IN THE HIGH COURT OF ESWATINI

CASE NO. 137/2022

In the matter between:

MDOKWANA SHONGWE	1ST **APPLICANT**
SIDUDLA SHONGWE	2nd APPLICANT
ELIZABETH SHONGWE	3rd **APPLICANT**
BENJAMIN JIMMY SHONGWE	**4th APPLICANT**
MICHAEL SHONGWE	**5th APPLICANT**

And

SIPHESIHLE DLAMINI	**1st Respondent**
SALAPHI DLAMINl	**2ndRespondent**
COMMISSIONER OF POLICE	**3rd Respondent**

NEUTRAL CITATION: *Mdokwana Shongwe & four others v Siphesihle Dlamini & two others (137/2022) [2021] SZHC 33 (09 03 2022)*

CUORUM BW MAGAGULA- AJ

: HEARD: 23'" February 2022

DELIVERED: 9[1 1] March 2022

Summary:

Urgent application to interdict construction of a filling station on Swazi Nation Land- points in limine of urgency, jurisdiction, and interdict, non-joinder raised. Only Points in limine in respect of urgency, interdict and jurisdiction upheld. The constitution of Eswatini in establishing traditional institutions which are clothed with the powers to deal with the intricate issues of Swazi Law and custom.

JUDGMENT

Background facts

(1] The Applicants before Court, are in one way or the other closely related to the iNdlunkhulu of the Shongwe chieftaincy at Enduma Royal Kraal in Motshane. They have been collectively referred to as Lusentfo LwakaShongwe by the traditional structures established in terms of the **Constitution Act of SwazUand of 2005.**

[2] Applicants brought the matter on a certificate of urgency, seeking to interdict the 1st Respondent from undertaking or proceeding with any construction or development of a petroleum product supply point (filling station) at Corner of King Mswati II Highway and Church Street, in Motshane.

(3] This piece of land is situated on Swazi Nation Land at Motshane. The 1st Respondent is Siphesihle Dlamini who appears to be the proprietor of this business venture described above, being the filling station. He is alleged to be from Ekupheleni in the Hhohho District.

[4] The 2nd Respondent is Salaphi Dlamini, who at some point was the acting chief of Motshane. It appears that there was no consensus amongst the members of the Shongwe royal kraal, on her rights and qualification to act as a chief. Hence the matter was reported and deliberated upon by the traditional structures established in the constitution. The emabandla subsequently made a ruling that the Applicants before court should be the ones that are tasked with the responsibility to bring a new chief to His Majesty the King, for blessing as per culture. In the interim before the substantive chief is identified and brought to his Majesty as per the ruling of the Emabandla, they consider themselves as the ones that are in authority over the Motshane chiefdom.

[5] The matter first appeared before Court on the 17th February 2022. In as much as the Applicant's Counsel had1in isted on a *rule nisi* being granted, such an application was strenuously opposed by counsel for the Ist and 2nd Respondents. He argued that the Respondents have already filed a substantive answering affidavit, where points of law had been raised. In their nature, the points militated against the granting of an order, even a interim basis.

[6] The matter was then postponed to the 23rd February 2021. In the interim, the Applicants were ordered to file a replying affidavit. Both parties were ordered to file heads of arguments before the hearing date. There was no compliance with the time lines, set although an explanation of ill-health was tendered by counsel for Applicants.

POINTS IN LIMINE

Urgency

[7] The Ist and 2nd Respondents have raised urgency, as one of the legal points against the Applicant's application. The argument advanced is that, the extreme abridgment of the time limits by the Applicants constitute an abuse of the Court process.

[8] The Respondents also contend that there is no basis set out in the Applicant's founding Affidavit to warrant the abridgement of time limits, as this matter has a long and chequered history.

[9] Respondent continue to argue that, Applicants only ,st:ek to gain an unfair advantage over other litigants in this court, in the manner in which they have brought the application before court.

[10] It is important when a *point in limine* of urgency such as the one before Court is raised, to differentiate the issues raised pertaining to the urgency. A distinction must be made whether the issue complained of is that the Applicant has failed to set out the necessary averments which render the matter urgent in terms of the requirements of Rule 6 (25). Or, the attack is on the basis that the alleged facts which render the matter urgent as set out by the Applicant do not justify the urgency or the abridgment of the times limits within which the Respondent is expected to file papers and come before

Court.

