



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil case No: 33/2014

In the matter between:

BHEKWAKO DLAMINI

BOY BOY MASEKO

LUCKY MASEKO

APPELLANT

MADONDO DLAMINI

MUZI MASEKO

THABSILE MASEKO

FIRST APPELLANT

SECOND APPELLANT

THIRD

FOURTH APPELLANT

FIFTH APPELLANT

SIXTH APPELLANT

AND

CHIEF ZULELIHLE MASEKO

RESPONDENT

Neutral citation:

Bhekwako Dlamini & 5 Others And Chief Zulelihle Maseko (33/2014) [2014] SZSC 84 (03 December 2014)

Coram:

**S.A. MOORE JA
M.C.B. MAPHALALA JA
E.A. OTA JA**

HEARD

: 13 NOVEMBER 2014

DELIVERED : 03 DECEMBER 2014

Summary

Civil Appeal – Swazi Law and Custom – application by a Chief duly appointed in terms of the Constitution seeking a mandatory interdict compelling the first appellant to remove a fence erected unlawfully on land belonging to KaLuhleko Royal Kraal – application further sought an order interdicting and restraining the six appellants from holding meetings at the Chief’s Kraal without leave of the Traditional Authorities – court a quo granted the orders sought on the basis that the respondent is authorised by the Constitution to administer the Chiefdom where the land which forms the subject-matter of the proceedings is situated – held that the respondent has established the mandatory interdict sought on the basis that he was duly appointed by iNgwenyama to administer the Chiefdom – held further that the orders sought were not excluded from the jurisdiction of the court a quo – appeal accordingly dismissed.

JUDGMENT

M.C.B. MAPHALALA JA

[1] The respondent lodged an urgent application in the court *a quo* for an order directing the first appellant to remove a fence he had erected on a piece of land belonging to KaLuhleko Royal Kraal within twenty-four hours from date and time of service. The respondent further sought an order interdicting and restraining the six appellants or anyone acting on their behalf from holding meetings and summoning community members to such meetings at the Chief’s Kraal. The respondent also sought an order

directing members of the Swaziland Police Service to assist the Deputy Sheriff in serving all court processes as well as maintaining law and order.

[2] It is common cause that the respondent is the Chief of KaLuhleko Chiefdom. He was appointed Chief by the iNgwenyama King Mswati III on the 25th July 2013 in accordance with section 233 of the Constitution of 2005. He succeeded his late father, Chief Mfanawenkhosi Maseko, who was Chief of the area until his death in 1992. Before the respondent was appointed, the Family Council of KaLuhleko Royal Kraal appointed Robert Maseko as the Acting Chief.

[3] It is not in dispute between the parties that the land in dispute belongs to KaLuhleko Royal Kraal. It is further not in dispute that during the reign of the late Chief, he had set aside a portion of land for the use of community members who were interested in showcasing their farming skills; hence, the land was not allocated to any particular resident on a permanent basis. It is also not in dispute that all residents of KaLuhleko Chiefdom have their own portions of land allocated to them on a permanent basis for building their homes as well as farming. Such is the practice in all Chiefdoms duly administered by Chiefs; the land is administered by Chiefs on behalf of iNgwenyama who holds it in trust for the Swazi Nation. The Chief in consultation with the Chief's Inner Council has authority to allocate land on

permanent basis to residents for building homes and farming. Chiefs have power to set aside portions of land for community projects and other developmental initiatives such as building schools, public clinics as well as other public institutions. See section 211 of the Constitution of 2005 as well as the case of *Sandile Hadebe v Sifiso Khumalo and Three Others* Civil case No. 2623/2011 (HC) para 53-56.

- [4] All the six appellants are residents of KaLuhleko Chiefdom under the administration of the respondent. The first appellant is one of the residents who showed interest in farming on the disputed land, and, it is common cause that he was given that opportunity to utilize the land by the late Chief. However, it is not in dispute that many residents subsequently lost interest in farming on the land; hence, in 1996 the Acting Chief of the area, Robert Maseko, informed all residents that the land had been earmarked for the construction of a new Chief's Kraal which would be used as the administrative headquarters of the respondent. All the residents who were still farming on the land were advised to surrender the land back to the Chief's Kraal. It was explained to the concerned residents that Swazi Law and Custom dictates that a new residence should be built for a new Chief to serve as his administrative headquarters.

