IN THE APPEAL COURT OF SWAZILAND

Appeal Case No. 5/86

HOLDEN AT MBABANE

In the matter of

MAMISA MAHLALELA

vs

MBHAKELANE MAHLALELA

CORAM : MELAMET, J.P.
: SCHREINER, J.A.
: HANNAH, CJ.

JUDGMENT (12.10.89)
Melamet, J.P.

The appellant comes on appeal to this court against the judgment of the High Court of Swaziland in terms whereof the appeal against judgment of the National Higher Court of Appeal succeeded and the judgment of the court was set aside. The appellant in that appeal is the respondent in this appeal and the respondent in that appeal is the appellant in the present appeal. The respondent in that appeal was ordered to hand over to the appellant nearly one hundred and two head of cattle.

The respondent (hereinafter called the plaintiff) brought an action against the appellant (hereinafter called the defendant) in the Swazi National Court at Siteki in 1983 for one hundred and two head of cattle. The defendant was sued in his capacity as the sole and universal heir of his late

father. The plaintiff and defendant are half-brothers from a common father. The defendant was appointed the sole and universal heir by the Mahlalela family. The plaintiff based his claim to the said cattle on a verbal agreement entered into between him and his late father prior to the latter's death. Defendant disputed the existence of any such agreement.

I shall deal with the facts later because the dispute has been pursued through various courts culminating in the present appeal and save and except in the High Court of Swaziland evidence was led in each of the courts. In each court a little was added to the evidence which had previously been given. Whether this is competent in terms of the Swazi Courts Act No.18/1950 is not necessary for the decision of the present appeal. It would appear however that this is a recognised practice and in this connection I refer to the case of SHOSHO NKAMBULE v R reported in the Swaziland Law Reports 1979/81 at page 147. At page 150 the Acting Chief Justice said:
"Before giving any specific grounds of appeal I quote I wish to reiterate my remarks made in the case of LUKHELE v MKHONTA 1977 - 1978 SLR 47 in which I dealt with the approach to issues of fact by the court in its appellate jurisdiction against the findings of the traditional courts. At 50 I said, inter alia: In any event in the instant matter we are not concerned with the findings of an 'intermediate appellate court'. Here three courts presided over by three different court Presidents and assisted in all by eight assessors have all come to the same conclusion on the factual issues, and I do not think that this can be disregarded by me, more especially, as I have tried to indicate earlier, because of the

traditional and informal manner of giving evidence in the National Courts and the expected lack of accuracy and fulness in the recording of such evidence. I consider that an appellant in order to

succeed in this court must clearly show why the lower court was wrong. Naturally when a matter has been heard in three traditional courts with witnesses testifying in each of these courts there must be some confusion as to what actually took place. But the persons who sat and listened to the evidence were much more able to appreciate and understand this confusion than a court of this kind. Although I do not have to go so far I would say that this court would be extremely reluctant to disturb the findings of fact by any National Court and in my view would only do so in extreme cases, e.g. where it is shown that the judgment was palpably wrong or that the triers of fact had acted arbitrarily."

It would seem therefore that the procedure followed is in accordance with practice that has developed.

I would recommend that rules as to the procedures in these courts be formulated and promulgated by the relevant authorities. I appreciate the possible difficulty in this regard but it would lead to clarity and uniformity.

In 1983 the Swazi National Court in Siteki found agaisnt the defendent and ordered him to pay one hundred and two head of cattle to the plaintiff as claimed and further two beasts as costs. The order should presumably have been to deliver the one hundred and two cattle claimed by the plaintiff. The judgment was based on a letter which was allegedly written by the parties' late father in which it was allegedly said that the plaintiff was to be appointed the heir to the father. This was not the basis of the claim which as set out above was an alleged verbal agreement entered into

4

between the father and himself. Not until the grounds of appeal in the present appeal was the claim of the defendant that he had been appointed sole and universal heir to his late father's estate challenged.

The defendant appealed against the judgment to the National Court of Appeal at Lozitha and that court in November 1984 considered the appeal and confirmed the judgment of the Court of First Instance. No reasons for judgment were furnished.

The defendant appealed to the National Higher Court of Appeal who on 19th March, 1985 upheld the appeal and varied the judgment ordering the plaintiff to leave the one hundred and two head of cattle with the defendant who was appointed by the Mahlalela family (lusendvo) to be the deceased's heir (inkosana). The Higher Court of Appeal purported to try the matter afresh, and finding the defendant to be the duly appointed sole and universal heir ordered that the one hundred and two head of cattle be left with him.

The plaintiff then appealed to the High Court of Swaziland, which on 7th November, 1986, upheld the appeal and set aside the judgment of the National Higher Court of Appeal. It ordered the defendant to hand over to the plaintiff the one hundred and two head of cattle. This judgment was based on the assumption that the plaintiff had not been given the opportunity to rebut the evidence of two witnesses whose evidence had been led on behalf of the defendant. It was found that the President of the National Higher Court of Appeal in so doing had acted contrary to the principles of natural justice and that the proceedings were tainted with irregularities. There is no basis set out in the evidence or judgment for such conclusion. The matter comes on appeal to this court some three years later and this inordinate delay is a matter which should be investigated. As set out

5

above the plaintiff's action is based on an alleged verbal agreement between plaintiff and his father.

