IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO: 36/2016**

In the matter between:

DONALD MANDLAKAYISE NDLOVU	**1ST APPELLANT**
LUCKY NDLOVU	**2ND APPELLANT**
MAKHOSAZANE DLAMINI (NEE NDLOVU)	**3RD APPELLANT**
ZANELE ZWANE (NEE NDLOVU)	**4TH APPELLANT**
NYAMALELE DLAMINI (NEE NDLOVU)	**5TH APPELLANT**
THANDIWE MAVUSO (NEE NDLOVU)	**6TH APPELLANT**

And

ELGIN MAGUDUZA MAKHUBU	**1ST RESPONDENT**
LINCOLINE MOTSA	**2ND RESPONDENT**
NATIONAL COMMISSIONER OF POLICE	**3RD RESPONDENT**
THE ATTORNY GENERAL	**4TH RESPONDENT**

Neutral Citation: *Donald Mandlakayise Ndlovu and 5 others v. Elgin Maguduza Makhubu and 3 Others (36/2016) [2017] SZSC 61 (17th November 2017)*

Coram: **MCB MAPHALALA CJ**
DR. B.J. ODOKI JA
RJ CLOETE JA

Date Heard: **23RD October 2017**

Date delivered: **17th November 2017**

Summary: *Civil Procedure – Application for order discharging interim interdict and authorizing Appellants to execute decision of the Eluyengweni Royal Kraal on the ground that Appellants allege that Respondent have failed to file an appeal against the traditional authority. – Plea by Respondents that there is a pending appeal before the traditional structures – whether evidence adduced to support plea – court **a quo** requesting for such evidence after submissions by both parties are made and relying on it to hold that appeal pending before Traditional Structures– whether court **a quo** erred in so doing – Held court **a quo** had power to call for additional evidence and to rely on it in interest of justice – Court **a quo** correct in finding that there was an appeal pending before the traditional structures and therefore interdict would not be discharged – Appeal dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] The Appellants brought an Application in the court ***a quo*** seeking the following orders;

> *"(i) Discharging the interim interdict that was issued by the above Honorable Court on 22nd September 2014 forthwith.*
>
> *(ii) Authorising Applicants to execute the decision of the Eluyengweni Royal Kraal re-instating Applicants as the lawful possessors or occupiers of the land in question at Luyengo bus station.*
>
> *(iii) Costs of this Application*
>
> *(iv) Such further and alternative relief as the court may deem expedient"*

[2] The background to this matter is as follows. The Appellants and the Respondents are involved in a dispute over the lawful possession of a piece of land situated at Luyengo area next to the Bus stop, which is used as a business with shops.

[3] The Appellants believe that they are the lawful occupants of the said piece of land as it was allocated to their family more than five decades ago. The land was allocated to the Appellants family by the duly authorized chief acting in council and assistance of the Inner Council of the area.

[4] The Respondents have made some developments on the land allegedly without the permission of the Appellants, and erected business structures some of which are fully operational with tenants.

[5] The dispute was referred to the Umphakatsi of the area sometime during the month of April in 2013, to determine the rightful owner or occupier of the land. The Luyengweni Umphakatsi heard the matter and decided the dispute in favour of the Appellants who were declared the rightful owners of the land.

[6] The Appellants gave the Respondents thirty days verbal notice to vacate the premises so that the Appellants could take occupation of the land.

[7] The Respondents claim that they lodged an appeal before the traditional structures, challenging the ruling of the Umphakatsi.

[8] The Respondents launched an application in the court ***a quo*** for an interdict preventing the Appellants from evicting them, on the ground that they had filed an appeal before the traditional structures. On 22nd September 2014, the judge in the court ***a quo*** granted the interim interdict staying execution of the ruling pending the final determination of appeal before the traditional authorities in accordance with Swazi Law and Custom. In his ruling the judge stated, "*It is not in dispute that the matter of ownership of the land upon which the business is situated is pending before the Luyengweni Royal Kraal"*

[9] The Appellants complain that after getting the interdict the Respondents have done nothing to prosecute the appeal before the relevant traditional authorities, and that if the Appellants wait longer, the Respondents will develop the property further and later claim an expensive lien on the property.

[10] The Respondents have denied that the appeal has been abandoned and claimed that it is still pending in the traditional structures which have appellate jurisdiction over matters of Swazi National Land disputes.

