

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 122/2016

In the matter between

PRINCE BHUTANA DLAMINI

Applicant

and

CHIEF NKAMANE MKHATSHWA

Respondent

In re:

CHIEF NKAMANE MKHATSHWA

1st Applicant

TISUKA TAKANGWANE

2nd Applicant

and

MONGI JELE

1st Respondent

MUPHO DLAMINI

2nd Respondent

NDIPHETHE DLAMINI

3rd Respondent

THAMI XABA

4th Respondent

PITOLI SHABANGU

5th Respondent

MATHANDI NDLOVU

6th Respondent

THEMBA DLAMINI

7th Respondent

NDENDA DLAMINI

8th Respondent

SABELO DLAMINI

9th Respondent

KHISIMUSI DLAMINI

10th Respondent

VUSI MAGAGULA

11th Respondent

THABO ZWANE

12th Respondent

THEMBA ZWANE	13th Respondent
MAZIYA (UNKNOWN)	14th Respondent
DAN SIMELANE	15th Respondent
GELI MATHOBA	16th Respondent
MANCOBA DLAMINI	17th Respondent
BONGANI DLAMINI	18th Respondent

**ANY PERSON WHO UNLAWFULLY
ALLOCATES A HOMESTEAD AT FARM
NO. 9 “THE PEBBLES BLOCK” (NORTH)
SITUATE AT MONENI** **19th Respondent**

**ANY PERSON WHO UNLAWFULLY
CONSTRUCTS HOMESTEAD AT FARM
NO. 9 “THE PEBBLES BLOCK” (NORTH)
SITAUTED IN MONENI** **20th Respondent**

**THE NATIONAL
COMMISSIONER OF POLICE** **21st Respondent**

JUDGMENT

Citation:

Prince Bhutana Dlamini v. Chief Nkamane Mkhathswa & others (122/2016) [2023] SZHC 304(30 October 2023).

Preamble:

Civil law- Interdict- Rule nisi- Requirements for the grant of an interdict and confirmation of a rule nisi in this matter which has been deliberated upon by a competent authority in accordance with siSwati law

and custom since the matter involve a dispute of allocation of land on a private farm under the administration of Tisuka Takangwane situate within the boundaries of Lwandle Chiefdom.

CORAM: N.M. MASEKO J.
FOR APPLICANTS: V. KUNENE AND M DLAMINI (Main matter)
FOR RESPONDENTS: NO APPEARANCE

DATE HEARD: 5TH OCTOBER 2018

DATE OF WRITTEN REASONS: 30th OCTOBER 2023

[1] On the 3rd October 2018 the 1st Applicant in the main matter filed a Notice of Set down for the Registrar of this Court to enrol the matter on the 5th October 2018 seeking the following relief: -

1. *Removal of Court Order issued on the 21st April, 2016, "staying execution of the Court Order issued on the 31st January 2014 for Case No. 122/14.*
2. *That the Court Order issued on the 31st January 2014 for Case No. 122/14 be confirmed;*
3. *Make the confirmatory affidavit of Vincent Mhlanga an Order of this Court;*
4. *Kindly place the matter on the roll accordingly.*

[2] Attached to the Notice of set down is the confirmatory affidavit of Mr. Vincent Mhlanga as well as the Order of the 31st January 2014 in Case No. 122/14.

[3] The Notice of set down was duly served on L. R. Mamba Attorneys at 11:43 hours on the 3rd October 2018, and it was also served on

Robinson Bertram Attorneys at 11:20 hours also on the 3rd October 2018.

- [4] On the 5th October 2018 when the matter appeared before me on the contested roll in Court H, there was no notice to oppose the granting of the prayers which the Applicant in the main matter was seeking. There was also no appearance for and on behalf of the Respondents in the main matter.
- [5] I granted the prayers as per the Notice of set down dated the 5th October 2018 after having satisfied myself that the said prayers were deserving and competent to be granted.

ANAYSIS OF THE MATTER: THE HISTORY OF THIS MATTER IS AS FOLLOWS: COURT ORDER 31ST JANUARY 2014.

- [6] On the 31st January 2014, His Lordship M.C.B. Maphalala J (as he then was) granted the following order: -

1. ***That the above Honourable Court dispenses with the rules relating to the manner of service, time limits and the form are dispensed with and this matter is to be heard as one of urgency.***
2. ***That the Applicant's non-compliance with the rules of this Honourable Court is condoned.***
3. ***Granting a rule nisi calling upon the Respondents to show cause on the 17th February 2014 why an Order in the following terms should not be made final: -***
 - 3.1. ***Interdicting and restraining the 1st to 11th Respondents and any other person acting on the***

authority of the 1st to 11th Respondents or anyone else other than the lawful authority from allocating land at Farm 9 “the Peebles Block (North), situate at Moneni area and which is under the authority of the 1st Applicant.

- 3.2. Interdicting and restraining the 1st to 11th Respondents and any other person acting on the authority of the 1st to 11th Respondents or anyone else other than the lawful authority from calling meetings at Farm No. 9 “the Peebles Block” (North), situate at Moneni area and without the authority of the 1st Applicant and from regarding themselves as Bandlancance of Moneni.*
- 3.3. Interdicting and restraining the 1st to 11th Respondent and any other person acting on the authority of the 1st to 11th Respondents or anyone else from holding themselves as the lawful authority of Farm No. 9 “the Peebles Block” (North) situated at Moneni area and which is under the authority of the 1st Applicant.*
- 3.4. Interdicting and restraining the 12th to 20th Respondents or any other person acting on the authority of the 11th to 19th Respondents or anyone else acting on the authority of the 11th to 19th Respondents or anyone else than the Applicant from continuing with the construction of the illegal homesteads and to comply with the decision of the Ludzidzini Royal Council.*

3.5. Demolishing all illegal homesteads that has been constructed in defiance of the ruling of the Ludzidzini Royal Council and that of the Applicant.

