



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 25/2012

HELD AT MBABANE

In the matter between:

SANDILE HADEBE

APPELLANT

And

**SIFISO KHUMALO N.O.
ALBERT VILAKATI
OUPA LAPIDOS
JAMES DLAMINI**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

Neutral Citation : Sandile Hadebe and Sifiso Khumalo & 3 Others
(25/2012) [2013] SZSC 39 (31 MAY 2013)

Coram : M.M. RAMODIBEDI C.J., S.A. MOORE J.A., and
DR. S. TWUM J.A.

Heard : 8 MAY 2013

Delivered : 31 MAY 2013

Summary : Applicability of Swazi Law and Custom – Ejection of widow from the matrimonial home where she had been living with her deceased husband and her two young children up to the time of his early death – Widow had been evicted by her brother-in-law – Widow complained to traditional authorities – Appellant summoned to appear before traditional authorities –

Appellant failed to do so – Appellant fined two cows by traditional authorities – Appellant failed to pay fine – Under Swazi Law and Custom appellant as a younger son required to establish his own homestead – Appellant failed to do so – Appellant having defied traditional authorities evicted from Chieftdom for defying traditional authorities – Record of appeal and heads of argument filed hopelessly out of time – Appeal dismissed with costs.

JUDGMENT

MOORE JA

OPENING

[1] In this case the court *a quo* is alleged to have committed a plethora of errors. Some 15 in all. It is not necessary to set them all out and reference will only be made to those which are germane to the disposition of the appeal.

[2] The opening salvo in this litigation in the High Court came in the form of a Notice of Application in which the appellant (Mr. Sandile Hadebe), then applicant, prayed for the following reliefs:

“2. *Condoning any non compliance with the rules of court.*

3. *That a rule nisi do issue calling upon the respondents to show*

cause on a date to be fixed by the above Honourable Court why;

- (a) They should not be interdicted and restrained from evicting the Applicant (directly or indirectly) from his parental home at eZulwini, eNyonyane area.*
- (b) They should not be ordered to pay the costs of this application jointly and severally, the one paying for the other to be absolved, in the event they oppose this application.*
- (c) Granting further and or alternative relief.*

4. That the order of the above Honourable Court operate with immediate interim effect pending finalization of this matter.”

[3] The several paragraphs of the appellant’s founding and supplementary affidavit tell a startling tale. They allege that, out of the blue, at about 5.45 a.m. on the 29th December 2011, a group of about twenty (20) people, led by the 3rd Respondent (Mr. Lapidos) descended upon his parental home. Mr. Lapidos first introduced himself as a community policeman of eZulwini and thereafter introduced the 2nd and 4th Respondents, Mr. Vilakati and Mr. Dlamini, respectively. The Station Commander from the eZulwini Police Post let him know that the police were present to maintain law and order.

Mr. Dlamini explained that he had been sent by the 1st Respondent Mr. Khumalo, the Indvuna of the area.

[4] What allegedly happened thereafter according to Mr. Sandile Hadebe can be condensed in numerical sequence thus:

- i. People from the neighbourhood were called to witness the event. The affidavit is silent about who called the neighbours.
- ii. Tenants of flats at his parental home were also called and told by Mr. Dlamini that they should no longer pay rent as the homestead was from then on, under the eZulwini Umphakatsi.
- iii. Before he could comply with the order to leave, Mr. Lapidos snatched the key to his flat from him and took away his car keys without his permission.
- iv. Messrs Vilakati, Lapidos, Dlamini and other residents of the area then held a caucus meeting. This deponent did not say if he attended the caucus meeting, or if he heard what was said at that meeting.
- v. After the caucus meeting, says the appellant, he was informed that he was being given up to 4.00 p.m. on the 20th December 2011 to vacate the flat and the eZulwini area.

- vi. The above events happened without any charges being laid against him by the Umphakatsi.
- vii. It was only after being ordered to vacate the flat and leave the area that his alleged offences of insolence and disobedience to a summons by the eZulwini Royal Kraal and ungovernable conduct were disclosed to him.
- viii. In sum, the appellant's complaint is that he was condemned without a hearing and without due process in any court whatsoever.
- ix. The appellant also alleged a violation of what he called his clear right to live in his father's house. He swore that his grandfather, who survived his parents, had no objection to his occupation of the house. The grandfather Robert Samukelo Hadebe swore a confirmatory affidavit supporting the appellant's relevant averment.
- x. Finally, the appellant alleged breaches of his constitutional right to a fair hearing and to dignity.