[11] In the letter dated 7th October 2015 the Attorney General stated that he had consulted with the clients, the Ludzidzini Royal Councilor on the 30th September 2015 at Ludzidzini Royal Residence regarding the matter but he had been informed that there was no such matter from Luyengweni involving the said parties pending before them.

[12] After hearing the submission of both parties on 12 February 2016, the learned judge issued an order returnable on 26th February 2016, whereby the Respondents were ordered to file proof of their appeal or review.

[13] On 24 February 2014, the Respondents filed a letter from the office of the Manzini Regional Administrator, dated 18th February 2016, which stated that the Makhubu family had visited the Regional Administration's office during the month of April 2013 to seek advice in connection with their dispute over the store. The letter stated further that the matter was referred to their Chiefdom in particular Chief Prince Lembelele, for appeal.

[14] The learned judge in the court ***a quo*** found that the Respondents had filed an appeal or review with the relevant structures, but they were being frustrated by the relevant Royal Kraal. The court held that the Appellants had not proved that the Respondents had failed to comply with the order of the court issued on 22nd September 2014, and dismissed the application with costs.

[15] Having been dissatisfied with the decision of the court ***a quo,*** the Appellants appealed to this court, on the following grounds of appeal:

*" 1. The learned judge **a quo** erred in law and in fact in not dismissing the Respondent's case and hold that Respondents have failed to prove on a preponderance of probabilities that any appeal has been lodged with any tribunal exercising appellate functions either under Swazi Law and Custom and or otherwise.*

*2. The learned judge **a quo** erred in law and in fact in holding, on the pleadings before him that the Appellant had failed to prove that the Respondents have failed to prove that the appeal had been noted and is pending before traditional structures.*

*2.1 The learned judge **a quo** applied a strange and unknown procedure in determining the matter as normally the onus was on the Respondents to adequately refute the fact that had been made out by the Appellants in the founding affidavit. Instead the learned judge erroneously held that the Appellants had an onus to prove that the*

Respondents have failed to comply or prove that the appeal was noted and pending before any traditional structures whatsoever.

2.2 *The learned judge **a quo** erred in law and in fact by giving the Respondents further chance to bring adequate proof that the appeal had been noted way after hearing the application and at the time when the Judge was to pronounce a judgment. Again the procedure was strange as a party (the Respondent) was given a chance to supplement its papers without even a formal application and denied the Appellants a chance to respond to the same yet the court **a quo** relied on the same (additional evidence) for his judgment.*

2.3 *The learned judge **a quo** grossly misdirected himself by assisting the Respondents avoid the consequences of the removal of the injunction given in Respondent's favour by the Learned Justice MCB Maphalala. The neutrality of the learned judge **a quo** cannot be guaranteed in the above matter as he had extended compassion of the Respondent's version despite their apparent failure to convince the court that the appeal had been lodged.*

2.4 *The learned judge **a quo** failed to confine himself on the set of papers before him and allow each and every party to rise and /or fall by its own papers. In this regard the learned judge **a quo** ought to have granted the application and not rely on the flimsy correspondence*

which was admitted by the court as evidence way after a close of pleadings and after hearing arguments in open court from both parties.

2.5 *The judge **a quo** misdirected himself in fact and in law by refusing to award Appellants the relief sought from the Notice of motion relying on a correspondence which does not even talk about any appeal pending, but a visitation to seek advice not to lodge an appeal.*

3. *The learned judge **a quo** failed to give justice to the Appellants as he acknowledged in his judgment on page Six (6) paragraph Five (5) that Respondents have filed no proof that the appeal was noted and pending but went on to refuse to grant the discharge of the injunction prayed for by the appellants.*

4. *The learned judge **a quo** erred and misdirected himself in law and in fact in ignoring the correspondence from the Attorney General's office which stated unequivocal that no appeal was pending before the known traditional structure dealing with matters of Swazi Law and Custom or land disputes appeals.*

5. *The judge **a quo** erred and misdirected himself in law and in fact in finding without factual basis before him, that the Respondent had filed*

an appeal before the unknown traditional structure which appeal was being frustrated by the "relevant Royal Kraal."