3.6. Ordering and authorising the NATCOM or any member of the Royal Swaziland Police Services to ensure that the Order is effectively complied with by arresting and charging anyone who contravenes this Order and assist in the service of the said Order and Application.

[7] On the 12th April 2016 an Order was issued by His Lordship M.R. Fakudze J in the following terms: -

“Having heard Counsel for the parties and by consent of both parties it is hereby ordered that: -

The Order and judgment issued by Mavuso A.J. under Case No. 122/14 is hereby stayed pending the finalisation and resolution of the dispute between the Indlunkhulu of Moneni and Chief Nkamane Mkhathshwa by the Ingwenyama in terms of Swazi Law and Custom.”

This is the Order which is the subject of Prayer 1 of the notice of set down dated the 3rd October 2018. The Order of the 12th April 2016 was staying execution of the order of the 31st January 2014 granted by His Lordship M.C.B. Maphalala J. (as he then was), which I have referred to above.

[8] It is common cause that when M.C.B. Maphalala J. (as he then was) issued the Order of the 31st January 2014, the Ludzidzini Royal Council had already pronounced on the dispute between Chief Nkamane Mkhathshwa and Prince Bhutana Dlamini. The matter had already been dealt with by the appropriate traditional structure seized with the

jurisdiction to deal with such matters in accordance with Siswati Law and Custom.

[9] The ruling which the Ludzidzini Royal Council delivered on the 15th October 2010 was to the effect that (see page 20 of the Book of Pleadings Paragraph 5 – founding affidavit of Chief Nkamane Mkhathshwa).

- Moneni is under Lwandle chiefdom;
- That Polycarp Dlamini is not a chief but Umtfwanenkhosi Lomkhulu;
- That no construction should happen on the farm, the “Peebles Block” (North) without authority of the 1st Applicant who is the overseer of the Farm.
- Owing to the inspection in loco conducted in 2012 there the Chairperson of the Ludzidzini Royal Council reiterated that the construction of structures should stop “akume kukhalisa sandvo”.
- That several warnings were made to the Respondents regarding their unlawful construction activities but to no avail.

[10] When the Applicant’s Attorneys launched the urgent application which resulted to the Order of M.C.B. Maphalala J (as he then was), the Crown Counsel Vusi Kunene stated as follows in the preamble of the Certificate of Urgency at pages 2 – 3 paragraphs 3 – 4 of the Book:

“3. The matter is urgent by virtue of the fact that the Respondents are continuing with the allocation and construction of illegal homesteads on His Majesty’s farm despite warnings from the police and from both higher traditional authorities and from the office of the Attorney General to stop the construction and allocation of illegal homesteads on the farm. Further, the 1st to 11th Respondents continues calling meetings for the community at Moneni without any authority, as they continue regarding themselves as Bandlancane of Moneni yet the

Ludzidzini Royal Council's ruling states clearly that there is no Umphakatsi at Moneni and despite the fact that even Polycarp Dlamini whom they regard as their Chief consented in Court that he is not a Chief of Moneni and that Moneni is under Lwandle Chiefdom.

4. ***If the matter were to take its normal cause, Applicant would suffer irreparable harm since by that time a lot of structures would have mushroomed and the community would have been misled to the effect that the Respondents have authority at Moneni, such will end up leading to chaos and rendering the area of Moneni ungovernable.***

[11] At pages 21 – 25 paragraphs 5.5, 5.7, 6.1, 6.1, 7.1, 7.2, 7.3, 7.4, 8, 9, 11 Chief Nkamane Mkhathshwa states as follows: -

“5.5. Further, may I state that the matter involving Moneni and Lwandle has gone through all the traditional structures and when the application against Polycarp Dlamini was made, confirmatory affidavits were also annexed as evidence that traditional authorities have ruled that Moneni is under Lwandle. I beg leave to refer the Court to the Affidavits under Case No. 2167/11. May I state that among those affidavits is the affidavit of the late Ntfontjeni Dlamini who was Ndabazabantu of Manzini at the time. I apply that the affidavit be incorporated herein as evidence in this matter.

5.7. May I further state that in 2012, after the Applicants have complained to the Ludzidzini Royal Council that the Respondents were not complying with the ruling that Moneni is under Lwandle, an inspection on the

farm was conducted by the Ludzidzini Royal Council which was represented by the Chairperson of the Ludzidzini Royal Council. Also present was the 2nd Applicant and myself with the Moneni representatives. After being shown the boundaries of the farm, the Chairman, of the Ludzidzini Royal Council reiterated that there should be no construction on the farm "sandvo asime kukhala" as it belongs to His Majesty. Further it was reiterated that the 1st Applicant have the mandate overseeing of the Farm.

6.1. *May I bring to the attention of this Court that the land in question is a Farm, being Farm Remainder 9 Moneni. The owner of the Farm is Ingwenyama in Trust for the Swazi Nation. I beg leave to refer this Honourable Court to Annexure "LW3" being a copy of the Title Deed.*

6.2. *The Farm in question is under the custodianship of Tisuka TakaNgwane. My late father Chief Siganda whom I succeeded, and Indvuna of Lwandle of that time and who is still the Indvuna of Lwandle Dr. Ben M. Sibandze and the Inner Council of Lwandle were assigned by His Majesty the Late King Sobhuza II to guard the boundaries of the farm in question.*

I beg leave to refer to the Court to the confirmatory affidavits of Indvuna of Lwandle and that of Mr. T.N. Nyawo who is the General Manager of Tisuka TakaNgwane.

