IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 29/2015

In the matter between:

MBOMBO DLAMINI **Appellant**

And

CHIEF HYND DLAMINI **Respondent**

Neutral Citation: *Mbombo Dlamini vs Chief Hynd Dlamini (29/2015)* [2016] SZSC 56 (30th June 2016)

Coram: DR. B. J. ODOKI, JA
S. P. DLAMINI, JA
Z. W. MAGAGULA, AJA

Date Heard: 06th May 2016

Date Handed Down: 30th June 2016

Summary: **Civil Appeal – Dispute emanating from Swazi Law and Custom – Appellant claims to be acting Chief of Gebeni Area – King's Advisory Council (Liqoqo) ruling that Gebeni under Endlinilembi – Respondent Chief of Endlinilembi – Appellant noting an appeal to Ingwenyama.**

Question – Whether Ingwenyama determined appeal – Respondent files affidavits indicating that Ingwenyama has made ruling on appeal – Held that no need to determine merits of appeal before this court – Ingwenyama's ruling on Chieftaincy dispute final and binding.

JUDGMENT

MAGAGULA AJA

[1] The Appellant instituted motion proceedings in the Court *a quo* seeking *inter alia*:

(2) that a Rule *Nisi* do issue on and be returnable on a date suitable to this Honourable Court, calling upon the Respondent to show cause why;

(a) that the Respondent be restrained and interdicted from settling any person on land falling under Gebeni Chiefdom and/or interfering with land falling under Gebeni Chiefdom in any manner whatsoever pending finalization of the matter by the Liqoqo as directed by the Ingwenyama". (My emphasis)

[2] The brief history of the dispute between the parties it would appear from the affidavits filed of record in the Court *a quo* is as follows. The Respondent is Chief of an area called Endlinilembi within the Manzini Region. The Appellant alleges to be acting Chief of Gebeni area, also within the Manzini Region. I say alleges because it appears that his position as acting Chief, or even the existence of the Chiefdom of Gebeni may be in doubt.

[3] The dispute between the parties then may be characterized as a Chieftaincy, as opposed to a boundary dispute. It would further appear that the dispute has been

adjudicated upon in various structures of Swazi Law and Custom and by the time the initial proceedings were launched in the Court *a quo* a final appeal had been lodged with the Ingwenyama and a decision was awaited. It further appears that Liqoqo, the King's Advisory Council, had made a determination in the matter which was against the Appellant; its effect was that Gebeni was not a separate Chiefdom from Endlinilembi and that the rightful Chief of Endlinilembi was the Respondent. This determination is captured in a letter by then Chairman of Liqoqo Prince Logcogco annexed to the Founding Affidavit.

> ***"(1) On the 7th June 2011 the Ingwenyama in Libandla, the King's Advisory Council (Liqoqo) heard the dispute between Prince Hynd, Chief of Endlinilembi Royal Residence and Prince Mahlobo and Mbombo of Kahlushwana Royal Residence, Lavumisa, Shiselweni Region in the presence of both parties and made the following decision:***
>
> ***(2) That Endlinilembi area was allocated (Liphakelo) to Inkhosikati LaMatsebula and currently Prince Hynd is the Chief of the area.***

(3) That Prince Mbombo and Prince Mahlobo belong to Inkhosikati LaNtjalintjali who was allocated at Kuhlushwana, Lavumisa area, Shiselweni Region and therefore they do not have a right to allocate land and call meetings at Endlinilembi area and that they can only exercise such rights at Kuhlushwana Royal Residence, Lavumisa area".

[4] However, the catalyst to the application in the Court *a quo* was that while His Majesty's ruling or review of the earlier decision was awaited, earth moving machinery was seen at Gebeni preparing land for new settlements at the instance of the Respondent. Appellant then instituted the proceedings seeking to interdict the Respondent from settling people or allocating land at Gebeni area, until such time that the Ingwenyama has made a ruling on his appeal.

[5] Argument in the matter was heard by His Lordship Hlophe J., who dismissed the application with costs on the grounds *inter alia* that there existed material disputes of fact which were not capable of resolution on affidavit. The

Appellant being aggrieved by the Judgment has appealed to this court.

[6] This matter was mentioned before this court in its last sitting, November 2015, and postponed to this session. The postponement was necessitated by submissions from the bar made by Respondent's counsel, Mr. Kunene. He submitted that to all intents and purposes the appeal was academic because the Ingwenyama, whose verdict or decision was awaited in the dispute between the parties, had determined the matter to finality. Mr. Kunene was ordered by the court to file an affidavit confirming that the matter had been finally determined. That affidavit was filed on the 19th April 2010 and deposed to by Prince Mabandla in his capacity as the acting Chairman of Liqoqo.