[5] Unsurprisingly, the affidavits in support of the Respondents' case tell a wholly different story. They countered that Mr. Sandile Hadebe had deliberately omitted much relevant information from his own affidavits which he was obliged to admit later. They also reveal a merciless and

heartless eviction by him of a widow and her young children, when they were most vulnerable and in need of human sympathy and support, from the home where they had lived with their husband and father respectively immediately preceding his untimely death.

NON COMPLIANCE WITH RULES

[6] The appellant seeks condonation of his failure to comply with the rules in several respects:

- (1) Failure to file the record timeously.
- (2) Failure to file heads of argument timeously.
- (3) Failure to pursue appeal hence application to reinstate. He says they were pursuing negotiations. This means that the failure to act was deliberate.

[7] This court has repeatedly, as if reciting a litany, pointed out that non compliance with the Rules of the Supreme Court would not be countenanced except in cases where good and substantial reasons, or sufficient cause, have been shown to warrant the exercise of this Court's indulgence.

[8] Despite these many warnings, glaring violations of the rules still continue. This case was enrolled for hearing at the May session of the Supreme Court. That roll was first published on the 22nd March 2013.

- [9] The hearing of this appeal took place on the 8th May 2013. Judgment was reserved to be delivered on the 31st May 2013. Out of the blue, the Attorneys for the appellant, Messrs Magagula & Hlophe, without obtaining leave, delivered a Book of Pleadings on the 24th May 2013 to the Respondents' attorneys and to the Deputy Registrar of the Supreme Court.
- [10] That Book of Pleadings bore on its face a Supreme Court Registry stamp dated 8th May 2013. But such is the appellant's regard for this Court and the judges who must prepare and deliver reasoned judgments within the Lilliputian time frame of less than one month, that their attorneys sat upon that Book of Pleadings for 15 days before taking steps to make it available to the judges, who had already heard the case, on the 16th day. In any event, it was already late when it was presented in the Registry on the 8th May 2013. As mandated by rule 30 to the Supreme Court Rules the record should have been lodged with the Registrar of the High Court for certification as correct on or before the 26th June 2012, the Notice of Appeal having been filed on the 27th April 2012. Needless to say, this appeal is now deemed to have been abandoned under rule 30 (4) of the Rules of the Supreme Court.

JURISDICTION

[11] At the heart of this appeal is the critical question of the applicability of Swazi Law and Custom to the controversy between the various parties in this case. Several individuals are involved in their personal capacities only. The role played by others is based upon their status as functionaries in one or more of the several Traditional Authorities.

[12] Counsel for the appellant in his many papers has both expressly as well as inferentially accepted the applicability of Swazi Law and Custom to the contending issues between the parties. The following illustrations will suffice.

- *“Notice of Appeal: “The Court **a quo** erred in deciding questions involving Swazi Law and Custom **mero motu** ...”*
- *“The Court a quo erred in not at least granting the Appellant interim relief pending determination of the dispute between the parties in the traditional structures under Swazi Law and Custom.”*
- *“Inasmuch as the eviction of the Applicant did not constitute the enforcement of a lawful custom, tradition, practice or usage.”*

[13] In an agreed chronology of events prepared and signed at this Court's request by both the Appellant's and the Respondent's attorney's, their acceptance of the applicability of Swazi Law and Custom to the instant case were expressed at paragraph 3 of the agreed chronology in these terms:

“The Appellant approached the High Court of Swaziland ... seeking to interdict and restrain his eviction from his parental home at Ezulwini which is administered under Swazi Law and Custom by the 1st Respondent as a Headman.”