- 7.1. ***The Respondents are interfering with the administration of His Majesty's Farm by allocating people land on the farm without my authority. Despite repeated warnings from myself and my Libandla, from the Tisuka TakaNgwane and also from the office of The Attorney General, the Respondents are continuing with defying my authority at Moneni.***
- 7.2. ***Further, this is despite that Polycarp Dlamini did consent to this Court that he is not Chief of Moneni and that he has no authority over Moneni, the allocation and construction of homesteads are continuing on the farm without the approval of the relevant authority despite repeated warnings to stop the allocation and construction.***
- 7.3. ***As such, I apply for demolishing of all the structures that are constructed on the farm without my authority as overseer of the farm. This is so because every time a new homestead is constructed illegally, as Umphakatsi we always inform the person doing the construction to stop but the people do not heed to our instructions and they continue with the illegal construction. I also apply for the prosecution of those allocating land on the farm for their defiance of traditional authorities.***
- 7.4. ***May I state that the 1st to 11th Respondents who hold themselves as part of Moneni Inner Council or "Bandlancane wase Moneni" continue allocating land to people illegally and calling and holding meetings at Moneni without my authority or knowledge. The***

latest of these meetings was held on Saturday 25th January at Moneni.

- 8. I submit that if the Respondents are allowed to do as they please by holding themselves as Bandlancane and the lawful authority of Moneni, Applicants will suffer irreparable harm in that such conduct is setting a bad precedent and my authority as Chief and Overseer of the farm is undermined.*
- 9. Other than the remedy that Applicant is seeking there is no alternative remedy available which can obviate the anticipated damage which has the potential of causing defiance of the traditional authorities' order by the Respondents not to continue with the illegal allocation and construction. Further the holding of meetings which is the sole prerogative of the Umphakatsi is being undermined. I cannot be afforded substantial redress at a hearing in due course because by that time the harm that I want to forestall would have already occurred as the Respondents are continuing with their defiance of traditional authorities.*
- 11. As the Applicant I have no other remedy available except to approach the Court for the interim order because already higher traditional authorities namely the Ludzidzini Royal Council have ruled on this matter that Moneni is not a chiefdom and that Polycarp Dlamini is not a Chief of Moneni. The question that needs to be answered by the Respondents is that since even Polycarp Dlamini is not Chief of that area, under which Umphakatsi are they working as Bandlancane. Further, the fact that the area is on a farm, if they have authority from the owner of the farm to allocate land to people.*

[12] Amongst other affidavits filed in this matter in support of the Applicant's case is the confirmatory affidavit of Timothy Velabo Mtsetfwa, the Chairman of the Ludzidzini Royal Council, who states as follows at pages 37 – 38 paragraph 2.1: -

“2.1. I have read the Founding Affidavit deposed to by the Applicant herein and wish to confirm its contents in as far as they relate to the issue in question, the issue of illegal construction of structures on His Majesty's farm situated at Moneni.

In particular, I confirm that the Ludzidzini Royal Council deliberated on the matter and ruled that Moneni is under Lwandle and that Polycarp Dlamini is not a Chief of Moneni but only Umtfwanenkhosi Lomkhulu and as such has no authority to allocate land on the farm. I further confirm that I toured the farm together with the relevant parties in 2012 where I reiterated that “asime sandvo”.

[13] There is also the confirmatory affidavit of Dr. Nicholas Thandokuhle Nyawo found at pages 29 – 31 paragraphs 1 – 2 of the Book wherein he states as follows: -

“(1) I am an adult Swazi male and General Manager of Tisuka Taka Ngwane, the 2nd Applicant herein and under whose custody the farm in question is on behalf of His Majesty who is the owner of the farm in question.

(2) In particular, I confirm that the farm in question or where the illegal allocation and construction is happening belong to Ingwenyama. I further confirm that the matter has been dealt with by the traditional structures, in particular, The Ludzidzini Royal Council where it was ordered that Moneni is under Lwandle and that Polycarp Dlamini is not chief but Umtfwanenkhosi Lomkhulu. It was further ordered that no construction should happen on the farm without the authority of the 1st Applicant who is the overseer of the farm. I further confirm that the inspection on the farm was also conducted in 2012 where the Chairman of the Ludzidzini Royal Council reiterated that the construction should stop. “akume kukhalisa sandvo”. I further confirm that several warnings have been made to the Respondents regarding their illegality to no avail.”

[14] There is also the confirmatory affidavit to Ntfonjeni Dlamini which gives a historical perspective of this matter and is found at page 42 paragraph 2 of the Book, and it reads as follows: -

‘2. I have read the affidavit of Chief Nkamane Mkhathshwa and wish to confirm its contents in so far as they relate to me. In particular, I confirm that in 2005 I was Court President at Manzini National Court. The issue in question was reported to my office. I then called a meeting between the Council from Lwandle Royal Kraal and the children of the late Prince Mshoshi. Lonyezi stated that they knew Applicant as their Chief and he was supported by Gungubele and Bhutana. I then advised the parties to go back home and resolve the dispute because they are relatives.’