*6. The Judge **a quo** also erred mulcting the Appellants with costs in the peculiar circumstances of this case. The learned Judge on his own words acknowledged the absence of proof that any appeal was pending before any court or traditional structure, but went on the award the party that failed to discharge its onus of proof, costs of the application.*

[16] I wish to observe that the above grounds of appeal are repetitive and argumentative and offend the provisions of Rule 6(4) of the Rules of this Court which states,

> *"(4) The notice of appeal shall set forth concisely and under distinct heads the grounds of appeal and such grounds shall be numbered consecutively.*

[17] It is clear that the main complaints raised by the Appellants in the above grounds are firstly, that the Court ***a quo*** erred in not holding that the Respondents had failed to prove that they had lodged an appeal which was pending before the traditional authorities and secondly, that the court ***a quo***

erred in allowing the Respondents to adduce additional evidence to prove that they had filed the appeal before the traditional authorities.

[18] It is convenient to deal first with the complaint that the court erred in allowing the Respondents to adduce additional evidence to establish whether there was an appeal pending before the traditional structures.

Counsel for the Appellant submitted that he central question in this appeal is whether the judge ***a quo*** was justified in going beyond the four corners of the papers before him and demand the Respondents to file extra evidence which was not there during arguments. Counsel referred to the authority of ***L.H. Herbstein and D.Z Zeffart*** in the *South African Law of Evidence* 14th Edition at Page 274 where the authors state;

> *"In civil action the court has no power to call a witness without the consent of the parties although consent may be inferred from failure to object. The cross examination of such a witness is subject to the control of a judge"*

[19] Counsel also quoted the same authors at pages 476 – 477 where they observe that;

> *"A trial Court has a general discretion to allow a party who has closed his case to lead evidence at any time up to judgment. Naturally leave will be more readily granted after only one party has closed his case that after both have done so, and will be still more difficult for a*

party to obtain leave after the weaknesses in his case have been exposed in argument or judgment has been reserved and the other witnesses have gone home"

[20] With regard to considerations before additional evidence is admitted, Cousel for the Appellants referred to the cases of **Mkhwanazi vs Van Der Merwe** 1970 (1) S A 609 **(A D) and Oosthuizen v Stanley** 1938 A D 322, where it was stated that the guiding considerations or factors must not be regarded as inflexible or as being individually decisive, and that the Supreme Court has, inherently much the same discretion, to allow further evidence before judgment, as is given to the Magistrates Courts by Rule 28 (11). The considerations or factors to be taken into account are the following:

(i) The reason why the evidence was not led timorously.

(ii) The degree of materiality of the evidence.

(iii) The possibility that it may have been shaped to relieve the pinch of the shoe.

(iv) The balance of prejudice i.e. the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.

[21] It was the contention of counsel that it was common cause that none of the parties before the court ***a quo*** ever moved and motivated an application for further and /or fresh evidence. Counsel submitted that the authorities cited above refer to a situation where reopening the case is sought at the instance of either party and does not accommodate a privilege granted to a party **meromotu.**

[22] On the other hand, counsel for the Respondent submitted that the learned judge in the court ***a quo*** was entitled to deal with the matter as he did because in terms of Rule 6 (17) of the High Court Rules, where an application cannot be decided properly on affidavit the court may dismiss the application or make such order as it deems fit with a view of ensuring a just and expeditions decision. It was counsel's contention that the judge ***a quo*** ordered that proof of the matter being dealt with at the at the Regional Administration Offices be submitted during legal submissions of the parties.

[23] In paragraphs [5] and [6] of his judgment , the learned judge in the court ***a quo*** explained how he dealt with the matter of ordering additional evidence as follows:

"*[5] After hearing submissions from both sides on 12 February 2016, I issued an order returnable on 26 February, 2016, whereby the respondents were ordered to file proof of their appeal or review. I made this order because there was no proof of such appeal or at least some intimation or statement of any sort on the issue*

by either the Regional Administrator or the Ludzidzini Inner Councilor or such like body confirming or denying the allegations made by the Respondents that they had indeed prosecuted their appeal or review.

[6] On 24 February 2014, the Respondents filed some correspondence from the office of the Manzini Regional Administrator dated 18 February 2016. This letter was issued and signed by the Regional Secretary.