[14] Section 115 of the Constitution sets out the matters which are regulated by Swazi Law and Custom. Sub section (6) declares that the provisions of this section apply to a bill which, in the opinion of the presiding officer would, if enacted, alter or affect –

- “(a) the status, powers or privileges designation or recognition of the Ngwenyama, Ndlovukazi or Umtfwanenkhusi Lomkhulu;*
- (b) the designation, recognition, removal, powers, of chief or other traditional authority;*
- (c) the organization, powers or administration of Swazi (customary) courts or chiefs' courts;*
- (d) Swazi law and custom, or the ascertainment or recording of Swazi law and custom;*

- (e) *Swazi nation land; or*
- (f) *Incwala, Umhlanga (Reed Dance), Libutfo (Regimental system) or similar cultural activity or organization.*

[15] The all-important subsection (7) reads:

“Subject to the provisions of this section, the matters listed under subsection (6) shall continue to be regulated by Swazi law and custom.”

THE CONFLICT OF LAWS

[16] In the **Commissioner of Police v Mkhondvo Aaron Maseko** [2011] SZSC 15 Ramodibedi CJ made it abundantly clear that under the Constitution of Swaziland, there are two separate and distinct systems of law co-existing within this Kingdom. Before Europeans first arrived in Southern Africa, the original communities which inhabited these lands were regulated by a system by indigenous laws and customs which were acceptable to them.

[17] It is a notorious fact that the prevailing order in what is now Swaziland was rudely disturbed by the imposition, by superior weaponry, of what is now known as the Roman Dutch Common Law. Despite the colonizer’s policy

of forcing an alien culture and system of laws down the throats of the so-called native peoples, the ancestors of the modern day Swazi Nation took a justifiable pride in their own culture, and in what is known today as Swazi law and custom. It was no surprise therefore that despite the juggernaut movement to Europeanize Southern Africa, strenuous efforts had been made over the years by the Swazi Nation to preserve cherished elements of their law and custom by incorporating them into the 2005 Constitution. Those elements of the Constitution which have been carved out for regulation by Swazi law and custom must be afforded the same reverence as those aspects which are reflective of a European ethos as embodied in the Roman Dutch Law.

[18] At paragraph [8] of **The Commissioner of Police v Maseko**, the learned Chief Justice made it clear that wherever the question of the appropriate forum arises for determination, a proper choice must be made between the Roman – Dutch common law courts and the Swazi National Courts.

HIERARCHY OF SWAZI COURTS

[19] Section 115 of the Constitution having set out the matters regulated by Swazi law and custom, attention must now be turned to the structure of

Swazi courts which is in place for the regulation of those matters. The Swazi Courts Act No. 50/1950 is an act to make better provision for the recognition, constitution, functions and jurisdiction of the Swazi Courts, and generally for the administration of justice in Swaziland in cases recognizable by Swazi Courts.

[20] The question which readily arises concerns the ambit of the jurisdiction of the Swazi Courts established by the Act. As has been pointed out in paragraph [16], two separate and distinct systems of law co-exist side by side in this Kingdom. Section 2, the interpretation section of the Act, makes this abundantly clear when it defines:

“Law of Swaziland” as meaning:

*“the common law and statute law in force in Swaziland, **other than Swazi law or custom.**”* (Emphasis added).

[21] Under section 3 of the Act, Swazi Courts shall exercise jurisdiction over members of the Swazi Nation within such limits as may be defined in a warrant under the hand of the Ngwenyama. Section 4 specifies that a Swazi Court shall be constituted in accordance with Swazi law and custom of Swaziland.

[22] Section 7 permits every Swazi Court to “exercise civil jurisdiction... over causes and matters in which all the parties are members of the Swazi nation and the defendant is ordinarily resident, or the cause of action shall have arisen, within the area of jurisdiction of the court.”

[23] It is apposite to observe, in the context of this case that: (a) certain cases are excluded under section 9 from the jurisdiction of Swazi Courts, and that (b) the controversy in this case is not excluded under the section.

[24] Section 11 lays down the laws to be administered in Swazi Courts. That section reads:

“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

Ngwenyama or a Chief under the Swazi Administration Act No. 79/50 or any law repealing or replacing 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. (Amended L.34/1966)”*

[25] The legislator of the Act evidently contemplated that a party to a dispute triable in a Swazi Court might prefer to have the hearing of that dispute transferred to another court. Section 28 caters for this. It allows a disgruntled party, for the several reasons set out in the section, to report the matter to:

- (a) A Swazi Court of Appeal where the court concerned is a Swazi Court;
- (b) to the Higher Court of Appeal where the court concerned is a Swazi Court of Appeal;
- (c) to the Judicial Commissioner where the Court concerned is the Higher Swazi Court of Appeal.