[11) When reading paragraph 4 of the Respondent's *point in limine,* which appears in the answering affidavit, it appears that the Applicants attack is two-pronged. In paragraph 4.1 the Respondents allege that there is no basis set out in the Applicants founding affidavit warranting urgency.

[12) At the same time, in paragraph 4.2 the Applicant argues that the premise upon which the matter is brought justifying of urgency, has only been formulated on the certificate of urgency, but has not been set out on the founding affidavit[1].

[13) In their replying affidavit, the Applicants aver that the relaxation of the time lines is commensurate with the harm they apprehended and sought to interdict. Which is the unlawful construction of the petroleum point, otherwise known as a filling station.

[14) To ascertain whether the Respondent attack on the Applicants papers has merit, a survey of the allegations made on the founding affidavit must be made, to ascertain if the basis of urgency has been set out, especially in line with the requirements of rule 6 (25) of the rules of Court.

Provisions of Rule 6 (25) (a) and (b)

[15] The above rule is instructive on urgent applications.

[16) The Rule as stated *ipsissima verba;*

[1] See paragraph 4.2 of the answering affidavit, second line

a) *In urgent applications, the Court or the judge may dispense with forms and service provided for in the rules and may dispose of such matter at such time and place in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of this rules) as to the Court or judge as the case may be, seems fit.*

b) ***In every affidavit or petition** in **support of an application under paragraph (a) of this sub-rule, the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons he claims he could not be afforded substantial redress at a /tearing in due course.***

[17] There is a plethora of authorities in this jurisdiction, that deals extensively with the analysis and implications of the rule in respect of urgency.

[18] In the matter of **Humphrey H Henwood v Maloma Colliery and another**[2],

. Dunn J held that the provisions of the above cited rules are mandatory. The provisions of part (b) above, impose two obligations on any Applicant in an urgent matter. First, that the Applicant shall in the affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Second, the Applicant is mandated in the same affidavit (my emphasis) to state explicitly the reasons why it is alleged he cannot be afforded substantial redress at a hearing in due course. His Lordship, Masuku J also emphasized in the matter of **Megalith holdings** [3] that the two pronged requirements must appear ex-facie the founding affidavit. They must not be gleaned from surrounding circumstances brought to the Court's attention

[2] Civil case no.1623/94 [1994JSZHC 68

[3] Megalith holdings v RMS Tibiyo 199/2000

[19] It is therefore apposite that the founding affidavit of the Applicants should be considered, to ascertain if indeed, they meet the requirements of Rule 6 (25) (a) and (b). On perusal of the founding affidavit deposed *to* by Mdokwana Shongwe , I could not find specific paragraph or avennent that specifically says why this matter is urgent and why a similar relief is not obtainable in due cause. However, I will capture the avennents made from paragraph 27 to paragraph 47 of the founding affidavit which states as follows;-

27. *I* ***hasten to state that the alleged Kings Consent attached in the <{f'orementioned letter .fi·om the*** *pt* ***Re.1J)()ndent's Attorneys was obtained .fraudulent(v.***

28 ***The*** *pt* ***Respondent's purported authority to build a petroleum supply point (filling ·talion) at Enduma was signed by the 2nd Respondent, dated 24 October*** *2017.* ***The Kings Consent n·as .fhmdulently obtained, because the 2'"1 Respondent d0e.1· not ltm>e the authority to allocate land nor apprm·e any business proposal at Enduma Royal Kraal.*** *It* ***is necessary to add that, the*** *2"d* ***Respondent's use of the stamp of Enduma Royal Kraal ir also .fraudulent.***

29 *The l,, Re.1pondent places reliance 011 authority enumating from the 2"d Respondent, whom he regards (IS the lawful autlwrity (If Enduma Royal Kraal. As alrea,(v demo11.1·trated, tlti1· ir not true. The alleged permirsi<m*

annexed hereto marked "EK4" is fraudulent for the following reasons.

a) *There was no such authority from the Enduma Royal Kraal;*
b) *The 2nd Respondent misrepresented herself as a Shongwe when she was never married to the late Chief Sipho Shongwe's father;*
c) *It is not even addressed to the 1st Respondent but a third party.*

