



**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**JUDGMENT**

**Civil Appeal Case No. 44/2013**

**In the matter between**

**ISAAC SIGULULWANE ZWANE**

**Appellant**

**And**

**MAQALENI DLAMINI  
COMMISSIONER OF POLICE  
ATTORNEY GENERAL**

**First Respondent  
Second Respondent  
Third Respondent**

**Neutral citation:** Isaac Sigululwane Zwane v *Maqaleni Dlamini and 2 Others (44/2013)* [2013] SZSC 54 (29 November 2013)

**Coram:** RAMODIBEDI CJ, EBRAHIM JA, and  
LEVINSOHN JA

**Heard:** 8 NOVEMBER 2013

**Delivered:** 29 NOVEMBER 2013

**Summary:** Practice and Procedure – Appeal arising from an application on notice of motion for spoliation order – Dispute concerning alleged theft of cattle belonging to the King and Ingwenyama – Conflict of laws – Jurisdiction and the choice of law – The High Court correctly declining jurisdiction on the basis that the matter fell to be determined by Swazi Courts in terms of Swazi law and custom – Appellant raising a collateral constitutional challenge on appeal - Appeal dismissed with costs.

## JUDGMENT

**RAMODIBEDI CJ**

[1] These proceedings essentially raise the question of a proper choice of law between two legal systems obtaining in this country, namely, Roman – Dutch Common law on the one hand and Swazi law and custom on the other hand as laid down by this Court in the seminal case of the Commissioner of Police and Others v Mkhondvo Aaron Maseko, Civil Appeal No. 03/2011.

[2] Briefly, the background leading up to these proceedings is the following. On 1 February 2013, the appellant filed a notice of motion against the respondent in the High Court. In the main, he sought a spoliation order for the restoration into his possession of 24 head of cattle which he alleged were his property. He alleged in his founding affidavit that he had been dispoiled of these cattle by the first respondent (“Maqaleni”), who is the overseer of His Majesty’s cattle, and others including members of the police force from the Big Bend Police Station.

[3] The respondents filed an answering affidavit of Maqaleni as well as a confirmatory affidavit of Lofana Vilakati (“Lofana”) who is the indvuna yemcuba of kaNgcamphalala Umphakatsi where the disputed cattle were allegedly stolen. Apart from dealing issuably with the appellant’s founding affidavit, the respondents specifically raised a point of law that the High Court had no jurisdiction since the cattle in question had been stolen from the King and Ingwenyama. The respondents contended, therefore, that the proper choice of law to invoke was Swazi law and

custom. They contended that the Roman-Dutch common law of “spoliation” was inappropriate in the circumstances.

[4] The *court a quo* upheld the respondents’ objection to jurisdiction, noting that the whole process concerning the seizure of the cattle in question occurred in a customary law environment. Accordingly, the court held specifically in paragraph [22] of its judgment that the jurisdiction of the High Court “does not extend to matters relating to the office of iNqwenyama because such issues fall to be determined in terms of Swazi law and custom.” The appellant has appealed to this Court against that order.

[5] In their respective affidavits, both Maqaleni and Lofana corroborated each other in their identification of the appellant as the culprit in the theft of the cattle belonging to the King and Ingwenyama from Luvatsi estate/farm in St Phillips. Amongst the brazen atrocities which they alleged the appellant committed with impunity against His Majesty were the following:-

- (1) He stole His Majesty's cattle on a regular basis.
- (2) On one occasion he had slaughtered some cattle in large quantities, selling the meat to buyers such as butchery owners.
- (3) Some of the hides of the slaughtered cattle actually had His Majesty's brand mark.
- (4) On one occasion he was found "skinning" His Majesty's stolen cattle.
- (5) Whenever he was summoned to the Umphakatsi to question him about this rampant stealing of His Majesty's cattle he simply refused to attend.

[7] Against the foregoing background, both Maqaleni and Lofana corroborated each other that they subsequently received a "command" from the King's Office to collect His Majesty's cattle from the appellant on 31 January 2013 and so it happened.

