



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 598/2021

IN THE MATTER BETWEEN:

THEMBA SUKATI

APPLICANT

AND

SIBONGILE MTHUPHA

1ST RESPONDENT

SIMANGA SUKATI

2ND RESPONDENT

EMSENI ROYAL KRAAL

3RD RESPONDENT

THE NATIONAL COMMISSIONER OF POLICE

4TH RESPONDENT

THE ATTORNEY GENERAL

5TH RESPONDENT

Neutral Citation: *Themba Sukati v Sibongile Mthupha & 4 Others (598/2021)*

[2023] SZHC 226 (16 August 2023)

CORAM: N.M. MASEKO J

FOR APPLICANT: MR. E. SHABANGU

FOR 1ST RESPONDENT: MR. M. TSAMBOKHULU

DATE OF HEARING: 13/04/2022

DATE OF DELIVERY: 16/08/2023

Preamble:

Civil Law – Civil procedure – Points *in limine* – Whether this Court has original jurisdiction to grant an interdict as a Court of the First Instance in a matter involving a dispute of land situate on Eswatini Nation Land – Constitutional provisions, the Swazi Courts Act and legal precedent discussed.

Held: That this Court has no original jurisdiction to adjudicate on land disputes situate on Eswatini Nation Land and consequently the point *in limine* on jurisdiction is upheld and the application dismissed.

RULING

MASEKO J

[1] On the 26th March 2021, the Applicant launched Motion Proceedings for an order in the following terms:-

- (i) The first and second respondents and all those holding title under them be and/or are hereby interdicted and/or restrained and/or evicted from residing at the Applicant's parental home situate at Luve, District of Manzini in conformity with the ruling of the Ndabazabantu dated 22 June 2020.
- (ii) The Deputy Sheriff of this Court is ordered to execute the order herein in the company of the police officers from Mafutseni Police Station in order to maintain law and order.
- (iii) Costs against the first and second respondents in the event of unsuccessful opposition.
- (iv) Further and/or alternative the affidavits of the Applicant and the Respondents respectively are used in support of this application.

SUMMARY OF THE APPLICATION

- [2] The late Reuben Sukati is the father of the Applicant from Make LaTfwala who is also deceased. Make Tfwala passed on in the year 1994 and was resident at her matrimonial home at Luve area with her husband Reuben and their children, including the Applicant.
- [3] After the death of Make LaTfwala, Reuben brought in the second respondent to live with him in the matrimonial home he had built with or for his deceased wife Make LaTfwala. This did not go down well with the Applicant and this was or is the cause of a long misunderstanding between the Applicant and his father Reuben during his lifetime.
- [4] It appears that the dispute between the Applicant and his father concerning the presence of the second respondent in the parental homestead of the Applicant – ka LaTfwala forced the Applicant to relocate. However, his father Reuben recalled him back to his (Applicant's) parental homestead where he was allowed by his father to rebuild the rondavel, which he (the Applicant) had initially constructed.
- [5] The dispute between Applicant and his late father was referred to the Emseni Royal Kraal by the deceased Reuben during his lifetime, however, he thereafter rejected and refused to accept the ruling of the Emseni Royal Kraal and accused the Umphakatsi of having accepted a bribe from the Applicant. See **Annexure "TS 4"**.
- [6] It is common cause that the matter was then referred to the Magistrate's Court on the following dates:-

(I) 9th January 2029 (**Annexure “TS 3”**)

Judicial Officer: His Worship Magistrate S. Vilakati

Held: Mbabane Magistrate’s Court District of Hhohho.

Parties:

Applicant: Themba Sukati

Respondent: Reuben Sukati

Order:-

1. Respondent interdicted and restrained from insulting or chasing Applicant from the family homestead at Luve.
2. Both parties to keep and maintain peace with each other at all times.
3. The parties are further ordered to refer their dispute to the family for deliberations with an effort to find an amicable solution.
4. The Royal Eswatini Police are ordered to serve the order and further assist in its execution.
5. Upon completion of the rondavel the respondent is to occupy same.

(II) 4th June 2019 (**Annexure “TS 2”**)

Judicial Officer: His Worship Magistrate S. Vilakati

Held: Mbabane Magistrate’s Court, District of Hhohho

Parties:-

Applicant: Themba Sukati

Respondent: Reuben Sukati

Order:-

1. The dispute is referred to the Emseni Royal Kraal for further deliberations. The parties were further ordered to comply with the order granted by this Court on 9th January 2019.

(III) 5th August 2019

Judicial Officer: Her Worship P. Simelane

Held: Manzini, Magistrate's Court for the District of
Manzini

Parties:-

Applicant: Reuben Sukati

Respondent: Themba Sukati

Order:-

1. Both parties are ordered to live in peace.
2. Matter is referred back to the Emseni Umphakatsi for further deliberations and a proper ruling which will be forwarded to the Court.
3. Respondent is ordered to secure his house at the homestead forthwith.
4. The Royal Eswatini Police Service is ordered to assist in executing this order.