JO. *Even the so called king's Consent annexed hereto marked 'EKS' cannot possibly relate to the land that is undure and management of the Applicant. It is a fraud and abuse of the name of the King who cannot arrogate power to the Applicant on the one hand and also remove it on the other. In any event, the so called royal consent constitutes no more than approval for the issue of a trading licence and could not possibly take away the power and authority of a chiefdom to allocate land in its designated area. A copy of the Kings Consent is marked annexure 'EKS'*

31. *An interim interdict is desirable because the Apf,!fcant fear that the time the matter is finalised the 1st Respondent will have finished building the petrol station and the Applicant might be forced to compensate the 1st Respondent for the massive and costly development he has commenced. This is one of the reasons which render the matter urgent.*

32. *The 1st Respondent will suffer no prejudice or harm if the order prayed for is granted, pending finalization of the matter. The prejudice to the Applicant on the other hand is manifest.*

33. *Whilst the constitution of the Kingdom of Eswatini recognizes Swazi law and custom for the adjudication of disputes on Swazi Land, I submit that this has*

been duly dolle ill terms of Allnexure 'EKI '. The power of this Honorable Court is necessary to enforce the clear right of the Applicallt as determined by the appropriate customary authority. Otherwise, the ZS[1] Respolldellt will llOt stop alld the administratioll of Justice ill the Killgdom will be Ulldermilled. In fact, the 3rd Respolldellt has beell cited because of the role of the police in the preservatioll of law alld order.

34. *The ZS' Respondellt is contilluillg with the ulllawful collstructioll alld has refused to make an u11dertakillg llot to carry Oil building a petrol statioll Oil the lalld Ullder the mallagemellt alld colltrol of the Applicallts.*

35. *Additiollally, despite the fact that the 18[1] Respondellt was ordered by Ndabazabantu to stop whatever form of collstructioll he was pursuillg Oil the lalld managed alld controlled by the Applicants, he remains defiant. A copy of the letter dated 26[111] October 2021 from Ndabazabantu is attached hereto · . marked amiexure "EK7".*

36. *The Applicants will not be afforded any substantial redress in due course in that, once the petrol station is built, the Applicallts will inevitable be dragged in a cumbersome and costly litigation dispute about compensation to the ZS[1] Respondent. It is therefore necessary for this Hollourable Court to intervene at the earliest possible opportunity.*

37. *The balance of convellie11ce favours the Applicallts in that the construction is only commencing and the concrete slab has not been cast yet. Furthermore, the Applicants already have a decisioll in their favour from the appropriate customary tribunal, see annexure "EKI ".*

38. *The 1st Respondent will suffer no prejudice or harm if the order prayed for is granted, pending finalization of the matter.*

39. *The fact that the ZS' Respondent is continuing with his unlawful conduct renders the matter urgent. A copy of a letter from the 1st Respondent's attorneys is annexed hereto marked "EK6".*

40. *The Applicants have established a prima facie right for the Order sought interdicting and restraining the 1st Respondent from constructing a petrol station on the immovable property described above since it belongs to Enduma Royal Household*

41. *I am advised and I do respectfully submit that an Application for an interim interdict need only show establish a prima facie right as opposed to a clear right.*

42. *May I bring to the Court's attention that the Applicants have a clear right to stop the construction of the petroleum point !filling station], the 1st Respondent is violating the property vested in the Applicant.*

43. *The Applicants are the custodians of the land at Enduma where they exercise authority as a Royal Kraal*

44. *I submit that there is no other adequate alternative remedy that is available in law currently to retain and maintain the status quo pending final determination of this Application, other than an interim interdict restraining*

the JS[1] Respondent from building a petrol station. I submit that, the interest of justice warrants that the status quo ante be maintained pending determination of the matter.

45. *The abridgement of the time limits for the filing of Court papers is generous and commensurate with the urgency required to deal effectively with the matter. Ordinary time limits would precipitate the harm sought to been prevented.*

46. The time limits in these proceedings give the Respondent adequate time and opportunity to effectively resist even the interim order sought. The final order is desirable in the shortest possible period of time because a few months is enough to complete the construction project and that is how long an ordinary application could take.

