IN THE HIGH COURT OF ESWATINI

CASE NO. 31/2024

HELD AT MBABANE

In the matter between:

TANELE DLAMINI	**Applicant**
And	
EDMUND DLAMINI	**1st Respondent**
MAGISTRATE INNOCENT MOTSA N.O	**2nd Respondent**
ATTORNEY GENERAL	**3rd Respondent**

NEUTRAL CITATION:	**TANELE DLAMINI VS EDMUND DLAMINI & 2 OTHERS (31/2024) SZHC – 11 [16/02/2024]**
CORAM:	**BW MAGAGULA J**
HEARD:	**05/02/2024**
DELIVERED:	**16/02/2024**

SUMMARY: *Civil Law – Peace and binding enquiry in terms of Section 341 of The Criminal Procedure and Evidence Act 67/1938 – Applicant brought an application for a peace binding order*

before 2nd Respondent, pursuant to alleged acts of threats emanating from 2nd Respondent – Parties appeared before the learned Magistrate (2nd Respondent) and made representations – The learned Magistrate issued orders impacting on questions of Swazi Law and Custom in particular Principle of Kuboshelwa umtfwalo – Applicant argues that the decision by the Magistrate is reviewable as he committed a serious reviewable irregularity and acted ultra vires the powers bestowed on him in Section 341 of The CP&E Act 67/1938 by ordering that the Applicant must assist the 1st Respondent's family in facilitating the custom of kuboshelwa umtfwalo.

HELD: *The 2nd Respondent's act of granting orders 3, 4, 5 and 6 are reviewable. The honourable Magistrate overstepped his powers and went beyond the requirements of Section 341 of the CP&E Act. Application granted with costs.*

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

[1] This is an application, where the Applicant seeks to review correct and/or set aside part of a peace binding order which was granted by the 2nd Respondent at the Mbabane Magistrate's Court under Case Number 13/2024.

[2] The peace binding order was issued pursuant to peace binding proceedings instituted against 1st Respondent on the 9th January 2024. The sole purpose for the proceedings was for the 1st Respondent to maintain peace with Applicant. Also, that the former is restrained from harassing, and threatening the Applicant.

[3] The Applicant avers that although 2nd Respondent granted certain aspects of the orders as desired, however, the learned Magistrate then overstepped his limits and proceeded to grant further orders that were not only sought but are now prejudiced to the Applicant. The peace binding order *per verbatim* is captured as follows:-

1. *"Both parties are ordered and directed to maintain peace with each other at all times and to refrain from any conduct likely to cause breach of same.*
2. *The Respondent is interdicted and restrained from harassing, insulting or threatening the Applicant.*
3. *The matter is referred back (sic) the Ekupheleni Royal Krall (sic) for proper determination.*
4. *The Applicant is ordered and directed to assist the Respondent's family (her in-laws) in facilitating the*

custom of (kuboshelwa umtfwalo) and to ensure that there is peace among the two families.

5. *Respondent is ordered and directed to leave the Applicant's clothing with the Ndlovu family as per Swazi Law and Custom.*
6. *The Royal Eswatini Police are ordered and directed to assist in execution of this order."*

[4] The Applicant desires that the orders captioned in 1 and 2 above should be retained and not reviewed, as she was successful on them.

[5] The matter between the parties has a painful history which culminated to a spectacle, where the 1st Respondent found a man in the marital home at eKupheleni. The media at some point was called to capture what the 1st Respondent calls an act of adultery in the still of the night. For purposes of this application, I do not wish to belabour this judgment by setting out blow by blow, the detailed history of the strife between the parties over the years. They are married in terms of Swazi Law and Custom. Two children are born out of the marriage. What can be gleamed from the papers is that the parties are not strangers to litigation in this court. At some point, Judge M. Dlamini issued the following order;

1. ***The 1st Respondent is to construct a homestead within a period of nine (9) to twelve (12) months from the date of this order.***

