

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case 81/2020

In the matter between:

BANELE DLAMINI

Appellant

And

FAMILY OF GOD CHURCH

Respondent

Neutral citation: Banele Dlamini vs Family of God Church (81/2020) [SZSC] 18
[2021] (5th August, 2021)

Coram: S.B MAPHALALA JA
S.J.K. MATSEBULA JA
M. MANZINI AJA

Heard: 31st May, 2021

Delivered: 5th August, 2021

Summary: *Civil Procedure: Appeal before this court – Appellant raised a point of law of jurisdiction which was rejected by the court a quo – on appeal before this Court - Appellant contends that the court a quo misdirected itself– the*

Application ought to be dealt with in terms of Swazi law and Custom – that the matter be referred to that court – the Respondent contends that the order of the High Court of the 28th September, 2018 clothed the High Court with the necessary jurisdiction to hear the matter. The Supreme Court has come to the conclusion that the Appellant was not a party to the order of the 28th September, 2018 - therefore – the matter is referred to the traditional courts in accordance with the law.

JUDGMENT

S.B. MAPHALALA JA

Introduction

[1] Serving before this Court is an appeal against the judgment of the High Court of the 17 November, 2020 by Justice M. Dlamini under the consolidated civil case number 325/2018; 732/2018 and 733/2018 on a number of grounds from grounds 1 to 4.7 thereof. More importantly in respect of ground 1 the Applicant states the following:

1. The court *a quo* erred in law and in fact by not upholding the points of law raised by the Appellant as follows:

1.1 That court *a quo* lacked jurisdiction to hear and determine the matter which arose out of allocation of Swazi nation land under Swazi law and custom which is precluded by section 151(3) read with section 252(2) of the Constitution of the Kingdom of Eswatini.

1.2 That the Respondent lacked *locus standi* in judicio in as much as, unlike the Appellant, did not have requisite lawful authority to occupy the land in dispute.

1.3 The non-joinder of the Land Management Board and Kwaluseni King's Council vested with authority over the land in dispute.

[2] In the subsequent grounds of appeal various issues between the parties are raised.

Background

[3] A brief outline of the facts between the parties are referred at paragraph 1 of the Appellant's Heads of Arguments to be the following:

1. The Appellant is the holder of Title in Swazi nation land acquired in the following manner:

1.1 Initial allocation by the lawfully authorised King's Council at Kwaluseni as borne out by annexure "BD1"). It is important to stress at the outset that the authority of the said King's Council is recognised by the Government of Eswatini as borne out by the letter from the responsible Ministry of Tinkhundla Administration and Development (annexure "BD2").

1.2 Following the allocation of the piece of land to the Appellant by the lawfully (Government) recognized King's Council at Kwaluseni, the Swazi Commercial Amadoda made representations on the Appellant's behalf to the Ingwenyama for purposes of the business currently undertaken by the Appellant. The result was the King's written consent dated 13 August 2018 which was signed by the Ingwenyama.

1.3 As is practice in allocations of Swazi nation land blessed by the Ingwenyama, Swazi Commercial Amadoda issued written authority (annexure "BD3" to the Appellant to conduct his business in the land allocated to him. This Honourable Court will note that the said written

authority is duly signed by the Regional Administrator and Ndabazabantu in the relevant region of Manzini in which the Appellant's piece of land is situated.

Arguments

- [4] Counsel for the parties appeared before this court on the 31st May 2021 and advanced their arguments filing Heads of Arguments.