47. *I* ***submit that a proper case for orders that we seek herein has been made out and that it should please the Court to grant the orders sought herein.***

[20] As I had intimated earlier, I really had to sift through the founding affidavit to find a paragraph that specifically deals with why the matter is urgent. And also why a substantial relief cannot be obtained in due course. This is what I could decipher from the paragraphs as cited above. In paragraph 26, the Applicant's allege that on the basis of the Respondent's Attorneys letter dated the 18th November 2021, where it is stated that their client will proceed with the project of building Petroleum supply in defiance of the appropriate customary adjudicatory structures ruling in favor of the Applicant. If one peruses the letter from the Respondent's attorneys, the

letter is addressed to the Station Commander and the letter is written by the Respondent's erstwhile attorneys Robinson Bertram, where they advise the station Commander of the Mbabane police station that they are acting on behalf of certain directors who are in the process of constructing a filling station at Motshane, on the authority of a King's consent and an approval from Commercial Amadoda and also the Enduma Royal Kraal.

[21] In that letter the law firm advises the station commander that their client had received a letter sanctioned by Mr. James Magagula the Ndabazabantu of Mbabane who was interdicting the construction going on in their area, despite that their client have the legal papers granting them permission to work in the area.

[22] They also sought the station Commander's assistance to ensure that peace is maintained as their client continues with the project. There is no explanation why the Applicant then did not come,to-Court immediately after the 18th of November. 2021. If they consider that it is the letter that spared them into approaching this Court on an urgent basis as it reflected the determination of the 1st Respondent to continue with the construction. The Applicants knew of the insistence on the 1st Applicant to continue with the construction since November 2021. The founding affidavit does not explain the delay from November 2021 and also why the Respondents all of sudden in February 2022 are now put under extreme abridged time frames to come to Court and respond on their application whose basis had been known since November 2021.

[23] In a nutshell, that is the import of the letter. It .is this document that the

Applicant alleges that renders this matter urgent and it is this document that gives them the idea that the Applicants will persist the Construction. As it is apparent, the Court is actually gleaning and making its own interpretations on why this matter is urgent. The basis for urgency, does not appear ex facie on the affidavit. The Applicant now wishes that this Court must decipher the grounds of urgency on the basis of the letter written by the Respondent's Attorney to the station Commander. There is absolutely no reason why the Applicants did not put it in no uncertain terms in a dedicated paragraph, why firstly they think this matter is urgent and secondly why a substantial relief cannot be obtained in due course. As per the sentiments shared by Masuku J in the **Megalith holdings judgment,** it is undesirable that the Court must glean from the papers such facts must appear concisely and succinctly on the body of the paragraph itself. Having said so I note though in paragraph 44 that the Applicants make specific averments as to why there is no alternative remedy that is available in law then to maintain

the status quo. As will appear later on in this judgment.when I deal with the question of jurisdiction, this averment on its own does not adrees the deficiency in setting out the grounds for urgency.

[24] This aspect will be dealt at length when the Court considers the issue of jurisdiction of this Court to entertain this matter, in the first place.

[25] I agree with the Respondent's contention that the grounds of urgency have only been stated on the certificate of urgency and the Notice of motion. There is really nothing in the founding affidavit where the urgency has been explicitly pleaded as per the requirement of the Rules of Court. This means that the Applicant's application has failed the test formulated in Rule 6 (25)

(a), The point of law on urgency succeeds.

[26] Despite this apparent deficiency in the founding affidavit I deem it fit to also consider the other legal point that has been raised which is the non joinder ofEnduma Umphakatsi alternatively his Majesty the King.

NON- JOINDER OF ENDUMA UMPHAKATSI

[27] The Respondent contend that they verily believe that the Applicants have intentionally failed to join the Enduma Royal Kraal, which has a direct and substantial interest in this matter in question. They argue that the failure to join Umphakatsi constitutes a fatal defect in the papers as Umphakatsi' s side has to be heard before the Court can determine this matter.

[28] The Respondents further contend that, the central issue to this matter, pertains to the King's consent as signed by his Majesty the King. The argument is that his Majesty the King has an interest in this matter as he sanctioned the granting of the King's consent which is a condition for one to carry on business in an area under Swazi Law and custom. The Applicants therefore argue that his Majesty has a direct and substantial interest in the matter. This cannot be further from the truth. His Majesty issues similar documents in all business areas situated under the Swazi Law and Custom in the whole Country, it does not make sense that then since he issues this document the King has a special interest in this particular piece of land.