There is no evidence as to where and when the alleged agreement was concluded. All that is said is that he and his father were alone at the time. There is no evidence as to where the alleged one hundred and two cattle were or whether there were in fact other one hundred and two head of cattle.

There is no evidence as to when the parties' father died. There is no evidence whatsoever that the defendant in his capacity as sole and universal heir or in his personal capacity ever took possession

of the one hundred and two head of cattle. There is evidence that in 1945 he was given five head of cattle by his late father and it would appear that he received thirty-six head of cattle in his capacity as heir although this was not canvassed with him. There is no evidence that the thirty-six head of cattle were part of the one hundred and two head of cattle claimed.

It would appear that during the father's life, the plaintiff left the homestead to build his own homestead in another area whilst the defendant remained at his father's homestead until his father's death. It was only after the defendant had been appointed that the plaintiff brought the action.

As set out above the plaintiff claimed that he was alone with his father when the agreement between them was reached. There is no corroboration of this and he seeks corroboration in an alleged letter written by his father before his death in which he disinherited the older brother and appointed him as heir. There is evidence that the late father could not read or write and the author of the alleged letter was not called nor was it handed in. The alleged circumstances under which it came to light some time after - the period is not disclosed - are also open to some doubt.

I am of the opinion that it has not been proved in any of the courts that the defendant either in his personal

6

capacity or in his capacity as sole and universal heir is or was ever in possession of the alleged one hundred and two head of cattle claimed by the plaintiff. There is no proof further that at the time of the death of the father he was in fact in possession of the one hundred and two head of cattle. In the circumstances I am of the opinion that the plaintiff has failed to prove his claim against the defendant.

In the circumstances the appeal should succeed and the judgment in the original court should be altered to one of absolution from the instance. The appellant is ordered to pay the costs of the appeal.
Hannah, CJ.

I agree: and as this case is apparently unique in that we are informed that it is the first time that a case emanating in a Swazi National Court of first instance has reached the pinnacle of the court system, that is to say the Court of Appeal, I would like to add a few observations on that part of the judgment of the learned judge of the High Court which dealt with the procedure which was adopted in the Swazi Higher Court of Appeal and also in the Swazi Court of Appeal. The learned judge appears to have considered that the procedure in the Swazi Appeal Courts whereby parties present their respective cases anew was irregular and it seems to me on reading his judgment that this was a factor which influenced him in his decision to reverse the findings of the Higher Court of Appeal.

The difficulty I have with the view expressed by the learned judge in the court a quo is that subject to any rules made by the Ngwenyama the practice and procedure of Swazi Courts is regulated in accordance with Swazi law and custom. See

7

section 21 of the Swazi Courts Act, 1950. So far as I am aware no such rules have been made, certainly Mr. Lukhele has been unable to refer this Court to any, and therefore the position must be that the practice and procedure of Swazi National Courts is regulated in accordance with Swazi law and custom; and I ask myself what evidence was there before the High Court that the practice and procedure which is followed by Swazi Appellate Courts is not in accordance with Swazi law and custom? The answer to that question is that there was none and presumably in this regard the learned judge simply took account of the submissions made to him by Mr. Lukhele and the advice tendered to him by the two assessors who sat with him. But if this be so the judge did not set out in his judgment the advice tendered by the assessors and it is therefore impossible to test such advice.

It is of course unusual for an appellate court to hear witnesses afresh but that is a practice which is not completely without precedent. In England the Crown Court sitting on appeal from decisions of magistrates hears witnesses afresh including witnesses who were not called in the magistrate's court.

That is an invariable practice in that country and I see no reason why it might not also be the position under Swazi law and custom. Counsel, as I understand it, concedes that it has been the general practice in Swazi National Courts since their inception some forty years ago to rehear cases as they go on appeal but Mr. Lukhele contends that such practice does not normally extend to calling new witnesses. As My Lord, the Judge-President, pointed out in the course of argument there seems to be very little difference in principle between the situation where a new witness is called and the one where he is not. The principle involved is whether or not there should be a full rehearing.

I recognise that the procedure of allowing parties to present their cases anew on appeal is open to criticism. It is a cumbersome procedure and a procedure which permits a party perhaps to tailor his case to fit the evidence adduced by his opponent in the court below: but whatever the criticisms may be, my own view is that it was wrong for the High Court to decide that such a practice is contrary to Swazi law and custom without first hearing some evidence on the point. Relying on assessors alone is, in my view, insufficient particularly when it is borne in mind that the assessors who sit in the High Court are usually drawn from the Swazi National Courts. It is difficult to see how the opinion of two such assessors should hold any greater sway than the opinion of their colleagues who have apparently operated the procedure in question for many, many years.

For these, and also for the reasons given by My Lord, the Judge-President, I would allow this appeal.

Schreiner, J.A.
I agree with both judgments.