*It reads**: "(the Makhubu family visited the Regional Administrator's office during the month of April 2013 to seek advice in connection with their dispute over their store…This matter was referred to their chiefdom in particular Chief Prince Lumbelele for appeal since it had a ruling from their Bandlancane…"***

[24] It is clear that after the letter from the Regional Administrator's office was received in court, both counsel were allowed to make submissions on the letter. The learned judge in the Court ***a quo*** explains,

> *"[7] Counsel for the respondents submitted before me that this was clear and unequivocal proof that the Respondents have filed an appeal or at least have taken steps to reverse or challenge the said ruling. Counsel for the Applicants has submitted that this letter is no proof or confirmation of such appeal or review."*

[25] It should be noted that after the court ***a quo*** had admitted the letter in question, counsel for the Appellants did not object to its admissibility as he is doing on appeal. The Appellants are deemed to have consented to its admission in evidence.

[26] The Respondents relied on Rule 6(17) of the Rules of the High Court for supporting the order by the court ***a quo*** to allow the Respondents to adduce additional evidence. Rule 6 (17) provides;

> *(17) Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it deems fit with a view to ensuring a first and expeditions decision."*

As provided under Rule 6 (18) the court **a quo** had discretion to direct that oral evidence be heard on specified issues or, refer the matter for trial on defined issues, but it chose to allow the Respondents to produce the additional evidence from the Traditional Authorities to ensure a just and expeditious disposal of the matter.

[27] It is trite law that a trial or appellate court has a general discretion to allow a party who has closed his or her case to adduce additional evidence at any time before judgment. What is critical is that the additional evidence must meet the laid down criteria for admission of such evidence and must not be to the prejudice of the other party. In this case the relevant conditions were met and there was no prejudice suffered by the Appellants as they had

opportunity to challenge the evidence. It was clearly in the interest of justice that the question of whether the appeal by the Respondents was pending before the traditional authorities be resolved.

[28] I shall now consider the second issue whether the court ***a quo*** erred in holding that the appeal by the Respondents was pending before the traditional structures.

Counsel for the Appellants submitted that the learned judge ***a quo*** was called upon to discharge the interdict issued by MCB Maphalala J (as he then was) on the ground that the Appeal which the learned judge had in mind when he issued the interdict was not being prosecuted by the Respondents or that reasonable time has since elapsed without the appeal being pursued before the relevant tribunal. Counsel pointed out that in their answering affidavit the Respondents have insisted that the same was still pending somewhere within the web of traditional structures claiming appellate jurisdiction over matters of Swazi National Land Disputes.

[29] Counsel argued further that a factual inquiry was carried out and the Attorney General who is the legal representative of the traditional institutions and chiefs wrote a letter stating that there was no appeal noted by the Respondents before any authority whatsoever. The letter from the Attorney General is dated 7 October 2015 and was addressed to Counsel for the Appellants. The letter which was headed "*Re Elgin Maguduza*

Makhubu, Donald Mandla Ndlovu and Others High Court case No. 83 82/2013" stated:

> *" 1. The above matter refers in particular your letter dated on the 16 September 2015.*
>
> *2. Kindly be informed that I have consulted with our clients the Ludzidzini Royal Counsel on the 30th September 2015 at Ludzidzini Royal Residence regarding your matter.*
>
> *3. I am informed by the Council that there is no such matter from Luyengweni involving the above stated parties pending before them.*
>
> *4. We thank you for your usual cooperation."*

[30] It was counsel's submission that if the legal representative of the tribunal stated that there was no appeal, there was no reason why the court ***a quo*** demanded for more proof of the non-existent appeal.

[31] Counsel pointed out that there was inconsistence in the allegations made by Mkhululi Makhubu in his affidavit where he claimed that the dispute was pending before Lozitha Council while at the same time he claimed that he reported the matter to the office of the Regional Administrator – Manzini,

for onward transmission to the Ludzidzini Counsel, being the utmost traditional structure to deliberate on disputes of this nature

[32] Counsel also observed that there is no legal instrument establishing any tribunal mentioned above and clothing it with appellate jurisdiction. It was Counsel's contention that traditional institutions may be advisory to the King, but they do not have legal authority to sit on appeal from decision of Umphakatsi.

[33] Counsel for the Respondents submitted that the office of the Attorney General is not a secretarial office of the Ludzidzini Inner Council or any traditional forum for that matter. Counsel maintained that the Appellants did not file any affidavit from the Governor of Ludzidzini who is the coordinator of appeals and all issues pertaining to Swazi Law and Custom.