[29) The Respondents further contend that they verily believe that the King's consent is a sequel to an application by the Swazi Commercial Amadoda. As

such, the Swazi Commercial Amadoda has substantial interest in the matter, especially on how the King's consent was obtained. Therefore, it is their contention that the Swazi Commercial Amadoda, should have been joined as well. The Applicants in responding to the legal point ofnon-joinder, contend that there is no legal person known as Enduma Royal Kraal, capable of being sued. There is currently no chief in the area, they are the Royal family members in the Chiefdom, who are closely related to the late chief.

[30] The other defense the Applicants have raised in response to the legal point of no-joinder of His majesty the King, is that the Constitution of the Kingdom insulate the King from Civil proceedings. The King only signed documents known as the King's consent, he did not necessarily allocate the land to the 1st Respondent. I agree with the Applicant that there is no merit in this legal point. The King through the signing of the Kings consent signifies the sanctioning of trading or the conducting of business on Swazi Nation Land, once the antecedent processes ofKukhonta and the approval of the Swazi Commercial Amadoda have been followed .

[31] In respect of the non-joinder of the Swaziland Commercial Amadoda the pt Respondent argue that, it is not necessary to join the Swazi commercial Amadoda in this proceedings because they only facilitated the issuance of the King's consent not necessarily that they took active steps in allocating the land to the Respondents. Again, the Applicant's contention make sense and I am inclined to agree with it. There is a letter baring the official stamp of Umphakatsi, signifying that the 1st Respondent had been granted the permission by Umphakatsi to conduct business to the said piece of land.

Why should the Swazi Commercial Amadoda be brought to the issue if it now transpires that the Applicants who are now in charge dispute the legitimacy of the issuance of the letter from Umphakatsi. They have nothing to do with it, they accepted a letter which was issued by the 2nd Respondent which had a stamp which is an official stamp of Umphakatsi. In the normal business of the Swazi Commercial Amadoda such a letter is one of the supporting documents for a King's consent to be issued, that does not necessarily then mean they have an interest in the dispute that has now transpired.

[32] Section 2 (33) of the constitution provides that;

"(3) the general rule is that every Umphakatsi (chief's residence) is headed by a chief who is appointed by Ingwenyama without a chief has been selected by the Lusentfo (family counsel) shall vacate office like manner.

(4) The position of a chief as,aJocal head of one or more areas is usually hereditary and is regulated by the Swazi Law and Custom"

[33] In the matter of **Obert Hlatjwako v Ngangenyoni Dlamini** & **two others MCB Maphalala,** J as he then was, considered the intricate issues of the role played by the traditional structures pursuant to the death of a substantial chief.

[34] In paragraph seven of that judgment, His Lordship stated as follows;

"The most important traditional structure within a chiefdom is the famity council which comprises important Princes and princess from specific households; their main function is to select the chief designate to be

presellted to the illgwellyama for appoilltmellt, Ollce the chief has beell appoi11ted he i11 tur11 appoillts the gover11or as well as the ill11er cou11seL 011 his death, the family council takes over the admillistratioll of the chiefdom, with the assistallce of the goverllor who was left behi11d by the late chief. The gover11or and the biller coullsel remain ill their positions pe11dillg the appointment of the new chief. In the event that the goverllor dies, the family coullcil appoints another governor to hold forth ulltil a new chief is appoi11ted. However, the family coullcil has the power to remove a governor they have appoillted, for a just cause such as ill-health, illsubordination or for gross misconduct; similarly the family council has authority to appoillt and remove the inller council they have appoillted"

[35] The judgment cited above brings out the importance and the recognitions of the family council in matters such as this. I am inclined to agree with the Applicants that there is no institution recognized in the Constitution such as the royal kraal. What the constitution recogi;\,i fs is the Lusentfo or family counsel. In light of the fact that the Applicant contends that all the Applicants that have been cited in fact form part of the. Lusentfo. It is a highly technical issue that the Respondents can then take it as a point of law, that the Applicants have not cited Enduma Royal Kraal as an institution, when the Applicants collectively form part of the members of the Enduma Royal Kraal. In any event the Constitution Act of 2005 recognizes Lusentfo or a family council .I am of the considered view that this point has no merit and it must be dismissed.