2. ***The 1st Respondent is to comply with the maintenance order granted by the Mbabane Magistrates' Court and parties are to pay school fees respectively for the two minor children as per the Magistrates' Court Order.***
3. ***The 1st Respondent is granted full and unlimited access to the matrimonial homestead.***
4. ***The 1st Respondent is ordered to maintain peace within his family.***
5. ***No order as to costs.***

[6] This demonstrates that the parties have been litigating against each other for a while now. Also, in the 1st Responding answering affidavit filed before this court. There is an annexure, A2[1], which reflects that the 1st Respondent has commenced action proceedings against the Applicant, where he seeks that the marriage between them be dissolved and that the Applicant forfeits all her benefits arising out of the marriage. It appears that the 2nd Respondent premises his prayers on the adultery allegedly committed by the Applicant.

[7] I will now revert to the nub of the application before me. The crux of the application as set out in the Applicant's application is not necessarily to determine the merits of whether adultery was committed or not. But the Applicant argues that the 2nd Respondent overstepped his powers in dealing with a peace binding application and went overboard to grant orders beyond

[1] The Summons and particulars of claim are annexure A2 to the answering affidavit

the provisions of **Section 341 of The CP&E Act**[2]. Applicant argues that the orders are adverse to her and their effect are also prejudicial to her. Her personal clothing and belongings were transported from her marital home at Ekupheleni to her parental home in Mafutseni in her absence and without her consent. This was allegedly done under the guise of implementing the Swazi Law and Custom of *kuboshelwa umtfwalo*.

SYNOPSIS OF THE PROCEEDINGS THAT OBTAINED BEFORE HIS WORSHIP MAGISTRATE INNOCENT MOTSA

[8] On the reading of the record which has been filed by the Attorney General's Chambers, it appears that it is the Applicant who initiated the peace binding process. She first made a report at the Mbabane Police Station on the 9th January 2024, ostensibly raising the following issues;

8.1 That she had received a telephone call from his son Wakhile Dlamini that the 1st Respondent (her husband) had come to their marital home in Ekupheleni and removed all her personal belongings. She indeed confirmed this when she eventually travelled to the homestead.

8.2 She was seeking that the 1st Respondent returns the belongings since they are not in talking terms and that the 1st Respondent must allow the courts to determine the matter as it was pending before the courts.

[2] Criminal Procedure and Evidence Act.

[9] It appears that the learned Magistrate actually heard oral submissions from both the Applicant and the 1st Respondent. This appears on pages 8 and 9 of the record of proceedings filed in court. According to the record, the Applicant made the following submissions before the learned Magistrate:-

9.1 In 2018, the 1st Respondent once attempted to douse her with petrol all over her body. Subsequent thereto, the 1st Respondent then moved into their marital home with another woman. She was then compelled to leave the marital home with her children and they were homeless. She then approached the High Court, where an order was issued that she must be allowed to stay in the marital home.

9.2 In January 2024, whilst she was at Ekupheleni in the marital home, with one Lwazi Mabuza, the 1st Respondent came into the homestead. He subsequently called the media and drama ensued. She then left the homestead and moved in with her cousin Thulani Zulu. It is while she was staying with her cousin in Mbabane that her husband (2nd Respondent) came to their homestead (at Ekupheleni) and removed all her belongings without her permission. She told the Magistrate that in the clothes that were removed, there was cash amounting to E5 000-00 **(Five Thousand Emalangeni)** belonging to one Tsandzile Ndlovu.

[10] I pause to remark that in the application before court the issue of (Five Thousand Emalangeni) E5 000-00 cash is not pursued and was not made an issue even during the submissions.

[11] The 1st Respondent in summary, made the following representations before the learned Magistrate during the peace binding order proceedings.

11.1 He submitted that he had been complying with the High Court order, ever since it was issued. He conceded that he indeed moved out of the marital home due to what he referred as **"the life that they were living with the Applicant".**

11.2 He told the learned Magistrate that the home belongs to his parents. He continued to tell the court that subsequent thereto, he visited the home at Ekupheleni. He found the Applicant with another man in bed naked. He then took pictures. What is startling though, is that in the same record, the 1st Respondent is said to have submitted before the Magistrate that when he found them, they were in the sitting room. He also submitted that all this unfolded in the presence of a community police member.