[5] Pursuant to the directive by the Acting Chief, all the residents who were utilizing the land surrendered it to the Chief's Kraal; they further removed fences which they had erected to protect their crops. The first appellant refused to comply with the directive even after the respondent had been appointed as the substantive Chief of the area. The first appellant contended that he did not recognize the respondent as the legitimate Chief of the area, and, that the iNqwenyama was not properly advised when appointing the respondent. He further contended that only a legitimate Chief would issue such a directive and not the Acting Chief.

[6] It is a criminal offence for a resident to defy a Chief's order or to undermine the Chief's authority as reflected in sections 13, 14 and 17 of the Swazi Administration Act No. 79 of 1950. It is against this background that the respondent laid a criminal charge to the police against the first appellant which is still pending at the Manzini Magistrate's Court.

[7] The court *a quo* was therefore correct in rejecting the first appellant's argument that the present matter was pending before the Magistrate's Court on the basis that the two matters are not the same. The magistrate's court is seized with a criminal matter relating to the defiance by the first appellant of the respondent's orders as Chief of KaLuhleko Royal Kraal. This offence is created by sections 13, 14, and 17 of the Swazi Administration

Act 79/1950. On the other hand, the court *a quo* was seized with a civil matter in which the appellant was seeking a mandatory interdict compelling the first appellant to remove a fence he had erected on a piece of land belonging to the Chief's Kraal. The respondent further sought an order interdicting and restraining the six appellants from holding unlawful meetings at the Chief's Kraal without the consent and permission of the Traditional Authorities of the Chiefdom.

The respondent has annexed to his founding affidavit the Letter of Appointment as a Chief of KaLuhleko Chiefdom in terms of section 233 of the Constitution of 2005. Accordingly, the respondent has the authority to exercise the powers and functions of Chief over the Chiefdom.

[8] Section 233 of the Constitution provides the following:

“233. (1) Chiefs are the footstool of *iNgwenyama* and *iNgwenyama* rules through the Chiefs.

(2) The *iNgwenyama* may appoint any person to be chief over any area.

(3) The general rule is that every *umphakatsi* (Chief's residence) is headed by a Chief who is appointed by *iNgwenyama* after the Chief has been selected by the *lusendvo* (family council) and shall vacate office in like manner.

(4) The position of a Chief as a local head of one or more areas is usually hereditary and is regulated by Swazi law and custom.

(5) Unless the situation otherwise requires, a Chief shall assume office at the age of eighteen years or so soon thereafter as the period of mourning comes to an end.

(6) A Chief, as a symbol of unity and a father of the community, does not take part in partisan politics.

(7) A Chief may be appointed to any public office for which the Chief may be otherwise qualified.

(8) The powers and functions of Chiefs are in accordance with Swazi law and custom or conferred by Parliament or *iNgwenyama* from time to time.

(9) In the exercise of the functions and duties of his office, a Chief enforces a custom, tradition, practice or usage which is just and not discriminatory.”

[9] The Constitution of 2005 does recognize Swazi Law and Custom as part of the law of Swaziland. This country has two systems of law being the Roman-Dutch Common Law as well as Swazi Law and Custom. Section 252 of the Constitution provides the following:

“252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd 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] The Constitution provides for important traditional institutions which support the Monarchy. It further provides that the iNqwenyama is the traditional head of the Swazi State. The Chiefs are expressly mentioned as one of the traditional institutions recognised by the Constitution.

Sections 227 and 228 of the Constitution provide the following:

“227. (1) 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).