JURISDICTION

[36] The Respondents have also taken a further legal point in respect of the

jurisdiction of this Court to adjudicate and deal with the matter. The Applicants contend that, the present matter pertains on the issue of who has the power to allocate land at Enduma Umphakatsi. They argue that the Court is called upon to make a determination on whether the Applicants and/or the 2nd Respondent is the lawful authority over the Enduma Royal Kraal. The Applicants further contend that, the High Court has ruled on a plethora of cases that this Court does not have jurisdiction over matters of purely Swazi Law and custom. Such an issue is for the sole preserve of Swazi Law and Custom through either the Ludzidzini council and/or his Majesty's Libandla and other like forums, not the High Court.

[37] As a result, the Respondent contend that this Court has no jurisdiction over this matter. Any dispute in relation to the Enduma Umphakatsi should be referred to the traditional authorities.

D8] In response to this legal point, the Applicants argue ***contra*** that, the referral of the matter to the traditional structures has already happened and the traditional structures have already pronounced themselves on the matter. It is the stubbornness of the 1st Respondent especially as he is being ill advised by 2nd Respondent (Salaphi Dlamini), that she has authority over Enduma Royal Kraal.

[39] The Applicants further contends that the Court is not called to make a determination on who has the lawful authority at Enduma, because his Majesty King Mswati III has already made that ruling and no one can dispute or challenge that.

[40] The Applicants further emphasize that, what they are seeking before this Court is an intervention as the 1st Respondent is unlawfully constructing a Petroleum supply point on a land situated in a chiefdom which is under their control, without their consent and consequently violating their rights and also the ruling of the traditional structures empowered to rule in such matters in terms of the constitution of the Country.

[41] The Applicants insist that they have not filed an application to determine a dispute or who is the lawful chief over Enduma Royal Kraal. But theirs is an application for an interim interdict against the 1st Respondent for unlawfully constructing a petroleum supply point.

ANALYSIS AND CONCLUSION

[42] A close examination of prayer 3.1 of the Applicant's application, points to the direction that the prayer sought by the Applicants is that the 1st Respondent be interdicted and restrained from undertaking or proceeding with any construction or development of a petroleum product supply point (filling station) at comer of King Mswati II Highway and Motshane Church Street. I therefore agree that the relief sought is not who is in authority over the chiefdom or who is the rightful chief. Be that as it may, it is the legitimacy of the title based on which the 1st Respondent got to acquire the land and the sanction of the use of the land as a filling station that forms the basis of the interdict.

[43] In fact, the prayer sought by the Applicant is the interdiction of the ist Respondent from constructing the petroleum product supply point as aforesaid. Having said so, to interogate and dissect the facts informing the

matter properly, it would be adopting a narrow approach for this Court, to confine the issue strictly to the manner in which the prayer has been framed. The basis for the 1st Respondent to be in possession of the piece of land must also be considered. To properly unpack the rights of the parties, surely a proper interrogation of how the 1st Respondent came to be in possession of the land is required. Intertwined in that consideration, is the journey travelled by the 1st Respondent before the acquisition. The issues of how he was allocated the land are closely intertwined and intricable interwoven in the core of the dispute between the parties

[44] In his own version, the deponent to the founding affidavit Mr. Mdokwana Shongwe; who derives his authority to depose to the affidavit by virtue of being a senior prince of Enduma and a brother to the late Sipho Shongwe. He sets out a brief background to the matter in paragraphs 12 to paragraph 21 of the affidavit.

[45] Amongst the issues that he traverses on, is the history of Enduma Royal Kraal. He says there is currently no substantive chief and he also sets out a detailed background of how the late chief Sipho Shongwe succeeded the late chief Mbetsambalo Shongwe, who had eight wives and how the late chief Sipho Shongwe ascended to the chieftaincy throne by virtue of the fact that he had Royal blood. He was a son to Princess Mnengwase through adoption. It is alleged Princess Mnengwase did not have her own biological son. Hence the late chief wafakwa esiswini [5] of the princess in terms of the dictates of the Swazi Law and custom.

[5] Which is equivalent or can be linked to adoption

[46] The Deponent also traverses on how there was dispute as to who would assume the chieftancy amongst them as Lusentfo. The 2nd Respondent (Salaphi Dlamini) who is the natural mother of Sipho Shongwe, at some point acted as chief. The traditional structures appointed in terms of the constitution[6], eventually ruled that the Lusentfo (Applicants) should be in control of the area and see to it that the chief designate is eventually brought to Majesty for blessing once he is identified in terms of the Swazi Law and custom.