[26] Section 29 allows for the transfer of matters from Swazi Courts to Magistrate's Courts. Section 31 sets out the Revisory powers in civil proceedings of the Higher Swazi Court of Appeal and the Swazi Court of Appeal subject to a restriction upon those powers after the expiration of six months from the termination of the proceedings in the Court concerned. See subsection (2). Section 32 declares that the Ngwenyama may recognize the several courts of appeal named therein. Sections 33, 34 and 35, deal with appeals, appeals out of time, and powers on appeal respectively.

[27] Section 33 is particularly important to the appeal processes of the Swazi Court system. It reads:

“(1) A person aggrieved by an order or decision of a Swazi Court of first instance may within thirty days from the date of such order or decision appeal therefrom to a Swazi Court of Appeal.

(2) A person aggrieved by an order or decision of a Swazi Court of Appeal may within thirty days from the date of such order or decision appeal therefrom to the Higher Court of Appeal.

(3) ...

- (4) *A person aggrieved by an order or decision of the Higher Swazi Court of Appeal in a civil matter may within thirty days from the date of such order or decision appeal therefrom to the High Court:*

Provided that if in the opinion of a Judge of the High Court the written record of the case is inadequate for the purpose of the hearing of the Appeal in the High Court he may order the Appeal to be heard in the first instance by the Judicial Commissioner.

- (5) *A person aggrieved by an order or decision of the Judicial Commissioner under sub-sections (3) and (4) of this section may within thirty days of such order or decision appeal therefrom to the High Court.*

- (6) *An Appeal to the High Court under sub-sections (4) and (5) shall lie only in cases where the amount of the judgment exceeds two hundred Emalangeni or where sentence of imprisonment for a period exceeding three months or of corporal punishment exceeding eight strokes has been imposed.”*

[28] The foregoing review of the relevant provisions of the Swazi Courts Act illustrates that there is an elaborate array of courts of first instance and appellate fora designed to ensure that the Swazi Courts as established under

section 139 (1) (b) of the Constitution and under the Act are capable of delivering the high quality of justice envisaged by the framers of the Constitution and the draftspersons of the Act.

ASSESSORS

[29] It is a basic, fundamental and well established rule, that questions of law must be determined by the Judge in trials by jury. This is even more so where, as here in Swaziland, cases are tried, in the main, by judges only. Counsel for the appellant submitted in his fulsome heads of argument that:

*“With due respect, the Learned Judge in the Court **a quo** could not make findings on Swazi law and custom unassisted”.*

[30] Without citing any authority, he further posited that:

*“4.8 The Court **a quo** was obligated to enlist the assistance of Assessors as provided for in section 6 of the High Court Act 20/1954 where it is legislated:*

(6) (1) The High Court may call to its assistance at any civil or criminal trial or appeal not more than four persons to serve as assessors, of whom –

- (a) *Not more than two shall be administrative officers chosen by the Minister for Local Administration; and*
 - (b) *Not more than two shall be chosen by the Ngwenyama from chiefs, sub chiefs, headmen or others suitably qualified to aid the court.*
- (2) *An assessor shall, either in open court or otherwise, give such assistance and advice as the Judge may require, but the decision shall be vested exclusively in the judge.*
- (3) *The agreement or disagreement of an assessor with the decision of the judge shall be noted on the record.*

4.9 *Similarly Section 144 of the Constitution provides as follows:*

- (1) *A Superior court may hear a case wholly or in part with the assistance of assessors.*
- (2) *A superior court may in any case in which it appears to that court to be expedient call in the aid of one or more assessors with such qualifications as the court may deem appropriate.”*

[31] While it is open to a trial judge to seek such assistance in making findings of law from the many well known sources, it is an affront to the erudition, competence, and capacity of a judge of the Swaziland High Court to suggest that he or she is bound to seek assistance from assessors before making findings of Swazi law and custom.