(i) Appellant's arguments

- [5] The gist of the Appellant's arguments in support of the appeal is the submission that the court *a quo* ignored the argument of the Appellant on the question of the *locus standi* and the court *a quo* lack of jurisdiction. Counsel for the Appellant contended that the issue of jurisdiction was ignored by the court *a quo* yet this matter can only be decided under Swazi law and custom.
- [6] In this regard on the question of *locus standi* Counsel for the Appellant contends that based on the lawful allocation to him as set out above, the Appellant duly challenged the *locus standi* of the Respondent to question his title to the disputed land. The Appellant contends that the Respondent's title was neither supported by the appropriate traditional authority nor the Government of the Kingdom of Eswatini. The Respondent's title is certainly not supported by the hand of the Ingwenyama. The Appellant concluded that the Respondent did not possess the requisite *locus standi* to challenge the Appellant who possessed all the attributes of a lawful title holder.
- [7] On the argument that the court *a quo* lacks jurisdiction it is contended for the Appellant that this issue is intertwined with the unassailable authority of the

Ingwenyama on issues pertaining to Swazi nation land and the Respondent's lack of *locus standi* is the court *a quo*'s lack of jurisdiction in respect of Swazi nation land disputes. That in terms of the Constitution of the Kingdom of Eswatini, the court *a quo* has no jurisdiction on such disputes. Otherwise than on review or appeal.

- [8] In support of this argument of the Appellant has cited the provisions of the Constitution of Eswatini as in section 151(3) (b) to the following:

5.1 *"notwithstanding the provision of subsection (1), the High court 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."*

- [9] Further, the Appellant contends that accordingly the court *a quo* lacked jurisdiction to hear and determine this matter in that it arises from allocation of Swazi Nation Land under Swazi law and Custom citing the case of the **Commissioner of Police and Another vs Mkhondvo Aaron Maseko Supreme Court case no 3/2011** to the following:

6.1 *"it is plain from section 252(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."*

- [10] Various arguments are canvassed by the Appellant's Counsel in his Heads of Argument in paragraphs 2 to 41 thereat.

- [11] Finally, the Appellant prays that his appeal be upheld and that the decision of the court *a quo* be replaced with one in terms of which the application is dismissed with costs at attorney and client scale.

(ii) Respondent's arguments

- [12] On the first ground of appeal relating to the court *a quo* not having jurisdiction to entertain the Application that was placed before it. The contention by the Appellant is that section 151 (3) and section 252 (2) of the Constitution ousted the court's jurisdiction.
- [13] The Respondent contends that as demonstrated in the history of the matter and which is common cause between the parties, the High Court inherited the matter and / or the matter landed in its jurisdiction after it had been deliberated upon by traditional structures.
- [14] That the court *a quo* when dealing with the matter exercised its powers in terms of section 152 of the Constitution. In support of this argument Respondent's Counsel has cited the High Court case of **Mphatsekahle Dlamini and Another vs Nhlanhla Macingwane and Another Court case 325/2018 consolidated with case no 732/2018 and 733/2018**. In that case the court stated that where matters are not *lis pendens* before traditional court, the High Court has jurisdiction to ensure that orders of traditional courts structures are carried out. Spoliation orders may be granted in exercise of its supervisory powers [supervisory powers of the High Court].
- [15] That therefore the court *a quo* had the requisite jurisdiction to entertain the Application challenged by the Appellant.

[16] Further submissions of the Respondent are canvassed at paragraphs 18 to 34 of the Heads of Argument of the Respondent.

[17] The final submission of the Respondent is that in fact the Appellant's defence is nothing more but an attempt to mislead, confuse and undermine the court's intelligence, the court is therefore called upon to dismiss this appeal with costs.

The analysis

[18] The arguments of Counsel of the parties before us were focused on the issue of the jurisdiction of the court *a quo* and the *locus standi* of the 2nd Respondent (who is the present Appellant).

[19] In order to answer these questions it is imperative for this court to trace the breakdown of the matter before the court *a quo* of how these points were dealt with in that court.

[20] The Learned Judge in the court *a quo* at paragraph [15] of her judgment stated what was deposed by the Respondent (present Appellant) in his opposing affidavit at page 41 paragraph 7 of the Book of Pleadings:

"This Honourable Court lacks jurisdiction to hear and determine this matter because it arises from allocation of Swazi nation land under Swazi Law and Custom which this Honourable court is precluded by section 151 (3) (b) of the Constitution from adjudicating unless the matter is escalated to it by way of appeal or review which is not the case."