[15] Chief Nkamane Mkhathshwa has also attached a copy of the Court Order of Her Lordship M. Dlamini J which she handed down on the 18th

September 2012 under Case No. 2167/2011, which is framed as follows: -

***“Chief Nkamane Nhlonipho Mkhathswa
Polycarp Dlamini***

***Applicant
Respondent***

***Held at Mbabane on the 18th September 2012 before the
Honourable Judge M. Dlamini J.***

For Applicant: T. Vilakati

For Respondent: M. Mabila

By Consent between the parties, it is hereby declared that: -

- 1. The Respondent is not a Chief of Moneni Area or any area in the Kingdom of Swaziland.***
- 2. The Respondent has no authority to discharge duties of a Chief.***
- 3. The matter is postponed sine die***

***GIVEN UNDER MY HAND AND SEAL AT
MBABANE ON THE 28TH DAY OF
SEPTEMBER, 2012.***

(SIGNED

REGISTRAR OF THE HIGH COURT

[16] At pages 44 – 48 of the Book, Chief Nkamane has attached the Title Deed of the Farm in question. It is described as follows at page 45:-

“AND the Appearer declared that his said Principal, the said HENDELIZA TOWNSHIPS (PROPRIETARY) LIMITED, had on the 13th day of July 1978 truly and legally sold, and that the Appearer, did by these presents cede and transfer in full and free property to and on behalf of

THE INGWENYAMA IN TRUST FOR THE SWAZI NATION

his successors-in-title or assigns:-

CERTAIN: *Remaining Extent of the Farm “THE PEBBLES BLOCK (NORTH) No. 9, situate in the Manzini District, Eswatini.*

MEASURING: *as such 384, 4843 (Three Eight Four Comma Four Eight Four Three) Hectares.*

EXTENDING: *as Crown Grant No. 8/1912 with diagram annexed hereto, made in favour of Swaziland Corporation Limited on the 27th day of February, 1912 and several subsequent deeds, the last of which is Deed of Transfer No. 23/1972 made in favour of the Appearer’s said principal on the 27th day of January, 1972, will more fully point out.”*

- [17] It is common cause that Chief Nkamane has also annexed documentary evidence detailing numerous attempts to stop and prevent the unlawful allocation and construction of structures on the farm “Peebles Block” (North), without success. The office of the Attorney General and the 2nd Applicant have also conscientized the Respondents about the unlawful allocation of land and construction of houses/ homesteads within the farm, however Chief Nkamane states that all these efforts fell on deaf

ears. From pages 51 – 55 of the Book Chief Nkamane has attached pictures of about ten (10) construction sites within the “Peebles Block” (North) Farm which he alleges were unlawfully sanctioned by the Respondents.

[18] On the 21st May 2018, Mr. Vincent Mhlanga deposed to a confirmatory affidavit in this matter and states as follows in paragraphs 1 – 5:-

- “1. I am an adult Swazi male of Lozitha and I am employed by the King’s Office as the Chairman of Tisuka Taka Ngwane.**
- 2. I am duly authorised to depose to this affidavit by virtue of my position as aforesated.**
- 3. The purpose of this affidavit is to put certain issues into perspective more particularly the decision of the Ingwenyama with regards to the issue between Indlunkhulu of Moneni and Chief Nkamane Mkhathshwa and the status of Farm No. 9 “the Peebles Block” (North), Moneni.**
- 4. I do confirm that it is the decision of Ingwenyama that Farm No. 9 “the Peebles Block”, is under the administrative authority of Tisuka Taka Ngwane.**
- 5. It is further the decision of the Ingwenyama that Chief Nkamane Mkhathshwa and Prince Mshoshi Dlamini must live together in the area like their forefathers did.”**

[19] I must state that this affidavit of Vincent Mhlanga compliments the affidavits of Chief Nkamane and Dr. N. T. Nyawo on the administration of the Farm “Peebles Block” (North). This affidavit further compliments the Ludzidzini Royal Council’s decision on the matter. Tisuka Taka Ngwane and Tibiyo Taka Ngwane are the only institutions in the country which have custody and administrative powers over farms held by the

Ingwenyama in trust for Emaswati and they are always assisted and depend on the Chief of the area where the particular farm is situate. In casu the farm is within the Lwandle chiefdom under Chief Nkamane.

THE RESPONDENTS' CASE

[20] The Order of M.C.B. Maphalala J. (as he then was) was served on the Respondents on the 31st January 2014, and on the 31st January 2014, the Respondents filed a Notice of Intention to Oppose the application. However, on the 5th March 2014, the Respondents' Attorneys of record filed a Notice of Withdrawal as Attorneys of Record in the matter, and whereafter on the 20th March 2014 a Notice of Re-Appointment as Attorneys of Record was filed by the same law firm, together with an Answering Affidavit deposed to by Pitoli Shabangu, the 5th Respondent who describes himself as the Moneni Area Runner (Umgijimi) and Umsumpe of the area. From pages 84 – 88 paragraphs 4 – 4.4. Pitoli Shabangu raises the following points in limine: -

- Dispute of fact;
- Lack of jurisdiction;
- Lack of interdict requirements; and
- Lack of urgency.

AD DISPUTE OF FACTS

[21] The 5th Respondent states that this matter is fraught with disputes of facts which cannot be resolved on the papers as they stand because under Case No. 1662/2013 this Court ruled that this matter cannot be resolved on affidavit.

[22] The 5th Respondent states that the 1st Applicant is not a Chief of Moneni and has never been a Chief of Moneni at all, but he is a Chief of Lwandle area. He states further that the area in question is the "Peebles Block",

Rem 9 and 938 which was allocated by the elders of the county to Prince Mshoshi, where he established his home as the senior prince, in turn the prince handed over to the elders of the country 100 (One Hundred) head of cattle as a token of appreciation.