(2) The following Swazi traditional institutions are hereby guaranteed and protected –

- (a) *iNgwenyama*;**
- (b) *iNdllovukazi*;**
- (c) *Ligunqa (Princes of the Realm)*;**
- (d) *Liqoqo***
- (e) *Sibaya*;**
- (f) *(Tikhulu) Chiefs*;**
- (g) *Umntfwanenkhosi Lomkhulu (Senior Prince)*;**
- (h) *Tindvuna (Royal Governors)*.**

228. (1) *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. . .”

[11] The duties and powers of Chiefs are outlined in section 6 of the Swazi Administration Act 79/1950. Section 6 thereof provides the following:

“6. (1) . . . every Chief shall perform the obligations imposed on them by this Act, and generally maintain order and good government among the Swazis residing or being in the area

over which his authority extends; and, for the fulfilment of this duty, he shall have and exercise over such Swazis the powers by this Act conferred in addition to such powers as may be vested in him by any other law, or by Swazi Law and Custom for the time being in force, providing such Swazi Law and Custom is not incompatible with any other law or clearly injurious to the welfare of the Swazis.”

[12] His Lordship Justice Moore in the case of *Sandile Hadebe v Sifiso Khumalo NO and Three Others* Civil Appeal No. 25/2012 at para 82 upheld the judgment of the court *a quo* where the learned judge held the following:

“[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 iNgunyama in trust for the Swazi Nation 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’ is allocated by the Chief or “Lidvuna¹” on the advice of their Inner Councils through the Custom of ‘Kukhonta²’.”

¹ “Lidvuna” is fully defined in paragraph 13 of this judgment.

² “Kukhonta” is a custom where a resident of one chiefdom approaches another chiefdom seeking land to build his homestead and to cultivate crops for subsistence farming. If he is given the land, he should pay a cow to the local chief. In every chiefdom there is grazing land set aside by the Traditional Authorities for all cattle within a particular chiefdom.

[13] In the case of *Sandile Hadebe v Sifiso Khumalo NO and Three Others* Civil case No. 2623/2011 (HC) at paragraphs 54 and 55, I dealt with the duties and functions of chiefs as follows:

“[54] Section 233 provides that Chiefs are the footstool of iNgwenyama and that he rules through Chiefs; they are appointed by iNgwenyama to administer specific and particular areas. Every chief has an administrative centre called Umphakatsi or Chief’s residence. In the exercise of his powers, functions and duties of his office, a chief enforces a custom, tradition, practice or usage which is just and not discriminatory. As stated in the preceding paragraph, the first respondent is “Lidvuna”, and he is senior in rank to an ordinary chief; his position is usually hereditary, and he is appointed by the iNgwenyama to administer those areas called “emahambate³” which are directly under the control of iNgwenyama, and not under Chiefs. “Lidvuna” exercises functions of a Chief over the area allocated; in addition, he usually performs specific assignments during important national rituals such as the National Incwala.

[55] Section 6 of the Swazi Administration Act No. 79 of 1950 provides that the duties of every Chief include the maintenance of order and good government over Swazis residing in the area over which his authority extends in accordance with the Act, in addition to powers vested in him by any other law or by Swazi Law and Custom which is not inconsistent with any other law. In addition, in terms of Swazi Law and Custom, the Chief

³ “Emahambate” is plural for “lihambate”, and, this refers to land situated in a “Swazi Area’ which vests in iNgwenyama in-trust for the Swazi Nation. This is land which is administered by “lidvuna” on behalf of iNgwenyama and King of Swaziland.

acting on the advice of his Inner Council has power to allocate land by means of “kukhonta custom” to Swazis from other chiefdoms who wish to reside in his area; similarly, the Chief’s Inner Council also sits as a court to determine minor disputes between members of the Chiefdom. A person affected by the decision of the Inner Council has a right of appeal to the Chief who can either confirm or reverse the decision of the Inner Council.”