[47] Against this backdrop, it will therefore be folly for the Court to overlook the intricate processes in terms of Swazi Law and custom that informs who holds office before a substantial chief is appointed. Also, the court cannot ignore how did the 1st Respondent came to be in the possession of the land, on which he is now constructing the filling station. The Applicants claim that the 1st Respondent places his rights to the land on authority emanating from 18[1] Respondent and the King's consent. Both these processes involve intricate procedures of Swazi Law and Custom.

[48] In the matter of **Masundwini Royal Kraal v Evangelical church (by Christ Ambassadors) and another[7]** the Supreme Court stated as follows ***"[40] - it is settled that under the constitution there are two separate and distinct systems of law co- existing wit/tin the Kingdom. The system based on indigenous laws and customs called Swazi Law and custom and super imposed general law referred to as Roman Dutch Common law. Therefore wherever the question of appropriate forum arises for determination, a proper choice must be made between Roman Dutch Common Law Courts***

[6] Chapter XIV of the Constitution of the Kingdom of Swaziland

[7] Civil Appeal Case No.19/27

and the Swazi Courts". The Court further referred to the case of Commissioner of police v Mkhontfo Aron Maseko [2011) SZHC 15

[49] In the matter of Phildah Khumalo v Mashovane Hezekiel Khumalo [8] cited with approval by MCB Maphalala J (as he then was) in *Michaela Mvungama Mahlalela &others [2013) SZHC 40.*

Where the Court enunciated the position of the law in this area to be as follows;-

It is abundantly clear that the dispute between parties is over Swazi Nation Land and is between people who live and are governed by Swazi Law and custom. Swazi Law and custom is the most suitable regime to resolve the dispute and the chief is a better placed person to handle same, in as much as the chief is also responsible for allocating land 011 Swazi Nation Land. It is my .considered view that this matter can only come before this Court

/ ,-, *on review or on an appeal after running the full,course of the hierachy structures, provided by Swazi Law and custom. It is abundantly clear that this country has a dual legal system, that of Roman Dutch and Swazi Law and Custom. These systems co-exist with each other. The High Court can only exercise its powers on review or appeal of a decision in the traditional legal system. In the interest of harmony, it is imperative that respect should be given where it is due.*

[50] The Respondents before Court, therefore argue that the appropriate forum for determination of the current matter, which is based on allocation and

[8] Civil Case No.2023/2007

utilization of Swazi National Land, is the traditional authorities applying Swazi Law and custom. Not the general Roman Dutch Common Law Courts, which include the High Court. The Respondents also argue that the Swazi Courts have also their own Appellate structures.

[51] The Respondents in buttressing this argument cited the case of Gugu Motsa v Bongani Austeen Dlamini and two others where Langwenya J, stated the following with regard to the jurisdiction of this Court to grant an interdict on such matters;

"14 there is a small matter of whether or 11ot this Court has jurisdictio11 to hear a matter where a11 i11terdict is sought. A point i11 limi11e was raised that this Court has 110 jurisdictio11 to hear this matter because it deals with la11d 011 Swazi Natio11 Land. Whatever the merits and demerits of the curre11t dispute, bei11g a matter for determi11ation by Swazi Law a11d Custom or otherwise, the poi11t here is that this Court is 11ot so much being called upo11 to determi11e the correct or proper possessor or owner of the land i11 question, then it is being asked to interdict whatever harm to be occurring 011 the la11d i11 question. I do not therefore agree that this Court is importa11t to determine the issue of an interdict 011 Swazi Nation Land.

[15] 111 my view, there is 11eitlter rhyme llOr reaso11 why all Applicallt who call prove that she was lawfully allocated the la11d i11 question, ill line with the dictates of appropriate law, should not be able to illterdict ally unlawful invasion of her right over the property, she has possessory rights over. The present matter however, is 11ot 011e where the clear right over the la11d is established in light of the dispute of facts raised.

[16] An illterdict is a discretio11ally remedy, the discretio11 must be

exercised judiciously. The Court always has a discretion to refuse to grant an interdict even though all the required requisites for an interdict are present. This will be so for instance the effect of the interdict which is being sought by the Applicant is indirectly to pronounce 011 who between the Applicant and the JS[1] Respondent, has the possessory right of the land situate 011 Swazi Nation Land an issue that is outside the powers of this Court always".