- [23] The 5th Respondent states further that ever since the existence of Moneni area, the Chief of Lwandle has never had authority over people of Moneni area. Further that the Chief of Lwandle was never installed, put and/or handed over to the people of Moneni area as their Chief. Further that the people of Moneni area have always been under the leadership of the prince who administer the land through his libandla, "Bandlancane". He states further that this has been the case for over 100 years and that none of the homesteads or residents in the area were put by the 1st Applicant, but that all these people were allocated land by the prince through his libandla.
- [24] It is my considered view that this point in limine has no merit because it seeks to suggest that this Court has to deal with the dispute on the merits, which is not the case, instead, Chief Nkamane and 2nd Applicant are seeking for an interdict and demolition of the structures unlawfully built within Farm "Peebles Block" (North) which is within the custodianship of Lwandle chieftdom together with Tisuka TakaNgwane, an organisation that has control and custody of farms registered in the Ngwenyama in Trust for Emaswati. The 5th Respondent is in my view trying to resuscitate arguments which should have bene made /or were made before the Ludzidzini Royal Council whose chairman was T.V. Mtsetfwa who filed an affidavit in support of Chief Nkamane and the 2nd Applicant Tisuka Taka Ngwane. The dispute of custodianship and ownership of the farm "Peebles Block" (North) was settled by the Ludzidzini Royal Council in October 2010 and therefore this Court cannot venture into that territory because it is the exclusive domain of the traditional structures and has as a matter of fact been dealt with to finality, and what remains now is for the Respondents to comply with

the ruling of the Ludzidzini Royal Council eloquently outlined and dealt with by T.V. Mtsetfwa, Dr. N.T. Nyawo, Chief Nkamane himself, Ntfontjeni Dlamini and Vincent Mhlanga.

- [25] In fact at paragraphs 4.1. 2.3 page 86 of the Book, the 5th Respondent states that the Applicants did not even join Polycarp Dlamini in these proceedings yet he has a vested interest in the outcome of the matter. This argument has no merit because on the 18th September, 2012 under Case No. 2167/2011 wherein Chief Nkamane is the Applicant and Polycarp Dumisa Dlamini, the Respondent, the said Polycarp Dlamini consented to an Order that: -
- He is not a Chief of Moneni area and any area in the Kingdom of Swaziland; and
 - He has no authority to discharge duties of a Chief.

This Order has been fully recorded herein in the preceding paragraphs of this judgment. This point in limine is without merit and is dismissed. Also, the point in limine on urgency has no merit, it is also dismissed. The Applicants were entitled to be heard on urgency if there was continued defiance of the Ludzidzini Royal Council's order.

AD LACK OF JURISDICTION

- [26] Again the 5th Respondent and his co-Respondents seem to suggest that the Applicants seek adjudication of the matter on the merits, however that is not the case *in casu*. Chief Nkamane and Tisuka Taka Ngwane are not seeking for adjudication of this matter on the merits, instead they say, the Ludzidzini Royal Council dealt with this matter way back in October 2010 but the Respondents are continuously and systematically defying the Order or Ruling of the said Ludzidzini Royal Council by unlawfully allocating land within the farm "Peebles Block" (North). Chief Nkamane and Tisuka Taka Ngwane are therefore seeking

for an interdict from this Court which this Court has jurisdiction to hear and determine. It is common cause that this Court does not have jurisdiction to hear and determine a matter which concerns a dispute of land situate on Eswatini nation land, since that is the prerogative of traditional structures in accordance with the Siswati law and custom. This Court can only deal with a review or appeal from the appropriate levels of adjudication within the traditional structures and/or the Swazi Courts duly established in terms of the Swazi Courts Act No. 80 of 1950. Again, this point in limine on jurisdiction has no merit and is dismissed.

AD LACK OF INTERDICT REQUIREMENTS

- [27] The 5th Respondent states that Chief Nkamane and Tisuka Taka Ngwane have failed to sufficiently allege and prove the requirements of a final interdict and yet the orders sought are of a nature of a final interdict. He states that the allegations in the founding affidavit have been insufficiently pleaded and cannot meet the standard required for the grant of an interdict. He continues to state that, most of all, the Applicants have failed to show they have a clear right over the area in question, i.e., the Farm “Peebles Block” (North) situate at Moneni, and further that the Applicants have not stated that there is imminent danger and/or that the Respondents will hold a meeting in the near future. He states further that **“in any event Respondents are perfectly entitled to hold meetings at Moneni area and not at Lwandle area where 1st Applicant has authority.”** (Page 88 last two lines of paragraph 4.3 of the Book).
- [28] I do not believe that Chief Nkamane and Tisuka Taka Ngwane have not satisfied the requirements for the grant of the interdict as alleged by the 5th Respondent, Pitoli Shabangu. I say this for the following reasons: -
- (i) At pages 22 – 25 of the Book, Chief Nkamane takes his time outlining the reasons why it would be in the interest of justice to

grant the interdict because of the facts *in casu*. He is a Chief of Lwandle area including Moneni where the Farm "Peebles Block" (North) is situated. Where there is disturbance in the administration of his chieftom which is caused by the Respondents, the Applicants therefore have a clear right to approach this Court for an interdictory relief to prevent further harm in the form of unlawful allocation of land by the Respondents resulting in illegal construction of homesteads and other structures within the boundaries of the Farm "Peebles Block" (North);