[32] There is a heading, upon which the appellant seems to rely, printed in italic above section 6 of the High Court Act No. 20/1954 which reads:

“Court to have assistance of assessors”.

[33] Subsection (1) of the Act employs the word ‘may’ rather than the word ‘shall’ or ‘must’. The deliberate use of the discretionary ‘may’ rather than the imperative ‘shall’ or ‘must’, means that the legislator was conferring a discretionary power rather than a mandated duty upon the High Court. The deliberate and studied use of the words ‘may’ and ‘shall’ is illustrated in subsection (2) which declares that:

“An assessor shall, (mandatory) either in open court or otherwise, give such assistance and advice as the judge may require, (that is only if the judge asks for it) but the decision shall (mandatory) be vested exclusively in the judge.”

- [34] Black’s Law Dictionary Eighth Edition explains that “For ease of reference, marginal notes are usually in distinctive print. Many jurisdictions hold that notes of this kind cannot be used as the basis for an argument about the interpretation of a statute – also termed *sidenote*.” The same dictionary defines a headnote as “A brief title or caption of a section of a statute, contract, or other writings”.
- [35] The appellant also relied upon section 144 of the Constitution in support of the proposition that a judge was bound, as he put it, to enlist the assistance of assessors. Subsection (1) allows a superior court to hear a case wholly or in part with the assistance of assessors. Here too the word “may” is employed rather than the word “shall” or “must”. Clearly, this subsection does not cast any mandatory obligation upon a superior court to employ assessors.
- [36] Subsection (2) of section 144 of the Constitution affords an insight into the mind of the legislator. It envisages a situation where it appears to a superior court that it may be expedient to call in the aid of one or more assessors with such qualifications as the court may deem appropriate.

[37] Subsection (2) clearly allows the court to make a judicial assessment of the case before it. It may be that the case is one of much complexity or that the judge has to pronounce upon an issue where the precepts of Swazi law and custom are as yet unsettled, or where he or she, in his or her own determination, concludes that the court may benefit from the assistance of assessors who possess unique qualifications or experiences bearing upon the issue(s) with which the court must grapple.

[38] Section 6 (2) and (3) of the High Court Act 20/1954 leave no doubt whatever about the respective roles and powers of the judge and the assessors. The judge *may* consult or seek the advice of the assessors. But the decision is solely his or hers. The wording of subsection (2) is that “an assessor shall (that means that once appointed the assessor is obliged to) either in open court or otherwise, give such assistance and advice as the judge may require, (this means that the judge’s request for any assistance or advice is purely at his or her option and not by any obligation resting upon the judge) but the decision (the all important power) shall (mandatory) be vested exclusively (to the exclusion of the assessors and all other persons for that matter) in the judge” (and the judge alone).

[39] Subsection (3) allows the assessors to agree or to disagree with the decision of the judge. It is of no decisive moment whether they agree or not. Their consensus or lack thereof cannot compel the judge to decide one way or the other. For the sake of completeness, however, the agreement or disagreement of an assessor with the decision of the judge shall (mandatory) be noted on the record.

[40] In **Nxumalo v Ndlovu** [consolidated] [2011] SZSC 7, Foxcroft JA determined at paragraph [8] that:

*“the central question to be determined in the court **a quo** was whether the civil marriage of the respondent to the deceased in 1966 was bigamous and therefore invalid”.*

[41] Two versions of the relevant Swazi law and custom were advanced by the opposing parties for the consideration of the trial court. Paragraph [10] of this Court’s judgment recorded that in the court **a quo**.

“All counsel agreed to the appointment of an expert in Swazi law and custom. Mr. Charles Mavuso, the Judicial Commissioner”.

[42] That witness was called as the Court's witness and testified *inter alia* that there is in Swaziland only one system of customary marriage. There was much uncertainty as to whether or not a customary marriage could be dissolved at all, and if so, under what conditions and circumstances. One factor evidently underpinning the employment of an assessor in the court *a quo* was expressed by this court this way in paragraph [13].

“It does not appear that the Supreme Court of Swaziland has in any judgment decided what the customary law of divorce was at any time, or in 1966 in particular when the respondent and deceased were married by civil rites.”

