IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 1059/2021**

In the matter between

CHIEF MGWAGWA **APPELLANT**

AND

JOSHUA BOY MAMBA **RESPONDENT**

Neutral Citation: *CHIEF MGWAGWA v JOSHUA BOY MAMBA (1059/2021) [2022] SZHC 53 (28 MARCH 2022)*

Coram : MAMBA J.

Heard and ex tempore judgment : 26 NOVEMBER, 2021

Written Reasons Handed Down : 28 MARCH, 2022

[1] *Civil Law- Chief after due process in terms of SiSwati Law and Custom – ordering the removal of respondent's property from land. Respondent successfully filing application for spoliation in Magistrate's Court. On appeal order reversed.*

[2] *Civil Law- Application for spoliation – remedy - requirements thereof restated.*

[3] *Civil Law- Powers of Chief in hearing matters qua chief. Chief in-Libandla acts in terms of SiSwati Law and Custom – as per Section 233 (8) of Constitution. Chief exercises both adjudicative and administrative function or role.*

[1] The appellant is Chief Mgwagwa Gamedze of kaMadlenya area in the Lubombo region. He was the 6th respondent in the Court below. The respondent was the applicant in the Court *aquo*. He is a member of the said chiefdom and occupies a piece of Eswatini nation land within that jurisdiction.

[2] On 18 August 2020, the respondent launched an application at the Siteki Magistrate's Court where he sought, *inter alia,* the return to him of certain items which had been removed from a piece of land he occupied within the Madlenya Chiefdom. He claimed that he had been despoiled of these items by certain named persons, who were from the Madlenya Royal House. He stated that this spoliation had been committed on 02 December 2018. It was his evidence that prior to this date, he and his family had been advised that the said Royal Kraal or House '--- was grabbing our field for purposes of making it a grave yard'. It was his evidence further that this was happening without prior and due notice to them as a family.

[3] The respondent alleged that the items in question had been placed on a piece of land measuring about three (3) hectares. This land was part of an eleven (11) hectare land allocated to his family in or about 1972. The rest of the land, measuring about eight (8) hectares had been ceded by the family to a communal company known as Sibhotela Investments (Pty) Ltd.

[4] In support of his application for spoliation, the respondent stated, *inter alia,* that:

> '105. When respondents came to load my belongings to their truck, they did not say a word to us. They did not produce any document authorizing them to dispossess me of my property. They did not even profess to have been sent by the Royal Kraal or any person thereof. I wish to state that we were surprised and feared for our lives as their silence was not just normal but exhibited that they were in a fighting mood.
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> What I know is that the dispossession was unlawful as it was not sanctioned by any Court of law. The respondents unlawfully

removed my property from my care and responsibility without my consent or any person from our homestead'.

He added that he had undisturbed peaceful possession of the items in question at the material time, i.e. time of removal.

[5] The application was set down to be heard on 27 August 2020. On that date, however, the appellant filed and served an application for him to be joined as the 6th respondent. This application was not opposed and was accordingly granted.

[6] The application for joinder was supported by the affidavit of Mfanyana Ngcamphalala, the Indvuna of the said Umphakatsi or Royal Household. In that affidavit, the Indvuna stated that:

'6.1 The property sought to be recovered is under the custody of the Umphakatsi. This was necessitated by the respondent's conduct of defying the Umphakatsi's decision not to occupy a piece of land which was reserved for graves. The aforementioned piece of land is under the administration of Madlenya Umphakatsi.

6.2 The respondents in the main matter were acting on the advice and instructions of the Umphakatsi to enforce its decision against the respondent. It is therefore the duty of the Umphakatsi to safeguard the interests of the respondents - - - who acted in pursuit of its [Umphakatsi's] instructions.

[7] From the above brief summary of the facts or allegations made, it seems to me fair to conclude that the respondent did not cite or join the appellant in the proceedings because at the time he launched the application, he did not know that the persons who took away his property from the land in question were mandated to do so by the Umphakatsi.

[8] In his defence, the appellant stated that the respondent and his family had, after due process in terms of SiSwati Law and Custom, been advised that the land in question had been allocated to one Gaya Ngcamphalala. After occupying it for a while, Gaya was allocated another piece of land. The disputed land was then designated as a cemetery or graveyard. The father of the respondent was allowed to farm on that portion of the land that was not used for burial. This was,

however, specifically on the understanding that once required by the Umphakatsi to use as a burial site, the father of the respondent would surrender the land to the Umphakatsi. It was the appellant's evidence that after numerous attempts by the Umphakatsi to have the land back from the respondent's family, without success, the Umphakatsi decided to evict them from the land. This decision was taken after all due process had been done in terms of SiSwati Law and Custom. This decision was arrived at in the presence of the said family on 02 December 2018. (See FN 1).