- (ii) Chief Nkamane and Tisuka Taka Ngwane states further that they have no alternative remedy other than to approach this Court for the grant of the interim interdict against the Respondents from continuing with the unlawful allocation of land and illegal construction of structures on the said farm by the aforesaid Respondents, who have been ordered not to do so by the Ludzidzini Royal Council, however, the 5th Respondent, Pitoli Shabangu, continue to defy the authority and Order of the aforesaid Ludzidzini Royal Council;
- (iii) Chief Nkamane and Tisuka Taka Ngwane states further that the balance of convenience favours the grant of the interdict against the Respondents because the Ludzidzini Royal Council ruled that Moneni area fall under Lwandle Chieftom and that the aforesaid Respondents should not allocate land in the farm "Peebles Block" (North), Chief Nkamane states further that despite the ruling from the appropriate higher traditional structure duly exercising Siswati law and custom, the Respondents continue to defy the order by continuing to allocate land to people with impunity. He argues that it is therefore in the interest of justice that this Court grants the interdictory interim relief against the Respondents.

- [29] Chief Nkamane has annexed to his founding affidavit the letter of appointment as a Chief of Lwandle area in terms of Section 7 of The Swazi Administration Order No. 6/1998. This authority is found at page 50 of the Book and herein marked Annexure “LW4”.
- [30] Authority is legend that Chiefs who are lawfully appointed by the appointing authority are important traditional institutions which support the Monarchy. Chiefs are an extension of the appointing authority in the administration of their respective chiefdoms for and on behalf of the appointing authority. In the case of **BHEKWAKO DLAMINI AND 5 OTHERS v. CHIEF ZULELIHLE MASEKO (33/2014) [2014] SZSC 84 (03 DECEMBER 2014)** M.C.B. MAPHALALA JA (as he then was) stated as follows at page 6 paragraph 8

“Section 233 of the Constitution of the Kingdom of Eswatini Act No. 001/20005 (the Constitution) clearly and unequivocally outline the important role which chiefs play in the administration of their chiefdoms in accordance with Siswati Law and Custom and on behalf of the Ingwenyama. This Section (233) provides as follows: -

- 233. (1) Chiefs are the footstool of Ingwenyama and Ingwenyama rules through the Chiefs;**
- (2) The Ingwenyama may appoint any person to be Chief over any area;**
- (3) The general rule is that every Umphakatsi (Chief’s residence) is headed by a Chief who is appointed by Ingwenyama after the Chief has been selected by the Lusendvo (family council) and shall vacate office in like manner;**

- (4) ***The position of a Chief as a local head of one or more areas is usually hereditary and is regulated by Swazi Law and Custom;***
- (5) ***Unless the situation otherwise requires a Chief shall assume office at the age of eighteen years or so soon thereafter as the period of mourning comes to an end;***
- (6) ***A Chief, as a symbol of unity and a father of the community, does not take part in partisan politics;***
- (7) ***A Chief may be appointed to any public office for which the Chief may be otherwise qualified;***
- (8) ***The powers and functions of Chiefs are in accordance with Swazi Law and Custom and 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.***

[31] At page 11 paragraph 13 of the case of **BHEKWAKO DLAMINI** (supra), His Lordship M.C.B. Maphalala JA (as he then was) continued to state as follows: -

“In the case of Sandile Hadebe v. Sifiso Khumalo N.O. and 3 others Civil Case No. 2623/2011 (HC) at paragraphs 54 and 55, I dealt with the duties and functions of Chiefs as follows: -

- 54. Section 233 provides that Chiefs are the footstool of Ingwenyama and that he rules through Chiefs; they are appointed by Ingwenyama to administer specific and particular areas. Every Chief has an administrative centre called Umphakatsi or Chief’s residence. In the exercise of his powers, functions and duties of his office, a Chief enforces a custom, tradition, practice or usage which is just and not discriminatory;***
- 55. Section 6 of the Swazi Administration Act No. 79 of 1950 provides that the duties of every Chief include the maintenance of order and good government over Swazis residing in the area over which his authority extends in accordance with the Act, in addition to powers vested in him by any other law or by Swazi law and custom which is not inconsistent with any other law;***

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 the members of the chiefdom.

A person affected by the decision of the Inner Council has a right to appeal to the Chief who can either confirm or reverse the decision of the Inner Council.”

- [32] I have referred to the authorities in the preceding paragraphs cited by his Lordship M.C.B. Maphalala JA (as he then was) to demonstrate that Chief Nkamane and Tisuka Taka Ngwane have a clear right to approach this Court for an interdictory relief against the Respondents who are undermining their authority by continuing to allocate land and sanction the construction of houses and structures within Farm “Peebles Block” (North) in violation and defiance of the ruling of the Ludzidzini Royal Council of the 15th October 2010. The 2nd Applicant Tisuka Taka Ngwane an organisation led by Dr. N.T. Nyawo which is the custodian of the Farm “Peebles Block” (North) situate in Moneni. As stated herein above it is common cause that there are only two institutions in the country which are vested with powers of custodianship of private farms which are registered in the Ingwenyama in Trust for Emaswati, and these institutions are Tisuka Taka Ngwane, the 2nd Applicant herein and Tibiyo Taka Ngwane.
- [33] I must state that both Applicants *in casu* have suffered harm by the unlawful allocation of land to people in the aforesaid farm, and which unlawful allocations continue despite the order of the Ludzidzini Royal Council, which defiance has led the Applicants to institute these proceedings.
- [34] The Applicants have no other or alternative remedy to stop or restrain or interdict the Respondents from allocating land in the aforesaid farm unlawfully other than to approach this Court for the grant of the interdictory relief against the Respondents.