[21] In paragraph [16] thereof the following is stated by the Learned Judge:

There is absolutely no merit on this point. The applicant holds title by virtue of orders of this court dated 28th September 2018 and later confirmed on appeal. Applicant is enforcing his rights flowing from the said judgment. It is this court that is fully seized with the matter therefore. This point stands to be rejected.

- [22] The Learned Judge in paragraph [17] of the said judgment dealt with the point of lack of *locus standi* where 2nd Respondent averred on this point the following:

"The Applicant lacks the requisite authority to question my title to the property which it is disingenuously trying to incorporate as part of the land which it contests with the 1st Respondent. The 1st Respondent does not lay any claim to my specific property, the title of which was confirmed by written consent of Ingwenyama the King of Eswatini as early as 13 august 2018."

- [23] In paragraph [18] the Learned Judge in the court *a quo* stated that on similar reasons as lack of jurisdiction, this point must be thrown out of the window root and branch. Worse still all the attached annexures belong to the 2nd Respondent. Do not state that the land under issue belong to 2nd Respondent.

- [24] Counsel of the parties have advanced arguments on two points and after considering these arguments to and fro I am inclined to agree with the contentions of the Appellant that the court *a quo* as stated above the paragraphs [17], [18] and [19] cut across the issue of *locus standi* and jurisdiction with a simple finding that the Respondent holds title by virtue of its order of the 28th September, 2018.

- [25] That is contrary to the compelling evidence which clearly distinguished the Appellant's land and title set out above in Appellant's contentions. The basis of the court *a quo* was that the Appellant holds the disputed land under a principal who is 1st Respondent Macingwane (see pages 27 – 28 of the record).

[26] It would appear to me that the Appellant's arguments are correct that the first point to be made regarding this impugned finding of the court *a quo* is that Appellant was not a party to the order of the 28 September, 2018 as stated at pages 27 – 28 of the Record of appeal and it could not therefore be binding on him.

[27] Secondly, the Appellant is correct that the land covered by the 28 September, 2018 court order was not surveyed and distinguished and has instead referred to as **“land situate of Swazi nation land at Hababa area, Matsapha near Lusushwana Water Services depot and adjacent to Manzini – Mbabane High Way”**. It also appears on the papers before us that the distinguished feature of the land that is the subject matter of the 28 September, 2018 court order can be summarised as follows:

9.1 *“it was clearly disputed between the Respondent on one hand and the 1st Respondent as (Macigwane) on the other*

9.2 *a church building was erected on it (as stated order (c) at page 28 of the record of appeal.”*

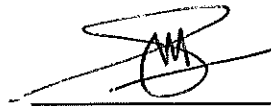
[28] It appears to me that Appellant Counsel is correct that a mere glance at the 28th September 2018 Court order reveals that Macigwane was entitled to compensate the church for its building if he was minded to do so. This was confirmed by the same Court when it clarified its order in subsequent proceedings instituted by the Respondent.

[29] Further it would appear to me that the court *a quo* also committed the error of proceeding on the basis that it found the land disputed between the Respondent and Macigwane to belong to the Respondent when it did not determine the validity of the Respondent's title in its decision of the 28 September. It is contended by Counsel

for the Appellant that the determination of title on Swazi nation land is a matter of Swazi Law and Custom to resolve.


[30] Finally, for the foregoing reasons the appeal succeeds that the court *a quo* ought to have upheld the point of jurisdiction of the court and referred the matter to the traditional court to be determined in terms of the Swazi Law and Custom and the judgment of the court *a quo* is therefore set aside and replaced with the following orders:

1. The judgment of the court *a quo* is set aside.
2. The matter is referred to the traditional courts to be determined in terms of Swazi Law and Custom.
3. The Respondent to pay costs of the appeal at the ordinary scale.




S.B. MAPHALALA JA

I AGREE



S. MATSEBULA JA

I ALSO AGREE



M. MANZINI AJA

For the Appellant:

M.S. DLAMINI

(of Magagula & Hlophe Attorneys)

For the Respondent:

M. Gamedze

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