11.3 The 1st Respondent further submitted before the learned Magistrate that the Applicant was not staying at Ekupheleni. She left their son who is seventeen (17) years old there. The 1st Respondent continued to tell the learned Magistrate that, he then went to the house and removed all

the Applicant's belongings and transfereed them to his in laws (Applicant's home in Mafutseni). Prior a delivering the belongings they went via the Mafutseni Umphakatsi, who then accompanied them to the Applicant's parental homestead.

[12] It appears that after hearing both parties, the learned Magistrate issued the order that is fully captured in paragraph [3] above. It does not appear *ex facie* the record of the proceedings, how the Magistrate arrived at the decision that he then issued. There is no analysis of the facts nor the law that he relied on.

The 1st Respondent's Arguments before court

[13] The 1st Respondent field an answering affidavit which was also accompanied by a confirmatory affidavit of Masebenza John Hlatswayo. In summary, the 1st Respondent answers as follows to the Applicant's application:-

13.1 He never threatened the Applicant, but he was following the provisions of the Swazi Custom on what should happen when a wife is caught committing adultery.

13.2 There is a pending matter under High Court Case No. 1490/2023, for the nullification of the marriage following a discovery that the Applicant was at some point in November 2020, pregnant without the 1st Respondent's knowledge. This shows that the Applicant was committing adultery.

13.3 The reason why the learned Magistrate granted the order as he did was because the Ndlovu family failed and /or refused to cooperate with the Dlamini family when they were bringing back the Applicant's clothing, as per the custom of *kuboshelwa umtfwalo*.

13.4 When they took the Applicant's belongings to Mafutseni, the Applicant's brother Themba Ndlovu attacked them.

13.5 The homestead at Makhwane, Ekupheleni is not a matrimonial home for him and the Applicant, as it belongs to his late mother LaMdluli.

13.6 He concedes that he is in a relationship with one Petunia Cedusizi Fakudze, but not as a girlfriend, but she is his wife.

13.7 The reason why the learned Magistrate included the order that the Applicant must assist the 1st Respondent in facilitating the custom of *kuboshelwa umtfwalo*, is because whilst facilitating the order, the Applicant's family was threatening the 1st Respondent's family with violence, when they approached the Ndlovu homestead at Mafutseni.

13.8 The learned Magistrate was not wrong in referring the matter to the Ekupheleni Royal Kraal for determination as the matter had initially been dealt with by the same Royal Kraal.

13.9 There is nothing ousting the jurisdiction of the 2nd Respondent in terms of Section 29 of the Magistrates Court Act.

13.10 Section 341 of The Criminal Procedure and Evidence Act of 1938, empowers the 2nd Respondent to do all acts to preserve peace between the parties. The adulterous behavior of the Applicant, was widely publicized in the media. The community of Ekupheleni may be violent against the Applicant, if she were allowed to return back to the home.

THE LAW

[14] It appears to me that the parties are aligned on the legal position pertaining to the issues involved in this matter. This is evinced by the common legal authorities cited by the parties in their respective heads of arguments.

[15] Section 341 of **The Criminal Procedure and Evidence Act 67/1938** provides as follows;

> ***"(1) If a complainant on oath is made to a Magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat***

was made in a public or private place, such Magistrate may order such person to appear before him, and if necessary may cause him to be arrested and brought before him.

(2) The Magistrate shall thereupon enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath, and may order the person against whom the complaint is made to give recognizances with or without sureties in an amount not exceeding R50.00 (fifty rand) for a period not exceeding 6 (six months) to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.

(3) The Magistrate may, upon the enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to such enquiry."