- [35] The balance of convenience favours Chief Nkamane as Chief of Lwandle including Moneni, and also favours Tisuka Taka Ngwane, the custodian and administrator of the aforesaid Farm “Peebles Block” (North).
- [36] When dealing with the requirements of a final interdict, M.C.B. Maphalala JA (as he then was) stated as follows at paragraph 17 of the **BHEKWAKO DLAMINI** Case (supra): -

“17. In the case of Maziya Ntombi v. Ndzimandze Theminkosi, Civil appeal Case No. 02/2012 the Supreme Court dealt with the requirements of a final interdict. At paragraphs 41 and 42, I had occasion to say the following: -

“41the leading case in this regard is the case of Setlogelo v. Setlogelo 1914 AD 221 at 227 where Innes C.J. stated the following: -

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy;

43the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear

right to the subject matter of the dispute.”

- [37] *In casu*, the subject matter of the dispute is the unlawful allocation of land by the Respondents in the farm “Peebles Block” (North) despite the Order of the higher traditional structure the Ludzidzini Royal Council which restrained and interdicted the Respondents from allocating land to people to build their homesteads in the aforesaid farm.
- [38] The Ludzidzini Royal Council made it clear that the farm in question is under the jurisdiction of Chief Nkamane whose chieftaincy is at Lwandle and further that Moneni is under Lwandle chieftdom.
- [39] On numerous occasions the Applicants attempted several times to alert the Respondents that Farm “Peebles Block” (North) is a farm held by Ingwenyama in Trust for Emaswati and that Chief Nkamane and Dr. N.T. Nyawo are custodians of the farm in question, however the Respondents did not bother to listen. Further Chief Nkamane states that whenever a person is seen excavating the site in preparation for erecting a structure, his tindvuna would always alert that particular person to stop the aforesaid construction in the farm, but again people would not obey that caution. The 5th Respondent who refers himself as Umgijimi (Runner) and Umsumpe of Moneni area at pages 83 – 84 paragraphs 4.1.11 and 4.1.2.1 admitted that there are over two hundred and fifty (250) homesteads which have been allocated land by the libandla of Moneni and not by the 1st Applicant.
- [40] At paragraph 2 page 83 of the Book, Pitoli Shabangu states as follows:

“(2). I am filing this Answering Affidavit on my behalf and on behalf of the other Respondents in this matter who have duly authorised me to act on their behalf and file this

present affidavit. This is more so because I am the senior person of the area and knowledgeable on all the issues pertaining to this matter.”

[41] The 5th Respondent deposed to his Answering Affidavit on the 10th March 2014, about seventeen (17) months from the 18th September 2012 when Polycarp Dlamini consented to an Order before Justice M. Dlamini J. that he is not a Chief of Moneni area or any area in the Kingdom of Eswatini and also that he has no authority to discharge duties of a Chief.

[42] The 5th Respondent deposed to his Answering Affidavit about three (3) years and five months from October 2010 to March 2014 from the date (October 2010) when the Ludzidzini Royal Council heard and determined the matter.

[43] As I stated earlier that the Applicants attempted on numerous occasions to alert the Respondents from allocating land in the farm resulting to illegal construction of structures without success, I hereby refer to correspondence annexed by the 2nd Applicant in this regard: -

1. Tisuka Taka Ngwane letter to Police Regional Commander – Manzini dated 13th September 2012 (page 56 of the Book).

Dear Sir,

**RE: SQUATTERS ENCROACHMENT IN FARM REM 9
MONENI, NEXT TO ELWANDLE -A PROPERTY UNDER
INGWENYAMA IN TRUST FOR THE SWAZI NATION**

The above matter refers.

This is a farm under the custodianship of Tisuka Taka Ngwane. It is a Trust property held by the Ingwenyama in trust for the Swazi Nation.

Time and again squatters from Moneni have tried to establish illegal settlement of homesteads on this farm without either the King's consent nor Tisuka Taka Ngwane's permission. The Chief, Indvuna ye Lwandle and their Inner Council were assigned by His Majesty King Sobhuza II the responsibility to guard the boundaries of the farm in question so that there won't be any influx of squatters illegally settling on it. Apparently, there are vicious people of Manyenyweni who are making in roads into the farm and they purposely challenge the Elwandle Chiefdom sentinels. We consider this to be an outright travesty of justice on the part of Manyenyweni people.

Hence the Main Committee kindly requests the presence of our respected Regional Commander, and Manzini Station Commander at a meeting scheduled for Friday 20th September 2012 at Tisuka Taka Ngwane starting at 9.00 a.m. All affected parties will be present.

The intention of the meeting is to come up with a lasting solution to this matter.

Thank you for your co-operation in advance in this regard.

Yours faithfully

(Signed)

DR. N. T. NYAWO
GENERAL MANAGER

C.c. Manzini Police Station (Commander).

- [44] Herbstein and Van Winsen in their textbook titled **The Civil Practice of the High Court of South Africa, Vol 2, 5th Edition, 2012** Juta states as follows at S454 – 1457 when dealing with interdicts.

“Interdicts are orders of Court which normally prohibit (prohibitory interdicts) or compel (mandatory interdicts) the doing of a particular act to avoid injustice and hardship. Another purpose of a mandatory interdict is to remedy the effects of unlawful action already taken. The procedure is usually resorted to when other remedies are not available or when the delays associated with the use of other remedies could cause irreparable harm.