[9] It is common cause, I think, that the respondent or his family failed to heed or adhere to the decision of the 02 day of December 2018; requiring or ordering them to vacate the land. It was pursuant to this decision or failure to evacuate the land that the Umphakatsi ordered the removal of the respondent's property therefrom.

[10] In *limine,* the appellant submitted before the Court *aquo* amongst other things, that

(a) the Court had no jurisdiction to entertain or hear the matter inasmuch as it had been decided in terms of SiSwati Customary Law;

(b) the land in question was on Eswatini national land and regulated or governed under that law; and,

(c) the appellant-in-Libandla or Council, had lawfully authorised the removal of the property and consequently, even under the common, the application for spoliation was incompetent or could not succeed.

[11] Whilst there were other defences raised by the appellant in the Court below, I do not find it necessary to burden this judgment with these as they do not, in my judgment, have any significant bearing on this appeal or the judgment by the Court below. Suffice it to state that the Court below held that:

> '49. - - - Chiefs have this mammoth task of providing administrative services to a chiefdom and in the exercise of their administrative functions they are enjoined by law not to take the law unto their own hands. No institution is exempted by the law

from approaching Courts of law to authorise implementation of resolutions and decisions which adversely affect the rights and interests of their people.

50. May I mention that there is no legal authority which was brought to my attention to the effect that chiefs are vested with judicial power. In my judgment I hold that when a chief like the [appellant] seats and decide either alone or in Libandla he does so as an administrative functionary who has to observe all the rules of natural justice, the law of the land and the Constitution'.

[12] In arriving at the above conclusion, the Court *aquo* relied on the decision of the supreme in the *Regional Administrator, Lubombo Region and 6 Others v Coshiwe Matsenjwa and 7 Others (15/2016) SZSC 13 (30 June 2016)* at paragraph 12 where the Court said:

> 'It is still open to the appellants to institute legal proceedings to stop the construction of a community hall if such construction is not sanctioned by the traditional authorities of Maphungwane Chiefdom. However, the appellants are not entitled to take the law onto their own hands and forcefully remove the

construction material from the building site without a Court Order.

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Consequently, it is important to emphasize that judicial power vests in the judiciary and, that an organ or agency of the crown cannot be conferred with final judicial power. Accordingly, the appellants could not deprive the respondents of the building material in the absence of a Court Order authorising the removal of the property.'

[13] In *Enock Gwebu v Chief Ntunja Mngomezulu* the Court also held that it had not been referred to any law that authorised a chief to exercise an adjudicative role and impose or issue an injunction against any of his subjects. SiSwati Law and Custom, however, do empower a chief to do so. Such orders are, however, appealable within those traditional fora. I discuss this issue in the next segment of this judgment.

[14] The remedy or notion of spoliation is very well known or recognised under our common law and it is this:

> '- - - is a remedy to restore to another *Ante Omnia* property dispossessed forcibly or wrongfully and against his consent. It protects the possession of movable and immovable property as well as some forms of incorporeal property. The mandament van spolie is available for the restoration of *quasi-possessio* of certain rights and in such legal proceedings it is not necessary to prove the existence of the protested right: this is so because the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right'. (per the Court in *First Rand Ltd T/A Rand Merchant Bank and Another v Scholtz N.O. and Others 2008 (2) SA 503 (SCA)).*

As it is often said, spoliation is a right of possession rather than a right to possession. In other words, the Court does not enquire into the right of the claimant to possess the property in question or how such possession was acquired. Similarly, ownership of the property also becomes irrelevant. Once the Court is satisfied that the claimant or applicant had the requisite possession and was illicitly deprived or divested of such possession, the Court would without any further ado or enquiry, grant that possession be

restored ante omnia. The primary aim is to prevent people from taking the law into their own hands and resorting to self-help. Where people resort to self-help, this would result in chaos and anarchy and the law of the jungle where might is right. This is anathema to justice and the rule of law, which are some of the attributes of a civilised, open and democratic society. (See Section 1 (1) of the Constitution). The required possession must, however, have been peaceful and undisturbed. It must have been established or ensconced. Vide also *Galp Eswatini (Pty) Ltd v NUR and SAM (Pty) Ltd T/A Big Tree Filling Station (62/2020) [2020] SZSC 13 (03 June, 2021)* and the cases therein cited.