[7] These are the three Court Orders of the Magistrate's Court which were issued in this matter. In all these orders the Magistrate's Court never

usurped the functions of the traditional structures and dealt with the matter on the merits. This is because, at all material times the civil Courts are alive to the fact that matters which pertain to Siswati Law and Custom are the sole preserve of traditional authorities, being the relevant Royal Kraal (Umphakatsi), family council (Lusendvo) and even the Ndabazabantu, the King's Liaison Officer.

- [8] On the 19th February 2022, the matter was heard and determined by the Ekutsimleni Royal Kraal (Emseni) where the aforesaid Royal Kraal ordered that the second respondent is to construct a homestead at his great grandfather's place of residence where he will then reside with the first respondent who was never married to the deceased Reuben Sukati. This order was issued.
- [9] It appears that the order of the Emseni/Ekutsimleni Royal Kraal (the Third Respondent) was never complied with by the late Reuben Sukati during his lifetime, and similarly the ruling of the third respondent was never complied with by the first and second respondents respectively. As a result of the failure by the first and second respondents to comply with the order or ruling of the third respondent, the Applicant then instituted these proceedings.

THE POINTS IN LIMINE

- [10] The 1st and 2nd Respondents raised the following points *in limine*:-
- (i) Ad Absence of jurisdiction
 - (ii) Ad Irregular application
 - (iii) Ad Irregular prayers

[11] I must state that the parties argued the point *in limine* on jurisdiction only and the other two points were abandoned by the 1st and 2nd respondents. This ruling is therefore on the point *in limine* on jurisdiction only.

ISSUE FOR DETERMINATION

[12] The issue for determination is on whether this Court has jurisdiction to entertain this matter or not owing to the fact that the dispute pertains to land situate on Eswatini Nation Land.

THE 1ST AND 2ND RESPONDENTS' CASE

[13] Mr. M. Tsambokhulu who appeared for the 1st and 2nd Respondents respectively submitted that the Applicant relies on two rulings from the 3rd Respondent (the Umphakatsi) and also a ruling made by the Ndabazabantu, the King's Liaison Officer.

[14] Counsel further submitted that the purpose of these proceedings is meant to give effect to the rulings of the traditional structures. Mr. Tsambokhulu submitted that this matter fall within the jurisdiction of the Swazi Court and therefore this Court does not have jurisdiction to deal with this matter. He submitted that Section 11 (b) of the Swazi Courts Act No. 80 of 1950 provides that only the Swazi Courts have jurisdiction to deal with the right to occupy land on Eswatini National Land. He submitted further that even The Constitution of the Kingdom of Eswatini Act No. 001 of 2005 (the Constitution) Section 151 (3) which provides that this Court does not have original jurisdiction in matters in which a Swazi Court has jurisdiction. Counsel further submitted that the matter is *lis pendens* before the

traditional structures, and therefore this Court is urged to uphold the point *in limine* on lack of jurisdiction.

APPLICANT'S CASE

- [15] On the other hand Counsel for the Applicant Mr. E. Shabangu submitted that the application before Court is purely a civil one in nature and that this Court has inherent jurisdiction to deal with this matter as per Section 151 of the Constitution. Mr. Shabangu argued further that this Court has jurisdiction to deal with this matter because it is not exercising original jurisdiction but merely granting a final interdict in the matter in light of the existing decisions of the customary structures in the matter.
- [16] Mr. Shabangu argued further that the Applicant seeks a final interdict against the Respondent to evict them from the home at Luve area. Counsel argued further that it is trite law that this Court should exercise a judicious approach in the exercise of its discretionary power in granting a final interdict. Counsel submitted further that the Applicant has established the trite requirements for this Court to grant the interdict prayed for by the Applicant.

ANALYSIS OF THE MATTER AND THE LAW APPLICABLE

- [17] It is common cause that the matter *in casu* involves a dispute on land which is situate on Eswatini Nation Land at Luve area under the Emseni/Ekutsimleni Royal Kraal in the Manzini District.
- [18] It is also common cause that the Applicant seeks a final interdict against the respondents from residing at his parental homestead situate at Luve.

[19] It is further common cause and most importantly that this dispute has been dealt with at length before the Applicant's family council and also escalated to the Umphakatsi namely the Emseni Royal Kraal where certain orders were issued by the aforesaid traditional structures. This matter has also been dealt with by the Magistrate's Court on about three (3) occasions, and in all these instances the Magistrate's Court referred the matter to the family council and to the 3rd Respondent.

[20] It appears that the Applicant is of the view that the Respondents are refusing to comply with the order of the Emseni Royal Kraal, and therefore seeks the intervention of this Court to enforce an order which was issued by the 3rd Respondent.

[21] The question is whether this Court has original jurisdiction to issue the interdict as prayed for by the Applicant. This is the issue which this Court must determine.