[14] It is apparent from the evidence that the appellants summoned and held unauthorised meetings at the Chief’s Kraal⁴ to the extent of undermining the respondent’s authority. The respondent is the administrative head of KaLuhleko Chiefdom. In the exercise of his administrative functions, he has the right to call community meetings at the Chief’s Kraal, resolve disputes between residents, allocate land to residents as well as to recall land that has been set aside for community projects. It was within his rights to recall land that had been set aside for community farming in order to allow for the construction of the new Chief’s Kraal. From the evidence it is not in dispute that the land in question belongs to the Chief’s Kraal, and, that the previous Chief had allowed the community to showcase their farming skills on the land on a rotational basis.

⁴ Chief’s Kraal and Chief’s Residence are synonymous and refers to “Umphakatsi” in Siswati. This is the Chief’s residence which operates as both his home as well as his administrative headquarters. Community meetings are held at the Chief’s Residence at the instant of the Chief. When the Chief dies, his successor is bound by Custom to build a new Chief’s Kraal as his administrative headquarters. The residents are expected to contribute to the construction of the residence.

[15] Madlanga J in the case of *Bangindawo and Others v Head of the Nyanda Regional Authority and Another; Hlanhlalala v Head of the Western Tembuland Regional Authority and Others* 1998 (3) BGLR 314 (TK) at 326 had this to say:

“ . . . the judicial, executive and law-making powers in modern African customary law continue to vest in the Chiefs and so-called Paramount Chiefs (the correct appellation being Kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in Western Legal Systems, or not believing in African Customary Law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It is believed in and accepted by the vast majority of those subject to Kings and Chiefs and who continue to adhere to African Customary Law.”

[16] The trial court was correct and did not misdirect itself in holding that the court *a quo* had jurisdiction to hear the matter. It is common cause that the respondent instituted an urgent application in the court *a quo* seeking a mandatory interdict compelling the first appellant to remove a fence from a piece of land belonging to the Chief's Kraal. The respondent further sought an order interdicting and restraining the appellants from holding unlawful meetings at the Chief's Kraal as such conduct undermined the authority of the respondent as Chief of the area. From the evidence it is

apparent that the respondent satisfies all the requirements of a mandatory interdict; hence, he is entitled to the remedy sought. An application for a mandatory interdict is justiciable before the High Court.

[17] In the case of *Maziya Ntombi v Ndzimandze Thembinkosi*, Civil Appeal case No. 02/2012, the Supreme Court dealt with the requirements of a final interdict. At para 41 and 43, I had occasion to say the following:

“[41] The leading case in this regard is the case of *Setlogelo v Setlogelo* 1914 AD 221 at 227 where *Innes JA* stated the following:

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

. . .

[43] . . . the requirement of a clear right is the most important of the three requirements of a final interdict, and that the other two requirements are predicated on the presence of a clear right to the subject-matter of the dispute.”

[18] This matter is not excluded from the jurisdiction of the High Court. Section 151 of the Constitution outlines the jurisdiction of the High Court and provides the following:

“151. (1) The High Court has –

(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution;

(b) such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland;

(c) such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and

(d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.

(2) Without derogating from the generality of subsection (1), the High Court has jurisdiction –

(a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and

(b) to hear and determine any matter of a constitutional nature.

(3) Notwithstanding the provisions of subsection (1), the High Court –

(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;

(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force.

...

(8) Notwithstanding subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of iNgwenyama; the office of iNdlovukazi (the Queen Mother); the authorisation of a person to perform the functions of Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the Libutfo (regimental) system, which matters shall continue to be governed by Swazi law and Custom.”

[19] This Court in the case of *Sandile Hadebe v Sifiso Khumalo and Three Others* Civil Appeal No. 25/2012 at para 14 and 15 dealt with those matters in which the High Court has no jurisdiction. His Lordship Justice Moore said the following:

“[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 iNgwenyama, iNdlovukazi or Umtfwanenkhosi 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.”

[20] Accordingly, the appeal is dismissed with costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

S.A. MOORE
JUSTICE OF APPEAL

I agree:

E.A. OTA
JUSTICE OF APPEAL

FOR APPELLANT: Attorney Siphon Gumedze
FOR RESPONDENTS: Attorney Thulasizwe Dlamini

DELIVERED IN OPEN COURT ON 3 DECEMBER 2014