[15] I think, it is necessary to emphasize in this case that the possession and deprivation thereof which is at the centre of this matter is not so much as in the land but rather, it pertains to the removal of the goods belonging to the respondent. Therefore, the respondent complained that the appellant had despoiled or deprived him of the possession of the movable goods that were on the disputed land. Again, the ownership of these goods or items was and is not in issue. Corollary, when or why the respondent placed those movables there is not in issue. The central and perhaps crisp question to answer is whether the

appellant acting alone or in-Libandla had the right, authority or mandate to order or sanction their removal therefrom.

[16] The appellant submitted that in his capacity or qua chief, and acting in terms of Eswatini Law and Custom, he had and has the authority to make the order he issued. This is denied by the respondent. The Court *aquo* impliedly held that having made the decision, the appellant was at liberty to seek the help of a Court of law to enforce it. I cannot agree. I find neither rhymn nor reason why this should be so. To my mind, every Court; common law Court, Eswatini National Court or Traditional Court has its own mechanism or ways of enforcing or carrying out its own orders. It should be remembered and I think, I can take judicial notice of this fact, that the institution or status or office of chief existed amongst the Emaswati long before the advent of our common law and Eswatini National Courts. The office and functions or jurisdiction of chiefs is as old as the Emaswati nation itself. These functions or powers are in like manner as the office or status of chief, rooted in or founded on Eswatini Customary law. This Court accepts, of course that Eswatini Law and Custom is not static. It is flexible and readily adaptable to the needs and pressures of the

society it serves and is a product of. In the performance of its adjudicative duties, a traditional institution or Court properly so-called, does not require the help of a conventional or statutory Court to enforce its orders or decrees.

[17] In *Mariah Duduzile Dlamini v Augustine Divorce Dlamini and 2 Others (550/2012 [2012] SZHC 66 (12 April 2012)* the Court had this to say on the role of a chief and the application of Eswatini Customary Law:

> '[14] Now, Swazi Customary Law (Swazi Law and Custom), is recognised, adopted, applied and enforced as part of the law of the Kingdom of Swaziland, pursuant to Section 252 (2), (3) and (4) of the Constitution of the Kingdom of Swaziland Act No.001, 2005, in the following terms:-
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> *"252 (2) subject to the provisions of this Constitution the principles of Swazi customary law (Swazi Law and Custom) are hereby recognised and adopted and shall be applied and enforced as part of the Law of Swaziland.*

(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is inconsistent with a provision of the Constitution or a statute or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may

(a) provide for the proof and pleading of the rule of custom for any purpose.

(b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced and

(c) provide for the resolution of conflicts of customs or conflicts of personal law"

[15] Now, it cannot be gainsaid that Swazi Law and Custom is not only enforced via the Swazi National Courts established pursuant to Section 7 of the Swazi Courts Act 80/1950, but is also enforced by traditional structures, through chiefs heading the different communities, which chiefs are described in Section 233 (1) of the Constitution as:-

"the footstool of iNgwenyama and iNgwenyama rules through the Chiefs".

[16] Further, Section 233 (9) of the Constitution gives the following mandate to the Chiefs:-

"In the exercise of the function and duties of his office, a chief enforces a custom, tradition, practice or usage which is just and not discriminatory"

[17] It is thus beyond controversy that these traditional structures like the Moneni Royal Kraal *in casu,* which area headed by Chiefs, have the Constitutional mandate to enforce Swazi Law and Custom, just like the Swazi National Courts.

[18] This position of our law was recognised by the Supreme Court in the case of the **Commissioner of Police and Another v Mkhondvo Aaron Maseko (supra), at paragraph 22,** with reference to the statement of **Professor Kerr,** in the work titled:- **Customary Law of Immovable Property and Succession (3rd ed) Grocott and Sherry at 25,** where the following is depicted:-

"In old customary law "the tribe is a community or collection of natives forming a political and social organisation under the government, control and leadership of a chief who is the centre of the national or tribal life"

The chief exercised the functions of a king, chief justice, chief executive. In his council, he exercised the sovereign right of making laws, while in is person, he acted as Chief Justice adjudicating cases in his tribal court and as a chief executive sometimes even carried out the sentence himself. Thus the ***Rev H H Digmore*** *said:-*

"The laws originate in the decisions of the chief and his Council, but the same council forms the great law court of the tribe in which the chief sits as judge, and afterwards enforces the execution of his own sentences or perhaps inflicts the awarded punishment with his own hand"

[19] The Supreme Court in **paragraph 23 of the Commissioner of Police (supra),** followed the foregoing statement, with the pronouncement of **Madlanga J,** in the case of **Bangindawo and Others v Head of the Nyanda Regional**

Authority and Another; Hlantlalala v Head of the Western Tembuland Regional Authority and Others 1998 (3) BCLR 314 (TK at 326:-

"Although Professor Kerr refers to the position in "old customary law" the judicial, executive and law making powers in modern African customary law continue to vest in the Chiefs and so called paramount chiefs (the correct appellation being Kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western legal systems, or not exposed to, or sufficiently exposed to African customary law, or not believing in African customary law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It continues to thrive and is believed in and accepted by the vast majority of those subject to Kings and Chiefs and who continue to adhere to African Customary Law".