[34] The letter from the Regional Administrator's Office dated 18 February 2016, was addressed to the Registrar of the High Court, Mbabane, and signed by the Regional Secretary, Manzini and stated as follows:

"RE: DISPUTE BETWEEN MAKHUBU AND NDLOVU FAMILIES OF LUYENGO

This is to certify that the Makhubu family visited the Regional Administration's Office during the month of April 2013 to seek advice in connection with their dispute over their store whereby, the Ndlovu family was demanding that they remove their store on their land.

This matter was referred to their chiefdom in particular the Chief Prince Lembelele for appeal since it had a ruling from their Bandlancane which was to the effect that the Makhubu's must remove their store in their land.

Your cooperation will be highly appreciated."

[35] The court ***a quo*** accepted the evident contained in the above letter that the Respondent's appeal was pending before the traditional structures. The court stated,

"*[8] Whilst it is true that the Regional Secretary states that the Respondents approached his office for mere "advice" he plainly states that the matter was referred "for appeal" before the relevant chief. I do accept that this is contrary to clear assertion by the respondents that the matter was subsequently referred to the Ludzidzini Inner Council and is pending thereat. What is however, clear from the respondent's assertion or evidence is that the matter was taken up with the Regional Administrator's office after the decision of the Luyengweni Kraal Bandlancane. The*

office of the Regional Administrator viewed and treated it as an appeal and referred it to the Chief being the next hierarchy in the dispute resolution or determination under the traditionary machinery. That, to my mind, is prosecuting or challenging the decision of the Bandlancane. Whether that challenge or appeal is before the chief or the Ludzidzini Inner Council, is in my view, of very little consequence."

[36] I entirely agree with the court ***a quo*** that there was sufficient evidence to establish that the Respondents had launched an appeal before the traditional structures and that the appeal was pending determination.

There appears to be some confusion regarding the relevant traditional structures where the appeal is pending but as the court ***a quo*** observed, that is of little consequence in view of the clear evidence from the Regional Administrator's office. Although the structure of the traditional authorities may not be well laid out or well known, it is clear that traditional institutions are recognized under the Constitution.

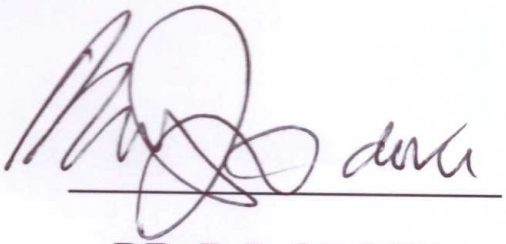
[37] Accordingly I find no merit in this appeal.

[38] Before I take leave of this matter I am constrained to observe that the Appellants were also complaining about the delay by the Respondents in prosecuting the appeal, and thus arguing that the appeal be deemed to have been abandoned. The Respondents have submitted that they were frustrated by the Luyengo Royal Kraal who failed to submit the record of proceedings

and or minutes of the hearing. The Respondents should take active steps to prosecute the appeal within a reasonable time. Otherwise the Appellants will be entitled to bring another application to set aside the interdict. For this reason the relevant traditional authorities are urged to determine the appeal expeditiously. A copy of this judgment should be sent to the office of the Regional Administrator for necessary action.

In the result, I made this order:

1. That the appeal is dismissed and
2. That the Respondents are awarded costs



DR. B.J. ODOKI

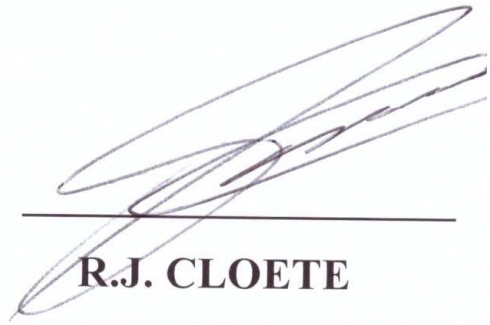
JUSTICE OF APPEAL

I Agree

MCB MAPHALALA

CHIEF JUSTICE

I agree



R.J. CLOETE

JUSTICE OF APPEAL

FOR THE APPELLANT: **Z. DLAMINI**

FOR THE RESPONDENT: **S. MNGOMEZULU**