[22] It has repeatedly been laid down in this Court and in the Supreme Court that disputes of land situate on Eswatini Nation Land falls squarely to be dealt with by the relevant traditional structures in accordance with siSwati Law and Custom. Such disputes are the prerogative of Umphakatsi wherein the land is situate, of course, regard being had that any aggrieved party has the right to appeal the decision of the traditional structures through the relevant traditional appellate structures. Further, there is provision in the Constitution which oust the original jurisdiction of this Court from adjudicating on this matter, and that is Section 151 (3) (b) which 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.”

[23] *In casu* this Court is being requested to issue a final interdict based on an order issued by the 3rd Respondent, which the 1st and 2nd Respondents are allegedly defying. Traditional structures themselves have their own mechanisms by which their orders are enforceable. This Court must at all material times possible avoid to interfere or meddle into the affairs of traditional structures in particular where enforcement of orders issued by traditional structures.

[24] In the case of **Sigonyela Mamba v Sicelo Mahlalela and Another**, **High Court Case No. 1860/2021**, Langwenya J stated as follows at para 26-27:-

[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 mechanism. 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’s decision and by extension rubberstamp the 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 and 9 Others (925/2016) [2017] SZHC 227 (30 October 2027)** 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 Masundwini 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 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.’

[25] In the case of **Mkhulu Khanyile v Allison Nsingwane and Two Others (756/2012) [2014] SZHC 67 (3 April 2014)** MCB Maphalala J (as he then was) stated as follows at paragraphs 11 and 13 when dealing with a similar issue of dispute of land situate on Eswatini Nation Land, and I quote:-

[11] The Supreme Court in the case of *Maziya Ntombi v Ndzimandze Theminkhosi* Appeal Case No. 2/2012 emphasized that it is a trite principle of our law that the High Court has no 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 Court Act as well as the Constitution.

[13] The Constitution further recognizes and adopts Swazi Law and Customs as part of the law of Swaziland in addition to the Roman Dutch Common Law. Section 252 of the Constitution provides the following:

“252 (1) Subject to the provisions of the Constitution or any other written law the principles and rules that formed, immediately before the 6th September 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the Common Law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a Statute.

(2) Subject to the provisions of this Constitution, the principles of Swazi Customary Law (Swazi Law and Custom) are hereby recognized and adopted and

shall be applied and enforced as part of the law of Swaziland.”

[26] It is common that disputes that are dealt with at traditional structures level get escalated to the Swazi Courts which are established in terms of the Swazi Courts Act No. 80 of 1950 (the Swazi Courts). *In casu* the Applicant has a right to refer the matter to the 3rd Respondent for contempt of their order by the 1st and 2nd Respondent, and the 3rd Respondent as the Umphakatsi has its own mechanisms of enforcing its orders. In fact the Applicant and the 1st and 2nd Respondents have a right to escalate the matter to Ndabazabantu and eventually to the Swazi Courts if they so wish. Whatever decision taken by the Swazi Court is appealable to the Swazi Courts Appeal structures. The matter can only be dealt with by this Court either as an appeal or on review as sanctioned by Section 151 (3) (b) (*supra*) of the Constitution. It is my considered view that this matter is therefore prematurely before this Court.

[27] The Swazi Courts are established in terms of Section 3 (1) which provides as follows:-

“3 (1) By warrant under his hand, the iNgwenyama may recognize or establish within Swaziland Swazi Courts which shall exercise jurisdiction over members of the Swazi nation within such limits as may be defined by such warrant.”

[28] Section 11 of the Swazi Courts Act establishes and defines its jurisdiction in this manner:-

11. Subject to the provisions 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 or 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. 79/1950 or any law repealing or replacing or 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.

[29] Section 32 of the Swazi Courts Act establishes the appeal structures of the Swazi Courts as follows:-

“Courts of Appeal

32. The iNgwenyama may, by warrant under his hand, recognize any Swazi Court or establish such Swazi Courts of Appeal as he may think fit, or a Higher Court of Appeal from any specified Swazi Court in Swaziland in respect of any of the cases arising therein.”

[30] I have referred to the Swazi Courts Act to demonstrate that litigants in matters dealt with by the traditional structures in accordance with siSwati Law and Custom have full rights of appeal on any aspect of their respective cases. If a litigant refuses to comply with an order of a traditional structure, as is the case *in casu*, that litigant has a right to pursue the enforcement of the order or orders of the traditional structure through the clearly defined appeal structures. This Court can only exercise review or appellate jurisdiction where such traditional matters are properly brought before it in such manner. This Court has no inherent or original jurisdiction in matters involving disputes of land situate in Eswatini Land.

[31] Consequently, and having considered the matter and this being a matter involving close family members, I shall order that each party is to pay its own costs.

[32] In the premises, I hand down the following order:-

1. The point *in limine* on this Court's lack of jurisdiction to deal with this matter is hereby upheld on the basis of Section 151 (3) (b) of The Constitution of the Kingdom of Eswatini Act No. 001 of 2005.
2. Consequently, the application is dismissed.
3. Each party is to pay its own costs.


N.M. MASEKO
JUDGE