[8] It may be important to add that Maqaleni also relied on a "directive", annexure "K1", from the King's Office. The

document is dated 19 March 2008. It is addressed to the Attorney General. It reads as follows:-

*“Dear Sir,*

*During the year 2003 His Majesty King Mswati III in Libandla commissioned that any person who is in one way or the other found to have stolen His Majesty’s cattle will not be prosecuted in the Courts but will be hauled before Libandla or a Chief of that area. If that individual is found guilty, he will be fined two cows in addition to the one he is found to have stolen.*

*No Court has jurisdiction over Theft of his Majesty’s Cattle. That was an Order. Kindly advise on actioning this Order in line with the Constitution of Swaziland.*

*Yours sincerely,*

*(signed)*

*Bheki R. Dlamini*

*Chief Officer.”*

[9] In paragraph 13 of the appellant's heads of argument in this Court the following point is made:-

*“13. It is submitted that annexure “K1” is a decision or order of the iNgwenyama in Council but not a directive in that it did not constitute an instruction or command or give instructions.”*

It is strictly not necessary to enter the debate on semantics in the matter. It shall suffice merely to observe that the Concise Oxford Dictionary: Ninth Edition defines the word “order” as “an authoritative command”, “direction.” Viewed in this way, I am satisfied that the word “order” appearing in annexure “K1” does not detract from the fact that this annexure is evidently a general directive which was given in 2003, before the current Constitution of 2005 came into operation.

[10] Because this case has, in my view, a remarkable similarity to **Commissioner of Police and Others v Mkhondvo Aaron Maseko**, *supra*, I discern the need to reproduce what I said

(Ebrahim JA and Dr Twum JA concurring) at paragraphs [9] – [13] of that case, namely:-

*“[9] In determining a proper choice of law s252 of the Constitution as the supreme law is decisive. It provides as follows:-*

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

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



*(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution, or a statute, or repugnant to natural justice or morality or general principles of humanity.*

*(4) Parliament may –*

*(a) provide for the proof and pleading of the rule of custom for any purpose;*

*(b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and*

*(c) provide for the resolution of conflicts of customs or conflicts of personal laws.’*

*[10] It is plain from s252 (2) of the Constitution that the principles of Swazi law and custom are ‘recognised and adopted and shall be applied and enforced as part of the law of Swaziland.’ No court in this country can simply ignore this constitutional provision as was apparently done in the present case.*

[11] *Similarly, the courts in this country are obliged to observe s4 of the Constitution on the Monarchy, with particular reference to His Majesty the King and Ingwenyama. Insofar as this case is concerned, subsection 4 thereof bears reference. It provides as follows:-*

*‘(4) The King and iNgwenyama has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights prerogatives and obligations in terms and in the spirit of this Constitution.’*

[12] *The rights and prerogatives of the King and Ingwenyama referred to in subsection 4 of the Constitution undoubtedly include, in my view, the right to property as well as protection of that property under Swazi law and custom. It is by design then that Roman-Dutch law is not mentioned in the subsection. On the contrary, it must be stressed that the Constitution is informed by very strong traditional values.*

[13] *It follows from the foregoing considerations that a proper interpretation of subsection 4 of the Constitution can only mean that where the rights of the King and Ingwenyama*

*are concerned in a matter such as this, involving as it does the rights to cattle allegedly stolen by one of his subjects, the proper choice of law to invoke is Swazi law and custom. It is not Roman-Dutch concept of “spoliation” as the Judge a quo erroneously held in my view.”*

[11] In my considered view, those apposite remarks decide the present matter in favour of the respondents. I am satisfied from these considerations, therefore, that the *court a quo* correctly declined jurisdiction on the basis that the matter concerned the rights of the King and Ingwenyama and as such fell to be determined by Swazi Courts in terms of Swazi law and custom including traditional structures. In this regard, it must be stressed, as the *court a quo* correctly noted, that the whole process concerning the seizure of the cattle in question took place in a customary law environment. In a commendably able argument, Mr Kunene for the respondents submitted in these circumstances that the appellant should have exhausted local remedies such as the traditional structures, thus leaving the High Court with a review

power only under s 152 of the Constitution. I see much force in that submission.

[12] Finally, I should state at this juncture that I am not persuaded by the appellant's belated collateral constitutional challenge in the matter. In this Court, Adv Maziya, counsel who appeared for the appellant, submitted that the seizure of the cattle in question was a violation of the appellant's right to property enshrined in s 19 of the Constitution. He submitted, therefore, that only the High Court had jurisdiction to deal with this constitutional issue in terms of s 151 of the Constitution. Counsel laid stress on s 151 (2) which provides that the High Court has jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the Constitution.

