

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 1141/2022**

**IN THE MATTER BETWEEN:**

**GABEKILE ROSE FAKUDZE**

**PLAINTIFF**

**AND**

**BHEKINKHOSI TSABEDZE**

**1<sup>ST</sup> DEFENDANT**

**LINDIWE TSABEDZE**

**2<sup>ND</sup> DEFENDANT**

**Neutral Citation:** *Gabekile Rose Tsabedze v Bhekinkhosi Tsabedze & Another*  
(1141/2022) [2023] SZHC 225 (16 August 2023)

**CORAM:**

**N.M. MASEKO J**

**FOR THE PLAINTIFF:**

**MR. AC. HLATJWAKO**

**FOR THE DEFENDANTS:**

**MR. E. SHABANGU**

**DATE OF HEARING:**

**04/11/2022**

**DATE OF DELIVERY:**

**16/08/2023**

**Preamble:**

*Civil Law- Civil procedure- siSwati Law and  
Custom- Special Pleas on the Court's lack of original  
jurisdiction to hear and determine a matter*

*involving a land dispute situate on Eswatini Nation Land is hereby upheld – Sections 151 and 233 of the Constitution referred to – Section 11 of the Swazi Courts Act referred to.*

*Held: that this Court has no original jurisdiction to hear and determine this matter which involves a land dispute situate on Eswatini Nation Land.*

*Held further: that the action proceedings is hereby dismissed*

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### **RULING**

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#### **MASEKO J**

- [1] On the 21<sup>st</sup> June 2022, the Plaintiff sued out a Combined Summons against the Defendants for the following order:-
- (a) Declaring the agreement between Plaintiff and Defendants to be null and void *ab initio*.
  - (b) Ejecting the Defendants from the shop.
  - (c) Costs of suit.

#### **HISTORY OF THE MATTER**

- [2] The history of this matter is that the Plaintiff and her husband one Madeli Fakudze entered into an oral agreement with the Defendants for the purported sale of a shop which is situate at Makhewu area, Siteki in the Lubombo Region. The purchase price agreed between the parties was E70 000-00 (Emalangenani Seventy Thousand).
- [3] The agreement between the parties was that the purchase price would be payable in E40 000-00 (Emalangenani Forty Thousand Cash) and the

balance of E30 000-00 (Emalangeni Thirty Thousand) to be in the form of a motor vehicle described as a seven-seater. It is common cause that the Defendants duly paid the purchase price as aforesaid on or during the month of February 2021 and thereafter assumed occupation of the aforesaid shop.

- [4] It is common cause that the aforesaid shop or business premises are situate on Eswatini Nation Land at Makhewu area, Siteki in the Lubombo Region.
- [5] In a turn of events, the Plaintiff has now commenced these action proceedings before Court where she is seeking the prayers herein outlined above in the opening paragraph of this ruling. In these proceedings she alleges that she entered into this oral agreement to sell her business because of undue influence and duress by her husband Madeli Fakudze, and that the aforesaid purported agreement and purported sale of the shop was null and void *ab initio* as Eswatini Nation Land cannot be sold but can only be acquired through the traditional custom of *kukhonta*. Therefore this Court is urged to cancel the said oral agreement of sale and further order an ejectment of the Defendants from the shop.
- [6] The Defendants vigorously defends this action proceedings and have raised a special plea of lack of jurisdiction on this Court to deal with this matter, and they have also raised a point of non-joinder of Madeli Fakudze who is alleged to have a direct and substantial interest in this matter.

## **ANALYSIS OF THE MATTER AND THE LAW APPLICABLE**

- [7] It is my view that the special plea, on this Court's lack of original jurisdiction to deal with this matter is dispositive of the matter for the reasons hereunder.
- [8] Authority is legend that all matters involving disputes of land situate on Eswatini Nation Land are the prerogative of the chiefdom(s) where ever situate. *In casu* it would be the Chiefdom responsible for the area of Makhewu in the Lubombo Region. The parties were under a legal obligation to report their purported agreement to sell each other the shop to the Chief through the Libandla so that they are advised and guided accordingly on how to alienate land rights in respect of immovable property situate on Eswatini Nation Land. It was an oversight on the part of both parties not to involve the traditional authorities of Makhewu area about this transaction because land situate on Eswatini Nation Land cannot be sold but is only acquired through the *kukhonta* custom. This purported agreement executed by the parties is *void ab initio* and is unlawful.
- [9] It starts with the Constitution of the Kingdom of Eswatini Act No.001/2005 (the Constitution) where at Section 233 (8) and (9) provides that:-
- “233 (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 custom, tradition, practice or usage which is just and not discriminatory.”*