[20] It appears to me therefore from the totality of the foregoing, that these traditional structures are competent adjudicatory authorities and their decisions are binding on all'.

I, with due respect, endorse these remarks by the Court. Whilst in holding or performing an adjudicative role, the chief in-Libandla may not be called a Court, *strictu senso*, a chief does have the power or jurisdiction to issue binding or enforceable decisions or orders. These orders are referred to as *Sijubo* in SiSwati. The chief or chief in-Libandla (Council) is simply known as the Umphakatsi or Indlunkhulu (the Centre or Great House). The word 'Court' is, in the literature available to me, not used. In any event, SiSwati refers to a Court of law as *inkantolo.* This is a corruption of the Afrikaans word "kantoor" meaning "office". The order made must, nonetheless not be inconsistent with the Constitution. The so-called repugnancy clause has lost its meaning or efficacy, as everything is now underpinned by the Constitution.

[18] In *Sipho Samuel Hlophe v African Methodist Episcopal Church (5/2013 [2013] SZHC 31 (28 February 2013),* this Court acknowledged the dual legal system of law and the role of chiefs and said as follows:

> '[21] - - - The Swazi Courts were established in terms of the Swazi Courts Act No.80 of 1950, and consists of Swazi Courts of first instance, the Swazi Courts Appeal, the Higher Swazi

Court of Appeal and the Judicial Commissioner and, these Courts apply Swazi Law and Custom. Matters emanating from Chiefdoms are appealable to the Swazi Courts from where they are reviewable by the High Court and Supreme Court. Disputes over the ownership of Swazi nation land are matters within the jurisdiction of chiefs.

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[27] In *Sandile Hadebe v Sifiso Khumalo O.N. and 3 Others, Civil case 2623/2011* - - - I explained the powers of chiefs as follows:

> "[55] - - - In addition, in terms of Swazi Law and Custom, the chief acting on the advice of his Inner Council has power to allocate land by means of *kukhonta* custom to Swazis from other chiefdoms who wish to reside in his area; similarly the chief's inner council also sits as a court to determine minor disputes between members of the chiefdom. A person affected by the decision of the Inner Council has the right to appeal to the chief who can either confirm or reverse the decision of the Inner Council.

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[58] Generally, decisions of the chief's Inner Council are appealable to the Swazi Court'.

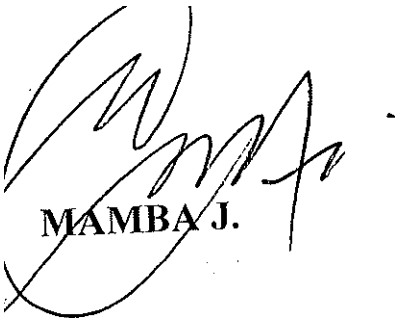
(See also proposal 13 of the **South African Law Commission** *Discussion Paper 82 on the Harmonisation of the Common Law and Indigenous Law; Traditional Courts and their Judicial Function).*

[19] From the above authorities, it is plain to me that although a chief, acting alone or in-Libandla, does not run or operate a Court *strictu senso,* he nonetheless operates as an adjudicating authority in terms of Eswatini Law and Custom. The decisions issued or pronounced by these fora have the force of law and are binding on the parties. Accordingly, it would be erroneous and legally unsound to hold that the appellant had no power or jurisdiction to issue the order for the removal of the respondent's goods from the land in question. Equally untenable is the suggestion that the requisite authority or sanction needed to defeat a spoliation application is only an order of a Court. That is an unjustifiably restrictive and narrow interpretation of the law. Any competent or adjudicating body would, in my judgment,

have the power to sanction such an act. Additionally, a statute may specifically grant or authorise such a power.

[20] For the above reasons, I upheld the appeal and se,t aside the order issued by the Court below and substituted it with the following order:

The application is dismissed with costs.



FOR THE APPELLANT: (S. HLAWE)

FOR THE RESPONDENT: MR. S. K. DLAMINI