[13] In my judgment, there are at least three (3) insurmountable hurdles to Adv Maziya's belated collateral constitutional attack.

(1) The appellant's prayers in the notice of motion did not include any constitutional relief. It is true that in paragraph 20 of his founding affidavit the appellant alluded to the fact that he had been advised that in terms of s 19 of the Constitution a person shall not be compulsorily deprived of property or any interest or right over property except under a court order. Similarly, in paragraph 29 of his founding affidavit, the appellant averred that the balance of convenience favoured the granting of an interim order "in that the Respondent's conduct to seize the cattle is unlawful and unconstitutional." In the absence of a prayer for constitutional relief, I consider however, that these statements were merely made in passing. The real gist of the appellant's case was, and remained, common law spoliation throughout.

(2) Section 19 of the Constitution on protection from deprivation of property is in my view plainly aimed at protecting lawfully owned property or any lawful interest in or right over

property. Any suggestion that the section aims at protecting stolen property is in my view absurd to the extreme. The full text of the section provides as follows:-

*“19. (1) A person has a right to own property either alone or in association with others.*

*(2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied -*

*(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health;*

*(b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for -*

*(i) prompt payment of fair and adequate compensation; and*

(ii) *a right of access to a court of law by any person who has an interest in or right over the property;*

(c) *the taking of possession or the acquisition is made under a court order.” (Emphasis added.)*

In this matter, the appellant’s alleged ownership was disputed. On the contrary, the respondents’ version was that the appellant was something of a serial thief of the King’s cattle. These being motion proceedings, and on the rule laid down in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**, the *court a quo* was fully justified in leaning towards the acceptance of the respondents’ version for the purposes of determining jurisdiction in the matter. I must mention that, although the court did not expressly say so, it is clear from the order which it made in declining jurisdiction that this must have been the case. Accordingly, this conclusion disposes of Adv Maziya’s query that the respondents’ allegations against the appellant were not proved on the facts.

- (3) Adv Maziya's collateral constitutional attack falls foul of the following principle contained in paragraphs [5] and [6] of **Jerry Nhlapho and 24 Others v Lucky Howe N.O. (in his capacity as liquidator of VIP Limited in Liquidation), Civil Appeal No.37/07:-**

*“[5] It is a fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis. In general, a court will decide no more than what is absolutely necessary for an adjudication of the case. This is more so in constitutional litigation. The reason behind this approach is that constitutional jurisprudence must be developed in a cautious and orderly manner rather than haphazardly. Constitutional issues must therefore ordinarily be properly pleaded and canvassed. See for example **Prince v The President, Cape Law Society and Others 2002 (2) SA 794 (CC); S v Mhlungu and Others 1995 (3) SA 867 (CC); Kauesa v Minister of Home Affairs***



**and Others 1996 (4) SA 965 (NM SC)**. The remarks of Ngcobo J in **Prince's** case at paragraph [22] are singularly apposite, namely:-

*‘[22] Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as (sic) allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is*

*sought. Nor can parties hope to supplement and make their case on appeal.’*

*[6] Furthermore, it requires to be stressed that in our jurisdiction litigants in constitutional litigation are ordinarily entitled to the benefit of decisions of two courts, namely, the High Court and this Court. The raising of a constitutional point for the first time in this Court, disguised as a point of law, denies them that benefit. Each case must, however, be judged in the light of its own particular circumstances.”*

It is interesting to observe that counsel who unsuccessfully argued the collateral constitutional challenge in that case was none other than Adv Maziya himself. Curiously, the appellant’s heads of argument in the instant matter do not contain any reference to that case, if only for the assistance of the Court as counsel is enjoined to do so even if the case does not favour him or her. Importantly, however, it must be stressed that the appellant made no more than a passing reference to s 19 of the Constitution without actually seeking any Constitutional relief

for determination. The collateral Constitutional attack must accordingly fail in the circumstances.

[14] In light of these considerations, I have come to the conclusion that the appellant's appeal is completely unmeritorious. It is accordingly dismissed with costs.

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**M.M. RAMODIBEDI**  
**CHIEF JUSTICE**

**I agree**

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**A.M. EBRAHIM**  
**JUSTICE OF APPEAL**

**I agree**

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**P. LEVINSOHN**  
**JUSTICE OF APPEAL**

**For Appellant** : **Adv M.L.M. Maziya**

**For Respondents** : **Mr V. Kunene**