[16] In the matter of **Zwelakhe Nhleko vs Magistrate Ndlela N.O and another**[3], the court interpreting the import of Section 341 of the CP&E stated the following;

1. ***In performing his duties or functions under the above Section, a Magistrate does not sit as, either a civil or criminal court. It is more of an administrative function whose aim or objective is to keep maintain peace in***

[3] Civil High Court Case No. 448/2012 at paragraph 10

general. The proceedings are not a trial but an inquiry. Although the complaint may reveal a crime which has been committed, the Magistrate may not return a verdict of guilt. The crown is not a party to the proceedings either.

[17] The court went further and cited a South African decision of **R vs The Mbada, 1953 (2) SA 368 (N) at 370 C- D** where the court observed that the Magistrate in the South African Decision, had stated that an enquiry of such a matter was purely an administrative matter or a quasi-judicial one and therefore no criminal appeal could be filed against such a decision. It was observed that the machinery created by the similar provision to the South African legislation, is designed primarily to prevent the commission of an offence rather than to deal with the offence ready committed.

Issues for determination

[18] In as much as the parties have to a great extent, set out the background of what led the Applicant approaching the court *aquo* for the peace binding order and in doing so, brought to the fore facts that obtained prior to the proceedings before the 2nd Respondent. After carefully considering the affidavits by both parties, I have come to the conclusion that the issues for determination are crisp. Primarily, this being a review application, the court is called upon to determine whether the 2nd Respondent committed a reviewable error in the manner in which he issued the order in question. Over and above granting the order that both parties are ordered and directed to maintain peace with each

other at all times and to refrain from any conduct to cause breach of same, did he commit a reviewable irregularity by also granting an order referring the matter to Ekupheleni Royal Kraal? And to also order that the Applicant is directed to assist the Respondent's family in facilitating the custom of kuboshelwa umtfwalo and by also ordering that the 1st Respondent be directed to leave the Applicant's clothing with the Ndlovu family as per the Swazi Law and Custom? Those are the issues for determination in any view.

[19] The court is therefore called to determine whether the orders issued by the learned Magistrate, beyond orders 1 and 2, constitute a reviewable irregularity.

Analysis and Conclusion

[20] It has been submitted on behalf of the 1st Respondent both in the heads of argument and through oral submissions by Counsel that the conduct of the 2nd Respondent in issuing the order in the manner in which he did, is not outside his jurisdiction as envisaged in Section 29 of the Magistrate Court Act. On the same breath, it was also conceded on behalf of the 1st Respondent[4], that in performing his duties or functions under Section 341 of the CP&E, a Magistrate does not sit as either a civil or criminal court. The proceedings are more of an administrative function, whose aim or objective is to keep or maintain peace between the parties.

[4] In paragraph 2.2.2 of the Heads of Arguments

[22] It is then baffling on how the 1st Respondent then on the same breath, argues that it was reasonable and rationale for the Magistrate to issue orders that are in 3, 4 and 5, which are basically the orders that ordered the Applicant to assist the 1st Respondent's family in facilitating the custom of *kuboshelwa umtfwalo*. It appears to me that in doing so, then the Magistrate was siting as a civil court when he directed what either of the parties should do.

[23] On perusal of the record, it appears that the orders granted by the learned Magistrate are also not supported by demonstrated reasoning and analysis of the evidence that was before him. There is therefore no material from which a reader of the record can decipher the basis on which he decided to issue the order in the manner in which he did. He simply captured the submissions made by the Applicant and the submissions made by the 1st Respondent. Thereafter he issued the order without analyzing the evidence before him and stating his reasons on how he was swayed into holding that the Applicant was indeed supposed to assist the 1st Respondent's family in the custom of *kuboshelwa umtfwalo*. It appears to me, that the Magistrate had an impression, whether intentionally or unintentionally to conclude that the conduct of the Applicant in whatever nature was already deserving that the custom of *kuboshelwa umtfwalo* be initiated and implemented. This is contrary to the correct position in this jurisdiction as outlined in a number of decisions of this court[5]. The function of pronouncing on whether certain conduct by a married couple suffices to attract the dissolution procedures is usually made by the