[43] This Court was careful to allude to the evolving natures of Swazi law and custom at paragraph 21 of the judgment which reads:

“[21] It is important to re-emphasize that this judgment is concerned with the state of the Swazi Customary Law in 1966. It is clear from all that we have heard and read on this subject in the limited time available that customary law in this country is not static but is continually evolving. By its very nature it is dependent upon the conduct, values and beliefs of the people of Swaziland.”

[44] The judges of the superior courts of Swaziland are at the very least as professionally and academically qualified and experienced as most experts in related fields who may be invited to sit as assessors. Superior Court judges are steeped in the ethos of Swazi law and custom and are best able to determine for themselves if, in any given case, they should employ assessors or not.

[45] Paragraph [9] of **Ndlovu** reads as follows:

*‘In order to show that a Swazi customary marriage has come to an end it is necessary for an expert in that field to testify. It is also necessary that the assessors sitting with the learned Judge **a quo** in matters of this kind participate in the proceedings, giving “such assistance and advice as the Judge may require. The final decision is vested exclusively in the Judge. This is provided in Section 6 (2) of the High Court Act No. 20 of 1954 which goes on in section 6 (3) to add that*

“The agreement or disagreement of an assessor with the decision of the Judge shall be noted on the record.”

*In the Court **a quo** no agreement or disagreement was recorded.’*

[46] The agreement of the parties and the acceptance by the court of expert testimony in that case cannot translate, without more, into a rule that it is necessary for an expert in the field to testify **in all cases** where the termination or otherwise of a Swazi customary marriage, or any other question involving Swazi law and custom, is in issue. A judge of the High Court is perfectly capable of deciding such questions in the absence of expert testimony. The reference to assessors must be read in the context of their employment by the trial judge in the exercise of his or her free and unfettered discretion. It would be wrong to infer from paragraph [9] of **Ndlovu**, that a judge is bound to employ assessors even if, in his or her own deliberate judgment, there was no need for the adoption of that course.

THE INCWALA CEREMONY

[47] The Appellant sought to adduce further evidence to establish that he had no effective remedy in as much as his eviction was affected at the height of the Incwala ceremony. This Court can take judicial notice of the notorious fact that there is access to a duty judge in Swaziland on a 24 hour x 365/66 day basis. In other words access is available to a judge of the High Court at every time of the day or night to deal with emergency or urgent applications. Even when the Incwala ceremony is at its height, an applicant can obtain an

interim order so as to preserve the status quo until the Incwala ceremony is completed.

ISSUES NOT PROPERLY BEFORE THE COURT

[48] Under this head of appeal, Mr. Sandile Hadebe submitted that the court *a quo* should have confined the judgment to the issues before the Court, namely the application by the Appellant. It is common cause that there was no prayer by any of the parties on their papers for items (b) to (e) of the judge's order. The answering affidavit concluded with the simple prayer that the application be dismissed with costs. Those items at (b) to (e) are:

- “(b) The decision of the first respondent evicting the applicant from Ezulwini chiefdom is confirmed.*
- (c) The decision of the first respondent evicting the applicant from the home of Mbonwa Hadebe in Ezulwini Chiefdom is confirmed.*
- (d) The applicant is hereby interdicted and restrained from evicting Nelisiwe Ndlangamandla and her children from their homestead at Ezulwini area.*
- (e) The applicant is hereby interdicted and restrained from staying or setting foot at the homestead of Mbonwa Hadebe or*

communicating with Nelisiwe Ndlangamandla and her children.”

[49] The Court holds that there is merit in the appellant’s submissions on this ground and accordingly vacates items (b) to (e) of the judge’s order.

THE CONSTITUTIONAL CHALLENGES

[50] These grounds of Appeal alleged breaches of the following provisions of the constitution:

- Section 252 (3)
- Section 233
- Section 211

[51] The alleged breach of section 252 (3) of the Constitution can only be properly considered by references to the section as a whole and more particularly by reference to subsection (2) which reads:

“Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.”

[52] In reading subsection (3) the starting point must surely be the premise that the customs which have been observed by the Swazi Nation for millennia could only be displaced upon the clearest evidence that a particular custom, or some part of it, is inconsistent with a provision of the Constitution, or repugnant to natural justice or morality or general principles of humanity.