It is a procedure which has its origins in the Roman Law and although our courts have on occasion looked to the English law of injunctions, its principles as developed in the Roman Dutch Law of procedure are genuinely accepted and applied by our Courts.

.....an Interdict can either be final if the order is based on a final determination of the rights of the parties to the litigation or interim pending the outcome of proceedings between them.

Normally, the purpose of an interim interdict (also referred to as an interlocutory or temporary interdict or an interdict pendente lite) is the preservation or the restoring of the status quo pending the final determination of such rights.

Interim mandatory interdicts to obtain interim relief may also be granted pending the decisions of administrative tribunals.

.....In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an Applicant must establish:-

- a) Clear right;***
- b) an injury actually committed or reasonable apprehended;
and***
- c) the absence of similar or adequate protection by any other ordinary remedy (see Setlogelo v Setlogelo (supra))***

An Applicant for a temporary interdict will obviously succeed if able to satisfy the above three requirements, but the Court has a discretion to grant a temporary interdict even when a clear right has not been proved. This the Court will do if: -

- a) the right that forms the subject matter of the main action and that the Applicant seeks to protect a prima facie established, even though open to some doubt;***
- b) there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;***

c) the balance of convenience favours the granting of the interim relief; and

d) the Applicant has no other satisfactory remedy.

In deciding whether the interdict sought is temporary or final, the Court will look at a substance rather than form.....”

[45] When the Applicants launched these proceedings in January 2014 when His Lordship M.C.B. Maphalala J (as he then was) granted the interim order on the 31st January 2014 and which this Court eventually confirmed on the 5th October 2018, they (Applicants) were seeking for an interdict to prohibit the Respondents from continuing their unlawful allocation of land and construction of structures on the farm “Peebles Block” (North) situate at near Moneni area, Manzini District.

[46] The Applicants were not seeking for the adjudication of the dispute on land situate on Eswatini nation land. The dispute concerning the custody of the aforesaid farm and the chiefdom wherein the farm is situated was or had already been dealt with by the Ludzidzini Royal Council also referred to as the Ludzidzini Standing Committee on the 15th October 2010 in the presence of all the parties including Polycarp Dumisa Dlamini (see page 150 paragraph 13.3 of the Book). The Ludzidzini Royal Council is one that has jurisdiction to deal with these matters, and it has done so in accordance with Siswati Law and Custom. The consent order between Chief Nkamane and Polycarp Dlamini that Dlamini is not a chief of any area in Eswatini and that he does not have any right to exercise the duties of a Chief in Eswatini had also been issues as demonstrated above.

- [47] These circumstances outlined in the preceding paragraphs strengthens Chief Nkamane and Tisuka's arguments that they have a clear right to the Farm "Peebles Block" (North), and that the Respondents have actually committed injury to the Applicants in the sense that they have allocated land to people in the farm and continue to do so despite having been ordered not to do so by the Ludzidzini Royal Council on the 5th October 2010. The Applicants have further demonstrated that they have no adequate remedy or protection other than to approach this Court for the interdictory relief.
- [48] I have no doubt in my mind that when the interim order of the 31st January 2014 was issued by this Court per His Lordship M.C.B. Maphalala JA (as he then was), the Applicants had proven a *prima facie* right and further their affidavits and confirmatory affidavits clearly established a well-grounded apprehension of the irreparable harm to the Applicants because of the continued unlawful allocation of land despite the order of the Ludzidzini Royal Council. Further the affidavits of the Applicants established that the balance of convenience favours them, because of the ruling of the Ludzidzini Royal Council that Moneni fall under Lwandle chieftom and that Polycarp Dlamini is not a Chief but Umtfwanenkhosi Lomkhulu.
- [49] I must emphasise that there is nowhere in these pleadings where this Court is asked to deal with a chieftaincy dispute between Chief Nkamane and Polycarp Dlamini, and there is nowhere in these proceedings where this Court determines or adjudicates on the chieftaincy dispute between the parties because this Court does not have the jurisdiction to deal with such matters. However, this Court has a right to hear and determine any matter that concerns interdictory relief as between feuding parties simply to preserve the status quo pending the finalisation of the proceedings. The point *in limine* that the Applicants have not established the requirement for the grant of an interdict has no merit and is dismissed.

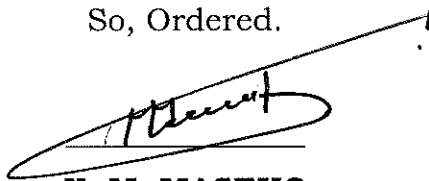
[50] That is the position *in casu* in the sense that the Applicants sought for the interdict against the Respondents from continuing with the unlawful allocation of land and illegal construction of structures within the Farm “Peebles Block” (North). The Applicants are entitled at law to lay the background facts in order to establish the mandatory requirements for the interdictory relief which they seek. In my view they established requirements for the grant of the interdict, and it was on those considerations that I granted the following Order on the 5th October 2018 when the matter appeared before this Court and the rule nisi confirmed and other prayers were also granted. There was no notice of intention to oppose filed, and there was no appearance for and on behalf of the respondents.

[51] This is the Order that I handed down on the 5th October 2018:

Having heard Counsel for the Applicant and there being no appearance for the Respondents,

I hereby grant prayers 1, 2, and 3 of the Notice of set down dated the 3rd October 2018.

So, Ordered.

A handwritten signature in black ink, appearing to read 'N. M. Maseko', is written over a horizontal line. The signature is stylized and extends upwards and to the right.

N. M. MASEKO

JUDGE