[5] Matry Nompumelelo Dlamini vs Musa Clement Dlamini Case No. 15702013
Setsabile N. Ginindza vs Comfort G. Myeni and 3 Others Case No. 953/2015
Patricia Mndzebele (nee Msibi) vs Nolwazi Mndzebele and Others SZHC Civil Case No 828/2013,
Siphiwe Magagula vs Lindiwe Mabuza and Others Civil Case No. 4577/08

appropriate traditional structure preceded by a meeting of the families. Those facts were not placed before the Magistrate. Secondly, it was definitely not his turf at that time, especially since the proceedings that obtained before him were Section 341 of the CP&E procedures, which was plainly a peace binding procedure where a peace binding order was sought. He was not sitting as a civil court.

[24] If one applies the dicta as espoused by His Lordship Mamba J in the decision of **Zwakele Nhleko** (*supra*)[6] where he unequivocally stated that the proceedings under the Section 341 enquiry are not a trial but an enquiry based on a complaint by the person who has initiated the inquiry. If one considers what the enquiry was in the matter at hand, it was that the 1st Respondent was accused of removing the Applicant's belongings at their home at Kupheleni. To therefore make a finding that the Applicant must assist the 1st Respondent in performing the custom of *kubophelwa umtfwalo* and also to authorize police officers to assist the 1st Respondent in removing the Applicant's belongings from Ekupheleni to her marital home, is clearly beyond the complaint that the Applicant had lodged. Also, to sanction that the 1st Respondent must remove the Applicant's clothing and leave it with the Ndlovu family (her parental home) was clearly outside the administrative function of maintaining peace in general.

[25] It appears the Magistrate went overboard in pronouncing on the rights of the respective parties. Not only did he do so, in my view, he usurped the function

[6] At paragraph 10

of the traditional structures, who are the ones after following the procedures in terms of the Swazi Law and Custom to meet and pronounce whether indeed the act that the Applicant is alleged to have committed, constituted adultery. The issue of the adultery was not only not the subject of the complaint before him, he was not competent to adjudicate on it at the time. He was hamstrung to decide on it in so far as the proceedings before him were instituted under Section 341 of The Criminal Procedure and Evidence Act. He therefore exceeded his powers because he then went on to deal with an offence pertaining to adultery, yet his role at that time was to prevent the commission of the offence which was the subject of the complaint before him. Being the unlawful removal of clothes and the threats.

[26] It also common cause that the 2nd Respondent over and above ordering that the Applicant must assist the 1st Respondent's family in facilitating the custom of *kuboshelwa umtfwalo*, the learned Magistrate also ordered that the matter be referred to Ekupheleni Royal Kraal. It appears to me that he had already made his mind that the Applicant had committed the adultery. As such, he had decided that due to that transgression, the custom of *kubophelwa umtfwalo* was supposed to be triggered. In my view, this was premature and irregular of him to make a finding to that effect without the issues having been fully ventilated in the appropriate traditional structures, which include at the family level and at Umphakatsi level.

[27] It was argued by the 1st Respondent's Counsel during the arguments, that the Applicant failed to demonstrate before court the prejudice that she stands to

suffersas a result of the order that was made by the learned Magistrate. It is common cause and has not been denied by the 1st Respondent, that indeed he removed all the personal belongings of the Applicant including her clothing from the place which she considers to be her matrimonial home. If it is not an inconvenience to travel from Mbuluzi High School where she is employed to Mafutseni and back to Mbuluzi for work, then the word inconvenience must be given another meaning. It is common cause that eKupheleni in terms of distance is much more closer to Mbuluzi. It is therefore the finding of this court that the Applicant has clearly demonstrated prejudice, the order issued by the 2nd Respondent aggravates her situation.