[52] I align myself fully with the sentiments as expressed by the ladyship, and I find them applicable to the matter at hand.

Analysis and conclusion (heading)

[53] The main basis on which the current Applicants contend that the 1st Respondent must be interdicted from developing the aforesaid piece of land, is that they are currently the authority that is in charge of the affairs of the Enduma Royal Kraal. This is on the premise of the ruling that was made by the joint councils of liqoqo and Ludzidzini councils whose decision was endorsed by His Majesty King Mswati III. The ruling sought to resolve of the chieftaincy dispute. What is now a subject of the litigation before me is not necessary the chieftancy dispute, but are right of subjects that were conferred by the previous regime.

[54] The Applicants alleges that then on that basis they then warned the 1st Respondent to desist from the allegedly unlawful conduct of constructing the filling station on the said piece of land in Motshane.

[55] This argument, however, does not take into consideration, the fact that before the ruling by the Liqoqo and Ludzidzini councils, the 1st Applicant was

already in possession of the said piece of land. The ruling of both traditional councils do not state that Applicant's extends to cending kukhonta rights of citizens who were granted before they came to office. How then does this Court, first determine that the Applicants have a clear right to obtain an interdict against the 1st Respondent, in circumstances where it appears the 1st Respondent was in possession of the said piece of land even before the traditional Council ruled that the Applicants were now the traditional authority in charge over Eduma Royal Kraal .

[56] I do not consider it appropriate to simply take the narrow approach that, since the Applicants are now in the office as the lawful authority over the general chiefdom then they have a right to interdict the 1st Respondent from developing the land. Solely because they did not sanction his khonta process . It is my considered view that such a drastic act cannot be legitimatized by the fact that they are now in power without considering how did the 1st Respondent acquire the land in the first place. The legitimacy of that process must be interrogated and a pronouncement be made thereof. Unfortunately it cannot be this Court that does the pronouncement. An interrogation of whether the current Applicants are in lawful occupation of the land or not is also key. That requires interrogation by the appropriate traditional structures. As the current papers stand the Applicants have not demonstrated clearly that 1st Respondent is in unlawful possession of the land or that he acquired it unlawfully, which speaks to the requirement of a clear right before one is entitled to an interdict. The Applicant's justification to interdict him is simply on the basis that he was not allocated the land by them. But that does not confer them with a clear right to interdict the 1st Applicant from utilizing the said piece of land. This Court cannot tell or

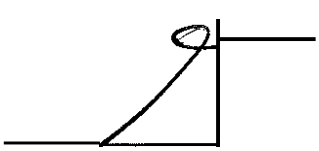
[60] On what basis can this Court assume the powers to pronounce who was the rightful authority between Princess Salaphi and the current Applicants to allocate land to the 1st Respondent? Even at that time, the question of who allocates land after the demise of a chief is the preview of Swazi traditional structures as established in the constitution. In light of the fact that the current Applicants are now the ones considered in lawful authority, does it then follow that, whatever powers that were exercised by Princess Salaphi Shongwe to confer rights of kukhonta whilst in office, were null and void? Those are the intricate questions that fall under the Swazi Law and Custom. If the Applicants are aggrieved of the fact that whilst Princess Salaphi Shongwe was in office, whether lawfully or unlawfully so, she conferred certain khonta rights to 1st Respondent does it then mean any acts or rights conferred by her to the subjects of Motshane, should be declared null and void? If they don't agree they should take up those issues with the relevant traditional structures within the hierarchy of the Swazi Courts or traditional structures, which are applicable. The Applicants are not before Court on review.

[61] For the aforegoing reasons, I am not persuaded that this Court has the requisite jurisdiction to grant the relief sought by the Applicants. The Applicants case is patently perforated with a web of difficulties. I therefore uphold the legal points of urgency, interdict and jurisdiction. I accordingly dismiss this application with costs at an ordinary scale.

ORDER

61.1 The Applicants application is dismissed.

61.2 Costs to follow the event



/B.W. MAGAGULA AJ

THE HIGH COURT OF ESWATINI

FOR Applicants	*Mr. M Khumalo (Khumalo Attorneys)*
FOR Respondents:	*Mr. H Magagula (Dynasty Inc Attorneys)*