[10] It is common cause that the area of Makhewu in the Lubombo Region is under the authority of a Chief, and therefore any dispute concerning land ought to be dealt with in terms of Siswati Law and Custom and thus such dispute cannot be adjudicated upon by the Court.

[11] Further, Section 151 (3) (b) of the Constitution provides as follows:-

*“151 (3) Notwithstanding the provisions of subsection (1), the High Court –*

*(a) -----*

*(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.”*

[12] There is no doubt therefore in my view that the Constitution recognizes and adopts Siswati Law and Custom as part of the law of Eswatini and further restricts or prohibit this Court to adjudicate on Siswati Law and Custom matters, except where such matters come before it either on review or on appeal. This means that this Court cannot act as a Court of first instance. The proposition of the Plaintiff *in casu* that this Court adjudicates on this matter which pertains to a dispute concerning land situate on Eswatini Nation Land cannot in my view be sustained, because this matter has to be dealt with at the chieftdom level before the Umphakatsi. In terms of Siswati Law and Custom, land situate on Eswatini Nation Land cannot be sold, but certain traditional customs such as *kukhonta* are always employed by the Chief through his/her Libandla to allocate land to any person. In the circumstances of the case *in casu*, the parties concluded the oral agreement for the sale of the shop situate on Eswatini Nation Land contrary to Siswati Law and Custom. This Court cannot adjudicate upon this matter because it has no jurisdiction to do so since this matter is not on review or being brought as an appeal.

[13] Siswati Law and Custom are adjudicated upon at chiefdom level and escalated to the Swazi Court, which Court is established in terms of the Swazi Courts Act No. 80/1950, (the Act).

[14] In the case of **Mkhulu Khanyile v Allison Nsingwane and Two Others** **High Court Case No. 756/2012**, MCB Maphalala J (as he then was) stated as follows at paragraphs 10 to 11:-

*"[10] Section 11 of the Swazi Courts Act No. 80/1950 provides the following:-*

*Subject to the provision of this Act a Swazi Court shall administer -*

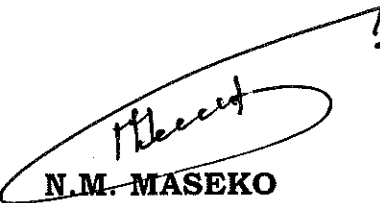
- (a) The Swazi Law and Custom prevailing in Swaziland so far as it is not repugnant to natural justice of morality or inconsistent with the provisions of any law in force in Swaziland;*
- (b) The provisions of all rules or orders made by the iNgwenyama or a chief under the Swazi Administration Act No. 79 of 1950 or any law repealing or replacing the same and in force within the area of jurisdiction of the Court;*
- (c) The provisions of any law which the Court is, by or under such law authorized to administer."*

*[11] The Supreme Court in the case of **Maziya Ntombi v Ndzimandze Thembinkosi** (supra), emphasized that it is a trite principle of our law that the High Court has no original jurisdiction over land disputes in a Swazi area. When giving judgment, I emphasized that such disputes are determined by the Chief's Inner Council or a Competent Authority as defined under the Swazi Administration Amendment Act No. 6 of 1979. Such a decision is appealable to the Swazi Courts established in terms of the Swazi Courts Act No. 80 of 1950. A decision of the Chief's Inner Council and that of the Competent Authority are both reviewable and appealable to the High Court in terms of the Swazi Courts Act as well as the Constitution."*

[15] It is on the circumstances of this case and for the reasons stated above herein, that I hereby grant the following order:-

1. The special plea that this Court does not have original jurisdiction to deal with this matter is hereby upheld.

2. Consequently, the action proceedings herein sued out by the Plaintiff against the Defendants is hereby dismissed with costs.

  
**N.M. MASEKO**  
**JUDGE**