[28] The 1st Respondent also makes an issue regarding the ownership of the home in Ekupheleni. He has stated in his answering affidavit that the home is not their marital home, but it is his late mothers that khontaed in the area and as such it is not their marital home. In as much as this argument is not crucial to the determination of the issues at hand, it deserves mention. It is absurd that the 1st Respondent can adopt this line of thinking when he is the one that proposed love to the Applicant, married her and brought her to this home. They proceeded to stay in this home and raised two children. When did the Applicant then realize that this home belongs to his late mother and all of a sudden is not their matrimonial home? This is the kind of treatment against women which is not only abusive but oppressive and must be frowned upon.

[29] The importance of the matter being deliberated upon by the appropriate traditional structure is also more important because the Applicant refutes that she committed adultery.[7] The questions of what constitute adultery in terms of Swazi Law and Custom and what constitutes evidence of such a commission should be deliberated by these traditional structures. More especially because in the matter at hand, the Applicant has stated under oath that in as much as a man was found in the house, but they were not in the bedroom, but in the lounge fully dressed. Hence, it is important for the traditional structures to interpret the alleged conduct of the Applicant against a definition of a conduct of what constitutes adultery under Swazi Law and Custom. It does not appear from the record that such relevant evidence was placed before the learned Magistrate to enable him to have appreciated the depth and intricacies of what exactly did the Applicant do, to warrant that a conclusion be made that she committed adultery to justify sanctioning of the removal of her personal belongings from the marital home.

[30] In the matter of **Enock Qedusizi Ndlovu vs Bhokile Elliot Shiba and Another High Court Case No 1760/94 Sapire J** stated succinctly that a litigant who relies on Swazi Law and Custom as the basis of his claim will have to produce expert evidence as to the provisions of Swazi Law and Custom applicable to his case. When applying this principle to the facts of the matter before me, the Applicant has not demonstrated through expert evidence that he is permitted by Swazi Law and Custom to immediately implement the custom of *kuboshelwa umtfwalo* as soon as he finds a man in the sitting room at the marital home. Surely, there must be another structure at family level or

[7] See paragraph 52 of the Applicant's replying affidavit.

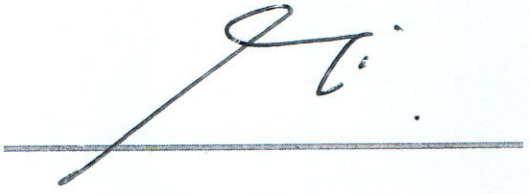
Umphakatsi that must look at the issue before a concrete finding is made that the conduct of the wife suffices as an offence constituting adultery. It is again on that basis that this court finds that no such evidence had been placed before the learned Magistrate to inform him that indeed the Applicant had committed adultery to warrant that her personal belongings be removed from her marital home.

[31] It is therefore my finding that indeed the learned Magistrate overstepped his powers to the extent that he did. He got carried away and fixated himself on the merits of the matter being adultery and completely ignored the perimeters under which he should exercise his powers. Especially where he was sitting on an enquiry in terms of Section 341 of the CP&E.

[32] Due to the aforegoing reasons, the court finds that the 2nd Respondent indeed committed a reviewable act of irregularity. I will accordingly grant prayers number 3, 4, 5 and 6 of the Notice of Motion. The court hereby grants the following order;

1. **Reviewing, correcting and setting aside orders 3, 4, 5 and 6 of the peace binding order which was granted by the 2nd Respondent at the Mbabane Magistrate Court under Case No. 13/2024.**
2. **That orders 1 and 2 of the peace binding order under Mbabane Magistrate Court Case No. 13/2024 continue to be in full force and effect.**

3. **Ordering that the status *quo ante* before the grant of the peace binding order be restored. The 1st Respondent is orders to forthwith deliver to Applicant her clothing and/or belongings, listed in Annexure "A" hereto, which he took from the parties' matrimonial home at Makhwane, Ekupheleni, District of Hhohho pursuant to the aforesaid peace binding order within forty-eight (48) hours of service upon him of this Order hereof.**
4. **Costs of suit to be borne by the 1st Respondent at the ordinary scale.**



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For Applicant: B. S Dlamini & Associates

For Respondents: Bongani G. Mdluli Associates