by Nyamazane Khumalo

Date stamp 5 October 2021.

- [16] There is nowhere in the Council's decision where it is stated that the decision is of an interim nature. There is also no explanation on the papers and from the Council why the respondents were called upon to appear before it after the ruling was made. This is not explained in the ruling by the Council. A confirmatory affidavit from the Council would help clear the air.
- [17] There are clearly sharp factual disputes between the parties in this case. Each of the disputants has a decision from each of the two Royal kraals who claim to have jurisdiction over the land in question. In a long line of cases, the High court and the Supreme court have consistently held that these courts have no jurisdiction over matter pertaining to the rights of persons on land situate *esicintsini*. Such jurisdiction rests with the applicable traditional

authority⁵. In this case, that authority is not determinable as eBuhleni Royal kraal and eMashobeni Royal kraal both claim to have jurisdiction over the land in question.

[18] I have highlighted the disputes of fact to show that this is not a matter that can be dealt with by way of application proceedings. The said disputes of fact cannot be resolved on the papers before the court. It is also not for this court to adjudicate who among the warring parties has possessory rights over the disputed land. Our indigenous law would appear to me to be the most appropriate forum to resolve the impasse referred to herein.

[19] The disputes of fact outlined above have a bearing on whether the applicant has satisfied the requirement of an interdict. First, in my respectful view, the manner the prayer for an order for an interdict is couched is problematic. Applicant seeks an order 'restraining and or interdicting the respondents from building and constructing on the land in dispute at eTimphisini until the dispute is determined by eBuhleni Royal kraal (my emphasis). *Ex facie*, the ruling of the Council of eBuhleni Royal kraal is explicit that the matter was determined in favour of the applicant. This relief, in my respectful view is therefore incompetent as on the face of the papers filed on behalf of the applicant, the Council at eBuhleni Royal kraal determined the matter already by copy of its decision dated 5 October 2021. There is no evidence from any of the Council members that the matter is to be revisited.

Prima facie right

[20] The applicant contends that he has a *prima facie* right to the land as it belongs to him having inherited it from his forbears. The second respondent

⁵ See: *Phildah Khumalo v Mashovane Khumalo* Civil case 2023/2007.

states that the disputed land belong to her deceased father who left her in charge of same. She sought and was granted permission by eMashobeni Royal kraal to build a house on the said piece of land.

[21] On a holistic evaluation of the evidence of the pleadings, I am no wiser who between the disputants has a clear right over the land in question. This is because both parties have filed documentary evidence from different Royal kraals which claim to have jurisdiction over the disputed land in question. The applicant has, in my view failed to establish that he has a clear right to the land in question in as much as the second respondent disputes same and also claims to have title over the disputed land. In this regard, the second respondent is supported by the eMashobeni Royal kraal. In light of the foregoing, my respectful view is that applicant's right over the disputed land is anything but a clear right.

[22] There is also the issue of whether the injury complained of is still ongoing and whether second respondent's construction works have been completed. The applicant states that the construction is ongoing while the respondents argue that the construction of the house has since been completed and the place is ready for second respondent to move in. Here again the issue of dispute of fact rears its ugly head.

[23] The applicant concedes in his replying affidavit that this matter is replete with disputes of fact on the merits of the matter but hastens to add that the merits are due to be determined in the appropriate traditional structures. I could not agree more with this submission. The reality however is that the sharp disputes of fact outlined above have a correlation with whether the applicant has satisfied the requirement of an interdict. In my respectful view,

the present matter is not one where the clear right of the applicant over the disputed land has been established in light of the disputes of fact raised.

- [24] I reiterate here what I stated in *Gugu Motsa v Bongani Austin Dlamini & 2 Others*⁶ regarding granting an interdict namely that:

‘An interdict is a discretionary remedy. The discretion must be exercised judiciously. The court has discretion to refuse to grant an interdict even though all the requisites for an interdict are present. This will be so if, for instance, the effect of the interdict which is being sought by the applicant is, indirectly to pronounce on who, between the applicant and the first respondent, has the possessory rights of the land situate on Swazi nation land-an issue that is outside the powers of this court.’

- [25] As pointed out in the preceding paragraphs, it is my respectful view that the prayer for an order interdicting the respondents from the disputed land is incompetent in so far as it presupposes the matter is still pending before eBuhleni Royal kraal’s council when there is no evidence from any of the council members buttressing that view. There is also the issue of the effect of an order for an interdict in a matter that is replete with disputes of fact: it would be unseemly to grant such an interdict if, as I think its effect would indirectly mean the applicant is the one who has possessory rights over the disputed land-and this issue is outside the powers of this court.

Traditional structure and execution of orders

- [26] It is applicant’s lamentation further that he has an order from an appropriate structure which order he cannot enforce because the said structure has no enforcement mechanism⁷. It seems to me that the tenor and effect of this application is that this court should order compliance with the order of eBuhleni Royal kraal council decision and by extension rubberstamp the

⁶ (1536/20) [2020] SZHC 202 (5 October 2020).

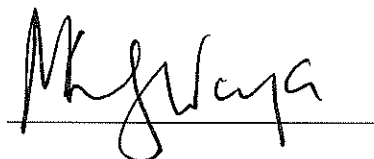
⁷ See Founding affidavit paragraph 16 at page 8 of the Book of Pleading.

decision of the said council. I am of the respectful view that structures under customary law have their own mechanisms to enforce and execute their judgments and orders. It is not for this court to get entangled in those mechanisms. Mamba J in *Mciniseli Cindzi and Another v The Ministry of Housing and Urban Development & 9 others*⁸ eloquently captured the legal position in the following terms:

‘[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 Masundvini 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 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.’

[27] I couldn’t agree more with the articulation of the legal position on the issue of enforcement of orders from traditional structures.

[28] For the foregoing reasons the application is dismissed with costs.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Applicant:

Mr M. C. Simelane

For the Respondents:

Mr B. Gama

⁸ (925/2016) [2017] SZHC 227 (30 October 2017).