[7] In the affidavit, Prince Mabandla deposes to the following facts:

> ***"I am an adult male and Senior Prince. I the acting Chairman of the King's Advisory Council; Liqoqo in my capacity as such I am duly authorized to depose to this affidavit to confirm that this appeal has since (been) overtaken by events as His Majesty through Liqoqo has***

reviewed the decision that was the subject matter of the application in court.

In this new decision, which was delivered at Nkhanini on the 29th November 2015, His Majesty confirmed the previous ruling in this matter and that the previous decision to the effect that Gebeni is part of Endlinilembi under the Respondent Chief Hynd stands".

The contents of Prince Mabandla's affidavit are confirmed by Mr. Mandla Dlamini, Secretary of Liqoqo and Mr. Vusi Kunene, Respondent's counsel who both stated on oath that they were present when the ruling was delivered.

[8] The contents of Prince Mabandla's affidavit were sharply disputed by the Appellant who argued that they were not aware of the ruling, that despite Respondent's counsel having submitted on the 16th November 2015 that the verdict had been issued, Prince Mabandla stated that the ruling was delivered on the 29th November 2015, there was, therefore, an element of doubt about the authenticity of the ruling, that it cannot be correct that the review had been done by His Majesty through the Liqoqo because His Majesty had previously issued a Royal command to the

effect that Liqoqo was to play no further role in the matter, that he was going to personally review the earlier order made by Liqoqo, that it was criminal for Liqoqo to hold itself out as His Majesty in so far as it claims that its action was that of His Majesty.

[9] The Appellant further argued that the noting of the appeal to this court had the effect of staying the proceedings in all *fora* pending the final determination of the appeal. This argument was made by Appellant's counsel, Mr. L. Maziya and repeated in Appellant's affidavit which was filed subsequent to the hearing.

[10] The principal question before this court is whether or not the matter was decided finally by the Ingwenyama as alleged by Prince Mabandla. If the matter was so determined, then there is no need to inquire into the correctness or otherwise of the Judgment of the Court *a quo*.

[11] The Appellant approached the Court *a quo* seeking an interim interdict pending the finalization of the matter by "the Liqoqo as directed by the Ingwenyama" (Emphasis added). I do not think it to be correct that the noting of the appeal had the effect of staying the proceedings before the liqoqo. The appeal to this court was noted against the judgment of the Court *a quo* and not against the ruling of the Liqoqo therefore Liqoqo was always at liberty to reconsider their decision in line with the royal directive issued on the 30th October 2014.

[12] M. M. Ramodibedi C. J. as he then was in the Case of ***Daniel Didabantu Khumalo vs The Attorney General Civil Appeal No. 31/2010*** had this to say when confronted with an almost identical set of facts:

> ***"…Interestingly, it was submitted on the Appellants' behalf that the order in question did not exist because it was not shown to him. That submission defies logic. The fact that an order is not shown to a person to be evicted does not necessarily means it does not exist. It is not disputed that the Appellant was advised to follow the customary procedure of "Kubonga***

eNkhosini" in order to verify the existence of the order in question. This he failed to do. It follows from these considerations that as a matter of overwhelming probability, it must be accepted that the Ingwenyama did make the order in question".

[13] The contention by the Appellant that he was not aware of the ruling or that it may be completely authentic can be confirmed by him by following the Swazi law and Custom process of "Kubonga" as eloquently stated by the court in the ***Daniel Didabantu Case (Supra)*** while it is correct that in terms of the Swazi Administration Act 1950, it is a criminal offence for any person to hold themselves act as the Ingwenyama as argued by Mr. Maziya before this court. It is not possible for this court at this stage to verify whether or not Liqoqo had in fact committed that offence. There is however, no reason to doubt the veracity of the averments in Prince Mabandla's affidavit, more so because the Appellant in his affidavit in response does not raise any serious contradictory matter other than make bare denials.

[14] As alluded to in the paragraphs above, this court need not reach any conclusion whether or not the Court *a quo* was correct in relying on the existence of disputes of fact. It is sufficient to show that where the court is faced with a dispute of facts in an application, it has a discretion either to dismiss the application or order that the matter go to oral evidence or make any such order that would lead to a speedy resolution of the matter. The appellate court will generally not interfere with such discretion in the absence of a misdirection.

[15] Mr. Maziya argued before this court that the Court a quo misdirected itself by holding that it had a choice whether to dismiss the matter or make a different order. I find that this contention is not material. Choice and discretion may be used interchangeably; they both mean "the freedom to act and think as one wishes usually within legal limits." See the Concise Oxford Dictionary 9th Edition page 386.

[16] In the premises this court finds that the dispute between the parties has been determined to finality and

accordingly the appeal is dismissed, costs to follow the event.

Z. W. MAGAGULA
ACTING JUSTICE OF APPEAL

I Agree

DR. B. J. ODOKI
JUSTICE OF APPEAL

I also Agree

S. P. DLAMINI
JUSTICE OF APPEAL

For the Appellant: Advocate Maziya

For the Respondent: Mr. V. Kunene