[53] It has been reported in the media that the Parliament of neighbouring South Africa will shortly debate reports of the deaths of some 33 initiates in Limpopo and Mpumalanga. It may be that it is a customary practice which leads to such dire results that the framers had in mind when they settled the wording of section 252 (3).

CONCLUSION

[54] MCB Maphalala J, with his customary attention to detail, explored the workings of the Swazi social and judicial systems from the level of the Monarchy to the lowliest of the subject members of the Swazi nation. The essence of his discourse of these masters is encapsulated at paragraph [53] of his judgment which I will repeat without including the remainder of his comprehensive treatment of these subjects. That treatment, with which this

court agrees, can be read in his judgment. Paragraph [53] is to the following effect:

“The matter before this court relates to the powers and functions of chiefs. It is common cause that chiefs administer “Swazi Areas”, and that the legal system applicable in those areas is Swazi Law and Customs. Section 227 of the Constitution provides that the Swazi traditional government is administered according to Swazi Law and Custom and the traditional institutions that are pillars of the Monarchy as set out in subsection (2). This section further provides for Swazi traditional institutions which are guaranteed and protected(sic) are the Ingwenyama, Indlovukazi, Ligungqa (princes of the realm), Likoqo, Sibaya, Chiefs, Umntfwanenkhosi Lomkhulu (senior prince), and Royal Governors (Tindvuna Tetigodlo). Section 228 of the Constitution provides that the Ingwenyama is the traditional head of the Swazi State and is chosen by virtue of the rank and character of his mother in accordance with Swazi Law and Custom; and that subject to an elaborate system of advisory councils, the functions of Ingwenyama shall be regulated by Swazi Law and Custom.”

[55] Finally, the trial judge expressed in paragraphs [80] – [85] his conclusions which this Court endorses. Those paragraphs read:

“[80] As discussed in the preceding paragraphs, the applicant has failed to establish a clear right over the homestead; on the death of Mbonwa, the homestead accrued to his wife and children. Since the applicant is younger to Mbonwa Hadebe, he should move out of the homestead and establish his own homestead because he has come of age. Furthermore, in the absence of proof of a clear right established, it is not possible for the applicant to establish the existence of an injury actually committed or reasonably apprehended.

[81] Furthermore, he has failed to establish the absence of a similar protection by any other ordinary remedy. I have already discussed alternative remedies which were open to the applicant in the preceding paragraphs.

[82] Another important issue requiring the court’s attention relates to the ownership of land in Swaziland, and, in particular land administered by chiefs in a “Swazi Area”. Section 211 of the Constitution vests all land in Swaziland including concessions in iNqwenyama save for privately owned land. Citizens of Swaziland have equal access to land for normal domestic purposes including building homes and subsistence farming. Land in “Swazi Areas”(sic) allocated by the Chief or “Lidvuna” on the advice of their Inner Councils through the Custom of “kukhonta”.

[83] *Where a person decides to leave the chiefdom either to reside in another chiefdom or to reside in a Title-deed land, he surrenders the land to the chief of “Lidvuna” and it vests in the custody of the chief who can either utilise it or allocate it to another person.*

[84] *Section 211 (3) of the Constitution expressly provides that a person shall not be deprived of land without due process of law, and if that happens, that person shall be entitled to prompt and adequate compensation for improvements on the land or loss consequent upon that deprivation unless otherwise provided by law.*

[85] *In the present case, section 211 (3) of the Constitution has no application because the deprivation of land in respect of the applicant has been done after a due process of law; and, the applicant was found to have defied the authority of the first respondent and his Inner Council. In terms of Swazi Law and Custom, the first respondent has a right to evict him from the chiefdom for defying his authority.”*

ORDER

[56] It is the order of this Court in these circumstances that:

- i. The appeal is dismissed with costs.

- ii. The order of the **court a quo** as set out at paragraph [86] (a) which reads:

“the application is dismissed with costs on the ordinary scale.”

is upheld.

- iii. The orders of the court **a quo** at paragraph [86] (b) to (e) are set aside.

S. A. MOORE
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

DR. S. TWUM
JUSTICE OF APPEAL

For Appellant : Mr. S. Dlamini

For Respondents : Mr. V. Kunene